

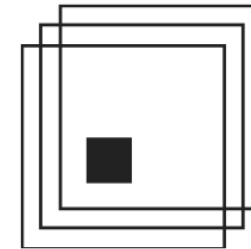


# SOFTWARE DEVELOPMENT CHECKLIST

Contracts-Direct.com | Customer Checklist Series | 2021

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Checklist	Further information	Notes (if any)
<b>Grant and Scope of Licence</b>		
<input type="checkbox"/> Is the software clearly and adequately described?	The customer should be clear what it is contracting for. There may also be warranties from the supplier that the software will perform as described.	
<input type="checkbox"/> Who has the right to use the software?	Contractors and other group companies should be expressly included if relevant.	
<input type="checkbox"/> Consider the length of the term.	A term may be fixed or perpetual.	

## Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
<input type="checkbox"/> Consider whether the licence is exclusive or non-exclusive.	The majority of commercial software is licensed on non-exclusive terms.	
<input type="checkbox"/> Consider the territories in which the software can be used.	A worldwide licence is ideal from the customer's perspective but may not be offered by the supplier.	
<input type="checkbox"/> Consider the permitted use of the software.	Particularly, ensure that it is adequate for the customer's anticipated future needs.	
<input type="checkbox"/> Is sublicensing permitted?	If it is, consider whether there are conditions (such as imposing end-user licence terms on the sublicensees).	
<b>Software Modification</b>		
<input type="checkbox"/> If software is developed or heavily configured specifically for the customer, consider including additional protections	Useful provisions may include: —customer ownership of the intellectual property in the developed components —clear specifications for modifications —testing and acceptance criteria	
<b>Specification and Delivery</b>		
<input type="checkbox"/> Does the agreement specify the delivery date and format?.	The majority of software is delivered by file transfer or download.	
<input type="checkbox"/> Will acceptance testing take place and, if so, on what terms?		
<b>Support and Maintenance</b>		
<input type="checkbox"/> Consider whether support and / or maintenance services will be provided by the supplier.	Where specific levels of support are required, the agreement should include adequate service-level provisions, particularly in relation to response times and fix times.	

Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
<input type="checkbox"/> Check whether support and maintenance services are dependent on the purchase of upgrades at additional cost and / or support of customer version guaranteed for a period after any new version released.		
<b>Documentation</b>		
<input type="checkbox"/> What documentation (such as user manuals) is the supplier committing to provide?	It may be useful to specify the language of documentation, and include a warranty that it is sufficient to enable a reasonably skilled user to operate the software without third-party assistance.	
<input type="checkbox"/> How regularly will the supplier maintain or update the documentation?	Documentation updates should be made available to the customer when it receives any updates to the software.	
<b>Licence Fee</b>		
<input type="checkbox"/> Is there an upfront one-off licence fee and / or periodic licence fee?		
<input type="checkbox"/> What are the provisions on interest for late payment?	The supplier is likely to require interest for late payment. It may be better to agree a specific rate rather than rely on statutory interest rates under the Late Payment of Commercial Debts (Interest) Act 1998.	
<input type="checkbox"/> Consider whether the licence fee is inclusive / exclusive of support and maintenance?	If exclusive, any support and maintenance fees must be clearly specified.	
<input type="checkbox"/> Consider whether the licence fee may be increased only with the written agreement of the parties.	The supplier may seek increases for the charges (eg annual, indexed linked) and additional machines / users.	

Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
<input type="checkbox"/> Consider whether software updates (including new versions and patches) are included in / excluded from the licence fees?	If excluded, the customer should have the right to reject updates without affecting its right to support.	
<p><b>Warranties and Representations</b></p>		
<input type="checkbox"/> Ensure that the agreement contains appropriate warranties and (potentially) representations.	Key warranties for the customer may include: —that the software conforms to specification and accompanying documentation —that the software is of satisfactory quality and fit for customer’s intended purpose (it is usual for suppliers to resist this warranty) —that all necessary rights, consents and approvals to grant the licence have been obtained by supplier —that the use of software and any accompanying documentation by customer will not infringe any third-party intellectual property rights, and —that the software is free from material defects, viruses and errors	
<p><b>Audit Rights</b></p>		
<input type="checkbox"/> Consider if the supplier is requesting a right to audit customer’s use of the software (to ensure licence terms complied with and all fees paid).	If so: —is the customer able to self-certify the number of users, etc? —will the audits be completed at agreed times on reasonable notice and (at most) annually? —is the supplier contractually required to minimise disruption to customer’s business? —is the supplier required to keep all information confidential? —are there suitable restrictions on what the supplier may request to see?	

Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
	<p>—is the customer reimbursed for any reasonable expenses incurred in assisting with the audit (although this may be difficult if the supplier uncovers underpayment of licence fees, in which case commonly the supplier will want to be reimbursed its audit costs)?</p>	
<b>Escrow</b>		
<input type="checkbox"/> Consider whether the supplier is required to place source code for software in escrow.		
<b>Liability</b>		
<input type="checkbox"/> To what extent is the supplier’s liability limited or excluded?	<p>Both parties will usually seek a cap on liability. Ensure the cap on supplier liability is sufficient to cover the potential losses which could be suffered by customer. If the software is not system critical and is relatively easy to replace or repair then, as a minimum, the customer should ensure the capped amount covers all fees likely to be paid by them under the licence</p>	
<input type="checkbox"/> Consider including specific types of loss which customer can recover.	<p>For example:            —operational / administrative expenses            —wasted expenditure / charge            —fines            —additional costs of re-procuring services            —losses relating to the infringement of third-party intellectual property rights</p> <p>The supplier will usually expect an exclusion of consequential or indirect losses, and loss of profits.</p>	

Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
<b>Intellectual Property Rights Indemnity</b>		
<input type="checkbox"/> Does the agreement contain an indemnity protecting the customer against infringement of third-party intellectual property rights?	<p>The supplier should indemnify the customer from any third-party intellectual property infringement claim in relation to the software.</p> <p>An indemnity may include every country where the customer may use the software.</p>	
<input type="checkbox"/> What remedies does the customer have in the event of infringement of third-party rights?	<p>They may include, at the customer’s option, requiring the supplier to modify the software, to procure rights for the customer’s continued use, to substitute with non-infringing software or to give a refund.</p>	
<input type="checkbox"/> Is there a conduct of claims clause?	<p>If so, does it contain appropriate customer concessions such as, for example, a requirement that the supplier must seek the written consent of the customer before any settlement?</p>	
<input type="checkbox"/> Consider expressly stating that the indemnity is not subject to the cap on liability.	<p>See ‘Liability’ above.</p>	
<b>Termination</b>		
<input type="checkbox"/> Consider the rights of the customer to terminate the agreement.	<p>A customer may have the right to terminate an agreement for reasons including:</p> <ul style="list-style-type: none"> <li>—material or persistent breach by the supplier</li> <li>—supplier insolvency</li> </ul> <p>There is often no right for supplier to terminate for convenience.</p>	

Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
<input type="checkbox"/> Consider whether the customer should have the right to continue using software if the customer terminates due to breach by supplier.		
<input type="checkbox"/> Consider what happens upon termination in relation to accrued rights / liabilities.	The termination of the agreement should not to relieve the supplier from accrued rights / liabilities under the warranties and indemnities.	
<b>Miscellaneous</b>		
<input type="checkbox"/> Are export controls likely to be an issue?	Export controls are laws that require the licensing of the export, brokering or transshipment of sensitive goods and software.	
Consider whether it may be useful to include other provisions in the agreement.	These may include dispute resolution, sub-contractors, non-solicitation, confidentiality, force majeure, data protection and standard boilerplate provisions.	
<b>Other standard legal terms and conditions</b>		
<input type="checkbox"/> Identify any key personnel involved in the software development.	This may involve different individuals during the build phase (i.e. project managers) and then during the run phase, if services are being provided (i.e. account managers). Set out procedures for agreeing what should happen in the event that these key personnel leave or are dismissed. How much control is required over the selection of replacement personnel?	
<input type="checkbox"/> Confirm when title and risk in the developed software / other key deliverables will pass and		



Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
when the same will be deemed to have been delivered, installed or accepted.		
<input type="checkbox"/> Identify exclusions and limitations on liability and liability caps and any types of loss for which a party has unlimited liability.		
<input type="checkbox"/> Confirm what each party must do on termination (e.g. returning each party's confidential information or handing over any licensed software that exists at the date of termination). Are there any licensed rights that will continue post-termination? Will there be any escrow release?		
<input type="checkbox"/> Confirm general warranties and indemnities (e.g. for IPR infringement or breach of confidence and whether subject to limitations).		
<input type="checkbox"/> Identify specific obligations regarding confidentiality and publicity and their duration.		
<input type="checkbox"/> Consider if it is appropriate for both parties to only be able to assign or subcontract rights under the agreement with the prior consent of the other.	Should there be some exceptions, e.g. associated companies of either party, pre-approved subcontractors of the supplier?	
<input type="checkbox"/> Consider whether the agreement should identify a process for dispute resolution.	This could be all or one of expert determination, mediation, arbitration and / or courts.	

Software Development Checklist- Customers

Checklist	Further information	Notes (if any)
<input type="checkbox"/> Confirm that the agreement is to be governed by laws of England and Wales, having exclusive jurisdiction.		
<input type="checkbox"/> Consider other boilerplate provisions to include.	For example: —escrow arrangements —non-solicitation —rights of third parties —entire agreement —anti-bribery —force majeure —insurance —data protection —freedom of information —publicity —notice —severability —compliance with law —variation —change control —reporting —audits and investigations —waiver —set-off —disputes resolution and ADR	
<input type="checkbox"/> Confirm how the agreement will be signed / executed. Consider counterparts, execution clauses, electronic completion and further assurance clause (including a power of attorney, if relevant).		

## Software Development Checklist- Customers

Checklist	Further information	Notes (if any)

### Checklist Notes:

- This checklist is provided for the purposes of obtaining a customer's instructions.
- The customer's responses will be taken into consideration in the preparation of requested documentation.
- No warranty is given that the checklist is comprehensive in its questions or that it covers all of the customer's requirements.
- The customer is required to provide all relevant information in any event.
- Documents prepared by contracts-direct.com are provided without legal advice.
- Customers are recommended to obtain legal advice on their documentation.