



Australian Government
Defence

[INSERT NAME OF CAPABILITY/SYSTEM] SUPPORT CONTRACT

CONTRACT NO: (INSERT NUMBER)

DETAILS SCHEDULE

PARTIES

COMMONWEALTH OF AUSTRALIA represented by the Department of Defence
ABN 68 706 814 312 (Commonwealth)

Commonwealth Representative:	(INSERT DETAILS)		
Notice Details:	Address:	(INSERT ADDRESS)	
	Fax:	(INSERT FAX NUMBER)	
	Email:	(INSERT EMAIL ADDRESS)	

(INSERT FULL NAME OF CONTRACTOR) ABN (INSERT CONTRACTOR'S ABN) (Contractor)

Contractor Representative:	(INSERT DETAILS)		
Notice Details:	Address:	(INSERT ADDRESS)	
	Fax:	(INSERT FAX NUMBER)	
	Email:	(INSERT EMAIL ADDRESS)	

INFORMATION TABLE

Item	Information		
Item 1 (clause 1.7)	Initial Term: (Core)	Effective Date:	(INSERT DATE)
		Expiry Date:	(INSERT DATE)
Item 2 (clause 1.8)	Options to Extend: (Optional)	Number of Options:	[INSERT NUMBER]
		Option Period:	[INSERT PERIOD OF EACH OPTION]
Item 3	Base Date: (Core)	[INSERT DATE]	
		Note to drafters: Base Date should be the date one month prior to the date on which tenders close.	
Item 4 (clause 7.4)	Mobilisation Payment: (RFT Core)	Mobilisation Payment:	(INSERT AMOUNT)
Item 5		Mobilisation Security Amount:	(INSERT AMOUNT)

Item	Information			
(clause 7.5)	Bank Guarantee for Mobilisation Payment: (RFT Core)	Mobilisation Security Date:	(INSERT DATE)	
Item 6 (clause 7.6)	Bank Guarantee for Performance: (RFT Core)	Performance Security Amount:	[INSERT AMOUNT]	
		Performance Security Date:	[INSERT DATE]	
		Release Event:	[INSERT RELEASE EVENT]	
Item 7 (clause 7.8)	Deed of Guarantee and Indemnity: (RFT Core)	<input type="checkbox"/> Yes / <input type="checkbox"/> No Guarantor: (INSERT NAME)		
Item 8 (clause 7.12) (optional)	GST Agent: (Optional)	Name:	(INSERT NAME)	
		Address:	(INSERT ADDRESS)	
		Fax:	(INSERT FAX NUMBER)	
		Email:	(INSERT EMAIL ADDRESS)	
Item 9 (clause 8.1.1)	Defect Notification Period (Core)	From the Effective Date until [INSERT PERIOD] after expiry or earlier termination of the Contract.		
Item 10 (clause 8.2.1)	Defect Rectification Period (Core)	If the Defect is a Latent Defect, [INSERT PERIOD] after the date of Acceptance of the Deliverable or, for any Service that is not subject to Acceptance, completion of the relevant Service in accordance with the Contract. If the Defect is not a Latent Defect, [INSERT PERIOD] after the date of Acceptance of the Deliverable or, for any Service that is not subject to Acceptance, completion of the relevant Service in accordance with the Contract.		
Item 11 (clause 9.1) Note to drafters: Delete insurance policies if they do not apply.	Approved Contractor Insurance Program Status (Core)	<input type="checkbox"/> Yes / <input type="checkbox"/> No		
	Limits of indemnity for required insurances: (Core)	Public liability (Clause 9.1.1b)	[\$[INSERT AMOUNT]] million each and every occurrence	
		Products liability (Clause 9.1.1b)	[\$[INSERT AMOUNT]] million each occurrence and in the annual aggregate for all occurrences	
		Professional indemnity (Clause 9.1.1c)	[\$[INSERT AMOUNT]] million each claim and in the annual aggregate for all claims	
		Motor vehicle liability (Clause 9.1.1g)	[\$[INSERT AMOUNT]] million each and every occurrence.	

Item	Information		
Item 12 (clause 10.6)	Limitation Amount: (Core)	[INSERT AMOUNT]	
Item 13 (clause 11.9)	Approved Subcontractor Threshold: (Optional)	[INSERT \$A AMOUNT PER ANNUM] per annum.	
Item 14 (clause 13.1)	Management Representatives: (position) (Core)	Commonwealth:	(INSERT)
		Contractor:	(INSERT)
Item 15 (clause 13.1)	Senior Representatives: (position) (Core)	Commonwealth:	(INSERT)
		Contractor:	(INSERT)
Item 16 (clause 11.10)	Defence Security: (Core)	Security classification of information, assets and work to be performed under the Contract: (clause 11.10.3)	[INSERT CLASSIFICATION]
		Personnel security clearance: (clause 11.10.3b)	[INSERT CLASSIFICATION]
		DISP membership required: (clause 11.10.4 or 11.10.5) Note to Drafters: Delete DISP Governance Level, DISP Personnel Security Level, DISP Physical Security Level and DISP Information / Cyber Security Level if DISP membership is not required.	<input type="checkbox"/> Yes / <input type="checkbox"/> No
		DISP Governance Level:	[INSERT LEVEL]
		Note to Drafters: In accordance with Section 16 of the DSPF, the DISP membership level required for the Governance	[INSERT SPECIFIC DETAILS IF REQUIRED]

Item	Information			
	<p>element must equal the highest DISP membership level required for the other elements.</p>			
	DISP Personnel Security Level:	<p>[INSERT LEVEL] [INSERT SPECIFIC DETAILS IF REQUIRED]</p>		
	DISP Physical Security Level:	<p>[INSERT LEVEL] [INSERT SPECIFIC DETAILS IF REQUIRED]</p>		
	DISP Information / Cyber Security Level:	<p>[INSERT LEVEL] [INSERT SPECIFIC DETAILS IF REQUIRED]</p>		
	Security Classification and Categorisation Guide included: (clause 11.10.7)	<p><input type="checkbox"/> Yes / <input type="checkbox"/> No</p>		
	COMSEC material: (clause 11.10.9) <input type="checkbox"/> Yes / <input type="checkbox"/> No	<table border="1"> <tr> <td data-bbox="938 974 1174 1120"><input type="checkbox"/> transmitted in Australia</td> <td data-bbox="1174 974 1409 1120"><input type="checkbox"/> transmitted overseas</td> </tr> </table>	<input type="checkbox"/> transmitted in Australia	<input type="checkbox"/> transmitted overseas
<input type="checkbox"/> transmitted in Australia	<input type="checkbox"/> transmitted overseas			
<p>Item 17 (clause 12.1)</p>	<p>Governing law: (Core)</p>	<p>[INSERT RELEVANT STATE OR TERRITORY]</p>		

DRAFT CONDITIONS OF CONTRACT

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1 CONTRACT FRAMEWORK (CORE)

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 in the Details Schedule or the Glossary at Attachment C.

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 any 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 that 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;
- 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 specified in the Details Schedule, 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;
- 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; and
- l. a provision stating that a party 'may' agree or consent to something, approve or reject something, or take or decline to take an action, means that the party may exercise its discretion in deciding whether or not to do so, and may impose conditions on any such agreement, consent or approval.

1.3 Precedence of Documents (Core)

1.3.1 If there is any inconsistency between parts of the Contract, a descending order of precedence shall be accorded to:

- a. the COC (including the Details Schedule) and the Glossary (other than the referenced documents in the Glossary);
- b. in relation to an S&Q Service, the S&Q Order for the S&Q Service;
- c. the SOW and its annexes;
- d. the Attachments other than the SOW and the Glossary; and
- e. any document expressly incorporated as part of the Contract,

so that the provision in the higher ranked document, to the extent of the inconsistency, shall prevail.

1.4 Effective Date (Core)

1.4.1 The Contract commences on the Effective Date specified in the Details Schedule.

1.5 Operative Date (Optional)

Note to drafters: An Operative Date allows for the provision of Recurring Services to commence after the Effective Date. If Services commence immediately from the Effective Date, then the following clauses may be replaced with a single 'Not used'. If an Operative Date is required,

drafters need to define the date or an event that establishes the Operative Date, and review the scope of the obligations placed on both parties prior to the Operative Date. For more extensive Operative Date clauses refer to the ASDEFCON (Support) COC template.

- 1.5.1 The Commonwealth has no obligations under the Contract before the Operative Date other than:
- a. to the extent provided for in this clause 1.5;
 - b. to action data items in accordance with clause 2.3 of the SOW;

Option: If clause 6.4, Performance Relief, is included in the draft COC, then include this clause.

- c. the obligations under clause 6.4, where a delay is caused by a Commonwealth failure to perform its obligations under clause 1.5.4b;
 - d. the obligations under clause 11.4, for the protection of Confidential Information;
 - e. payments for Services that are specified in the Contract or by notice from the Commonwealth Representative, to be provided before the Operative Date (eg, repair of faulty GFM, before the Operative Date, if requested by the Commonwealth); and
 - f. **[...INSERT ANY OTHER APPLICABLE COMMONWEALTH OBLIGATIONS...]**.
- 1.5.2 Clause 1.5.1 does not limit or affect the Commonwealth's rights under the Contract, including rights in relation to the Contractor's obligations under this clause 1.5.
- 1.5.3 Unless otherwise specified by the Commonwealth Representative, by notice to the Contractor, the **'Planned Operative Date'** shall be **[...INSERT PERIOD (EG, "20 Working Days after the Effective Date") OR EVENT...]**.
- 1.5.4 On or before the Planned Operative Date:
- a. the Contractor shall:
 - (i) receive deliveries of, or collect, and inspect or functionally check (as applicable) GFM, in accordance with Attachment G;
 - (ii) obtain the Support Resources necessary to be able to provide the Services;
 - (iii) provide any financial securities required under clauses 7.5 and 7.6; and

Note to drafters: Additional requirements may include obtaining export approvals, etc.

- (iv) **[...INSERT REQUIRED LIST ITEM...]**; and
- b. the Commonwealth shall:
 - (i) in accordance with clause 2.3 of the SOW, action any data items that are required to be delivered and actioned by the Commonwealth before the Operative Date;
 - (ii) deliver to, or provide the Contractor with access to, GFM in accordance with Attachment G; and

Note to drafters: Additional requirements may include training Contractor staff in the use of Defence information systems, etc. If linked to a Contract (Acquisition) this may include the evaluation, for purposes of acceptance, of the supplies under that contract.

- (iii) **[...INSERT REQUIRED LIST ITEM...]**.
- 1.5.5 Subject to clause 1.5.6, if the Commonwealth is satisfied that all obligations under clause 1.5.4 have been met, the Commonwealth Representative shall issue a notice to the Contractor specifying the **'Operative Date'** for the Contract, which shall be either:
- a. the Planned Operative Date; or
 - b. the date that the Commonwealth Representative acknowledges, in the notice, that the obligations under clause 1.5.4 were fully performed.
- 1.5.6 If, for any reason, an obligation under clause 1.5.4 has not been performed by the Planned Operative Date, or a requirement under clause 1.5.4 otherwise cannot be met, the Commonwealth may, by notice to the Contractor, elect to:
- a. specify a new date as the Planned Operative Date;

- b. waive the requirement for the Contractor to perform the obligation by the Planned Operative Date (subject to conditions, if any, specified in the notice, which may include conditions as to when the obligation is to be performed) and issue a notice under clause 1.5.5; or
- c. if the Commonwealth Representative considers that:
 - (i) an obligation under clause 1.5.4a is unlikely to be met within an acceptable period, terminate the Contract in accordance with clause 13.2; or
 - (ii) a requirement under clause 1.5.4, other than an obligation of the Contractor, is unlikely to be met within an acceptable period, terminate the Contract in accordance with clause 13.4.

1.6 Entire Agreement (Core)

- 1.6.1 To the extent permitted by law, the Contract represents the parties' entire agreement in relation to its subject matter of the Contract and supersedes all tendered offers and prior representations, communications, agreements, statements and understandings, whether oral or in writing.

1.7 Term (Core)

- 1.7.1 The Contract expires at the end of the Initial Term specified in the Details Schedule unless it is:

Option: For when clause 1.8 below is used.

- a. extended in accordance with clause 1.8; or
- b. terminated in accordance with the Contract or otherwise.

1.8 Options to Extend (Optional)

Note to drafters: To determine the timing for Extension Notices, consider the time for related and alternative actions, such as time to negotiate any changes to the Contract scope for the Option Period, or to re-tender the Contract if not extending it. Also consider that shorter periods for the Extension Notice will increase the risk of the Contractor's skilled staff being reassigned or lost.

- 1.8.1 The Commonwealth may extend the Contract for one or more Option Periods specified in the Details Schedule on the terms and conditions then in effect, by issuing an Extension Notice to the Contractor not less than [...INSERT NUMBER OF DAYS / MONTHS...] before the end of the Initial Term specified in the Details Schedule or the current Option Period, as applicable.
- 1.8.2 An extension to the Contract, in accordance with the Extension Notice, is subject to the Approval of a CCP in accordance with clause 11.1.
- 1.8.3 In exercising its discretion under clause 1.8.1, the Commonwealth shall take into account the performance of the Contractor during the Initial Term or Option Period, as applicable.

2 ROLES AND RESPONSIBILITIES (CORE)

2.1 Representatives (Core)

- 2.1.1 The Commonwealth Representative is responsible for managing the Contract on behalf of the Commonwealth.
- 2.1.2 The Contractor shall comply with the reasonable directions of the Commonwealth Representative made within the scope of the Contract.
- 2.1.3 If given orally, a direction shall be confirmed in writing by the Commonwealth Representative within 10 Working Days. Unless otherwise specified in the Contract, the Commonwealth Representative has no authority to waive any provision of, or release the Contractor from, its obligations under the Contract except in accordance with clause 11.1 or clause 10.4 of the SOW.
- 2.1.4 The Contractor Representative has the authority to represent the Contractor for the purposes of the Contract.
- 2.1.5 The Commonwealth Representative or the Contractor Representative:

- a. shall advise of a change in representative; and
- b. may delegate their functions under the Contract, or authorise another person on their behalf to carry out their functions under the Contract,

by giving a notice to the other party (including updated Notice Details specified in the Details Schedule, and the scope of the delegation or authorisation, as applicable).

- 2.1.6 Unless authorised by the Contract, any work performed or cost incurred by the Contractor in response to a communication from the Commonwealth Representative is at the Contractor's sole risk.

2.2 Notices (Core)

- 2.2.1 Unless the contrary intention appears, any notice under the Contract shall be effective if it is in writing, and sent from and delivered to the Commonwealth Representative or Contractor Representative, as the case may be, in accordance with the Notice Details specified in the Details Schedule.

- 2.2.2 A notice given in accordance with clause 2.2.1 is deemed to be delivered:

- a. if hand delivered, when received at the address;
- b. if sent by pre-paid post, in 3 Working Days when sent within Australia and in 8 Working Days when sent by air mail from one country to another;
- c. if sent as an email, when the email enters the recipient's information system, unless the sender's information system receives a message within 1 Working Day that the email has not been delivered to the recipient,

but if the receipt or entry into the information system is not on a Working Day or is after 5.00pm (recipient's local time) on a Working Day, the notice is taken to be received at 9.00am (recipient's local time) on the next Working Day.

3 PROVISION OF SERVICES

3.1 Language and Measurement (Core)

- 3.1.1 All information provided as part of the Services 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* (Cth), or, if Services are imported, units of measurement as agreed in writing by the Commonwealth Representative.

3.2 Standards of Work and Conformity (Core)

- 3.2.1 The Contractor shall:
- a. carry out its work under the Contract (including provision of the Services):
 - (i) in accordance with the standards specified in the Contract and all applicable laws; and
 - (ii) otherwise in accordance with good industry practice;
 - b. ensure that the Services conform to the requirements of the Contract; and
 - c. ensure that the Deliverables are compatible with and do not restrict the performance of, or adversely affect, other equipment specified or referred to in the Contract that will or may be used with the Deliverables.
- 3.2.2 For the purpose of this clause, 'good industry practice' means practices, methods and standards that would reasonably be expected from professional and experienced contractors in the relevant industry undertaking the same type of work as the Contractor in the same or similar circumstances.

3.3 Fitness for Purpose (Core)

- 3.3.1 The Contractor shall ensure that the Services are fit for the purposes provided for in the Contract, except to the extent that the failure of the Services to be fit for purpose results from a Commonwealth Default.

3.4 Authorisations (Core)

- 3.4.1 The Contractor shall, and shall ensure that its Subcontractors:
- a. obtain and maintain in full force all Authorisations (other than Export Approvals);
 - b. take all reasonable steps to obtain and maintain in full force all Export Approvals;
 - c. provide a copy of any Authorisations to the Commonwealth within 5 Working Days after request by the Commonwealth; and
 - d. ensure that all work under the Contract is performed and the Services are provided in accordance with all Authorisations.
- 3.4.2 The Contractor shall notify the Commonwealth Representative within 5 Working Days after receiving notification that an Authorisation is refused, revoked or qualified.
- 3.4.3 The Contractor shall notify the Commonwealth Representative within 5 Working Days after:
- a. the application for an Export Approval; or
 - b. the grant of, or a new requirement for, an Export Approval.
- 3.4.4 The Commonwealth Representative shall, on request by the Contractor, give the Contractor all assistance reasonably required to facilitate the provision of an Export Approval, including the provision of a certificate by the Commonwealth as to the end use of the Services.

Option: For when clause 3.6 below is used.

- 3.4.5 The Commonwealth shall take all reasonable steps to ensure that the provision and use of GFM under the Contract is permitted under all applicable Export Approvals.
- 3.4.6 The Contractor shall, on request by the Commonwealth, give the Commonwealth all assistance reasonably required to ensure that the provision and use of GFM under the Contract is permitted under all applicable Export Approvals.

- 3.4.7 If a party becomes aware of a breach of an Export Approval, it shall promptly notify the other party and co-operate with any investigation or disclosure to the relevant government authorities in relation to the breach.

3.5 Imports and Customs Entry (RFT Core)

- 3.5.1 The Contractor shall arrange customs entry and the payment of any customs duty applicable to any aspect of the provision of the Services at no additional cost to the Commonwealth except as provided in this clause 3.5.
- 3.5.2 The Contractor shall give the Commonwealth Representative a notice, including supporting evidence, of any variation to the rate of customs duty applicable to the Services between the Base Date specified in the Details Schedule and the relevant date of entry and:
- a. in the case of an increase, the Contractor may claim reimbursement of an amount equivalent to the extra customs duty payable as a consequence of the increase; or
 - b. in the case of a decrease, the Commonwealth may elect to recover from the Contractor under clause 13.6 an amount equivalent to the reduction in the customs duty payable as a consequence of the decrease. No amount shall be owing to the Commonwealth under this clause 3.5.2 until the Commonwealth elects to recover the amount.
- 3.5.3 The Commonwealth shall not be liable to reimburse the Contractor for any fine or penalty incurred by the Contractor under any Australian customs, excise or duty legislation applicable to the importation of the Services.

3.6 GFM – Provision and Management (Optional)

Note to drafters: This clause 3.6, SOW clause 3.10 and Attachment G are optional but interdependent and must be inserted or omitted as a package. If no GFM is to be provided, then the clauses under clause 3.6 may be replaced with a single “Not used” (and Attachment G would also be “Not used”).

- 3.6.1 The Commonwealth shall deliver or provide access to, and the Contractor shall manage, the GFM in accordance with the Contract.
- 3.6.2 The Commonwealth shall notify the Contractor of any known damage, Defect or deficiency in the GFM.

- 3.6.3 The Contractor acknowledges that:
- a. the Commonwealth's obligations to deliver or provide access to GFM on the dates described in the Contract or the GFM section of an S&Q Order may be subject to the Contractor performing the Services 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 deliver or provide the Contractor with access to GFM or Products (as applicable).
- 3.6.4 The Contractor shall ensure that the use of GFM does not adversely affect the provision of the Services or the operation of the Products.

Option: For when GFI is to be provided.

- 3.6.5 The parties acknowledge that the GFI is not furnished to the Contractor for the purpose of 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.
- 3.6.6 Except as otherwise provided in this clause 3.6 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 GFD and/or Commonwealth Mandated GFM.

Note to drafters: Data should only be furnished to the Contractor as GFD where that data is required for the performance of the Contract, can only be provided to the Contractor by the Commonwealth and cannot be independently verified by the Contractor.

- 3.6.7 The Commonwealth shall ensure that each item of GFD and Commonwealth Mandated GFM is fit for the purpose specified in respect of that item in Attachment G or the GFM section of an S&Q Order, except to the extent that the failure of the item to be fit for the relevant purpose results from:
- a. a Defect that was present in the item when it was provided to the Commonwealth by or through the Contractor or a Related Body Corporate of the Contractor (whether under the Contract or another contract); or
 - b. a Contractor Default.

3.7 Commonwealth Property (Core)

- 3.7.1 The Contractor acknowledges that GFM and any other Commonwealth Property provided to or used by the Contractor or a Subcontractor for the purposes of the Contract, remains the property of the Commonwealth.
- 3.7.2 The Commonwealth retains the right to identify Commonwealth Property as its property and the Contractor shall preserve any means of identification.
- 3.7.3 The Contractor shall only use Commonwealth Property:
- a. for the purposes of the Contract;
 - b. in a manner consistent with any applicable requirements for the Commonwealth Property, including as set out in the SOW; and
 - c. for the purposes for which the Commonwealth Property was designed, manufactured or constructed, or otherwise as expressly permitted or required by any prior written Approval of the Commonwealth Representative.
- 3.7.4 The Contractor shall not, without the prior written approval of the Commonwealth Representative, do any of the following:
- a. modify Commonwealth Property;
 - b. move Commonwealth Property from the location to which it was delivered (except to return the property to the Commonwealth); or
 - c. transfer possession or control of Commonwealth Property to any other person, except to the extent reasonably necessary to enable the Contractor to satisfy an express requirement of the Contract.

- 3.7.5 The Contractor shall not, without the prior written approval of the Commonwealth Representative, create or allow to be created any Security Interest over any Commonwealth Property.
- 3.7.6 The Contractor shall return all items of Commonwealth Property (including GFM) that are required to be returned to the Commonwealth in accordance with the SOW, Attachment G or as otherwise directed by the Commonwealth Representative.
- 3.7.7 The Contractor acknowledges that it may be provided with the ability to access Commonwealth-held information in connection with its performance of the Contract, including through access to Commonwealth information technology systems. The Contractor shall not access or use Commonwealth-held information except to the extent strictly required for the performance of the Contractor's obligations under the Contract.
- 3.7.8 Without limiting the Contractor's obligations with respect to Commonwealth Property as set out in the SOW, the Contractor shall notify the Commonwealth Representative within 5 Working Days after becoming aware of any material loss or damage to, or any material defect in, any Commonwealth Property provided to, or used by, the Contractor or a Subcontractor for the purposes of the Contract.

3.8 Key Persons and Personnel (Core)

Note to drafters: Key Persons are those individuals named in the Approved SSMP for the corresponding Key Staff Position. If Key Persons are not required, amend the title of this clause to 'Contractor Personnel', and use Option B below.

Option A: For use when the Contract identifies Key Persons.

- 3.8.1 The Contractor shall ensure that each person named in the Approved SSMP is appointed to the Key Staff Position nominated for the person, and that each vacancy is filled as soon as practicable by a person accepted under this clause 3.8.
- 3.8.2 If the Contractor becomes aware that a Key Person will or may become unavailable to fill the relevant Key Staff Position for a period of four consecutive weeks or more, the Contractor shall:
- a. promptly notify the Commonwealth of the impending unavailability; and
 - b. as soon as practicable, nominate a replacement with appropriate experience, skills and expertise.
- 3.8.3 The Commonwealth may give a notice, including reasons, directing the Contractor to remove specified Contractor Personnel from work in respect of the Services, if in the Commonwealth Representative's opinion that the person specified in the notice is:
- a. a Key Person who is unable to perform the work required of them under the Contract for reasons of incapacity or incompetence; or
 - b. acting inappropriately to undertake the work required of them under the Contract for reasons relating to WHS, security, equity and diversity, workplace gender equality, probity, or the relationship between the Commonwealth and the Contractor.
- 3.8.4 If the Commonwealth gives the Contractor a notice under clause 3.8.3 the Contractor shall (or shall ensure that the relevant Subcontractor shall):
- a. within the period specified in the notice, remove the person from the work in respect of the Services; and
 - b. as soon as practicable, nominate a replacement with appropriate experience, skills and expertise.
- 3.8.5 For any person nominated as a Key Person or to replace a Key Person, the Contractor shall give the Commonwealth supporting documentation that:
- a. demonstrates how the nominated person satisfies the requirements for the relevant Key Staff Position;
 - b. demonstrates how any capability shortfalls of the nominated person will be addressed; and

	c.	includes an update to position/person specifications for affected Key Staff Positions to reflect any changes in duties and responsibilities that result from the replacement of a Key Person.
3.8.6		The Commonwealth shall notify the Contractor within 10 Working Days after receiving the documentation referred to in clause 3.8.5 whether or not a nomination has been accepted (including reasons if the nomination is rejected). The Commonwealth shall act reasonably in determining whether to accept or reject the nomination. If the Commonwealth notifies the Contractor that a nomination is rejected, the Contractor shall promptly nominate another person to replace the person.
3.8.7		If the Contractor is required to replace any Key Person under this clause 3.8, and a replacement person satisfactory to the Commonwealth is not accepted within three months after the Commonwealth first receives or provides notice under clause 3.8.2 or 3.8.3, the Commonwealth may exercise its rights to terminate the Contract under clause 13.2.1k.

Option B: For use when the Contract does not identify Key Persons.

3.8.8		The Commonwealth may give a notice, including reasons, directing the Contractor to remove specified Contractor Personnel from work in respect of the Services, if in the Commonwealth Representative's opinion the person specified in the notice is acting inappropriately to undertake the work required of them under the Contract, for reasons relating to WHS, security, equity and diversity, workplace gender equality, probity, or the relationship between the Commonwealth and the Contractor.
3.8.9		If the Commonwealth gives the Contractor a notice under clause 3.8.8 the Contractor shall (or shall ensure that the relevant Subcontractor shall): <ul style="list-style-type: none"> a. within the period specified in the notice, remove the person from the work in respect of the Services; and b. as soon as practicable, nominate a replacement with appropriate experience, skills and expertise.

3.9 Task-Priced Services (Core)

Note to drafters: Task-Priced Services enable part of the Contract to function similar to a standing-offer for Services (including Item purchases) that are listed as Task-Priced Services in Attachment B (if any).

- 3.9.1 The Commonwealth Representative may by notice authorise the Contractor to provide a Task-Priced Service described in the notice.
- 3.9.2 If the Commonwealth Representative gives the Contractor a notice under clause 3.9.1, the Contractor shall:
- a. commence the Task-Priced Service within 2 Working Days of the notice (or within a longer period (if any) specified in the Contract or by the Commonwealth in the notice);
 - b. provide the Task-Priced Service in accordance with the Contract; and
 - c. complete the Task-Priced Service (and achieve Acceptance of any relevant Deliverables) within the period specified for that Task-Priced Service in the Contract (or within the longer period (if any) specified by the Commonwealth in the notice).

3.10 Survey and Quote Services (Core)

- 3.10.1 The Commonwealth Representative may request the Contractor to provide a quote for the provision of an S&Q Service described in the request. The request shall be in the form of Part 1 of Annex A to DID-SPTS-S&Q.
- 3.10.2 The Contractor shall, before the due date specified by the Commonwealth in the request, conduct a survey of the S&Q Service and submit a quote for the S&Q Service (**S&Q Quote**) by completing Part 2 of Annex A to DID-SPTS-S&Q. The S&Q Quote shall include a price for the provision of the requested S&Q Service:
- a. prepared on the price basis specified by the Commonwealth in the request; and
 - b. calculated in accordance with Attachment B.

3.10.3 The obligation to provide the S&Q Service in accordance with the S&Q Quote shall take effect when an S&Q Order in the form of Part 3 of Annex A to DID-SPTS-S&Q is executed by the Commonwealth ('**S&Q Order**').

3.10.4 The Contractor shall:

- a. provide the S&Q Service in accordance with the Contract and the S&Q Order; and
- b. complete the S&Q Service within the periods specified in the S&Q Order.

3.11 Coordination and Cooperation with other Commonwealth Contractors (Core)

3.11.1 The Contractor shall coordinate and cooperate with Associated Parties in accordance with clause 3.8 of the SOW at no additional cost to the Commonwealth.

4 AUSTRALIAN INDUSTRY CAPABILITY (OPTIONAL)

Note to drafters: If the expected value of any resultant Contract is less than \$4 million (including GST) for the Initial Term, or an exemption from the AIC program applies (refer to the 2019 Defence Policy for Industry Participation), then an AIC program is not required.

If an AIC program is not required, the heading should be retained and '(Not used)' added at the end of the heading. Delete all clauses below the heading. This will preserve the clause numbering and cross references throughout the Contract.

If the expected value of the Recurring Services for any resultant Contract is at or above \$4 million and less than \$20 million for the Initial Term (including GST), then include this clause 4.

If the expected value of the Recurring Services for any resultant Contract is at or above \$20 million for the initial term (including GST), then a more extensive AIC program, including an AIC Plan, will be required. Drafters will then need to transfer and tailor appropriate provisions from the higher level ASDEFCON templates into the draft Contract, and update the applicable tender data requirements. Drafters should contact their contracting officer for guidance on how to incorporate these requirements.

Drafters can consult with:

CASG AIC Division at aic.delivery@defence.gov.au; and

Strategy, Policy and Industry (SP&I) Group's AIC Directorate at aic.info@defence.gov.au or visit:

- **<http://drnet/strategy/DIPD/Australian-Industry-Capability/Pages/AIC.aspx>.**

4.1 General AIC Requirements (Core)

Note to tenderers: Tenderers should refer to Annex E (TDR E) to Attachment A to the Conditions of Tender for more details on including an AIC program.

4.1.1 The Contractor acknowledges the importance to the Commonwealth of the Australian Industry Capability (AIC) program, as set out in government and Defence policies, and the contribution made by the Contractor towards achieving the objectives for the AIC program, to:

- a. deliver capability to Defence, from Australian Industry, through solutions that provide value for money for the Commonwealth; and
- b. maximise opportunities for competitive Australian Industry to participate in Defence procurements.

4.1.2 The Contractor acknowledges that the AIC Schedule sets out:

- a. the AIC activities that it intends will be carried out by Australian Industry (whether by the Contractor or identified Subcontractors) in Australia or New Zealand in performing the Contract; and
- b. the expected Australian Contract Expenditure (ACE) of its Subcontracts with the Subcontractors referred to in clause 4.1.2a.

4.1.3 The Contractor shall use reasonable endeavours to:

- a. ensure that the AIC activities specified in the AIC Schedule are performed in Australia or New Zealand by the Contractor or relevant Subcontractors identified in the AIC Schedule; and

- b. achieve the value of ACE specified in respect of each AIC activity specified in the AIC Schedule.
- 4.1.4 If the Contractor is required to calculate ACE and Imported Contract Expenditure (ICE) under the Contract, ACE and ICE shall be calculated in accordance with the ACE Measurement Rules and any alternate and/or additional deeming rates included in Attachment B.

Note to drafters: If there are Australian Industry Activities (AIAs) required at Attachment K then optional clause 4.1.5 should be included.

Option: Include the following clause if there are Australian Industry Activities required under the Contract at Attachment K.

- 4.1.5 The Contractor acknowledges that the work performed under Contract contributes to the achievement of the Australian Industry Activities (AIAs), and that the loss or a reduction in the specialised skills, resources and/or work processes associated with those AIAs is considered by Defence as detrimental to the AIC program and to the support of the Capability.

4.2 AIC Obligations (Core)

- 4.2.1 The Contractor shall maintain the accuracy, completeness and currency of the AIC Schedule.
- 4.2.2 When the Contractor proposes an update to the AIC Schedule, the Contractor shall submit a CCP in accordance with clause 11.1.
- 4.2.3 The Contractor shall:
- a. achieve each Annual ACE Value;
 - b. without limiting clauses 4.1.3 or 4.2.3a, if the Contractor or a Subcontractor can no longer perform an AIC activity specified in the AIC Schedule, ensure that opportunities are maximised for Australian Industry to perform that AIC activity in Australia or New Zealand; and

Option: Include clause 4.2.3c if AIAs are included in Attachment K.

- c. for AIC activities specified in the AIC Schedule and identified as contributing to an AIA, ensure that the specialised skills, resources and/or work processes required for that AIA are retained within Australian Industry, including when performed by a Subcontractor.
- 4.2.4 The Contractor acknowledges and agrees that:
- a. compliance with clause 4.2.3 shall not relieve the Contractor from any other liabilities or other obligations under the Contract; and
 - b. the provision of Services and the Acceptance of the Deliverables shall not relieve the Contractor from complying with its obligations under clause 4.2.3 and its other obligations relating to AIC.
- 4.2.5 Where the Contractor fails to comply, or anticipates that it is likely to fail to comply, with clause 4.2.3 or the AIC Schedule, it shall notify the Commonwealth Representative in writing as soon as reasonably practicable.

4.3 AIC Remedies (Core)

- 4.3.1 The Contractor acknowledges and agrees that:
- a. the Commonwealth may suffer loss or damage if:
 - (i) the Contractor fails to comply with any AIC Obligation; or
 - (ii) the Contractor fails to comply with an Approved Remediation Plan in relation to compliance with any AIC Obligation;
 - b. damages may not be an adequate remedy for a failure by the Contractor to comply with:
 - (i) any AIC Obligation; or
 - (ii) an Approved Remediation Plan in relation to compliance with any AIC Obligation;

and that remedies, such as specific performance or injunctive relief may be sought by the Commonwealth; and

- c. the rights of the Commonwealth under this clause 4.3 are in addition to, and do not limit or affect, any other rights or remedies under the Contract or at law.

5 TECHNICAL DATA, SOFTWARE AND CONTRACT MATERIAL (CORE)

5.1 Ownership of Intellectual Property (Core)

Note to drafters: If Commonwealth ownership of IP (in addition to the circumstances provided for in clause 5.1.3) or broader IP rights for Defence Purposes are required (eg, for security reasons), appropriate clauses from ASDEFCON (Support) should be included.

Note to tenderers: The Commonwealth's default position, reflected in this clause 5.1, is that the Contractor (or its nominee) will own all IP created under the Contract, and that ownership of newly created IP created under a subcontract will be determined by the terms of the relevant Subcontract between the Contractor and Subcontractor.

Under clause 5.1.3, an exception exists to this default position, to enable the Commonwealth to own any new IP created under the Contract in relation to GFM or the Products (including new IP in updates or amendments to the GFM or Products). Clause 5.1.3 states that the Contractor is obliged to ensure that the Commonwealth is assigned any IP created under a Subcontract in Commonwealth TD, Commonwealth Software and GFM, whether the IP is owned by the Subcontractor or the Contractor. However, under clause 5.1.4, the Contractor (or its nominee) will own this IP if it already owns all of the existing IP in the GFM or Products.

- 5.1.1 Nothing in the Contract affects the ownership of Intellectual Property (IP), except as expressly provided for in this clause 5.
- 5.1.2 Subject to the other provisions of this clause 5.1, IP created under the Contract or a Subcontract in respect of TD, Software or Contract Material is assigned to the Contractor (or its nominee) immediately upon its creation.
- 5.1.3 The Contractor shall ensure that all IP created under the Contract or a Subcontract in respect of GFM or a Product (except as provided for in clause 5.1.4) is assigned to the Commonwealth (or its nominee) immediately upon its creation.
- 5.1.4 IP created under the Contract or a Subcontract in respect of GFM or a Product is not required to be assigned to the Commonwealth under clause 5.1.3 if the Contractor or the Subcontractor owns all of the IP in the GFM or Product.

5.2 TD and Software (Core)

- 5.2.1 This clause 5.2 applies to all TD and Software delivered or required to be delivered to the Commonwealth or any other person under the Contract, other than:
 - a. Commercial TD or Commercial Software to which clause 5.3 applies; and
 - b. TD or Software in GFM or Products where clause 5.4 applies to that GFM or those Products.
- 5.2.2 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all TD and all Software to which this clause 5.2 applies, to Use the TD for any Defence Purpose and to grant a sublicense to:
 - a. a Commonwealth Service Provider to Use the TD or Software to enable it to perform its obligations, functions or duties to the Commonwealth;
 - b. any person to Use the TD or Software and to grant a further sublicense to Use the TD or Software, for:
 - (i) installing, configuring, operating, maintaining, removing, uninstalling or disposing of the Deliverables or Products;
 - (ii) integrating the Deliverables with the Products or other systems;
 - (iii) rectifying any Defect in the Deliverables or the Products where the Contractor has failed to comply with its obligations under clause 8.2 in relation to the Defect;
 - (iv) undertaking training in relation to the Deliverables or the Products; or

- (v) any other Defence Purpose, but subject to any restrictions specified in the TDSR Schedule or an S&Q Order for the relevant TD or Software; and
- c. any person for a purpose referred to in clause 11.4.3.

5.3 Commercial TD or Commercial Software (Core)

- 5.3.1 The Contractor shall ensure that the Commonwealth is granted a licence, in respect of all Commercial TD and all Commercial Software delivered or required to be delivered to the Commonwealth or any other person under the Contract, on the best commercial terms available to the Contractor.
- 5.3.2 The Contractor shall ensure that any licence granted to the Commonwealth in respect of Commercial TD and Commercial Software under this clause 5.3 does not require the Commonwealth to pay a royalty or other fee (not otherwise included in the price under clause 7.1.1) unless the Commonwealth has agreed in writing to the payment.

5.4 GFM and Products (Core)

- 5.4.1 The Commonwealth grants to the Contractor (or shall ensure the Contractor is granted) a non-exclusive, royalty-free licence in respect of TD or Software in GFM or a Product (except TD or Software to which clause 5.1.4 applies), to:
 - a. Use the TD or Software for the purpose of enabling the Contractor to perform its obligations under the Contract;
 - b. grant a sublicense to a Subcontractor to Use the TD or Software for the purpose of enabling the Subcontractor to perform its obligations under the Subcontract; and
 - c. grant a sublicense to a person for a purpose referred to in clause 11.4.3,
 subject to any restrictions specified in Attachment G or the GFM section of an S&Q Order (for GFM), Attachment J (for Products) or as otherwise notified by the Commonwealth.
- 5.4.2 Without limiting any restrictions referred to in clause 5.4.1, the Contractor's right to grant a sublicense under clause 5.4.1b is subject to the following conditions:
 - a. the sublicense shall include (as a minimum) the same restrictions on Use and sublicensing as are applicable to the Contractor;
 - b. the rights granted under the sublicense shall be limited to the rights that are reasonably necessary to enable the sublicensee to Use the TD or Software to efficiently perform its obligations, functions or duties to the Contractor;
 - c. the rights granted under the sublicense shall expire when no longer required for the purposes referred to in clause 5.4.1b; and
 - d. any right of the sublicensee to grant a further sublicense shall be subject to the same conditions as set out in this clause 5.4.2.
- 5.4.3 The licence under clause 5.4.1a (and any sublicense granted under clause 5.4.1b) expires upon the expiry or termination (whichever is the earlier) of the Contract or the relevant Subcontract.

Note to drafters: When considering restrictions to be included in Attachment G or the GFM section of an S&Q Order (for GFM) or Attachment J (for Products), drafters should consider any restrictions included in the related acquisition contracts for the GFM or Product to ensure such restrictions are 'flowed into' this contract (where appropriate).

- 5.4.4 The Commonwealth shall ensure that any restrictions, including Export Approvals that apply to an item of GFM or the Products are specified in Attachment G or the GFM section of an S&Q Order (for GFM) or Attachment J (for Products).

5.5 Contract Material (Core)

- 5.5.1 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all Contract Material to Use the Contract Material for any Defence Purpose and to grant a sublicense to:
 - a. a Commonwealth Service Provider to Use the Contract Material to enable it to perform its obligations, functions or duties to the Commonwealth;

- b. any person to Use the Contract Material, or to grant a further sublicense to Use the Contract Material, for a Defence Purpose; and
- c. any person for a purpose referred to in clause 11.4.3.

5.6 No Commercialisation (Core)

- 5.6.1 A Licence or sublicense granted in accordance with this clause 5 does not permit the Commonwealth or its sublicensee to Commercialise any IP in the TD, Software or Contract Material.
- 5.6.2 For the avoidance of doubt, clause 5.6.1 does not prevent the Commonwealth from granting a sublicense in accordance with the rights granted in this clause 5 to a person for the purpose of the person providing goods or services to the Commonwealth for a Defence Purpose.

5.7 TDSR Schedule (Core)

- 5.7.1 The Contractor shall take all reasonable steps (including by submitting a CCP in accordance with clause 11.1) to ensure the TDSR Schedule is up to date and contains an accurate description of all restrictions applicable to the Commonwealth's rights in respect of TD and Software delivered or required to be delivered under the Contract, including an S&Q Order.
- 5.7.2 Despite clause 11.4.1, the Commonwealth may disclose a restriction included in the TDSR Schedule to a person for the purposes of the Commonwealth exercising a right or complying with a restriction under this clause 5 or the TDSR Schedule.

5.8 TD and Software required to be delivered (Core)

- 5.8.1 The Contractor shall deliver all TD and Software required to be delivered under the Contract to the recipients at the times and locations, and in the manner, specified in the Contract or as otherwise required to enable the provision of the Services.
- 5.8.2 If the time, location or manner of delivery of any item of TD or Software required to be delivered under the Contract is not specified in the Contract, the Contractor shall deliver the relevant item in accordance with a notice given by the Commonwealth (acting reasonably).

5.9 Markings (Core)

- 5.9.1 Where markings are used by the Contractor or a Subcontractor in relation to TD, Software or Contract Material, the Contractor:
 - a. shall ensure that those markings accurately reflect the rights and obligations of the Commonwealth, the Contractor or any other person; and
 - b. acknowledges that the markings are not determinative as to the rights and obligations of the parties.

5.10 TD and Software Warranties (Core)

- 5.10.1 The Contractor warrants that:
 - a. the rights granted to the Commonwealth in accordance with this clause 5 (including in relation to Commercial TD and Commercial Software) will not prevent the Products from being used and supported by or on behalf of the Commonwealth as contemplated under the Contract; and
 - b. all of the TD and Software delivered under clause 5.8.1 is complete and accurate.
- 5.10.2 The Contractor warrants and shall ensure that:
 - b. all Software delivered or required to be delivered to the Commonwealth under the Contract or a Subcontract is free from Malware, at the time of delivery to the Commonwealth; and
 - c. no Malware will be installed on the Products or any other Commonwealth system as a result of an act or omission of any of the Contractor Personnel.

5.11 Intellectual Property Warranties (Core)

- 5.11.1 The Contractor warrants and shall ensure that, in respect of any IP assigned or licensed to the Commonwealth under or in connection with this Contract, at all times:

- a. the relevant, assignor or licensor (as applicable) has the right, title or authority to assign or license, and has been made aware of, the rights granted in respect of IP under this clause 5; and
- b. as at the time of delivery and after making diligent enquiries, the Contractor has no notice of any challenge, claim or proceeding in respect of such IP.

5.11.2 The Contractor shall notify the Commonwealth if the Contractor becomes aware of any challenge, claim or proceeding referred to in clause 5.11.1b arising in respect of any IP after the TD, Software or Contract Material is delivered to the Commonwealth.

5.12 Patents, Registrable Designs and Circuit Layouts (Core)

5.12.1 The Contractor warrants and shall ensure that a licence is granted or obtained under the Contract for the Commonwealth to exercise any Patent, Registrable Design or Circuit Layout that is included in, or related to, a Deliverable and necessary to use the Deliverable for the purposes provided for under the Contract.

5.13 Existing IP Licences (Core)

5.13.1 The licences, rights and obligations under this clause 5 are in addition to, and do not affect, any other licences, rights or obligations relating to IP under any other contracts between the parties, unless expressly stated otherwise for the purposes of this clause 5.

6 PERFORMANCE, ACCEPTANCE AND OWNERSHIP (CORE)

6.1 Performance (Core)

- 6.1.1 The Contractor shall provide the Services in accordance with the Contract, including:
- a. providing the Services by the relevant dates (if applicable) and in the manner required;
 - b. achieving Approval or Acceptance of any Deliverables by the relevant dates (if applicable) and in the manner required;
 - c. providing the Services in accordance with, and to the standards, specifications, certifications and other requirements set out or referred to in the Contract (including the SOW and the Data Item Descriptions listed in Annex C to the SOW); and
 - d. ensuring that the Services are provided to the standards of work set out in clause 3.2.

Option: Include the following clause if the Contract will be implemented as a performance-based contract.

6.1.2 Where the performance of Services in accordance with clause 6.1.1 is measured using Key Performance Indicators (KPIs), the Contractor's performance of those Services shall be measured and reported, and Performance Payments shall be calculated, in accordance with Annex E to Attachment B.

6.2 Delay (Core)

- 6.2.1 Without affecting the Contractor's obligations under clause 6.1.1, the Contractor shall take all reasonable steps to prevent and minimise delay and to mitigate both parties' Losses due to delay.
- 6.2.2 If the Contractor becomes aware that the provision of the Services will or may be delayed, the Contractor shall notify the Commonwealth Representative of the following matters, to the extent that the Contractor is aware of them:
- a. the cause and nature of the delay;
 - b. the steps that the Contractor and its Subcontractors are taking and will take to minimise the delay and mitigate the effects of the delay;
 - c. the anticipated duration of the delay; and

Option: For when clause 6.4 (Performance Relief) is included in the Contract.

- d. whether the Contractor will be claiming Performance Relief of the date for the provision of the Services under clause 6.4, or seeks any other change to the Contract, on the basis of the delay.

- 6.2.3 A notice under clause 6.2.2 shall be given as soon as practicable after the Contractor becomes aware of the delay or potential delay, but no later than 30 days after the Contractor becomes so aware.
- 6.2.4 The Contractor shall comply with any request by the Commonwealth Representative for information concerning a delay or potential delay in the provision of the Services.

6.3 Performance Shortfalls (Optional)

Note to drafters: This clause is only applicable to performance-based contracts. Otherwise, replace the following clause with 'Not used'.

- 6.3.1 If the Adjusted Performance Score for any KPI for a Review Period is, or is likely to be, less than 80%, the Contractor shall:
- a. investigate the event or circumstance that caused of the shortfall in performance;
 - b. take all reasonable steps to minimise the adverse effects of the shortfall; and
 - c. within 5 Working Days of becoming aware of the shortfall, notify the Commonwealth and provide details of:
 - (i) the shortfall and the events or circumstances that caused the shortfall;
 - (ii) the steps taken, or to be taken, to minimise any adverse effect of the shortfall; and
 - (iii) whether the Contractor intends to make a claim under clause 6.4.

6.4 Performance Relief (Optional)

Note to drafters: This clause is only applicable to performance-based contracts. Otherwise, replace the following clause with 'Not used'.

- 6.4.1 If an event or circumstance affects the Contractor's ability to achieve a Required Performance Level for a KPI, then the Contractor is entitled to claim, in a notice, an adjustment to the Performance Payment for that KPI for that Review Period, but only to the extent that the event or circumstance:
- d. is beyond the reasonable control of the Contractor and its Subcontractors and could not have been reasonably contemplated and allowed for by the Contractor or its Subcontractors before entering into the Contract; or
 - e. resulted from a Commonwealth Default or an Excepted Risk.
- 6.4.2 The Commonwealth, acting reasonably, shall consider the Contractor's claim in the notice under clause 6.4.1, and may, at any time, by notice to the Contractor:
- a. increase the Adjusted Performance Score for a KPI for a Review Period; or
 - b. in accordance with Annex E to Attachment B, suspend the requirement to measure the Contractor's performance against a KPI for a Review Period or part thereof.
- 6.4.3 The Contractor acknowledges that a decision by the Commonwealth Representative to make an adjustment under clause 6.4.2 does not constitute a representation that the Commonwealth Representative will make a similar adjustment, for the same or a similar event or circumstance, in the future.

6.5 Acceptance (Core)

- 6.5.1 The Contractor shall offer for Acceptance any Deliverables, including spares, equipment, consumables, Software, Technical Data, items incorporated into a Product as part of the Services or otherwise required to be delivered under the Contract, at the delivery points and within the time frames specified in the Contract (where applicable).
- 6.5.2 The Contractor shall, when seeking Acceptance of Deliverables in accordance with clause 6.5.1:
- a. complete and present a signed Supplies Acceptance Certificate certifying that the Deliverables conform with the requirements of the Contract, except for any minor omissions or Defects, or any non-conforming materials or work detailed in the Supplies Acceptance Certificate; and

- b. provide any other supporting evidence required by the Commonwealth Representative including confirmation of successful completion of any testing or other Verification activities required by the Contract.
- 6.5.3 The Commonwealth Representative shall, within 15 Working Days (or other period specified in the Contract) after the offer of Deliverables for Acceptance:
- a. subject to clause 6.5.4, Accept the Deliverables by signing the Supplies Acceptance Certificate where all requirements in clause 6.5.2 have been met; or
 - b. reject the Deliverables where the requirements in clause 6.5.2 have not all been met, in which case the Commonwealth Representative shall notify the Contractor in writing of the reasons for rejection and the extent of any non-conformance.
- 6.5.4 The Commonwealth Representative may Accept Deliverables despite the existence of minor omissions or Defects in the Deliverables or non-conforming materials or work as detailed in an Application for a Deviation submitted in accordance with clause 10.4.1 of the SOW. The Commonwealth Representative shall endorse such omissions or Defects or non-conforming materials or work on the Supplies Acceptance Certificate (or on an attachment to the certificate). The Contractor shall, within 10 Working Days after Acceptance (or such longer period as the Commonwealth Representative may agree in writing), make good the omissions or Defects or non-conforming materials or work to the satisfaction of the Commonwealth Representative.
- 6.5.5 If the Commonwealth rejects any Deliverables under clause 6.5.3b, the Contractor shall, within a period determined by the Commonwealth, offer Deliverables that conform to the requirements of the Contract.

6.6 Ownership (Core)

- 6.6.1 Subject to clause 5.1, ownership of Deliverables, including Deliverables incorporated into Products being supported, shall pass to the Commonwealth on the earlier of:
- a. Acceptance of the Deliverable or the work in respect of the Deliverable; or
 - b. payment of the claim for the applicable Services for the period within which work on the Deliverable was undertaken.
- 6.6.2 The Contractor warrants and shall ensure that, at the time ownership of any item of Deliverables passes to the Commonwealth under clause 6.6.1;
- a. the Contractor has full power and authority to transfer full legal and beneficial ownership in those Deliverables to the Commonwealth; and
 - b. the Commonwealth will obtain good title to those Deliverables, free from any Security Interest.

6.7 Remediation Plan (Core)

- 6.7.1 Without limiting clauses 13.2 or 13.3, the Commonwealth may require the Contractor to submit a Remediation Plan to the Commonwealth for Approval in accordance with clause 3.14 of the SOW if:
- a. a Contractor Default occurs, and in the opinion of the Commonwealth, the Default is capable of being remedied;
 - b. the Contractor has failed to comply with, or is likely to fail to comply with, an AIC Obligation; or

Option: Include the following clause if the Contract will be implemented as a performance-based contract.

- c. the Adjusted Performance Score for any KPI for a Review Period is, or is likely to be, less than 80%.

- 6.7.2 The date for submission of a Remediation Plan for Approval by the Commonwealth Representative shall be within a reasonable period determined by the Commonwealth Representative.
- 6.7.3 If the Commonwealth Representative considers the Remediation Plan submitted by the Contractor to be unsatisfactory, the Contractor shall amend the Remediation Plan to rectify

the issues raised by the Commonwealth Representative and shall resubmit the Remediation Plan within a period agreed or determined in accordance with clause 6.7.2.

- 6.7.4 Once a Remediation Plan is Approved, the Contractor shall complete all of the steps and activities contained in the Approved Remediation Plan within the timeframe specified in the Approved Remediation Plan. The Contractor shall ensure that the steps the Contractor undertakes, as required by the Approved Remediation Plan, do not affect the performance of any other Services and are not inconsistent with the Contract.
- 6.7.5 If the Contractor has not remedied the Default within the period specified in the Approved Remediation Plan, the Commonwealth may:
- a. remedy, or procure the remedy of, the Default and recover, under clause 13.6 any expense that it incurs in doing so, as a debt due to the Commonwealth;
 - b. suspend payment in accordance with clause 7.9.1g; or
 - c. terminate the Contract in accordance with clause 13.2.
- 6.7.6 The Contractor shall fully cooperate with, and assist, the Commonwealth, or any person nominated by the Commonwealth, to ensure that the Commonwealth is able to exercise its rights under clause 6.7.5a effectively and expeditiously, including by providing access to its premises, plant and equipment, Technical Data (as determined necessary by the Commonwealth to remedy the Contractor Default), Contractor Personnel, the Products and any Commonwealth Property in the Contractor's possession.

7 PRICE AND PAYMENT (CORE)

7.1 Price (Core)

- 7.1.1 Subject to the other provisions of the Contract and the Contractor providing Services in accordance with the Contract (including achieving Acceptance of Deliverables or Services where required), the Contractor is entitled to make a claim for payment:

Option: Include this clause when a Mobilisation Payment is included in the Contract.

- a. for the Mobilisation Payment specified in the Details Schedule;

Option: Include this clause when Performance Payments will not adjust the Recurring Services Fee (ie, not applying a performance based contract).

- b. for the provision of Recurring Services, in accordance with Annex A to Attachment B;

Option: Include this clause when Performance Payments will be used to adjust the Recurring Services Fee (ie, when applying a performance based contract).

- c. for the provision of Recurring Services in accordance with Annex A to Attachment B, less any reduction in the Performance Payment amount determined in accordance with Annex E to Attachment B;

- d. for the provision of Task-Priced Services, in accordance with Annex B to Attachment B;
- e. for the provision of an S&Q Service, in accordance with the S&Q Order; and
- f. for an Adjustment Payment following an Adjustment Date in accordance with clause 7.3.4a.

- 7.1.2 The Commonwealth is entitled, without derogating from any other rights it may have, to defer payment of a claim until the Contractor has completed, to the satisfaction of the Commonwealth Representative, that part of the Services to which the claim relates.

- 7.1.3 If the Commonwealth agrees to Accept the Deliverables despite any minor omissions or Defects or other non-compliance, or if the Services are not performed in accordance with the Contract, the Commonwealth may, after consultation with the Contractor:

- a. determine a revised price under clause 7.1.1 reflecting the reduction in value for money of the omission, Defect, non-compliance or non-performance (**Reduction Amount**); and
- b. exercise its rights under clause 13.6 in respect of the Reduction Amount.

7.2 Claims for Payment (Core)

Note to drafters: Option A below should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant Contract. If the Commonwealth and Contractor agree to use the PEPPOL framework, the maximum payment term will be 5 days. However, the Commonwealth Pay On-Time Policy does not apply if the nature of the goods or services being procured, or the structure of the procurement, would make it impractical for the policy to be applied. If this is the case, and the Commonwealth does not intend to use the PEPPOL framework, Option A and the Note to Tenderers should be removed prior to RFT release.

Note to tenderers: Per the Commonwealth Pay On-Time Policy, maximum payment terms will depend on the applicability of the Pan-European Public Procurement On-Line (PEPPOL) framework. The maximum payment term will either be:

- 5 days, where the Commonwealth and the Contractor both have the capability to deliver and receive electronic invoices (e-invoices) through the PEPPOL framework and have agreed to use e-invoicing; or
- 20 days where the PEPPOL framework does not apply.

Further information on the Pay On-Time Policy is available at:

- <https://www.finance.gov.au/publications/resource-management-guides/supplier-pay-time-or-pay-interest-policy-rmg-417>.

7.2.1 If the Commonwealth is satisfied that:

- a. the Contractor is entitled to make a claim for payment under clause 7.1.1;
- b. the Contractor's claim for payment meets the requirements of clause 7.2.5; and
- c. the Contractor has complied with any other provisions of the Contract applicable to the payment,

then the Commonwealth shall Approve the claim for payment.

Note to tenderers: The option selected below will depend on the tenderer's response to clause 2.7 of Annex A to Attachment A to the Conditions of Tender.

Option A: For when the PEPPOL framework has been agreed by the Commonwealth and the Contractor.

7.2.2 The Commonwealth and the Contractor shall use electronic invoices through the Pan-European Public Procurement On-Line (PEPPOL) framework for the purposes of the delivery and receipt of payment claims under the Contract.

7.2.3 When a claim is Approved under clause 7.2.1, the Commonwealth shall make payment within 5 days of Approval of the claim.

Option B: For when the use of the PEPPOL framework has not been agreed by the Commonwealth and the Contractor.

7.2.4 When a claim is Approved under clause 7.2.1, the Commonwealth shall make payment within 20 days of Approval of the claim.

7.2.5 The Contractor shall ensure that each claim for payment under the Contract:

- a. specifies the Commonwealth's reference number for the Contract;
- b. is calculated in accordance with the Contract;
- c. contains sufficient information to enable the Commonwealth to verify the claim;
- d. is in the form of a valid Tax Invoice;
- e. is accompanied by any substantiating documentation requested by the Commonwealth Representative; and
- f. contains a statement by the Contractor that the claim is complete and accurate.

7.2.6 If a claim for payment is not Approved, the Commonwealth Representative shall notify the Contractor within 10 Working Days after receipt of the claim providing reasons for rejection

and any action to be taken by the Contractor for the claim to be rendered correct for payment. The resubmitted claim shall be subject to the same conditions as if it were the original claim.

7.3 Adjustments (Core)

- 7.3.1 Where specified in Attachment B in respect of a particular price or payment, the relevant formula in clause 5.2 of Attachment B shall be applied to the price or payment, on each Adjustment Date. However, unless stated otherwise in an S&Q Order the labour rates applicable to an S&Q Order executed before the relevant Adjustment Date shall not be adjusted.
- 7.3.2 Subject to clause 7.3.1, the adjusted price or payment amount shall apply on and after the applicable Adjustment Date.
- 7.3.3 No later than three months after the publication of the indices for an Adjustment Date, the Contractor shall submit a CCP in accordance with clause 11.1 to update Attachment B to reflect the adjustment to the price and payment amounts as determined in accordance with clause 7.3.1.
- 7.3.4 No later than three months after the publication of the indices for an Adjustment Date, the Contractor shall determine if, as a result of the adjustment under clause 7.3.1, an adjustment is required to any claim for payment that had been submitted in accordance with clause 7.2 after the Adjustment Date but prior to the date the CCP under clause 7.3.3 takes effect ('Adjustment Payment'). If such Adjustment Payment:
- is to the credit of the Contractor, the Contractor may claim that amount as a separate claim for payment in accordance with clause 7.1.1f; or
 - is to the credit of the Commonwealth, the Contractor shall notify the Commonwealth of the amount of the credit.
- 7.3.5 The Commonwealth shall not be liable for any claims for payment under clause 7.3.4a submitted after the end of the three month period referred to in clause 7.3.4.
- 7.3.6 If an Adjustment Payment calculated in accordance with clause 7.3.4 is to the credit of the Commonwealth, the Commonwealth may elect to recover the amount from the Contractor under clause 13.6. No amount shall be owing to the Commonwealth under this clause 7.3.6 until the Commonwealth elects to recover the amount.

Note to tenderers: It is Defence policy that when the proportion of the total price that is payable in source currency is significant, the contract is to be written in source currency. Refer to TDR D-7 for further information.

7.4 Mobilisation Payment (Optional)

Note to drafters: This clause must be included if clause 7.5 (Bank Guarantee for Mobilisation Payment) is included. If a Mobilisation Payment will not apply under the Contract, then clause 7.1.1a, this clause 7.4 and clause 7.5 must be replaced with "Not used".

- 7.4.1 Subject to the Contractor providing the financial security required by clause 7.5.1, the Commonwealth shall pay the Contractor the Mobilisation Payment specified in the Details Schedule.

7.5 Bank Guarantee for Mobilisation Payment (Optional)

Note to tenderers: If the tenderer proposes a Mobilisation Payment for any resultant Contract (refer to TDR D-2), the Commonwealth will (generally) require a non-reducing Bank Guarantee for 50% of the amount of the Mobilisation Payment, in accordance with this clause 7.5.

- 7.5.1 The Contractor shall provide a bank guarantee equal to the Mobilisation Security Amount specified in the Details Schedule to the Commonwealth no later than the Mobilisation Security Date specified in the Details Schedule. The bank guarantee shall be unconditional and shall be from a bank or financial institution acceptable to the Commonwealth Representative, and in the form of Annex C to Attachment F.
- 7.5.2 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 those claims for payment Approved in accordance with clause 7.2 and 7.3, until the sum of the Approved claims for payment equals the amount of the Mobilisation Payment.

- 7.5.3 The Commonwealth shall release the bank guarantee provided under clause 7.5.1 within 10 Working Days after the date on which the sum of amounts deemed to have been paid under clause 7.5.2 equals or is greater than the amount of the Mobilisation Payment.
- 7.5.4 The Commonwealth's rights under the bank guarantee provided under clause 7.5.1 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 any part of the Mobilisation Payment that has not been offset against amounts payable by the Commonwealth to the Contractor under the Contract in the event of termination of the Contract in accordance with clause 13.2; and
 - b. to recover any debts owing by the Contractor to the Commonwealth in relation to the Contract.

7.6 Bank Guarantee for Performance (RFT Core)

Note to drafters: Drafters must include both clause 7.6 Bank Guarantee for Performance and clause 7.8 Deed of Guarantee and Indemnity in the RFT. Although it is unlikely that both forms of security will be required, it may not be possible to determine the form of any required security until the preferred tenderer has been identified and the risk associated with the preferred tenderer has been fully assessed.

Note to tenderers: Whether the Commonwealth requires both a bank guarantee in respect of the Contractor's performance and a Deed of Guarantee and Indemnity (clause 7.8) will be determined during negotiations with the preferred tenderer, considering the risks associated with the provision of the Services.

If the Commonwealth determines that it does not require a security, the amount nominated for a security within the tender response will not be included in any resultant Contract.

If under the [Master Guarantee Program](#), Defence and the tenderer have pre-agreed amendments to the template Bank Guarantee Deed, the tenderer should identify this within the 'Statement of Non-Compliance' tendered in accordance with TDR D A-3 and indicate which alterations it is seeking to apply, and if any further amendments are proposed.

- 7.6.1 The Contractor shall provide a bank guarantee equal to the Performance Security Amount specified in the Details Schedule to the Commonwealth no later than the Performance Security Date specified in the Details Schedule. The bank guarantee shall be unconditional and shall be from a bank or financial institution acceptable to the Commonwealth Representative, and in the form of the Bank Guarantee Deed set out in Annex C to Attachment F.
- 7.6.2 The Commonwealth shall release the bank guarantee provided under clause 7.6.1 within 10 Working Days after the Release Event specified in the Details Schedule occurs.
- 7.6.3 The Commonwealth's rights under the bank guarantee provided under clause 7.6.1 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 13.2; and
 - b. to recover any debts owing by the Contractor to the Commonwealth in relation to the Contract.

7.7 Exercise of Securities (RFT Core)

- 7.7.1 If the Commonwealth exercises any or all of its rights under the securities provided under clauses 7.5 and 7.6, the Commonwealth shall not be liable for, and the Contractor shall release the Commonwealth from liability for, any resultant Loss suffered by the Contractor.
- 7.7.2 The rights of the Commonwealth to recover from the Contractor the balance, after draw down or exercise of either or both securities provided under clause 7.5 or 7.6, of Loss suffered by the Commonwealth shall not be limited by the Commonwealth's exercise of those securities.

7.8 Deed of Guarantee and Indemnity (RFT Core)

Note to tenderers: If the tenderer has a Master Guarantee and Indemnity Deed with Defence, that it wishes to apply to any resultant Contract, and this includes pre-agreed amendments to the template Bank Guarantee Deed, the tenderer is to indicate which alterations it is seeking to apply

within the 'Statement of Non-Compliance' tendered in accordance with TDR D A-3. Information on the Master Guarantee Program is available at:

- <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/master-guarantee-program>.

Option: For use when the Contractor does not have a Master Guarantee and Indemnity Deed with Defence, or elects not to add the Contract to its Master Guarantee and Indemnity Deed.

- 7.8.1 The Contractor shall, on the Effective Date specified in the Details Schedule, provide the Commonwealth Representative with a Deed of Guarantee and Indemnity in the form of Annex D to Attachment F executed by the Guarantor specified in the Details Schedule.

Option: For use when the Contractor has a Master Guarantee and Indemnity Deed with Defence and elects to apply the Master Guarantee and Indemnity to the Contract.

- 7.8.2 The Contractor shall, by the Effective Date specified in the Details Schedule, ensure that the Contract is included as a Guaranteed Agreement at Attachment 1 to the Master Deed of Guarantee and Indemnity.

7.9 Suspending Payments (Core)

Note to drafters: Tailor the following list of events as appropriate.

- 7.9.1 The Commonwealth may suspend some or all payments under the Contract if one or more of the following events occurs:

- a. the Contractor fails to replace a Key Person in accordance with clause 3.8;

Option: Include the following clause if the Contract will be implemented as a performance-based contract.

- b. the Adjusted Performance Score for any KPI for a Review Period is, or is likely to be, less than 80%;

- c. the Contractor fails to obtain or maintain any Authorisation, except to the extent that the failure was outside of the Contractor's reasonable control;
- d. the Contractor fails to provide or maintain a financial security or deed in accordance with clauses 7.5 to 7.8;
- e. the Contractor fails to comply with clause 9.1 or 12.4;
- f. the Contractor fails to comply with its obligations under clause 5;
- g. the Contractor fails to submit or obtain Approval for a Remediation Plan, or comply with an Approved Remediation Plan, in accordance with clause 6.7, within the timeframe required by the Commonwealth; or
- h. the Contractor fails to remedy a Default within the period specified in the Default Notice.

Note to drafters: The option of 5 days should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant Contract. If the Commonwealth does not intend to use the PEPPOL framework, the 5 day option and note to tenderers should be removed prior to RFT release.

Note to tenderers: In accordance with clause 7.2.1 and per the Commonwealth Pay On-Time Policy, the selection of 5 or 20 days below will depend on whether the PEPPOL framework has been agreed by the Commonwealth and the Contractor. This will be determined based on the tenderer's response to clause 2.7 of Annex A to Attachment A to the Conditions of Tender.

- 7.9.2 The Commonwealth shall pay any withheld amounts to the Contractor within **[INSERT 5 OR 20]** days after the cessation of all events that entitled the Commonwealth to withhold payment under this clause 7.9.

7.10 Late Payments (RFT Core)

Note to drafters: In accordance with the Supplier Pay On-Time or Pay Interest Policy, the Commonwealth is obliged to pay interest when it does not make payment in full within the

maximum payment terms. Refer to Resource Management Guide 417 for further information, including exceptions to the application of the policy:

- <https://www.finance.gov.au/publications/resource-management-guides/supplier-pay-time-or-pay-interest-policy-rmg-417>.

7.10.1 If payment of an amount due under the Contract is made late, the Commonwealth shall pay interest on the unpaid amount, whether or not the Contractor has submitted a separate invoice for the interest.

7.10.2 Interest payable by the Commonwealth under this clause 7.10 shall be calculated in accordance with the following formula:

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

where:

"I%" means the Australian Taxation Office (ATO) sourced General Interest Charge rate current at the due date of payment expressed as a percentage;

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

"n" means the number of days that the payment was late up to and including the day that the payment is made.

7.10.3 Interest shall only be payable in accordance with this clause 7.10 if the interest amount exceeds A\$100.

7.11 Taxes and Duties (Core)

7.11.1 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 the Contractor agrees that they are included within the payments under the Contract.

7.11.2 The amounts set out in or determined in accordance with Attachment B include GST for Services to be delivered under the Contract which are taxable supplies within the meaning of the GST Act.

7.11.3 Each Tax Invoice provided under clause 7.2.5 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.

7.11.4 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.

7.11.5 If the Commonwealth makes, or is assessed by the ATO as having made, a taxable supply to the Contractor under or in connection with the Contract, the Commonwealth is 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.

7.11.6 The Commonwealth may elect to recover from the Contractor under clause 13.6 any amount of GST to be paid by the Contractor under clause 7.11.5. No amount shall be owing to the Commonwealth under this clause 7.11.6 until the Commonwealth elects to recover the amount.

7.12 GST Agent (RFT Core)

Note to tenderers: This clause will only be included if the Contractor appoints a resident agent. 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 GST Act. Tenderers should indicate, within the 'Statement of Non-Compliance' tendered in accordance with TDR D A-3, the requirement for this clause in any resultant Contract and, if so, their ability to comply with it

7.12.1 The Contractor has appointed the GST Agent specified in the Details Schedule (if any) as its resident agent for the purposes of Division 57 of the GST Act.

7.12.2 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 clause 7.11 and this clause 7.12.

- 7.12.3 Without limiting clause 7.12.2, 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 7.2; and
 - b. complies with Division 57 of the GST Act.
- 7.12.4 The Commonwealth shall make all payments otherwise due to the Contractor under clause 7.2 to the resident agent. The Contractor agrees that such payments to the resident agent shall discharge, to the extent of the payment, the Commonwealth's liability to the Contractor for those Services.
- 7.12.5 If the Contractor appoints an alternative resident agent, the Contractor shall notify the Commonwealth Representative within 10 Working Days after the change and provide the information required in the Details Schedule.
- 7.12.6 The Contractor, if requested by the Commonwealth Representative, shall provide the Commonwealth Representative with a copy of the resident agency agreement, which copy need not contain prices.

7.13 Cost Principles (Core)

- 7.13.1 The Contractor shall apply the Defence Cost Principles when preparing any:

Option: For use when Defence Cost Principles are applied

Note to drafters: Use unless not required as per cl 2.31. of the Defence Cost Principles

- a. price for any CCP under clause 11.1; or S&Q Order under clause 3.10; or
- b.
- c. claim for costs if the Contract is terminated.

8 DEFECT NOTIFICATION AND RECTIFICATION (CORE)

8.1 Notification of Defects (Core)

- 8.1.1 If during the Defect Notification Period specified in the Details Schedule, the Contractor becomes aware of any Defect in the Products or Services which adversely affects, or is likely to adversely affect any of the following, then the Contractor shall notify the Commonwealth Representative within the time period indicated:
- a. the safety of any persons - 1 Working Day;
 - b. the security of any Product or the system on which the Product has been installed, where the risk is assessed, in accordance with the Approved SSMP as:
 - (i) high (or higher) – 1 Working Day; or
 - (ii) medium (or lower) – 5 Working Days;
 - c. subject to clause 8.1.1b, the operation or capability of any Product or Deliverable - 5 Working Days; or
 - d. any other property - 5 Working Days.
- 8.1.2 If a Defect requires an investigation to determine its cause and contributing factors, the Contractor shall perform the investigation in accordance with the SOW, or if directed by the Commonwealth, prepare and submit an S&Q Quote for the performance of the investigation. Unless the Contractor is entitled to claim an additional amount under clause 8.2.2, the investigation or S&Q Service shall be provided at no cost to the Commonwealth.

8.2 Defect Rectification and Assistance Obligations (Core)

- 8.2.1 If the Commonwealth Representative notifies the Contractor of a Defect in the Services, or the Contractor notifies the Commonwealth under clause 8.1 (or otherwise), then during the relevant Defect Rectification Period (specified in the Details Schedule), the Contractor shall, within **[INSERT PERIOD]** after the notification, or a longer period agreed in writing by the Commonwealth, by repair, replacement or modification:

- a. rectify the Defect; and
- b. rectify any damage or other adverse effect to the extent caused by the Defect or the rectification of the Defect,

whether or not the Defect arises out of or as a consequence of a Contractor Default.

8.2.2 Unless otherwise specified in the Contract, the Contractor shall be entitled to claim for an additional amount (calculated in accordance with Attachment B as an S&Q Service) for any rectification work performed under clause 8.2.1 but only to the extent that the Defect arose out of or as a consequence of any of the following:

- a. a Commonwealth Default;
- b. subject to clause 8.2.3, an act or omission of a Commonwealth Contractor under a previous acquisition, support or other contract with the Commonwealth;
- c. the Commonwealth wilfully damaging a Product being supported or Deliverable; or
- d. if the Defect comprises damage to the Product being supported or Deliverable, the damage arose out of or as a consequence of the following:
 - (i) the Product being supported or Deliverable being stored, installed, configured, used, maintained or modified by the Commonwealth or a Commonwealth Contractor in a way that deviates from any authorised specifications, instructions or manuals, unless such deviation is necessary to enable the Product or Deliverable to function and be fit for its intended purpose;
 - (ii) an Excepted Risk occurring; or
 - (iii) a breach of a general law duty or an applicable law by an Unrelated Party, except to the extent that the Contractor is liable for such damage under clause 10.4.2.

8.2.3 To the extent that any identified Defect is determined by the Commonwealth to have arisen out of or as an act or omission under a contract referred to in clause 8.2.2b, and the Commonwealth determines that rectification of the Defect is covered by that other contract (for example, within that contract's defect notification period), then the Contractor shall assist the Commonwealth in the gathering of evidence to support a claim under that other contract.

8.2.4 The Contractor's obligations under clause 8.2.1 do not require the Contractor to rectify a Defect in GFM incorporated into Deliverables except to the extent that the Defect:

- a. arose out of or as a consequence of a Contractor Default; or
- b. was present in the item when it was provided to the Commonwealth by or through the Contractor or a Related Body Corporate of the Contractor (whether under the Contract or another contract).

8.2.5 Subject to clauses 8.2.2 and 8.2.9, the Contractor shall bear all costs of, and incidental to any rectification work performed under clause 8.2.1, including the costs of any removal, disassembly, packing, freight relevant testing, re-assembly and reinstallation, except to the extent that the Commonwealth Representative otherwise reasonably agrees.

8.2.6 If the Contractor fails to rectify a Defect within the period specified in clause 8.2.1, the Commonwealth may itself or by a third party ensure that the rectification is performed. The Commonwealth may elect to recover from the Contractor under clause 13.6 the amount of the Commonwealth's costs of rectifying the Defect. No amount shall be owing to the Commonwealth under this clause 8.2.6 until the Commonwealth elects to recover the amount.

8.2.7 If a Defect (other than a Latent Defect) in any Services is rectified in accordance with clause 8.2.1, the Defect Rectification Period for the affected Services shall expire on the later of:

- a. the end of the original Defect Rectification Period; or
- b. the date that is half the original Defect Rectification Period after the rectified Products or Deliverables are returned to the Commonwealth.

8.2.8 If the Contractor has performed rectification work as required by this clause 8.2 and the Commonwealth is not satisfied that the Defect has been rectified, the Contractor shall perform any additional tests that are required by the Commonwealth to determine whether the Defect has been rectified.

- 8.2.9 If tests conducted under clause 8.2.8 show that the Defect has been rectified, the cost of the tests shall be borne by the Commonwealth. If the tests show that the Defect has not been rectified:
- a. the Contractor shall rectify the Defect as soon as practicable; and
 - b. the costs of the rectification work and the tests shall be borne by the Contractor.
- 8.2.10 Nothing under this clause 8.2 limits or affects:
- a. the obligations of the Contractor under clause 3.2, 3.3, 10.3 or 10.4; or
 - b. any other right of the Commonwealth under the Contract or otherwise arising out of or as a consequence of a Defect.

8.3 Manufacturer and Other Warranties (Optional)

Note to tenderers: This clause may be included if there are warranties that are available from the relevant manufacturer or supplier that will extend beyond the end of the relevant Defect Rectification Period and these warranties represent value for money for the Commonwealth. Tenderers should identify any warranties of this nature in their tenders, including the additional cost (if any) associated with such warranties.

- 8.3.1 The Contractor shall ensure that the Commonwealth obtains the benefit of any manufacturer, supplier or other third party warranty applicable to the Services (including after the expiry of the Defect Rectification Period for the relevant Services).

9 INSURANCE (CORE)

9.1 Insurance (Core)

Note to drafters: The Liability Risk Assessment (LRA) provides the basis for determining insurance requirements. Drafters are to tailor this clause by selecting only those insurances actually required for the draft Contract and by inserting the required limit of indemnity for the relevant insurances in the Details Schedule. The below clause is the short form version of the ASDEFCON Insurance clause, suited to projects with lower value and less complex risks. If the LRA supports requiring other types of insurance not listed here (such as aviation, marine or cyber insurance), or any of the limits of indemnity exceed A\$25 million, refer to the ASDEFCON (Support) template for the long form insurance clause.

Drafters should also refer to the ASDEFCON Insurance Handbook and seek support from contracting support officers, Defence Legal or seek specialist independent legal advice to assist with understanding and tailoring this clause.

The ACIP Initiative applies to CASG procurements in accordance with Functional Policy (Procurement) – Mandatory Procurement Policy Requirements for the Approved Contractor Insurance Program Initiative. Information on the ACIP Initiative is available at:

- <http://ibss/PublishedWebsite/LatestFinal/836F0CF2-84F0-43C2-8A34-6D34BD246B0D/Item/331E4CAE-EEBE-45A0-9DA6-9B2C24E1DE33>.

For non-CASG procurements, drafters may seek approval to apply the ACIP Initiative from the ACIP.ManagementTeam@defence.gov.au.

Drafters using this clause for non-CASG procurements (unless otherwise approved by the ACIP Management Team) or for CASG procurements in which no tenderer with ACIP status will participate, must delete the Note to tenderers below and also delete clause 9.1.9 and its associated Note to tenderers.

Note to tenderers: The operation of clause 9.1 will vary depending on whether the Contractor has Approved Contractor Insurance Program (ACIP) status and, where a Contractor has ACIP status, to the extent any of the policies required by clause 9.1 are within the Contractor's ACIP.

As per clause 9.1.9, for Contractors with ACIP status, the Contractor will be deemed compliant with relevant requirements of this clause where the policy is within the scope of the Contractor's ACIP. Information on the ACIP Initiative and the list of companies with current ACIP status is at:

- <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/acip-initiative>.

- 9.1.1 The Contractor shall effect and maintain (or be insured under) the following insurances for the times and in the manner specified in this clause 9.1, except to the extent that a particular risk is insured against under other insurance effected in compliance with this clause 9.1:
- a. workers compensation insurance or registration as required by law, in respect of the Contractor's liability to its employees engaged in the performance of any obligation or the exercise of any right under the Contract;
 - b. public and products liability insurance, written on an occurrence basis with limits of indemnity not less than the relevant amounts specified in the Details Schedule, which covers the Contractor and Contractor Personnel for their respective liabilities caused by, arising out of, or in connection with the negligent performance of any obligation or the exercise of any right under the Contract by the Contractor or Contractor Personnel. **[Note: The following sentence is optional and should be used where the works under the contract will occur only in Australia and the acquired items will not be used outside of Australia.]** This insurance shall have a territorial limit which includes Australia. **[Note: The following sentence is optional and should be used where the works under the contract will occur in whole or part outside of Australia and the acquired items may be used outside of Australia.]** This insurance shall have a worldwide territorial limit;
 - c. professional indemnity insurance with a limit of indemnity of not less than the amount specified in the Details Schedule, and including a right of reinstatement, which covers the liability of the Contractor at general law arising from a negligent breach of duty owed in a professional capacity. Such insurance shall have a retroactive date of no later than the earlier of the commencement of the work under the Contract or any earlier preparatory work by the Contractor. **[Note: The following sentence is optional depending on the services and risks]** Such insurance shall also:
 - (i) extend to cover claims related to Software and IT risks; and
 - (ii) extend to cover claims for unintentional breaches of intellectual property rights;
 - d. all risks property insurance covering:
 - (i) tangible Deliverables unless and to the extent that the Commonwealth has expressly retained the risk of such property;
 - (ii) GFE and any other property of the Commonwealth in the care, custody or control of the Contractor or Contractor Personnel unless and to the extent that the Commonwealth has expressly retained the risk of such property; and
 - (iii) all other property, plant and equipment in the care, custody or control of the Contractor material to the Contractor's ability to perform its obligations under the Contract,

against the risks of loss, damage or destruction by all commercially insurable risks, for the full replacement or reinstatement value of such insured property;
 - e. transit insurance covering any tangible property referred to in clause 9.1.1d, against the risks of loss, damage or destruction caused by all commercially insurable risks for an amount not less than their full replacement value plus freight and insurance on an indemnity basis during transit and during loading or unloading and storage during transit where such transits are at the risk of the Contractor;
 - f. compulsory third party motor vehicle insurance as required by law; and
 - g. motor vehicle liability insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule covering:

- (i) third party property loss or damage arising out of the use by the Contractor of any registered or unregistered plant or vehicles; and
 - (ii) third party bodily injury, illness or death arising out of the use by the Contractor of any unregistered plant or vehicles and, any registered vehicles not required to be insured under compulsory third party insurance in a foreign jurisdiction,
- in connection with the work under the Contract by the Contractor or Contractor Personnel.
- 9.1.2 For the avoidance of doubt, the terms of this clause 9.1 do not alter the allocation of risk or liability between the parties as provided for under any other clause of the Contract.
- 9.1.3 The insurances and registrations referred to in:
- a. the following clauses shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed:
 - (i) clause 9.1.1a (workers compensation); and
 - (ii) 9.1.1d (property);
 - b. clause 9.1.1b (public and products liability) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed **[Note: Include the rest of this sentence only if the products supplied have a life which exceeds the contract period]** and, in respect of product liability for **[Note: Insert period sufficient to cover the life of the product if it extends beyond the Contract term or, where this is commercially too long, some reasonable period eg 7/10]** years following completion of the work under the Contract;
 - c. clause 9.1.1c (professional indemnity) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until the earlier of:
 - (i) **[...INSERT EG. 'seven' or 'ten'...]** years following completion of the work under the Contract; or
 - (ii) **[...INSERT EG. 'seven' or 'ten'...]** years following an earlier termination of the Contract;
 - d. clause 9.1.1e (transit) shall be effected on or before the start of each conveyance and maintained until each conveyance ends by delivery; and
 - e. clauses 9.1.1f (compulsory third party) and 9.1.1g (motor vehicle liability) shall be effected on or before the date the plant or vehicle is used in connection with the work under the Contract and maintained until such plant or vehicle ceases to be so used.
- 9.1.4 To the extent that the Contractor's insurances and registrations required by clause 9.1 of this Contract are written on a claims made basis (notwithstanding any requirements of this Contract for such insurances to be written on an occurrence basis) then the Contractor shall maintain those insurances and registrations until the earlier of:
- a. **[...INSERT EG. 'seven' or 'ten'...]** years following completion of the work under the Contract; or
 - b. **[...INSERT EG. 'seven' or 'ten'...]** years following an earlier termination of the Contract.
- 9.1.5 With the exception of the workers compensation insurance or registrations (referred to in clause 9.1.1a) and the compulsory third party motor vehicle liability insurance (referred to in clause 9.1.1f), the insurances required by this clause 9.1 shall be effected with insurers with a financial security rating of "A-" or better by Standard & Poors (or the equivalent rating with another recognised rating agency), or an insurer approved by the Commonwealth, acting reasonably.
- 9.1.6 The Contractor shall, on request, produce evidence satisfactory to the Commonwealth Representative, acting reasonably, of the currency and terms of the insurances referred to in this clause 9.1.
- 9.1.7 The Contractor shall use its reasonable endeavours to ensure that its Subcontractors are insured as required by this clause 9.1, as is appropriate (including with respect to the amount

of insurance, types of insurance and period of insurance) given the nature of services or work to be performed by them, as if they were the Contractor.

- 9.1.8 The Contractor shall, in respect of the insurances required by this clause 9.1:
- a. promptly inform the Commonwealth if it becomes aware of any actual, threatened or likely claims (with the exception of claims or potential claims by the Commonwealth against the Contractor) which could materially reduce the available limits of indemnity or which may involve the Commonwealth, and shall reinstate or replace any depleted aggregate limit of indemnity resulting from claims that are unrelated to the work under the Contract, if requested to do so in writing by the Commonwealth; and
 - b. do everything reasonably required by the Commonwealth to enable the Commonwealth to claim and to collect or recover monies due under any insurance policy.

Note to tenderers: Clause 9.1.9 will only be included in a resultant Contract if the Contractor has ACIP status and the clause may require amendment to only apply to those insurances to be covered by the ACIP.

- 9.1.9 The Contractor shall be:
- a. deemed compliant with the requirements of the following clauses:
 - (i) clause 9.1.1a (workers compensation);
 - (ii) clause 9.1.1b (public and products liability);
 - (iii) clause 9.1.1c (professional indemnity);
 - (iv) clause 9.1.1d (property);
 - (v) clause 9.1.1e (transit);
 - (vi) clause 9.1.1f (compulsory third party motor vehicle liability);
 - (vii) clause 9.1.1g (motor vehicle liability); and
 - (viii) clause 9.1.5; and

- b. relieved of its obligations under clauses 9.1.6 and 9.1.8,

in respect of a particular insurance listed in clause 9.1.9a for any period during which the Contractor's insurance program holds Approved Contractor Insurance Program (ACIP) status under CASG's centralised process for monitoring the compliance of contractors with contractual insurance requirements, subject to any limitations on or conditions of that approval (including whether the Contractor's ACIP status extends to that type of insurance). The Contractor shall advise the Commonwealth Representative within 5 Working Days if its ACIP status is withdrawn or suspended by the Commonwealth.

- 9.1.10 If the Contractor fails to effect and maintain the insurances in accordance with this clause 9 the Commonwealth may, but is not obliged to, effect and maintain the relevant insurances and may:
- a. elect to recover from the Contractor under clause 13.6 the cost of effecting and maintaining the insurance; or
 - b. deduct the premiums payable for the relevant insurances from amounts payable to the Contractor under the Contract.

No amount shall be owing to the Commonwealth under this clause 9.1.10 until the Commonwealth elects to recover the amount.

10 INDEMNITIES, DAMAGES, RISK AND LIABILITY (CORE)

10.1 Indemnity (Core)

- 10.1.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with:
- a. the death, personal injury, disease or illness of any employee or officer of the Contractor in relation to the Contract; and
 - b. a Claim by a third party arising out of or as a consequence of a Contractor Default, including a Claim in respect of:

- (i) the death, personal injury, disease or illness of any person; or
- (ii) loss of or damage to any third party property.

- 10.1.2 The liability of the Contractor under clause 10.1.1a shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.
- 10.1.3 The liability of the Contractor under clause 10.1.1b shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of:
- a. a Commonwealth Default;
 - b. an Excepted Risk; or
 - c. a breach of a general law duty or an applicable law by an Unrelated Party.
- 10.1.4 The Contractor shall release the Commonwealth and Commonwealth Officers in respect of any liability for Loss referred to in clause 10.1.1, except to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.

10.2 Intellectual Property and Confidentiality (Core)

- 10.2.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with a Claim by a third party in respect of:
- a. an infringement or alleged infringement of the third party's IP rights (including Moral Rights) arising out of or as a consequence of an activity permitted or purportedly permitted by or under a licence or assignment of IP rights under or referred to in the Contract (including in clause 5); and
 - b. breach or alleged breach of any obligation of confidentiality owed to that third party arising out of or as a consequence of any act or omission of the Contractor or Contractor Personnel.
- 10.2.2 The liability of the Contractor under clause 10.2.1 shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.
- 10.2.3 In this clause 10.2:
- "**infringement**" of a right includes an act or omission that 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*, or section 25 of the *Circuit Layouts Act 1989*, constitute an infringement of the right.

10.3 Loss of or Damage to the Deliverables and Products (Core)

- 10.3.1 Risk in relation to any loss of, or damage to Deliverables, or Products which are not yet owned by the Commonwealth resides with the Contractor:
- a. until the Deliverables and Products are delivered or returned to the Commonwealth in accordance with the Contract; and
 - b. at any time after delivery or return (but prior to Acceptance of the Deliverables and Products) where the Contractor retakes possession of the Deliverables in accordance with the Contract.
- 10.3.2 The Contractor shall replace or reinstate any Deliverables and Products that are lost and repair any Deliverables and Products that are damaged while the risk resides with the Contractor under clause 10.3.1, except to the extent that the loss or damage to the Deliverables or Products arose out of or as a consequence of a Commonwealth Default.
- 10.3.3 Nothing in this clause 10.3 limits or affects the Contractor's obligations under clause 3.2, 3.3, 8.2 or 10.4.

10.4 Loss of or Damage to Commonwealth Property (Core)

- 10.4.1 The Contractor shall (and shall ensure that all Contractor Personnel) take reasonable care, to prevent loss of, or damage to, Commonwealth Property in connection with the work under the Contract.
- 10.4.2 The Contractor shall be liable for any Loss incurred by the Commonwealth in connection with any loss of, or damage to any Commonwealth Property while it is:

- a. on any Contractor Premises; or
- b. being stored, operated or transported by or on behalf of the Contractor, a Related Body Corporate of the Contractor, or a Subcontractor,

in connection with the Contract, whether or not the loss or damage arises out of or as a consequence of a Contractor Default.

10.4.3 The liability of the Contractor under clause 10.4.2 shall be reduced to the extent that the Contractor demonstrates that the loss or damage arose out of or as a consequence of:

- a. a Commonwealth Default; or
- b. an Excepted Risk.

10.4.4 Without limiting clause 10.4.2, the Contractor shall be liable for any Loss incurred by the Commonwealth in connection with any loss of, or damage to, Commonwealth Property arising out of or as a consequence of a Contractor Default.

10.4.5 The liability of the Contractor under clause 10.4.4 shall be reduced to the extent that the Contractor demonstrates that the loss or damage arose out of or as a consequence of:

- a. a Commonwealth Default;
- b. an Excepted Risk; or
- c. a breach of a general law duty or an applicable law by an Unrelated Party.

10.4.6 Nothing in this clause 10.4 limits or affects the Contractor's obligations under clause 3.2, 3.3, 8.2 or 10.3.

10.5 Exclusions of Certain Losses (Core)

10.5.1 Subject to clause 10.6.2, the Contractor is not liable to pay compensation or damages under or in relation to this Contract, or liable to make a payment under an indemnity in this Contract, for Loss incurred by the Commonwealth resulting from:

- a. damage to reputation or exemplary or punitive damages incurred by the Commonwealth; or
- b. the Commonwealth's diminished revenue, profits or business opportunities.

10.5.2 The Commonwealth is not liable to pay compensation or damages under or in relation to this Contract for Loss resulting from damage to reputation or for exemplary or punitive damages incurred by the Contractor.

10.6 Liability Caps (Core)

Note to drafters: A liability risk assessment is to be undertaken by the Commonwealth in accordance with the Defence Liability Principles and the standard Defence methodology described in the Liability Risk Assessment template, both of which can be accessed at:

- <http://drnet/casg/commercial/UndertakingProcurementinDefence/Pages/Liability-Risk-Management.aspx>.

The liability risk assessment provides the basis for determining the limitation of liability cap in this clause 10.6 and insurance requirements in clause 9.

Note to tenderers: The limitation of liability amounts were determined by the Commonwealth based on a liability risk assessment conducted in accordance with the Defence Liability Principles and the standard Defence methodology described in the Liability Risk Assessment template, both of which can be accessed at:

- <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/liability-risk-management>.

10.6.1 The liability of the Contractor to the Commonwealth in connection with the Contract (including at general law, in negligence or in equity) is limited in aggregate to the Limitation Amount specified in the Details Schedule.

10.6.2 The liability cap in clause 10.6.1 and the exclusions of liability under clause 10.5 do not apply to a liability of the Contractor under or arising out of the Contract in relation to:

- a. **(third party claims)** a Claim by a third party in respect of:

- (i) the death, personal injury, disease or illness of any person; or
 - (ii) loss of or damage to property of a third party;
 - b. **(IP)** an infringement of an intellectual property right (including a Moral Right) of any person;
 - c. **(confidentiality)** a breach of an obligation of confidence;
 - d. **(death of or personal injury to Commonwealth Officers)** the death, personal injury, disease or illness of a Commonwealth Officer;
 - e. **(non-Defence Commonwealth Property)** the loss of, or damage to, Commonwealth Property (other than Defence Property);
 - f. **(Defence security)** a breach of the Contractor's obligations in relation to Defence security;
 - g. **(privacy)** a breach of a written law with respect to privacy;
 - h. **(criminal offences)** an act or omission of the Contractor or Contractor Personnel, where the person concerned has been convicted or found guilty of an offence comprised in the act or omission;
 - i. **(Wilful Default)** a Wilful Default of the Contractor or Contractor Personnel;
 - j. **(repudiation)** a repudiation of the Contract by the Contractor where the Contractor has intentionally abandoned the Contract; or
 - k. **(restitution)** restitution of amounts paid under a mistake of fact or law in relation to the Contract.
- 10.6.3 Each paragraph of clause 10.6.2 is independent of, and its application is not affected by, any of the other paragraphs.
- 10.6.4 The amount of a liability cap in clause 10.6.1 shall be adjusted in accordance with the formula:

$$new\ amount = \left(\frac{most\ recent\ CPI}{Base\ Date\ CPI} \right) \times existing\ amount$$

where:

'CPI' means the Consumer Price Index, All Groups, Weighted Average of Eight Capital Cities published by the ABS in Catalogue number 6401.0, Table 7, Series ID A2325846C or, if that Index is no longer published by the ABS, the index published by the ABS that most closely corresponds to that Index;

'Base Date CPI' means the CPI most recently published before the Base Date; and

'most recent CPI' means the CPI most recently published before the question whether a liability cap has been reached is determined.

10.7 Proportionate Liability Laws (Core)

- 10.7.1 The parties agree that, to the extent permitted by law, the provisions of the Contract:
- a. are express provisions for their rights, obligations and liabilities with respect to matters to which a Proportionate Liability Law applies; and
 - b. exclude, modify and restrict the provisions of a Proportionate Liability Law to the extent of their inconsistency with the Proportionate Liability Law.

11 CONTRACT MANAGEMENT (CORE)

11.1 Change to the Contract (Core)

- 11.1.1 Except as expressly permitted in the Contract, the Contract shall only be changed by a CCP in accordance with this clause 11.1. The parties shall not be liable to each other for any additional work undertaken or expenditure incurred unless the change has been Approved under clause 11.1 and taken effect in accordance with clause 11.1.5.
- 11.1.2 Either party may propose a change to the Contract. CCPs shall be in the format set out at Annex A to Attachment F.

- 11.1.3 If the Commonwealth Representative proposes a change to the Contract it shall by notice to the Contractor, require the Contractor to prepare the CCP and the Contractor shall within 30 days of such notice, submit a CCP to the Commonwealth to give effect to the change.
- 11.1.4 The Contractor shall calculate the effect of a CCP on the Contractor's payment entitlements by reference to Attachment B (including any rates it contains), or any other basis agreed by the parties in writing.
- 11.1.5 The Commonwealth shall within 30 days after receipt (or such other period as agreed by the parties in writing) either Approve the CCP or reject the CCP giving reasons for such rejection. A CCP that has been Approved shall take effect when executed by both parties unless otherwise set out in the CCP.
- 11.1.6 Subject to clause 11.1.7, the Contractor shall not be entitled to any payment for the preparation of, or response to, a CCP.
- 11.1.7 Except where a CCP is proposed or required to address any non-performance of the Contractor under the Contract, the Commonwealth shall meet the reasonable costs of preparation of a CCP that is required by the Commonwealth (whether or not the CCP is Approved by the Commonwealth).
- 11.1.8 Prior to the Contractor preparing a CCP, the Commonwealth may require the Contractor to provide a Not to Exceed (**NTE**) quote for the preparation of a CCP and the amount payable under clause 11.1.7 shall not exceed the NTE quote provided.

11.2 Conflict of Interest (Core)

- 11.2.1 The Contractor warrants that, to the best of its knowledge after making diligent inquiries, no undisclosed conflict of interest exists as at the Effective Date, or is likely to arise in the performance of its obligations under the Contract by itself or by Contractor Personnel, any Approved Subcontractor or Approved Subcontractor Personnel.
- 11.2.2 If during the Term a conflict of interest arises, or appears likely to arise, the Contractor shall promptly notify the Commonwealth and take such steps as the Commonwealth may require to resolve the conflict.
- 11.2.3 If the Contractor fails to notify the Commonwealth in accordance with this clause 11.2, or is unable or unwilling to resolve the conflict of interest as required, or in the opinion of the Commonwealth the conflict cannot be satisfactorily resolved, the Commonwealth may exercise its rights to terminate the Contract under clause 13.2.

11.3 Waiver (Core)

- 11.3.1 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.
- 11.3.2 The exercise of the Commonwealth's rights under the Contract does not affect any other rights of the Commonwealth under the Contract or otherwise, and does not constitute:
- a. an election to exercise those rights instead of other rights; or
 - b. a representation that the Commonwealth will not exercise other rights.

11.4 Confidential Information (Core)

Note to tenderers: Completion of Attachment F will be undertaken with the preferred tenderer(s) prior to / during negotiations for any resultant Contract. The preferred tenderer(s) will need to justify how each clause and other information that is contained or generated under any resultant Contract, which is proposed to be treated as Confidential Information, meets all four of the criteria listed in Attachment F.

- 11.4.1 Each party shall ensure that Confidential Information provided by the other party under or in connection with the Contract or identified in Attachment E is not disclosed by the party, except to the extent that:
- a. the disclosure is permitted under clause 11.4.3;
 - b. the Confidential Information is in TD, Software or Contract Material and the disclosure is in connection with the exercise of the rights provided for in clause 5;
 - c. the disclosure is to a Commonwealth Service Provider to enable it to perform its obligations, functions or duties to the Commonwealth; or

- d. the other party provides its prior written consent to the disclosure (and such consent may be subject to conditions).
- 11.4.2 Each party shall ensure that, before disclosing Confidential Information under clause 11.4.1b or 11.4.1c, the recipient executes (or has already executed) a written undertaking in the form of a deed of confidentiality or is subject to a contractual obligation that appropriately restricts the further disclosure of that information.
- 11.4.3 The restriction in clause 11.4.1 does not apply to a disclosure of Confidential Information to the extent that the disclosure is:
- a. required or authorised by law;
 - b. necessary for the conduct of any legal proceedings arising in connection with the Contract;
 - c. made by the Commonwealth, a Minister or the Parliament, in accordance with statutory or portfolio duties or functions or for public accountability reasons, including following a request by the Parliament, a parliamentary committee or a Minister; or
 - d. to any of the following persons:
 - (i) a legal adviser, insurer, financier, auditor or accountant of a party to the extent required to enable them to perform those roles;
 - (ii) a Related Body Corporate for internal management purposes;
 - (iii) any Commonwealth Personnel who need to know the information in order to undertake their duties or functions; and
 - (iv) an employee, officer or agent of the Contractor who needs to know the information to enable the Contractor to perform its obligations under the Contract.
- 11.4.4 The Contractor shall not, in marking information supplied to the Commonwealth, misuse the term 'Confidential Information' or equivalent terms.
- 11.4.5 Subject to clause 11.4.6, the Contractor shall return to the Commonwealth or destroy, all documents in its possession, power or control which contain any Confidential Information of the Commonwealth if the Confidential Information is no longer required for the purposes of the Contract.
- 11.4.6 The Contractor may retain Confidential Information of the Commonwealth in its records, if retention is required to comply with any legal, professional or insurance obligations or where it is not reasonably practicable to destroy the records included in routine electronic backups.
- 11.4.7 Retention, return or destruction of the documents referred to in this clause 11.4 does not release the Contractor from its obligations under the Contract.

11.5 Assignment and Novation (Core)

- 11.5.1 Neither party may, without the written consent of the other, assign its rights under the Contract or novate its rights or obligations under the Contract.
- 11.5.2 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.

11.6 Negation of Employment and Agency (Core)

- 11.6.1 The Contractor shall not represent itself, and shall ensure that Contractor Personnel do not represent themselves, as being employees, partners or agents of the Commonwealth.
- 11.6.2 None of the Contractor or Contractor Personnel shall, by virtue of the Contract, be or for any purpose be deemed to be an employee, partner or agent of the Commonwealth.

11.7 Commonwealth Access (Core)

- 11.7.1 During the performance of the Contract, the Contractor shall, subject to the Commonwealth giving 5 Working Days prior notice to the Contractor, provide the Commonwealth Representative, and any person authorised by the Commonwealth Representative, with access to its premises, records or accounts for any purpose related to the Contract. However, in the event of an emergency, an accident or incident investigation, a threat to WHS or the Environment, the Commonwealth may require, and the Contractor shall provide, immediate

access to the premises, records or accounts for any purpose related to such emergency, investigation or threat. The Commonwealth and its nominees may copy any records or accounts relevant to the Services or the Contract and retain or use these records or accounts for the purposes of this clause.

- 11.7.2 The Contractor shall ensure that each Approved Subcontractor provides the Commonwealth Representative, and any person authorised by the Commonwealth Representative, with access to the Approved Subcontractor's premises, records and accounts for any purpose relevant to the Services or the Approved Subcontract, including the right to copy.
- 11.7.3 The Commonwealth shall comply with, and shall require any delegate or person authorised by the Commonwealth Representative to comply with, any reasonable Contractor or Approved Subcontractor safety and security requirements or codes of behaviour for the premises.
- 11.7.4 Without limiting clauses 11.7.1 to 11.7.3, the Contractor acknowledges and agrees that:
- a. the Auditor-General has the power under the *Auditor-General Act* 1997 to conduct audits (including performance audits) of the Contractor and Subcontractors in relation to the Contract;
 - b. the Auditor-General may give a copy of, or an extract from, a report on an audit in relation to the Contract to any person (including a Minister) who, in the Auditor-General's opinion, has a special interest in the report or the content of the extract; and
 - c. the Commonwealth Representative may authorise the Auditor-General, or member of the staff of the Australian National Audit Office, to access premises, records and accounts under clause 11.7.1 or 11.7.2.
- 11.7.5 Without limiting the generality of clauses 11.7.1 and 11.7.2, the purposes for which the Commonwealth Representative or any person authorised by the Commonwealth Representative may require access include:
- a. inspecting CMCA and attending, conducting or checking stocktakes of CMCA;

Option: Include when clause 4 is included in the Contract.

- b. validating the Contractor's compliance with the AIC Obligations;
- c. validating the Contractor's progress against the requirements of any Approved Remediation Plan;
- d. validating the Contractor's compliance with clause 5 and the TDSR Schedule;
- e. without being under any obligation to do so, monitoring the Contractor's compliance with any applicable laws or Approved plans in connection with the protection of WHS or the Environment; and
- f. monitoring and assessing compliance with the Commonwealth Supplier Code of Conduct in accordance with clause 12.10.1.

11.8 Contractor Access (Optional)

Note to drafters: Include this clause when the Contractor requires access to Commonwealth Premises for the purposes of performing the Services. If not required, the clause may be replaced with "Not used".

- 11.8.1 The Commonwealth shall, during the Term, provide access to any Commonwealth Premises for persons approved under this clause 11.8 as necessary for the Contractor's performance of the Contract.
- 11.8.2 Unless otherwise agreed in writing, the Contractor shall seek written permission from the Commonwealth Representative, at least 5 Working Days prior to entry being required, for each person the Contractor wishes to have access to Commonwealth Premises.
- 11.8.3 The Commonwealth Representative may grant or may refuse to grant a person access to the Commonwealth Premises. If access to any person specified by the Contractor is refused, the Contractor may request access for another person if necessary for the performance of the Contract.
- 11.8.4 The Commonwealth Representative may by notice to the Contractor withdraw access rights to any Commonwealth Premises at any time for any period.

- 11.8.5 The Contractor shall comply with, and require persons afforded access under this clause 11.8 to comply with, any relevant Commonwealth safety and security requirements, regulations, standing orders, or codes of behaviour for the Commonwealth Premises.

11.9 Subcontracts (Core)

- 11.9.1 The Contractor shall not subcontract the whole of the work under the Contract.
- 11.9.2 The Contractor may, but shall not be required to, subcontract with one or more of the Approved Subcontractors.
- 11.9.3 The Contractor, by subcontracting any part of the work under the Contract, shall not be relieved of its liabilities or obligations under the Contract and shall be responsible for all Subcontractors.

Note to drafters: If a proposed Subcontract meets one or more criteria in clause 11.9.4 then, subject to clause 11.9.5, the Subcontractor will be listed in Attachment I as an Approved Subcontractor and the Contractor will be subject to certain obligations, including the requirement to 'flow-down' certain provisions of this Contract. Drafters should carefully consider the criteria in clause 11.9.4 including the Approved Subcontractor Threshold, having regard to the value and complexity of the Contract and the nature of the work likely to be subcontracted. This clause is not intended to capture minor or low risk Subcontracts.

- 11.9.4 The Contractor shall not subcontract work under the Contract to a Subcontractor if:
- a. the total value of all work with the Subcontractor is expected to exceed the Approved Subcontractor Threshold specified in the Details Schedule;
 - b. the work involves:
 - (i) design and development activities, including engineering change proposals;
 - (ii) modification of systems or equipment;
 - (iii) a Prescribed Activity; or
 - (iv) **[INSERT OTHER SPECIFIC TYPE OF WORK OR TASK(S) TO BE PERFORMED]**; or
 - c. the work involves bringing or creating IP in significant items of TD or Software, unless that Subcontractor is an Approved Subcontractor or unless otherwise Approved by the Commonwealth in writing in accordance with clause 11.9.5.
- 11.9.5 Where clause 11.9.4 applies in respect of a Subcontractor, the Contractor may seek the Commonwealth Representative's Approval, by written request (which includes a detailed justification), for that Subcontractor not to be treated as an Approved Subcontractor for:
- a. the purposes of the Contract (as a whole); or
 - b. for the purposes of the application of specific provisions of the Contract.
- 11.9.6 The Contractor may request the inclusion of additional Approved Subcontractors in Attachment I by submitting a CCP in accordance with clause 11.1. 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.
- 11.9.7 The Commonwealth Representative shall Approve or reject the CCP in accordance with clause 11.1.5. The Commonwealth Representative's Approval shall not be unreasonably withheld.
- 11.9.8 Without limiting the Contractor's obligations under the Contract, the Contractor shall ensure that:
- a. the requirements of clauses 3.4, 3.8, 5.1.3, 5.2.2, 11.6, 12.1, 12.3 and 12.6 are included in all Subcontracts;
 - b. each Subcontractor that requires access to any Commonwealth Premises or to security classified information is subject to the requirements of clause 11.10;
 - c. the requirements of clauses 11.2, 11.7.2 and 11.11 are included in all Approved Subcontracts;

- d. the Subcontractor grants to the Contractor any rights in relation to TD, Software and Contract Material that are necessary to enable the Contractor to grant the licences under clause 5 and comply with its obligations under clause 5;
- e. the Contractor obtains rights, in each Approved Subcontract, that are equivalent to the rights of the Commonwealth under clause 13.4 and includes obligations of the Approved Subcontractor equivalent to the Contractor's obligations under clause 13.5; and
- f. all Approved Subcontracts contain equivalent provisions to those set out in clause 12.4, except where in relation to an Approved Subcontract:
 - (i) the WHS Legislation does not apply in respect of any work performed under that Approved Subcontract; and
 - (ii) the Commonwealth does not have any duties or obligations under the WHS Legislation in respect of the workers engaged or caused to be engaged by the relevant Approved Subcontractor,

in which case the Contractor shall ensure that the Approved Subcontract contains equivalent provisions to those set out in clauses 12.4.3, 12.4.4 and 12.4.11.

- 11.9.9 The Contractor shall not enter into a Subcontract if the terms of the Subcontract will result in the Contractor not complying with a requirement in clause 5.
- 11.9.10 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 itself or by engaging another Subcontractor.
- 11.9.11 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. If requested by the Commonwealth Representative, the Contractor shall provide the Commonwealth Representative with names of Subcontractors and copies of Subcontracts (which need not contain prices) for this purpose.
- 11.9.12 The Contractor shall not enter into a Subcontract with a Subcontractor named by the Workplace Gender Equality Agency as an employer currently not complying with the *Workplace Gender Equality Act 2012* (Cth).

Note to drafters: These clauses 11.9.13 to 11.9.17 must be included in the draft RFT in accordance with the Payment Times Procurement Connected Policy (PT PCP) if the procurement will be valued at over \$4 million (inc GST). If the value of the procurement is not known, it should be assumed for the purposes of the PT PCP, that the procurement is valued above \$4 million (inc GST), unless it is reasonable to assume otherwise.

It is not mandatory to include this clause if any of the limitations at 2.1 of the PT PCP apply. For example, this clause is not required to be included if the procurement is exempt from Division 2 of the CPRs under paragraph 2.6 of the CPRs (i.e. a Defence Exempt Procurement).

Note to tenderers: The Payment Times Procurement Connected Policy (PT PCP) imposes obligations on large businesses who enter into a contract with the Commonwealth to pay invoices under their new Subcontracts (up to \$1 million (inc GST)) within 20 days. Late payments of invoices in scope will incur interest. Further information about the Payment Times Procurement Connected Policy is available from the Department of Treasury at:

- <https://treasury.gov.au/small-business/payment-times-procurement-connected-policy>.

The PT PCP complements the Government Supplier Pay on Time or Pay Interest Policy.

The following clauses will be included in the Contract if:

- **the Tenderer is a Reporting Entity as at the date of its tender response; and**
- **the value of the Contract is above \$4 million (inc GST) as at contract execution.**

- 11.9.13 The Contractor shall comply with the Payment Times Procurement Connected Policy (PT PCP), including the obligation to provide and comply with a PT PCP Remediation Plan (as defined in the PT PCP) when required to do so by the PT PCP Policy Team.
- 11.9.14 If the Contractor enters into a PT PCP Subcontract, the Contractor shall include in that Subcontract:

- a. a requirement for the Contractor to pay the PT PCP Subcontractor:

- (i) within 20 days after the acknowledgement of the satisfactory delivery of the goods or services and receipt of a Correctly Rendered Invoice, provided that this does not affect any other obligation to comply with applicable legislation that provides for a shorter payment period; and
 - (ii) subject to clause 11.9.16, for payments made by the Contractor after the payment is due, the unpaid amount plus interest on the unpaid amount calculated in accordance with the formula for late payments at clause 7.10;
- b. a statement that the PT PCP applies to that Subcontract;
 - c. a statement that the Subcontractor may make a complaint to the PT PCP Policy Team in accordance with the PT PCP if there has been non-compliance with the requirements of this clause 11.9.14;
 - d. a statement that the Contractor must respond to any complaint of non-compliance made by the Subcontractor under clause 11.9.14c; and
 - e. a statement that, if requested by the PT PCP Policy Team, the Contractor must complete a questionnaire in the form of Appendix C to the PT PCP.
- 11.9.15 If the Contractor enters into a Reporting Entity Subcontract, the Contractor shall use reasonable endeavours to include in that Subcontract:
- a. obligations equivalent to those in clause 11.9.14; and
 - b. a requirement that if the Reporting Entity Subcontractor in turn enters into a Reporting Entity Subcontract, then that Subcontract shall include:
 - (i) obligations equivalent to those in clause 11.9.14; and
 - (ii) obligations equivalent to this clause 11.9.15b (such that the obligations in this clause 11.9.15b are to continue to be flowed down the supply chain to all Reporting Entity Subcontractors).
- 11.9.16 The Contractor is not required to pay interest in accordance with clause 11.9.14a(ii) if either:
- a. the Commonwealth has failed to pay the Contractor in accordance with the timeframes and requirements under this Contract; or
 - b. the amount of the interest that would otherwise be payable is less than \$100 (inc GST).
- 11.9.17 The Contractor agrees that if it is the subject of a complaint in relation to its compliance with clauses 11.9.13 to 11.9.16, or the associated payment provisions of a PT PCP Subcontract, the Contractor shall:
- a. not take any prejudicial action against the complainant due to the complaint or any investigation or inquiry in relation to the complaint; and
 - b. cooperate in good faith with the PT PCP Policy Team in connection with any investigation or inquiry and any attempt to resolve the complaint.

11.10 Defence Security (Core)

- 11.10.1 If the Contractor or Contractor Personnel require access to any Commonwealth Premises under the control or responsibility of Defence, the Contractor shall:
- a. comply with any security requirements (including those contained in the Defence Security Principles Framework (DSPF)) notified to the Contractor by the Commonwealth Representative from time to time; and
 - b. ensure that Contractor Personnel are aware of and comply with the Commonwealth's security requirements.
- 11.10.2 The Contractor shall:
- a. ensure that Contractor Personnel undertake any security checks, clearances or accreditations as required by the Commonwealth;
 - b. promptly notify the Commonwealth of any changes to circumstances which may affect the Contractor's capacity to provide Services in accordance with the Commonwealth's security requirements; and
 - c. provide a written undertaking in respect of security or access to the Commonwealth Premises in the form required by the Commonwealth.

Note to drafters: For further information on personnel security clearances and types of accreditation, refer to Principles 23, 40 and 73 of the DSPF. Facility accreditations will be required for certain Business Impact Levels. For information on Business Impact Levels refer to:

- <http://drnet/eig/Defence-Security/Security-Risk-Management/Pages/BIL.aspx>

or contact the relevant Regional DSVS Office.

Where the procurement involves complex security arrangements or a range of personnel security clearances, details should be set out in the Security Classification and Categorisation Guide at Attachment H. In this event, reference to that attachment should be made in the relevant section of the Details Schedule.

Note to tenderers: For information on security classification, and required facility accreditations refer to the Security Classification and Categorisation Guide (SCCG) at Attachment H (if applicable), Principle 73 and Principle 10 of the DSPF, and the Australian Government's Protective Security Policy Framework at:

- <https://www.protectivesecurity.gov.au/policies>.

11.10.3 The security classification of the information and assets accessible to the Contractor and work to be performed under the Contract will be up to and including the level specified in the Details Schedule. The Contractor shall:

- comply with the classification and protection of official information requirements of Principle 10 of the DSPF; and
- ensure that all required personnel (if any) possess a personnel security clearance at the level specified in the Details Schedule, and comply with the requirements and procedures of Principle 40 of the DSPF.

Note to drafters: DISP membership in accordance with Control 16.1 of the DSPF is required in various circumstances, including but not limited to where:

- a contractor is working on classified information or assets, storing or transporting Defence weapons or explosive ordnance, providing security services for Defence bases and facilities;
- the procurement involves weapons or explosive ordnance; or
- as a result of a Defence business requirement.

For further assistance and guidance in relation to determining whether DISP membership is required, refer to DISP Factsheet here:

- <http://ibss/PublishedWebsite/LatestFinal/836F0CF2-84F0-43C2-8A34-6D34BD246B0D/Item/EBDAF9B0-2B07-45D4-BC51-67963BAA2394>.

Note to tenderers: For information on the DISP (and equivalent international agreements or arrangements for overseas tenderers) refer to Control 16.1 of the DSPF. For access to the DSPF tenderers should contact the Contact Officer listed in the Tender Details Schedule.

Option A: If the Contractor will require DISP membership in accordance with Control 16.1 of the DSPF.

11.10.4 The Contractor shall obtain and maintain all elements of DISP membership at the levels specified in the Details Schedule (or an equivalent international agreement or arrangement) in accordance with Control 16.1 of the DSPF for the purposes of the Contract.

Option B: If the Contractor will not require DISP membership in accordance with Control 16.1 of the DSPF.

11.10.5 The Contractor is not required to hold DISP membership within the meaning of Control 16.1 of the DSPF for the purposes of the Contract.

Note to drafters: Where work to be performed overseas will involve security classified information and/or assets, the following option is to be included. Otherwise the option should be deleted.

If, at the time of drafting, it is not clear that this clause will be required, the option is to be included in the draft contract. Otherwise, the Note to tenderers should be deleted.

Note to tenderers: If the tenderer proposes to perform work at an overseas location and that work involved information and/or assets that is subject to a security classification, and that aspect proposal is agreed in any resultant contract, the following clauses will be included.

Option: If work is to be performed overseas and will involve security classified information and/or equipment (as identified in the Details Schedule).

11.10.6 Where work under the Contract is performed overseas, the Contractor shall hold a Facility Security Clearance at the relevant level verified by DS&VS through a bilateral security instrument in accordance with Principle 16 of the DSPF.

Option: For when the procurement involves classified information or security-protected assets (as identified in the Details Schedule).

11.10.7 The Contractor shall classify all information in its possession relating to the performance of the Contract according to the Security Classification and Categorisation Guide in Attachment H and shall ensure that such information is safeguarded and protected according to its level of security classification.

11.10.8 With respect to security classified information, the Contractor shall:

- a. ensure that no security classified information furnished or generated under the Contract shall be released to a third party, including a representative of another country, without prior written approval of the originator through the Commonwealth Representative;
- b. promptly report to the Commonwealth Representative any security incident, as defined by the DSPF, including instances 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; and
- c. ensure that 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 terms of Principle 71 of the DSPF.

Note to drafters: If, at the time of drafting, it is not clear that COMSEC material will be required to be transmitted within Australia, the following option is to be included in the draft contract. Otherwise, the note to tenderers should be deleted. Otherwise the option should be deleted.

Option: For when COMSEC material is transmitted in Australia (as identified in the Details Schedule).

11.10.9 Where COMSEC material is transmitted in Australia, the Contractor shall ensure that:

- a. without limiting clause 11.10.8c, all COMSEC material transmitted between the parties or a party and a Subcontractor in Australia shall in addition to the terms of clause 11.10.8c above be subject to the special security provisions of Principle 13 of the DSPF; and
- b. 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.

Note to drafters: If, at the time of drafting, it is not clear that COMSEC material will be required to be transmitted overseas, the following note to tenderers may be included in the draft Contract. Otherwise, the note to tenderers should be deleted.

Option: For when COMSEC material is transmitted overseas (as identified in the Details Schedule).

11.10.10 Where COMSEC material is transmitted overseas, the Contractor shall ensure that:

- a. all COMSEC material transmitted between the parties or a party and a Subcontractor located overseas shall be subject to approval in the first instance by the Director Australian Signals Directorate (ASD) in respect of Australian COMSEC material and by the respective COMSEC authorities in other countries in respect of COMSEC material originating from those countries; and
- b. 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 ASD and to any bilateral security instrument between Australia and the overseas country.

11.10.11 If there has been a breach by the Contractor or Contractor Personnel of this clause 11.10, the Commonwealth Representative may give the Contractor a notice of termination for default under clause 13.2.

11.10.12 The Contractor shall ensure the requirements of clause 11.10 are included in all Subcontracts where the Subcontractor requires access to any Commonwealth Premises, or to any security classified information or assets, in order to perform the obligations of the Subcontract.

11.11 Post Defence Separation Employment (Core)

11.11.1 Except with the prior written Approval of the Commonwealth Representative, the Contractor shall not permit (and shall ensure that each Approved Subcontractor does not permit) any Defence Personnel or Defence Service Provider who, at any time during the preceding 12 month period was engaged or involved in:

- a. the preparation or management of the Contract;
- b. the assessment or selection of the Contractor; or
- c. the planning or performance of the procurement or any activity relevant or related to the Contract,

to perform, contribute or advise in relation to the performance of the Contract (or the Approved Subcontract).

11.11.2 To avoid doubt, the 12 month period referred to in clause 11.11.1 applies from the date which is 12 months before the date on which the Contractor (or Approved Subcontractor) proposes that the person start performing or contributing to the performance of the Contract (or Approved Subcontract).

11.11.3 The Commonwealth Representative shall not unreasonably withhold Approval of a person under clause 11.11.1 and, in making a decision, shall consider:

- a. the character and duration of the engagement, services or work that was performed by the person during the relevant 12 month period;
- b. any information provided by the Contractor about the character and duration of the services proposed to be performed by the person under the Contract (or Approved Subcontract) including the manner in which the services are proposed to be performed;
- c. the potential for real or perceived conflicts of interest or probity concerns to arise if the person performs or contributes to the performance of the Contract (or Approved Subcontract) in the manner proposed under clause 11.11.3b, and the arrangements which the Contractor (or Approved Subcontractor) proposes to put in place to manage or reduce those conflicts of interest or probity concerns;
- d. any information provided by the Contractor concerning any significant effect that withholding Approval will have on the person's employment or remuneration opportunities or the performance of the Contract (or Approved Subcontract); and

- e. the policy requirements set out in DI ADMINPOL Annex C AG5 and the *Integrity Policy Manual*, as applicable.

12 POLICY AND LAW (CORE)

12.1 Governing Law (Core)

- 12.1.1 The laws of the State or Territory specified in the Details Schedule 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.
- 12.1.2 The United Nations Convention on Contracts for the International Sale of Goods shall not apply to the Contract.

12.2 Compliance with Laws (Core)

- 12.2.1 The Contractor shall, in the performance of the Contract, comply with and ensure Contractor Personnel comply with, the laws from time to time in force in the State, Territory, or other jurisdictions (including overseas) in which any part of the Contract is to be carried out.
- 12.2.2 The Contractor shall provide to the Commonwealth Representative within 10 Working Days after a request by the Commonwealth written confirmation that, to the best of the Contractor's knowledge and based on reasonable enquiries undertaken by the Contractor, the Contractor and Contractor Personnel are compliant with all laws (including foreign anti-corruption legislation) regarding the offering of unlawful inducements whether in Australia or otherwise in connection with the performance of the Contract and the Subcontracts.
- 12.2.3 The Contractor:
- a. shall take all reasonable measures to prevent, detect and investigate any fraud that may occur, is occurring or has occurred under the Contract or any Subcontract; and
 - b. acknowledges and agrees that its obligation in clause 12.2.3a extends to taking all reasonable measures to prevent, detect and investigate any fraud which has or may be committed by Contractor Personnel.
- 12.2.4 If the Contractor knows that any fraud is occurring or has occurred, it shall, as soon as practicable, provide written details to the Commonwealth, and provide such further information and assistance as the Commonwealth, or any person authorised by the Commonwealth, reasonably requires in relation to the fraud.

12.3 Policy Requirements (Core)

Note to drafters: Prior to any RFT release and prior to the execution of any resultant contract, the Glossary should be updated to reflect the version of the following documents and policies current at the time of RFT release.

If there are other Commonwealth or Defence policies relevant to the procurement activity, that are not otherwise referenced in the draft Contract, they can be listed below.

- 12.3.1 The Contractor shall comply with, and ensure that Contractor Personnel comply with, the following Commonwealth policies of general application relevant or applicable to the Contract:
- a. DI, and in particular:
 - (i) Administration and Governance Provision 4 AG4 – Incident reporting and management and the Incident Reporting and Management Manual;
 - (ii) Administration and Governance Provision 5, AG5 – Conflicts of interest and declarations of interest and the Integrity Policy Manual; and
 - (iii) People Provision 7, PPL 7 – Required behaviours in Defence and Chapter 3 of the Complaints and Alternative Resolutions Manual;
 - b. Financial Policy Gifts and Benefits (Including Hospitality) – Receiving;
 - c. Financial Policy Gifts and Benefits (Including Hospitality) – Spending
 - d. Financial Policy Sponsorship;
 - e. ADF alcohol policy detailed in MILPERSMAN Part 4 Chapter 1;
 - f. Public Interest Disclosure policy detailed at:

<http://www.ombudsman.gov.au/Our-responsibilities/making-a-disclosure>; and

- g. [DRAFTERS TO INSERT ANY OTHER RELEVANT COMMONWEALTH AND DEFENCE POLICIES THAT REGULATE DELIVERY OF THE SERVICES].

Note to tenderers: It is Commonwealth policy to stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy. The Commonwealth Indigenous Procurement Policy is available at:

- <https://www.niaa.gov.au/resource-centre/indigenous-affairs/commonwealth-indigenous-procurement-policy>.

12.3.2 The Contractor shall use its reasonable endeavours to increase its:

- a. purchasing from Indigenous enterprises; and
- b. employment of Indigenous Australians,

in the performance of the Contract. For the purposes of this clause “Indigenous enterprise” means an organisation that is 50 per cent or more Indigenous owned that is operating a business. Supply Nation maintains a list of enterprises that meet the definition of “Indigenous enterprises” (www.supplynation.org.au).

Option: For when a procurement is at or above the relevant procurement threshold, and does not meet the exemptions set out at Appendix A to the CPRs.

Note to drafters: If the procurement is specifically exempt from the additional rules detailed in Division 2 of the CPRs as a result of a Defence specific exemption, the procurement will still be subject to the Workplace Gender Equality Procurement Principles and the following clauses must be used.

Note to tenderers: These clauses 12.3.3 and 12.3.4 apply only to the extent that the tenderer has identified itself as a Relevant Employer for the purposes of the Workplace Gender Equality Procurement Principles. The Workplace Gender Equality Procurement Principles will only apply to overseas-based contractors to the extent that they have 100 or more employees in Australia.

12.3.3 The Contractor shall comply with its obligations under the *Workplace Gender Equality Act 2012* (Cth) (WGE Act).

12.3.4 If the Contractor becomes non-compliant with the WGE Act during the Term, the Contractor shall notify the Commonwealth Representative.

Option: For when a procurement is subject to the Shadow Economy Procurement Connected Policy.

Note to drafters: A procurement will be subject to the Shadow Economy Procurement Connected Policy where the procurement is conducted by open tender, subject to the CPRs and is valued at over \$4 million (inc GST).

Note to tenderers: The Shadow Economy Procurement Connected Policy imposes obligations on the Commonwealth to obtain from contractors satisfactory and valid Statement of Tax Records (STRs) and to require contractors to obtain and hold STRs in respect of certain Subcontractors. Further information about the requirements arising under the Shadow Economy Procurement Connected Policy is available from the Department of Treasury at:

- <https://treasury.gov.au/policy-topics/economy/shadow-economy/procurement-connected-policy>.

The Contractor will be required to obtain and hold copies of satisfactory and valid STRs for any Subcontractors that the Contractor directly engages (i.e. first tier Subcontractors) where the contract value will be over \$4 million (inc GST). Any STRs obtained from these Subcontractors must be provided to the Commonwealth upon request.

12.3.5 The Contractor shall not enter into a Subcontract with a proposed direct Subcontractor (or agree to a novation of a direct Subcontract) if the total value of all work under the Subcontract is expected to exceed \$4 million (inc GST), unless the Contractor has obtained and holds any the following STRs, as applicable to the proposed direct Subcontractor:

If the proposed Subcontractor to enter into the Subcontract is:	STRs required:
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(a)	(b)
a. a body corporate or natural person;	a satisfactory and valid STR in respect of that body corporate or person;
b. a partner acting for and on behalf of a partnership;	a satisfactory and valid STR: (i) on behalf of the partnership; and (ii) in respect of each partner in the partnership that will be directly involved in the delivery of the Subcontract;
c. a trustee acting in its capacity as trustee of a trust;	a satisfactory and valid STR in respect of the: (i) trustee; and (ii) the trust;
d. a joint venture participant;	a satisfactory and valid STR in respect of: (i) each participant in the joint venture; and (ii) if the operator of the joint venture is not a participant in the joint venture, the joint venture operator;
e. a member of a Consolidated Group;	a satisfactory and valid STR in respect of: (i) the relevant member of the Consolidated Group; and (ii) the head company in the Consolidated Group;
f. a member of a GST Group;	a satisfactory and valid STR in respect of the: (i) the GST Group member; and (ii) the GST Group representative.

12.3.6 The Contractor shall obtain and hold additional STRs in the following circumstances within 10 Working Days of the Contractor becoming aware of the circumstances arising:

If the Contractor or Subcontractor is:	Additional STRs required:
(a)	(b)
a. a partner acting for and on behalf of a partnership;	a satisfactory and valid STR in respect of any additional partner that becomes directly involved in the delivery of the Contract or Subcontract (as applicable);
b. a trustee acting in its capacity as trustee of a trust;	a satisfactory and valid STR in respect of any new trustee appointed to the trust;
c. a joint venture participant;	a satisfactory and valid STR in respect of: (i) any new participant in the joint venture; and (ii) any new joint venture operator if the new operator is not already a participant in the joint venture;
d. a member of a Consolidated Group;	a satisfactory and valid STR in respect of any new head company of the Consolidated Group; and
e. a member of a GST Group;	a satisfactory and valid STR in respect of any new representative for the GST Group.

12.3.7 The Contractor shall provide the Commonwealth with copies of the STRs referred to in clause 12.3.5 or 12.3.6 within 5 Working Days after a written request by the Commonwealth.

- 12.3.8 For the purposes of the Contract, an STR is taken to be:
- a. **satisfactory** if the STR states that the entity has met the conditions, as set out in the Shadow Economy Procurement Connected Policy, of having a satisfactory engagement with the Australian tax system; and
 - b. **valid** if the STR has not expired as at the date on which the STR is required to be held.

12.4 Work Health and Safety (Core)

12.4.1 The Commonwealth and the Contractor:

- a. shall, where applicable, comply with, and the Contractor shall ensure that all Subcontractors comply with, the obligation under the WHS Legislation to, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with the Commonwealth, the Contractor or the Subcontractors (as the case may be) and any other person who, concurrently with the Commonwealth, the Contractor or the Subcontractor (as the case may be), has a WHS duty under the WHS Legislation in relation to the same matter; and
- b. acknowledge that they have a duty under the applicable WHS Legislation to ensure, so far as is reasonably practicable, the health and safety of:
 - (i) Commonwealth Personnel;
 - (ii) Contractor Personnel; and
 - (iii) other persons,
 in connection with the Services.

12.4.2 The Contractor represents and warrants that:

- a. it has given careful, prudent and comprehensive consideration to the WHS implications of the work to be performed by it under the Contract; and
- b. the proposed method of performance of that work complies with, and includes a system for identifying and managing WHS risks which complies with, all applicable legislation relating to WHS including the applicable WHS Legislation.

12.4.3 The Contractor shall:

- a. provide the Services in such a way that the Commonwealth and Commonwealth Personnel are able to undertake any roles or obligations in connection with the Services (such as in relation to testing or auditing); and
- b. ensure that the Commonwealth and Commonwealth Personnel are able to make full use of the Services for the purposes referred to in clause 3.3.1, for which they are intended, and to maintain, support and develop the Services and Products, without the Commonwealth or Commonwealth Personnel contravening any legislation relating to WHS including the WHS Legislation, any applicable standards relating to WHS or any policy relating to WHS identified in the Contract.

12.4.4 Without limiting the application of the WHS Legislation (and subject to any relevant foreign government restrictions), the Contractor shall, in connection with or related to the Services, provide, and shall:

- a. ensure that an Approved Subcontractor provides; and
- b. use its reasonable endeavours to ensure that any other Subcontractor engaged in any Prescribed Activities provides in respect of those Prescribed Activities,

to the Commonwealth Representative:

- c. within 10 Working Days (or another period agreed in writing by the Commonwealth) after a request by the Commonwealth Representative any information or copies of documentation requested by the Commonwealth Representative and held by the Contractor or Subcontractor (as the case may be) to enable the Commonwealth to comply with its obligations under the WHS Legislation;
- d. in respect of:

- (i) the Contractor or an Approved Subcontractor, within 10 Working Days after receipt or submission of the notice, written communication or written undertaking by the Contractor or Approved Subcontractor (as the case may be); or
- (ii) any other Subcontractor engaged in any Prescribed Activities, within 10 Working Days after a request by the Commonwealth,

copies of:

- (iii) all formal notices and written communications issued by a regulator or agent of the regulator under or in compliance with the applicable WHS Legislation to the Contractor or Subcontractor (as the case may be) relating to WHS matters;
 - (iv) all formal notices issued by a health and safety representative of the Contractor or Subcontractor (as the case may be), under or in compliance with the applicable WHS Legislation; and
 - (v) all formal notices, written communications and written undertakings given by the Contractor or Subcontractor (as the case may be) to the regulator or agent of the regulator under or in compliance with the applicable WHS Legislation; and
- e. within 10 Working Days of a request by the Commonwealth Representative written assurances specifying that to the best of the Contractor's or the Subcontractor's (as the case may be) knowledge that the Contractor and Contractor Personnel are compliant with:
- (i) the applicable WHS Legislation; and
 - (ii) any relevant or applicable approved codes of practice under the *Work Health and Safety Act 2011* (Cth) except where the Contractor complies with the WHS Legislation in a manner that is different from the relevant code of practice but provides a standard of WHS that is equivalent to or higher than the standard required in the code of practice,

and that the Contractor or Subcontractor (as the case may be) has made reasonable enquiries before providing the written assurances.

12.4.5 Subject to clause 11.10 and any relevant foreign government restrictions, the Commonwealth shall provide to the Contractor in a timely manner any information or copies of documentation reasonably requested by the Contractor and held by the Commonwealth to enable the Contractor to comply with its obligations under the applicable WHS Legislation in relation to the Contract.

12.4.6 The Contractor shall ensure that if the WHS Legislation requires that:

- a. a person (including a Subcontractor):
 - (i) be authorised or licensed (in accordance with the WHS Legislation) to carry out any works at the workplace, that person is so authorised or licensed and complies with any conditions of such Authorisation; and/or
 - (ii) has prescribed qualifications or experience, or if not, is to be supervised by a person who has prescribed qualifications or experience (as defined in the WHS Legislation), that person has the required qualifications or experience or is so supervised; or
- b. a workplace, plant or substance (or design), or work (or class of work) be authorised or licensed, that workplace, plant or substance (or design), or work (or class of work) is so authorised or licensed.

12.4.7 If the Contractor becomes aware of any intention on the part of a regulatory authority to cancel, revoke, suspend or amend an Authorisation relating to WHS, it shall immediately notify the Commonwealth giving full particulars (so far as they are known to it).

12.4.8 Without limiting clause 11.7, the Contractor shall give, and shall ensure that an Approved Subcontractor gives, the Commonwealth Representative and any person authorised by the Commonwealth Representative access to:

- a. premises to conduct site inspections for the purpose of monitoring the Contractor's or the Approved Subcontractor's (as the case may be) compliance with any applicable laws, Authorisations or Approved plans in connection with WHS in relation to the Contract; and

- b. all internal and third party audit results in relation to WHS in relation to the Services or work performed under the Contract.
- 12.4.9 To the extent not inconsistent with the express requirements of the Contract, the Commonwealth Representative may direct the Contractor to take specified measures that the Commonwealth Representative considers reasonably necessary to comply with applicable legislation relating to WHS including the WHS Legislation in relation to the provision of the Services. The Contractor shall comply with the direction unless the Contractor demonstrates to the reasonable satisfaction of the Commonwealth Representative that it is already complying with the WHS Legislation in relation to the matter to which the direction relates or the direction goes beyond what is reasonably necessary to achieve compliance with the WHS Legislation. The Contractor shall not be entitled to claim relief from the performance of its obligations under the Contract as a result of compliance with the direction.
- 12.4.10 The Contractor shall comply with clause 11 of the SOW.
- 12.4.11 The Contractor shall not use ACM in providing the Services and shall not take any ACM onto Commonwealth Premises in connection with providing the Services.

Note to drafters: To the extent that any work under the Contract will involve construction work (eg, installation activities) over \$250,000, clause 12.4.14 of the conditions of contract in the ASDEFCON (Support) v5.0 template must be included (at clause 12.4.12) except where following receipt of advice from Defence Legal it is determined that the Commonwealth should be the principal contractor (refer to DPPI NO 4/2012 Engagement of Principal Contractors under the Work Health and Safety Legislation).

12.5 Environmental Obligations (Core)

- 12.5.1 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 Services 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* (Cth).
- 12.5.2 The Contractor shall ensure and warrants that:
- a. it has given careful, prudent and professional consideration to the environmental implications of the work to be performed by it under the Contract; and
 - b. as at the Effective Date specified in the Details Schedule, the proposed method of performance of that work complies with all applicable environmental legislation.
- 12.5.3 If the Contractor becomes aware of any intention on the part of a regulatory authority to cancel, revoke or amend an Authorisation relating to the environment that the Contractor requires to carry out the work under the Contract, it shall notify the Commonwealth without delay, giving full particulars (so far as they are known to it).

12.6 Privacy (Core)

- 12.6.1 The Contractor shall:
- a. if it obtains Personal Information in the course of performing the Contract, use or disclose that Personal Information only for the purposes of the Contract subject to any applicable exceptions in the *Privacy Act 1988* (Cth);
 - b. comply with its obligations under the *Privacy Act 1988* (Cth); and
 - c. as a contracted service provider, not do any act or engage in any practice which, if done or engaged in by the Commonwealth, would be a breach of the Australian Privacy Principles.
- 12.6.2 The Contractor shall notify the Commonwealth as soon as reasonably practicable if:
- a. it becomes aware of a breach or possible breach of any of the obligations contained, or referred to, in this clause 12.6, whether by the Contractor, Contractor Personnel, or any other person to whom the Personal Information has been disclosed for the purposes of the Contract; or
 - b. in relation to Personal Information obtained in the course of performing the Contract:

- (i) it becomes aware that a disclosure of such Personal Information may be required by law; or
- (ii) it is approached by the Privacy Commissioner.

12.6.3 The Contractor shall ensure that Contractor Personnel who deal with Personal Information for the purposes of the Contract are aware of, and comply with, this clause 12.6.

12.7 Severability (Core)

12.7.1 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.

12.8 Modern Slavery (Optional)

Option: For inclusion where the modern slavery risk assessment for the procurement has determined there is a risk of modern slavery existing in the relevant supply chain.

Note to drafters: The procurement should be assessed for the risk of modern slavery existing in the supply chain. Guidance on performing this risk assessment, as well as other guidance on the Modern Slavery Act 2018 (Cth), can be found on the Australian Border Force's (ABF) Modern Slavery Register site here:

- <https://modernslaveryregister.gov.au/resources/>.

If the modern slavery risk assessment determines that there is a risk of modern slavery existing in the supply chain, drafters must include the model clauses for Defence procurements subject to the requirements of the Modern Slavery Act 2018 (Cth). These model clauses are based on the ABF's model clauses and have been developed for use with ASDEFCON-based contracts. They are contained in the ASDEFCON Clausebank which can be found here:

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>.

If you have any questions relating to the clauses please email:

procurement.asdefcon@defence.gov.au.

For further assistance and guidance in relation to the application of the Modern Slavery clauses please refer to the Modern Slavery Factsheet here:

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/Factsheets-and-Guidance.aspx>.

12.9 Indigenous Procurement (Optional)

Option: For inclusion when the Indigenous Procurement Policy's Mandatory Minimum Requirements apply to the procurement.

Note to drafters: The [Indigenous Procurement Policy](#) may apply to a procurement valued at or over \$7.5 million (GST inclusive), depending on whether and how much of the resultant Contract's value will be spent in certain industry sectors. Drafters should refer to the ASDEFCON Clausebank for further information and appropriate clauses:

- <http://drnet.defence.gov.au/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>

12.10 Commonwealth Supplier Code of Conduct (Core)

Note to drafters: A procurement must incorporate the Commonwealth Supplier Code of Conduct in accordance with paragraph 6.11 of the CPRs.

Drafters must consider the interaction and alignment of this clause with clauses 3.4, 3.8, 11.2, 11.4 11.7, 12.2, 12.3, 12.4, 13.2 prior to RFT release and prior to any resultant Contract.

12.10.1 The Contractor shall (and shall ensure that all Contractor Personnel) comply with the Commonwealth Supplier Code of Conduct in the performance of the Contract.

- 12.10.2 The Contractor shall notify the Commonwealth Representative immediately after becoming aware of any potential or actual non-compliance with the Commonwealth Supplier Code of Conduct, including:
- a. a description of the non-compliance,
 - b. the date that the non-compliance occurred, and
 - c. whether any Contractor Personnel engaged in the performance of the Contract were or may have been involved in the non-compliance.
- 12.10.3 If the Commonwealth considers that a potential or actual non-compliance with the Commonwealth Supplier Code of Conduct has occurred, the Commonwealth may by notice to the Contractor, without limiting any of its other rights under the Contract, require that the Contractor:
- a. provide a response to the Commonwealth Representative within 3 Working Days on whether a potential or actual non-compliance has occurred; and
 - b. comply with its obligations under clause 12.10.
- 12.10.4 The Commonwealth Representative may request, and the Contractor shall provide, further information on any matter relating to:
- a. the policies, frameworks, or systems the Contractor has established to monitor and assess compliance with the Commonwealth Supplier Code of Conduct;
 - b. the Contractor's compliance with the Commonwealth Supplier Code of Conduct; or
 - c. an actual or potential non-compliance with the Commonwealth Supplier Code of Conduct, including its obligations under clauses 12.10.1 or 12.10.3a.
- The Contractor shall provide such information within the timeframes and in the manner specified by the Commonwealth Representative at the time of request.
- 12.10.5 The Contractor acknowledges and agrees that compliance with the Commonwealth Supplier Code of Conduct and the obligations under clause 12.10 shall not relieve the Contractor from its liabilities or other obligations under the Contract or at law.
- 12.10.6 The Contractor's performance of its obligations under this clause will be at no additional cost to the Commonwealth.
- 12.10.7 If the Contractor fails to comply with the Commonwealth Supplier Code of Conduct in accordance with clause 12.10.1, the Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1.

12.11 Environmentally Sustainable Procurement Policy (Optional)

Option: For when a procurement is subject to the Environmentally Sustainable Procurement Policy.

Note to drafters: A procurement will be subject to the Environmental Sustainable Procurement Policy (ESPP) where the procurement includes construction services (where the procurement value is over \$7.5million AUD inc GST) or furniture, fittings and equipment, ICT goods and textiles (where the procurement value is over \$1 million AUD inc GST)

If a procurement is subject to the ESPP, drafters must include the model clauses for Defence procurements subject to the requirements ESPP. These model clauses are based on the Department of Climate Change, Energy, the Environment and Water (DCCEEW)'s model clauses and have been developed for use with ASDEFCON-based contracts. They are contained in the ASDEFCON Clausebank which can be found here:

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>.

If you have any questions relating to the clauses please email the ASDEFCON and Contracting Initiatives team at:

- procurement.asdefcon@defence.gov.au.

For information in relation to ESPP and policy related questions please email the Commercial Policy team at:

- procurement.policy@defence.gov.au.

Or the Commonwealth Sustainable Procurement Advocacy and Resource Centre at:

- sustainable.procurement@dcceew.gov.au.

12.12 Australian Skills Guarantee (Optional)

Option: For inclusion when a procurement is subject to the Australian Skills Guarantee Policy.

Note to drafters: A procurement will be subject to the Australian Skills Guarantee (ASG) Procurement Connected Policy (PCP) within ICT and Construction as follows:

- Major construction projects (projects with a total contract value of \$10 million (GST Inclusive) or more;
- Direct Commonwealth procurements in the ICT sector, with a total contract value of \$10 million (GST Inclusive) or more; and
- Flagship construction projects (projects with a total contract value of \$100 million or more in the construction sector).

Information relating to the ASG PCP can be found at the Department of Employment and Workplace Relations (DEWR) website here:

- <https://www.dewr.gov.au/australian-skills-guarantee>.

If a procurement is subject to the ASG PCP drafters must include the model clauses for Defence procurements subject to the requirements of the ASG. These model clauses are based on the DEWR model clauses and have been developed for use with ASDEFCON-based contracts. They are contained in the ASDEFCON Clausebank which can be found here:

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>.

If you have any questions relating to the clauses please email the ASDEFCON and Contracting Initiatives team at:

- procurement.asdefcon@defence.gov.au.

If you have any questions relating to the ASG PCP or policy related questions, please email the Commercial Policy team at:

- procurement.policy@defence.gov.au.

Or DEWR at:

- ASG@dewr.gov.au.

13 DISPUTES AND TERMINATION (CORE)**13.1 Resolution of Disputes (Core)**

- 13.1.1 A party shall not commence court proceedings relating to any Dispute except as permitted under this clause 13.1.
- 13.1.2 The parties shall negotiate in good faith and use all reasonable efforts to resolve Disputes as quickly as practicable.
- 13.1.3 If the parties are unable to resolve a Dispute, either party may give a notice ('**Dispute Notice**') to the other party setting out the nature of the Dispute and the Dispute shall then be referred to the Management Representatives specified in the Details Schedule.
- 13.1.4 If the Dispute is not resolved by the Management Representatives within 30 days of the Dispute Notice being issued, the Dispute shall be referred to the Senior Representatives specified in the Details Schedule.
- 13.1.5 If the Dispute is not resolved within 30 days of the Dispute being referred to the Senior Representatives and the parties have not been able to agree on an alternative dispute resolution process (including mediation, arbitration or expert determination) for resolving the Dispute, either party may commence legal proceedings in respect of the Dispute.
- 13.1.6 The parties shall, despite any Dispute occurring, continue to perform their respective obligations under the Contract.
- 13.1.7 Nothing in this clause 13.1 prevents any party from seeking urgent interlocutory relief in relation to a Dispute.

13.2 Termination for Contractor Default (Core)

- 13.2.1 The Commonwealth may terminate the Contract by notice to the Contractor if any of the following occurs:
- a. an Insolvency Event occurs in relation to the Contractor, except to the extent the exercise of a right under this clause 13.2.1a is prevented by law;
 - b. an Insolvency Event occurs in relation to the Guarantor and the Commonwealth does not receive a replacement Deed of Guarantee and Indemnity from another guarantor acceptable to the Commonwealth within 10 Working Days (or another period agreed in writing by the Commonwealth), except to the extent the exercise of a right under this clause 13.2.1 is prevented by law;
 - c. the Contractor has failed to remedy a Default specified in a Default Notice within the period specified in the Default Notice or otherwise in accordance with an Approved Remediation Plan;
 - d. the Contractor commits a Default that, in the Commonwealth's opinion, is not capable of being remedied;
 - e. the Contractor commits a Default, or series of Defaults which, in the opinion of the Commonwealth has or will have a material adverse effect on the provision of the Services;
 - f. the Contractor would have, except for the operation of any limitation of liability under clause 10.6.1, been liable to the Commonwealth for Loss in aggregate for an amount greater than the Limitation Amount;
 - g. the Contractor fails to provide or maintain a financial security or deed in accordance with clauses 7.5 to 7.8;
 - h. the Contractor fails to grant, or ensure the grant of, any licence required under clause 5.2;
 - i. the Contractor breaches any of its obligations under clause 12.4;
 - j. a Change of Control occurs in relation to the Contractor without the prior written consent of the Commonwealth Representative; or

- k. another clause of the Contract provides that the Commonwealth may terminate the Contract under this clause.

13.2.2 To avoid doubt, the Commonwealth is not required to provide prior notice of an exercise of its rights under clause 13.2.2.

13.3 Default Notices (Core)

13.3.1 If the Commonwealth considers that a Contractor Default has been committed, the Commonwealth may give the Contractor a notice ('**Default Notice**') specifying the Default and requiring the Contractor to remedy the Default within a reasonable period, if the Default is capable of being remedied.

13.3.2 If the Commonwealth gives the Contractor 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.

13.4 Termination or Reduction for Convenience (Core)

13.4.1 In addition to any rights it has in relation to the Contract, the Commonwealth has the right to exercise its discretion at any time to terminate the Contract or reduce the scope of the Contract for convenience by notifying the Contractor.

13.4.2 None of the other provisions of the Contract limit the Commonwealth's ability to terminate or reduce the scope of the Contract under this clause 13.4.

13.4.3 If the Contract is terminated or reduced under this clause 13.4, the Commonwealth's liability in respect of the termination or reduction is limited to:

- a. payments under the payment terms of the Contract for work performed before the date the termination or reduction takes effect; and
- b. any reasonable costs incurred by the Contractor that are directly attributable to the termination or reduction,

and then only when the Contractor substantiates these amounts to the satisfaction of the Commonwealth Representative. In particular, the Contractor shall not be entitled to profit calculated by reference to any period after the date the termination or reduction takes effect.

13.5 General Termination Provisions (Core)

13.5.1 If the Contract is terminated under this clause 13.5 or otherwise, or the scope of the Contract is reduced under clause 13.4 or otherwise:

- a. the termination or reduction takes effect on the date of the notice of termination or reduction, or if the notice specifies a later date, the later date;
- b. the Contractor shall;
 - (i) stop or reduce work in accordance with the notice;
 - (ii) comply with any directions given to the Contractor by the Commonwealth; and
 - (iii) mitigate all loss, costs (including the costs of its compliance with any directions) and expenses in connection with a termination or reduction, including those arising from affected Subcontracts.
- c. the Contractor shall provide to the Commonwealth, as required by the Commonwealth, all documents in its possession, power or control or in the possession, power or control of Contractor Personnel that contain or relate to any Commonwealth or third party Confidential Information or which are security classified;

Option: For when clause 7.5 (Bank Guarantee for Mobilisation Payment) is included in the Contract.

- d. 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;
 - e. subject to clause 13.7 the parties shall be relieved from future performance, without prejudice to:
 - (i) any right, or cause of action that has accrued at the date of termination; or
 - (ii) any amount owing under or in connection with the Contract as at the date of termination;
 - f. subject to clauses 10.5, 10.6 and 13.4, the right to recover damages, including full contractual damages, shall not be affected;
 - g. the Contractor shall, within 30 days after receipt of the notice of termination or reduction (as applicable), or other period agreed in writing by the parties, deliver the Technical Data (in its then current state of development) for Services produced prior to the date of termination or reduction; and
 - h. the Contractor shall deliver to the Commonwealth all Commonwealth Property that the Contractor or Contractor Personnel have in their possession in connection with the Contract.
- 13.5.2 If the Commonwealth reduces the scope of the Contract under clause 13.4, the Contractor shall, within 30 days after receipt of the notice, prepare and submit a CCP to give effect to the notice, including to:
- a. remove Services from the SOW and other parts of the Contract;
 - b. reduce the amounts payable to the Contractor under the Contract to reflect the removal of Services; and
 - c. make such other amendments as necessary or convenient to be made to give effect to the notice.
- 13.5.3 The Contractor shall provide to the Commonwealth, within 30 days of receipt of request by the Commonwealth, information and documents relating to the Contractor's provision of the Services. The information which may be required includes:
- a. except where the Contract is terminated or reduced in scope under clause 13.4, answers to questions in relation to the methods and processes used for provision of the Services;
 - b. a full set of standard operating procedures in relation to the operation and Maintenance of the Products being supported that are able to be accessed and used by the Commonwealth or its nominee; and
 - c. Maintenance records or logs, any relevant asset details (including condition reports and expected life spans), arising rates and consumable usage rates, Maintenance efforts for Corrective Maintenance and Preventive Maintenance and similar information for the period requested by the Commonwealth.
- 13.5.4 The Commonwealth may use the information referred to in clause 13.5.3 to prepare procurement documents associated with the Capability or the subject matter of the Services, and recipients of the documents may use the information to undertake due diligence activities and prepare quotations.
- 13.5.5 The Contractor shall fully co-operate with the Commonwealth and any incoming contractor and do all tasks and things as may be reasonably necessary to ensure the smooth transition of the provision of the Services from the Contractor to the incoming contractor or to the Commonwealth (as the case may be) in a manner which ensures no interruption of the Services.
- 13.5.6 The Contractor shall comply with all reasonable directions from the Commonwealth Representative, having regard to the requirements of the Commonwealth for any incoming contractor.

- 13.5.7 The rights of the Commonwealth to terminate or reduce the scope of the Contract under clauses 13.2 and 13.4 are in addition to any other right or remedy the Commonwealth may have in relation to the Contract.

13.6 Right of the Commonwealth to Recover Money (Core)

- 13.6.1 Without limiting the Commonwealth's other rights or remedies under the Contract, if the Commonwealth elects, in accordance with the Contract, to recover an amount from the Contractor or the Contractor otherwise owes any debt to the Commonwealth in relation to the Contract, the Commonwealth may:
- a. deduct the amount from payment of any claim; or
 - b. give the Contractor a notice of the existence of a debt recoverable which shall be paid by the Contractor within 30 days after receipt of notice.
- 13.6.2 The Commonwealth may exercise any or all of its rights in respect of any security provided in accordance with clauses 7.5 or 7.6 to recover any debt owing by the Contractor, except to the extent otherwise recovered by the Commonwealth under clause 13.6.1.
- 13.6.3 If the Commonwealth deducts the amount of a debt from any payment or security, it shall notify the Contractor that it has done so.
- 13.6.4 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 ATO sourced General Interest Charge rate current at the date the payment was due for each day the payment is late.

13.7 Survivorship (Core)

- 13.7.1 Any provision 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 the termination or expiration of the Contract on its terms.
- 13.7.2 Without limiting clause 13.7.1, any provision dealing with Confidential Information, IP, Defence Security, Privacy and any warranties, guarantees, licences, performance of the Contractor's obligations under clause 13.5, indemnities, liability caps, rights to recover money or financial and performance securities given under the Contract shall survive the termination or expiration of the Contract on its terms.

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 of witness) (print name of witness) (date)

SIGNED for and on behalf of

THE CONTRACTOR:

Note for Contract Signature: Guidance on executing agreements, including some statutory requirements to ensure the execution is effective, are detailed in the 'Executing Agreements Fact Sheet', found on the Commercial Division intranet page at:

-
- <http://ibss/PublishedWebsite/LatestFinal/836F0CF2-84F0-43C2-8A34-6D34BD246B0D/Item/EBDAF9B0-2B07-45D4-BC51-67963BAA2394>

This guidance is developed for Commonwealth Personnel and should be used to assess the Contractor's execution of the Contract. The Contractor should seek its own independent legal advice on its execution of the Contract.

[INSERT APPROPRIATE CONTRACTOR'S EXECUTION CLAUSE]