

Information Technology & Management Consulting Professional Services Agreement (December 1, 2013) changes from previous version: Explanatory notes

Note: Further changes have been made to these templates; please refer to [Changes to the General Services Agreement Templates](#) for details

Section	Current Language	Revised Language (new language marked in red)	Reason for Change / Summary Statement
Description of Province	<p><u>HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA</u>, as represented by</p> <hr/> <p><i>[Identify the responsible minister, public officer or organizational unit for entering into the contract on behalf of the Province. For example, “the Minister of Finance”, “the Attorney General”, “the Information and Privacy Commissioner”, the “Financial Institutions Commission”, etc. It is customary and preferable to refer to the responsible minister unless the contract relates to matters which are independent from any minister (such as contracts entered into by officers of the Legislature). Occasionally, contracts are entered into which are the responsibility of more than one minister, in which case more than one minister may be referenced. Legal advice should be obtained if the contract writer is unclear on who should be named as the Province’s representative.]</i></p>	<p><u>HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA</u>, as represented by</p> <hr/> <p><i>[Identify the responsible minister, public officer or organizational unit for entering into the contract on behalf of the Province. For example, “the Minister of Finance”, “the Attorney General-Premier”, “the Information and Privacy Commissioner”, the “Financial Institutions Commission”, etc. It is customary and preferable to refer to the responsible minister unless the contract relates to matters which are independent from any minister (such as contracts entered into by officers of the Legislature). Occasionally, contracts are entered into which are the responsibility of more than one minister, in which case more than one minister may be referenced. Legal advice should be obtained if the contract writer is unclear on who should be named as the Province’s representative.</i> <i>Delete this instruction after completing the description of the Province]</i></p>	<p>These changes in the instructions for completing the description of the Province on the first page of the agreement provide a better example of a minister title not starting with “Minister of” and include an explicit statement that the instructions be deleted prior to finalizing and signing the agreement.</p> <p><u>Summary Statement:</u> These are minor housekeeping changes to the instructions for completing the description of the Province on the first page of the agreement.</p>
Section 1.1(d)	<p>“Produced Material” means records, software and other material, whether complete or not, that, as a result of this Agreement, are produced by the Contractor or a Subcontractor and includes the</p>	<p>“Produced Material” means records, software and other material, whether complete or not, that, as a result of this Agreement, are produced or provided by the Contractor or a Subcontractor and includes the</p>	<p>Incorporated Material is not necessarily produced by the Contractor under the Agreement, but may include pre-existing Contractor or third party</p>

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	Incorporated Material	Incorporated Material	<p>material. The addition of the words “or provided” recognizes that such material may be included by the Contractor in the Produced Material.</p> <p><u>Summary Statement:</u> This change is being made to capture other materials that are provided, but not necessarily created, by the Contractor under the Agreement.</p>
Section 4.1(a)(ii)	...the Contractor has sufficient trained staff, facilities, materials, appropriate equipment and approved subcontractual agreements in place and available to enable the Contractor to fully perform the Services...	...the Contractor has sufficient trained staff, facilities, materials, appropriate equipment and approved subcontractual or other agreements in place and available to enable the Contractor to fully perform the Services and to grant any licenses under this Agreement...	<p>The Contractor is required, under section 6.4, to grant the Province a broad license to any Incorporated Material that is embedded or incorporated in the Produced Material. Incorporated Material may include materials owned by a third party, as well as materials owned by the Contractor. The additional wording requires the Contractor to represent and warrant that the Contractor is in fact able to grant the Province the right to use Incorporated Material that may be owned by a third party. In conjunction with the additional wording in section 9.1, this gives the Province the ability to rely on the indemnity</p>

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			<p>provided by the Contractor in the event that this representation and warranty is or becomes untrue.</p> <p><u>Summary Statement:</u> This change is being made to recognize that a Contractor may sometimes wish to include another party's materials in the deliverables and to confirm that the Contractor has the necessary rights to do so.</p>
Section 6.4	<p>Upon any Incorporated Material being embedded or incorporated in the Produced Material and to the extent that it remains so embedded or incorporated, the Contractor grants to the Province:</p> <p>(a) a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to use, reproduce, modify and distribute that Incorporated Material; and</p> <p>(b) the right to sublicense to third-parties the right to use, reproduce, modify and distribute that Incorporated Material.</p>	<p>Upon any Incorporated Material being embedded or incorporated in the Produced Material and to the extent that it remains so embedded or incorporated, the Contractor grants to the Province:</p> <p>(a) a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to exercise, in respect of that Incorporated Material, the rights set out in the Copyright Act (Canada), including the right to use, reproduce, modify, publish and distribute that Incorporated Material; and</p> <p>(b) the right to sublicense or assign to third-parties any or all of the rights granted to the Province under section</p>	<p>The additional wording gives the Province broader rights to use the Incorporated Material as part of the Produced Material, as well as the ability to pass these rights on to others. These changes have been made as a result of recent clarifications in copyright law, and ensure that the Province has unhampered use of the Produced Material as a whole, including the ability to publish any Incorporated Material included in the Produced Material and to communicate such material to the public – e.g. through Internet streaming. This change does not impact the ongoing need to</p>

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		<p>6.4(a) to use, reproduce, modify and distribute that Incorporated Material.</p>	<p>consider, from a privacy perspective, what information can be made public.</p> <p><u>Summary Statement:</u> This change is being made to capture recent updates to copyright law, to avoid repetition and to allow the Province to assign its rights when applicable.</p>
<p>Section 9.1</p>	<p>The Contractor must indemnify and save harmless the Province and the Provinces' employees and agents from any losses, claims, damages, actions, causes of action, costs and expenses that the Province or any of the Province's employees or agents may sustain, incur, suffer or be put to at any time, either before or after this Agreement ends, including any claim of infringement of third-party intellectual property rights, where the same or any of them are based upon, arise out of or occur, directly or indirectly, by reason of any act or omission by the Contractor or by any of the Contractor's agents, employees, officers, directors or Subcontractors in connection with this Agreement, excepting always liability arising out of the independent acts or omissions of the Province and the Province's employees and agents.</p>	<p>The Contractor must indemnify and save harmless the Province and the Province's employees and agents from any losses, claims (including any claim of infringement of third-party intellectual property rights), damages award, actions, causes of action, costs and-or expenses that the Province or any of the Province's employees or agents may sustain, incur, suffer or be put to at any time, either before or after this Agreement ends, ^(each a "Loss") including any claim of infringement of third-party intellectual property rights, where the same or any of them are based upon, arise out of or occur to the extent the Loss is directly or indirectly caused or contributed to by [^]:</p> <p>(a) reason-of any act or omission by the Contractor or by any of the Contractor's agents, employees, officers, directors or Subcontractors in connection with this Agreement[^]; or</p>	<p>Apart from some restructuring of the section to improve readability, the changes are to clarify that the Contractor's liability for losses under the indemnity is limited to the extent to which those losses were directly or indirectly caused or contributed to by an act or omission of the Contractor or certain other persons who the Contractor is responsible for. In other words, it isn't intended to apply to the extent losses are caused or contributed to by the Province or by persons other than the Contractor or persons the Contractor is responsible for. The revised language also clarifies that the indemnity applies to representations or warranties of the Contractor that are or become untrue or</p>

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		(b) any representation or warranty of the Contractor being or becoming untrue or incorrect (each a "Loss") , excepting always liability arising out of the independent acts or omissions of the Province and the Province's employees and agents.	incorrect such as would, for example, based on the new section 4.1(a)(ii), allow the Province to rely on the indemnity if the Contractor failed to obtain rights from a third party necessary for Province to use Incorporated Material as set out in section 6.4. <u>Summary Statement:</u> The changes are to clarify that section 9.1 applies to untrue or incorrect representations and warranties by the Contractor but does not apply to the extent that a loss was caused or contributed by someone other than the Contractor or a person the Contractor is responsible for.
Section 9.3	The limitations set out in section 9.2 do not apply to a Loss resulting from any of the following: (a) bodily injury or damage to real property or tangible personal property; (b) a claim of infringement of third-party intellectual property rights; or	The limitations set out in section 9.2 do not apply to a Loss resulting from or relating to any of the following: (a) bodily injury or damage to real property or tangible personal property; (b) a claim of infringement of third-party intellectual property rights; or	The changes to section 9.3 are drafting clarifications.
Section 9.5	If the Loss is on the basis of a third-party claim that any element of the Material	If the Loss is on the basis of a third-party claim that any element of the Material	The change to section 9.5 is to make it clear that nothing in section

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	<p>infringes the intellectual property rights of any person,</p> <p>(a) then the Contractor must defend the Province against that claim at the Contractor's expense and the Contractor must pay all associated costs, damages and legal fees that a court or arbitrator finally awards or are included in a settlement agreed to by the Contractor; and</p>	<p>infringes the intellectual property rights of any person,</p> <p>(a) then, without limiting section 9.1, the Contractor must defend the Province against that claim at the Contractor's expense and the Contractor must pay all associated costs, damages and legal fees that a court or arbitrator finally awards or are included in a settlement agreed to by the Contractor; and</p>	<p>9.5(a) has the effect of limiting the scope of the indemnity in section 9.1.</p>
Section 13.3	<p>The Contractor must not assign any of the Contractor's rights under this Agreement without the Province's prior written consent.</p>	<p>The Contractor must not assign any of the Contractor's rights or obligations under this Agreement without the Province's prior written consent. Upon providing written notice to the Contractor, the Province may assign to any person any of the Province's rights under this Agreement and may assign to any "government corporation", as defined in the <i>Financial Administration Act</i>, any of the Province's obligations under this Agreement.</p>	<p>The addition of the words "or obligations" makes the current wording more comprehensive by restating the common law position that the Contractor cannot assign its obligations under the Agreement without the Province's approval. The current language is silent on the ability of the Province to assign its rights and obligations. The remainder of the additional wording restates the common law, which would allow the Province, on notice, to assign its rights under the Agreement, and expands on the common law by specifying that the Province may also, on notice, assign its obligations to corporations which are agents of, or owned or</p>

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			<p>controlled by, the Province.</p> <p><u>Summary Statement:</u> This change is being made to clarify what, and to whom, rights and obligations under the Agreement may be assigned by the Province and by the Contractor.</p>
Section 13.8	<p>Sections 2.9, 3.1 to 3.4, 3.7, 3.8, 5.1 to 5.5, 6.1 to 6.5, 7.1, 7.2, 8.1, 9.1 to 9.3, 9.5, 9.6, 9.9, 10.1 to 10.3, 11.2, 11.3, 11.5, 11.6, 12.1 to 12.3, 13.1, 13.2, 13.8, and 13.10, any accrued but unpaid payment obligations, and any other sections of this Agreement (including schedules) which, by their terms or nature, are intended to survive the completion of the Services or termination of this Agreement, will continue in force indefinitely, even after this Agreement ends.</p>	<p>Sections 2.9, 3.1 to 3.4, 3.7, 3.8, 5.1 to 5.5, 6.1 to 6.5, 7.1, 7.2, 8.1, 9.1 to 9.3, 9.5, 9.6, 9.9, 10.1 to 10.3, 11.2, 11.3, 11.5, 11.6, 12.1 to 12.3, 13.1, 13.2, 13.8, and 13.10, any accrued but unpaid payment obligations, and any other sections of this Agreement (including schedules) which, by their terms or nature, are intended to survive the completion of the Services or termination of this Agreement, will continue in force indefinitely subject to any applicable limitation period prescribed by law, even after this Agreement ends.</p>	<p>This change is to explicitly state that the survival of various sections under this provision (such as the indemnity in section 9.1) is not intended to have the effect of contracting out of any applicable statutory limitation periods for the bringing of legal proceedings such as those contained in the <i>BC Limitation Act</i>.</p> <p><u>Summary Statement:</u> This change clarifies that section 13.8 is subject to any applicable limitation periods in the <i>BC Limitation Act</i> or other legislation.</p>