ASDEFCON
Technical Data and Intellectual Property

Commercial Handbook
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9 April 2018
ASDEFCON Technical Data and Intellectual Property Commercial Handbook

Authority

This Handbook does not create new mandatory procurement policy. All Defence mandatory procurement policy is contained in the Defence Procurement Policy Manual or other Defence policy documents. This Handbook is intended as a guide only. The ASDEFCON templates set out detailed provisions relating to Technical Data, Software and Intellectual Property and this Handbook is not a substitute for reading and understanding those provisions and the specific contracts relating to each project.

Monitor and Review

The content of this Handbook will be reviewed whenever relevant sections of any of the identified references are updated or amended.

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Chapter 1

Introduction

Background

1. Defence established the Defence and Industry Intellectual Property Working Group (DIIPWG) to undertake a review of the way in which Intellectual Property (IP) rights are treated and managed under the ASDEFCON suite of contracting templates. The objectives of this review is to:
   a. balance the IP interests of Defence and Industry;
   b. better reflect the importance of Technical Data (TD) and Software and their relationship with IP, particularly so that items of TD and Software can be used as intended;
   c. reflect an efficient and commercially realistic treatment of TD, Software and IP issues;
   d. streamline the negotiation of IP, TD and Software provisions by promoting an understanding of the relative requirements of Defence and Industry; and
   e. improve the IP and TD management practices of both Defence and Industry, including IP and TD markings.

2. The review has resulted in substantial changes to the IP regime in the ASDEFCON contracting suite and other Defence technical guidance.

Purpose and use of this document

3. This Handbook outlines the approach to IP ownership and licensing under contracts for the acquisition of Defence capability (Capability) based on the ASDEFCON Strategic Materiel v3.1 template (Contracts). It explains the rationale of the approach to the IP in TD and Software supplied under the Contract and how the clauses are intended to operate.

4. This Handbook is intended to be used by Defence staff in preparing and negotiating Defence contracts, as well as providing guidance to Industry personnel in understanding Defence’s approach to TD and Software when tendering and contracting.

5. This Handbook is not intended to be used to identify the TD or Software that is to be provided to Defence or how it is to be managed. These matters are to be determined by project and technical staff in accordance with published technical guidance and engineering documentation1.

Nature of IP in Defence contracts

Intellectual Property or IP refers to legal rights that protect original ideas in the industrial, scientific, literary and artistic fields. These rights include copyright and rights relating to circuit layouts, patents, registrable designs and trademarks. The most important right held by owners of intellectual property is the right to decide who can use the original idea and on what terms.

6. The main source of IP rights in Defence contracts is Copyright. Copyright is the exclusive right to reproduce or copy an original work in a material form, to publish the work and to communicate the work to the public. Copyright will generally exist in relation to documentation and computer programs provided to Defence under a Contract. Accordingly, the focus of the IP clauses is on the three main types of Copyright works – TD, Software and Contract Material.

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7. There are a range of other types of IP that may arise in the context of a Contract, including Moral Rights, Circuit layouts, Patents and Registered Designs. The IP clauses in the Contract also include licences and warranties relating to these forms of IP.
Chapter 2

TD, Software and IP under Defence Contracts

What is Technical Data?

**TD** is technical or scientific data, know-how or information, reduced to a material form (whether stored electronically or otherwise) in relation to the Materiel System. TD includes calculations, data, databases, designs, design documentation, drawings, guides, handbooks, instructions, manuals, models, plans, reports, simulations, sketches, specifications, standards, training materials, test results.

1. TD also includes Source Code. Source Code is the expression of Software in human readable form (i.e. typed code) which is necessary to understand, maintain, modify and enhance that Software.

2. TD includes information that describes the performance, functional and physical attributes of the relevant Capability as well as information required for its operation and support.

3. TD does not include financial, contract management and administrative data (e.g. contract master schedules, project management plans, risk management plans, contract status reports and meeting agendas/minutes). This material is classified as Contract Material under the Contract.

What is Software?

**Software** is computer code that instructs a computer to bring about a certain result or perform tasks. Software includes computer programming languages that control a computer or its peripheral devices, and also firmware and installed applications.

4. The definition of Software does not include software documentation or Source Code. These are both TD for the purpose of the Contract.

5. The Software included in Supplies provided to the Commonwealth under a Contract may not always be obvious. Software may be included as firmware embedded in a piece of equipment, such as a military radio or aviation guidance system. Software may also be included in the Support System (e.g. in satellite monitoring and control equipment or test equipment to calibrate maintenance tools).

Importance of TD and Software

6. The IP provisions in the Contract recognise the fundamental importance of TD and Software as "enablers" of capability outcomes. The focus is on the TD and Software required to achieve capability outcomes and the IP rights for that TD and Software. This approach is similar to the approach adopted by the US Department of Defense under the US Defense Federal Acquisition Regulation.
7. The TD and Software related to a Capability procured under a Contract is crucial to ensuring that the Commonwealth obtains the most effective and efficient use of the Capability. For example, TD and Software for the Capability (i.e. operator manuals, maintenance manuals and product specifications) enable the Commonwealth and its contractors to use and repair that product in the field, at sea or in the air. Other TD and Software may be used to record and understand the performance of the Capability, with such performance information critical to ensuring that the Capability can be used effectively and safely.

8. The Contract recognises the flow of TD and Software from a range of Defence contractors, including as part of the acquisition and support phases of a project. The Contract allows for different items (provided by different contractors and with different IP rights) being combined in a single item.

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**Relationship between IP rights and TD/Software**

9. A critical element is the relationship between TD and Software and the associated IP rights. As noted above, TD and Software are key enablers of capability outcomes. An IP right, on the other hand, is the legal "permission" to use the relevant TD or Software to achieve those capability outcomes.

10. Defence contracts have often focused on the IP rights required by the Commonwealth, using the categories of Foreground IP, Background IP and Third Party IP. This IP-centric approach results in:
   a. the Commonwealth seeking IP rights for a broader category of TD and Software than necessary;
   b. the obligation to deliver TD being driven by what is required for the Commonwealth's IP rights rather than what is required for capability purposes;
   c. unnecessary Commonwealth ownership of valuable IP to avoid "gaps";
   d. a mix of IP rights in individual items of TD or Software; and
   e. extensive negotiations on IP rights with often insufficient clarity around what IP, and for what purposes the IP, is being sought by Defence.

11. Under the new approach, the Contract is focussed on the usable items of TD and Software delivered under the Contract with the IP rights being defined by reference to that TD and Software. The aim is to minimise the mixture of IP rights within individual items of TD and Software and to avoid seeking IP rights that the Commonwealth does not actually need to achieve capability outcomes.
12. This approach enables the Contractor, and its Subcontractors, to consider on a "per item" basis (rather than using abstract IP concepts) whether to:

a. restrict the Commonwealth from using an item of TD or Software in a way that might raise concerns for the owner of the IP; or

b. offer to supply the relevant IP rights to the Commonwealth to enable the use of the TD and Software for the particular activity (and include a price for doing so in its tender).
Chapter 3

Key Concepts

**TD and Software categories**

1. The Contract refers to a number of different categories of TD and Software.

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highly Sensitive TD and Software</td>
<td>Existing TD or Software brought to a Contract by the Contractor (or Approved Subcontractor) where disclosure of this to third parties would have a major adverse effect on the Contractor (or Approved Subcontractor) and its commercial position in the market.</td>
</tr>
<tr>
<td>Commercial TD and Software</td>
<td>TD and Software relating to &quot;Commercial-Off-The-Shelf (COTS)&quot; or &quot;Military-Off-The-Shelf (MOTS)&quot; items. These are known as Commercial Items. This category includes free and open source software.</td>
</tr>
<tr>
<td>Commonwealth TD and Software</td>
<td>TD or Software in which the Commonwealth requires IP ownership. As described in Chapter 8, this category will only be used where there are compelling reasons (e.g. national security reasons) and the grant of a licence to the Commonwealth is insufficient to advance or protect these interests.</td>
</tr>
<tr>
<td>Government Furnished Material</td>
<td>TD and Software provided as part of Government Furnished Material (GFM). This may include TD relating to equipment being installed on a Mission System, or Software procured by the Commonwealth under Foreign Military Sales or under a separate Defence contract.</td>
</tr>
<tr>
<td>TD and Software</td>
<td>Any TD and Software delivered under the Contract that does not fit within one of the categories listed above. It is likely that the majority of TD and Software delivered under a Contract will fall within this category.</td>
</tr>
</tbody>
</table>

2. These mutually exclusive categories were developed to assist the Commonwealth and Contractors to determine the licensing approach that is most suitable to a particular item of TD or Software.

3. Categorising TD and Software in this way enables different ownership and rights to be applied to each category. The categories are mutually exclusive: each item of TD and Software should fall within only one category, because the category will determine the ownership and rights that apply to the IP in the item.

4. The Contract also includes a category of material called **Contract Material** which has different licensing rights. This category does not cover TD and Software. This category is further described at Chapter 10 below.

**Ownership vs licensing of IP**

5. The Contract does not seek to change the ownership of any existing IP.
6. In relation to new IP (i.e. IP created under the Contract or a Subcontract), the default position is that the Contractor (rather than the Commonwealth) will be the owner. The Contract adopts this approach because the Contractor will generally be in the best position to obtain the commercial benefits of exploitation of the IP.

7. However, if the Commonwealth requires ownership of IP in specific items of TD or Software, those items should be identified as **Commonwealth TD** or **Commonwealth Software**. Items should only be categorised as Commonwealth TD or Software if a licence of the TD or Software granted to the Commonwealth would be insufficient to protect the Commonwealth's interests. For example, IP ownership may be required if:

   a. Defence's **strategic interests** will be better served. For example, where Commonwealth ownership of IP is needed to enable the development of a strategic Australian Industry Capability;

   b. for **national security reasons** the Commonwealth needs to control the use or disclosure of the TD and Software; or

   c. the new IP builds upon **existing IP owned by the Commonwealth** or a Commonwealth Contractor.

**Delivery of TD and Software**

8. The IP provisions in the Contract are focussed on the TD and Software required to be delivered under the Contract. This includes TD and Software required to achieve the relevant Specifications or required under the Statement of Work or the Contract Data Requirements List.

9. Importantly, the IP provisions do not apply to various other documents used or created by the Contractor or Subcontractors that are not Contract deliverables. For example, the IP provisions do not require rights in relation to working documents and drafts created by the Contractor or a Subcontractor in the background which are not delivered under the Contract. Further guidance regarding delivery is at Chapter 11 paragraphs 11-13 below.

**Licences and Sublicences**

10. Under the Contract, the Contractor must grant to the Commonwealth (or ensure that the Commonwealth is granted) "Licences" of TD, Software and Contract Material. Licence is a defined term.

A **Licence** granted by the Contractor:

- is worldwide and perpetual;
- does not require the Commonwealth to pay any additional payment (e.g. Royalty);
• cannot be revoked by the Contractor or the Contractor’s successors; and
• does not permit the Commonwealth to exploit the IP in TD, Software or Contract Material to earn royalties or profits.

11. A Licence permits the Commonwealth to grant Sublicences, subject to particular conditions (see Chapter 11 paragraph 1 below). There may also be additional restrictions on the ability of the Commonwealth to grant Sublicences in respect of certain items of TD and Software as further described in Chapters 5 and 6 below.

12. In some cases, the IP provisions do not use the defined terms "Licence" and "Sublicence". For example, the Contractor is not required to obtain a "Licence" in the context of Commercial TD or Commercial Software as this is usually not viable. In these cases, the IP provisions use the terms "licence" and "sublicence" which have their ordinary meaning.

"Defence Purpose"

13. The concept of a "Defence Purpose" is central to the Commonwealth's rights under the Contract.

A Defence Purpose is a purpose related to the defence and defence interests of Australia, the national security of Australia, the provision by Defence of aid or assistance (in respect of an emergency or disaster) or peacekeeping or peace enforcement activities.

14. Defence Purposes is intended to have a broad meaning to cover the activities that Defence undertakes as part of its role and functions.

"Use"

15. The Licences set out in the IP provisions give the Commonwealth (and its sublicensees) the right to "Use" the relevant TD, Software and Contract Material.

Use means to:
• use, reproduce, adapt and modify the TD, Software or Contract Material in accordance with the licence; and
• disclose, transmit and communicate the TD, Software or Contract Material:
  • to the licensee's employees, officers and agents; and
  • to a sublicensee under a sublicense granted in accordance with the licence.

16. The definition of Use reflects the terminology in IP legislation or terms commonly used in the context of IP. The following table sets out some examples of the types of activities that are covered by the definition of Use.

<table>
<thead>
<tr>
<th>Use</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use</td>
<td>To use, understand, apply, or run the TD, Software or Contract Material.</td>
</tr>
<tr>
<td>Reproduce</td>
<td>To make a copy of the TD, Software or Contract Material, including an electronic, photographic or handwritten copy or partial copy.</td>
</tr>
<tr>
<td>Adapt</td>
<td>To adapt the form or medium of the TD, Software or Contract Material. For example, from a manual to a video demonstration.</td>
</tr>
<tr>
<td>Modify</td>
<td>To modify the arrangement, content, configuration, performance or functionality of the TD, Software or Contract Material.</td>
</tr>
<tr>
<td>Disclose</td>
<td>To provide access to the TD, Software or Contract Material, including by revealing or permitting the viewing of it.</td>
</tr>
<tr>
<td>Transmit</td>
<td>To send to another person the TD, Software or Contract Material, including by unguided or guided electromagnetic energy or by post.</td>
</tr>
<tr>
<td>Communicate</td>
<td>To discuss, describe or announce the TD, Software or Contract Material.</td>
</tr>
</tbody>
</table>
Commercial TD and Commercial Software

17. As noted above, the Contract includes provisions which apply to Commercial TD and Commercial Software. Commercial TD and Commercial Software are defined by reference to "Commercial Items".

**A Commercial Item** is an item that is able to be used for its intended purpose, without requiring any significant changes to be made to the item by the Contractor or a Subcontractor to use it for that purpose, and the item is available in the market on standard commercial terms.

18. Commercial Items are essentially "off the shelf" items, i.e. COTS products available to the general public or MOTS products commonly provided on an "as is" basis. Some examples of Commercial Items are contained in the table below.

<table>
<thead>
<tr>
<th>COTS</th>
<th>MOTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small scale generators</td>
<td>Ruggedized laptops</td>
</tr>
<tr>
<td>Engines</td>
<td>Millitarised commercial radios</td>
</tr>
<tr>
<td>Commercial system or database software (e.g. Windows, Oracle)</td>
<td></td>
</tr>
</tbody>
</table>

19. These items do not need to be modified or only need minor modification or reconfiguration (e.g. complex enterprise resource planning software will often require a degree of configuration to reflect each user's unique business requirements).

20. **Commercial Software** is Software that is a Commercial Item, or any Software that is supplied under the standard commercial terms applicable to a Commercial Item.

This could include, for example, a Microsoft Office product or firmware embedded in a piece of industrial test equipment. The definition of Commercial Software captures all Free and Open Source Software (being software distributed on a free to use basis without payment of a royalty or other fee).

21. **Commercial TD** is TD that is a Commercial Item, or that is supplied under standard commercial terms applicable to a Commercial Item or Commercial Software.
21. Commercial TD could include the operating manual for a microwave or a laptop, or a book of specialised diagrams or calibration guides for use in undertaking scientific measurements or engineering assessments.

Role and structure of the TDSR Schedule

22. The provisions relating to IP ownership and licensing for TD, Software and Contract Material are set out in the Conditions of Contract. These provisions can be modified by the parties through the TD and Software Rights (TDSR) Schedule (Attachment G to the Contract). The TDSR Schedule is able to identify additional restrictions which can override some of the Commonwealth’s rights granted under the Conditions of Contract.

23. The TDSR Schedule is not an exhaustive list of all TD or Software to be provided under the Contract or a Subcontract. The Approved TD List (forming part of the Master TD Index) and the Approved Software List will list all relevant TD and Software. The TDSR Schedule will only list specific TD or Software where a restriction applies to the Commonwealth’s rights under the Conditions of Contract.

24. Tenderers will be required to provide a draft TDSR Schedule as part of their tenders to enable the Commonwealth to understand the restrictions required by the tenderer in any resultant Contract. For a Contract involving the provision of “developmental” Supplies, the TDSR Schedule will need to be periodically updated as all relevant information may not be known at the time of contract signature. However, for all Contracts, it is important that the TDSR Schedule is regularly reviewed so it is kept up to date and contains an accurate and complete description of all restrictions on the Commonwealth’s rights to Use and Sublicense TD, Software and Contract Material delivered under the Contract.
Chapter 4

Ownership

Pre-existing IP

1. The Contract does not change the ownership of pre-existing IP (or IP created outside the Contract and the Subcontracts). Ownership of IP in TD and not created under the terms of the Contract is not affected by the Contract, although a Licence to such material is still required.

Contractor ownership of new IP

1. As noted in Chapter 3 paragraphs 5 - 7 above, the default position is that the Contractor (or its nominee) will own the IP in the TD, Software and Contract Material created under the Contract or a Subcontract, subject to the exceptions listed below.

2. This does not mean that the Contractor will own IP in material created by the Commonwealth such as internal Commonwealth research or assessments. This material is not created under the Contract unless there is an obligation on the Commonwealth to produce such material.

Commonwealth TD and Software

3. As noted in Chapter 3 paragraphs 5 - 7 above, the Commonwealth may, where there are compelling reasons to do so, elect to own (or elect its nominee to own – e.g. another Commonwealth Contractor) IP created under the Contract or Subcontract in specified items of TD or Software. In these cases, the relevant TD or Software would need to be categorised as Commonwealth TD or Commonwealth Software in the TDSR Schedule.

4. In most cases the IP in Commonwealth TD or Commonwealth Software will be IP developed under the Contract. However, if these items also contain pre-existing IP (or IP created outside the Contract), the Contract will not change the ownership of the IP. This IP will be covered by the Licence granted (or procured) by the Contractor in respect of all other TD or Software delivered under the Contract (see Chapter 5 below).

GFM

5. Any new IP created under the Contract or a Subcontract in respect of GFM will be generally be owned by the Commonwealth (or its nominee). This is because the Commonwealth or another Commonwealth Contractor is likely to own the pre-existing IP in the GFM and therefore should own any new IP that is derived from, supplements or improves the GFM. In addition, if the Commonwealth does not own the IP in the GFM, the Commonwealth may be obliged to assign ownership in any improvements or enhancements to the GFM back to the original IP owner.

6. However, the parties may agree that new IP created in respect of the GFM will be owned by the Contractor (rather than the Commonwealth) by specifying this in Attachment E to the Contract. This option might be appropriate where:

   a. the Contractor owns part of the IP in the GFM from an earlier contract; or
b. where the Contractor is in the best position to exploit or further develop the new IP.

7. If it is agreed that the Contractor will own any new IP in GFM, this IP will be licensed to the Commonwealth under the general Licence to be granted (or procured) by the Contractor in respect of TD or Software delivered under the Contract (see Chapter 5 below).
Chapter 5

TD and Software

Overview

1. As described at Chapter 3 paragraphs 1 -4 above, there are a number of categories of TD and Software under the Contract, namely:
   a. Highly Sensitive TD and Highly Sensitive Software;
   b. Commercial TD and Commercial Software;
   c. Commonwealth TD and Commonwealth Software;
   d. GFM; and
   e. all other TD or Software that is delivered, or required to be delivered, under the Contract.

2. This Chapter 5 describes the licensing arrangements that apply to the last of the above mentioned categories of TD and Software. It is expected that the majority of TD and Software delivered under the Contract will be licensed to the Commonwealth on this basis.

3. The licensing arrangements applicable to the other above categories of TD and Software are dealt with in Chapters 6 – 9 of this Handbook.

4. The Contractor must grant the Licence itself or ensure the Licence is granted by the relevant owner of the IP. If the Contractor is unable to the grant the Licence itself, it must procure the grant of that Licence from the relevant licensor (i.e. the Subcontractor or a previous supplier that owns the IP in the TD and Software). The following diagram sets out the structure of this licence.

**Commonwealth right to Use the TD or Software**

5. The Commonwealth has the right to Use the TD or Software for any Defence Purpose. This right is internal to the Commonwealth and therefore cannot be made subject to any additional restrictions by the Contractor under the TDSR Schedule.

6. This right ensures that the Commonwealth (through its employees and officials) is able to make use of the Supplies and undertake Defence activities without having to pay additional licence fees or obtain additional consents, provided the Use is for Defence Purposes. However, the Commonwealth is not able to Commercialise the TD and Software (see Chapter 11 paragraphs 2 - 4 below).

7. The Commonwealth’s rights to sublicense this category of TD and Software are dealt with in clause 5.3.
Sublicensing to Commonwealth Service Providers

8. The Commonwealth has a right to grant a Sublicence in respect of the TD or Software to certain "above the line" contractors referred to as Commonwealth Service Providers.

A Commonwealth Service Provider is a person engaged to perform a function, or discharge a duty, of the Commonwealth, including a person engaged to provide:
- professional, administrative, contract management or project management services to the Commonwealth;
- technical management or assurance services, including verification and validation, safety, certification, security or capability development.

9. Defence engages these "above the line" contractors to assist Defence to perform its functions or duties. Examples include individuals engaged to perform technical, program management, commercial or administrative roles within a project or System Program Office (SPO), as well as larger professional service providers, such as accountancy or engineering firms providing a range of "above the line" services to Defence to support the delivery or operation of multiple projects or business units.

10. Commonwealth Service Providers essentially "stand in the shoes" of the Commonwealth and may be required to perform a wide range of activities typically performed by Commonwealth employees and officials. For this reason, it is necessary that Commonwealth Service Providers have sufficient rights to perform the services for which they have been engaged and not be subject to further restrictions in the TDSR Schedule.

11. However, given that Commonwealth Service Providers will have access to a range of commercially sensitive or Confidential Information, the Contract protects the interests of the Contractor (and Subcontractors) in a number of ways, including by ensuring that Commonwealth Service Providers:
   a. enter into confidentiality deeds before receiving any Confidential Information;
   b. are only able to Use the TD and Software to perform their obligations, functions, or duties.

12. There is nothing in the Contract which prohibits the Commonwealth from engaging a direct competitor of the Contractor in an above-the-line position. However the parties may agree to exclude direct competitors from being Commonwealth Service Providers (by listing them in the TDSR Schedule).

Sublicensing TD and Software to "any person"

13. The Commonwealth may grant a Sublicence to any other person to Use the TD or Software for certain "default" activities. These activities are considered integral to the Commonwealth's ability to undertake a range of routine activities with respect to the Supplies provided under the Contract and achieve the required Capability and strategic objectives of the Contract. The "default" activities are:
   a. installing or configuring the Supplies;
   b. physically integrating the Supplies with other systems;
   c. operating or maintaining the Supplies;
   d. rectifying any Defect in the Supplies where the Contractor has failed to rectify the Defect;
   e. undertaking training in relation to the Supplies;
   f. removing or uninstalling the Supplies;
   g. decommissioning or destroying the Supplies; and
h. enabling the person to respond to requests for tender etc.

14. Given the fundamental importance of these "default" activities, the Commonwealth's right to grant a Sublicence in relation to these cannot be made subject to any further restrictions in the TDSR Schedule.

15. The Commonwealth can also grant a Sublicence to a person to Use an item of TD or Software for any other purpose, including to modify and upgrade the Supplies. However, the Contractor may require restrictions in relation to the right to grant Sublicences for these broader purposes that fall outside the list of default activities. For example, the Contractor may restrict the Commonwealth from granting a Sublicence to a third party to use an item of TD for the purpose of manufacturing the associated equipment or product to which the TD relates. Any such restrictions would be agreed by the parties and included in the TDSR Schedule.
Chapter 6

Highly Sensitive TD and Software

Overview

1. As noted at Chapter 3 paragraphs 1 - 4 above, TD or Software may be categorised as Highly Sensitive TD or Highly Sensitive Software. The effect is that the Contractor may impose restrictions on the Commonwealth's right to Use and sublicense the TD or Software to other persons.

Licence Structure

Restrictions on rights to Use and Sublicence

2. As the baseline position, the Commonwealth has the right to:
   a. Use the Highly Sensitive TD or Highly Sensitive Software for any Defence Purpose; and
   b. grant a Sublicence to a person to Use the Highly Sensitive TD or Highly Sensitive Software.

3. However, recognising the highly valuable and sensitive nature of this category of TD and Software from the Contractor's perspective, the Commonwealth's rights in relation to Highly Sensitive TD or Software can be made subject to restrictions in the TDSR Schedule. This includes the Commonwealth's own rights to Use the TD or Software and, more importantly, the Commonwealth’s right to grant a Sublicence to other persons. The parties may (in appropriate circumstances) agree to restrictions on the use of Highly Sensitive TD or Software even in the context of the "default" activities referred to in Chapter 5 paragraphs 13 - 15.

4. These restrictions may include, as appropriate for the relevant Highly Sensitive TD or Software:
   a. a narrower purpose for which TD or Software may be Used (i.e. narrower than Defence Purposes);
   b. preventing the Commonwealth from granting a sublicense to specific entities (or individuals); or
   c. requiring the Commonwealth to provide the Contractor with details of disclosures.

What type of TD or Software is Highly Sensitive?

5. As noted above, the Contractor can impose restrictions on the Commonwealth's own Use of the Highly Sensitive TD or Software and the Commonwealth's right to grant a Sublicence, including in relation to the "default" activities.

6. In most Contracts only a very small amount of TD or Software will qualify as Highly Sensitive TD or Software. Much of this TD or Software is expected to relate to technologies that the Contractor (or a Related Body Corporate) has developed at its own (or a Related Body
Corporate’s) expense and is technology that is core to the Contractor’s (or Group’s) competitive edge.

7. The Commonwealth will not agree to TD or Software being included in this category without strong justification, which would need to be considered on a case by case basis. Relevant factors include:

a. whether the TD or Software was created under a contract with the Commonwealth or was otherwise funded by the Commonwealth; and

b. whether provision of the TD or Software to a third party would cause significant damage to the Contractor’s (or Subcontractor’s) commercial position in the market.
Chapter 7

Commercial TD and Software

Overview

1. As noted at Chapter 3 paragraphs 1 - 4 above, Commercial TD and Software are associated with certain "off the shelf" Commercial Items. The Contract recognises that it is not feasible nor value for money for the Commonwealth to require the Contractor to obtain broad IP rights from suppliers of Commercial Items. The Contractor (and Subcontractors) will have limited (if any) commercial leverage to negotiate IP licences with these suppliers. As such, the obligations of the Contractor in relation to IP in the Commercial TD or Commercial Software are more limited than for other types of TD or Software.

Licence Structure

2. The IP provisions require the Contractor to obtain licences on the "best commercial terms" available to the Contractor for the majority of Commercial TD and Software provided under the Contract. The Contractor should review the commercial licence terms for any Commercial Item to be supplied under a Contract to ensure they are the best terms available to the Contractor from the market. The Contractor also needs to ensure that the terms relating to Commercial TD and Software will not impact on the capability (i.e. by preventing the capability from being used and supported as intended). The Contractor is not required to specify these best available commercial terms in the TDSR Schedule.

Key Commercial Items

3. The IP provisions recognise that for some Commercial Items (known as "Key Commercial Items") an IP licence on the "best commercial terms" may not be sufficient to enable the Commonwealth to use and support the Capability. As such, for "Key Commercial Items" a different licence regime applies.

A Key Commercial Item includes a Commercial Item where the IP in the related TD or Software is owned by the Contractor, its Related Bodies Corporate or an Approved Subcontractor. There may be other Commercial Items to be delivered under the Contract that the Commonwealth requires to be categorised as Key Commercial Items.

4. The Contractor and its Related Bodies Corporate and Approved Subcontractors are in a better position to provide the Commonwealth with a broader set of rights to the IP in Commercial TD or Commercial Software than the standard commercial terms offered by other commercial suppliers.
5. The Contract outlines a "baseline" for licences relating to Key Commercial Items, being that the Commonwealth has the right to use the relevant TD or Software for the "default" purposes referred to in Chapter 5 paragraphs 13 - 15 above. However, the parties can agree to further restrictions on these "default rights" by including such restrictions in the TDSR Schedule.

6. The Contractor is also required to ensure that there are no fees or royalties payable for licences of Commercial TD and Commercial Software (without the Commonwealth's written consent), in addition to the agreed Contract Price. For example, any ongoing "per annum" licence fee for the use of Commercial Software that is not factored into the Contract Price must be agreed by the Commonwealth.
Chapter 8

Commonwealth TD and Software

Overview

1. As noted at Chapter 3 paragraphs 17 - 21 above, the Commonwealth may require ownership of IP in certain TD or Software, in which case that TD or Software will be categorised as Commonwealth TD and Software in the TDSR Schedule. Commonwealth TD and Commonwealth Software includes any developments, modifications or improvements made to the Commonwealth TD or Commonwealth Software.

2. In order to enable the Contractor (and its Subcontractors) to use the Commonwealth TD or Software, the IP provisions include a licence granted by the Commonwealth in favour of the Contractor.

Licence Structure

Commonwealth Technical Data/Software

Licence to Commonwealth TD and Commonwealth Software

3. The Commonwealth grants a limited royalty-free licence of Commonwealth TD and Software to the Contractor. The limited licence enables the Contractor to Use the Commonwealth TD and Commonwealth Software to perform its obligations under the Contract. For example, the Contractor may create training materials to be owned by the Commonwealth as Commonwealth TD, but the Contractor is also required to use those materials to provide a range of "train the trainer" courses.

4. The licence also permits the Contractor to sublicense the Commonwealth TD and Commonwealth Software to a Subcontractor to perform the Subcontract. For example, in the training situation described above, the Contractor may have created the training materials and engaged the Subcontractor to provide part of the training.

Restrictions on Commonwealth TD and Commonwealth Software

5. The licence of Commonwealth TD and Commonwealth Software is subject to any restrictions imposed by the Commonwealth. These restrictions may be included in the TDSR Schedule or may be notified to the Contractor by the Commonwealth. For example, if the Commonwealth has determined that it should own IP in certain Commonwealth TD or Commonwealth Software for national security reasons, the Commonwealth may include a restriction in the TDSR Schedule that prevents the Contractor from sublicensing the Commonwealth TD or Commonwealth Software to a particular foreign entity.

Identifying Commonwealth TD and Commonwealth Software

6. While it is expected that all (or at least most) IP in Commonwealth TD and Software will be created under the Contract, Commonwealth TD and Software may include some pre-existing IP
or IP created outside the Contract. If so, the Contractor is required to provide a Licence of this IP on the terms set out in Chapter 5, above.

7. If any Commonwealth TD or Commonwealth Software contains pre-existing IP (or non-contract IP), the Commonwealth will generally not agree to restrictions being included in the TDSR Schedule. This is because such restrictions would impact on the use of the Commonwealth TD and Software and potentially undermine the national security or other reason that was the basis for seeking Commonwealth ownership of the IP. However, if pre-existing material (or non-contract IP) included in Commonwealth TD or Software is properly categorised as Highly Sensitive TD or Software, the parties would need to negotiate and agree changes to deal with this situation.
Chapter 9

GFM Licence

Overview

1. The Commonwealth often provides TD and Software to assist the Contractor or Subcontractors to perform obligations under the Contract or a Subcontract. This TD forms part of Government Furnished Data (GFD) or Government Furnished Information (GFI), and Software is provided as part of Government Furnished Equipment (GFE). Collectively, these are known as Government Furnished Material (GFM).

2. The TD or Software provided as GFM may take various forms and be provided directly by the Commonwealth under the Contract (e.g. login guides for remote access) or by other Commonwealth Contractors pursuant to their contracts with the Commonwealth (e.g. maintenance manuals for equipment manufactured by the other Commonwealth Contractor).

Licence Structure

Licence to GFM

3. The Commonwealth grants (or must procure the grant of) a limited licence to the Contractor for IP in GFM sufficient for the Contractor to perform the Contract. The limited licence enables Contractor to Use the TD and Software in the GFM to perform its obligations under the Contract. For example, the Contractor may be provided with an operator's manual produced by an original equipment manufacturer so the Contractor can design a training course in using the equipment.

Restrictions on GFM

4. The licence of GFM is subject to any restrictions imposed by the Commonwealth as set out in Attachment E to the Contract. This may include a "pass through" of restrictions that the Commonwealth is subject to under its arrangements with the owner of IP in the GFM. For example, the Commonwealth may have agreed with the IP owner that the Commonwealth (or its contractors) will not give the material to certain parties (e.g. prohibited competitors) or will not use the TD or Software in the GFM to manufacture an item of GFE.

Sublicensing of IP in GFM

5. Subject to any restrictions in the licence granted by the Commonwealth, the Contractor may sublicense the IP in GFM to enable a Subcontractor to perform its obligations under a Subcontract. The sublicense will need to comply with sublicensing requirements equivalent to those which govern the Commonwealth's ability to sublicense (see Chapter 11 paragraph 1 below).
Export Approvals

6. The Commonwealth is responsible for ensuring that any Export Approvals that apply to an item of GFM are listed in the Attachment E to the Contract. This ensures that both the Commonwealth and the Contractor are actively considering the Export Approvals and all parties are aware of relevant requirements and restrictions, such as under ITARs or under the Customs Act 1901 (Cth) or Defence Trade Controls Act 2012 (Cth), when dealing with the provision of GFM to the Contractor under the Contract.
Chapter 10

Contract Material

Overview

1. The Contract includes a category of Contract Material that is separately licensed from the TD and Software.

**Contract Material** means information, other than TD or Software, reduced to a material form (whether stored electronically or otherwise) that is delivered or required to be delivered to the Commonwealth under the Contract (see Glossary).

2. Contract Material is essentially any information reduced to material form that is required to be delivered under the Contract that is not categorised as TD or Software. It includes a range of non-technical material (e.g. contract administration material, price and costing data, performance reporting, contract process guidance, transactional or management reporting, business rules or instructions that are required to be provided by the Contractor to the Commonwealth). If a document includes elements of technical and non-technical material, it is to be treated as an item of TD.

**Licence Structure**

**Commonwealth’s right to Use the Contract Material**

3. The Commonwealth (through its own employees and officials) has the right to Use any Contract Material for any Defence Purpose. This ensures that the Commonwealth will not have to seek additional consents to use the Contract Material for internal Defence purposes.

**Sublicensing to Commonwealth Service Providers**

4. The Commonwealth may grant a Sublicence of Contract Material to entities engaged as Commonwealth Service Providers. A Commonwealth Service Provider will be able to Use the Contract Material to perform its obligations, functions or duties owed to the Commonwealth in its capacity as a Commonwealth Service Provider. However, any Confidential Information in Contract Material is subject to the same protective measures as are described in Chapter 5 paragraphs 8 - 12.

**Sublicensing Contract Material to any other person**

5. The Commonwealth may grant a Sublicence to any other person to Use the Contract Material for any purpose. However, this is subject to the application of the Confidential Information clauses. Any Confidential Information in Contract Material (e.g. labour rates, unit prices and
other sensitive business information) cannot be disclosed except in limited circumstances (e.g. with Contractor consent).

**Restrictions on Contract Material**

6. The Contractor cannot impose restrictions on the Licence of IP in Contract Material under the TDSR Schedule. However, as noted in paragraph 5 above, the Commonwealth’s ability to disclose Contract Material may be limited by the Confidential Information provisions of the Contract.
Chapter 11

Other ASDEFCON Provisions

Sublicensing Conditions

1. The Commonwealth's right to grant a Sublicence of TD, Software or Contract Material is subject to some additional conditions as described in the table below:

<table>
<thead>
<tr>
<th>CONDITION</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sublicence must have at least the same restrictions as apply to the Commonwealth</td>
<td>Any restrictions applicable to the Commonwealth must, at a minimum, be &quot;flowed&quot; through to any Sublicensee. For example, if the Commonwealth is unable to disclose Highly Sensitive TD to a specific competitor, any Sublicence granted by the Commonwealth must also restrict disclosure to that specific competitor. To ensure no broader rights than are necessary are granted to Sublicensees, the Commonwealth will generally impose additional restrictions on Sublicensees.</td>
</tr>
<tr>
<td>Sublicence rights to be limited to what is reasonably necessary</td>
<td>The Commonwealth should not grant sublicence rights that are not actually required. If the Commonwealth needs to grant a Sublicence to another Commonwealth Contractor, it must limit the scope to the rights reasonably necessary to enable the Commonwealth Contractor to efficiently perform its obligations to the Commonwealth.</td>
</tr>
<tr>
<td>Sublicence must expire when no longer required</td>
<td>The Commonwealth should not grant perpetual Sublicences. A Sublicence to a Commonwealth Contractor should be limited to the term of the relevant Contract or should expire when no further obligations are required to be performed by the Commonwealth Contractor.</td>
</tr>
<tr>
<td>Further sublicences shall be subject to these conditions</td>
<td>If the Commonwealth grants a Sublicence, any further sublicence granted by the relevant Sublicensee must be similarly constrained.</td>
</tr>
</tbody>
</table>

No Commercialisation

2. The Commonwealth (and any sublicensee) is not permitted to Commercialise the IP in any TD, Software or Contract Material licensed under the Contract.

Commercialise means to exploit IP in TD, Contract Material or Software to earn royalties or profit.

3. This restriction prevents the Commonwealth and its Sublicensees from using TD, Software or Contract Material to obtain a profit or some other financial return or monetary advantage. For example, the Commonwealth cannot grant a sublicence of TD to a third party to enable the third party to compete in an international commercial or defence market (not involving the Commonwealth) against the IP owner.

4. However, this restriction does not prevent a Sublicence being granted to enable the Commonwealth to obtain supplies from another person for a Defence Purpose consistent with the Commonwealth’s rights granted under the Contract. For example, it is not Commercialisation for the Commonwealth to grant a Sublicence of TD or Software obtained under an acquisition contract, to a contractor to support an upgrade to the relevant Capability, or to obtain sustainment services.
Approved Subcontractor IP Deeds

5. The Contractor is required to obtain and provide to the Commonwealth an IP Deed from certain Approved Subcontractors. An IP Deed involves a direct Licence from the Approved Subcontractor to the Commonwealth. The Commonwealth can rely on the Licences granted to it under the IP Deed where the Licences granted to the Commonwealth under the Contract are unenforceable or invalid for any reason (including where the Contractor has suffered an Insolvency Event). However, the provision of an IP Deed does not replace the Contractor’s obligations under the Contract to obtain Licences of Subcontractor IP and grant a sublicence to the Commonwealth.

6. The parties will need to agree which Approved Subcontractors must provide an IP Deed. In general, IP Deeds should not be required for Subcontractors providing TD or Software for routine or low value Supplies. Tenderers will identify any proposed Subcontractors that will create or own IP in significant items of TD or Software. The Approved Subcontractors that must provide IP Deeds should be agreed in contract negotiations and reflected in the Contract. Where subcontractor details are not known at contract signature, this list will need to be updated at appropriate intervals over the life of the Contract.

Failure to obtain IP rights

7. The Contract recognises that it may be difficult for Contractors to obtain IP rights for TD, Software and Contract Material. An inability or failure to obtain IP rights in accordance with the Contract is a breach. There are a range of rights that the Commonwealth may have in this situation.

8. The Contract also includes a process to assist Contractors to resolve issues in obtaining IP rights (e.g. from Subcontractors). The Contractor must notify the Commonwealth of any such issues (e.g. where the Contractor is unable to obtain an IP Deed required under the Contract).

9. If the Contractor gives notice (or if the Commonwealth considers that an IP issue has arisen), the Commonwealth may take steps to resolve the IP issue in the best overall interests of the Capability. For example, if the Contractor is having difficulty securing IP rights from a proposed Subcontractor, one solution might be for the Contractor use alternative goods or services or modify the design so that the proposed Subcontractor is not required. There may be ways to mitigate the impact of the failure to obtain the required IP rights.

10. This process does not limit the Commonwealth’s other rights under the Contract or the Contractor’s obligations under the Contract, unless the Commonwealth agrees to waive or modify a requirement of the Contract as a result of the IP issue. This process is designed to provide the parties with a pragmatic means for resolving unanticipated IP issues to avoid the Commonwealth having to resort to other remedies under the Contract in the interests of achieving the best overall outcomes for the Commonwealth.
Delivery obligations

11. As noted at Chapter 3 paragraphs 8 - 9, the IP rights are linked to TD, Software and Contract Material delivered under the Contract. There are a number of parts of the Contract which set out items to be delivered, including the following:

   a. **SOW (and its Annexes):** This includes the process for delivery and the development of, and updates to, TD and Software in the form of various technical plans, reports, design documentation, assessments, lists, descriptions and other documents;

   b. **Contract Data Requirements List (CDRL):** This brings together the majority of the Contractor's TD, Software and Contract Material delivery obligations. It describes the documents to be delivered, the frequency and form of delivery and the Commonwealth's obligations to review or Approve; and

   c. **TD List and Software List:** These are lists developed and maintained by the Contractor in accordance with the CDRL and the SOW.

12. In most cases the Commonwealth will be the recipient of TD or Software delivered under a Contract. However, in some cases, the Commonwealth may not be the recipient of that material (e.g. where maintenance manuals are to be delivered to a sustainment contractor rather than the Commonwealth). The Commonwealth can nevertheless request a copy of any TD included on the TD and Software lists maintained by the Contractor unless there are specific restrictions agreed in the TDSR Schedule preventing re-delivery of the item for specific reasons.

13. If the Contract is terminated for default, the Contractor is required to deliver all TD and Software in its current state of development. This does not require that the Contractor meet all of its future obligations to deliver TD and Software that would have applied under the Contract had it not been terminated. It only applies to any TD and Software that has been developed at the time of termination. This ensures the Commonwealth gets the benefit of all TD and Software (including partly completed TD and Software) that it has funded under a Contract.

Electronic Delivery of TD, Software or Contract Material

14. The Contract recognises the increased use of electronic means for the transmission of information. Electronic delivery of TD, Software and Contract Material may occur in the following circumstances:

   a. **Accessible on Contractor Systems:** The parties may agree that an item of TD, Software or Contract Material will be delivered by making that item accessible for use by the Commonwealth on an information system of the Contractor. This allows for easy updating, correction and distribution by the Contractor to its staff and subcontractors; and

   b. **Electronic communication or transfer:** The Contract also contemplates the delivery of an item of TD, Software or Contract Material either through electronic communication (e.g. by email) or by electronic transfer into an information system nominated by the Commonwealth (e.g. uploaded into Objective).

Markings

15. As part of the Contractor's responsibility for managing IP, it will apply labels, writing or other markings to TD, Software or Contract Material. For example, a drawing may be marked with "Copyright of XYZ Pty Ltd" or "No copying without permission of XYZ Pty Ltd". The Contractor is required to ensure that any markings are accurate and properly reflect the rights of all relevant parties.

16. While such markings are important in assisting the Contractor in managing IP rights associated with TD, Software or Contract Material, these markings are not determinative of the Commonwealth's rights to use the relevant item.
Patents, Registrable Designs and Circuit Layouts

17. As noted at Chapter 1 paragraphs 6 - 7 above, the key IP that is relevant to Defence contracts is Copyright in TD, Software and Contract Material. However, for completeness, the Contract includes provisions relating to Patents, Registrable Designs or Circuit Layouts to ensure the Commonwealth obtains all relevant IP consents and authorisations in relation to the Supplies.

18. The Contractor is required to provide a warranty and to ensure that the Commonwealth is granted a licence to any Patent, Registrable Design or Circuit Layout that is necessary to use or support the Supplies for the purposes provided for in the Contract and to include any restrictions on that licence in the TDSR Schedule.

Escrow

19. There can sometimes be highly sensitive TD or Software that a Contractor (or a Subcontractor) is not willing to deliver to the Commonwealth (e.g. source code). The Commonwealth may nevertheless need to access the TD or Software in certain circumstances (e.g. where the Contractor or Subcontractor has become insolvent or is no longer carrying on business). In these cases, the relevant TD or Software can be placed into "escrow". This means it is put in the custody of an independent third party (an "Escrow Agent") who may release it to the Commonwealth if, and only if, defined “release events” occur.

20. The Contract includes optional clauses for dealing with an escrow situation. There needs to be an Escrow Agreement setting out the escrow arrangements and the Escrow Agent must meet certain requirements (for example that the escrow occurs in Australia).

21. A key issue with escrow arrangements is that the TD or Software held by the Escrow Agent can become redundant and superseded. It is also important to ensure that all security requirements are met where the TD or Software to be placed in escrow is security classified material. Accordingly, the Statement of Work contains provisions requiring the TD or Software held by the Escrow Agent to be updated.

Export Approvals

22. The Contract expressly recognises that the IP regime does not interfere with the obligations of either party to comply with the terms of a binding export approval. The parties will need to comply with both the IP obligations and any requirements or restrictions relating to export approvals. That is, despite any rights under the Contract to sublicense TD or Software to another person, all relevant export approvals must be in place before any export controlled material can be transferred to the sublicensee.
Chapter 12

Confidential Information

Protection of Confidential Information

1. The Contract imposes confidentiality obligations on both parties. These obligations apply to any Confidential Information included in the TD, Software and Contract Material delivered under the Contract. For example, TD may contain the trade secrets of the Contractor or include information that is commercially sensitive from a competition perspective.

2. The Confidential Information provisions set out the primary requirements for managing Confidential Information under the Contract address the interaction of those clauses with the IP regime.

Interaction with IP regime

3. In relation to TD and Software, the Contract recognises that the parties have negotiated and agreed detailed IP provisions setting out the rights of the parties to sublicense the material to third parties. Therefore, the confidentiality provisions should not further restrict the Commonwealth’s ability to provide TD and Software to third parties in accordance with the agreed licence rights. The Contractor (and Subcontractors) are able to protect their interests under the IP provisions and should not be using the confidentiality regime to undermine the utility of the Commonwealth’s IP rights agreed between the parties.

4. Accordingly, where the Contractor has granted the Commonwealth a right to use and sublicense TD or Software, the Commonwealth should be able to disclose any Confidential Information of the Contractor in that TD or Software if:
   a. the disclosure is permitted by the terms of licence granted to the Commonwealth; and
   b. the party has complied with any other confidentiality requirements (e.g. confidentiality deeds poll have been obtained).

5. The position is different in relation to Contract Material. In general, the Commonwealth must obtain the Contractor’s consent to the disclosure of Confidential Information in Contract Material (noting that the IP provisions do not allow Contractors to place restrictions on the rights granted in relation to Contract Material). However, under the Contract, the Commonwealth is able to disclose Confidential Information in Contract Material to other persons in their capacity as a Commonwealth Service Provider (provided that confidentiality deeds poll have been obtained and the person is not excluded under the TDSR Schedule). For all other third parties, the Commonwealth can generally only disclose the Confidential Information in Contract Material if the Commonwealth has obtained the Contractor’s consent for the disclosure.

6. The limited circumstances in which the Commonwealth can disclose Confidential Information in Contract Material to other persons that are not Commonwealth Service Providers are described in Chapter 12 paragraphs 7 – 8, below.

Other permitted disclosures

7. The Contract allows for the disclosure of Confidential Information of a party without that party’s consent in certain limited circumstances, including:
   a. as required or authorised by law;
   b. as necessary for the conduct of any legal proceedings arising in connection with the Contract;
c. where the Commonwealth is the disclosing entity, to a Minister or Parliament in accordance with statutory or portfolio duties or functions, or for public accountability reasons; or

d. to a legal adviser, insurer, financier, auditor or accountant;

e. where the Contractor is the disclosing entity, to a Related Body Corporate for internal management purposes; and

f. to personnel of the parties (and Subcontractors in the case of the Contractor) who need to know the information to perform their duties and functions.

8. The IP provisions specifically recognise these permitted disclosures under the Contract and allow a party to sublicense the relevant IP for purposes consistent with these disclosures.