PROJECT NUMBER: *[INSERT PROJECT NUMBER]*

PROJECT NAME: *[INSERT PROJECT NAME AND DESCRIPTION OF WORKS, AS APPLICABLE]*

ECI SUBCONTRACT

(FOR USE WITH DEFENCE MAnaGING CONTRACTOR CONTRACT)

***[LAST AMENDED: 15 MAY 2025]***

***[CONTRACTOR TO NOTE THAT THIS TEMPLATE IS NOT TO BE USED FOR CONTRACTS WHICH ARE VALUED IN EXCESS OF $4 MILLION (INCLUSIVE OF ANY GST) (ABOVE WHICH ADDITIONAL POLICY / LEGISLATIVE REQUIREMENTS MAY APPLY)]***

**FORMAL AGREEMENT**

The Subcontract is made on day of

Parties The contractor specified in the Subcontract Particulars (Contractor)

The subcontractor specified in the Subcontract Particulars (Subcontractor)

A The Commonwealth of Australia (**Commonwealth**) and the Contractor entered into the Managing Contractor Contract for the design and construction of the MCC Works.

B. The Contractor wishes to subcontract certain obligations under the Managing Contractor Contract to the Subcontractor under the Subcontract.

C. The Contractor and the Subcontractor therefore promise to carry out and complete their respective obligations in accordance with:

* 1. the attached Conditions of Subcontract; and
  2. the other documents referred to in the definition of Subcontract in clause 1 of the Conditions of Subcontract.

1. This Formal Agreement may be executed in any number of counterparts and all such counterparts taken together will be deemed to constitute one and the same instrument.

SIGNED as an agreement

*[S 127 OF CORPORATIONS ACT]*

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** by the **Contractor** in accordance with section 127 of the *Corporations Act* *2001* (Cth): |  |  |  |
|  |  |  |  |
| Signature of director |  |  | Signature of company secretary/director ***[delete position as appropriate]*** |
|  |  |  |  |
| Full name of director who states that they are a director of the **Contractor** |  |  | Full name of company secretary/director ***[delete position as appropriate]*** who states that they are a company secretary/director ***[delete position as appropriate]*** of the **Contractor** |

*[OR - AUTHORISED SIGNATORY OF COMPANY]*

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed** for and on behalf of the **Contractor** by its authorised signatory in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of authorised signatory |
|  |  |  |  |
| Full name of witness |  |  | Full name of authorised signatory |

*[THESE ARE EXAMPLE EXECUTION CLAUSES ONLY. INSERT APPROPRIATE EXECUTION CLAUSE FOR CONTRACTOR]*

*[S 127 OF CORPORATIONS ACT]*

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** by the **Subcontractor** in accordance with section 127 of the *Corporations Act* *2001* (Cth): |  |  |  |
|  |  |  |  |
| Signature of director |  |  | Signature of company secretary/director ***[delete position as appropriate]*** |
|  |  |  |  |
| Full name of director who states that they are a director of the **Subcontractor** |  |  | Full name of company secretary/director ***[delete position as appropriate]*** who states that they are a company secretary/director ***[delete position as appropriate]*** of the **Subcontractor** |

*[OR - AUTHORISED SIGNATORY OF COMPANY]*

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed** for and on behalf of the **Subcontractor** by its authorised signatory in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of authorised signatory |
|  |  |  |  |
| Full name of witness |  |  | Full name of authorised signatory |

***[THESE ARE EXAMPLE EXECUTION CLAUSES ONLY. INSERT APPROPRIATE EXECUTION CLAUSE FOR SUBCONTRACTOR]***

**CONDITIONS OF SUBCONTRACT**

1. GLOSSARY OF TERMS

Unless the context otherwise indicates, whenever used in the Subcontract, each word or phrase in the headings in clause 1 has the meaning given to it under the relevant heading.

Act of Prevention

1. Any one of:
   1. a breach of the Subcontract by the Contractor; or
   2. any other act or omission of the Commonwealth, the MCC Contract Administrator, the Contractor or the Contractor’s Representative;

but excluding any act or omission of by person specified in paragraph (b) in accordance with or otherwise permitted by the Subcontract.

Australian Privacy Principle

1. Has the meaning given in the Privacy Act.

Award Date

1. The date on which the Formal Agreement, to which these Conditions of Subcontract are attached, has been completed and signed by the Contractor and Subcontractor.

Claim

1. Includes any claim for an increase in the ECI Subcontract Price, for payment of money (including damages):
   1. under, arising out of or in connection with the Subcontract, including any direction of the Contractor’s Representative;
   2. arising out of or in connection with the ECI Services or either party’s conduct before the Subcontract; or
   3. otherwise at law or in equity including:
      1. by statute;
      2. in tort for negligence or otherwise, including negligent misrepresentation; or
      3. for restitution.

Commonwealth

1. Commonwealth of Australia.

Confidential Information

* 1. Means, subject to paragraph (b):
     1. the Subcontract;
     2. the Project Documents;
     3. any document, drawing, information or communication (whether in written, oral or electronic form) given to the Subcontractor by the Commonwealth, the MCC Contract Administrator, the Contractor, the Contractor’s Representative or anyone on the Commonwealth’s or the Contractor’s behalf, whether or not owned by the Commonwealth or the Contractor, which is in any way connected with the ECI Services, the Subcontract Works or the MCC Works, which:
        1. by its nature is confidential; or
        2. the Subcontractor knows or ought to know is confidential; and
     4. everything recording, containing, setting out or making reference to the document, drawing, information or communication (whether in written, oral or electronic form) described in subparagraph (iii) including documents, notes, records, memoranda, materials, software, disks and all other media, articles or things.
  2. Excludes any document, drawing, information or communication (whether in written, oral or electronic form) given to the Subcontractor by the Commonwealth, the MCC Contract Administrator, the Contractor, the Contractor’s Representative, or anyone on the Commonwealth’s or the Contractor’s behalf, whether or not owned by the Commonwealth or the Contractor, which:
     1. is in the possession of the Subcontractor without restriction in relation to its disclosure or use before the date of its receipt from the Commonwealth, the MCC Contract Administrator, the Contractor, the Contractor’s Representative or anyone on the Commonwealth’s or the Contractor’s behalf;
     2. is in the public domain otherwise than due to a breach of this Subcontract; or
     3. has been independently developed or acquired by the Subcontractor.

1. Contractor
2. The person specified in the Subcontract Particulars.

Contractor's Representative

The person specified in the Subcontract Particulars or any other person nominated by the Contractor from time to time to replace that person.

1. **Corruption**
2. Any conduct (whether criminal or non-criminal in nature) that does or could compromise the integrity, accountability or probity of public administration, including:
   1. any conduct of any person (whether or not a staff member of a Commonwealth agency) that adversely affects, or that could adversely affect, either directly or indirectly:
      1. the honest or impartial exercise of any staff member's powers as a staff member of a Commonwealth agency; or
      2. the honest or impartial performance of any public official's functions or duties as a public official;
   2. any conduct of a staff member of a Commonwealth agency that constitutes or involves a breach of public trust;
   3. any conduct of a staff member of a Commonwealth agency that constitutes, involves or is engaged in for the purpose of abuse of the person's office; and
   4. any conduct of a staff member of a Commonwealth agency, or former staff member of a Commonwealth agency, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a staff member of a Commonwealth agency.

Date for Delivery Phase Approval

1. The date (if any) specified in the Subcontract Particulars, as adjusted (if at all) under clause 6(e).

Delivery Phase

1. The period which commences upon written notice from the Contractor’s Representative that "Delivery Phase Approval" under and as defined in the Managing Contractor Contract has been achieved and extends for the duration of the performance of the Contractor's obligations under the Managing Contractor Contract.

direction

1. Any agreement, approval, authorisation, certificate, consent, decision, demand, determination, direction, explanation,failure to consent, instruction, notice, notification,order, permission, rejection, request or requirement.
2. **DISP**
3. The Defence Industry Security Program more particularly described at http://www.defence.gov.au/dsvs/industry.

DSPF

1. The Defence Security Principles Framework dated 19 July 2024 available at https://www.defence.gov.au/business-industry/industry-governance/defence-security-principles-framework, as amended or replaced from time to time.

ECI Brief

1. The brief set out in Annexure 1.

ECI Milestone

1. A milestone described in the ECI Milestone Fee Payment Schedule.
2. **ECI Milestone Date**
3. Means, in respect of an ECI Milestone, the relevant date set out in the ECI Milestone Fee Payment Schedule.

ECI Milestone Fee Payment Schedule

1. The milestone fee payment schedule set out in the Subcontract Particulars, as adjusted from time to time in accordance with clause 6(e), setting out:
   1. the instalments in which the ECI Subcontract Price will be payable; and
   2. the ECI Milestones which must be achieved for each instalment to become payable.

**ECI Objectives**

Means the following objectives:

* 1. achieving value for money, time and cost savings, efficiencies and innovation in the planning, design and delivery of the MCC Works;
  2. improved buildability, quality, constructability, maintainability and operability outcomes for the MCC Works;
  3. the development of a high quality design solution which is fully consulted, co-ordinated and properly documented at each design milestone;
  4. effective and compliant work, health and safety management throughout the lifecycle of the planning, delivery and operation of the MCC Works;
  5. effective risk management and risk mitigation; and
  6. maximising local industry participation and opportunities for Indigenous Enterprises and to increase employment of Indigenous Australians.

ECI Services

1. All services set out in, or reasonably to be inferred from, the ECI Brief.

ECI Subcontract Price

1. The amount specified in the Subcontract Particulars as adjusted in accordance with the Subcontract.
2. Fraud
3. Dishonestly obtaining (including attempting to obtain) a gain or benefit, or causing a loss or risk of loss, by deception or other means.

GST

1. The tax payable on taxable supplies under the *A New Tax System (Goods and Services Tax) Act* *1999* (Cth) and any related Act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax.

Indigenous Enterprise

An organisation that is 50% or more indigenous owned that is operating a business.

Information Security Requirements

1. Means the:
   1. Australian Government's Protective Security Policy Framework available at https://www.protectivesecurity.gov.au/;
   2. Australian Government's Information Security Manual available at https://www.cyber.gov.au/ism; and
   3. DSPF,
2. each as amended or replaced from time to time.

Insolvency Event

1. Any one of the following:
   1. the Subcontractor becomes, is declared to be, is taken under any applicable law (including the *Corporations Act* *2001* (Cth)) to be, admits to or informs the Contractor in writing or its creditors generally that the Subcontractor is insolvent, an insolvent under administration, bankrupt, unable to pay its debts or is unable to proceed with the Subcontract for financial reasons;
   2. execution is levied against the Subcontractor by a creditor;
   3. a garnishee order, mareva injunction or similar order, attachment, distress or other process is made, levied or issued against or in relation to any asset of the Subcontractor;
   4. where the Subcontractor is an individual person or a partnership including an individual person, the Subcontractor:
      1. commits an act of bankruptcy;
      2. has a bankruptcy petition presented against him or her or presents his or her own petition;
      3. is made bankrupt; or
      4. applies for, agrees to, enters into, calls a meeting for the consideration of, executes or is the subject of an order or declaration in respect of:
         1. a moratorium of any debts; or
         2. a personal insolvency agreement or any other assignment, composition or arrangement (formal or informal) with creditors,

by which his or her assets are subjected conditionally or unconditionally to the control of a creditor or trustee;

* 1. where the Subcontractor is a corporation, any one of the following:
     1. notice is given of a meeting of creditors with a view to the corporation entering into a deed of company arrangement;
     2. a liquidator or provisional liquidator is appointed in respect of a corporation;
     3. the corporation entering a deed of company arrangement with creditors;
     4. a controller, restructuring practitioner, administrator, receiver, receiver and manager, provisional liquidator or liquidator (each as defined in section 9 of the *Corporations Act 2001* (Cth)) is appointed to the corporation;
     5. an application is made to a court for the winding up of the corporation and not stayed within 14 days;
     6. any application (not withdrawn or dismissed within 7 days) is made to a court for an order, an order is made, a meeting is convened or a resolution is passed, for the purpose of proposing or implementing a scheme of arrangement other than with the prior approval of the Commonwealth under a solvent scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001* (Cth);
     7. a winding up order or deregistration order is made in respect of the corporation;
     8. the corporation resolves by special resolution that it be wound up voluntarily (other than for a members’ voluntary winding‑up);
     9. as a result of the operation of section 459F(1) of the *Corporations Act 2001* (Cth), the corporation is taken to have failed to comply with a statutory demand (as defined in the *Corporations Act 2001* (Cth)); or
     10. a mortgagee of any property of the corporation takes possession of that property;
  2. the Commissioner of Taxation issues a notice to any creditor of a person under the *Taxation Administration Act* *1953* (Cth) requiring that creditor to pay any money owing to that person to the Commissioner in respect of any tax or other amount required to be paid by that person to the Commissioner (whether or not due and payable) or the Commissioner advises that creditor that it intends to issue such a notice; or
  3. anything analogous to anything referred to in paragraphs (a) to (f) or which has a substantially similar effect, occurs with respect to a person or corporation under any law of any jurisdiction.

Intellectual Property Rights

1. All statutory and other proprietary rights in respect of inventions, innovations, patents, utility models, designs, circuit layouts, mask rights, copyrights (including future copyrights), confidential information, trade secrets, know-how, trade marks and all other rights in respect of intellectual property as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation of July 1967.

Managing Contractor Contract

1. The managing contractor contract between the Contractor and the Commonwealth specified in the Subcontract Particulars.

MCC Contract Administrator

1. Means:
   1. the person specified in the Subcontract Particulars or any other person nominated by the Commonwealth from time to time under the Managing Contractor Contract to administer the Managing Contractor Contract; and
   2. any representative of that person appointed under the Managing Contractor Contract,
2. as notified by the Contractor's Representative to the Subcontractor.

MCC Works

1. The physical works which the Contractor must design, cost, program and, subject to "Delivery Phase Approval" under and as defined in the Managing Contractor Contract, construct, commission and complete in accordance with the Managing Contractor Contract, a brief description of which appears in the Subcontract Particulars.

Personal Information

1. Has the meaning given in the PrivacyAct.

Planning Phase

1. The period commencing on the Award Date and ending (unless earlier terminated) on the date:
   1. upon which the Contractor's Representative gives a notice under clause 6(a); or
   2. specified in the notice given by the Contractor's Representative under clause 6(b),
2. (as the case may be).

Privacy Act

1. The *Privacy Act 1988* (Cth).

Project

1. Has the meaning set out in the Subcontract Particulars.

Project Documents

1. Means all documents, information and other material produced or provided, or required to be provided, to the Contractor or the Contractor’s Representative by the Subcontractor, under, or in connection with the Subcontract or the ECI Services, including any matters relating to the Subcontractor's compliance with the WHS Legislation.

Security of Payment Legislation

1. Means:
   1. *Building and Construction Industry Security of Payment Act 1999* (NSW);
   2. *Building and Construction Industry Security of Payment Act 2002* (Vic);
   3. *Building Industry Fairness (Security of Payment) Act* *2017* (Qld);
   4. in Western Australia:
      1. the *Construction Contracts Act 2004* (WA); or
      2. if this Subcontract is executed after the date on which a provision of the *Building and Construction Industry (Security of Payment) Act* *2021* (WA) commences, then the *Building and Construction Industry (Security of Payment) Act* *2021* (WA) and any provision of the *Construction Contracts Act 2004* (WA) which has not been repealed;
   5. *Construction Contracts (Security of Payments) Act 2004* (NT);
   6. *Building and Construction Industry Security of Payment Act 2009* (Tas);
   7. *Building and Construction Industry (Security of Payment) Act 2009* (ACT);
   8. *Building and Construction Industry Security of Payment Act 2009* (SA); and
   9. any legislation in any State or Territory of Australia addressing security of payment in the building and construction industry.

Sensitive and Classified Information

1. Means:
   1. any document, drawing, information or communication (whether in written, oral or electronic form) issued or communicated to the Subcontractor by the Commonwealth, the MCC Contract Administrator, the Contractor, the Contractor’s Representative or anyone on the Commonwealth’s or Contractor’s behalf, whether or not owned by the Commonwealth or Contractor:
      1. marked as "sensitive information", "for official use only" or "OFFICIAL: Sensitive";
      2. identified at the time of issue or communication as "Sensitive Information";
      3. marked with a national security classification or as "Classified Information";
      4. identified at the time of issue or communication as "Classified Information"; or
      5. the Subcontractor knows or ought to know is subject to, or ought to be treated as sensitive or classified information in accordance with any Statutory Requirement (including the Information Security Requirements); and
   2. everything recording, containing, setting out or making reference to the document, drawing, information or communication (whether in written, oral or electronic form) referred to in paragraph (a) above, including documents, notes, records, memoranda, materials, software, disks and all other media, articles or things.

Statutory Requirements

1. Means any law applicable to the ECI Services, including Acts, ordinances, regulations, by-laws and other subordinate legislation, and the Information Security Requirements.

Subcontract

The contractual relationship between the parties constituted by:

* 1. the Formal Agreement;
  2. these Conditions of Subcontract;
  3. the Subcontract Particulars;
  4. the ECI Brief; and
  5. the other documents (if any) specified in the Subcontract Particulars.

Subcontract Particulars

1. The particulars annexed to these Conditions of Subcontract and entitled "Subcontract Particulars".

Subcontractor

1. The person specified in the Subcontract Particulars.
2. **WHS Legislation**
3. Means any of the following:
   1. *Work Health and Safety Act 2011* (Cth) and *Work Health and Safety Regulations 2011* (Cth); and
   2. any corresponding WHS law as defined in section 4 of the *Work Health and Safety Act 2011* (Cth).

Works Subcontract

1. Means the agreement, if any, in respect of the Delivery Phase agreed between the parties in accordance with clause 5 and which is to be substantially in the form of the pro forma Medium Works Subcontract (for use with the Defence Managing Contractor Contract) or Major Works Subcontract (for use with the Defence Managing Contractor Contract), as published by the Commonwealth and provided by the Contractor’s Representative to the Subcontractor for the purposes of negotiations under clause 5.
2. INTERPRETATION

In the Subcontract, unless the context otherwise indicates:

* + 1. words in the singular include the plural and vice versa;
    2. references to a person include an individual, firm, corporation or unincorporated body;
    3. except in clause 1, headings are for convenience only and do not affect the interpretation of the Subcontract;
    4. references to any party to the Subcontract include its successors or permitted assigns;
    5. a reference to a party, clause, Annexure, Schedule, or exhibit is a reference to a party, clause, Annexure, Schedule or exhibit of or to the Subcontract;
    6. references to the Subcontract and any deed, agreement or instrument are deemed to include references to the Subcontract or such other deed, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
    7. words denoting any gender include all genders;
    8. references to any legislation or to any section or provision of any legislation include any:
       1. statutory modification or re‑enactment of or any statutory provision substituted for that legislation, section or provision; and
       2. ordinances, by‑laws, regulations and other statutory instruments issued under that legislation, section or provision;
    9. no rule of construction applies to the disadvantage of a party on the basis that the party put forward the Subcontract or any part;
    10. a reference to "$" is to Australian currency;
    11. where under the Subcontract:
        1. a direction is required to be given or must be complied with; or
        2. payment of money must be made (other than under clause 12),

within a period of 7 days or less from a specified event, then Saturdays, Sundays and public holidays in the place in which the site is situated will not be counted in computing the number of days;

* + 1. for the purpose of clause 12 to the extent that the ECI Services are to be carried out in:
       1. the Australian Capital Territory, "business day" has the same meaning as defined at Part 1 of the *Legislation Act* *2001* (ACT);
       2. New South Wales, "business day" has the same meaning as defined in section 4 of the *Building and Construction Industry Security of Payment Act* *1999* (NSW);
       3. the Northern Territory, "business day" has the same meaning as "working day" as defined in section 4 of the *Construction Contracts (Security of Payments) Act* *2004* (NT);
       4. Queensland, "business day" has the same meaning as defined in Schedule 2 of the *Building Industry Fairness (Security of Payment) Act* *2017* (Qld);
       5. South Australia, "business day" has the same meaning as defined in section 4 of the *Building and Construction Industry Security of Payment Act* *2009* (SA);
       6. Tasmania, "business day" has the same meaning as defined in section 4A of the *Building and Construction Industry Security of Payment Act* *2009* (Tas);
       7. Victoria, "business day" has the same meaning as defined in section 4 of the *Building and Construction Industry Security of Payment Act 2002* (Vic); and
       8. Western Australia, "business day" has the same meaning as defined in section 3 of the *Construction Contracts Act* *2004* (WA) or if this Subcontract is executed after the date on which section 4 of the *Building and Construction Industry (Security of Payment) Act* *2021* (WA) commences, then "business day" has the same meaning as defined in section 4 of the *Building and Construction Industry (Security of Payment) Act* *2021* (WA);
    2. other than as set out in paragraphs (k) and (l), references to "day" are references to calendar days;
    3. the words "including" and "includes", and any variants of those words, will be read as if followed by the words "without limitation";
    4. the word "subsubcontractor" will include subsubcontractors, suppliers and consultants and the word "subsubcontract" will include a contract with a subsubcontractor;
    5. derivatives of a word or expression which has been defined in clause 1 will have a corresponding meaning to that assigned to it in clause 1; and
    6. requirements contained in the ECI Brief, whether or not they include the expression "the Subcontractor must" or any equivalent expression, will be deemed to be requirements to be satisfied by the Subcontractor, unless stated otherwise.

Part A - Delivery Model

1. OVERVIEW OF DELIVERY MODEL

The Subcontractor acknowledges that the Commonwealth is carrying out the Project on the basis of the managing contractor delivery method, which:

* + 1. involves two phase delivery comprising:
       1. an initial Planning Phase; and
       2. subject to the terms of the Managing Contractor Contract and clause 6, a subsequent Delivery Phase;
    2. is intended to:
       1. promote a "one team" culture across all stakeholders; and
       2. maximise the scope of work delivered for the available funds, so as to optimise the utility of the MCC Works to the end users;
    3. in the Planning Phase, involves the Subcontractor:
       1. carrying out the ECI Services in accordance with this Subcontract; and
       2. being paid the ECI Subcontract Price in consideration of its performance of its obligations under this Subcontract;
    4. if the Contractor elects to proceed with the Subcontractor to the Delivery Phase in accordance with clause 6(a), involves the Subcontractor carrying out the agreed works during the Delivery Phase in accordance with the terms of the Works Subcontract; and
    5. if the Contractor elects not to proceed with the Subcontractor to the Delivery Phase, allows the Contractor to proceed to engage third party subcontractors in connection with the Delivery Phase.

1. PLANNING PHASE AND DELIVERY PHASE 
   * 1. The Subcontractor acknowledges and agrees that the Contractor has divided the Project into two distinct phases, being the Planning Phase and the Delivery Phase.
     2. The Subcontractor acknowledges and agrees that the purpose of this division is to, among other things, give the Contractor an opportunity to determine (in its absolute discretion and for any reason) whether or not to proceed with the Subcontractor from the Planning Phase to the Delivery Phase.
     3. The Subcontractor acknowledges and agrees that it is only engaged under this Subcontract in respect of the ECI Services during the Planning Phase and:
        1. there may not be a Delivery Phase; and
        2. even if there is Delivery Phase, the Subcontractor may not be engaged in connection with the Delivery Phase.
2. Negotiation of works Subcontract
   * 1. Subject always to clause 6(b), if the Contractor is considering engaging the Subcontractor for the Delivery Phase, the Subcontractor must, within the time specified by the Contractor's Representative, undertake genuine and good faith negotiations with the Contractor's Representative to seek to reach agreement, in the Contractor's Representative's absolute discretion, as to the terms of the Works Subcontract.
     2. The Subcontractor acknowledges and agrees that:
        1. for the purposes of negotiations under paragraph (a), the Contractor's Representative may require the Subcontractor to:
           1. submit a proposal within a specified time, such proposal to include information and documentation reasonably requested by the Contractor’s Representative for the purposes of informing the negotiations and the terms of the Works Subcontract; and
           2. attend meetings with the Contractor's Representative or such other persons nominated by the Contractor’s Representative; and
        2. negotiations under paragraph (a) must be conducted by the Subcontractor on an open book cost transparent basis and consistently with the objective of maximising value for money for the Commonwealth.
3. PROCEEDING TO THE DELIVERY PHASE
   * 1. Subject always to paragraph (b), if by the Date for Delivery Phase Approval:
        1. under the Managing Contractor Contract, the Commonwealth has elected to proceed to the Delivery Phase with the Contractor;
        2. the Contractor's Representative and the Subcontractor have agreed to the terms of the Works Subcontract in accordance with clause 5(a);
        3. the Contractor has determined (in its absolute discretion) to proceed to the Delivery Phase with the Subcontractor; and
        4. the Contractor's Representative has not otherwise issued a notice under paragraph (b),

then the Contractor may (in its absolute discretion) elect to issue a notice in writing notifying the Subcontractor that it will proceed with the Subcontractor to the Delivery Phase, on the terms of the Works Subcontract as agreed whereupon the Subcontractor must execute the agreed Works Subcontract within the time specified by the Contractor's Representative.

* + 1. The Contractor's Representative may at any time prior to the Date for Delivery Phase Approval (and irrespective of whether negotiations are taking place under clause 5(a)), and for any reason, notify the Subcontractor that it will not proceed to the Delivery Phase with the Subcontractor, such notice to include the date on which the Planning Phase is to end.
    2. If the Contractor's Representative issues a notice under paragraph (b), the Subcontractor:
       1. will be entitled to payment of the ECI Subcontract Price due and payable for the ECI Services completed in accordance with the Subcontract before the date on which the Planning Phase ends as specified in the notice;
       2. will not be entitled to be engaged for the Delivery Phase;
       3. to the extent permitted by law, will not be entitled to make (nor will the Contractor be liable upon) any Claim arising out of or in connection with the notice, the Subcontract or the Delivery Phase;
       4. must, at the end of the Planning Phase:
          1. hand over to the Contractor's Representative copies of all Project Documents prepared by the Subcontractor to the end of the Planning Phase (whether complete or not);
          2. destroy all electronic copies of Project Documentation prepared by the Subcontractor or on the Subcontractor's behalf; and
          3. co-operate with the Contractor, the Contractor's Representative and any third parties required by the Contractor's Representative; and
       5. acknowledges and agrees that the Contractor may (in its absolute discretion) proceed to procure any third party subcontractor for the purposes of the Delivery Phase on such manner and such terms as it may determine (in its absolute discretion).
    3. The issue of a notice under paragraph (b) will not limit or affect the Subcontractor’s obligations under the Subcontract nor prejudice the right of the Contractor to exercise any right or remedy (including recovery of damages, whether while electing to keep the Subcontract on foot or after termination) which it may have where the Subcontractor breaches the Subcontract, whether under the Subcontract or otherwise at law or in equity.
    4. The Contractor may (in its absolute discretion) at any time and from time to time unilaterally extend the Date for Delivery Phase Approval or an ECI Milestone Date by notice in writing to the Subcontractor.
    5. The Subcontractor acknowledges that:
       1. the Contractor is not required to exercise the Contractor’s discretion under paragraph (e) for the benefit of the Subcontractor;
       2. paragraph (e) does not give the Subcontractor any rights and will not entitle the Subcontractor to bring a Claim against the Contractor; and
       3. the exercise or failure to exercise the Contractor’s discretion under paragraph (e) is not capable of being the subject of a dispute or difference for the purposes of clause 23(a) or otherwise subject to review.
    6. The Subcontractor acknowledges that any Act of Prevention which prevents the Subcontractor from proceeding to Delivery Phase will not:
       1. entitle the Subcontractor to bring a Claim against the Commonwealth or the Contractor; or
       2. limit or affect any right of the Commonwealth, the Contractor or the Contractor’s Representative,

whether on the basis that the obligation to finalise, agree, achieve or obtain the relevant matter has become an obligation to finalise, agree, achieve or obtain the relevant matter within a reasonable time or on any other basis at law or in equity.

Part B - ECI Services

1. ECI SERVICES

The Subcontractor must:

* + 1. carry out the ECI Services:
       1. under and in accordance with the requirements of this Subcontract;
       2. in an open and transparent manner; and
       3. so as to maximise achievement of the ECI Objectives;
    2. comply with the ECI Brief in performing the ECI Services, and with all instructions given to the Subcontractor from time to time by the Contractor's Representative in relation to the Project;
    3. ensure that the ECI Services are completed in a timely manner, and must use its best endeavours to achieve each ECI Milestone by the relevant ECI Milestone Date;
    4. use its best endeavours to ensure that the ECI Services are fit for their intended purpose;
    5. exercise, in the performance of the ECI Services, the degree of care, skill and diligence that would be reasonably expected from a prudent, competent and experienced contractor engaged to perform services similar to the ECI Services; and
    6. exercise the utmost good faith in the best interests of the Contractor and keep the Contractor fully and regularly informed as to all matters affecting or relating to the ECI Services and the MCC Works.

1. COMPLIANCE WITH LAW; work health and safety
   * 1. The Subcontractor must in carrying out the ECI Services comply with all the duties and obligations imposed on the Subcontractor by all applicable legislation, including all regulations and other delegated Statutory Requirements, with all applicable Commonwealth policies, with the requirements of any state, local or other authorities with jurisdiction over the ECI Services, with all applicable Australian Standards, and with any other codes, practices or other requirements which are, or which otherwise may become, applicable to the ECI Services (including notifying the Contractor's Representative immediately of any notifiable incident - as defined in the WHS Legislation).
     2. Without limiting paragraph (a), the Subcontractor must keep the Contractor's Representative fully informed of any work health and safety matters arising out of or in connection with the ECI Services, and comply with any instructions from the Contractor's Representative in connection with such matters, including without limitation through the provision of any information or copies of documentation requested.
     3. The Subcontractor must ensure that in carrying out the ECI Services it complies with:
        1. all laws and other requirements of the Subcontract in respect of work health and safety, including the applicable WHS Legislation;
        2. where the applicable WHS Legislation does not prescribe a duty referred to in this Subcontract as one the Subcontractor must comply with, it complies with the duty contained in the Commonwealth WHS Legislation;
        3. the duty under the WHS Legislation to consult, co-operate and co-ordinate activities with all other persons who have a work health and safety duty in relation to the same matter;
        4. the duty under the WHS Legislation to notify the relevant regulator immediately upon becoming aware that a notifiable incident (within the meaning of the WHS Legislation) has occurred arising out of its business or undertaking; and
        5. the duty under the WHS Legislation to, where a notifiable incident has occurred, ensure, so far as is reasonably practicable, that the site where the notifiable incident has occurred is not disturbed until an inspector arrives at the site or any earlier time that an inspector directs, unless:
           1. it is to assist an injured person or remove a deceased person;
           2. it is to make the area safe or to minimise the risk of a further notifiable incident; or
           3. the relevant regulator/inspector has given permission to disturb the site.
2. PERSONNEL
   * 1. The Contractor’s Representative will give directions and carry out all of the other functions of the Contractor’s Representative under the Subcontract as the agent of the Contractor (and not as an independent certifier, assessor or valuer).
     2. The Subcontractor must comply with any direction by the Contractor’s Representative given or purported to be given under a provision of the Subcontract. Except where the Subcontract otherwise provides, the Contractor’s Representative may give a direction orally but will as soon as practicable confirm it in writing.
     3. The Subcontractor agrees that it will:
        1. at all times allocate adequate competent resources to enable the Subcontractor to comply with its obligations under this Subcontract; and
        2. ensure that any key persons named in the Subcontract Particulars continue at all times to be closely involved in the day to day performance of the ECI Services (unless they no longer remain employed by or associated with the Subcontractor, in which case the Subcontractor must promptly replace such persons with similarly qualified and experienced persons previously approved by the Contractor's Representative in writing).
     4. The Contractor's Representative may by notice in writing instruct the Subcontractor to remove any person from the performance of the ECI Services who in the reasonable opinion of the Commonwealth or the Contractor is guilty of misconduct or is incompetent or negligent.
3. RISK AND INSURANCE
   * 1. The Subcontractor must effect and maintain policies for professional indemnity and public liability insurance in respect of the Subcontractor's performance of the ECI Services in full force and effect for so long as the Subcontractor retains liability under this Subcontract, with limits of indemnity not less than the amounts stated in the Subcontract Particulars.
     2. The Subcontractor must effect and maintain a policy to insure against liability for death or injury to persons employed by the Subcontractor as required under any workers compensation legislation, and to the full extent of common law liability. The insurance policy must extend to provide indemnity to the Commonwealth and the Contractor in respect of any statutory liability to the Subcontractor's employees.
     3. The Subcontractor must produce upon request from time to time documentary evidence to show that all insurance policies under this Subcontract are being properly maintained, and obtain the Contractor's prior written consent to any alteration to the terms of such policies.
     4. The Subcontractor must indemnify the Contractor against any losses, claims, proceedings, compensation and costs payable, suffered or incurred by the Contractor due to the death of or injury to any person, loss or damage to any property or the environment which arises from or in connection with or by reason of the carrying out of the ECI Services.
     5. The operation of any proportional liability legislation which might otherwise apply is hereby excluded in relation to all rights, obligations and liabilities of the parties under or in connection with this Subcontract and the performance of the ECI Services.
4. Exclusion of consequential loss and limitation on liability
   * 1. Subject to paragraphs (b) and (c):
        1. neither the Contractor nor the Subcontractor will be liable to the other for any Consequential Loss howsoever arising; and
        2. to the extent permitted by law, the maximum aggregate liability of the Subcontractor to the Contractor arising out of or in connection with the Subcontract (whether arising in contract, in equity, tort (including negligence), by way of indemnity, under statute or otherwise at law) is limited to the amount specified in the Subcontract Particulars.
     2. Paragraph (a) does not apply to a liability of the Subcontractor:
        1. for any deliberate breach or repudiation of the Subcontract;
        2. under the indemnity in clause 10(d);
        3. for Fraud;
        4. to the extent that payments are received by the Subcontractor under any insurance policy or policies required to be effected and maintained under the Subcontract in relation to that liability or which would have been received by the Subcontractor under such insurance policy or policies but for:
           1. the failure of the Subcontractor to effect and maintain the required insurance policy or insurance policies;
           2. any failure of an insurance policy to respond due to the misconduct of the Subcontractor (including a failure to make proper disclosure or to comply with the requirements of the policy);
           3. the failure by the Subcontractor to diligently pursue any claim for indemnity under any insurance policy or insurance policies; or
           4. the reliance by the insurer of the required insurance on this clause 11 to deny liability on the basis that the party has no liability to the Commonwealth; and
        5. for fines or penalties incurred by the Contractor arising from the ECI Services.
     3. Paragraph (a)(i) does not apply to a liability of the Contractor for:
        1. any deliberate breach or repudiation of the Subcontract;
        2. Fraud; or
        3. fines or penalties incurred by the Subcontractor arising from an act or omission of the Contractor.
     4. For the purposes of this clause 11, **Consequential Loss** means any loss of income, loss of revenue, loss of profit, loss of financial opportunity, loss of business or loss of business opportunity, loss of goodwill, loss of use (other than loss of use of the MCC Works or other Commonwealth property) or loss of production or financing costs, whether present or future, fixed or unascertained, actual or contingent.
5. PAYMENT
   * 1. For the proper performance of the Subcontract's obligations under this Subcontract, the Subcontractor will be paid the ECI Subcontract Price in accordance with the ECI Milestone Fee Payment Schedule. Unless otherwise stated in the Subcontract Particulars, the ECI Subcontract Price is inclusive of all disbursements and other expenses, but exclusive of GST.
     2. Payment claims may be submitted monthly, subject, where applicable, to completion of a relevant ECI Milestone.
     3. The Contractor's Representative will provide the Subcontractor (with a copy to the Contractor), on behalf of the Contractor, with a payment statement within 10 business days of receiving the Subcontractor's payment claim, setting out the amount (if any) that the Contractor proposes to pay and, if such amount is less than the amount claimed, the reasons for the difference.
     4. Within 3 business days of the Subcontractor receiving a payment statement under paragraph (c), the Subcontractor must give the Contractor’s Representative, with a copy to the email address set out in the Subcontract Particulars, a tax invoice for the amount stated as then payable by the Contractor to the Subcontractor in the payment statement.
     5. The Contractor will make payment of the amount set out in its payment statement within the number of business days set out in the Subcontract Particulars of the Contractor receiving a payment statement.
     6. The Subcontractor agrees that the Contractor may deduct from moneys otherwise due to the Subcontractor any debt or other moneys due from the Subcontractor to the Contractor, together with any claim to money which the Contractor may have against the Subcontractor whether for damages or otherwise, in each case whether under this Subcontract or otherwise at law, relating to the ECI Services.
6. VARIATIONS
   * 1. The Subcontractor agrees that the Contractor may vary the ECI Services from time to time, and that no variation will vitiate or void this Subcontract. To the extent applicable, variations must be valued in accordance with the rates or prices set out in this Subcontract. To the extent that this Subcontract does not include applicable rates or prices, then the value of the variation will be a reasonable amount agreed between the parties or, failing agreement, determined by the Contractor's Representative. The Subcontractor will not be entitled to be paid for any additional work or services unless they were instructed by the Contractor's Representative in writing before they were performed.
7. SUSPENSION
   * 1. The Contractor’s Representative:
        1. may (subject to the Contractor having first complied with clause 8.11 of the Managing Contractor Contract, as if such suspension constituted a variation for the purposes of that clause) instruct the Subcontractor to suspend and, after a suspension has been instructed, to re-commence, the carrying out of all or a part of the ECI Services; and
        2. is not required to exercise the Contractor’s Representative’s power under subparagraph (i) for the benefit of the Subcontractor.
     2. To the extent permitted by law, the Subcontractor will not be entitled to make (nor will the Contractor be liable upon) any Claim arising out of or in connection with the suspension.
     3. Except to the extent permitted by the relevant Security of Payment Legislation, the Subcontractor may only suspend the ECI Services when instructed to do so under paragraph (a)(i).
8. INTELLECTUAL PROPERTY
   * 1. The Subcontractor hereby grants the Contractor a perpetual, royalty-free, irrevocable and non-exclusive licence to exercise all rights of the owner of the Intellectual Property Rights in the Project Documents, including to use, reproduce, communicate to the public, modify and adapt any of the Project Documents. The licence includes the unlimited right to grant sub-licences and is freely transferable by the Contractor.
     2. The Subcontractor warrants that the performance of the ECI Services has not and will not infringe the rights (including Intellectual Property Rights) of any third party and that neither the Contractor nor any sublicensee is liable to pay any third party any licence or other fee in respect of the use of the Project Documents.
9. Non-Complying ECI Services
   * 1. If the Contractor's Representative discovers or believes that any ECI Services have not been performed in accordance with this Subcontract, then it may, without limiting the Contractor's other rights or remedies, give the Subcontractor a notice in writing:
        1. requiring the Subcontractor to re-perform within the time specified in the notice the ECI Services which are non-complying and to take all steps reasonably necessary to mitigate the failure to properly carry out the ECI Services; or
        2. accepting the non-complying ECI Services despite the non-compliance, and a corresponding deduction from the ECI Subcontract Price will be made by the Contractor in respect of the non-complying ECI Services.
     2. If a direction is given under paragraph (a)(i) the Subcontractor must re-perform the non-complying ECI Services within the time specified in the Contractor's Representative's direction.
10. PRIVACY
    * 1. The Subcontractor agrees that it must, in connection with obtaining, creating, storing or using Personal Information for the purposes of this Subcontract:
         1. comply with the Privacy Act;
         2. comply with the Australian Privacy Principles as if the Subcontractor were an agency as defined in the Privacy Act;
         3. only use Personal Information for the purposes of this Subcontract;
         4. not disclose Personal Information or transfer and/or store Personal Information outside Australia, without the prior written approval of the Contractor's Representative;
         5. co‑operate with demands or inquires made by the Federal Privacy Commissioner and/or the Contractor's Representative;
         6. comply with policy guidelines issued by the Contractor and/or the Federal Privacy Commissioner; and
         7. ensure that any subsubcontract made in connection with this Subcontract contains obligations requiring the subsubcontractor to comply with this paragraph (a) and paragraph (b).
      2. The Subcontractor must promptly notify the Contractor's Representative if the Subcontractor:
         1. becomes aware of any breach or possible breach of any of the obligations mentioned in paragraph (a);
         2. becomes aware that a disclosure of Personal Information may be required by law; or
         3. is approached by the Federal Privacy Commissioner or by any individual claiming that their privacy has been interfered with in connection with this Subcontract or the performance of the ECI Services.
11. COMMERCIAL-IN-CONFIDENCE INFORMATION

Clause 18 does not apply unless the Subcontract Particulars state that it applies.

* + 1. The Contractor must keep confidential any information which has been provided by the Subcontractor, reviewed by the Contractor and set out in the Subcontract Particulars (**Commercial-in-Confidence Information**) provided that the Contractor's obligation under this paragraph (a) does not apply if the Commercial-in-Confidence Information is:
       1. disclosed by the Contractor to its legal or other advisers, or to its officers, employees, contractors or agents in order to comply with its obligations or to exercise its rights under or in connection with this Subcontract;
       2. disclosed by the Contractor to its legal or other advisers, or to its officers, employees, contractors or agents in order to comply with the Contractor's management, reporting or auditing requirements under the Managing Contractor Contract;
       3. disclosed to any Minister, the Parliament, Commonwealth department, agency or authority;
       4. authorised or required by law to be disclosed; or
       5. in the public domain otherwise than due to a breach of this paragraph (a).

1. CONFIDENTIAL INFORMATION REQUIREMENTS
   * 1. The Subcontractor must not, without prior written consent from the Contractor's Representative (in its absolute discretion):
        1. copy or otherwise reproduce in any form or medium the contents of any Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be copied or reproduced in any form or medium; or
        2. disclose or use or deal with, the contents of any Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be disclosed, used or dealt with, in each case for any purpose other than performing the ECI Services or in connection with the Managing Contractor Contract or the MCC Works.
     2. Without limiting paragraph (a), the Subcontractor must:
        1. ensure that all recipients of Confidential Information (or any part of it) comply with the requirements of paragraph (a) and this paragraph (b) as if they were a counterparty to this Subcontract;
        2. at the Contractor's Representative's direction, promptly return or destroy (as applicable) all copies of any Confidential Information whether in a tangible or intangible form, provided that the Subcontractor may keep one copy of the Confidential Information for its records where required by law; and
        3. upon request, notify the Contractor's Representative of all Confidential Information (or any part of it) which the Subcontractor knows or ought to know is beyond the Subcontractor's possession, power, custody or control, giving full particulars (including the nature and extent of the Confidential Information, precise location, entity in possession, custody or control and any security arrangements). The Contractor's rights under clause 25(b) shall extend to assessing compliance with and enforcing the Contractor's rights under paragraph (a) and this paragraph (b).
2. DISP AND INFORMATION SECURITY
   * 1. At the request of the Contractor's Representative, the Subcontractor must:
        1. comply with the Commonwealth’s security clearance process;
        2. obtain the level of security clearance requested by the Contractor; and
        3. comply with all security policies and procedures notified by the Contractor from time to time.
     2. The Subcontractor must handle and store any Sensitive and Classified Information in its possession or control strictly in accordance with the provisions of the DSPF.
     3. Without limiting clauses 19(a) and (b), the Subcontractor must not disclose any Sensitive and Classified Information unless such disclosure is strictly in accordance with the provisions of the DSPF and has first been approved in writing by the Commonwealth and the Contractor's Representative. In giving any approval to the Subcontractor under this paragraph (c), the Commonwealth and the Contractor may impose such conditions as the Commonwealth and the Contractor think fit, including conditions requiring any recipient of Sensitive and Classified Information to obtain a level of security clearance and to enter into a deed in a form acceptable to the Commonwealth.
     4. Without limiting the Subcontractor's other obligations under this Subcontract, the Subcontractor must:
        1. ensure that it, and must ensure that its subsubcontractors are fully familiar with, and comply with, the requirements of Defence's Security Alert System at the level specified in the Subcontract Particulars; and
        2. attend any security briefing or participate in any rehearsal of Defence's Security Alert System as may be requested or directed by the Contractor's Representative from time to time.
     5. Without limiting paragraphs (b) or (c) or any other provision of the Subcontract, the Subcontractor:
        1. must at its cost obtain and thereafter maintain for the term of the Subcontract the level of DISP membership specified in the Subcontract Particulars in accordance with Control 16.1 of the DSPF;
        2. must comply with any other direction or requirement of the Contractor's Representative in relation to the DISP; and
        3. acknowledges and agrees that if the Subcontractor has failed to strictly comply with this paragraph (e) (including any direction or requirement of the Contractor's Representative in relation to the DISP), the Contractor may (in its absolute discretion):
           1. terminate the Subcontract under clause 22(a); or
           2. take such failure into account in any registration of interest process, tender process or similar procurement process in connection with any other Commonwealth project,

and the exercise of any of the Contractor's absolute discretions under this paragraph is not capable of being the subject of a dispute or difference for the purposes of clause 23(a) or otherwise subject to review.

1. FINANCIAL VIABILITY
   * 1. The Subcontractor:
        1. warrants that, on the Award Date and on the date of submitting each payment claim under clause 12(b):
           1. it has the financial viability necessary to perform the ECI Services and otherwise meet its obligations under the Subcontract (including the payment of all subsubcontractors (in accordance with paragraph (b)); and
           2. each subsubcontractor engaged in the ECI Services has the financial viability necessary to perform its activities in accordance with the relevant subsubcontract; and
        2. acknowledges and agrees that the Contractor has entered into the Subcontract and if applicable has made payments to the Subcontractor under clause 12(e), strictly on the basis of and in reliance upon the obligations and warranties set out in clause 21.
     2. The Subcontractor must pay all subsubcontractors in accordance with the payment terms in all subsubcontracts.
     3. The Subcontractor must keep the Contractor’s Representative fully and regularly informed as to all financial viability matters which could adversely affect:
        1. the Subcontractor’s ability to perform the ECI Services or otherwise meet its obligations under the Subcontract; and
        2. a subsubcontractor’s ability to perform its activities in accordance with the relevant subsubcontract.
2. TERMINATION
   * 1. If:
        1. an Insolvency Event occurs to the Subcontractor or, where the Subcontractor comprises two or more persons, to any one of those persons;
        2. the Subcontractor does not remedy a failure or breach the subject of a notice under clause 16(a)(i) within the number of days specified in the that notice; or
        3. the Subcontractor fails to comply with:
           1. clause 19;
           2. clauses 20(b) and (c);
           3. clause 20(e);
           4. clause 26; or
           5. clause 27,

then the Contractor may by written notice to the Subcontractor immediately (and without having to first give a notice under clause 16(a)(i), except in the case of subparagraph (ii)) terminate the Subcontract.

* + 1. If the Contractor terminates the Subcontract under paragraph (a) or if the Subcontractor repudiates the Subcontract and the Contractor otherwise terminates the Subcontract, the Contractor will:
       1. to the extent permitted by the relevant Security of Payment Legislation, not be obliged to make any further payments to the Subcontractor, including any amount the subject of a payment claim or a payment statement under clause 12(b); and
       2. be entitled to recover from the Subcontractor all costs, expenses, losses, damages or liabilities suffered or incurred by the Contractor arising out of or in connection with such termination.
    2. Without limiting any other rights or remedies, the Contractor may, at its sole and absolute discretion, terminate the Subcontractor's appointment under this Subcontract for its own convenience for any reason at any time on 7 days’ notice.
    3. If the Contractor terminates the Subcontract under paragraph (c), the Subcontractor will be entitled to payment for ECI Services carried out prior to the date of termination as determined by the Contractor's Representative.
    4. Payment under paragraph (d) is subject to the Subcontractor's compliance with clause 6(c)(iv) as if the references to "the end of the Planning Phase" were references to "the date of termination" (including by handing over to the Contractor's Representative copies of Project Documents prepared by the Subcontractor to the date of termination (whether complete or not)) and will be a limitation upon the Contractor's liability to the Subcontractor arising out of or in connection with the termination.

1. DISPUTES
   * 1. If any dispute or difference between the Subcontractor and the Contractor arises at any time out of or in connection with the ECI Services, the dispute or difference must be determined in accordance with the procedure in this clause 23.
     2. Where such a dispute or difference arises, the party raising it is to notify the other party in writing of the nature of the dispute and give adequate particulars to identify the dispute.
     3. Within 7 days of the giving of a written notice under paragraph (b), the Subcontractor and Contractor's Representative are to meet to attempt to resolve the dispute. Unless otherwise directed by the Contractor's Representative, the Subcontractor must at all times continue to carry out its obligations under this Subcontract, regardless of any dispute.
     4. All disputes not resolved within 14 days of the giving of a written notice under paragraph (b) are referred for decision to an independent industry expert (**Industry Expert**) appointed by the person specified in the Subcontract Particulars.
     5. In making a decision, the Industry Expert acts as an expert and not as an arbitrator and is to:
        1. make the decision in such manner as considered suitable for the dispute;
        2. engage and consult with any advisors, legal or technical, as the Industry Expert sees fit; and
        3. give a decision within 14 days of the referral of the dispute and need not give reasons for the decision.
     6. If required by the Industry Expert, the Subcontractor and the Contractor must sign an agreement with the Industry Expert containing such reasonable terms which the Industry Expert may require.
     7. Each party will bear its own costs in respect of any expert determination and must bear the costs of the Industry Expert (including the Industry Expert's costs of engaging and consulting advisors, if any) equally.
     8. If for any reason a determination has not been made by the Industry Expert within 14 days from the acceptance by the expert of his or her appointment, the jurisdiction of the Industry Expert shall lapse and a further expert must be appointed under paragraph (d).
     9. If the Subcontractor does not pay its share of the costs of the Industry Expert upon request, then the Contractor may pay those costs to the Industry Expert, and the amount of those costs will be a debt due by the Subcontractor to the Contractor under this Subcontract.
     10. The Industry Expert's decision is final and binding on the Subcontractor and the Contractor, and neither party may challenge the decision in any other proceedings.
     11. Despite the existence of a dispute or difference between the parties the Subcontractor must continue to carry out the ECI Services and otherwise comply with its obligations under the Subcontract.
2. NOTICES
   * 1. Any notice to be given or served under or arising out of a provision of this Subcontract must:
        1. be in writing;
        2. be delivered by hand, sent by prepaid post or sent by email (except for notices under clauses 22 and 23 which, if sent by email, must additionally be delivered by hand or sent by prepaid express post) to the relevant address or email address stated in the Subcontract Particulars or last notified in writing to the party giving or serving the notice, for the party to whom or upon which the notice is to be given or served; and
        3. be signed by the party giving or serving the notice or (on the party's behalf) by the solicitor for or attorney, director, secretary or authorised agent of the party giving or serving the notice.
     2. A notice given or served in accordance with this clause 24 is taken to be received by the party to whom or upon whom the notice is given or served in the case of:
        1. delivery by hand, on delivery;
        2. prepaid express post sent to an address in the same country, on the fifth day after the date of posting;
        3. prepaid express post sent to an address in another country, on the seventh day after the date of posting; and
        4. email, the earlier of:
           1. delivery to the email address to which it was sent; and
           2. one hour after the email enters the server of the email address to which it was sent, provided that no delivery or transmission error is received by the sender within one hour of the time of sending shown on the "sent" email.
     3. In the case of notices under clauses 22 and 23, if the notice is sent by email as well as being delivered by hand or sent by prepaid express post in accordance with subparagraph (a)(ii), the notice is taken to be received by the party to whom or upon whom the notice is given or served on the earlier of:
        1. the date the notice sent by email is taken to be received; or
        2. the date the notice delivered by hand or sent by prepaid express post is taken to be received,

as determined in accordance with paragraph (b).

1. GENERAL
   * 1. The Subcontractor must at all times comply with the *Workplace Gender Equality Act 2012* (Cth). The Subcontractor must not enter into a subsubcontract with any entity named by the Workplace Gender Equality Agency as an employer currently not complying with the *Workplace Gender Equality Act 2012* (Cth).
     2. The Subcontractor agrees that:
        1. the Contractor, or any person nominated by the Contractor's Representative may, for so long as the Subcontractor retains liability under this Subcontract, inspect, audit, or investigate any documents and other information prepared or maintained by or on the Subcontractor's behalf in connection with the ECI Services; and
        2. it will provide whatever documents, other information, access, facilities or assistance is necessary to conduct whatever audit, inspection or investigation is required by the Contractor or any person nominated by the Contractor's Representative.
     3. Without limiting the Subcontractor's other obligations, the Subcontractor must proactively:
        1. take all necessary measures to prevent, detect and investigate any known or suspected Fraud or Corruption in connection with the performance of ECI Services (including all measures directed by the Contractor's Representative);
        2. take all necessary corrective action to mitigate any loss or damage to the Commonwealth or the Contractor resulting from known Fraud or Corruption to the extent that the Fraud or Corruption was caused or contributed to by the Subcontractor or any of the Subcontractor's officers, employees, consultants, subsubcontractors or agents and put the Commonwealth or the Contractor in the position that it would have been in if the Fraud or Corruption had not occurred (including all corrective action directed by the Contractor's Representative); and
        3. take all reasonable steps to ensure that any of its officers, employees, subsubcontractors or agents that report any known or suspected Fraud or Corruption which is occurring or has occurred in connection with the Subcontract or the ECI Services are protected from reprisals.
     4. If the Subcontractor knows or suspects that any Fraud or Corruption is occurring or has occurred, the Subcontractor must immediately provide a detailed written notice to the Contractor's Representative including details of:
        1. the known or suspected Fraud or Corruption;
        2. how the known or suspected Fraud or Corruption occurred;
        3. the proactive corrective action the Subcontractor will take under paragraph (c)(ii);
        4. the proactive measures which the Subcontractor will take under paragraph (c)(i) to ensure that the Fraud or Corruption does not occur again,

and such further information and assistance as the Contractor, or any person authorised by the Contractor, reasonably requires in relation to the known or suspected Fraud or Corruption.

* + 1. The Subcontractor must use reasonable endeavours to increase its:
       1. purchasing from organisations that are 50 per cent or more indigenous Australian owned and that are operating a business; and
       2. employment of indigenous Australians,

in the carrying out of ECI Services, in accordance with the Commonwealth’s Indigenous Procurement Policy, as amended from time to time, available at https://www.niaa.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp.

* + 1. If any part of the activities carried out by the Subcontractor under the Subcontract (including any ECI Services) involves the Subcontractor employing or engaging a person (whether as an officer, employee, agent, subconsultant, or volunteer) that is required by State or Territory law to have a working with children check to undertake such activities or any part of such activities, the Subcontractor agrees:
       1. without limiting its other obligations under the Subcontract, to comply with all State, Territory or Commonwealth law relating to the employment or engagement of people who work or volunteer with children in relation to such activities, including mandatory reporting and working with children checks however described; and
       2. if requested, provide the Commonwealth at the Subcontractor’s cost, a statement of compliance with this clause, in such form as may be specified by the Commonwealth.

1. Significant Events
   * 1. The Subcontractor must issue a notice to the Contractor's Representative as soon as reasonably practicable after becoming aware of a Significant Event.
     2. The notice issued under paragraph (a) must provide, to the extent the information is known by or reasonably available to the Subcontractor at the time of giving the notice:
        1. a summary of the Significant Event, including the date or dates on which it occurred and the date on which the Subcontractor became aware of it; and
        2. information as to whether any of the Subcontractor's personnel engaged in connection with the Subcontract, or any officers or employees of any subsubcontractors, were involved.
     3. Where reasonably requested by the Contractor's Representative, the Subcontractor must, within 3 business days of the request (or longer period agreed in writing by the Contractor's Representative), provide the Contractor's Representative with any additional information regarding a Significant Event, to the extent that information is known by or reasonably available to the Subcontractor.
     4. If requested by the Contractor's Representative, the Subcontractor must prepare a draft Significant Event plan and submit that draft plan to the Contractor's Representative within 10 business days of the request (or longer period agreed in writing by the Contractor's Representative).
     5. A draft Significant Event plan prepared by the Subcontractor under paragraph (d) must include the following information:
        1. how the Subcontractor will address the Significant Event in the context of the ECI Services to minimise the impact of the Significant Event on the performance of the ECI Services or compliance by the Subcontractor with its obligations under the Subcontract;
        2. how the Subcontractor will seek to ensure that any events of a similar nature to the Significant Event do not occur again; and
        3. any other information reasonably requested by the Contractor's Representative.
     6. The Contractor's Representative will review the draft Significant Event plan and either approve it or provide the Subcontractor with the details of any changes that are required. The Subcontractor must make any changes reasonably requested by the Contractor's Representative and resubmit the draft plan to the Contractor's Representative within 5 business days of the Contractor's Representative's request (or longer period agreed in writing by the Contractor's Representative). This paragraph (f) will apply to any resubmitted draft Significant Event plan.
     7. Without limiting its other obligations under the Subcontract, the Subcontractor must:
        1. comply with each Significant Event plan as approved by the Contractor's Representative; and
        2. provide such reports and other information about the Subcontractor's progress in implementing a Significant Event plan as may be reasonably requested by the Contractor's Representative.
     8. A failure by the Subcontractor to comply with its obligations under this clause 26 will be a material breach of the Subcontract and the Commonwealth may terminate under clause 22(a) of the Subcontract.
     9. The Contractor's rights under this clause 26 are in addition to and do not otherwise limit any other rights the Contractor may have under the Subcontract or at law or in equity. The performance by the Subcontractor of its obligations under this clause 26 will be at no additional cost to the Contractor.
     10. The Contractor may, in addition to any of its other rights or remedies under the Subcontract, take into account the occurrence of a Significant Event at any time, including when:
         1. deciding whether to consent to the subcontracting of any ECI Services (including under clause 28(b));
         2. without limiting the operation of clause 6, determining whether to proceed to the Delivery Phase with the Subcontractor; and
         3. deciding whether to exercise any rights in relation to termination or a reduction of the scope of the ECI Services under or in connection with the Subcontract.
     11. Nothing in this clause 26 requires the Subcontractor to act in any manner or disclose any information which would:
         1. breach an obligation of confidentiality that existed prior to the date the Significant Event occurred, that is owed to an unrelated third party;
         2. cause the Subcontractor to breach any law or regulation or contractual obligation regarding privacy or security (in Australia or outside of Australia);
         3. have the effect of waiving legal professional privilege (or any equivalent privilege in Australia or outside of Australia) in relation to the information; or
         4. breach the rules of a stock exchange or any similar body on which the Subcontractor, or any related body corporate of the Subcontractor, is listed, which require the information to be first disclosed to the stock exchange or body. In this case, the Subcontractor must disclose the information promptly after disclosure is made to the stock exchange or body.
     12. Notwithstanding any restriction that may apply in respect of specific information, such as described in paragraph (k), the Subcontractor must use reasonable endeavours to make any disclosures and take reasonable steps to ensure that the overarching intent of this clause 26 is achieved.
     13. For the purposes of this clause 26, Significant Event means:
         1. any adverse findings made by a court, commission, tribunal or other statutory or professional body regarding the conduct or performance of the Subcontractor or its subsubcontractors (or any officers, employees or agents of any of them) that impacts or could be reasonably perceived to impact on their professional capacity, capability, fitness or reputation; or
         2. any other significant matters, including the commencement of legal, regulatory or disciplinary action involving the Subcontractor or its subsubcontractors (or any officers, employees or agents of any of them) that may adversely impact on compliance with Commonwealth policy and legislation or the Commonwealth's reputation.
2. Compliance with the Commonwealth Supplier Code of Conduct
   * 1. The Subcontractor must comply with, and ensure that its officers, employees, agents and subsubcontractors comply with, the Code in connection with the performance of the Subcontract.
     2. The Subcontractor must:
        1. periodically monitor and assess its, and its officers', employees' and agents', compliance with the Code; and
        2. on request from the Contractor's Representative, promptly provide information regarding:
           1. the policies, frameworks or systems it has established to monitor and assess compliance with the Code; and
           2. the Subcontractor's compliance with paragraph (a).
     3. The Subcontractor must immediately notify the Contractor's Representative in writing upon becoming aware of any breach of paragraph (a). The notice must include a summary of the breach, the date that the breach occurred and details of the personnel involved.
     4. Where the Contractor's Representative identifies a possible breach of paragraph (a), it may notify the Subcontractor in writing, and the Subcontractor must, within three days of receiving the notice, either:
        1. where the Subcontractor considers a breach has not occurred - advise the Contractor's Representative that there has not been a breach and provide information supporting that determination; or
        2. where the Subcontractor considers that a breach has occurred - notify the Contractor's Representative under paragraph (c) and otherwise comply with its obligations under this clause 27.
     5. Notwithstanding paragraph (d), the Contractor's Representative may notify the Subcontractor in writing that it considers that the Subcontractor has breached paragraph (a), in which case the Subcontractor must notify the Contractor's Representative in writing under paragraph (c) and otherwise comply with its obligations under this clause 27.
     6. Nothing in this clause 27 or the Code limits, reduces or derogates from the Subcontractor's other obligations under the Subcontract. The Contractor's rights under this clause 27 are in addition to and do not otherwise limit any other rights the Contractor may have under the Subcontract. The performance by the Subcontractor of its obligations under this clause 27 will be at no additional cost to the Contractor.
     7. The Subcontractor acknowledges and agrees that the Subcontractor's compliance with the Code may be taken into account in any registration of interest process, tender process or similar procurement process in connection with any other Commonwealth project.
     8. For the purposes of this clause 27, **Code** means the Commonwealth Supplier Code of Conduct dated 1 July 2024, available at https://www.finance.gov.au/government/procurement/commonwealth-supplier-code-conduct/commonwealth-supplier-code-conduct, as amended from time to time.
3. MISCELLANEOUS
   * 1. The Subcontract is subject to and is to be construed in accordance with the laws of the State or Territory specified in the Subcontract Particulars.
     2. The Subcontractor must not subcontract the whole or any part of the ECI Services without the Contractor's Representative's prior written approval. The Subcontractor will be wholly responsible for all acts and omissions of any subsubcontractors, and subsubcontracting will not relieve the Subcontractor of any responsibility or liability for the performance of the ECI Services.
     3. The Subcontractor may not assign, novate or transfer any of its rights or obligations under this Subcontract, nor permit any change in control, without the Contractor's Representative's prior written consent. Such consent may be withheld or granted at the Contractor’s sole and absolute discretion, and may be subject to such conditions as it may otherwise determine. The Contractor may at any time novate this Subcontract to a third party on such reasonable terms of novation as may be proposed by the Contractor.
     4. Where a party comprises two or more persons, each person will be jointly and severally bound by the party's obligations under the Subcontract.
     5. This Subcontract constitutes the entire agreement between the parties in connection with the performance of the ECI Services and will take effect according to its terms despite any prior agreement or prior representations, understandings or arrangements made between the parties whether orally or in writing.
     6. None of the terms of this Subcontract can be waived, discharged or released unless the parties agree in writing.
     7. Any provision in the Subcontract which is illegal, void or unenforceable will be ineffective to the extent only of such illegality, voidness or unenforceability and such illegality, voidness or unenforceability will not invalidate any other provision of the Subcontract.
     8. All obligations to indemnify under the Subcontract survive termination of the Subcontract on any basis.

SUBCONTRACT PARTICULARS

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Contractor:**  (Clause 1) | ***[INSERT]*** | | | |
| **Contractor's Representative:**  (Clause 1) | ***[INSERT]*** | | | |
| **Date for Delivery Phase Approval:**  (Clause 1) | ***[INSERT]*** | | | |
| **ECI Milestone Fee Payment Schedule:** (Clause 1) | **Date** | **ECI Milestone** | | **Fee Payment** |
| ***[INSERT DATE OF MILESTONE]*** | ***[INSERT MILESTONE DESCRIPTION]*** | | ***[INSERT INSTALMENT AMOUNT]*** |
|  |  | |  |
| **ECI Subcontract Price:**  (Clauses 1 and 12(a)) | $***[INSERT] [NOTE: IF ANY DISBURSEMENTS OR OTHER EXPENSES ARE PAYABLE IN ADDITION TO THE ECI SUBCONTRACT PRICE, STATE THIS HERE]*** | | | |
| **Managing Contractor Contract:**  (Clause 1) | ***[INSERT]*** | | | |
| **MCC Contract Administrator:** (Clause 1) | ***[INSERT]*** | | | |
| **MCC Works:**  (Clause 1) | ***[INSERT A BRIEF DESCRIPTION OF THE MCC WORKS]*** | | | |
| **Project:** (Clause 1) | ***[INSERT DESCRIPTION OF THE PROJECT]*** | | | |
| **Subcontract - other documents forming part of the Subcontract:**  (Clause 1) | ***[INSERT ADDITIONAL DOCUMENTS, IF APPLICABLE. IF SPECIAL CONDITIONS ARE REQUIRED FOR THE SUBCONTRACT, INSERT A NEW ANNEXURE AND INCLUDE A REFERENCE TO THAT ANNEXURE IN THIS SUBCONTRACT PARTICULAR]*** | | | |
| **Subcontractor:**  (Clause 1) | ***[INSERT]*** | | | |
| **Key Persons:** (Clause 9(c)(ii)) | **Subcontractor’s Representative: *[INSERT NAME OF SUBCONTRACTOR’S REPRESENTATIVE]****.*  **Quality Manager: *[INSERT NAME OF SUBCONTRACTOR’S QUALITY MANAGER]***.  **Other: *[INSERT NAME OF OTHER KEY PERSONS]*** | | | |
| **Professional indemnity insurance:** (Clause 10(a)) | Amount of cover: $***[INSERT]*** per claim and $***[INSERT]*** in the aggregate, all claims during the period of insurance  ***[CONTRACTOR TO INSERT THE REQUIRED LEVEL OF PI COVER HAVING REGARD TO THE REQUIREMENTS OF THE PROJECT]*** | | | |
| **Public liability insurance:** (Clause 10(a)) | Amount of cover: $***[INSERT]*** in respect of any one occurrence and $***[INSERT]*** in the aggregate, all occurrences during the period of insurance  ***[CONTRACTOR TO INSERT THE REQUIRED LEVEL OF PL COVER HAVING REGARD TO THE REQUIREMENTS OF THE PROJECT]*** | | | |
| **Maximum aggregate liability of the Subcontractor to the Contractor:** (Clause 11(a)(ii)) | $ | | | |
| **Email address for copy of tax invoice:**  (Clause 12(d)) |  | | | |
| **Number of business days for payment:** (Clause 12(e)) | To the extent that the relevant part of the ECI Services are carried out in:  1. Queensland, New South Wales or the Australian Capital Territory: 5; or  2. any other State or Territory: 10. | | | |
| **Commercial-in-Confidence Information:**  (Clause 18) | Clause 18 ***[DOES/DOES NOT]*** apply | | | |
| **Information which is Commercial-in-Confidence Information:**  (Clause 18(a)) | **Specific Information** | **Justification** | | **Period of confidentiality** |
|  |  | |  |
| **Defence's Security Alert System level:** (Clause 20(d)(i)) | ("Aware" if not otherwise specified) | | | |
| **DISP membership Levels:** (Clause 20(e)(i)) | DISP membership ***[IS/IS NOT]*** required.  Where DISP membership is required:  ***[REFER TO CONTROL 16.1 OF THE DSPF (AVAILABLE AT https://www.defence.gov.au/business-industry/industry-governance/defence-security-principles-framework) FOR GUIDANCE AS TO WHEN DISP MEMBERSHIP SHOULD BE REQUIRED AND THE RELEVANT LEVELS FOR EACH DOMAIN]*** | | | |
| **DISP Membership / Security Domain** | | **Level** | |
| Governance | | ***[INSERT LEVEL AND SPECIFIC DETAILS (AS REQUIRED) NOTING THAT, IN ACCORDANCE WITH CONTROL 16.1 OF THE DSPF, THIS MUST EQUAL THE HIGHEST LEVEL REQUIRED FOR THE OTHER THREE DOMAINS BELOW. INSERT "NOT APPLICABLE" IN THIS AND BELOW ROWS IF DISP MEMBERSHIP IS NOT REQUIRED]*** | |
| Personnel Security | | ***[INSERT LEVEL AND SPECIFIC DETAILS (AS REQUIRED)]*** | |
| Physical Security | | ***[INSERT LEVEL AND SPECIFIC DETAILS (AS REQUIRED)]*** | |
| Information / Cyber Security | | ***[INSERT LEVEL AND SPECIFIC DETAILS (AS REQUIRED)]*** | |
| **Nominating authority for Industry Expert:**  (Clause 23(d)) | (The President for the time being of the Resolution Institute unless otherwise stated) | | | |
| **Address and email address, for the giving or serving of notices upon:**  (Clause 24(a)(ii)) | **Contractor**:  Address (not PO Box):  Email address:  Attention:  **Subcontractor:**  Address (not PO Box):  Email address:  Attention: | | | |
| **Governing law:**  (Clause 28(a)) | ***[INSERT]*** | | | |

annexure 1 - ECI BRIEF

***[INSERT OR ATTACH THE BRIEF CONTAINING THE SCOPE AND OTHER REQUIREMENTS FOR THE PERFORMANCE OF THE ECI SERVICES]***