

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH TERMS AND CONDITIONS FOR INFORMATION TECHNOLOGY CONTRACTS



This Commonwealth Terms and Conditions for Information Technology Contracts (“IT Terms and Conditions”) form is jointly issued by the Executive Office of Technology Services and Security (EOTSS), the Executive Office for Administration and Finance (A&F), the Office of the Comptroller (CTR) and the Operational Services Division (OSD) for use by all Commonwealth of Massachusetts (“State”) Departments and Contractors to govern Contracts subject to the object codes for information technology, as defined by the Office of the Comptroller’s [Expenditure Classification Handbook](#), or other Contracts as expressly approved in writing by EOTSS, A&F, OSD, and CTR. Any changes by either the Department or the Contractor to this form shall be void. These IT Terms and Conditions will be incorporated by reference into this Contract for IT commodities or services executed by the Contractor and Department, in the absence of a superseding law or regulation requiring a different contract form.

For purposes of these IT Terms and Conditions, “Performance” shall include, but shall not be limited to, services rendered, obligations due, costs incurred, commodities and Deliverables provided and accepted by the Department, programs provided, or other commitments authorized under a Contract. A “Deliverable” shall include, but shall not be limited to, any tangible or intangible product, good, or service to be provided by the Contractor to the Commonwealth as an element of Performance under a Contract. The Commonwealth is entitled to ownership and possession of all Deliverables purchased or developed with funds paid by the State. The Commonwealth’s possession, installation, or use of proprietary IT commodities or services, developed by a Contractor for the open market without the use of State funds, shall not transfer title or ownership thereof to the Commonwealth. A “Contract” shall mean, in the following order of priority: (i) these IT Terms and Conditions; (ii) the Standard Contract Form issued jointly by A&F, CTR and OSD, and the Standard Contract Form Instructions and Contractor Certifications; (iii) the Request for Response (RFR) or applicable solicitation document, as it may be amended by the Department; (iv) the Contractor’s response to the RFR or applicable solicitation document, as it may be amended by the Department and Contractor, including any negotiated terms and conditions allowable pursuant to law or regulation; (v) a solicitation created by the Department for a particular engagement such as a Request for Quote (RFQ), as it may be amended by the Department; (vi) any negotiated terms and conditions governing a particular engagement, as expressly agreed to in writing between the Department and the Contractor; and (vii) the Contractor’s response to the Department’s solicitation.

1. Contract Effective Start Date

Notwithstanding any verbal or other representations by the parties, the effective start date of Performance under a Contract shall be the latest of: the date the Contract was executed by an authorized signatory of the Contractor, the date the Contract was executed by an authorized signatory of the Department, the date specified in the Contract, or the date of any approvals required by law or regulation.

2. Payments And Compensation

The Contractor shall only be compensated for Performance delivered and accepted by the Department in accordance with the specific terms and conditions of a Contract. The Department may, in its sole discretion, agree to pre-payment for subscription-based IT commodities or services for a term length as specified in the Contract. All Contract payments are subject to appropriation pursuant to M.G.L. c. 29, § 26, or the availability of sufficient non- appropriated funds for the purposes of a Contract and shall be subject to intercept pursuant to M.G.L. c. 7A, §

3 and 815 CMR 9.00. Overpayments shall be reimbursed by the Contractor or may be offset by the Department from future payments in accordance with state law. Acceptance by the Contractor of any payment or partial payment, without any written objection by the Contractor, shall in each instance operate as a release and discharge of the State from all claims, liabilities or other obligations relating to the Performance of a Contract.

3. Contractor Payments

The Contractor shall timely submit invoices and supporting documentation as prescribed in a Contract. The Department shall review and return rejected invoices within fifteen (15) days of receipt with a written explanation for rejection. Payments shall be made in accordance with 815 CMR 4.00 and the Bill Payments policy issued by CTR, provided that payment periods listed in a Contract of less than forty-five (45) days from the date of receipt of an invoice shall be effective only to enable a Department to take advantage of early payment incentives and shall not subject any payment made within the forty-five (45) day period to a penalty.

4. Contract Termination or Suspension

a. Termination/Suspension

A Contract shall terminate on the date specified in a Contract, unless that date is properly amended in accordance with all applicable laws and regulations prior to the date, or unless terminated or suspended under this section, following written notice to the Contractor. The Department may, in its sole discretion, for any reason, without penalty, terminate in whole or in part or suspend a Contract in whole or in part: (i) without cause; (ii) if the Contractor breaches any material term or condition or fails to perform or fulfill any material obligation required by a Contract; (iii) in the event of an elimination of an appropriation or availability of sufficient funds for the purposes of a Contract; or (iv) in the event of an unforeseen public emergency mandating immediate Department action.

b. Force Majeure

Upon immediate notification to the other party, neither the Department nor the Contractor shall be deemed to be in breach for failure or delay in Performance due to acts of God or other causes factually beyond their reasonable control and without their fault or negligence (each a "Force Majeure Event"). The notification from the Contractor to Department must include the date and extent of the Contractor's failure or delay in Performance and the cause thereof. Contractor shall use all reasonable and good faith efforts to remedy, remove, or circumvent the Force Majeure Event with the least practicable delay, and resume the performance of its obligations as soon as reasonably practicable after the remediation, removal or circumvention of the Force Majeure Event. Failure of a subcontractor (as defined in Section 9 below) to perform, or price increases due to market fluctuations or product availability will not be deemed factually beyond the Contractor's control. Likewise, labor disputes and power failures shall not be deemed beyond the Contractor's control. A Force Majeure event does not excuse Contractor's obligation to comply with its contractual obligations regarding disaster recovery and business continuity, including, but not limited to, the obligations set forth in the Commonwealth's Enterprise Security Policies and Standards, currently located at <https://www.mass.gov/handbook/enterprise-information-security-policies-and-standards> (collectively "the DR/BC obligations"). Contractor's failure to comply with the DR/BC obligations shall constitute "fault" and/or "negligence" for purposes of this Section 4(b).

c. Payment Upon Termination

If the Department has pre-paid for subscription services, Contractor shall refund Department the as-yet unused pro-rata portion of such pre-payment as of the date of termination. This applies even where the Contract was terminated by the Department without cause.

5. Written Notice

A notice shall be deemed delivered and received when submitted in writing in person or when delivered by any other appropriate method evidencing actual receipt by the Department or the Contractor. Any written notice of termination or suspension delivered to the Contractor shall state the effective date and period of the notice, a reason for the termination or suspension, if applicable, any alleged breach or failure to perform, a reasonable period to cure any alleged breach or failure to perform, if applicable, and any instructions or restrictions concerning allowable activities, costs or expenditures by the Contractor during the notice period.

6. Confidentiality, Privacy, And Protection of Data

The Contractor shall ensure the physical security and restrict access to any personal or other Department data in the Contractor's possession or used by the Contractor in the Performance of a Contract, which shall include, but shall not be limited to, the Department's public records, documents, files, software, equipment or systems. The Contractor shall comply with the Commonwealth Standard Contract Form and the Commonwealth's Standard Contract Form Instructions and Contractor Certifications, all applicable laws, rules, and regulations relating to personal data including, but not limited to, M.G.L. c. 66A if the Contractor becomes a "holder" of "personal data" and M.G.L. c. 93H if the Contractor accesses "personal information", and the Enterprise Information Security Policies and Standards <https://www.mass.gov/handbook/enterprise-information-security-policies-and-standards>. If the Contractor accesses Protected Health Information (PHI) as defined by the Health Insurance Portability and Accountability Act (HIPAA), the Contractor shall comply with all applicable HIPAA requirements, including those governing business associates, and shall execute a "Business Associate Agreement" as necessary.

7. Record-keeping And Retention, Inspection of Records

The Contractor shall maintain records, books, files and other data as specified in a Contract and in such detail as shall properly substantiate Contractor performance or claims for payment under a Contract, for a minimum retention period of six (6) years beginning on the first day after the final payment under a Contract, or such longer period as is necessary for the resolution of any litigation, claim, negotiation, audit or other inquiry involving a Contract. The Department shall have access, as well as any parties identified under Executive Order 195, during the Contractor's regular business hours and upon reasonable prior notice, to such records, including on-site reviews and reproduction of such records at a reasonable expense.

8. Assignment

The Contractor may not assign or delegate, in whole or in part, or otherwise transfer any liability, responsibility, obligation, duty or interest under a Contract, with the exception that the Contractor shall be authorized to assign present and prospective claims for money due to the Contractor pursuant to a Contract in accordance with M.G.L. c. 106, §§ 9- 318. The Contractor must provide sufficient notice of assignment and supporting documentation to enable the Department to verify and implement the payment assignment. In accordance with the Comptroller's Bill Payment Policy, payments to third party assignees will be processed as if

such payments were being made directly to the Contractor, and these payments will be subject to intercept, offset, counter claims or any other Department rights which are available to the Department or the State against the Contractor. Upon prompt written notice to the Contractor, the Department may assign or delegate, in whole or in part, or transfer any liability, responsibility, obligation, duty or interest under a Contract, to another Department, provided that the assignee has agreed to take full responsibility of such Contract, liability, responsibility, obligation, duty or interest.

9. Subcontracting by Contractor

“Subcontractor” shall mean Contractor’s representatives, agents, affiliates, consultants, volunteers, suppliers, service providers, hosting providers, providers of third-party software imbedded in a Contractor’s product, or any other entity with whom Contractor is in privity of oral or written contract and whom Contractor intends to perform under the Contract in any capacity. Any agreement entered into by the Contractor with a Subcontractor for the purposes of fulfilling the obligations under a Contract must be in writing, authorized in advance by the Department, and shall be consistent with and subject to the provisions of these IT Terms and Conditions and a Contract. Subcontracts will not relieve or discharge the Contractor from any duty, obligation, responsibility or liability arising under a Contract. The Contractor shall be responsible for the acts and omissions of its Subcontractors. The Department is entitled to copies of all subcontracts and shall not be bound by any provisions contained in a subcontract to which it is not a party.

10. Affirmative Action, Non-Discrimination in Hiring and Employment

The Contractor shall comply with all federal and state laws, rules and regulations promoting fair employment practices or prohibiting employment discrimination and unfair labor practices and shall not discriminate in the hiring of any applicant for employment nor shall any qualified employee be demoted, discharged or otherwise subject to discrimination in the tenure, position, promotional opportunities, wages, benefits or terms and conditions of their employment because of race, color, national origin, ancestry, age, sex, religion, disability, handicap, sexual orientation or for exercising any rights afforded by law. The Contractor commits to purchasing supplies and services from certified minority or women-owned businesses, small businesses or businesses owned by socially or economically disadvantaged persons or persons with disabilities.

11. Insurance

Contractor represents and warrants that Contractor, its subsidiaries, and each Subcontractor performing work under the Contract shall, for the duration of the Contract, and in the case of claims-made policies for two years following termination of the Contract, maintain, or cause to be maintained, insurance in such amounts and covering such risks as specifically set forth elsewhere in the Contract, provided that in the event that such coverages are not specified, Contractor shall maintain or cause to be maintained insurance coverage in such types and amounts as are customarily required for contracts of similar scope and nature, including but not limited to, Worker’s Compensation/Employer’s Liability, Commercial General Liability, Bodily Injury, Property Damage, Automobile Liability, Professional Liability/Errors & Omissions, first and third party Cyber Liability, and Umbrella Liability. The Contractor shall provide Department with certificates of insurance reflecting all coverages at least thirty days prior to the start of Performance and thereafter upon request of the Department, EOTSS, A&F, OSD, and/or CTR.

12. Liability And Indemnification

a. Liability and Indemnification

Unless otherwise exempted by law, and subject to Section 13, the Contractor shall be liable for, and shall defend, indemnify, and hold harmless the State, including the Department, its agents, officers and employees, against any and all damages, claims, liabilities, and costs which arise out of the Contractor's Performance of a Contract (each an "Indemnified Claim"), including, but not limited to, personal injury, property damage, infringement of intellectual property, Data Breach as defined below, and claims arising from new, emerging, or novel technologies and claims (such as those related to Generative AI ("GenAI")); GenAI is a type of artificial intelligence technology that can generate many forms of content including but not limited to texts, images, and multimedia).

b. Control of Defense

The Contractor shall exercise control and direct the defense and/or settlement of any Indemnified Claim; provided that after prompt notification by the State, the State shall have an opportunity to control and direct the defense of any Indemnified Claim that would require the State to admit liability, pay money, or take or refrain from taking any action pursuant to M.G.L. c. 12, § 5. In the event that the State exercises its option to control and direct the defense of a claim, Contractor shall not be liable for attorney's fees incurred by the State following such exercise. The State shall not be liable for any costs incurred by the Contractor arising under this Section 12.

c. Indemnification of Contractor

The Contractor (including its agents, officers, employees or Subcontractors) shall at no time be considered an agent or representative of the Department or the State. Any indemnification of the Contractor shall be subject to appropriation and applicable law.

13. Limitation of Liability

Absent a higher limitation of liability expressly agreed to in a particular Contract between the Department and the Contractor, the limitation of liability in this Section 13 shall apply. This Section 13 shall not limit Contractor's liability and indemnification obligations for personal injury, property damage, and/or intellectual property claims, nor the State's ability to join the Contractor as a third-party defendant in connection with any claims. The Contractor's liability for any security incident, data breach, or unauthorized disclosure of data (each a "Data Breach") shall not exceed the greater of: (i) \$500,000; (ii) the amount mandated by applicable State or Federal law; (iii) three (3) times the total value of the Contract (or in the case of subscription-based Contracts, three (3) times the total value of the Contract during the committed subscription term); or (iv) the total coverage available from Contractor's insurance provider(s) for such Data Breach. The Contractor's liability for any other claim shall not exceed the greater of: (i) \$100,000; or (ii) two times the total value of the Contract (or in the case of subscription-based Contracts, two times the total value of the Contract during the committed subscription term). The Contractor shall be liable for incidental or consequential damages, including without limitation, loss of use of equipment, lost revenue, lost savings or lost profits of the State only with respect to personal injury, property damage, intellectual property rights and Data Breaches.

14. Warranties

a. Warranty Of Functionality

Contractor warrants that for at least six (6) months following the acceptance of a Deliverable provided to the Commonwealth (“Warranty Period”), its Performance will achieve in all material respects the functionality described in the Contract, user guides, and in other related documentation and that such functionality will be maintained in all material respects in subsequent upgrades or updates. Contractor is required to use best efforts to modify its Performance to achieve in all material respects the functionality described in the Contract, user guides, and other related documentation and, if it is unable to deliver such functionality, Department shall be entitled to terminate the Contract. Notwithstanding the foregoing, any subscription term licenses provided by Contractor shall be warranted for the duration of the subscription term. During the Warranty Period, Contractor shall remediate all warranty claims that it is or should be reasonably aware of at no cost to the Department.

b. Non-Infringement Warranty

Contractor represents and warrants that it has full power and authority to grant the title, license and/or use of the Deliverables and any other rights granted by the Contract to the Department with respect to the Deliverables. Contractor further represents and warrants that neither the Contractor’s performance, nor the performance by the Department in its utilization of the Deliverables, when used as permitted by the Contract, nor the license of and authorized use by Department of the Deliverables, including any materials owned by third parties supplied or specified by Contractor for incorporation in the Deliverable, as described in the Contract, will in any way constitute an infringement or other violation of any copyright, trade secret, trademark, patent, invention, proprietary information, non-disclosure, or other rights of any third party.

c. Qualified Personnel Warranty

Contractor represents and warrants that the services will be performed by appropriately qualified and trained personnel; with due care and diligence and to a high standard of quality as is customary in the industry; in compliance with the terms and conditions of the Contract; and in accordance with all applicable professional standards for the field of expertise. Contractor warrants that all personnel granted access to Commonwealth systems and/or confidential data are monitored and have been properly trained on system security and handling confidential data.

d. Qualified Software Publisher Warranty

If Contractor is reselling software under a Contract, Contractor represents and warrants that, prior to submitting to the Department a quote from such software publisher, it has obtained assurances from the software publisher that it can provide its services consistent with the terms of the Contract.

e. Other Warranty

Contractor warrants that Deliverables shall be free of viruses, Trojan horses, worms, spyware, or other malicious code or components.

15. Waivers

Forbearance or indulgence in any form or manner by a party shall not be construed as a waiver, nor in any way limit the legal or equitable remedies available to that party. No waiver by either party of any default or breach shall constitute a waiver of any subsequent default or breach.

16. Risk Of Loss

The Contractor shall bear the risk of loss for any Contractor materials used for a Contract and for all Deliverables, Department personal or other data which is in the possession of the Contractor or used by the Contractor in the Performance of a Contract until possession ownership, or full legal title, as applicable, to the Deliverables are transferred to and accepted by the Department.

17. AI Usage Disclosure

The Contractor shall disclose to the Department, at the time of submitting its bid or proposal, and in the terms of the contract, whether artificial intelligence, GenAI, or any GenAI components are included or planned for inclusion in the product or service offering. Additionally, the Contractor has a continuing obligation during the term of the contract to notify the Department promptly in writing prior to inclusion of any artificial intelligence, GenAI, or GenAI components in the product or service roadmap; this includes use of such tools by subcontractors or 3rd party products used in the performance of the contract. The notice must state in detail how artificial intelligence, GenAI, or GenAI components are being used in performance of the contract, and the impact of its inclusion on how Department data is accessed, used, shared, or stored.

18. Forum, Choice of Law And Mediation

Any actions arising out of a Contract shall be governed by the laws of Massachusetts and shall be brought and maintained in state court in Massachusetts, unless a federal court in Massachusetts has exclusive jurisdiction thereof. The Department, subject to the approval of the Office of the Attorney General (AGO), may: (i) consent to the jurisdiction of federal courts outside of Massachusetts; or (ii) agree to the established voluntary mediation process through the Massachusetts Office of Public Collaboration (MOPC) of any Contract dispute and will share the costs of such mediation with the Contractor. No legal or equitable rights of the parties shall be limited by this section.

19. Contract Boilerplate Interpretation, Severability, Conflicts With Law, Integration

Any amendment or attachment to any Contract which contains conflicting language or has the effect of deleting, replacing or modifying any printed language of these IT Terms and Conditions, as officially published by EOTSS, A&F, CTR and OSD, or any printed language of the Standard Contract Form shall be interpreted as superseded by the official printed language. If any provision of a Contract is found to be superseded by state or federal law or regulation, in whole or in part, then both parties shall be relieved of all obligations under that provision only to the extent necessary to comply with the superseding law, provided however, that the remaining provisions of the Contract, or portions thereof, shall be enforced to the fullest extent permitted by law. All amendments must be executed by the parties in accordance with Section 1 of these IT Terms and Conditions and kept with the original record copy of a Contract as prescribed by CTR. The printed language of the Standard Contract Form, as officially published by A&F, CTR, and OSD, which incorporates by reference these IT Terms and Conditions, shall supersede any conflicting verbal or written agreements relating to the Performance of a Contract, or attached thereto, including contract forms, purchase orders or invoices of the Contractor. For the avoidance of doubt, any provision in any document forming a Contract, or any subsequent

updates to Contractor terms of use or privacy policies, that conflicts with, modifies, waives, or alters a provision of these IT Terms and Conditions shall be null and void unless expressly approved in writing prior to execution by EOTSS, A&F, OSD, and CTR.

20. Press Release and Marketing

Contractor agrees that no brochure, news, media, press release, public announcement, memorandum or other information of any kind regarding the Contract shall be disseminated in any way to the public, nor shall any presentation be given regarding the Contract without prior approval by the Department. Written approval shall not be unreasonably withheld or delayed by the Department; provided, however, that Contractor shall be authorized to provide copies of the Contract and answer any questions relating thereto to any state or federal regulators or, in connection with its financial activities, to any financial institutions for any private or public offering.

Contractor shall not use graphics, logos, page headers, icons, or scripts unique to the State without the Department's prior written permission, and Contractor must not display the Commonwealth of Massachusetts Seal for commercial purposes as use of the coat of arms and the Great Seal of the Commonwealth for advertising or commercial purposes is prohibited by law.

IN WITNESS WHEREOF, the Contractor certifies under the pains and penalties of perjury that it shall comply with these IT Terms and Conditions for any applicable Contract executed with the Commonwealth as certified by their authorized signatory signing the Standard Contract Form.