

## JHS 166 Terms and Conditions of Public IT Procurement

### Annex 3. Special Terms and Conditions for the Procurement of Client's Application under Software Terms Other than Open Source (JIT 2015 – Client's Applications Non-Open)

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#### INSTRUCTIONS FOR USE

Special terms and conditions for the procurement of client's applications include the Special Terms and Conditions for the Procurement of Client's Application under Open Source Software Terms (*JIT 2015 – Client's Applications Open Source*), the Special Terms and Conditions for the Procurement of Client's Application under Software Terms Other than Open Source (*JIT 2015 – Client's Applications Non-Open*), and the Special Terms and Conditions for Projects Implemented Using Agile Methods (*JIT 2015 – Agile Methods*). Before any application procurement, the client must always select the most suitable special terms and conditions. In some cases, it may be appropriate to enable, in the invitation to tender, the submission of tenders based on different special terms and conditions.

In the special terms and conditions for the procurement of client's applications, "client's application" refers to a program or its part produced specifically for the client, and any expansions, modifications, additions (such as interfaces), configurations and parameterisations of standard software made by the supplier for the client. The delivery of the client's application may also include standard software if so expressly agreed in the agreement.

These terms and conditions are intended to be used in the procurement of client's applications in cases where the client does not require that the client's application be licensed under the terms and conditions of open source code. When the client requires open source code rights, the Special Terms and Conditions for the Procurement of Client's Application under Open Source Software Terms (*JIT 2015 – Client's Applications Open Source*) should be used instead. These terms and conditions result in the supplier providing the client with a non-open but otherwise extensive licence to the client's application.

These terms and conditions are suitable mainly to the procurement of a client's application following the so-called waterfall model. For the procurement of client's applications using so-called agile methods, it is recommended that the *JIT 2015 Special Terms and Conditions for Projects Implemented Using Agile Methods (JIT 2015 – Agile Methods)* are used instead.

The client's application must fulfil the requirements set out in the agreement and the specifications concerning the implementation. The contracting parties should pay attention to ensuring that the specifications fulfil the requirements. If it becomes apparent in the specification phase that a requirement will not be fulfilled or that it will not be e.g. expedient to implement it, the supplier must notify the client of this and the matter must be handled through the change management procedure.

The client often procures the application so that it is built upon standard software which is parameterised or supplemented to meet the client's requirements. The object of delivery, which consists of the client's application and any standard software possibly included in the delivery, must be specified in the agreement. Attention should also be paid to the following:

- The testing and acceptance procedures apply to the entire object of delivery, including any related standard software. The special terms and conditions for application procurement include stipulations on the testing and acceptance procedure. However, it may be necessary to agree upon the testing and acceptance process in more detail in the agreement. Documentation forms an essential part of the

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product or service. Therefore, the documentation needs to be inspected in connection with the testing, as well.

- If the delivery includes standard software programs, they must be itemised in the agreement. Rights of use to standard software are primarily determined according to their own licence terms and conditions. The scope of the rights of use to standard software must correspond with the requirements presented by the client in its invitation to tender.
- If the object of the agreement is software critical to the client, it is advisable to prepare for the end of software maintenance or any discontinuation of the operations of the software supplier. The source code and associated document material related to software important to the client may be stored in the possession of an independent provider of a source code storage service (escrow agent) by entering into a separate source code storage agreement. The provider of the source code storage service will store the material and, in case of problems, release the source code under the terms and conditions agreed in the storage agreement. It should be noted that the source code of third-party standard software cannot usually be obtained or stored even by escrow agents. In these situations, the source code can principally be stored only for that part of the solution the source code of which is held by the supplier and the source code of which it is entitled to transfer.

In the application procurement phase, special attention must be paid to the prevention of vendor lock-in by preparing to withdraw from the use of the system during or at the end of the system life cycle and for the costs resulting from it. Any costs arising from the withdrawal from the application should be taken into account in the offer comparison phase already when procuring the specific application.

Requirements concerning the use of open interfaces should preferably be defined in the invitation to tender. *Annex 10* of the recommendation *JHS 166* offers supporting material for the use of open interfaces.

These use instructions do not form part of the agreement.

Agreement date and no.: \_\_\_\_\_

Annex no.: \_\_\_\_\_

## JIT 2015: Special Terms and Conditions for the Procurement of Client's Application under Software Terms Other than Open Source

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## 1 Scope of application

(1) These Special Terms and Conditions for the procurement of a client's application under terms other than the terms of open source software shall be applied to the client's procurement of an application created based on an assignment by a public procurement unit, if these Special Terms and Conditions have been referred to in the agreement and to the extent it has not been otherwise agreed in writing.

(2) These Special Terms and Conditions are used together with the General Terms and Conditions of Public IT Procurement.

## 2 Definitions

In addition to the following definitions of the Special Terms and Conditions, the definitions of *JIT 2015 General Terms and Conditions* shall be applied.

### **development environment**

fi kehitysympäristö

the technical platform required for the development of the client's application agreed in the agreement, such as hardware, software and data links, and the required licences and their maintenance

## **operating environment**

fi käyttöympäristö

the technical platform (servers, system software, data links, etc.) on which the object of delivery is installed for testing or production use

## **handover**

fi luovuttaminen

the handover of the object of delivery to the client for acceptance testing.

A part of delivery can also be handed over for approval testing.

## **specifications**

fi määrittäykset

the technical and functional properties of the client's application defined by the contracting parties for the object of delivery on the basis of the requirements, of which the client and supplier parties have agreed or will agree in writing

## **client's application**

fi tilaajan sovellus

software or a part thereof created for the client, expansions and additions (such as interfaces) to standard software made by the supplier for the client, configurations, parameterisations and any other possible software delivered by the supplier as part of rollout, apart from standard software

The client's application also includes its documentation.

## **standard software**

fi valmisohjelmisto

software or a part thereof developed and marketed by the supplier or a third party and defined as standard software in the agreement, together with its documentation

Standard software may be open source software. Standard software or its documentation is not the client's application.

## **error**

fi virhe

the object of delivery does not fulfil the agreed requirements and specifications, or it does not function in accordance with them

## **3 Delivery**

(1) The client's application has been specified in the agreement. If the object of delivery includes standard software programs, such programs and the special terms and conditions governing them, if any, must be stated in the agreement.

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- (2) Unless otherwise agreed, the delivery includes the design, specification, implementation, testing and rollout of the client's application. In addition, the delivery may include other tasks, such as those associated with data conversion and personnel training, if they have been agreed upon in the agreement.
- (3) Delivery phases, the delivery schedule and the resources required are agreed upon in the agreement.
- (4) The support, maintenance and further development of the client's application are agreed separately.

### **4 Testing and the acceptance of the delivery**

(1) The supplier shall perform the supplier's tests agreed in the agreement for the object of delivery or its part before the supplier hands over the object of delivery or its part to the client for intermediate testing or acceptance testing. Unless otherwise agreed, the supplier shall perform the tests in accordance with its practices using the material supplied by the client in advance. The accepted performance of the supplier's testing is an absolute requirement for the supplier's right to hand over the object of delivery or its part to the client for acceptance testing. The supplier's testing shall be deemed accepted when the tests performed by the supplier no longer reveal any errors which the client might, with justified cause, consider to prevent acceptance testing from being performed. The supplier shall notify the client of the time when the object of delivery or its part is ready for the client's acceptance testing and provide the client with an account of the testing performed and its results.

(2) The client shall, at its own expense, bring the operating environment required in testing into compliance with the agreement, unless otherwise agreed. The supplier shall hand over the object of delivery for acceptance testing so that it is installed in the operating environment in accordance with the agreement according to the delivery schedule. The supplier shall provide the client with operating instructions for the client's acceptance testing as well as the documentation concerning the object of delivery. The supplier shall also provide the client's representatives with agreed training for the performance of the tasks in question.

(3) The client shall perform the acceptance testing. The client shall provide an acceptance testing plan for the supplier in advance for commenting. However, the acceptance testing plan is not binding, and the client shall have the right, without being limited by the plan, to perform all tests it deems necessary. Unless otherwise agreed, the client shall have thirty (30) days to perform the client's acceptance testing, starting from the date on which the supplier has reported in writing that the object of delivery or its agreed part is ready for acceptance testing and has handed over the object of delivery for testing in accordance with *Section 4(2)*. The supplier may not hand over the object of delivery or its part to the client for acceptance testing before the mutually agreed date, unless the client gives its express written consent to it. The contracting parties may agree that the supplier assists the client during acceptance testing.

(4) Unless otherwise agreed, the client shall test the agreed intermediate stages within seven (7) weekdays after the supplier has announced in writing that testing may be started. The acceptance of an intermediate stage does not release the supplier from liability concerning errors which are revealed during later testing stages and which could not be and cannot be reasonably expected to have been detected during testing at intermediate stages. The acceptance of an intermediate stage is a precondition for the commencement of the next stage, unless otherwise agreed.

(5) The supplier shall immediately correct any errors discovered during acceptance testing. The time reserved for acceptance testing shall be extended by the time the supplier needs to correct the error and the client reasonably needs for the testing and acceptance of the corrected errors. If an error is caused by standard software, the supplier shall correct the error or have the error corrected at its own expense and according to its possibilities. If this is not reasonably possible, the supplier shall work around the error at its own expense. If creating a workaround is not reasonably possible through generally available means, the parties may agree upon additional work to work around the error, or the client shall be entitled to a price reduction. If the error is so significant that, due to the error, the purpose of the agreement remains essentially

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unfulfilled, the client shall have the right to cancel the agreement, unless the error concerns the standard software required by the client.

(6) The client shall immediately notify the supplier in writing of any errors it has detected in the application; however, no later than within three (3) working days after the time reserved for the client's acceptance testing has ended.

(7) The object of delivery or its part shall be deemed accepted if the client has not given any notification of errors within the time stated in *Section 4(6)* or if the client takes the object of delivery or its part into production use.

(8) Acceptance will not be prevented by minor errors that do not prevent the object of delivery from being used in the agreed purpose of use or prevent its operation. However, the supplier is obligated to correct such errors and defects free of charge and without any undue delay.

(9) With regard to fixed-price deliveries, both contracting parties shall be responsible for their own costs associated with the performance of acceptance testing. With regard to deliveries priced on the basis of working hours, the client shall, however, compensate the supplier for its work performed in relation to acceptance testing so that the supplier is responsible for its own costs associated with any re-testing performed due to the correcting of any possible errors.

(10) Unless otherwise agreed, the delivery shall be deemed to have taken place when the object of delivery has been accepted and the supplier has fulfilled all of its obligations under the agreement related to the rollout of the product or the end result of the service.

### **5 Organisation and implementation of the delivery**

(1) The contracting parties shall set up a project and a steering group for it for the fulfilment of the agreement and cooperation between the parties. Both contracting parties shall appoint their representatives to the steering group which supervises the implementation of the project as a cooperation organisation of the contracting parties. The tasks and authority of the steering group shall be specified in the agreement, and the group shall meet upon the request of a contracting party as necessary and at a minimum after each delivery phase. Minutes shall be maintained of the meetings of the steering group. The steering group may not amend the agreement.

(2) The supplier shall appoint a project manager whose task is to report on the state and progress of the project to the project's steering group. Other tasks shall be specified in the agreement. Both contracting parties shall appoint a contact person whose task is to monitor and supervise the fulfilment of the agreement and to communicate matters related to the fulfilment of the agreement within their organisation and to the other contracting party. Unless otherwise agreed, the supplier's project manager shall be the supplier's contact person. Each contracting party shall notify the other contracting party in good time if their contact person is replaced.

(3) The contracting parties shall appoint the required personnel resources to the project. Appointed key persons may be agreed upon in the agreement.

(4) The contracting parties shall each on their part reserve the necessary work premises and equipment for the project.

(5) A contracting party shall contribute to the implementation of the project in situations and contexts that are under the control of the said party. Both contracting parties shall make the decisions required to implement the project without delay.

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(6) Unless otherwise agreed, the supplier shall produce the client's application and perform other tasks belonging to the project using the supplier's working methods.

(7) The contracting party responsible for the development environment shall be, during the project, responsible for taking the backup copies that are part of the object of the agreement and pertain to the object of delivery and for verifying that they are functional.

(8) The delivery project shall end once the object of delivery has been accepted and taken into use.

### **6 The supplier's resources**

(1) The supplier shall ensure on its part that a sufficient number of persons are available for the delivery.

(2) The supplier shall not replace the key persons named in the agreement without the client's permission for reasons other than those independent of the supplier. The client may not refuse from issuing its permission for such replacements without reasonable cause. The supplier shall always notify the client in advance in writing of replaced key persons and shall without delay name a new person in place of the person to be replaced.

(3) In terms of competence, the new person must fulfil the agreed requirements.

### **7 Warranty**

(1) During the warranty period, the supplier shall, free of charge and without any undue delay, correct any errors detected in the object of delivery. Corrections also include amending the documentation with changes corresponding to the corrections.

(2) The warranty period is six (6) months starting from the acceptance of the application by the client, unless otherwise agreed. If the client's application is accepted in stages, the warranty period for previously accepted stages will not expire until six (6) months have passed from the acceptance of the entire client's application.

(3) The client has the right to demand that, before the payment of the final instalment, the supplier lodges for the client a security accepted by the client regarding the fulfilment of the warranty obligations. The security shall be fifteen (15) per cent of the total price of the agreement inclusive of value added tax, and it must remain valid for at least three (3) months after the term of the warranty period under the agreement. In case of a delay in the fulfilment of the warranty obligations, the supplier shall extend the term of the warranty period. The supplier shall be responsible for all security-related costs.

(4) With regard to standard software, the warranty terms of the standard software in question shall be applied to the warranty.

(5) If an error detected in the object of delivery during the warranty period is caused by standard software, the supplier shall correct the error or have the error corrected at its own expense and according to its possibilities. If this is not reasonably possible, the supplier shall work around the error at its own expense. If creating a workaround is not reasonably possible through generally available means, the parties may agree upon additional work to work around the error, or the client shall be entitled to a price reduction. If the error is so significant that, due to the error, the purpose of the agreement remains essentially unfulfilled, the client shall have the right to cancel the agreement, unless the error concerns the standard software required by the client.

(6) The warranty shall expire to the extent the client modifies the client's application or the specified application environment without agreeing on it in writing with the supplier, or the client's application is used

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for purposes other than its intended purpose of use or in violation of instructions concerning its use, or the error is caused by some other reason attributable to the client.

### 8 Rights

(1) The right of ownership to data media containing the applications that are the object of the agreement shall be transferred to the client once the data media have been delivered.

(2) The right of ownership and intellectual property rights to the client's material belong to the client or a third party, and they are not assigned to the supplier. The supplier shall have the right to process the client's material only for purposes pertaining to the fulfilment of the agreement.

(3) Unless otherwise agreed, copyright and intellectual property rights to the client's application and the associated documentation, the client's material excluded, shall belong to the supplier or a third party.

(4) The client shall have the unrestricted right, without any extra charge, independently or assisted by an external service provider, and without being limited by the copyright, intellectual property rights or business or professional secrets of the supplier or a third party, to:

- i. use the client's application in its own activities,
- ii. modify and develop the client's application further for its own use,
- iii. make copies of the client's application for its own use,
- iv. use the material and know-how generated in conjunction with the production of the client's application in connection with other applications,
- v. transfer the client's application to another hardware platform or operating system environment or geographic location; however, taking into account any export restrictions,
- vi. transfer rights to use the client's application to third parties, if this is required for the performance or reorganisation of the client's tasks,
- vii. receive the right of use and possession to the machine and source code versions of the client's application.

When exercising these rights, the client shall ensure that the supplier's business secrets remain confidential in accordance with the Act on the Openness of Government Activities.

(5) However, the provisions under *Section 8(4)* do not apply to standard software, unless otherwise agreed. The rights of use to standard software shall be determined by application of the licence terms and conditions specified by the manufacturer or copyright holder of the standard software.

(6) The client's afore-mentioned rights do not alter or expand the warranty or any other liabilities of the supplier from the provisions of warranty or acceptance or other obligations or requirements which applied to the client's application in its original application environment.

### 9 The supplier's obligations

(1) The supplier shall be responsible for ensuring that the client's application and the documentation concerning it are in compliance with the agreement and that the work is carried out with the professional expertise required by the task and following good technical practices and a high quality level.

(2) The supplier shall cooperate and negotiate with any other suppliers and consultants used by the client, if the client so requests. Unless otherwise agreed, the supplier shall be entitled to charge for such additional work. However, the supplier must give an advance notification of any additional work thus resulting.

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- (3) The supplier shall define and design the object of delivery so that the client is able to convert, utilising automated systems as specified by the supplier, all of the client's material stored by the application into a format complying with the data material openness requirement.
- (4) The supplier shall define and design the object of delivery so that the processing of personal data with the application complies with the requirements set by data protection legislation.
- (5) The documentation of the object of delivery includes a data description. The supplier shall not be entitled to charge separately for the delivery of the data description, unless otherwise agreed.
- (6) The supplier shall provide an open interface to the object of delivery if a requirement for an open interface has been agreed upon in the agreement.

### **10 The client's obligations**

- (1) In addition to the client's tasks agreed in the agreement, the client shall provide the supplier with the information which the supplier requires in order to carry out its task and which can be turned over to the supplier. The client shall be responsible for the information, instructions and regulations it has issued to the supplier.
- (2) The client shall be responsible for carrying out the tasks agreed upon in the agreement within the agreed schedule.

### **11 Maintenance**

- (1) The supplier shall provide support and maintenance services for the object of delivery as agreed separately. The supplier commits to offering these support and maintenance services for the duration of at least one (1) year, starting from the acceptance of the client's application.

### **12 Storing the source code of standard software**

- (1) If the client so demands, the supplier shall contribute to ensuring that the source code of the standard software included in the object of delivery, together with any modifications and additions made thereto for the client, is stored in the possession of an impartial provider of a source code storing service (an escrow agent) so that the client obtains the source code and the rights to use it in case:
  - i. the holder of the rights to the standard software is declared bankrupt or placed into liquidation, or
  - ii. maintenance is not available for the object of delivery from the supplier, the right holder of the standard software in question, or from any third party, under terms and conditions substantially similar to those agreed upon by the supplier and client.

### **13 Delays**

- (1) If a contracting party finds that it will be delayed in its delivery or in its performance of an obligation or considers such delay probable, the contracting party must, without delay and in writing, notify the other contracting party of the delay and its impact on the fulfilment of the agreement. The contracting parties shall agree upon a new delivery time, if required.

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(2) If the delivery is delayed due to a reason under the responsibility of the supplier, the supplier shall pay a contractual penalty to the client for every commencing period of seven (7) days by which the supplier exceeds the due date agreed for the delivery or its part under the agreement. The penalty for each above-mentioned period shall be 0.5 per cent of the purchase price of the delayed object of delivery. However, the maximum penalty is 7.5 per cent of the afore-mentioned price. The amount of damage caused by the delay does not affect the amount of the penalty. A delay in the delivery of documents and information preventing the use of the object of delivery shall be considered comparable to a delay in the delivery of the product or service.

(3) The supplier shall not be entitled to receive a contractual penalty due to the client's delay.