

The Contract made between the Commonwealth of Australia represented by the Department of Defence. A.B.N. 68 706 814 312 (the 'Commonwealth') and (...INSERT COMPANY NAME, COMPANY A.C.N./A.R.B.N. AND A.B.N. AS APPLICABLE...) and having its registered office at (...INSERT COMPANY'S REGISTERED OFFICE...) (the 'Contractor').

RECITALS

- A. The Commonwealth has a requirement for the supply of [...INSERT REQUIREMENT...].
- B. The Contractor has offered to provide the Supplies on the terms set out in the Contract.
- C. The Commonwealth has agreed to accept the offer by the Contractor on the terms set out in the Contract.

THE PARTIES AGREE AS FOLLOWS

FOR DEPARTMENTAL USE: For Systems Entries

Contract No:		Project ID:	
ROMAN ORDER No:		Cost Centre Code:	
Order Date:		WBS Element Code:	
Contractor A.B.N:		Cost Element:	
Vendor No:		Internal Order:	

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1. CONTRACT FRAMEWORK

1.1 Definitions (Core)

1.1.1 In the Contract, unless the contrary intention appears, words, abbreviations and acronyms have the meaning given to them by the Glossary at Attachment M. The Glossary also contains definitions of WBS elements, a list of documents referred to in the Contract and details of the version that is applicable to the Contract.

1.2 Interpretation (Core)

1.2.1 In the Contract, unless the contrary intention appears:

- a. headings are for the purpose of convenient reference only and do not form part of the Contract;
- b. the singular includes the plural and vice-versa;
- c. a reference to one gender includes the other;
- d. a reference to a person includes a body politic, body corporate or a partnership;
- e. if the last day of any period prescribed for the doing of an action falls on a day which is not a Working Day, the action shall be done no later than the end of the next Working Day;
- f. a reference to an Act is a reference to an Act of the Commonwealth, State or Territory of Australia, as amended from time to time, and includes a reference to any subordinate legislation made under the Act;
- g. a reference to a clause includes a reference to a subclause of that clause;
- h. a reference to a 'dollar', '\$', '\$A' or 'AUD' means the Australian dollar unless otherwise stated;
- i. a reference to a specification, publication, Commonwealth policy or other document is a reference to that specification, publication, Commonwealth policy or document, in effect on the Effective Date, or alternatively, a reference to another version of the document if agreed in writing between the parties;
- j. the word 'includes' in any form is not a word of limitation; and
- k. a reference to a party includes that party's administrators, successors, and permitted assigns, including any person to whom that party novates any part of the Contract.

1.2.2 The objectives of the parties in entering into this Contract are:

- a. to ensure that the Contractor delivers the Supplies on time, on budget, to the required safety, quality and capability, in accordance with the Contract;
- b. to provide an effective capability to the ADF that:
 - (i) supports the ADF's mission to 'fight and win';
 - (ii) supports the Commonwealth's policy of Defence self-reliance; and
 - (iii) minimises the Commonwealth's costs of maintaining and supporting the [...INSERT CAPABILITY...];
- c. to develop, maintain and enhance appropriate skill sets and capabilities within both the Commonwealth and the Contractor;
- d. to obtain value for money for the Commonwealth on an ongoing basis in relation to the delivery of [...INSERT CAPABILITY...];
- e. to obtain for the Contractor as a commercial entity a reasonable return on its investment when it performs the Contract efficiently and successfully, and a return that appropriately reflects properly managed risks involved in the performance of the Contract;
- f. to have appropriate IP for acquisition, whole of life support and disposal;

- g. to facilitate the retention and enhancement of strategically important Australian capabilities and skills;
 - h. to ensure availability of necessary facilities (including any plant and systems) to develop and maintain (as appropriate) the [...INSERT CAPABILITY...];
 - i. to encourage the most efficient possible use of resources for the achievement of the [...INSERT CAPABILITY...];
 - j. to work within a framework that ensures personnel and materiel safety, and assures compliance with all laws and other regulatory requirements;
 - k. to achieve these joint objectives through a culture of mutual respect and co-operation, and in an environment that fosters innovation, continuous improvement, cost efficiency, transparency and open, honest and timely communication; and
 - l. [...INSERT PROJECT SPECIFIC OBJECTIVES IF ANY...].
- 1.2.3 Without in any way affecting or overriding the other terms of this Contract, each party agrees to perform its obligations and enforce its rights under the Contract having regard to, and with the aim of, satisfying the objectives described in clause 1.2.2.

1.3 Commencement of Operation (Core)

- 1.3.1 The Contract commences on the Effective Date.

1.4 Entire Agreement (Core)

- 1.4.1 The Contract represents the parties' entire agreement in relation to the subject matter and supersedes all tendered offers and prior representations, communications, agreements, statements and understandings, whether oral or in writing.

1.5 Precedence of Documents (Core)

- 1.5.1 If there is any inconsistency between terms of the Contract, a descending order of precedence shall be accorded to:
- a. the conditions of contract and the Glossary;
 - b. the SOW and its annexes;
 - c. the Attachments other than the SOW and the Glossary; and
 - d. any document incorporated by express reference as part of the Contract,
- so that the term in the higher ranked document, to the extent of the inconsistency, shall prevail.

1.6 Contracted Requirement (Core)

- 1.6.1 The Contractor shall, for the Contract Price, and any other payment required under the Contract, provide the Supplies and fulfil all its other obligations under the Contract.

1.7 Option for Further Quantities and Optional Extras (Optional)

- 1.7.1 The Contractor grants the Commonwealth the option to purchase additional quantities of the Supplies and optional extras as set out in Annex D to Attachment B, at any time prior to (...INSERT DATE/MILESTONE...) under the terms of the Contract, including those detailed in Annex D to Attachment B.
- 1.7.2 The Commonwealth may exercise the option by providing written notice to the Contractor identifying the optional extras or quantity and type of additional quantities of the Supplies (as appropriate) to be purchased. The Contractor shall, within 30 days of receipt of the notice, submit a CCP in accordance with clause 10.1.

2. ROLES AND RESPONSIBILITIES

2.1 Commonwealth Representative (Core)

- 2.1.1 The Commonwealth Representative is responsible for administering the Contract on behalf of the Commonwealth.
- 2.1.2 If the Commonwealth appoints as Commonwealth Representative a person who is not a Commonwealth officer, the Commonwealth shall obtain the prior written consent of the Contractor, whose consent shall not be unreasonably withheld.
- 2.1.3 The Commonwealth Representative may delegate its functions, or authorise that its functions be carried out on its behalf. The Commonwealth shall notify the Contractor in writing of the persons who are delegated functions or authorised to carry out functions on behalf of the Commonwealth Representative ('Authorised Persons'), from time to time, and the scope of their delegation or authorisation.
- 2.1.4 The Contractor shall comply with the reasonable directions of:
- a. the Commonwealth Representative made within the scope of the administration of the Contract; and
 - b. an Authorised Person, within the scope of their delegation or authorisation.
- 2.1.5 If given orally a direction shall be confirmed in writing within 14 days. Neither the Commonwealth Representative nor any Authorised Person shall have any authority to waive or vary any term of, or release the Contractor from, its obligations under the Contract except in accordance with clause 10.1 or clause 8.4 of the SOW.
- 2.1.6 Unless authorised by the Contract or a direction given under clause 2.1.4, any work performed or cost incurred by the Contractor in response to a communication from the Commonwealth Representative or an Authorised Person is at the Contractor's sole risk.

2.2 Contractor's Representative (Core)

- 2.2.1 The Contractor shall on or before Effective Date nominate in writing the person with the authority to represent the Contractor for the purposes of the Contract. Any communication passed by the Commonwealth to this person shall be deemed to have been delivered to the Contractor.

2.3 Notices (Core)

- 2.3.1 Unless the contrary intention appears, any notice or communication under the Contract shall be effective if it is in writing, signed and delivered to the Commonwealth Representative or Contractor's representative referred to in clause 2.2 as the case may be, at the following address:
- [...INSERT COMMONWEALTH REPRESENTATIVE POSTAL ADDRESS AND FACSIMILE NUMBER...].
- [...INSERT CONTRACTOR REPRESENTATIVE POSTAL ADDRESS AND FACSIMILE NUMBER...].
- 2.3.2 A notice or communication shall be deemed to have been delivered:
- a. by prepaid post, in three Working Days if sent within Australia and in eight Working Days if sent by air mail from one country to another; or
 - b. by facsimile, at the time recorded by the transmitting machine, unless within one Working Day the sender is informed that the transmission was received in incomplete or garbled form; in which case a re-transmitted notice or other communication shall be received when it is effectively delivered in accordance with clause 2.3.

3. PRODUCTION OF THE SUPPLIES

3.1 Language and Measurement (Core)

- 3.1.1 All information delivered as part of the Supplies under the Contract shall be written in English. If such documentation is a translation into the English language, the translation shall be accurate and free from ambiguity.
- 3.1.2 Measurements of physical quantity shall be in Australian legal units as prescribed under the National Measurement Act 1960, or, if Supplies are imported, units of measurement as agreed by the Commonwealth Representative.

3.2 Design, Development and Production (Core)

- 3.2.1 The Contractor shall design the Supplies with a high degree of professional skill and care, and in accordance with the Contract. If the Contract does not specify a design standard, the Contractor shall apply industry best practice relevant to the Supplies.
- 3.2.2 The Contractor shall design, develop and produce the Supplies so they are compatible with and do not restrict the performance of, or adversely affect, existing equipment. For the purposes of this clause 'existing equipment' means equipment specified or referred to in the Contract or any other equipment used by the Commonwealth that the Contractor knows, or reasonably ought to know, will be used with the Supplies.

3.3 Export Approvals (Optional)

- 3.3.1 Prior to [...INSERT DATE OR EVENT...] the Contractor shall obtain all necessary valid export licences or other approvals to meet the requirements of the Contract. The Contractor shall provide, on request by the Commonwealth Representative, a copy of any licence or other approval, or proof that such licence or approval has been obtained.
- 3.3.2 The Contractor shall notify the Commonwealth Representative in writing of the occurrence of each of the following events within 10 days:
- a. the application for;
 - b. the Contractor becoming aware of the grant of;
 - c. the Contractor becoming aware of the refusal or revocation of; and
 - d. the Contractor becoming aware of any qualification of,
- any export licence or other approval.
- 3.3.3 The Commonwealth Representative shall, on request by the Contractor, give the Contractor all assistance reasonably required to facilitate the provision of an export licence or other approval, including the provision of a certificate by the Commonwealth as to the end use of the Supplies.
- 3.3.4 Nothing in clause 3.3.3 shall release the Contractor from responsibility to take all reasonable steps to secure any export licence or approval required for the Supplies.

3.4 Imports and Customs Entry (Optional)

- 3.4.1 The Contractor shall, within the Contract Price, arrange customs entry and the payment of any customs duty applicable to the Supplies, except as provided in this clause 3.4.
- 3.4.2 The Contractor shall provide the Commonwealth Representative with notice in writing, including supporting evidence, of any variation to the rate of customs duty applicable to the Supplies between the Base Date and the date of entry of the item and:
- a. in the case of an increase, the Contractor may claim reimbursement in the amount of such increase; or
 - b. in the case of a decrease, the Commonwealth may recover such money as a debt recoverable under clause 12.4.

- 3.4.3 The Commonwealth shall not be liable to reimburse the Contractor for any fines or penalties imposed on the Contractor under Australian Customs legislation from time to time in force, for any offence under the legislation.

3.5 Provision and Management of Government Furnished Material (Optional)

Note to drafters: Clauses 3.5 and Error! Reference source not found. of the conditions of contract and clause 3.5 of the SOW are optional but interdependent and must be inserted, amended or omitted as a package.

- 3.5.1 The Commonwealth shall provide, and the Contractor shall manage, GFM in accordance with the Contract.
- 3.5.2 The Contractor acknowledges and agrees that:
- a. the Commonwealth's obligations to provide GFM on the dates or at the times described in Attachment D is subject to the Contractor delivering the Supplies in accordance with clause 6.1.1; and
 - b. any delay of the Contractor in meeting its obligations under the Contract may result in the Commonwealth not being able to provide GFM at the time the Contractor requires delivery or access to that GFM.
- 3.5.3 If at any time the Contractor's requirement for the timing of delivery or access to GFM changes because of a delay by the Contractor in meeting its obligations under the Contract, the Commonwealth:
- a. shall use reasonable endeavours to accommodate changes to the Contractor's requirements for delivery or access to GFM and to deal with them in accordance with clause 10.1 and
 - b. is only required to deliver or provide access to the GFM at the time it becomes available for use for the purposes of the Contract.
- 3.5.4 To avoid doubt, clause 3.5.2 does not require the Commonwealth to remove GFM from operational requirements, or to provide GFM allocated to or available for other contracts.
- 3.5.5 Subject to clause 3.5 the Commonwealth's inability to deliver or provide access to GFM in the circumstances described in clause 3.5.3 is not an event beyond the reasonable control of the Contractor for the purposes of clause 6.2.4b.
- 3.5.6 Clause 3.5.5 does not operate to limit the operation of clause 6.2.4 in circumstances where:
- a. the relevant GFM is Commonwealth Mandated GFM; or
 - b. the delay giving rise to the Contractor's changed requirement for delivery of or access to GFM is an event in respect of which postponement was granted by the Commonwealth in accordance with clause 6.2.
- 3.5.7 If the Commonwealth fails to deliver or provide access to GFM on the dates set out in Annex A to Attachment D, the Contractor may claim postponement of the date for delivery of affected Supplies and postponement costs except to the extent that the failure to deliver or provide access to the GFM was caused by a default or an unlawful or negligent act or omission of the Contractor, its officers, employees, agents or Subcontractors. The process for submission and consideration of the claim shall be in accordance with clauses 6.2 and 6.3. .
- 3.5.8 The Contractor shall be responsible for ensuring that the GFM does not adversely impact on production, delivery or functionality of Supplies.

Option: For when GFI is to be provided

- 3.5.9 The parties acknowledge that the GFI is not furnished to the Contractor for the purpose of either directing or guiding the Contractor's task under the Contract. The Commonwealth does not warrant the suitability of such GFI for any particular use or application, nor does the Commonwealth warrant the accuracy or precision of the GFI.

3.5.10 Except as otherwise provided in this clause 3.5, the Contractor shall be responsible for the application or use of the GFI and any conclusions, assumptions or interpretations made by the Contractor on the basis of the GFI, or its application or use of them.

Option: For when the Contract includes either GFD or Commonwealth Mandated GFM.

3.5.11 The Commonwealth warrants that GFD and Commonwealth Mandated GFM (“warranted GFM”) is fit for its intended purpose, except to the extent that the warranted GFM is not fit for purpose as a result of:

- a. any failure, damage, defect or deficiency that would have become apparent in the course of a proper examination or test of the warranted GFM as required by the Contract;
- b. misuse of the warranted GFM by the Contractor;
- c. any failure, damage, defect or deficiency caused or contributed to by a modification or integration action by the Contractor; or
- d. any failure, damage, defect or deficiency otherwise within the control of the Contractor;
- e. any damage, defect or deficiency in the warranted GFM, if:
 - (i) the warranted GFM was supplied to the Commonwealth by or through the Contractor or a related entity (whether under the contract or another contract); and
 - (ii) the damage, defect or deficiency existed at the time the warranted GFM was supplied to the Commonwealth.

3.5.12 For the purposes of clause 3.5.11, the “intended purpose” of an item of GFM means the purpose specified against that item in Annex A to Attachment E.

3.6 GFM Ownership and Restrictions (Optional)

3.6.1 Subject to clause 3.6.3, GFM remains the property of the Commonwealth. The Commonwealth retains the right to reasonably identify GFM as its property and the Contractor shall preserve any means of identification.

3.6.2 The Contractor shall not:

- a. without the prior written Approval of the Commonwealth Representative or express authorisation in the Contract:
 - (i) use GFM other than for the purposes of the Contract;
 - (ii) modify GFM;
 - (iii) transfer possession or control of GFM to any other party;
 - (iv) move GFM from the location to which it was delivered ; or

Option: For use if GFI or GFD is to be provided.

- (v) Communicate or divulge GFI or GFD to any other party; or

b. create or allow to be created any lien, charge, mortgage or encumbrance over any GFM.

3.6.3 The Commonwealth Representative shall notify the Contractor of any Intellectual Property rights applicable to the GFM and the Contractor shall not act contrary to the existence of such rights.

3.6.4 The Contractor shall return all items of GFM that are required to be returned to the Commonwealth in accordance with Annex A to Attachment E.

3.7 Government Furnished Facilities (Optional)

- 3.7.1 The Commonwealth shall grant to the Contractor a non-exclusive licence to occupy and use the GFF for the purpose of performing work under the Contract in the form of the deed at Annex B to Attachment H.

3.8 Key Persons (Optional)

Note to drafters: Key Persons are those individuals named in Attachment L to the conditions of contract who are appointed to fill the Key Staff Positions. The position/person specifications for each Key Staff Position are appointed in accordance with clause 3.4 of the SOW.

- 3.8.1 The Contractor shall ensure that each person named in Attachment L is appointed to the Key Staff Position nominated for that person.
- 3.8.2 In the event that a Key Person will or may become unavailable for the performance of work under the Contract for a period of four consecutive weeks or more the Contractor shall:
- notify the Commonwealth of the impending unavailability immediately that the Contractor becomes aware of the situation; and
 - nominate, at its earliest opportunity, a suitable replacement for the Commonwealth's consideration.
- 3.8.3 The Commonwealth may, at its discretion and at any time, give a notice in writing including reasons, directing the Contractor to remove a Key Person from the Key Staff Position occupied by that person.
- 3.8.4 The Commonwealth may only exercise its discretion under clause 3.8.3 where the Commonwealth Representative is of the opinion that the Key Person in the notice is:
- unable to undertake the work required of them under the Contract for reasons of incapacity or incompetence; or
 - inappropriate to undertake the work required of them under the Contract for reasons relating to occupational health and safety, security, equity and diversity, equal opportunity for women in the workplace or relationship between the Commonwealth and the Contractor.
- 3.8.5 If the Commonwealth gives the Contractor a notice under clause 3.8.3 the Contractor shall within the time specified in the notice:
- remove the appointed Key Person from the relevant Key Staff Position; and
 - nominate, at its earliest opportunity, a suitable replacement for the Commonwealth's consideration.
- 3.8.6 For any replacement Key Person nominated by the Contractor under clause 3.8.2b or clause 3.8.5b, the Contractor shall provide the Commonwealth with documentary evidence identifying the match of the nominated person to the relevant Key Staff Position. As part of this documentary evidence, the Contractor shall describe how any capability shortfalls of the nominated person will be addressed.
- 3.8.7 If the Commonwealth is satisfied that a person nominated by the Contractor under clause 3.8.2b or clause 3.8.5b is a suitable replacement for the relevant Key Person, the Commonwealth shall notify the Contractor that the nomination has been accepted.
- 3.8.8 If the Commonwealth is not satisfied that a person nominated by the Contractor under clause 3.8.2b or clause 3.8.5b is a suitable replacement for the relevant Key Person, the Commonwealth shall give notice in writing to the Contractor, including reasons, that the nomination has not been accepted.
- 3.8.9 If the Contractor receives a notice under clause 3.8.8, the Contractor shall, at the Commonwealth's request, nominate a further replacement person for the Commonwealth's consideration. This clause 3.8.8 shall apply (as applicable) with respect to that further nomination.

- 3.8.10 Any requirement to remove or replace any Key Person under this clause, and the Contractor's inability to find a suitable replacement person, shall not be taken to be an event beyond the reasonable control of the Contractor for the purposes of clause 6.2.4b.
- 3.8.11 If the Contractor is required to replace any Key Person under this clause and a replacement person is not accepted by the Commonwealth under clause 3.8.8 within three months of the Commonwealth first receiving or providing notice under clause 3.8.2 or clause 3.8.3 respectively, the Commonwealth may give the Contractor a notice of termination for default in accordance with clause 12.2.
- 3.8.12 If at any time a Key Person is replaced in accordance with this clause, the Contractor shall prepare a CCP in accordance with clause 10.1 to update Attachment L to reflect that change.

3.9 Contractor Managed Commonwealth Assets (Core)

- 3.9.1 The Contractor shall take all reasonable care of CMCA and shall provide Facilities to store and handle all CMCA as they are received.
- 3.9.2 The Contractor shall, within seven days of becoming aware that any CMCA is lost, destroyed, damaged, defective or deficient, notify the Commonwealth Representative of the event in writing.
- 3.9.3 The Contractor shall be liable for loss or destruction of, damage to or defects or deficiencies in, the CMCA, except to the extent that the loss, destruction, damage, defects or deficiencies result from any unlawful or negligent act or omission on the part of the Commonwealth, its officers, employees or agents. Subject to clause 3.9.4, or an agreement by the parties to replace the CMCA, the Contractor shall compensate the Commonwealth for the loss or destruction of, damage to or defects or deficiencies in, the CMCA and the Commonwealth may recover an amount equivalent to the value of the compensation under clause 12.4 as a debt due to the Commonwealth.
- 3.9.4 If in the opinion of the Commonwealth Representative the Contractor has the necessary capacity, the Commonwealth Representative may require the Contractor, by notice in writing, to transport, dispose of or repair damaged, defective or deficient CMCA. If the Contractor is liable under clause 3.9.3 for the damage, defect or deficiency, the work performed by the Contractor under clause 3.9.4 shall discharge or partially discharge the Contractor's liability. If the Contractor is not liable under clause 3.9.3 for the damage, defect or deficiency, the Contractor shall, if the parties agree in advance to the cost of the work, perform the work for no more than the agreed cost.

4. AUSTRALIAN INDUSTRY CAPABILITY (AIC)

4.1 Australian Industry Capability (Optional)

Note to drafters:

An AIC plan is mandated for all complex procurements when:

- a. an applicable Industry Requirement has been identified; or**
- b. the contract price exceeds \$50 million.**

To determine if an applicable Industry Requirement exists, drafters should contact the Director AIC implementation on (02) 6265 2922.

Where an AIC Plan is required, draft COC clause 4.1 and draft SOW clause 3.12 should also be selected.

- 4.1.1 The Contractor shall comply with clause 3.12 of the SOW and achieve the Industry Requirements.
- 4.1.2 The Contractor acknowledges that:
 - a. compliance with the AIC Plan shall not relieve the Contractor from responsibility to complete the Supplies, or from liability for any defect in the Supplies arising from the design, workmanship or materials provided by Australian and New Zealand (ANZ) industry; and
 - b. Acceptance of the Supplies shall not relieve the Contractor from meeting its obligations under the AIC Plan at Attachment E.
- 4.1.3 The parties acknowledge that if the Contractor fails to achieve the Industry Requirements in the AIC Plan the Commonwealth will suffer loss and damage. All such loss and damage will, having regard to the governmental and non-commercial nature of the Supplies and their significance to the defence of Australia, be impossible, complex or expensive to quantify accurately in financial terms and the loss and damage arising from such failure may not be able to be precisely calculated or proved.
- 4.1.4 The parties agree that the amount of liquidated damages referred to in clause 4.1.5 is a genuine pre estimate of the damage which would be suffered by the Commonwealth in such event.
- 4.1.5 If:
 - a. the Contractor fails to achieve any of the Industry Requirements in the AIC Plan before Acceptance of the last item of Supplies; and
 - b. the Commonwealth Representative is not satisfied that the failure is due to circumstances beyond the reasonable control of the Contractor which could not have reasonably been foreseen at the Effective Date,

the Commonwealth shall be entitled to recover from the Contractor, as liquidated damages and not as a penalty, the amount specified in Attachment C including any adjustment calculated in accordance with Attachment C. No amount shall be owing to the Commonwealth until the Commonwealth elects, in accordance with clause 4.1.6 to recover any such liquidated damages.
- 4.1.6 Upon becoming entitled to recover liquidated damages under clause 4.1.5 the Commonwealth may, at any time prior to Final Acceptance, elect in respect of the relevant AIC Requirement to do either or both of the following:
 - a. recover the amount of liquidated damages as a debt due to the Commonwealth under clause 12.4; or
 - b. accept agreed compensation from the Contractor to the extent (if any) that liquidated damages are not recovered under clause 4.1.6a. Such compensation, together with any liquidated damages elected to be recovered under clause 4.1.6a, shall be equivalent in value to the total liquidated damages recoverable for that AIC Requirement.

- 4.1.7 When the Commonwealth elects to accept compensation in lieu of liquidated damages, the Contractor shall prepare a CCP to effect a change to the Contract and any other contract between the Commonwealth and the Contractor which may be affected. If any part of the compensation to be provided is in the form of goods or services, the CCP shall provide that the goods or services shall be incorporated into the supplies under whichever relevant contract is agreed by the Commonwealth.

5. INTELLECTUAL PROPERTY

5.1 Intellectual Property Management (Core)

5.1.1 The Contractor shall comply with clause 3.13 of the SOW.

5.2 Ownership of Intellectual Property (Core)

5.2.1 Nothing in the Contract affects the ownership of Background IP or Third Party IP.

Option A: For when the Commonwealth is to own all Foreground IP.

5.2.2 Ownership of all Foreground IP vests on its creation in the Commonwealth.

5.2.3 For any Foreground IP that vests in the Commonwealth, the Commonwealth has the exclusive right to apply for registration of that Foreground IP in all countries of the world.

Option B: For when the Contractor or Approved Subcontractor is to own all Foreground IP.

5.2.4 Ownership of all Foreground IP vests on its creation in the Contractor or Approved Subcontractor as the case may be.

5.3 Intellectual Property Licence (Core)

5.3.1 The Contractor grants to the Commonwealth a royalty-free, irrevocable, world-wide, perpetual, non-exclusive licence in respect of all Background IP and any Foreground IP that is owned by the Contractor, including the right to sub-licence:

- a. to use, maintain and dispose of the Supplies;
- b. subject to the limitations listed in the IP Plan, to modify and develop the Supplies and to manufacture the Supplies for Defence Purposes without commercialising the licensed IP;
- c. to complete the Supplies upon termination of the contract other than in accordance with clause 12.3; and
- d. to remedy defects or omissions in the Supplies in accordance with clauses 6.4, 9.2 and 9.4.

5.3.2 The Contractor shall ensure that the Commonwealth is granted a licence from each Approved Subcontractor on the same terms as clause 5.3. At the request of the Commonwealth, the Contractor shall arrange for an Approved Subcontractor to execute a deed substantially in the form set out at Annex A to Attachment H and provide the Deed to the Commonwealth.

5.3.3 The Contractor shall ensure that the Commonwealth is granted a licence to exercise all Third Party IP on the best available commercial terms.

Option: For when the Commonwealth is to own all Foreground IP.

5.3.4 The Commonwealth may, on request, grant the Contractor a licence to exercise Foreground IP owned by the Commonwealth on terms acceptable to the Commonwealth, including an appropriate licence fee.

5.4 Provision of Technical Data (Core)

5.4.1 The Contractor shall deliver TD in accordance with the SOW.

5.4.2 For all Foreground IP that vests in the Commonwealth, the Contractor shall provide with the Supplies all TD in existence that relates to that Foreground IP.

5.4.3 If the Commonwealth is granted a licence under clause 5.3, the Contractor shall provide with the Supplies all TD necessary for the Commonwealth to exercise its IP rights for the purposes permitted by that licence.

- 5.4.4 The Commonwealth may provide TD to a third party to enable the Commonwealth to fully exercise its IP rights under clause 5.
- 5.4.5 The Contractor shall ensure that all TD delivered to the Commonwealth will enable a reasonably skilled person to efficiently and effectively do the things permitted to be done by the Commonwealth in the exercise of its IP rights under clause 5.3.
- 5.4.6 When the Commonwealth Representative requires additional TD to enable the Commonwealth to fully exercise its IP rights under clause 5, the Contractor shall deliver such TD to the Commonwealth Representative by [...INSERT PROJECT SPECIFIED EVENT THAT IS NOT LATER THAN FINAL ACCEPTANCE...] at no additional cost to the Commonwealth.

5.5 Release to Third Parties (Core)

- 5.5.1 If the Commonwealth makes available to another person any IP rights that are owned by the Contractor or an Approved Subcontractor and which is Foreground IP or Background IP, the Commonwealth shall obtain from that person a deed of confidentiality.

5.6 Moral Rights (Core)

- 5.6.1 The Contractor represents and warrants that the use of the Supplies for Defence Purposes or other purposes permitted by the Contract will not infringe the Moral Rights of the officers, employees or agents of the Contractor or its Subcontractors.
- 5.6.2 The Contractor shall ensure that none of its:
- a. officers, employees or agents;
 - b. Subcontractors; or
 - c. Subcontractors' officers, employees or agents,
- institute, maintain or support any claim or proceeding against the Commonwealth or its officers, employees or agents for infringement of any of their Moral Rights.

6. DELIVERY, ACCEPTANCE AND OWNERSHIP

Note to drafters: Where the resultant payment regime will NOT include milestone payments, drafters must amend all clauses, removing references to Milestones.

6.1 Delivery (Core)

6.1.1 The Contractor shall deliver Supplies in accordance with the Contract, including the Price and Delivery Schedule at Annex A to Attachment B and clause 2.2 of the SOW.

Option: For when Milestones will be used under the Contract.

6.1.2 The Contractor shall meet the Milestones as required under the Contract.

6.1.3 If the Contractor does not meet a Milestone by the relevant Milestone Date the Commonwealth may exercise various rights and remedies including:

- a. claiming liquidated damages or recovering compensation under clause 7.11;
- b. withholding payments for Stop Payment Milestones under clause 7.8; or
- c. terminating the Contract under clause 12.2.1

6.1.4 To avoid doubt the Contractor is responsible for ensuring that the Commonwealth is, for every Milestone, and in sufficient time, placed in a position where it can perform the Commonwealth's tasks required for completion of that Milestone prior to the date specified for achievement of that Milestone, and this clause does not limit the Contractor's obligations in clause 6.1.1.

6.2 Postponement (Core)

6.2.1 The Contractor shall take all reasonable steps to prevent and minimise delay and to mitigate both parties' losses due to delay.

6.2.2 The Contractor shall, within seven days of becoming aware that delivery of the Supplies or the achievement of a Milestone or both will or may be delayed, by any cause, notify the Commonwealth Representative in writing of the cause and nature of the delay.

6.2.3 The Contractor shall, within a further seven days of the notification under clause 6.2.2, notify the Commonwealth Representative in writing:

- a. of the steps it shall take to minimise the delay;
- b. the anticipated duration of the delay; and
- c. whether it shall be claiming postponement of the date of delivery or the Milestone date or seeking any other change to the Contract.

6.2.4 Subject to clauses 6.2.10 and 6.4 the Contractor shall be entitled to postponement of the date of delivery of the Supplies or the Milestone Date, or both, only to the extent that the event giving rise to the claim:

- a. delays the Contractor in the performance of its obligations under the Contract;
- b. is beyond the reasonable control of the Contractor;
- c. could not have been reasonably contemplated and allowed for by the Contractor before entering the Contract; and
- d. is not provided for elsewhere in the Contract,
and provided that the Contractor:
 - e. submits a CCP in accordance with clause 10.1 requesting a postponement of the date for delivery of the Supplies or the Milestone Date within 14 days of its notice under clause 6.2.3;
 - f. demonstrates to the Commonwealth Representative's satisfaction that work under the Contract cannot be performed in such a way as to meet the date for delivery or

- Milestone Date as is reasonable with regard to the Contract Price and any other relevant circumstances;
- g. makes all reasonable endeavours to minimise the delay and mitigate both parties' losses; and
 - h. supports the claim above with substantiating documentation to the satisfaction of the Commonwealth Representative.
- 6.2.5 If the delay affects more than one delivery date or Milestone Date or both, the Contractor shall submit a revised Annex A to Attachment B, as appropriate, with the CCP submitted under clause 6.2.4. The Contractor shall not be entitled to claim a postponement of the date for delivery or Milestone Date for a period greater than the duration of the delay.
- 6.2.6 The Commonwealth Representative shall evaluate CCPs provided under clause 6.2.4 in accordance with clause 10.1.
- 6.2.7 If the Commonwealth Representative rejects the CCP under clause 10.1.5b, the Contractor may, within seven days of receiving the notice of rejection, resubmit a revised CCP under clause 6.2.4 requesting postponement of the date for delivery of the Supplies or the Milestone Date. The Commonwealth Representative will evaluate the revised CCP in accordance with clause 10.1.
- 6.2.8 If the Contractor does not submit a revised CCP within the time mentioned in clause 6.2.7, or the Commonwealth Representative rejects the revised CCP under clause 10.1.5b, the Contractor shall:
- a. not be entitled to postponement of the date for delivery for the Supplies or the Milestone Date;
 - b. be fully responsible for any loss, damage, cost or expenses arising from the delay; and
 - c. continue to comply with its obligations under the Contract.
- 6.2.9 To avoid doubt, unless and until a claim for postponement is approved by the Commonwealth Representative under clause 6.2, the Contractor is fully responsible for any delay in the delivery of the Supplies or the achievement of a Milestone, and any loss, damage, cost or expenses arising from such a delay.
- 6.2.10 Any delay attributable to a Subcontractor shall be considered for the purposes of clause 6.2 only to the extent that the reasons for the delay satisfy clause 6.2 and are beyond the reasonable control of the Subcontractor and the Contractor.
- 6.2.11 The Commonwealth Representative may, at its discretion and at any time, by written notice to the Contractor, immediately postpone the date for delivery of the Supplies or postpone a Milestone Date to the date specified in the notice.

Option B: For when Milestones will be used under the Contract.

- 6.2.12 If the Contractor is granted a postponement of the date of delivery of the Supplies under clause 6.2.4, the Commonwealth shall grant a corresponding postponement of affected Milestone Dates.
- 6.2.13 For the purposes of this clause, a reference to 'the date of delivery of the Supplies' is also a reference to an affected Milestone Date.

- 6.2.14 The parties acknowledge that:
- a. the Commonwealth Representative is not required to exercise its discretion under clause 6.2.11 for the benefit of the Contractor; and
 - b. the exercise or failure to exercise the discretion under clause 6.2.11 is not capable of being subject of a dispute for the purposes of clause 12.1 or otherwise subject to review.
- 6.2.15 If the Commonwealth Representative exercises its discretion under clause 6.2.11, the Contractor shall submit a CCP in accordance with clause 10.1 that is consistent with the notice issued under clause 6.2.11 to incorporate the change into the Contract.

6.3 Postponement Costs (Core)

- 6.3.1 Subject to clause 6.3.3, the Contractor shall be entitled to postponement costs when all of the following are satisfied:
- a. postponement of the date for delivery of the Supplies or postponement of the Milestone Date is granted under clause 6.2;
 - b. the delay is caused by an act or omission of the Commonwealth in relation to, and which is inconsistent with, the Contract;
 - c. the Contractor notifies the Commonwealth Representative in writing of the quantum of the postponement costs it claims immediately following the determination of the costs by the Contractor but no later than six months from the granting of the relevant postponement claim in accordance with clause 6.2.4; and
 - d. the Contractor provides substantiating evidence to the satisfaction of the Commonwealth Representative of the costs incurred and steps taken to mitigate the Contractor's loss.
- 6.3.2 The Commonwealth Representative shall within 30 days of receiving the claim:
- a. grant the claim and notify the Contractor of the amount of postponement costs awarded; or
 - b. reject the claim and notify the Contractor of the reason for rejection.
- 6.3.3 The Contractor shall only be entitled to postponement costs equal to the unavoidable additional costs incurred by the Contractor as a direct consequence of the act or omission of the Commonwealth referred to in clause 6.3.1, such costs to be determined on the basis set out in the Attachments to the Contract.
- 6.3.4 The Contractor shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify all postponement costs claimed to have been incurred by the Contractor. In addition to the Commonwealth's right under clause 10.7, the Contractor shall make these records available to the Commonwealth Representative on request and the Commonwealth Representative and any person authorised by the Commonwealth Representative have the right to investigate the records.

6.4 Acceptance (Core)

- 6.4.1 The Contractor shall offer conforming Supplies to the Commonwealth Representative for Acceptance at the delivery points and dates specified in accordance with Annex A to Attachment B.
- 6.4.2 The Contractor shall, when seeking Acceptance:
- a. complete and present a signed Supplies Acceptance Certificate certifying that the Supplies listed on the Supplies Acceptance Certificate conform with the requirements of the Contract, except for any non-conforming materials or work approved by the Commonwealth Representative under clause 6.4.4 detailed on the Supplies Acceptance Certificate or attachment; and
 - b. provide any other supporting evidence required by the Commonwealth Representative, including confirmation of successful completion of any Acceptance testing required by the Contract.
- 6.4.3 The Commonwealth Representative shall, within 21 days of the offer of Supplies for Acceptance:
- a. Accept the Supplies by signing the Supplies Acceptance Certificate; or
 - b. reject the Supplies, in which case the Commonwealth Representative shall notify the Contractor in writing of the reasons for the failure and the extent of the non-conformance.

- 6.4.4 The Commonwealth Representative may Accept Supplies despite the existence of minor omissions or defects in the Supplies. The Commonwealth Representative shall endorse such omissions or defects or non conforming work on the Supplies Acceptance Certificate or on an attachment to the certificate. The Contractor shall, within 14 days after issue of the Supplies Acceptance Certificate or within such time as the Commonwealth Representative may at its discretion allow, make good the omissions or defects to the satisfaction of the Commonwealth Representative.
- 6.4.5 If the Contractor fails to make good the omissions or defects in accordance with clause 6.4.4 the Commonwealth may, without limiting the Contractor's warranties and obligations under clause 9, perform or have performed the necessary remedial work at the expense of the Contractor and may recover such expense as a debt under clause 12.4.
- 6.4.6 If the Commonwealth Representative rejects Supplies as not conforming to the requirements of the Contract under clause 6.4.3b, the Contractor shall, within 14 days of receipt of the advice, provide full written details to the Commonwealth Representative of its proposed remedy.
- 6.4.7 The Commonwealth Representative shall within 14 days of receipt of the written notice referred to in clause 6.4.6 either:
- a. instruct the Contractor in writing to complete any course of action proposed by the Contractor within a specified time; or
 - b. issue a notice of rejection of the Contractor's proposal and require that the Contractor submit an alternative proposal within 14 days of that notice.
- 6.4.8 When an application for Acceptance is rejected and resubmitted, processing of the resubmitted application shall be subject to the same conditions as if it were the original.
- 6.4.9 If an application for Acceptance is rejected under clause 6.4.3, clause 6.4.13 shall apply.
- 6.4.10 The Contractor acknowledges and agrees that:
- a. the specification of the requirements for the Supplies in the Contract is the result of resource-intensive Commonwealth approval and procurement processes;
 - b. the Commonwealth has relied on the Contractor's representations about time (including as reflected in the Contract);
 - c. the Commonwealth has determined that the Contract is value for money on the basis that full Acceptance of all Supplies is achieved with no delay; and
 - d. it is reasonable that the Commonwealth at all times during the period of the Contract has current knowledge of:
 - (i) progress under the Contract;
 - (ii) risks to achievement of Acceptance including potential minor omissions and defects;
 - (iii) any other potential or actual non-compliance with the Contract;
 - (iv) risk management by the Contractor including of emerging risks; and
 - (v) any potential delay in meeting any timing obligation in the Contract, for any reason, and whether or not the delay risk was foreseeable or has been previously identified.
- 6.4.11 The Contractor shall:
- a. proactively ensure that the Commonwealth is kept informed of matters relevant to the issues in clause 6.4.10, using the communication channels and reporting processes in the Contract; and
 - b. comply with any directions by the Commonwealth or the exercise of any other Commonwealth powers under or in relation to the Contract in dealing with such matters.

- 6.4.12 If the Commonwealth agrees that Acceptance may be achieved despite any minor omissions or defects or other non-compliance, the Commonwealth may, after consultation with the Contractor:
- a. determine a revised Contract Price reflecting the reduction in value for money of the non-complying Supplies ('Reduction Amount');
 - b. direct the Contractor to provide a SG2 Request for Deviation that is consistent with this clause; and
 - c. exercise its rights under clause 12.4 in respect of the Reduction Amount.
- 6.4.13 The Commonwealth Representative may require the Contractor to retake possession of any item of Supplies within seven days when a notice of failure to achieve Acceptance is issued. Repossession of Supplies shall not affect the obligation of the Contractor to provide conforming Supplies.
- 6.4.14 The Contractor shall bear all costs associated with replacing or correcting rejected Supplies and of complying with the directions of the Commonwealth Representative.
- 6.4.15 Any action of the Contractor in correcting or replacing the Supplies shall not entitle the Contractor to claim postponement of the date of delivery of the Supplies or relieve the Contractor from performing its obligations under the Contract.

6.5 Final Acceptance (Optional)

Note to drafters: This clause should only be used if Milestone Payments will be used under the Contract and Final Acceptance is required.

- 6.5.1 The Contractor shall, when seeking Final Acceptance:
- a. complete and present a signed Final Acceptance Certificate certifying that the Contractor has fulfilled its obligations under the Contract, except to the extent that the Contractor's obligations expressly, or by implication, survive the Final Acceptance Milestone, including the obligations in clause 12.5; and
 - b. provide any other supporting evidence required by the Commonwealth Representative, including confirmation of successful completion of any Final Acceptance testing required by the Contract.
- 6.5.2 The Commonwealth Representative shall, within 21 days of the Contractor seeking Final Acceptance:
- a. endorse the Final Acceptance Certificate if the following requirements are met:
 - (i) the Contractor has achieved all previous Milestones and Acceptance of all Supplies in accordance with clause 6.4; and
 - (ii) the Contractor demonstrates to the satisfaction of the Commonwealth Representative that the Supplies function and integrate as required by the Contract and that the Contractor has fulfilled its obligations in accordance with the Contract, except to the extent that the Contractor's obligations expressly, or by implication, survive the Final Acceptance Milestone, including the obligations in clause 12.5; or
 - b. notify the Contractor that it has failed to achieve the requirements of Final Acceptance detailed in clause 6.5.2a, in which case the Commonwealth Representative shall advise the Contractor in writing of the reasons for the failure.
- 6.5.3 If the Commonwealth Representative notifies the Contractor under clause 6.5.2b that it has failed to achieve Final Acceptance, the Contractor shall, within 14 days of receipt of that advice, provide full written details to the Commonwealth Representative of its proposed remedy.
- 6.5.4 The Commonwealth Representative shall within 14 days of receipt of the written notice referred to in clause 6.5.3 either:
- a. instruct the Contractor in writing to complete any course of action proposed by the Contractor within a specified time; or

- b. issue a notice of rejection of the Contractor's proposal and require that the Contractor submit an alternative proposal within 14 days of that notice.
- 6.5.5 When an application for Final Acceptance is rejected and resubmitted, processing of the resubmitted application shall be subject to the same conditions as if it were the original.
- 6.5.6 The Commonwealth Representative may require the Contractor to retake possession of any item of Supplies within seven days when a notice of failure to achieve Final Acceptance is issued under clause 6.5.2b. Repossession of Supplies shall not affect the obligation of the Contractor to provide conforming Supplies.
- 6.5.7 The Contractor shall bear all costs associated with achieving Final Acceptance and of complying with the directions of the Commonwealth Representative.
- 6.5.8 Any action of the Contractor in achieving Final Acceptance and in complying with the directions of the Commonwealth Representative under clause 6.5 shall not relieve the Contractor from performing its obligations under the Contract.

6.6 Ownership and Risk (Core)

Option A: For when Option A in clause 7.2 is selected.

- 6.6.1 Subject to clause 5, ownership of Supplies shall pass to the Commonwealth on payment of a claim relating to those Supplies in accordance with clause 7.2.

Option B: For when Option B in clause 7.2 is selected.

- 6.6.2 Subject to clause 5, ownership of Supplies or partially completed Supplies included in a Milestone shall pass to the Commonwealth on payment of a claim for that Milestone in accordance with clause 7.2.

Option C: For when Option C in clause 7.2 is selected.

- 6.6.3 Subject to clause 5, ownership of Supplies or partially completed Supplies shall pass to the Commonwealth:
 - a. when the Supplies or partially completed Supplies are included in a Milestone, upon payment of a claim for that Milestone in accordance with clause 7.2; or
 - b. when the Supplies or partially completed Supplies are not included in a Milestone, on payment of a claim relating to those Supplies in accordance with clause 7.2.

- 6.6.4 At the time ownership of any item of Supplies passes to the Commonwealth, those Supplies shall be free of any registered or unregistered charge, lien, mortgage or other encumbrance.
- 6.6.5 Risk of loss of or damage to the Supplies resides with the Contractor until the Supplies have been delivered to the Commonwealth in accordance with Annex A to Attachment B.
- 6.6.6 If the Commonwealth Representative rejects Supplies as not conforming to the requirements of the Contract, or where the Contractor retakes possession of the Supplies in accordance with the Contract, risk of loss of, or damage to, those Supplies shall revert to the Contractor on repossession or seven days after issue of a notice under clause 6.4.13, whichever is the earlier.

7. PRICE AND PAYMENT

Note to drafters: Where the resultant payment regime will NOT include milestone payments, drafters must amend all clauses by removing references to Milestones.

7.1 Price and Price Basis (Core)

Option A: For when the Contract is a firm price contract and no adjustment claims will be allowed.

7.1.1 The Contract Price is set out in Annex A to Attachment B and, subject to clause 10.1, is unalterable.

Option B: For when adjustment claims will be allowed.

7.1.2 The Contract Price is set out in Annex A to Attachment B and, subject to clauses 7.3 and 10.1, is unalterable.

7.2 Payment (Core)

Note to tenderers: Tenderers should note that it is Commonwealth policy to pay its suppliers by direct credit. If it has not done so in the past, the successful tenderer should prior to Contract signature provide the Commonwealth Representative with details of the bank account into which payments should be directed.

- 7.2.1 If the Contractor submits a claim for payment it shall be accompanied by:
- a. the Certificate(s) signed by both parties that relates to the Supplies listed in the claim for payment; and
 - b. any other relevant documentation necessary to establish that, to the satisfaction of the Commonwealth Representative, the claim is in accordance with the Contract.
- 7.2.2 On receipt of a claim for payment the Commonwealth Representative shall either:
- a. approve the claim where it is submitted in accordance with clause 7.2.1; or
 - b. reject the claim where the claim is not submitted in accordance with clause 7.2.1.

Option A: For when the Contract Price will be paid after delivery and Acceptance of the Supplies.

7.2.3 When a claim is approved under clause 7.2.2, the Commonwealth shall make payment within 30 days of Acceptance of the Supplies or the submission of the claim, whichever occurs last.

Option B: For when the entire Contract Price will be paid in Milestone Payments.

7.2.4 Where a claim is approved under clause 7.2.2, the Commonwealth shall make payment within 30 days of the Milestone Date or the submission of the claim, whichever occurs last.

Option C: For when the Contract Price will be paid using a combination of Milestone Payments and payment after delivery and Acceptance.

7.2.5 [...INSERT PERCENTAGE...] of the Contract Price shall be payable in Milestone Payments in accordance with Annex B to Attachment B and clause 7.2.6a. [...INSERT PERCENTAGE...] of the price of each item of the Supplies as set out in Annex A to Attachment B shall also be payable in accordance with clause 7.2.6a. [...INSERT PERCENTAGE...] of the Contract Price shall be payable after delivery and Acceptance in accordance with clause 7.2.6a.

7.2.6 When a claim is approved under clause 7.2.2, the Commonwealth shall make payment:

- a. for a Milestone Payment claim, within 30 days of the Milestone Date or the submission of the claim, whichever occurs last;
- b. for all other claims, within 30 days of Acceptance or the submission of the claim, whichever occurs last.

7.2.7 If the Commonwealth Representative rejects the claim, the Commonwealth Representative shall, within 14 days of receipt of the claim, notify the Contractor in writing of the need to resubmit the claim or part of the claim and the reasons for rejection and any action to be taken by the Contractor for the claim to be rendered correct for payment.

7.2.8 Upon receipt of a notice issued pursuant to clause 7.2.7, the Contractor shall immediately take all necessary steps to make the claim for payment conform to the requirements of the Contract and shall submit a revised claim to the Commonwealth Representative when such action is complete. The resubmitted claim shall be subject to the same conditions as if it were the original claim.

7.3 Adjustments (RFT Core)

Note to tenderers: These clauses may be included in any resultant contract following receipt of the Tenderers response and a determination by the Commonwealth as to whether adjustments relating to the cost of labour and materials or Exchange Rates will be allowed.

Option: For when the Contract period is greater than 2 years and Adjustment for fluctuation in the cost of labour and materials will be allowed.

7.3.1 The formulae in Annex C to Attachment B shall be applied to:

Option: For when Option A or C is selected in clause 7.2

- a. a payment under clause 7.2, for fluctuations in the cost of labour and materials occurring between the Base Date and the relevant date for delivery of the Supplies as set out in Annex A to Attachment B, or completion of the delivery of Supplies by the Contractor, whichever occurs first;

Option: For when Option B or C is selected in clause 7.2

- b. a Milestone Payment, for fluctuations in the cost of labour and materials occurring between the Base Date and the Milestone Date set out in Annex B to Attachment B or achievement by the Contractor of that Milestone, whichever occurs first; or

Option: For when the optional Mobilisation Payment clause is included at clause 7.4.

- c. a Mobilisation Payment, for fluctuations in the cost of labour and materials occurring between the Base Date and the date the Mobilisation Payment is made by the Commonwealth.

Option: For when the Contract Price shall be payable in Australian dollars only and adjustment for fluctuation in exchange rates will be allowed.

7.3.2 The element of a payment representing the purchase of imported items from overseas suppliers to form part of the Supplies shall be subject to adjustments to reflect fluctuations in Exchange Rate occurring between the Base Date and:

Option: For when Option A or C is selected in clause 7.2.

- a. for payment for Supplies, the relevant date for delivery of the Supplies as set out in Annex A to Attachment B or the date on which the overseas supplier's account is settled, whichever occurs first.

Option: For when Option B or C is selected in clause 7.2.

- b. for Milestone Payments, the Milestone Date or the date on which the overseas supplier's account is settled whichever occurs first.

7.3.3 For the purposes of clause 7.3.2, 'Exchange Rate' means the spot selling rate of (...INSERT THE RELEVANT FOREIGN CURRENCY/CURRENCIES) relative to the dollar used by (...INSERT THE RELEVANT FINANCIAL INSTITUTION...).

7.3.4 If the amount calculated in accordance with clause 7.3 is to the credit of the Contractor, the Contractor shall submit a separate claim for payment of that amount:

Option: For when the Contract period is greater than 2 years and Adjustment for fluctuations in the cost of labour and materials will be allowed.

- a. for an amount calculated in accordance with clause 7.3.1; no later than three months after the publication of the final indices for the period referred to in clause 7.3.1 to which the application of the formulae relates; and

Option: For when the Contract Price shall be payable in Australian dollars only and price adjustment for fluctuation in Exchange Rates will be allowed.

- b. for an amount calculated in accordance with clause 7.3.2, no later than three months after the end of the period referred to in clause 7.3.2.

7.3.5 If the amount calculated in accordance with clause 7.3 is to the credit of the Commonwealth, the Contractor shall notify the Commonwealth in writing of the amount of the credit:

Option: For when the Contract period is greater than 2 years and Adjustment for fluctuations in the cost of labour and materials will be allowed.

- a. for an amount calculated in accordance with clause 7.3.1; no later than three months after the publication of the final indices for the period referred to in clause 7.3.1 to which the application of the formulae relates; and

Option: For when the Contract Price shall be payable in Australian dollars only and price adjustment for fluctuation in exchange rates will be allowed.

- b. for an amount calculated in accordance with clause 7.3.2, no later than three months after the end of the period referred to in clause 7.3.2.

7.3.6 The Commonwealth shall not be liable for any adjustment claims for payment under clause 7.3 outside the period mentioned in clause 7.3.4.

- 7.3.7 On receipt of a claim for payment under clause 7.3 the Commonwealth Representative shall:
- a. approve the claim if it is submitted in accordance with clause 7.3 and make payment within 30 days of receipt of the claim; or
 - b. reject the claim and notify the Contractor in writing, within 14 days of receipt of the claim, of the reasons for the rejection.
- 7.3.8 If a claim is rejected under clause 7.3.7, the Contractor may resubmit the claim no later than 30 days after notice of the rejection. The Commonwealth shall deal with the resubmitted claim as if it were the original claim for the purposes of clause 7.3. If the Contractor fails to resubmit the claim within 30 days, or the Commonwealth rejects the resubmitted claim, the Commonwealth shall not be liable for any adjustment claims in relation to the relevant period.
- 7.3.9 If an amount calculated in accordance with this clause 7.3 is to the credit of the Commonwealth, the amount is a debt to the Commonwealth for the purposes of clause 12.4.

7.4 Mobilisation Payment (Optional)

- 7.4.1 Subject to the Contractor providing the financial security required by clause 7.4, the Commonwealth shall pay the Contractor the Mobilisation Payment identified in Annex B to Attachment B.
- 7.4.2 The Mobilisation Payment shall be offset against amounts payable by the Commonwealth to the Contractor under the Contract. The Commonwealth shall be deemed to have paid approved claims for payment in accordance with clause 7.2 until the sum of amounts approved as payable, equals the amount of the Mobilisation Payment.

Note to drafters: Where the Mobilisation Payment is greater than \$2 million, the financial security amount inserted should be 50% of the Mobilisation Payment amount (inclusive of GST). Where the Mobilisation Payment is less than \$2 million the financial security amount inserted should be equal to the Mobilisation Payment.

- 7.4.3 The Contractor shall provide financial security for the Mobilisation Payment in the amount of (...INSERT AMOUNT INCLUSIVE OF GST IF APPLICABLE...) no later than the date identified in Annex B to Attachment B.
- 7.4.4 The security shall be unconditional and shall be from a bank or financial institution acceptable to the Commonwealth Representative in the form of the Mobilisation Security Deed set out at Annex G to Attachment H.
- 7.4.5 The Commonwealth shall release the security on the date the sum of claims paid by the Commonwealth in accordance with the Contract equals or is greater than the amount of the Mobilisation Payment.
- 7.4.6 The security shall be exercisable by the Commonwealth for either or both of the following:
- a. to obtain repayment of an amount equal to the value of the Mobilisation Payment that has not been offset against amounts payable as approved claims in the event of termination of the Contract in accordance with clause 12.2; or
 - b. to recover any debts due to the Commonwealth in relation to the Contract.
- 7.4.7 If the Commonwealth approves an adjustment to the amount of the Mobilisation Payment under clause 7.3.7a, the Contractor shall, within seven days from the Commonwealth's approval, ensure that:
- a. the amount of the Mobilisation security provided under clause 7.4.3 is adjusted to reflect the adjustment to the amount of the Mobilisation Payment; and
 - b. a revised Mobilisation Security Deed is executed and delivered to the Commonwealth, and the Mobilisation Security Deed shall be on the same terms as that provided under 7.4.4.

7.5 Performance Security (RFT Core)

Note to drafters: Where security for the performance of the contract is required, both options should be included in the RFT.

Note to tenderers: Tenderers shall only be required to provide a performance security or a Deed of Substitution and Indemnity, not both. See TDR D-5 of the conditions of tender for further details.

Option A: For when the Contractor's performance will be secured by a financial security.

- 7.5.1 The Contractor shall provide financial security for performance of the Contract, in the amount of [...INSERT AMOUNT...] no later than [...INSERT PERIOD...] after the Effective Date.
- 7.5.2 The security shall be unconditional and shall be from a bank or financial institution acceptable to the Commonwealth Representative, and in the form of the Performance Security Deed set out at Annex H to Attachment H. The security shall be released by the Commonwealth when [...INSERT THE EVENT WHICH WILL LEAD TO RELEASE OF SECURITY...].
- 7.5.3 The security shall be exercisable by the Commonwealth for either or both of the following:
- a. to obtain compensation for loss suffered in the event that the Contractor fails to perform the Contract, including upon termination of the contract in accordance with clause 12.2; or
 - b. to recover any debts due to the Commonwealth in relation to the Contract.

Option B: For when the Contractor's performance will be secured by a Deed of Substitution and Indemnity.

- 7.5.4 The Contractor shall, at the Effective Date, provide the Commonwealth Representative with an unconditional undertaking in the form of the Deed of Substitution and Indemnity set out at Annex I of Attachment H from (...INSERT SUBSTITUTED CONTRACTOR'S NAME...), (the "Substituted Contractor") to the Commonwealth Representative providing for substituted performance of the Contract and an indemnity.
- 7.5.5 If the Commonwealth Representative is entitled to terminate the contract, it may issue a notice of substitution under clause 7.5 to the Contractor and to the Substituted Contractor. Upon issue of the notice of substitution the Substituted Contractor shall be substituted for the Contractor, and the rights and obligations under the Contract transferred to the Substituted Contractor, as provided by the Deed.
- 7.5.6 If the Commonwealth issues a notice of substitution any security provided under the Contract shall be released by the Commonwealth on the issue of a replacement security under the Deed of Substitution and Indemnity.
- 7.5.7 If the rights and obligations of the Contractor are transferred to the Substituted Contractor and the Substituted Contractor does not provide the securities in accordance with the terms of the Deed of Substitution and Indemnity, the Commonwealth may issue a notice requiring the Substituted Contractor to provide the securities within 30 days of the notice. If the Substituted Contractor fails to provide the securities within 30 days of the notice the Commonwealth may terminate the contract in accordance with clause 12.2.
- 7.5.8 Nothing in clause 7.5 shall prevent the Commonwealth Representative issuing a notice of substitution under clause 7.5 by agreement with the Contractor and the Substituted Contractor.

7.6 Securities (RFT Core)

Note to drafters: This clause should be included in the RFT when clause 7.4 or clause 7.5 is selected.

- 7.6.1 If the Contractor fails to provide or maintain any security required under the Contract, the Commonwealth Representative may withhold all or part of any payment under the Contract until the Contractor meets those obligations.
- 7.6.2 If the Commonwealth exercises any or all of its rights under the securities provided under the Contract, the Commonwealth shall not be liable for, and the Contractor shall release the Commonwealth from liability for, any resultant loss or damage to the Contractor.
- 7.6.3 The rights of the Commonwealth to recover from the Contractor the balance, after draw down of any securities provided under the Contract, of loss or damage suffered by the Commonwealth shall not be limited by the Commonwealth's exercise of those securities.

7.7 Time of Payment (Core)

- 7.7.1 The Commonwealth shall notify the Contractor of the date a payment in accordance with clause 7 is made.

7.8 Failure to Achieve Stop Payment Milestones (Optional)

Note to drafters: It is important to note the provisions of this clause when payments are being specified in the Schedule of Payments at Annex B to Attachment B. Inclusion of this clause will be dependent on the selections made at clause 7.2.

- 7.8.1 If the Contractor fails to complete a Stop Payment Milestone by the relevant Milestone Date, the Commonwealth may, do either or both of the following:
- a. withhold all payments specified against that Milestone (if any) and all subsequent payments until that Milestone has been achieved; and
 - b. require the Contractor to prepare and deliver to the Commonwealth a CCP under clause 10.1 which includes a full schedule review and sets out the extent to which the Contractor proposes to rectify the problem.
- 7.8.2 The Commonwealth's rights under clause 7.8.1 are in addition to any other rights or remedies the Commonwealth may have under the Contract or at law. For the avoidance of doubt, the Commonwealth may terminate the Contract under clause 12.2.1 or clause 12.2.2 (as applicable) whether or not the Commonwealth has withheld any payment under the Contract, or required or subsequently approved a CCP.

7.9 Early and Late Payment (Core)

- 7.9.1 If payment of an amount due under the Contract is made early, interest shall be payable to the Commonwealth in accordance with the formula at clause 7.9.3..
- 7.9.2 If payment of an amount due under the Contract is made late, interest shall be payable by the Commonwealth in accordance with the formula at clause 7.9.3. Any payment not made within 60 days after the date it is to be made under the Contract shall be in breach of the Contract.

7.9.3 Interest payment =
$$\frac{I\% \times P \times n}{365}$$

Where:

"I%", for early payments, means the Reserve Bank of Australia cash rate target current at the date of payment expressed as a percentage;

"I%", for late payments, means the Australian Taxation Office sourced General Interest Charge rate current at the due date for payment expressed as a percentage;

"P" means the amount of the early or late payment; and

"n" means the number of days before or after the due date for payment that the payment is made.

- 7.9.4 If the interest payment is not offset or paid as part of the subject claim, the Commonwealth Representative shall adjust the next approved payment under the Contract. If there are no

further payments, the relevant party shall pay the interest payment within 30 days of being provided with written notice.

7.10 Incentive Payments (Optional)

7.10.1 In addition to the Contract Price, the Commonwealth shall pay the Contractor incentive payments ("Incentive Payments") for superior performance as evidenced by the Contractor achieving the key performance indicators set out in Annex F to Attachment B, to the Commonwealth Representative's satisfaction but subject to clause 7.10.2.

7.10.2 The Commonwealth shall not pay the Contractor Incentive Payments for any assessment period if during the assessment period:

Option: For when Milestones will be used under the Contract.

a. the Contractor has not achieved a Milestone in Annex B to Attachment B due to be achieved during the assessment period;

Option: For when Liquidated Damages will be required.

b. the Commonwealth is entitled to claim liquidated damages in accordance with clause 7.11; or

c. the Commonwealth is entitled to terminate the Contract for default under clause 12.2.

7.10.3 The maximum amount payable as Incentive Payments under the Contract shall be [...INSERT AMOUNT...] to be apportioned over the assessment periods set out in Annex F to Attachment B.

7.10.4 The weightings for the key performance indicators for each assessment period are set out in Annex F to Attachment B.

7.10.5 At the end of each assessment period the Contractor shall provide the Commonwealth Representative with a written statement of its achievement of the key performance indicators and reasonable information as requested by the Commonwealth Representative to evaluate the Contractor's performance. No Incentive Payments shall be awarded until the Contractor has provided the Commonwealth Representative with the written statement and reasonable information as requested.

7.10.6 Within 30 days of the completion of the assessment period, the Commonwealth Representative shall assess the information provided under clause 7.10.5 and inform the Contractor of the amount of Incentive Payments awarded, if any.

7.10.7 On receipt of advice as to the amount of the Incentive Payments, the Contractor shall submit to the Commonwealth Representative a claim for the amount detailed in the advice. The Commonwealth shall pay the claim for Incentive Payments within 30 days of receipt of the claim.

7.10.8 Incentive Payments not awarded for the assessment period to which they apply shall not be payable by the Commonwealth in any subsequent assessment period.

7.11 Liquidated Damages and Other Compensation (Optional)

7.11.1 The parties acknowledge that if the Contractor delays delivery of any item of Supplies beyond the date set out at Annex A to Attachment B:

a. the Commonwealth will suffer loss and damage; and

b. all such loss and damage will, having regard to the governmental and non-commercial nature of the Supplies and their significance to the defence of Australia, be impossible, complex or expensive to quantify accurately in financial terms and the loss and damage arising from such delay may not be able to be precisely calculated or proved,

- and therefore, the parties agree that the amount of liquidated damages specified in Attachment C is a genuine pre-estimate of the damage which would be suffered by the Commonwealth in such event.
- 7.11.2 If the Contractor delays delivery of any item of Supplies beyond the relevant date, the Commonwealth shall be entitled to recover from the Contractor as liquidated damages and not as a penalty the amount specified at Attachment C for each day of the delay. No amount shall be owing to the Commonwealth until the Commonwealth elects, in accordance with clause 7.11.3, to recover any such liquidated damages.
- 7.11.3 Upon becoming entitled to recover liquidated damages under clause 7.11.2 the Commonwealth may, within the period determined under clause 7.11.4, elect in respect of the relevant period of delay to do either or both of the following:
- a. recover the amount of liquidated damages as a debt to the Commonwealth under clause 12.4; or
 - b. accept agreed compensation from the Contractor to the extent (if any) that liquidated damages are not recovered under clause 7.11.3a. Such compensation, together with any liquidated damages elected to be recovered under clause 7.11.3a, shall be equivalent in value to the total liquidated damages recoverable for that period of delay.
- 7.11.4 Unless some other period is agreed in writing between the parties, the period within which the Commonwealth may make an election under clause 7.11.3 shall be:
- a. any time during the period of a delay;
 - b. four months after the end of the relevant period of delay, if there is an end to that period; or
 - c. if any limit on the amount of liquidated damages is reached before the end of the relevant period of delay, four months after the Commonwealth receives written notification from the Contractor that the limit has been reached.
- 7.11.5 If the Commonwealth makes no election under clause 7.11.3 within the period determined in accordance with clause 7.11.4, then the liquidated damages payable by the Contractor shall become a debt due to the Commonwealth in accordance with clause 12.4 on the day after the period referred to in clause 7.11.4 ends. The amount of liquidated damages payable under this clause shall be calculated in accordance with Attachment C, including any adjustments calculated in accordance with Attachment C.
- 7.11.6 If the Commonwealth elects to accept compensation in lieu of liquidated damages the Contractor shall prepare a CCP to effect a change to the Contract and any other contract between the Commonwealth and the Contractor which may be affected. When any part of the compensation to be provided is in the form of goods and services, the CCP shall provide that the goods and services shall be incorporated into the supplies under whichever relevant contract is agreed by the Commonwealth.
- 7.11.7 The Commonwealth's right to claim liquidated damages for delay or to recover other compensation as agreed shall be the Commonwealth's sole right to be compensated for loss or damage suffered by the Commonwealth as a result of the delay during the period in which an entitlement to recover liquidated damages accrues under clause 7.11.2. However, nothing in clause 7.11 shall affect, limit or exclude the Commonwealth's rights or remedies in respect of:
- a. a delay in delivery of Supplies for which an entitlement to recover liquidated damages does not accrue under the Contract;
 - b. loss or damage suffered by the Commonwealth at any time for causes other than the Contractor's delay in delivering the Supplies;
 - c. termination for default of the Contractor for the delay, whether or not the Commonwealth has been compensated under clause 7.11; and
 - d. termination for convenience in accordance with clause 12.3.
- 7.11.8 For the purposes of clause 7.11:

- a. if Supplies are rejected they shall be taken not to have been delivered; and
- b. the "relevant period of delay" means the whole period of each delay for which liquidated damages are recoverable by the Commonwealth under clause 7.11.2, or one or more periods within the whole period of delay which the Commonwealth may nominate in writing to the Contractor, as the case requires.

Option: For when Milestones will be used under the Contract.

7.11.9 The Commonwealth's entitlement to recover an amount as liquidated damages under clause 7.11.2, is not affected by any variation of a Milestone Date (other than where postponement has been granted under clause 6.2.4), and accrues from the first day of any delay under the Contract whether or not the affected date has been changed by amendment of the Contract. To avoid doubt, if a Milestone Date has been varied by the parties and the Contractor delays achievement of the relevant Milestone beyond that Milestone Date, the Commonwealth shall be entitled to recover as liquidated damages under clause 7.11.2 the amount specified at Attachment C for each day of the delay irrespective of whether the Commonwealth has already recovered an amount as liquidated damages for delay in achievement of the Milestone before the Milestone Date was varied.

7.12 Taxes and Duties (Core)

- 7.12.1 All taxes, duties and government charges imposed or levied in Australia or overseas in connection with the Contract shall be met by the Contractor and shall be included within the Contract Price.
- 7.12.2 The Contract Price set out in Annex A to Attachment B includes Goods and Services Tax (GST) for Supplies to be delivered under the Contract which are taxable supplies within the meaning of the GST Act.
- 7.12.3 The Contractor shall submit each claim for payment pursuant to clause 7 in the form of a valid tax invoice. The tax invoice shall include the amount and method of calculation of any GST payable by the Contractor in relation to that claim for payment as a separate item.
- 7.12.4 If the Contractor incorrectly states the amount of GST payable, or paid, by the Commonwealth on an otherwise valid tax invoice, the Contractor shall issue to the Commonwealth a valid adjustment note in accordance with the GST Act.
- 7.12.5 If the Commonwealth makes, or is assessed by the Australian Taxation Office (ATO) as having made, a taxable supply to the Contractor under or in connection with the Contract, the Commonwealth shall be entitled to recover from the Contractor upon presentation of a valid tax invoice, the amount of GST paid or payable by the Commonwealth to the ATO.
- 7.12.6 Any amount of GST to be paid by the Contractor under clause 7.12.5 shall be a debt recoverable by the Commonwealth in accordance with clause 12.4.

7.13 GST Agent (RFT Core)

Note to tenderers: This clause will only be included where the Contractor appoints a resident agent. (Refer to Annex D to Attachment A to the conditions of tender). Tenderers should make their own inquiries regarding the suitability of proposing an agent to act for them for the purposes of Division 57 of the A New Tax System (Goods and Services Tax) Act 1999.

- 7.13.1 The Contractor has appointed (...INSERT NAME, ADDRESS, TELEPHONE, FAX NUMBER, A.C.N. AND A.B.N...) as its resident agent for the purposes of Division 57 of the GST Act.
- 7.13.2 The Contractor, by appointing a resident agent, shall not be relieved of its liabilities or obligations under the Contract and shall at all times be responsible for ensuring that the resident agent complies with the requirements of this clause 7.13.
- 7.13.3 Without limiting clause 7.13.2, the Contractor shall ensure that its resident agent:
 - a. provides all necessary documentation required by the Commonwealth for a claim for payment to be considered under clause 7.12, and

- b. complies with Division 57 of the GST Act.
- 7.13.4 The Commonwealth shall make all payments otherwise due to the Contractor under clause 7 to the resident agent. The Contractor acknowledges that such payments to the resident agent shall discharge, to the extent of the payment, the Commonwealth's liability to the Contractor for those Supplies.
- 7.13.5 If the Contractor appoints an alternative resident agent, the Contractor shall notify the Commonwealth Representative in writing within 14 days of the change, and provide the information required in clause 7.13.1.
- 7.13.6 The Contractor, if requested by the Commonwealth Representative, shall provide a copy of the resident agency agreement, which copy need not contain prices.

8. INSURANCE AND LIABILITY

8.1 Contractor's Employees (Core)

- 8.1.1 The Contractor shall indemnify the Commonwealth against liability of the Commonwealth for death of or personal injury to any person employed by the Contractor on work under the Contract, except to the extent that such death or injury results from any unlawful or negligent act or omission on the part of the Commonwealth or any person through whom the Commonwealth is acting (but not including the Contractor, its officers, employees, agents or Subcontractors).

8.2 Property Damage and Public Risk (Core)

- 8.2.1 The Contractor shall indemnify the Commonwealth, its officers, employees and agents against any liability, loss, damage, cost (including the cost of any settlement and legal costs and expenses on a solicitor and own client basis), compensation or expense sustained or incurred:

- a. by any person in respect of personal injury or death, except to the extent that the Contractor's indemnity under clause 8.1.1 applies;
- b. by any person in respect of loss of, or damage to, any property (other than the Supplies and CMCA); and
- c. that comprises costs and expenses of defending or settling any claim referred to in clauses 8.2.1a and 8.2.1b,

arising out of or as a consequence of a default or unlawful or negligent act or omission on the part of the Contractor, its officers, employees, agents or Subcontractors except to the extent that such death, injury, or property loss or damage results from any unlawful or negligent act or omission on the part of the Commonwealth or any person through whom the Commonwealth is acting (but not including the Contractor, its officers, employees, agents or Subcontractors).

8.3 Care of the Supplies (Core)

- 8.3.1 The Contractor shall make good any loss or damage caused to the Supplies while risk resides with the Contractor, except to the extent that the loss or damage was a direct consequence of an excepted risk.

- 8.3.2 For the purposes of clause 8.3.1, "excepted risks" means:

- a. any negligent act or omission of the Commonwealth, the Commonwealth Representative or officers, employees or agents of the Commonwealth;
- b. war, invasion, acts of foreign enemies, hostilities between nations, civil insurrection or militarily usurped power;
- c. confiscation by governments or public authorities; or
- d. ionising radiation, contamination by radioactivity from nuclear fuel or waste, or combustion of nuclear fuels,

which in the case of clauses 8.3.2c and 8.3.2d is not caused by the Contractor.

8.4 Intellectual Property Indemnity (Core)

- 8.4.1 The Contractor shall indemnify the Commonwealth its officers, employees, agents, licensees or sub-licensees against any liability, loss, damage, cost (including the cost of any settlement and legal costs and expenses on a solicitor and own client basis), compensation or expense sustained or incurred by the Commonwealth which arises out of any action, claim, dispute, suit or proceeding brought by any third party in respect of any:

- a. infringement or alleged infringement of that third party's IP rights including Moral Rights when the infringement or alleged infringement arises out of any activity

permitted under any licence or assignment referred to in clause 5 or otherwise under the Contract; or

- b. breach or alleged breach of any duty of confidentiality owed to that third party, when the breach is caused by any act or omission on the part of the Contractor or any of its Subcontractors, officers, employees or agents (whether or not such act or omission constitutes a breach of the Contract).

8.4.2 For the purposes of this clause 8.4, 'infringement' includes unauthorised acts which would, but for the operation of section 163 of the *Patents Act 1990*, section 96 of the *Designs Act 2003*, section 183 of the *Copyright Act 1968*, and section 25 of the *Circuits Layout Act 1989*, constitute an infringement.

8.5 Limitation of Liability (Optional)

Note to drafters: A risk assessment should be undertaken by the Commonwealth prior to release of the RFT to determine appropriate caps for inclusion in clause 8.6.1.

Note to tenderers: This clause will be included where tenderers propose and the Commonwealth agrees to limit liability under the Contract at TDR C-2 of the conditions of tender.

8.5.1 Subject to clause 8.5.2, the liability of the Contractor to the Commonwealth arising out of the Contractor's performance of the Contract shall be limited as follows:

- a. for liability for obligations and warranties under clause 9, in aggregate [...INSERT AMOUNT...];
- b. for loss of, or damage to, the Supplies, in aggregate to [...INSERT AMOUNT...];
- c. for loss of, or damage to, Commonwealth property, including CMCA, in aggregate to [...INSERT AMOUNT...];
- d. for liquidated damages recoverable under the Contract, in aggregate to [...INSERT AMOUNT...]; and
- e. for a breach of contract, breach of statute or negligent act or omission not mentioned in clauses 8.5.1a to d in aggregate to [...INSERT AMOUNT...].

8.5.2 The limitations in clause 8.5.1 do not apply to liability of the Contractor, including under an indemnity whether or not expressly referred to in this clause, for:

- a. personal injury and death;
- b. loss of, or damage to, third party property or Commonwealth property (other than Defence Property);
- c. breach of IP rights, confidentiality, privacy or security obligations;
- d. fraud or dishonesty;
- e. unlawful or illegal acts;
- f. the IP indemnity provided by the Contractor under clause 8.4; or
- g. the privacy indemnity provided by the Contractor under clause 8.7.

8.5.3 To avoid doubt if more than one limitation mentioned in clauses 8.5.1a to 8.5.1e is capable of applying to a particular liability, and the cap under one limitation is reached, the Commonwealth may recover from the Contractor for the remainder of the liability under the other limitation up to the cap applicable to the other limitation.

8.5.4 If a change to the Contract is proposed by either party that:

- a. by itself or cumulatively with previous changes to the Contract, represents an increase in the original Contract Price of more than (...INSERT AMOUNT...); or
- b. varies the SOW,
including by exercise of an option, the parties shall negotiate in good faith to make

appropriate amendments to the liability caps specified in clause 8.5.1 and to the liquidated damages set out in Attachment C.

8.6 Insurance (Core)

8.6.1 Before commencing work under the Contract, the Contractor shall:

- a. be fully insured or registered with the appropriate statutory authority against liability for death of or injury to persons employed by the Contractor, including liability under statute and common law;
- b. have public liability insurance for an amount of not less than [...INSERT AMOUNT...]; and

Option: For when the Commonwealth requires additional insurance policies to be taken out.

- c. have [...DRAFTER TO INSERT...] for an amount of not less than [...INSERT AMOUNT...].

8.6.2 The Contractor shall ensure each Subcontractor is insured against the Subcontractor's corresponding liabilities.

8.6.3 The Contractor shall maintain the insurance or registration required under clause 8.6.1a to 8.6.1c for the duration of the work under the Contract, and for obligations that survive expiry or termination of the Contract, shall ensure that cover is maintained for the period that those obligations survive expiry or termination or for a period as otherwise specified in writing by the Commonwealth.

8.6.4 The Contractor shall:

- a. on the Effective Date;
- b. on each anniversary of the Effective Date; and
- c. on request by the Commonwealth at any time, including after expiry or termination of the Contract;

produce satisfactory evidence of the insurance or registration to the Commonwealth Representative.

8.6.5 The evidence required by clause 8.6.4 shall include details of:

- a. name of the insurance provider;
- b. type of insurance;
- c. terms of the insurance including any specific exclusions;
- d. limits of liability per claim or occurrence and details of any aggregate limits or relevant sublimits which apply;
- e. whether any past or current claims made under the policy have been materially affected, or are likely to materially affect, the amount of cover available under the policy;
- f. deductible amounts; and
- g. period of insurance.

8.6.6 The Contractor shall immediately notify the Commonwealth if any policy or policies of insurance relevant to the Contract:

- a. are cancelled by an insurer;
- b. are to have their coverage reduced in any material respect; or
- c. if the Contractor reasonably believes that a policy or policies of insurance relevant to the Contract will or may be cancelled.

8.7 Privacy Indemnity (Core)

- 8.7.1 The Contractor shall indemnify the Commonwealth against any loss, liability or expense suffered or incurred by the Commonwealth which arises directly or indirectly from a breach of any of the Contractor's or Subcontractor's obligations referred to in clause 11.7

9. WARRANTIES AND SUPPORT OF THE SUPPLIES

9.1 Fitness for Purpose (Core)

- 9.1.1 The Contractor shall ensure and warrants that any Supplies provided under the Contract shall be fit for the purpose or purposes detailed in the Contract.

9.2 Warranty (Core)

- 9.2.1 The Contractor warrants that the design, materials and workmanship in the Supplies conform with, and that the Supplies meet the requirements of the Contract. The Contractor shall remedy by repair, replacement or modification, defects in design, materials and workmanship in the Supplies notified to the Contractor by the Commonwealth Representative during the period of [...INSERT PERIOD...] starting from Acceptance of the Supplies (for the purposes of clause 9.2 called the "warranty period").
- 9.2.2 The Contractor shall remedy by repair, replacement or modification any other Supplies which are affected by the corrective actions taken by the Contractor to address a warranty claim notified to the Contractor under clause 9.2.
- 9.2.3 The liability of the Contractor to remedy defects under the warranty provided by the Contractor under clause 9.2.1 shall not apply to the extent that the defect arises from the Commonwealth's negligent or wilful damage of the Supplies.
- 9.2.4 The Contractor, unless the Commonwealth Representative otherwise allows, shall meet all costs of, and incidental to, the performance of remedial work under clause 9.2, including any packing, freight (not exceeding the freight cost between the Contract delivery point and the Contractor's nominated repair facility and return), disassembly and re-assembly costs.
- 9.2.5 The Commonwealth Representative may at its discretion require the Contractor to carry out such tests as are relevant to the remedial work and provided for under the Contract. If such tests show that Supplies remedied by the Contractor do not comply with the Contract, the Contractor shall rectify the defect, and the costs of the rectification and tests shall be borne by the Contractor. The Commonwealth shall bear the cost of any test where the Supplies which have been remedied fulfil the Contract requirements.
- 9.2.6 If the Contractor fails within the period of [...INSERT PERIOD...] after notification by the Commonwealth Representative, to rectify a defect pursuant to clause 9.2, the Commonwealth may, without limiting the Contractor's warranties and obligations under clause 9, perform or have performed the necessary remedial work at the expense of the Contractor and may recover such expense as a debt under clause 12.4.
- 9.2.7 If a further defect in design, materials, and workmanship in an item of Supplies remedied in accordance with clause 9.2 is notified to the Contractor by the Commonwealth Representative before the expiry of the warranty period or during a period commencing on the date the remedied Supplies are returned to the Commonwealth and extending for [...INSERT PERIOD, BEING HALF THE WARRANTY PERIOD...], whichever is the greater, the Contractor shall remedy the further defect.
- 9.2.8 The rights and remedies provided in clause 9.2 are in addition to, and shall not limit, any other rights of the Commonwealth under the Contract or otherwise.

Option: For when GFM will be provided under the Contract.

- 9.2.9 In clause 9.2 the obligation to remedy defects in Supplies shall not extend to remedy of defects in GFM incorporated into the Supplies.

9.3 Notification of Defects (Optional)

- 9.3.1 If during the period of [...INSERT PERIOD IN YEARS...] commencing on the Effective Date, the Contractor becomes aware of any defect (including Latent Defects) in the Supplies which adversely affects, or is likely to adversely affect, the operation of the Supplies or the safety of personnel, the Contractor shall immediately give notice of the defect to the Commonwealth Representative. The Contractor shall within 28 days of the initial notice provide a written statement of the nature of the defect, its cause and effect, and proposed remedial action.

9.4 Latent Defects (Optional)

- 9.4.1 The Contractor shall, within the Contract Price, diagnose and correct any Latent Defects in Supplies if those Latent Defects are notified to it in writing by the Commonwealth Representative within the period of [...INSERT PERIOD IN YEARS...] commencing on Acceptance.
- 9.4.2 The Contractor shall, at its own expense:
- a. when the Latent Defect is the result of a design deficiency, redesign the Supplies (including provision of effective test procedures to demonstrate the rectification of the deficiency);
 - b. correct the Supplies notified by the Commonwealth Representative under clause 9.4.1 and all similar items of Supplies by repair, modification or replacement of the Supplies or by any other means acceptable to the Commonwealth Representative; and
 - c. make any necessary correction, modification or replacement of any other Supplies which are affected by the Latent Defect,
- whether or not those Supplies have already been Accepted or delivered.
- 9.4.3 If the Contractor fails to rectify a Latent Defect in the Supplies within the time specified by the Commonwealth Representative in the notice referred to in clause 9.4.1, the Commonwealth may, without limiting the Contractor's warranties and obligations under the Contract, perform or have performed at the expense of the Contractor any rectification work, and may recover such expense as a debt under clause 12.4.

9.5 Spare Parts and Support Equipment (Optional)

- 9.5.1 The Contractor shall for the period of [...INSERT PERIOD IN YEARS...] commencing immediately after delivery of the Supplies provide facilities for the supply of sufficient quantities of spare parts and support equipment to maintain the Supplies in [effective operation].
- 9.5.2 If during the period set in clause 9.5.1 the Contractor becomes aware that its ability to provide spare parts or support equipment may be adversely affected it shall provide the Commonwealth with advance notice being not less than [...INSERT PERIOD...] of that event. If there will be a final production run of spare parts or support equipment the Contractor shall nominate in the notice the date by which the Commonwealth may place final orders.
- 9.5.3 The Contractor shall include the rights of the Commonwealth contained in clause 9.5 in all Approved Subcontracts.
- 9.5.4 The Commonwealth shall not be bound to order any, or any particular quantity of, spare parts or support equipment from the Contractor.

10. CONTRACT MANAGEMENT

10.1 Change to the Contract (Core)

- 10.1.1 Except as expressly permitted in the Contract, the Contract may be changed only in accordance with clause 10.1. The parties shall not be liable to each other for any additional work undertaken or expenditure incurred unless the change has been approved in accordance with clause 10.1.
- 10.1.2 Either party may propose a change to the Contract. CCPs shall be in the format set out at Annex E to Attachment H and if the proposal is a change to the SOW, be accompanied by an ECP in the format set out at Annex F to Attachment H.
- 10.1.3 If the Commonwealth Representative proposes a change to the Contract it shall:
- notify the Contractor and the Contractor shall provide a CCP to the Commonwealth Representative within a period of 30 days after receipt of such notice or such other period as agreed; or
 - provide a CCP to the Contractor and the Contractor shall notify the Commonwealth Representative of any changes it requires to the CCP within 30 days of receipt.
- 10.1.4 The Commonwealth Representative may at its discretion require the Contractor to provide a not to exceed quote for the preparation of a CCP, prior to the Contractor preparing the CCP in accordance with clause 10.1.3. If the Commonwealth Representative exercises its discretion under this clause the Commonwealth's payment of the reasonable costs of preparation of a CCP under clause 10.8 or through change to the Contract under clause 10.1.5 shall not exceed the quote provided.
- 10.1.5 The Commonwealth Representative shall evaluate a CCP submitted under clause 10.1, and shall either:
- on the basis set out in clause 10.1.9 approve the CCP and issue an amendment to the Contract; or
 - reject the CCP giving reasons for such rejection.
- 10.1.6 The Commonwealth Representative shall approve or reject a CCP under clause 10.1.5 within:
- 30 days after receipt; or
 - such other period as specified in clause 2.3 of the SOW; or
 - such other period as may be agreed.

Note to drafters: The list included in clause 10.1.7 needs to be validated against the contract and the SOW to ensure that it is both accurate and complete.

- 10.1.7 The cost of preparing the following CCPs will be borne by the Contractor:
- a CCP under clauses 1.7.2, 4.1.7, 6.2.4, 6.2.15, 7.11.6 or 10.9.4;
 - a CCP under clause 2.3.6 of the SOW; and
 - any other CCP which is proposed or required to address any non-performance of the Contractor under the Contract.
- 10.1.8 For a CCP required by the Commonwealth (other than a CCP mentioned in clause 10.1.7), the Commonwealth shall meet the reasonable cost of preparation of the CCP whether or not the CCP is agreed by the Contractor.
- 10.1.9 A CCP shall take effect:
- if no date for taking effect is specified in the CCP, on the date a CCP is approved and executed by both parties; or
 - on the date specified in the CCP.

- 10.1.10 The Commonwealth Representative may issue an amendment to the Contract to incorporate CCPs that have taken affect under clause 10.1.9. The amendment does not affect the legal status of the CCP as determined under clause 10.1.9.

10.2 Condition as to Disclosure by the Contractor (Core)

- 10.2.1 The Contractor shall promptly notify and fully disclose to the Commonwealth, in writing, any event or occurrence actual or threatened during the performance of the Contract which may materially affect the Contractor's ability to perform any of its obligations under the Contract.
- 10.2.2 Without limiting clause 10.2.1, the Contractor:
- a. undertakes that, to the best of its knowledge, as at the Effective Date, no conflict of interest exists which is likely to affect the performance of its obligations under the Contract by itself or by any of its employees, officers, agents or Subcontractors; and
 - b. shall notify the Commonwealth in writing immediately if such a conflict or risk of such a conflict of interest arises.
- 10.2.3 Within seven days after giving notice under clause 10.2.1 or 10.2.2, the Contractor shall notify the Commonwealth of the steps it will take to resolve the issue. If the Commonwealth considers those steps are inadequate, it may direct the Contractor to resolve the issue in a manner proposed by the Commonwealth. If the Contractor is unable or unwilling to resolve the issue in the required manner, the Commonwealth may terminate the Contract in accordance with clause 12.2.

10.3 Waiver (Core)

- 10.3.1 Failure by either party to enforce a term of the Contract shall not be construed as in any way affecting the enforceability of that term or the Contract as a whole.

10.4 Commercial-in-Confidence Information (Core)

- 10.4.1 If in connection with the Contract, Commercial-in-Confidence Information is provided or produced by any person, the relevant party shall ensure that any person receiving or producing the information protects the confidential nature of the information except:
- a. when disclosure of the information is required by law or statutory or portfolio duties; or
 - b. to the extent that the Commonwealth would be prevented from exercising its IP rights under the Contract.
- 10.4.2 If it is necessary to disclose Commercial-in-Confidence Information, provided or produced by or on behalf of the other party, to a third party, other than a legal adviser or for a purpose within an exception listed in clause 10.4.1, the party wishing to make the disclosure shall obtain the written consent of the other party to the Contract.
- 10.4.3 The Commonwealth may require the Contractor to ensure that its officers, employees, agents, and Subcontractors engaged in the performance of the Contract give a written undertaking in the form of a deed of confidentiality prior to the disclosure of Commercial-in-Confidence Information. The Contractor shall provide properly executed deeds as required by this clause.
- 10.4.4 The Contractor shall not, in marking information supplied to the Commonwealth, misuse the term "Commercial-in-Confidence" or the Contractor's equivalent. The marking of information as "Commercial-in-Confidence" shall not affect the legal nature and character of the information.
- 10.4.5 Without limiting any rights of the Commonwealth provided for elsewhere in this Contract, and in particular in clauses 5 and 10.4, the Contractor grants to the Commonwealth the right to disclose information relating to communication protocols, interface standards, message formats, or any other electrical, mechanical or optical interface or other requirements which may be required to be released by the Commonwealth so as to allow software or equipment to connect to or communicate with any of the Supplies.

- 10.4.6 The parties agree that the conditions of contract and Attachments, or the parts of them, listed in Attachment K are Commercial-in-Confidence Information for the relevant party as at the Effective Date.
- 10.4.7 The Contractor agrees to deliver to the Commonwealth, as required by the Commonwealth, all documents in its possession, power or control which contain or relate to any information that is Commercial-in-Confidence Information of the Commonwealth on the earlier of:
- a. demand by the Commonwealth; and
 - b. the time the documents and other material are no longer required for the purposes of the Contract.
- 10.4.8 If the Commonwealth makes a demand under clause 10.4.6 and the Contractor has placed or is aware that documents containing the Commercial-in-Confidence Information are beyond its possession or control, then the Contractor must provide full particulars of the whereabouts of the documents containing the Commercial-in-Confidence Information, and the identity of the person in whose custody or control they lie.
- 10.4.9 The Contractor, when directed by the Commonwealth in writing, agrees to destroy any document in its possession, power or control which contain or relate to any Commercial-in-Confidence Information.
- 10.4.10 Return or destruction of the documents referred to in this clause 10.4 does not release the Contractor from its obligations under the Contract.

10.5 Assignment and Novation (Core)

- 10.5.1 Neither party may, without the written consent of the other, assign its rights under the Contract.
- 10.5.2 If the Contractor proposes to enter into any arrangement which will require the novation of the Contract, it shall notify and seek the consent of the Commonwealth Representative within a reasonable period prior to the proposed novation.
- 10.5.3 The Contractor shall ensure that any arrangements proposed under clause 10.5.2 are governed by an agreement in the form of a deed of novation.
- 10.5.4 Notwithstanding the Contractor's compliance with clause 10.5.3, the Commonwealth may, in its discretion, refuse to consent to an arrangement proposed by the Contractor under clause 10.5.2.

10.6 Negation of Employment and Agency (Core)

- 10.6.1 The Contractor shall not represent itself, and shall ensure that its officers, employees, agents and Subcontractors do not represent themselves, as being employees, partners or agents of the Commonwealth.
- 10.6.2 The Contractor, its officers, employees, agents and Subcontractors shall not by virtue of the Contract be, or for any purposes deemed to be, an employee, partner or agent of the Commonwealth.

10.7 Commonwealth Access (Core)

- 10.7.1 During the performance of the Contract, the Contractor shall permit the Commonwealth Representative or any person authorised by the Commonwealth Representative access to its premises, and access to any of its records or accounts relevant to or impacting on performance of work under the Contract. The Commonwealth may copy any records or accounts for the purposes of the Contract.
- 10.7.2 Without limiting the generality of clause 10.7.1, the purposes for which the Commonwealth Representative may require access include:
- a. inspecting CMCA, attending, checking or conducting stocktakes of CMCA, including viewing and assessing the Contractor's inventory control and stocktaking systems and any data stored or recorded in the Contractor's inventory

- control and stocktaking systems, or removing CMCA that are no longer required for the performance of the Contract;
- b. conducting audits under the *Auditor-General Act 1997*;
 - c. performing Audit and Surveillance activities in relation to Quality in accordance with clause 8 of the SOW;
 - d. validating the Contractor's progress in meeting the AIC Plan;
 - e. investigating the reasonableness of proposed prices or costs in any CCP submitted in accordance with clause 10.1. For the purpose of this investigation, the Contractor shall permit the Commonwealth to, or facilitate the Commonwealth being able to, exercise its access rights in this clause 10.7 to access Related Bodies' Corporate records (including subsidiary and parent company records) relating to transfer pricing, cross-subsidisation with related bodies corporate and the allocation of overheads between the Contractor and the Related Bodies Corporate to the extent that such records relate to the CCP;
 - f. determining whether and to what extent steps should be taken to register or otherwise protect Commonwealth IP;
 - g. validating the Contractor's progress in meeting the IP Plan;
 - h. auditing raw data, Software Design Data, software, and Source Code for the purpose of validating the Contractor's performance under the Contract;

Option: For when an EVMS is used.

- i. performing reviews of the EVMS in accordance with clause 3.2.4 of the SOW; and
- j. investigating the reasonableness of any cost claims made by the Contractor under the Contract, including any claims for postponement costs submitted in accordance with clause 6.3 and schedule recovery costs submitted in accordance with clause 6.5

Note to drafters: When significant software management activities may be performed by Subcontractors, the project should consider including a tripartite deed (ideally in the RFT or otherwise in the draft Contract for negotiation) to capture the obligations in clause 10.7.2g and 10.7.3 (as an annex to Attachment H to the Contract) within the context of a direct relationship between the Contractor, Subcontractor and Commonwealth. An additional clause would need to be included in clause 10.7 requiring the Contractor to obtain and provide to the Commonwealth an executed deed substantially in accordance with the relevant annex to Attachment H from all Approved Subcontractors performing software management activities.

10.7.3 The Contractor shall ensure that Approved Subcontracts require Approved Subcontractors to give the Commonwealth Representative and any person authorised by the Commonwealth Representative, access to Approved Subcontractors' premises, and to records and accounts in connection with the performance of work under the Subcontract, including the right to copy.

10.7.4 The Commonwealth shall comply with, and shall require any delegate or person authorised by the Commonwealth Representative to comply with, any reasonable Contractor or Subcontractor safety and security requirements or codes of behaviour for the premises.

10.8 Contractor Access (Optional)

10.8.1 The Commonwealth shall, during the period of the Contract, provide access to any Commonwealth place, area or facility for persons approved under clause 10.8 as necessary for the Contractor's performance of the Contract.

10.8.2 Subject to clause 3.8 and unless otherwise agreed, the Contractor shall seek written permission from the Commonwealth Representative, at least eight days prior to entry being required, for each person the Contractor wishes to have access to a Commonwealth place, area or facility.

10.8.3 The Commonwealth Representative may by notice to the Contractor withdraw access rights to any Commonwealth place, area or facility at any time for any period.

- 10.8.4 The Contractor shall comply with, and require persons afforded access under clause 10.8 to comply with, any relevant Commonwealth safety and security requirements, regulations, standing orders, or codes of behaviour for the Commonwealth place, area or facility.
- 10.8.5 The Commonwealth Representative may notify the Contractor of, and the Contractor shall comply with, any special security or access provisions that apply to a particular Commonwealth place, area or facility relevant to the Contract.

10.9 Subcontracts (Core)

- 10.9.1 The Contractor shall not Subcontract the whole of the work under the Contract.
- 10.9.2 The Contractor may, but shall not be required to Subcontract with one or more of the Approved Subcontractors.
- 10.9.3 The Contractor shall not Subcontract work under the Contract to a Subcontractor who is not an Approved Subcontractor if:
- a. the total value of all work with the Subcontractor is expected to exceed [...INSERT AMOUNT...];
 - b. the Subcontractor will in any way be involved in
 - (i) design and development activities;
 - (ii) modification of systems;
 - (iii) systems installation or integration;
 - (iv) tasks to meet AIC Industry Requirements; or
 - (v) [...INSERT OTHER SPECIFIC TYPE OF WORK OR TASK(S) TO BE PERFORMED...]; or
 - c. the Subcontractor will bring IP to the proposed Subcontract or create IP under the proposed Subcontract necessary to enable the Commonwealth to use and support the Supplies,
- unless otherwise agreed between the parties and the extent of that exception is expressly set out in Attachment G.
- 10.9.4 The Contractor may request the inclusion of additional Approved Subcontractors in Attachment G by submitting a CCP in accordance with clause 10.1. The CCP shall include full particulars of the work to be Subcontracted, the name and address of each proposed Subcontractor and any other information about the Subcontractor required by the Commonwealth Representative.
- 10.9.5 The Commonwealth Representative shall Approve or reject the CCP in accordance with clause 10.1.4. The Commonwealth Representative's approval shall not be unreasonably withheld.
- 10.9.6 The Contractor, by subcontracting any part of the work under the Contract or by obtaining the Commonwealth Representative's approval of a Subcontractor, shall not be relieved of its liabilities or obligations under the Contract, and shall be responsible for all Subcontractors.
- 10.9.7 If a Subcontract is terminated, repudiated or rescinded, whether in relation to its terms or as a result of any legislation relating to bankruptcy, liquidation or official management, the Contractor shall promptly notify the Commonwealth Representative and shall complete the work under the Contract either by itself or by engaging another Subcontractor.
- 10.9.8 The Contractor, if requested by the Commonwealth Representative, shall provide the Commonwealth representative with names of all Subcontractors and a copy of any Subcontract, which copy need not contain prices. The Contractor acknowledges and shall inform its Subcontractors that the Commonwealth may be required to publicly disclose the Subcontractors' participation in the performance of the Contract.
- 10.9.9 The Contractor shall not enter into a Subcontract under the Contract with a Subcontractor named by the Director of Equal Opportunity for Women in the Workplace Agency as an

employer currently not complying with the *Equal Opportunity for Women in the Workplace Act 1999*.

10.10 Defence Security (Core)

10.10.1 If the Contractor requires access to any Commonwealth place, area or facility under the control or responsibility of the Department of Defence or the Australian Defence Force, the Contractor shall:

- a. comply with any security requirements notified to the Contractor by the Commonwealth Representative from time to time; and
- b. ensure that its officers, employees, agents and Subcontractors are aware of and comply with the Commonwealth's security requirements.

10.10.2 The Contractor shall:

- a. ensure that its officers, employees, agents and Subcontractors, undertake any security checks or clearances as required by the Commonwealth;
- b. notify the Commonwealth of any changes to circumstances which may affect the Contractor's capacity to provide the Supplies in accordance with the Commonwealth's security requirements; and
- c. provide a written undertaking in respect of security or access to the Commonwealth's place, area or facility in the form required by the Commonwealth.

Note to drafters: The following clause should be used when it is clear that clearances such as personnel and facility clearances will be required under the Contract.

Option A: For when the Contract is placed with an Australian Contractor and a facility clearance is required.

10.10.3 The security classification of work to be performed under the Contract will be up to and including [...INSERT CLASSIFICATION...] level. The Contractor shall possess a facility accreditation at [...INSERT CLASSIFICATION...] level for [...INSERT DOCUMENT STORAGE/ INFORMATION SYSTEMS/ EQUIPMENT/ COMSEC...] or equivalent, issued by the relevant government industrial security authority where Australia has a bilateral security arrangement in place, and shall comply with the requirements and procedures of Part 1 (Defence Industry Security Program) and Part 3 (Information Security) of the Defence Security Manual (DSM), as amended from time to time.

Option B: For when the Contract is placed with an overseas Contractor.

10.10.4 The security classification of work to be performed under the Contract will be up to and including [...INSERT CLASSIFICATION...] level. The Contractor shall possess a facility clearance at [...INSERT CLASSIFICATION...] level for [...INSERT DOCUMENT STORAGE/ INFORMATION SYSTEMS /EQUIPMENT/ COMSEC ...], or equivalent, issued by the relevant government industrial security authority where Australia has a bilateral security arrangement in place, and shall comply with the relevant government industrial security policy.

Option C: For when the Contract is placed with an Australian Contractor and a Personnel Facility Clearance is required.

10.10.5 The security classification of work to be performed under the Contract will be up to and including [...INSERT CLASSIFICATION...] level. The Contractor shall possess a personnel facility clearance at [...INSERT CLASSIFICATION...] level and shall comply with the requirements and procedures of Part I of the DSM, as amended from time to time.

Option D: For when the Contract only involves RESTRICTED information and the Contractor is

not in the Defence Industrial Security Program.

10.10.6 The security classification of work to be performed under the Contract will be up to and including RESTRICTED level. The Contractor shall comply with the requirements of Defence industrial security policy, as set out in Part I of the DSM, as amended from time to time.

10.10.7 The Contractor shall classify all information in its possessions relating to the performance of the Contract according to the Security Classification Grading Document in Attachment I and shall ensure that such information is safeguarded and protected according to its level of security classification.

10.10.8 All security classified information furnished or generated under the Contract, shall not be released to a third party, including a representative of another country, without prior written approval of the Commonwealth Representative.

10.10.9 The Contractor shall promptly report to the Commonwealth Representative any instance in which it is known or suspected that security classified information furnished or generated under the Contract has been lost or disclosed to unauthorised parties, including a representative of another country.

10.10.10 All security classified information transmitted between the parties or a party and a Subcontractor, in Australia, whether generated in Australia or overseas, shall be subject to the provisions of Defence industrial security policy as set out in Part I of the DSM, as amended from time to time.

Option: For when COMSEC material is transmitted in Australia.

10.10.11 All Communications Security (COMSEC) material transmitted between the parties or a party and a Subcontractor, in Australia, shall in addition to the provisions of clause 10.10.10 above, be subject to the special security provisions of the Australian Department of Defence publication *Australian Communications Security Instruction 53*, as amended from time to time.

10.10.12 All security classified information transmitted between the parties or a party and a Subcontractor, located overseas, whether generated in Australia or by another country, shall be subject to the laws of the overseas country regarding the custody and protection of security classified information, and to any bilateral security instrument between Australia and the overseas country.

Option: For when COMSEC material is transmitted overseas.

10.10.13 All Communications Security (COMSEC) material transmitted between the parties or a party and Subcontractor located overseas, shall be subject to approval in the first instance by the Director Defence Signals Directorate (DSD), in respect of Australian COMSEC material, and by the respective COMSEC authorities in other countries in respect of COMSEC material originating from those countries. Once approved for release, the material shall be subject to the laws of the overseas country regarding the custody and protection of COMSEC material as determined by the Director DSD and to any bilateral security instrument between Australia and the overseas country.

10.10.14 If there has been a breach by the Contractor, or any of their officers, employees or agents, or Subcontractors of clause 10.10, the Commonwealth Representative may give the Contractor a notice of termination for default under clause 12.2.1.

10.10.15 The Contractor shall ensure the requirements of clause 10.10 are included in all Subcontracts where the Subcontractor requires access to any Commonwealth place, area or facility, or to any security classified information in order to perform the obligations of the Subcontract.

10.11 Post Defence Separation Employment (Optional)

Note to drafters: Drafters are to include the following clauses when it is expected that any resultant contract will be valued at over \$5 million or valued at under \$5 million but considered to be commercially sensitive.

- 10.11.1 The Contractor shall ensure that any employee who is a former Defence employee complies with the requirements of DWRM and DI(G) PERS 25-4 as applicable.
- 10.11.2 Except with the written approval of the Commonwealth Representative, the Contractor shall not permit a person who:
- a. in a Relevant Period was an Employee or Service Provider to Defence engaged in the preparation or management of the Contract, the selection of the Contractor or the performance of the project or activity to which the Contract relates; or
 - b. in the 12 months immediately preceding the request for approval was an Employee; to perform or contribute to the performance of the Contract.
- 10.11.3 The Commonwealth Representative shall not unreasonably withhold approval under clause 10.11.2 and shall consider:
- a. the character and duration of the engagement, services or work performed by the Employee or Service Provider in the period specified in clause 10.11.2a or 10.11.2b as applicable;
 - b. any information provided by the Contractor about the character and duration of the services to be performed by the Employee or Service Provider under the Contract;
 - c. the potential for real or perceived conflicts of interest or probity objections if the Employee or Service Provider performs or contributes to the performance of the Contract;
 - d. any information provided by the Contractor concerning any significant effect which withholding approval will have on the Employee or Service Provider's employment opportunities or the performance of the Contract; and
 - e. the policy set out in DWRM and DI(G) PERS 25-4, as applicable.
- 10.11.4 Each restriction created by clause 10.11, by the operation of the definition of 'Relevant Period' (due to the three Relevant Periods applying), is separate and independent of the other (although they are concurrent in effect).

11. POLICY AND LAW

11.1 Applicable Law (Core)

- 11.1.1 The laws of the [...INSERT RELEVANT STATE OR TERRITORY...] shall apply to the Contract. The courts of that State or Territory shall have non-exclusive jurisdiction to decide any matter arising out of the Contract.
- 11.1.2 The United Nations Convention on Contracts for the International Sale of Goods shall not apply to the Contract.

11.2 Compliance with Laws (Core)

- 11.2.1 The Contractor shall, in the performance of the Contract, comply with the laws from time to time in force in the State, Territory or other jurisdictions in which any part of the Contract is to be carried out.

11.3 Policy Requirements (Core)

Note to drafters: Prior to RFT release and prior to the execution of any resultant contract, the Glossary at Attachment M to the draft conditions of contract should be updated to reflect the version of the following documents and policies current at the time of RFT release and signature of any resultant contract, as applicable. Version numbers need not be included in this clause as they are set out in the Glossary at Attachment M to the draft conditions of contract.

- 11.3.1 Subject to clause 11.3.2, the Contractor shall comply with and require its officers, employees, agents and Subcontractors to comply with the following Commonwealth policies of general application relevant or applicable to the Contract:

Option: For acquisition contracts valued at more than \$10 million dollars.

- a. Company ScoreCard policy as detailed in the *Defence Company ScoreCard Policy Statement*.
- b. Defence Equity and Diversity policy as detailed in the *Defence Plain English Guide to Managing and Reporting Unacceptable Behaviour*; *Departmental Personnel Instruction No 1/2001 Equity and Diversity in the Department of Defence*; and *Defence Instruction (General) Personnel 35-3 Management and Reporting of Unacceptable Behaviour*;
- c. Equal Opportunity for Women in the Workplace policy as detailed in the DPPM;
- d. Defence Stocktaking policy as detailed in the DI (G) LOG 4-3-014.
- e. Freedom of Information policy as detailed in the DPPM;
- f. Hazardous Substances policy as detailed in the DPPM;

Option: For when acquisition contracts valued at more than \$5 million dollars.

- g. Maximising Employment Opportunities for Aboriginal and Torres Strait Islanders policy as detailed in the DPPM;
- h. Ozone Depleting Substances Policy as detailed in the DPPM; and
- i. Industry Capability Network policy as detailed in the DPPM.

- 11.3.2 Notwithstanding clause 1.5, if the SOW is inconsistent with a policy mentioned in clause 11.3.1, the Contractor shall comply with the SOW to the extent of the inconsistency.

11.4 Occupational Health and Safety (Core)

- 11.4.1 The Contractor shall perform its obligations under the Contract in such a way that:

- a. Commonwealth employees (as defined in Section 9(1) of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*) are able to participate in any necessary inspections of work in progress and tests and evaluations of the Supplies without the Commonwealth being in breach of; and
 - b. the Commonwealth is, as from Acceptance of the Supplies, able to maintain and to make full use of the Supplies for the purposes for which they are intended without being in breach of,
- any Occupational Health and Safety statutory requirements which apply to the Supplies.

11.5 Environmental Obligations (Core)

- 11.5.1 The Contractor shall perform its obligations under the Contract in such a way that:
- a. the Commonwealth is not placed in breach of; and
 - b. the Commonwealth is able to support and to make full use of the Supplies for the purposes for which they are intended without being in breach of,
- any applicable environmental legislation including the Environment Protection and Biodiversity Conservation ACT 1999.

11.6 Severability (Core)

- 11.6.1 If any part of the Contract is or becomes illegal, invalid or unenforceable, the legality, validity or enforceability of the remainder of the Contract shall not be affected and shall be read as if that part had been severed.

11.7 Privacy (Core)

- 11.7.1 The Contractor shall:
- a. use or disclose Personal Information obtained during the course of performing the Contract, only for the purposes of the Contract;
 - b. not do any act, or engage in any practice that would breach an Information Privacy Principle contained in section 14 of the Privacy Act 1988, which if done or engaged in by an agency, would be a breach of that Information Privacy Principle;
 - c. not use or disclose Personal Information, or engage in an act or practice that would breach section 16F of the Act, or an National Privacy Principle, particularly National Privacy Principles 7 through to 10 or an Approved Privacy Code, unless:
 - (i) in the case of section 16F, the use or disclosure is necessary, directly or indirectly, to discharge an obligation under the Contract; or
 - (ii) in the case of an National Privacy Principle or an Approved Privacy Code, if the activity or practice is engaged in for the purpose of discharging, directly or indirectly, an obligation under the Contract, and the activity or practice is inconsistent with the National Privacy Principle or Approved Privacy Code;
 - d. notify individuals whose Personal Information is held by the Contractor or Subcontractor, as the case may be, of the complaints mechanism outlined in the Act that may apply to the Contractor;
 - e. disclose in writing to any person who asks, the content of the provisions of the Contract (if any) that are inconsistent with a National Privacy Principle or an Approved Privacy Code binding a party to the Contract;
 - f. carry out and discharge the obligations contained in the Information Privacy Principles as if it were an agency under the Act; and
 - g. ensure that any officer, employee or agent of the Contractor who is required to deal with Personal Information for the purposes of the Contract, is made aware of the obligations of the Contractor as set out in this clause 11.7.
- 11.7.2 The Contractor shall promptly notify the Commonwealth Representative if the Contractor:

- a. becomes aware of a breach or possible breach of any of the obligations contained in, or referred to in, clause 11.7, whether by the Contractor or a Subcontractor;
- b. becomes aware that a disclosure of Personal Information may be required by law; or
- c. receives a request or inquiry from the Privacy Commissioner, or by any individual to whom any Personal Information held by the Contractor or Subcontractors relates, in respect of Personal Information.

11.7.3 The Contractor shall ensure that all Subcontracts entered into for the purposes of fulfilling its obligations under the Contract contains provisions to ensure that each Subcontractor has the same awareness and obligations as the Contractor has under clause 11.7, including the requirement in relation to Subcontracts.

12. DISPUTES AND TERMINATION

Note to drafters: Where the resultant payment regime will NOT include milestone payments, drafters must amend all clauses by removing references to Milestones.

12.1 Resolution of Disputes (Core)

- 12.1.1 A party shall not commence court proceedings relating to any dispute arising from the Contract except where that party seeks urgent relief from a court or where dispute resolution has failed under clause 12.1. If a party fails to comply with clause 12.1 the other party is not required to undertake dispute resolution for the dispute in accordance with clause 12.1.
- 12.1.2 If a dispute arising between the Commonwealth and the Contractor cannot be settled by negotiation (including negotiation between senior management of the parties) within [...INSERT PERIOD...] days, the parties may agree to use an alternative dispute resolution process to attempt to resolve the dispute.
- 12.1.3 The parties shall at all times during the dispute continue to fulfil their obligations under the Contract.

12.2 Contractor Default (Core)

12.2.1 Immediate Termination for Default

- 12.2.1.1 The Commonwealth may immediately terminate or reduce the scope of the Contract by notice in writing to the Contractor if the Contractor:
- a. becomes bankrupt or insolvent;
 - b. becomes subject to one of the forms of external administration provided for in Chapter 5 of the *Corporations Act 2001*;
 - (i) the appointment of a person to administer a scheme or compromise in relation to the body in accordance with Part 5.1 of the *Corporations Act 2001*;
 - (ii) the appointment of a controller or managing controller to the whole or any part of its assets or undertakings in accordance with Part 5.2 of the *Corporations Act 2001*;
 - (iii) the appointment of an administrator under Part 5.3A of the *Corporations Act 2001*; or
 - (iv) the appointment of a liquidator in relation to the body;
 - c. becomes subject to any form of administration under the laws of a non-Australian jurisdiction, which is the same as, or substantially equivalent to, one of those referred to in clause 12.2.1.1;
 - d. is wound up by resolution or an order of the court;
 - e. suffers execution against any of its assets which has an adverse effect on the Contractor's ability to perform its obligations under the Contract;
 - f. makes an assignment of its estate for the benefit of creditors or enters into any arrangement or composition with its creditors;
 - g. becomes an insolvent under administration;
 - h. ceases to carry on business;
 - i. fails to obtain or ceases to hold any relevant licence, approval, authorisation or consent required to enable it to comply with its obligations under the Contract, except to the extent that the failure or cessation was outside of the Contractor's reasonable control;
 - j. breaches any of its obligations under clause 5;

- k. commits any breach (other than a breach the subject of clause 12.2.2) for which the Contract provides a notice of termination for default may be given;
- l. assigns its rights other than in accordance with the requirements of the Contract; or

Option: For when Milestones will be used under the Contract.

- m. fails to complete any of the following Stop Payment Milestones by the relevant Milestone Date:
 - (i) [...LIST IDENTIFIED STOP PAYMENT MILESTONE OR CROSS REFERENCE TO ANNEX B TO ATTACHMENT B...];
- n. fails to comply with any of the following requirements by the relevant due date;
 - (i) [...LIST SPECIFIC SOW REQUIREMENTS OR OTHER CONTRACTUAL EVENTS IN RELATION TO WHICH PERFORMANCE BY SPECIFIC DATES ARE REQUIRED, E.G. REFERENCE TO ITEMS AND DATES IN THE DELIVERY SCHEDULE...]
- o. without limiting the Commonwealth's other rights under this clause, has committed a Default of a kind that the Contractor has been required by the Commonwealth to remedy under clause 12.2.2 on two or more prior occasions, whether or not the Contractor has remedied the Default on those occasions; or
- p. has otherwise regularly or persistently failed to meet any, some or all requirements of the Contract, whether or not the Commonwealth has required the Contractor to remedy a Default under clause 12.2.2.

12.2.1.2 To avoid doubt, the Commonwealth is not required to provide prior notice, either orally or in writing, of an exercise of its rights under clause 12.2.1.

12.2.2 Termination following Default Notice

- 12.2.2.1 For clause 12.2, a 'Default' exists if the Commonwealth considers that the Contractor has:
- a. failed to commence work under the Contract within [...INSERT NUMBER...] days after the Effective Date;

Option: For when Milestones will be used under the Contract.

- b. failed to complete any Milestone (other than a Milestone mentioned in clause 12.2.1m) by the relevant Milestone Date;
- c. failed to deliver any Supplies by the relevant date for delivery of Supplies set out at Annex A to Attachment B; or
- d. failed to comply with another obligation to be performed or observed under the Contract.

12.2.2.2 The Commonwealth may notify the Contractor in writing of a Default ("Default Notice") and require the Contractor to remedy the Default within the period specified in the Default Notice.

- 12.2.2.3 If the Commonwealth issues a Default Notice, the Contractor shall:
- a. remedy the Default within the period specified in the Default Notice;
 - b. comply with any directions given to the Contractor by the Commonwealth in relation to the Default; and

- c. mitigate all loss, costs (including the costs of its compliance with any directions) and expenses in connection with the Default, including those arising from affected Subcontracts.

12.2.2.4 The Commonwealth may immediately terminate or reduce the scope of the Contract by notice in writing to the Contractor if the Contractor fails to:

- a. commence remedying the Default within the period specified in the Default Notice; or
- b. remedy the Default within the period specified in the Default Notice.

Option: For when clause 8.5 is used.

12.2.3 Termination for Reaching Liability Cap

12.2.3.1 Without limiting the Commonwealth's other rights under clause 12.2, the Commonwealth may immediately terminate or reduce the scope of the Contract by notice in writing to the Contractor, if the Contractor would have, except for the operation of clause 8.4, been liable for Commonwealth loss in relation to:

- a. one of the liability caps provided for in clause 8.4 to an amount equal to or greater than the amount of the liability cap; or
- b. any one or more of the liability caps provided for in clause 8.4 to an amount in aggregate equal to or greater than the Contract Price.

12.2.4 General Termination Provisions

12.2.4.1 If the Contract is terminated under clause 12.2 or otherwise:

- a. the Contractor shall deliver to the Commonwealth, as required by the Commonwealth, all documents in its possession, power or control or in the possession, power or control of its officers, employees, agents or Subcontractors and Personnel, which contain or relate to any Commercial-in-Confidence Information or which are security classified;

Option: For when a Mobilisation Payment is used.

- b. the Contractor shall repay the Mobilisation Payment or any portion of the Mobilisation Payment that has not been offset in accordance with clause 7.5;

- c. subject to clause 12.5, the parties shall be relieved from future performance, without prejudice to any right of action that has accrued at the date of termination;

Option: For when Limitation of Liability is used.

- d. subject to the liability caps in clause 8.4 and the process set out in clause 12.3, the right to recover damages, including full contractual damages, shall not be affected;

- e. the Contractor shall deliver the TD for Supplies produced prior to the date of termination, within 30 days after receipt of the notice of termination, or other period agreed by the parties; and

Option: For when CMCA is used.

- f. the Contractor shall return all CMCA in its possession, power or control or in the possession, power or control of its officers, employees, agents or Subcontractors and Personnel.

12.2.4.2 To avoid doubt, and despite anything else in the Contract, if the Contractor delays in meeting a Milestone, delivering Supplies or complying with any other obligation in accordance with the Contract, each day of delay is a new breach of the Contract for which the Commonwealth may exercise its rights under this clause or at law, notwithstanding any conduct by the Commonwealth or election not to terminate the Contract for a previous breach of the Contract.

- 12.2.4.3 The rights of the Commonwealth to terminate or reduce the scope of the Contract under clause 12.2 are in addition to any other right or remedy the Commonwealth may have in relation to the Contract.

12.3 Termination for Convenience (Core)

- 12.3.1 In addition to any other rights it has under the Contract, the Commonwealth may at any time terminate the Contract or reduce the scope of the Contract by notifying the Contractor in writing.
- 12.3.2 If the Commonwealth Representative issues a notice under clause 12.3.1, the Contractor shall:
- a. stop work in accordance with the notice;
 - b. comply with any directions given to the Contractor by the Commonwealth; and
 - c. mitigate all loss, costs (including the costs of its compliance with any directions) and expenses in connection with the termination, including those arising from affected Subcontracts.
- 12.3.3 The Commonwealth shall only be liable for:
- a. payments under the payment conditions of the Contract for work conducted before the effective date of termination; and
 - b. any reasonable costs incurred by the Contractor that are directly attributable to the termination,

when the Contractor substantiates these amounts to the satisfaction of the Commonwealth Representative.
- 12.3.4 The Contractor shall not be entitled to profit anticipated on any part of the Contract terminated.
- 12.3.5 The Contractor, in each Approved Subcontract, shall secure the right of termination and provisions for compensation functionally equivalent to that of the Commonwealth under clause 12.3.

12.4 Right of Commonwealth to Recover Money (Core)

- 12.4.1 Without limiting the Commonwealth's rights under the Contract, if the Contractor owes any debt to the Commonwealth in relation to the Contract, the Commonwealth may at its discretion exercise one or both of the following:
- a. deduct the amount of the debt from payment of any claim; or
 - b. provide the Contractor with written notice of the existence of a debt recoverable which shall be paid by the Contractor within 30 days of receipt of notice.
- 12.4.2 If the amount of any debt owed by the Contractor is not fully recovered by the Commonwealth under clause 12.4.1, the Commonwealth may exercise any or all of its rights in respect of any security provided in accordance with clause 7.4 or 7.5.
- 12.4.3 If the Commonwealth deducts the amount of a debt from any payment or security, it shall notify the Contractor in writing that it has done so.
- 12.4.4 If any sum of money owed to the Commonwealth is not received by its due date for payment, the Contractor shall pay to the Commonwealth interest at the Reserve Bank of Australia cash rate target current at the date the payment was due for each day the payment is late.
- 12.4.5 Nothing in clause 12.4 shall affect the right of the Commonwealth to recover from the Contractor the whole of any debt owed by the Contractor, or any balance that remains owing after deduction.

12.5 Survivorship (Core)

12.5.1 Any term of the Contract which expressly or by implication from its nature is intended to survive the termination or expiration of the Contract and any rights arising on termination or expiration shall survive, including Commercial-in-Confidence Information, IP, Right of the Commonwealth to Recover Money, Defence Security, Spare Parts and Support Equipment and any warranties, guarantees, licences, indemnities or financial and performance securities given under the Contract.

SIGNED AS AN AGREEMENT

SIGNED for and on behalf of

THE COMMONWEALTH OF AUSTRALIA:

(signature)

(print name and position)

(date)

In the presence of:

(signature)

(print name)

(date)

SIGNED for and on behalf of

THE CONTRACTOR:

Note to drafters: Appropriate execution clauses, and instruction on their use, may be found in the ASDEFCON (Complex Materiel) Handbook.

[...INSERT APPROPRIATE CONTRACTOR'S EXECUTION CLAUSE...]