

Reference Table of Special Terms & Conditions for IT Contracts

Definitions		Clear definitions for any project specific terms or supplier terms reduce room for misinterpretation or understanding between the parties. For example, "Acceptance" may be defined as: "Successful performance of the (solution or software)" or "completed and successful acceptance testing in conformance with the requirements of the contract."
Term & Termination	<ul style="list-style-type: none"> • Transition of Services • Contract Kick-Off Meeting • Contract Closeout 	Besides the usual general termination provisions, depending on the nature of the project, you may need to specifically address any special transition or self-sufficiency needs, may require a kick-off meeting to ensure supplier understanding of the contract and project requirements, or you may have special close-out documents to complete your file.
Software License	<ul style="list-style-type: none"> • License Grant • License Type 	<p>If you are purchasing software licenses, your contract language should be very clear that the licenses will be held by the Commonwealth (if you are a state agency) or to the public body (if you are a locality, school, university, etc.).</p> <p>Further, if you are purchasing software directly from the software publisher, be positive to review all their terms and conditions. If your supplier is a reseller you will want to ensure they have their partner software publishers accept the terms of the License Agreement Addendum which can be found under the Forms section at this VITA SCM website: https://www.vita.virginia.gov/procurement/policies--procedures/procurement-forms/</p> <p>You will need to replace all references to VITA with your agencies', as defined by §2.2-2006 of the <i>Code of Virginia</i> and legislative, judicial and independent agencies of the Commonwealth, name and remove every reference to "Authorized Users", as your contract may not be issued as a statewide contract (which this template was originally developed for the development of a VITA statewide contract). These terms are either statutory or in the best interest of the Commonwealth. You will note that this template takes precedence over the supplier's license agreement. Be very careful when reading over any supplier license agreement that becomes part of your contract. Ensure, that your contract takes precedence and that the supplier may not randomly change their terms without your being notified and being able to review before accepting.</p> <p>There is little that you may negotiate or supersede with boxed off-the-shelf software, but still read the terms before downloading/using/accessing the software.</p> <p>Always request this type of grant and negotiate down: "a fully paid, perpetual, worldwide, nonexclusive, transferable, irrevocable object code license to use, copy, modify, transmit and distribute the Software and Documentation including any subsequent revisions, in accordance with the terms and conditions set forth herein and subject only to the limitations and/or restrictions explicitly set forth in this Contract."</p> <p>Occasionally, Virginia legislation will merge agencies or require some other consolidation of services, so transferability is an important need for the Commonwealth. This language</p>

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		<p>may be acceptable to suppliers who resist: “(Name of Your Agency) may transfer its license (i) to another Commonwealth agency due to legislative action or if such transfer is in the best interests of the Commonwealth or (ii) to the Commonwealth’s infrastructure partner, if this Contract is so transferred by VITA, under direction of the Commonwealth’s Secretary of Administration.”</p> <p>Also, you should demand the rights to allow your agents or third-party suppliers to have access rights only in performing the business of the Commonwealth.</p>
Rights To Work Product	<ul style="list-style-type: none"> • Definition • Rights • Ownership • Pre-existing rights 	<p>If your project will result in Work Product you will want to add a definition such as: “Inventions, combinations, machines, methods, formulae, techniques, processes, improvements, software designs, computer programs, strategies, specific computer-related know-how, data and original works of authorship (collectively, the "Work Product") discovered, created, or developed by Supplier, or jointly by Supplier and Agency Name in the performance of this Contract. Work Product shall not include configuration of software.”</p> <p>The contract should include clear language regarding rights and ownership of any work product. If your agency pays for Work Product it belongs to the Commonwealth. You can grant rights back to the supplier, with any necessary restrictions.</p> <p>The contract should also include clear language about pre-existing rights that are embodied or reflected in any work product. Title to it belongs to whomever paid for it—either Commonwealth or the supplier. And, it is a good idea to state in the contract that you expect supplier to return any work product and other properties provided to them by your agency, like you would request return of any confidential information you may have provided.</p>
Warranties	<ul style="list-style-type: none"> • Ownership • Solution • Limited • Malicious Code • Open Source • Privacy and Security • Operating System and Software Supportability • Supplier’s Viability • Other (per your business owner) 	<p>In addition to the normal warranty clauses that may be used with IT procurements you may need additional warranties such as those listed in the previous column. If you are procuring a full-blown solution, you want the supplier to warrant the whole solution and its components because they proposed the technical solution to meet your business needs. If you are procuring licensed services, such as hosting or software as a service, you will want the supplier to warrant not only the licensed services, but also their application that supports your access to the services. Normally, a limited warranty is provided by the supplier for a specific period. It is important to ensure this meets your needs. And, maintenance, support services and related fees should only begin when the warranty period ends, as the contractual warranty means supplier should fix or replace at no cost to you.</p> <p>For hosting or software as a service contracts, the following additional terms are recommended:</p> <p>Privacy and Security:</p>

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		<p>Supplier warrants that it and its employees, subcontractors, partners and third party providers have taken all necessary and reasonable measures to ensure that the application, licensed services, supplier product, and any related deliverables do not include any degradation, known security vulnerabilities, or breach of privacy or security. Supplier agrees to notify (Your Agency Name) of any occurrence of such as soon as possible after discovery and provide (Your Agency Name) with fixes or upgrades for security vulnerabilities within 90 days of discovery.”</p> <p><u>Operating System and Software Supportability:</u> Supplier warrants that it and its employees, subcontractors, partners and third party providers have taken all necessary and reasonable measures to ensure that the application, licensed services, supplier product, and any deliverables do not have dependencies on other operating systems or software that are no longer supported by Supplier, or its subcontractors, partners and third-party providers.”</p> <p><u>Access to Product and Passwords:</u> Supplier warrants that the application and licensed services do not contain disabling code or any program device or other undisclosed feature, including but not limited to, viruses, worms, trojan horses, or other code which is designed to permit unauthorized access, delete, disable, deactivate, interfere with or otherwise harm the application, licensed services or the hardware or software of any application users. In addition, Supplier warrants application users will be provided commercially reasonable uninterrupted access to the application. Supplier also warrants that it will not cancel or otherwise terminate access to the application by disabling passwords, keys or tokens that enable continuous use of the application by application users during the term of this contract. Supplier further warrants that the application and licensed services are compatible with and will operate successfully on the equipment.</p> <p>A supplier’s viability is critical if you are procuring a major project, or one that is foundational to your business objectives and continuity.</p>
<p>Delivery & Installation</p>	<ul style="list-style-type: none"> • Scheduling • Deployment of a Solution or Software • Documentation of Software Configuration • Hardware Engineering 	<p>If you require the supplier to install any software/hardware, be sure to clearly state any required scheduling, access and deployment needs or requirements. Supplier may have its own requirements for a proper setup/installation environment. Always require documentation for any related software configuration the supplier may have done during installation. Require documentation for all hardware engineering changes, planned changes and modifications within 30 days of such change. Also, state that all engineering changes or modifications that affect the product’s safety or ability to meet the published specifications (performance changes) shall be made at no cost to your agency.</p>

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	<p><i>Changes & Product Modifications</i></p>	<p>For solution/software contracts, you may state that supplier’s failure to deploy on schedule may constitute a material breach of the Contract resulting in damages to your agency and include language similar to:</p> <p>“Supplier agrees that failure to deploy the Solution/Software/Hardware/etc. in accordance with the Contract’s delivery schedule shall constitute a material breach of this Contract resulting in damages to (Your Agency Name) As an estimate of the damages (Your Agency Name) shall suffer, Supplier agrees to credit (Your Agency Name) an amount equal to XX percent (XX%) of the total Solution/Software/Hardware/etc. fee, for each day after the scheduled deployment date that the Solution/Software/Hardware/etc. has not been deployed for a period of thirty (30) days following the agreed upon delivery date. If the delay lasts longer than thirty (30) days, (Your Agency Name) may immediately cancel the Contract and collect damages for each day of that period of late delivery. (Your Agency Name) reserves any and all other remedies available at law or in equity for delays lasting longer than thirty (30) days or for non-deployment.”</p> <p>If your agency wants to do its own software installation, be sure to include language to that effect. For software/solution contracts installation means: “when all programs, program libraries and user interfaces are copied to and initialized on the appropriate equipment as executable by having the (Name of Your Agency) invoke the primary function of each major component of the software or when acceptance criteria have been met.</p> <p>For hardware, product installation is generally completed by the supplier and means: “unpacking, removal of all shipping/packing materials, positioning, connecting to internal utility services, testing, and related necessary services to allow for acceptance. All product installations shall comply with building and facilities standards established by (Name of Your Agency).”</p> <p>If you agency installs the product, be sure the contract states that supplier shall provide all reasonably necessary telephone assistance at no charge, or onsite services at the supplier’s rates, provided in the contract’s fee or price schedule.</p>
<p>Acceptance</p>	<ul style="list-style-type: none"> • <i>Acceptance Criteria</i> • <i>Cure Period</i> • <i>Remedies</i> 	<p>Acceptance criteria may be tied to the whole solution, to the software or hardware, to the services, licensed services and/or deliverables. Be sure that you clearly define the criteria, or it may simply point to the requirements and supplier’s proposal, but you want to reiterate it in the contract document. There should be a stated period to cure and re-test/accept. If the supplier can never get the solution/software/hardware/deliverable to conform with the Requirements you may state they will be in default, or if your agency has invested too much time and budget already, then you may include a step before default to include more cure/remedy periods and language that reflects an equitable adjustment for</p>

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		<p>your agency's benefit; i.e., reducing the price, not paying supplier milestone payment hold-backs intended for after final acceptance, etc.</p>
<p>Warranty & Maintenance Services</p>	<ul style="list-style-type: none"> • <i>Known Defects</i> • <i>New Releases</i> • <i>Coverage</i> • <i>Service Levels</i> • <i>Software Evolution</i> • <i>Escalation Procedures</i> • <i>Remedies</i> • <i>Maintenance & Support Services & Renewal Options</i> 	<p>The column to the immediate left lists examples of topics you may include as terms and conditions in the contract to specify your requirements or the negotiated terms of warranty and maintenance support services for hardware and software, licensed services (as in Software as a Service), or a total solution.</p> <p>For solution/software contracts, supplier should be required to notify your agency promptly and in writing of any defects or malfunctions in the solution/software/documentation the supplier learns of; they should correct them or provide a work around until corrected within XX days of their first knowledge of the defect or malfunction. Supplier shall provide your agency with copies of the software and documentation immediately after general release of any new releases, upgrades, and access modes. You may request this at no charge or negotiate accordingly.</p> <p>All solution/software/hardware contracts should state your desired/negotiated phone, written or onsite support and service level expectations during the warranty period and the maintenance period. Specify escalation steps and contact names/information. Suppliers may have their own printed terms regarding this and, if acceptable to your agency, refer to it in this section of the contract.</p> <p>If supplier or the software publisher merges or splinters the software you purchased, you may require that it not cost you extra to receive any related enhancements, releases, upgrades or support for the software. If the software has reduced or replaced functionality, you can require that you receive the new product at no additional cost, including maintenance of it. Make sure the supplier does not include additional terms and conditions that your agency cannot agree to.</p> <p>Remedies should be stated for the warranty period, in addition to those for the implementation or pre-acceptance period. Because supplier has warranted the solution/software/hardware/deliverable there should be no costs to you associated with making your technology purchase perform as promised during the warranty period. You can require the supplier to notify you 60 days in advance of the warranty expiration so that you have sufficient time to process the first annual maintenance. Often suppliers will have varying levels of maintenance that should be priced and included in your price schedule so that the price cannot change when this time arrives. For renewals avoid evergreen or auto-renewal terms from the supplier and attempt to cap annual renewal price increases to be not more than, for instance, 3% above the preceding year's fee or the annual change in the CPI. Based on the proposed solution, you may want the solution and/or the solution's components (hardware, software) to be included in the maintenance plan. A pure hardware procurement may need to have a stated time period that the supplier will be able to access replacement parts for the hardware in case the</p>

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		<p>manufacturer discontinues the product or if you use a third-party maintenance provider. Think about all support and maintenance needs and address each in the contract.</p>
<p>Performance & Service Level Agreements</p>	<ul style="list-style-type: none"> • Metrics gathering • Metrics reporting • Metrics analysis 	<p>Depending on your IT procurement you may require supplier to adhere to certain performance and/or service levels. Your business owner will likely establish these in the requirements section of the RFP. It is important to include them, but not duplicate them, in the contract either by reference to them or in full text. The collection of service or performance metrics from supplier and reporting of them to your agency at recurring intervals allows analysis which will determine supplier's performance and may then be used for any positive incentives (supplier benefit) or negative incentives (agency benefit) or other breach/default provisions you have included in the contract. The contract's performance obligations should align with the criticality of your project's business needs, for instance, if you are purchasing software as a service, as part of your agency's operation or provision of services to citizens, you will likely require 99% uptime of the application and licensed services. But, if you are buying a server to simply store archived records, you may require 85% uptime.</p>
<p>Escrow</p>	<ul style="list-style-type: none"> • Source Code • Data/Content 	<p>Always include an escrow agreement in a contract for software, a solution, hosting services accessible by a supplier's application or software as a service. This does not apply to boxed off-the-shelf software. In case the supplier discontinues doing business or becomes involved in a bankruptcy, your agency will want to be able to obtain the source code or data through an escrow agent under certain conditions. The supplier will provide the agreement with its proposal, if you requested such, and the supplier will obtain any negotiations from their agent. You will want access to the source code for the software, to all related proprietary and technical documentation, in English, including everything that will allow your agency or agent to create, maintain and/or enhance the software without the aid of the supplier or any other person or reference to any other materials, maintenance tools (test programs and program specifications) or proprietary or third party system utilities (compiler and assembler descriptions); descriptions of the system/program generation; and descriptions of any supplier tools required to enable you to continue to use the software. You will also want to ensure the version put into the escrow account is the version(s) you purchased including any future upgrades, versions, etc. and related documentation. You will want the escrow agent to conduct a validation test of the items in escrow to ensure they work and to provide written results. Any problems with the validation process should be immediately resolved. Everything in escrow should be included in an attachment to the escrow agreement. The escrowed items should be released to you upon the occurrence of certain events, including supplier's failure to carry out its contractual support and maintenance obligations for a period of 60 days, upon supplier's breach or default of the contract, supplier's bankruptcy, or failure to do business in the ordinary course.</p>

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		<p>In contracts for licensed software services and hosted application services it is advisable to include also, a Content or Data Escrow Agreement. You want supplier to keep your data, which is backed up monthly, in a media safe environment for your use. Items place in escrow should also be included on the list or inventory of what is in the escrow account and releasable under the same conditions as provided in the source code escrow agreement, but also should the data/content be destroyed, lost or damaged or following the termination or expiration of the licensed services.</p> <p>You can require that supplier pays all associated expenses with establishing and maintaining the escrow account, but often the supplier will insist you pay. You will want the supplier to grant the Commonwealth a royalty-free, perpetual, irrevocable license that permits disclosure to a third-party support vendor. Your agency will be the named beneficiary of that escrow agreement. Costs for a source code escrow account average \$1000 to \$1500 annually.</p>
Reporting	<ul style="list-style-type: none"> • Status • Performance • Other project-specific 	<p>Besides SWaM reporting requirements, your project may have other required reporting such as status, performance, SLA and other. Base the frequency of these on the complexity and governance requirements of your IT project, as well as any performance or service level metrics you must capture and/or have payment remedies tied to. Remember to include the format and media requirements of how you want the reports submitted and provide the name(s) of recipients.</p>
Confidentiality	<ul style="list-style-type: none"> • Treatment and Protection • Exclusions • Return or Destruction 	<p>In addition to any standard confidentiality provisions you normally include in your contract, it is important to ensure that you include any special project-related confidentiality requirements; i.e., HIPAA. Agencies dealing with personal information for citizens will have specific language to include.</p>
Data Privacy, Security & Protection	<ul style="list-style-type: none"> • Proprietary Rights • Supplier Partners • Supplier Security Certifications • Your Data's Privacy & Protection 	<p>Contracts for hosting services and software as a service need additional protection against data loss, unauthorized disclosure, compromise and other vulnerabilities. Be sure to include language in the contract that clearly specifies your agency's proprietary rights regarding your data and any customizations made and paid for by you for successful operation of the licensed services and application. The licensed services, the supplier's application and any modifications they make to them at their own expense will remain the exclusive property of the supplier. You will need to review the terms of supplier's services agreement and acceptable use policy, if applicable. If supplier uses any third-parties or subcontractors as part of their service offering, you should review their additional or embedded terms. You may want to include a requirement for supplier to have all their partners sign a non-disclosure agreement and keep these in your contract file. The more critical the data that your agency processes, the stronger you will want your protective contract language to be and your requirement for supplier's and, if applicable, supplier's partners, possession of security and audit certifications for SAS70 Type II or other industry preferred audits.</p>

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		<p>At a minimum, the contract should include language that addresses supplier compliance with the following:</p> <ul style="list-style-type: none"> • all federal, state and local laws and regulations for security and privacy. • a disaster recovery plan that will be followed • that your data will be stored and processed in the continental U.S. • daily backup of your data in an offsite hardened facility in the continental U.S. • that your metadata will be maintained and you will have easy retrieval and access of your metadata within two (2) hours of your request • that your data isn't impacted or forfeited due to E-discovery, search and seizure or other actions by third parties • all external connections to the World Wide Web will have appropriate security controls including industry standard intrusion detection and countermeasures that will detect and terminate any unauthorized activity prior to entering the supplier's firewall • user identification and access controls designed to limit access to your data by application users <p>Contact your agency's assigned VITA Customer Account Manager (CAM) for assistance to ensure proper compliance with Commonwealth standards and/or infrastructure requirements refer to next item.</p>
<p>COVA Security & Data Standards</p>	<ul style="list-style-type: none"> • Physical Access • Remote Access • Data Security • Data Standards • Data Protection • Data Removal • IT Accessibility • 508 Compliance 	<p>In addition to your agencies', as defined by §2.2-2006 of the <i>Code of Virginia</i> and legislative, judicial and independent agencies of the Commonwealth, security procedures and requirements, all IT projects must comply with Commonwealth Security and Data policies and standards or complete an Exception Request signed by the CIO. All of these are located at this link: https://www.vita.virginia.gov/it-governance/itrm-policies-standards/ IT Accessibility and 508 compliance standards and guidelines may be found at this link: https://www.vita.virginia.gov/it-governance/itrm-policies-standards/ Agencies may contact their assigned VITA CAM for assistance with this. It is also recommended that you include this language in your security provision: "Supplier shall immediately notify (Your Agency Name) of any breach of Unencrypted and Unredacted Personal Information, as those terms are defined in §18.2-186.6 of the <i>Code of Virginia</i>, and other personal identifying information, such as insurance data or date of birth, provided by (Your Agency Name) to Supplier. Supplier shall provide (Your Agency Name) the opportunity to participate in the investigation of the breach and to exercise control over reporting the unauthorized disclosure, to the extent permitted by law." For licensed service contracts, such as cloud services/Software as a Service, this language should be included:</p>

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		<p>“(Your Agency Name) shall have the right to review supplier’s information security program prior to the commencement of licensed services and from time to time during the term of the contract. During the performance of the licensed services, on an ongoing basis from time to time, (Your Agency Name), at its own expense, shall be entitled to perform, or to have performed, an on-site audit of supplier’s information security program. In lieu of an on-site audit, upon request by (Your Agency Name), supplier agrees to complete, within forty-five (45 days) of receipt, an audit questionnaire provided by (Your Agency Name) regarding supplier’s information security program. Supplier shall implement any reasonably required safeguards as identified by any program audit.”</p>
<p>Audit Rights</p>	<ul style="list-style-type: none"> • Supplier Software Audits • Hosting Services or Software as a Service Records & Audit 	<p>Software suppliers/publishers may want audit rights to ensure that your agency does not have more licenses than the number of paid licenses. If you utilize the License Agreement Addendum, the provisions state that no supplier audits are allowed. If you do not use the License Agreement Addendum, but the supplier proposes audit rights, you may offer the following language during negotiations:</p> <p>“Supplier shall provide forty-five (45) days’ written notice to (Your Agency Name) prior to scheduling any software license audit. The notice shall specify name(s) of individual(s) who will conduct the audit, the duration of the audit and how the audit will be conducted. Further, the supplier and its representatives, agents and subcontractors shall comply with any access, security and confidentiality requirements and restrictions of (Your Agency Name). No penalty shall be levied against (Your Agency Name) or the Commonwealth for unlicensed software found during the course of the audit. If (Your Agency Name) is determined to be using unlicensed software, the maximum liability to (Your Agency Name) shall be the cost of licensing the subject software. All costs associated with the audit shall be borne by the supplier.”</p> <p>Contact your agency’s assigned VITA Customer Account Manager (CAM) for assistance with any supplier request for remote access to ensure proper compliance with Commonwealth standards and/or infrastructure requirements.</p> <p>In hosting services and software as a service contracts, you may include this term:</p> <p>“Supplier shall maintain accurate records and other evidence pertaining to the costs and expenses for all licensed services performed/delivered pursuant to this contract. The records will be to the extent and in such detail as will properly reflect all direct and indirect costs associated with this contract. In addition, supplier shall maintain accurate records of the licensed services, including but not limited to, the “Uptime” and “Downtime” as set forth in the contract. (Your Agency Name) shall have the right, at any reasonable time</p>

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		during regular business hours after giving reasonable advance notice, to inspect and audit the records applicable to its order(s). Supplier shall preserve such records for five (5) years after termination/completion of the licensed services agreed to under this contract.
Indemnification		If VITA is hosting or supporting a solution, application or licensed services on your behalf for your project, be sure to include VITA in the list of indemnified parties in your indemnification clause.
Survival		Any provisions of this Contract regarding Software License, Rights To Work Product, Warranty, Escrow, Confidentiality, Content Privacy and Security, Liability, Indemnification, Transition of Services, and the General Provisions shall survive the expiration or termination of this Contract.