COMMERCIAL (CORE)

1. IMPORTATION OF SERVICES AND EXPORT APPROVALS (Core)

Draft COC reference: clauses 3.4 and 3.5

Note to tenderers: Tenderers are solely responsible for informing themselves of the export control status of the tendered Services and for ensuring their compliance with Australian and Foreign Government controls related to the export of defence and dual-use goods, including if the export is from an Australian contractor to an overseas Subcontractor or Related Body Corporate for the purposes of providing the Services to the Commonwealth.

Requests for advice on the control status of goods and/or services should be forwarded to Defence Export Controls via email at [ExportControls@defence.gov.au](mailto:ExportControls@defence.gov.au). Further information on Australian export controls may be found at:

<https://www1.defence.gov.au/business-industry/export/controls>.

* 1. Tenderers proposing to import parts of the Services are to provide:
     1. an indication of what is being imported;
     2. evidence from the Government of the country of origin that the tenderer will be granted an Export Approval for those items if the tenderer is awarded any resultant Contract;
     3. identification of any specific limitations or provisos that the Government of the country of origin could reasonably be expected to place on the Export Approval with respect to individual items of tendered Services including, as applicable, TD and Software;
     4. details of other approvals required in addition to, or as part of, the grant of Export Approvals (eg, technical assistance agreements) and the impact to schedule of gaining such approvals; and
     5. details of any rejected application for, or refusal to grant, an Export Approval for goods, similar to those within the Services, which might have a bearing on any application to export the Services.

1. LIABILITY (Core)

Draft COC reference: clause 10.10

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.defence.gov.au/casg/commercial/UndertakingProcurementinDefence/Pages/Liability-Risk-Management.aspx>.

The liability risk assessment provides the basis for determining the liability caps and insurance requirements in clauses 10.10 and 9 respectively of the draft COC.

Note to tenderers: Tenderers should familiarise themselves with the liability caps and insurance requirements in clauses 10.10 and 9 respectively of the draft COC. The liability caps and insurance requirements 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://www1.defence.gov.au/business-industry/procurement/policies-guidelines-templates/liability-risk-management>.

* 1. Tenderers are to specify the basis for Contractor liability that they propose will apply to any resultant Contract.
  2. If a tenderer proposes to limit its liability on an alternative basis to that set out in clause 10.10 of the draft COC (eg, by proposing a liability limitation additional to those set out in clause 10.10), the tenderer is to conduct its own liability risk assessment applying the Defence Liability Principles and the standard Defence methodology described in the Liability Risk Assessment template, and provide the following details:
     1. the terms of the tenderer’s proposed limitation of liability (if different to those set out in clause 10.10 of the draft COC), including its proposed monetary cap for each category of loss/liability set out in clause 10.10.1 and 10.10.3 (if applicable) of the draft COC;
     2. an explanation of why the tenderer requires a limitation of its liability regime different to that proposed in clause 10.10 of the draft COC; and
     3. the impact (if any) of these changes on the insurance requirements of the draft COC.

1. INSURANCE (Core)

Draft COC reference: clause 9

Note to tenderers: The ACIP Initiative permits tenderers with ACIP status to rely on the ACIP pre-qualification process as evidence of the tender’s compliance with the draft COC insurance requirements that will be covered by a tenderer’s ACIP. Information on the ACIP Initiative and the list of companies with current ACIP status is at:

<https://www1.defence.gov.au/business-industry/procurement/policies-guidelines-templates/acip-initiative>.

For tenderers without ACIP status, evidence of the tender’s compliance with the draft COC insurance requirements should not be returned with the tender. This evidence will be sought only from the preferred tenderer(s) prior to negotiations.

Tenderers should note that on the basis of the details and pricing information provided by a tenderer, the Commonwealth may require that the tenderer’s current insurance policies (or for tenderer’s with ACIP status, those policies falling outside the tenderer’s ACIP) be maintained or extended and any proposed insurance policies be obtained. The Commonwealth may also require that additional insurance policies be obtained following negotiations with a preferred tenderer.

Tenderers without ACIP Status:

* 1. Tenderers without ACIP status that are selected as a preferred tenderer are to provide prior to negotiations all relevant details of current or proposed insurance policies required by the draft COC, including:
     1. name of the insurer;
     2. type of insurance;
     3. terms and coverage of the insurance including person(s) insured, conditions and exclusions;
     4. limits of indemnity per claim or occurrence and details of any aggregate limits or relevant sublimits which apply;
     5. for a current policy, whether or not any past or current claims made under the policy have materially affected, or are likely to materially affect, the tenderer’s ability to meet its obligations under any resultant Contract;
     6. coinsurance, self-insured retention or deductible amounts; and
     7. period of insurance.

Tenderers with ACIP Status:

* 1. Tenderers with ACIP status are to indicate in their Statement of Non-Compliance against TDR C-3 the extent to which their ACIP covers the types of insurances required by the draft COC
  2. Tenderers with ACIP status that are selected as a preferred tenderer are not required to provide any details of those insurances required by the draft COC which a tenderer identifies as within the scope of its ACIP. However, the details set out in clause 3.1 of this annex are to be provided prior to negotiations for any insurance policy required by the draft COC that is outside the scope of its ACIP.

All tenderers:

* 1. All tenderers are to identify in their tendered prices detailed in TDR D2-1 details of all costs associated with the insurance policies covered in the tenderer’s insurance response.

1. Defect RECTIFICATION (OPTIONAL)

*Draft COC reference: clause 8.2 and 8.3*

Note to tenderers: The Commonwealth may not require Defect coverage, in which case the amount nominated for such coverage will be deducted from the tendered price and will not be included in any resultant Contract.

* 1. Tenderers are to provide details of the Defect rectification coverage being tendered where it differs from that sought in clause 8.2 of the draft COC.
  2. Tenderers are to provide at Table D-2, the amount tendered to cover the Defect rectification provisions proposed by the tenderer, and if the premium varies from item to item, the premium is to be shown against that specific item.
  3. Tenderers are to provide details of any warranties that are available from relevant manufacturers or suppliers that will extend beyond the end of the relevant Defect Rectification Period. Tenderers should identify any warranties of this nature in their tenders, including the additional cost (if any) associated with such warranties at Table D-2.

1. TECHNICAL DATA AND SOFTWARE RIGHTS (Core)

Draft COC reference: clause 5

Note to drafters: As part of the evaluation process and before agreeing to include restrictions in the TDSR Schedule, drafters are to ensure the impact of those restrictions on the Commonwealth's ability to use the TD, Software and Contract Material do not adversely affect the sustainment requirements for the Products Being Supported. Further information on clause 5 of the draft COC can be found in the ASDEFCON Technical Data and Intellectual Property Commercial Handbook at:

<http://drnet.defence.gov.au/casg/commercial/CommercialPolicyFramework/Pages/Handbooks.aspx>.

The Commonwealth's default position is to not own IP created under any resultant Contract or Subcontract. However, in limited cases for national security and/or strategic interest reasons, the Commonwealth can require ownership of IP in specific items of TD or Software (eg, items or equipment must be identified at the system, subsystem or component level). Any such items of TD or Software must be specified in Annex D to the draft TDSR Schedule prior to RFT release.

The Commonwealth will also generally own any new IP created under any resultant Contract in relation to GFM or the Products Being Supported (see clause 5.1.3 of the draft COC). However, the Contractor (or its nominee) will own this IP if it already owns all of the existing IP in the GFM or the Products Being Supported or if Contractor ownership is specified in Attachment E (for GFM) or Attachment S (for Products Being Supported).

Note to tenderers: Tenderers are required to include a draft TDSR Schedule with their tender. Tenderers are to ensure that any restrictions set out in the draft TDSR Schedule do not materially limit achievement of the Commonwealth’s sustainment objectives with respect to the Products Being Supported, affect the Commonwealth’s rights contained at clause 5.3 of the draft COC (otherwise than as provided for below) or the tenderer's compliance with the warranties contained in clause 5 of the draft COC.

Tenderers should familiarise themselves with the ASDEFCON Technical Data and Intellectual Property Commercial Handbook, which can be accessed at:

<https://www1.defence.gov.au/business-industry/procurement/policies-guidelines-templates/intellectual-property-framework>.

* 1. Tenderers are to provide a draft TDSR Schedule in the form of Attachment G to the draft COC by specifying the following:

Note to tenderers: Highly Sensitive TD and Highly Sensitive Software listed in Table 1 Annex A should only include that TD or Software, the disclosure of which would have a major adverse effect on the business of the Contractor or Approved Subcontractor and its commercial advantage. This TD or Software must be clearly identified at its lowest constituent / configuration item and linked to the TDL. Highly Sensitive TD and Highly Sensitive Software would generally already exist as at the Effective Date and not include TD or Software specifically created under the Contract for the Commonwealth.

* + - 1. Annex A - all items of TD and Software to be identified as Highly Sensitive TD and Highly Sensitive Software and all proposed restrictions that will apply to the Commonwealth's rights to Use and Sublicense the specified TD or Software;
      2. Annex B - all restrictions proposed limiting the:
         1. TD and Software rights to be granted under clause 5.3.3b(ix) of the draft COC; and
         2. delivery of TD and Software to the Commonwealth or other persons under clause 5.13 of the draft COC;

Note to tenderers: Tenderers should note that the Commonwealth may require that a Commercial Item be listed as a Key Commercial Item in Annex C, notwithstanding that it is not owned by the Contractor, Approved Subcontractor or a Related Body Corporate of the Contractor. This may be required if the Commonwealth considers that the relevant Commercial Item is of high value or particular significance to the sustainment of the Products Being Supported.

* + - 1. Annex C - any Key Commercial Items proposed to be provided as, or as part of, the Deliverables and the proposed licence terms in respect of the related Commercial TD and Commercial Software in accordance with clause 5.4.3 of the draft COC;

Note to tenderers: The Commonwealth may require ownership of certain TD and Software for reasons relating to national security and / or strategic interests associated with the sustainment of the Products Being Supported (Commonwealth TD or Commonwealth Software). If TD and Software is specified as Commonwealth TD / Commonwealth Software, then ownership of IP created under the Contract in respect of those items will vest in the Commonwealth.

If any Commonwealth TD or Commonwealth Software contains IP created outside the Contract and Subcontracts (which may include IP in existence prior to Effective Date), the Contractor is to grant a licence to the Commonwealth of that IP under clause 5.3 of the draft COC (subject to any proposed restrictions listed in Annex B). Tenderers should note that such restrictions should not prevent the use of the Commonwealth TD or Commonwealth Software as provided for in the Contract (see clause 5.16.1b of the draft COC).

* + - 1. Annex D - in relation to any items or equipment specified in Annex D for which the Commonwealth has identified that it is to own the IP created under the Contract or a Subcontract (Commonwealth TD or Commonwealth Software), the tenderer is to include, to the extent known, details of the TD or Software of those items or equipment at the system, subsystem or component level;

Note to tenderers: The listing of Excluded Parties will only be agreed to by the Commonwealth in exceptional circumstances to prohibit certain competitors from being Commonwealth Service Providers for the sole purpose of the licences granted under clauses 5.3.3a and 5.7.1b(i) of the draft COC. However, the Commonwealth will be permitted to grant Sublicences to Excluded Parties in other circumstances permitted under clause 5 of the draft COC.

* + - 1. Annex E - those parties who are proposed by the tenderer to be excluded from being a Commonwealth Service Provider for the sole purpose of the licences granted under clauses 5.3.3a and 5.7.1b(i) of the COC. The tenderer is to include the period of the restriction, which cannot be perpetual; and
      2. Annex F - details of any restrictions that limit the licences granted to the Commonwealth under the Contract in relation to Patents, Registrable Designs or Circuit Layouts, in accordance with clause 5.18 of the draft COC.
  1. Tenderers are to provide detailed justification for all proposed restrictions or other terms included in the draft TDSR Schedule to the extent known or anticipated by the tenderer at the time any resultant Contract would be executed, including a detailed explanation of how any such restrictions will not detrimentally impact the sustainment of the Products Being Supported.
  2. Tenderers are to identify in their tender any Commercial TD and Commercial Software for which the licence to be granted to the Commonwealth for the purposes of clause 5.4.4 of the draft COC, will or is likely to require the Commonwealth to pay a Royalty or other fee (not otherwise included in the Contract Price).

1. confidential information (CORE)

Draft COC reference: clause 11.4

* 1. Tenderers are to provide at Attachment N of the draft COC, a list of all Contract clauses and Contract outputs that they consider to be Confidential Information. For each clause or output to be included in Attachment N, tenderers are to justify their identification of the information as Confidential Information, explaining how it meets all four criteria listed in Attachment N to the draft COC.

1. COMMITMENT LETTER (CORE)

Note to tenderers: The signed Commitment Letter should not be returned with the tenderer’s proposal. The President/Chairman/Managing Director/Chief Executive Officer of the preferred tenderer or of the preferred tenderer’s parent company will be expected to sign the Commitment Letter after negotiations but before signature of any resultant Contract to allow the signing officer to confirm the proposed contractual obligations and make the undertakings contained in the Commitment Letter in light of that information.

* 1. Tenderers are to provide the following details in relation to the draft Commitment Letter found at Schedule 1 to this Annex C.:
     1. a statement confirming **(TENDERER’S/TENDERER’S PARENT COMPANY’S)** willingness or otherwise to sign the draft Commitment Letter after a Contract has been negotiated but before it is signed, should the tenderer become a preferred tenderer;
     2. if **(TENDERER/TENDERER’S PARENT COMPANY)** is unwilling to sign the letter, explanation as to why not; and
     3. if the tenderer proposes to amend the letter, a revised draft of the letter.

SCHEDULE 1

COMMITMENT LETTER

**(INSERT COMPANY LETTERHEAD ETC)**

Note to tenderers: The appropriate name and position title of the addressee will be advised at the time the letter is required to be provided to the Commonwealth.

Dear **(INSERT NAME)**,

**(INSERT CONTRACT TITLE AND PROPOSED CONTRACT NUMBER)**

I refer to the proposed Contract **[...INSERT CONTRACT TITLE...]** between **(INSERT SHORT NAME OF PARTY)** and the Commonwealth of Australia acting by and through the Department of Defence for Services to support the **[...INSERT DESCRIPTION OF THE SUBJECT OF THE CONTRACT AND SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC TO BE SUPPORTED...]**.

As the **(INSERT POSITION TITLE OF ADDRESSEE)**, you are accountable to the Australian Government for delivering capability for the Australian Defence Force and in doing so, you and the Commonwealth are relying on **(INSERT SHORT NAME OF PARTY)** to provide Services that will enable the **(SHIP/AIRCRAFT/VEHICLE/SYSTEMS ETC)** to achieve the required capability, maintain quality and safety, and to meet all of its obligations under the Contract.

The purpose of this letter is to give the Commonwealth assurance that the senior management of **(INSERT SHORT NAME OF PARTY)** have carefully considered the company’s obligations under the Contract, have exercised care and diligence in making themselves aware of that company's capacity to comply with those obligations for the duration of the Contract and are therefore able to give the undertakings below.

This letter is not signed in my personal capacity and does not create personal liability to the Commonwealth for me.

|  |
| --- |
| Option A: For when the Contract will be valued at more than $10 million per year.  I provide this letter to you, and execute it on behalf of the company, in my capacity as the ***(PRESIDENT/ CHAIRMAN/ MANAGING DIRECTOR/ CEO)*** of ***(INSERT NAME OF PARTY)*** and the leader of that organisation. I warrant that I am authorised to bind the company. |

|  |
| --- |
| Option B: For when the Contract will be valued at more than $50 million per year AND the contractor has a parent company.  I provide this letter to you, and execute it on behalf of the parent company, in my capacity as the ***(PRESIDENT/ CHAIRMAN/ MANAGING DIRECTOR/ CEO)*** of the parent company ***(INSERT NAME OF PARTY)*** and the leader of that organisation. I warrant that I am authorised to bind the parent company (referred to in this letter as 'the parent company'). |

On behalf of the **(INSERT ‘COMPANY’ OR ‘PARENT COMPANY’)**, I give you the following undertakings:

* + I fully understand the nature and scope of **(INSERT SHORT NAME OF PARTY)** obligations under the Contract including:
    - * the physical resources;
      * intellectual property and information requirements;
      * human resources (including the number of personnel and the requisite levels of skill and training); and
      * financial and program management resources;

necessary to provide the Services to support the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)** in accordance with, and for the duration of, the Contract;

* + that, based on diligent inquiries, **(INSERT SHORT NAME OF PARTY)** has the necessary physical, intellectual property, information, financial and human resources to provide Services to support the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)** in accordance with the Contract;
  + that **(INSERT SHORT NAME OF PARTY)** will ensure that it continues to have the necessary physical, financial, intellectual property, information, and human resources throughout the term of the Contract to provide Services to support the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)** in accordance with the Contract;
  + that **(INSERT SHORT NAME OF PARTY)** will ensure that it complies, and continues to comply, with the requirements of the Contract relating to:

Note to drafters: the following list may need to be amended to suit the scope of Services required. For example, the second dot point applies when Engineering Services are included.

* + - * the full scope of Services to enable the operation and support of the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)**;
      * maintenance of and, if applicable, enhancements to the design function and integrity of the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)** and its associated support resources;
      * required performance levels needed to enable Defence to achieve the required rates of effort and level of Capability for the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)**;
      * the integrity and safety of the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)**; and
      * support for the Commonwealth Personnel operating and supporting the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)**;
  + that **(INSERT SHORT NAME OF PARTY)** has appropriate arrangements with subcontractors and access to intellectual property and information to provide the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)** in accordance with the Contract, and will continue to do so for the duration of the Contract;
  + that **(INSERT SHORT NAME OF PARTY)** has done a full risk assessment and has made adequate provisions to ensure that it has the people, processes and systems to provide the Services to support the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)** in accordance with the Contract; and
  + that **(INSERT SHORT NAME OF PARTY)** is financially sound and is not presently subject to any litigation that may affect its performance of the Contract.

I fully recognise the importance to the Commonwealth of **(INSERT SHORT NAME OF PARTY)** providing Services that will support and enable the **(SHIPS/AIRCRAFT/VEHICLES/SYSTEMS ETC)** to sustain the required levels of capability, within budget, while ensuring both quality and safety.

Yours sincerely

**(INSERT RELEVANT SIGNATORY)**

SIGNING ON BEHALF OF

**(INSERT COMPANY/PARENT COMPANY)**