EUROPEAN COMMISSION

DG

Directorate

Unit

FRAMEWORK CONTRACT

ADDITIONAL INTELLECTUAL PROPERTY CLAUSES FOR INFORMATION TECHNOLOGIES CONTRACTS

I.15. INTELLECTUAL PROPERTY RIGHTS: SPECIFIC CLAUSES FOR IT SUPPLIES AND SERVICES[1].

I.15.1. Specific definitions and rules of interpretation

1. For the purpose of this article I.15, the following definitions (indicated in *italics* in the text) apply:

'Cloud services': Services which enable ubiquitous, scalable, convenient, on-demand network access to a shared elastic pool of configurable physical or virtual resources (such as networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or contractor interaction.

'Commissioned Software': New *software* or modifications to any existing *software*, developed by the contractor for the contracting authority under the FWC.

'Documentation': Instructions and manuals relating to the services, *hardware* or other materials provided in the performance of the FWC, whether intended for support/technical staff or for end-users, and whether provided in printed or in electronic form; *documentation* can be either *standard documentation* or customised *documentation*.

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[1] This article I.15 should be included in the Framework Contract – version 2018 (the "FWC"), at the end of part I – Specific Conditions, in contracts where the supplier provides supplies or services in the field of information technology. This may include the development of commissioned software; the delivery of hardware, the maintenance and support of IT systems, software or hardware; the provision of licensed software; the installation, configuration or customization of IT systems, software or hardware; the provision of Cloud Services; the advisory or technical services in the field of information technology, etc.
When this article I.15 is used:
- this article I.15 replaces the content of article I.10 entirely. The content of article 1.10 can be replaced by a mention "not applicable" or "ownership of the results is governed by article I.15";
- in article I.6.3, the following mention should be deleted: *"[a list of all pre-existing rights to the results or parts of the results or a declaration stating that there are no such pre-existing rights, as provided for in Article II.13.4]"*
This article I.15 can be used with or without the General Terms & Conditions for Information Technologies Services (part III of the FWC, the "GTC"). This article intends to deviate from the GTC on IP-related questions. Article I.15.1, paragraph 3, contains the appropriate deviations. This paragraph can be removed if this article is used without th GTC.
This article I.15 contains references to other articles of the FWC and relies on terms that are defined in the "definitions" sections of the FWC. It is not recommended to use it in another contract.

'EU Protected Material': *Software* or other protected material for which the intellectual property rights are the property of the contracting authority, or which have been licensed to the contracting authority by third parties.

'Hardware': Any tangible asset resulting from a manufacturing process and consisting of computer, media, electronic communications or other electronic equipment, whether or not it embeds *software*, as well as all accessories related to such equipment.

'Licensed software': *Software* of which intellectual property rights are held by the contractor or a third party, whether customised or not to meet the contracting authority's specific requirements, and licensed to the contracting authority under the FWC.

'Software': Any intangible asset resulting from a development process and consisting of a computer program or a part thereof.

'Source code': The code of *software*, including the associated control statements required for operation, maintenance and use of such code, each in programmer-readable form.

'Standard documentation': Any *documentation* that is not specifically adapted to the needs of the contracting authority.

2. For the interpretation of article II.13. in connection with this article I.15, the term *Union* refers to the *contracting authority*.

3[2].If the "general terms and conditions for information technologies contracts (Part III of the FWC)" are applicable to this FWC, the following provisions are not applicable and are replaced by this Article I.15: Articles III.2.3, III.5.4, III.5.6, III.8.4, and III.10.

I.15.2. *Ownership of the results – general principle*

1. Unless specified otherwise for certain services or supplies, in any subsection of this article I.15, the *contracting authority* acquires the ownership of any *results* delivered by the contractor, for all modes of exploitation, as set out in Article II.13.1 and the following articles,.

2. [*include any specific provision about ownership of results*]

I.15.3. Delivery and ownership of *commissioned software*

1. If the contractor must provide *commissioned software*, and unless agreed otherwise between the parties, in the *specific contract* or otherwise, the contractor shall provide the contracting authority with the *commissioned software* in both *source code* and object code, together with a comprehensive functional and technical *documentation*.

2. The *source code*, object code and *documentation* of the *commissioned software* are considered as *results* for the application of Article II.13., and, unless agreed otherwise between the parties, in the *specific contract* or otherwise, their ownership is transferred to the contracting authority as set out in article II.13.1.

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[2] Please remove if the GTC for IT contracts are not part of the FWC

I.15.4. Use of open-source software in the development of *commissioned software*

1. The contracting authority states and the contractor acknowledges that:
   a. the contracting authority encourages the (re)use of open-source software in the development of *software*;
   b. wherever possible and appropriate, the contracting authority intends to share the *source code* for any *software* where it holds the intellectual property rights ; and
   c. any incorporation of open-source software in *commissioned software* may, depending on the license conditions of such components, restrict the ability of the contracting authority to distribute the *commissioned software* or impose certain obligations to the contracting authority in connection with the distribution of the *commissioned software*.

2. The contractor shall comply with any reasonable guidelines that the contracting authority may provide on the use of open-source software in the development of *commissioned software*.

3. The contractor shall not include in *commissioned software*, without the prior approval of the contracting authority, any open-source software made available under licensing conditions that would cause any of the following:

   (a) restrict the ability of the contracting authority to distribute the *commissioned software* under the license terms of its choice;
   (b) oblige the contracting authority to make the *source code* of any part of the *commissioned software* available to anyone;
   (c) otherwise substantially restrict the ability of the contracting authority to use or distribute the *commissioned software* or impose substantial obligations to the contracting authority in connection with such use or distribution.

4. The contractor shall provide, together with the *commissioned software*, a list of all open-source software included in the *commissioned software*, and a reference to their respective license terms.

I.15.5. Licensing of *licensed software*

1. If the contractor must provide *licensed software,* the contractor hereby grants to the contracting authority a licence to use the *licensed software*, from the date of its delivery. Use should cover all modes of exploitation inherent to the normal use of the *software* and to any other use as specified in the *specific contract*, under the conditions as specified in the *specific contract*. The licence covers all intellectual property rights attached to the *licensed software* product. Unless agreed otherwise between the parties, in the *specific contract* or otherwise, the licence is irrevocable, non-exclusive, worldwide and granted for the entire duration of protection by the relevant intellectual property rights, including the right to assign or sublicense the rights to any European Institution, Agency or Body.

2. If a license on the *licensed software* is temporary, it may be extended by the contracting authority in the conditions set out in the *specific contract*. A renewal or

extension must be explicit to be valid. A tacit or automatic renewal or extension is not binding on the contracting authority. Temporary licences relating to *licensed software* shall only be renewed if the contracting authority expressly consents to such renewal.

3. The contracting authority may reproduce the *licensed software* if this is necessary for (i) benefiting from the license granted under this article and (ii) back-up and archiving.

4. The contracting authority shall not pledge, assign, transfer or lend, for payment or otherwise, the *licensed software* except in the manner set out under the FWC and the *specific contracts*.

5. For the avoidance of doubts, the *licensed software* is not considered as a *result* for the application of article II.13, and its ownership is not transferred to the contracting authority as set out in article II.13.1.

I.15.6. Ownership and intellectual property in the context of *cloud services*

1. If the contractor must provide *cloud services*, and unless agreed otherwise between the parties, in the *specific contract* or otherwise, the *contracting authority* shall retain intellectual property and/or ownership rights to all information, data, inputs, and outputs, related to the use of the *cloud services*. They are considered as *results* for the application of Article II.13, and their ownership is transferred to the *contracting authority* as set out in Article II.13.1.

2. The contractor shall retain intellectual property and/or ownership rights to the cloud infrastructure and *software* underlying the *cloud services* provided by the contractor, and these are not considered as *results* for the application of Article II.13, and their ownership is not transferred to the *contracting authority* as set out in Article II.13.1.

I.15.7. Intellectual property of the embedded technology in *hardware*

1. If the contractor must deliver *hardware*, the contractor grants to the *contracting authority*, from the moment of delivery of any *hardware* product, a non-exclusive licence to use, in the context of using the *hardware* product, any technology protected by intellectual property right and embedded in the *hardware* product. The licence covers all intellectual property rights attached to such technology. Unless agreed otherwise between the parties, in the *specific contract* or otherwise, that licence is granted on a worldwide basis, for the entire duration of protection, including the right to sublicense the rights to any third party, if required to enjoy the property or usage of the *hardware*.
2. The payment of the price for the *hardware* product shall include all fees payable to the contractor for the acquisition by the *contracting authority* of the licensed rights for all modes of exploitation inherent to the use of the *hardware* product.

I.15.8. Third party right holder

1. If the contractor is acting as a reseller of supplies or services, the contractor shall, prior to the provision of any supply or service, conclude the necessary back-to-back

agreements with any relevant third parties to ensure that the contractor can fully abide by its obligations under the FWC.

2. If the fulfilment of obligations by the contractor under the FWC requires the agreement of or the performance of actions by any third party, the contractor undertakes that such third party will provide the required agreement or perform the required actions promptly.

3. If the contractor is not the right holder of intellectual property rights attached to any *hardware, software* or *documentation*, and unless the contracting authority has agreed separate license terms with the right holder, the contractor shall either:
    - acquire from the right holder a valid licence or sub-licence allowing the contractor to sublicense all rights as specified in the FWC to the *contracting authority*, or
    - undertake that the right holder grants all rights as specified in the FWC to the *contracting authority*, at no additional costs.

4. The contractor shall inform in writing the *contracting authority* of any applicable licence terms imposed by a third party right holder of intellectual property rights attached to any *hardware*, *software* or *documentation,* and provide the relevant terms to the *contracting authority* together with the draft offer or specific contract or, in any case, before the corresponding purchase is made. Unless agreed in writing by the *contracting authority*, these licence terms may not derogate from the FWC.

5. The contractor indemnifies the *contracting authority* against any losses or liabilities suffered by the *contracting authority* because of a breach of this Article.

I.15.9. Intellectual property warranty

1. The contractor warrants that the performance of services, the delivery of *hardware* and the provision of any other materials to the *contracting authority* in the performance of the FWC do not infringe the intellectual property rights of any third party.

2. The contractor warrants that it holds any rights or authorization necessary to transfer or license the intellectual property rights to the *contracting authority* as set out in the FWC.

I.15.10. Third party claims relating to the use of materials delivered by the contractor in the performance of the FWC

1. Each party shall notify the other party promptly of the existence or threat of any third party claim or action alleging that the use by the *contracting authority* of any *results, hardware* or any other materials delivered by the contractor in the performance of the FWC, infringes that third party's intellectual property rights (any such existing or threatened claim, an "**infringement claim**").

2. In the event of an infringement claim, the contractor shall promptly provide the *contracting authority* with all assistance requested to mitigate losses, settle the claim, enable, facilitate and/or accelerate the clearance of the disputed third party rights. Upon request of the *contracting authority*, the contractor shall, at its own expense, voluntarily intervene in any pending litigation relating to the infringement claim.

3. The contractor shall provide the *contracting authority* promptly with any relevant information relating to the infringement claim that the contractor is aware of. Upon request of the *contracting authority*, the contractor shall, at its own expense, provide the *contracting authority* with any reasonable information and assistance.

4. The *contracting authority* may conduct its own defence or negotiate its own settlement, at its discretion. The contractor is liable for all reasonable legal expenses, including lawyers and experts fees, incurred by the *contracting authority* in this context.

5. The contractor indemnifies the *contracting authority* against any losses suffered in connection with an infringement claim and against any damages or liabilities arising out of any judgment, ruling or settlement relating to the third party infringement claim. The *contracting authority* shall request the consent of the contractor before entering a settlement, which may only be refused if (i) the contractor has opposed the settlement on reasonable grounds notified to the *contracting authority* and (ii) the contractor has provided a reasonable alternative solution to compensate all losses suffered by the *contracting authority*.

6. If the infringement claim results in a decision or settlement confirming the existence of an infringement, or if this is likely to happen, the contractor shall, at its own costs, either:
    -   modify the infringing materials to remedy the infringement to any third party rights;
    -   replace the infringing materials with substantially equivalent non-infringing materials; or
    -    obtain the third party rights required for the *contracting authority* to continue using the infringing materials as agreed.

7. If the contractor fails to remedy the infringement as set out in paragraph 6, the *contracting authority* may take all necessary measures to remedy the infringement at the contractor's expense.

8. If it is not reasonably possible to remedy the infringement as set out in paragraphs 6 and 7 , the *contracting authority* may terminate the FWC and/or the concerned *specific contracts* for breach of substantial contractual obligation as set out in Article II.18.1 (c). Without prejudice to the right of the *contracting authority* to claim additional damages, the contractor shall reimburse to the *contracting authority* the purchase, rental, leasing or licence price of any infringing materials. The *contracting authority* may decide to pursue the FWC and/or the concerned *specific contracts*, limited to the use of the non-infringing parts of the product, service or *documentation*. In such case, the parties will determine in good faith the amount of the reimbursement due to the *contracting authority* and the adapted price for the remaining products and services of the contract.

9. The contractor is not required to indemnify the *contracting authority* against losses, or to remedy an infringement, resulting from:
    -   the *contracting authority*'s use of any materials in combination with *hardware* or *software* not delivered by the contractor, if such combined use is the only cause of

the claimed infringement, and provided that the contractor did not expressly or implicitly agree with such combined use; or

- the *contracting authority*'s use of any materials in a form other than the one delivered by the contractor, if such modification is the only cause of the claimed infringement, and if the contractor did not perform that modification or expressly or implicitly agree with it.

I.15.11. Use of *EU protected material*

1. The *contracting authority* authorises the contractor to use identified *EU protected material* which the contractor needs in order to perform its obligations under the contract.

2. The contractor may use the *EU protected material* only to the extent strictly necessary for the implementation of the FWC.

I.15.12. Third party claims relating to the use of *EU protected material*

1. Each party shall promptly notify the other party of the existence or threat of any third party claim or action alleging a breach of any third party rights, including intellectual property rights, resulting from any use by the contractor of *EU protected material*.

2. In the event of such a dispute or threat of dispute, the contractor shall proactively notify the *contracting authority* of any relevant information. Upon request of the *contracting authority*, the contractor shall, at its own expense, provide the *contracting authority* with any reasonable information and assistance in connection with the dispute or threat of dispute.

3. The contractor indemnifies the *contracting authority* against any claim, payment arising out of any judgement, ruling or settlement or any other loss suffered in connection with any third party claims or actions alleging an infringement of third party rights, including intellectual property rights, resulting from the use by the contractor of *EU protected material* in contravention with Article I.15.11. Upon request of the *contracting authority*, the contractor shall, at its own expense, voluntarily intervene in any pending litigation regarding the use by the contractor of *EU protected material* in contravention with Article I.15.11.