



Australian Government

Department of Defence

**ASDEFCON
Acquisition and
Support
Linkages Module
Commercial
Guide**

Note to Defence Staff and External Agencies

Defence staff and external agencies intending to use the associated template will need to tailor it in order to meet their specific procurement requirements (including relevant internal guidance) and should seek appropriate professional guidance as required.

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Feedback

All feedback on this publication and suggestions for improvement should be sent to: procurement.ASDEFCON@defence.gov.au

Amendment Record

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1 GENERAL

1.1 Purpose of this Guide

This Guide has been designed to provide basic guidance on the key commercial aspects of the ASDEFCON Linkages Module (ALM). The aim of this Guide is to provide users with plain English guidance on the appropriate use of the ALM, including a description of the circumstances for which it is designed to be used and the key commercial issues/risks associated with seeking a combined acquisition and support solution from a single tender process (but under separate contracts).

This Guide does not address the Statement of Work or other technical aspects associated with seeking a combined acquisition and support solution. Separate guidance will be made available for these aspects of the ALM.

This Guide is not intended to be comprehensive and should not be used as a substitute for a careful review and understanding of the ALM documents. Users of the template should seek specialist advice from contracting, financial or legal support areas where required. Users should also refer to the notes and guidance included within the template.

Terms and acronyms used in this Guide have the meaning given to them in:

- a. ASDEFCON (Strategic Materiel) Attachment M, Glossary; and
 - b. ASDEFCON (Support) Attachment M, Glossary,
- each as modified by the ALM.

1.2 Purpose of the ASDEFCON Linkages Module

When considering any Major Capital Equipment (MCE) project, Defence is required to ensure that the most technically and commercially sound and risk balanced strategy is developed to acquire and support a Materiel System throughout that systems' life cycle. This is achieved through the Acquisition and Support Implementation Strategy (ASIS) process, which requires the development of a commercially sound strategy which delivers the required capability at minimal whole of life cost, and using a tender process(es) that minimises the cost of tendering for industry and Defence.

Where the approved ASIS determines that an acquisition and support solution is to be acquired using a single tender process, 'standard' Defence practice involves seeking those solutions under separate contracts. A single tender process, involving separate contracts, for an acquisition and support solution is considered best practice for several reasons.

Whole of life focus

Using a single tender process ensures that the acquisition and support solutions are considered as a single holistic package. If separate tender processes were to be used, Defence would need to consider the acquisition element of the capability in isolation, and decisions made in respect of acquisition may lock Defence into a particular solution with minimal (if any) options and commercial leverage for subsequently securing an optimal support solution. Considering the acquisition and support elements as a single package ensures that Defence considers the materiel elements of the capability from a whole of life perspective and generally provides the best possible means for transitioning a new capability to the support phase.

Reduced tendering costs

Using a single tender process also minimises any duplication of the information required to be provided by tenderers and evaluated by Defence compared to conducting separate acquisition and support tender processes. For example, provided a tenderer proposes the same contractor for the acquisition and support contracts, the evaluation of a tenderer's corporate structure and financial viability can be considered once in respect of both the acquisition and sustainment solutions and doesn't need to be replicated for the separate solutions. Similarly, it also reduces the cost of tendering for industry as they are only required to provide the information once.

Improved 'whole of life' contract management

As well as providing an improved whole of life focus and promoting efficiencies in tendering, the use of separate (but 'linked') acquisition and support contracts provides Defence with significant benefits throughout the contract management phase of the procurement lifecycle.

Separate (linked) contracts means Defence can use contracts that are specifically designed for the relevant stage of the capability lifecycle. This is important because the different requirements and characteristics of the acquisition and support phases require a very different set of contractual provisions. Any attempt to combine these provisions in a single contract can become a very complex activity, resulting in a very lengthy contract that will necessarily contain a number of redundant provisions once the acquisition stage is complete and support has fully ramped up.

1.3 Selection of ASDEFCON Linkages Module

The ALM has been developed for circumstances where the Contract (Acquisition) and Contract (Support) will be entered into by Defence as the outcome of a single tender process.

It is essential that the commercial, legal and technical risks associated with the performance of each separate contract are considered in the context of the overall tendered requirement and that these issues are addressed in the drafting of the two contracts. These contracts are generally entered into at the same time to maximise Defence's commercial leverage for securing the best possible overall 'deal'. For example, if the Contract (Acquisition) is signed before negotiations conclude on the Contract (Support), Defence may have limited leverage for securing the contractor's agreement to Defence's position on any outstanding negotiation issues related to Contract (Support).

The ALM does not assume or require that Contractor (Acquisition) and the Contractor (Support) are the same, or even related legal entities. Rather, the ALM equally applies whether the Contractor (Acquisition) and Contractor (Support) are the same, related or different legal entities. However, where a tenderer proposes unrelated legal entities to enter into the Contract (Acquisition) and the Contract (Support), there is a greater chance that they may be non-compliant with a number of the linkages in the ALM.

The purpose of the ALM is to ensure that Defence has an integrated and risk managed solution for the acquisition and support of the capability which minimises the commercial, legal and technical risks, as well as the interface and transition risks associated with having acquisition and support solutions delivered under separate contracts (irrespective of the identity of the contractor) that resulted from a single tender process.

Generally, a tender that offers the same contractor as both the Contractor (Acquisition) and the Contractor (Support) would be considered to present a lower risk than one which proposes separate entities for each contract. However, the level of risk associated with such a tender will still be affected (increased) if the tenderer is non-compliant (or only partially compliant) with any of the proposed 'linkages' (ie the provisions of the draft contracts that have been amended as per the ALM). In addition, the greater risk associated with entering into 'linked' Contract (Acquisition) and Contract (Support) contracts with different entities can be mitigated through the tenderer's acceptance of the proposed 'linkages' and its agreement to provide an appropriate performance guarantee that straddles performance of both contracts.

The Conditions of Tender provide guidance to tenderers on the type of measures that could be proposed in a tender to mitigate the risks for Defence if the tender proposes different contracting entities for the Contract (Acquisition) and Contract (Support). Specifically, the Conditions of Tender state that these measures could include an appropriate performance guarantee by:

- a. a common parent company of the proposed separate contracting entities;
- b. each proposed contracting entity in respect of the obligations of the other legal entity;
or
- c. an appropriate parent company of each proposed contracting entity in respect of the obligations of the other entity.

Tenderers' acceptance (or otherwise) of the proposed 'linkages' between the contracts and the risks for Defence associated with any such non-compliance, and/or any proposed use of separate contracting entities for the Contract (Acquisition) and Contract (Support), are matters that must be carefully assessed during the normal course of tender evaluations and will necessarily factor into any evaluation (including shortlisting) decisions.

Unless warranted in the circumstances of a particular procurement, it is not considered appropriate to restrict tenderers to proposing the same, or even related legal entities, as the contracting parties for Contract (Acquisition) and Contract (Support).

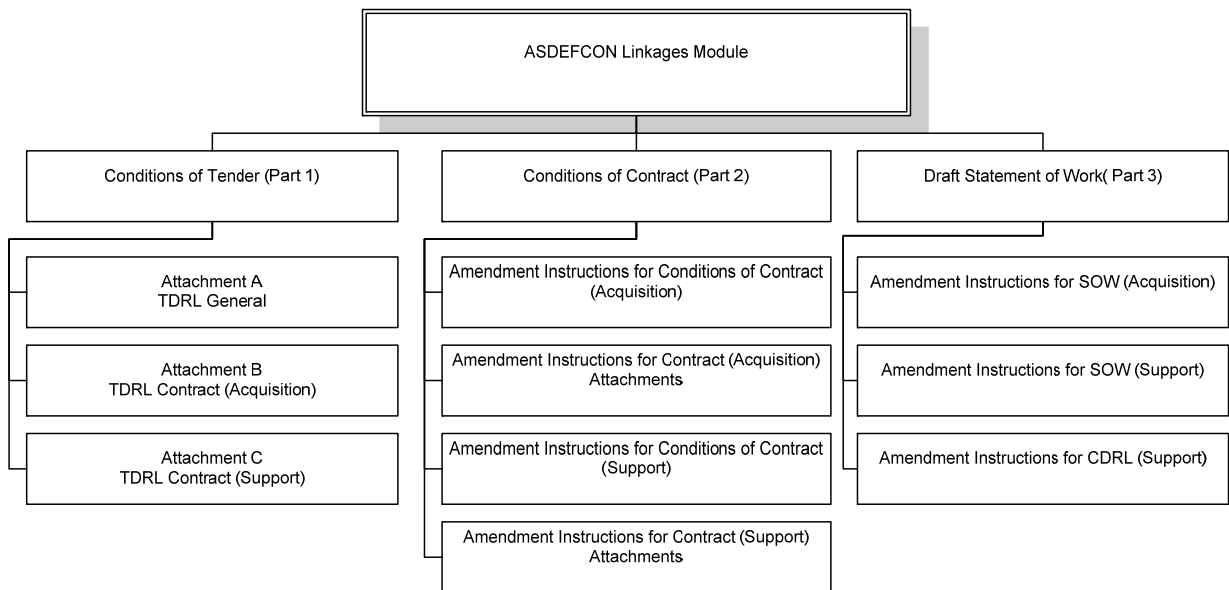
2 TEMPLATE STRUCTURE AND TAILORING

2.1 Template Structure

The ASDEFCON Linkages Module consists of:

- a. a single, consolidated Conditions of Tender (CoT) and Tender Data Requirements (TDRs) that should be used in place of the separate COTs and TDRs contained in the ASDEFCON (Strategic Materiel) and ASDEFCON (Support) templates; and
- b. a set of drafting instructions for users to amend the relevant provisions of the ASDEFCON (Strategic Materiel) and ASDEFCON (Support) Conditions of Contract, Statement of Work and other relevant attachments.

The following diagram depicts the structure of the ALM:



The key parts of the RFT are:

Part 1

Conditions of Tender	<p>The conditions of tender set out the ‘rules’ that apply to the RFT process, including:</p> <ul style="list-style-type: none"> • the minimum content and format requirements, being the requirements that tenderers must comply with in order to be eligible for further consideration in the RFT process; • any conditions for participation which are the minimum conditions that tenderers must comply with in order to participate in the RFT process. Conditions for participation must be limited to those that will ensure that a tenderer has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement; • the procedural requirements relating to the RFT; and • the evaluation criteria applicable to the RFT.
COT Attachments	<p>The Attachments to the COT set out the information and documentation that tenderers are to provide as part of their tenders. Attachment A contains all of the TDRs that require information which applies to both the acquisition and support elements of the tender. The commercial TDRs are all located at Attachment A to the COT. Attachment B contains the TDRs that are related</p>

to the acquisition element of the tender and Attachment C contains the TDRs that are related to the support element of the tender. The TDRs have been drafted to minimise any duplication of information requested in the tender and to ensure a fully integrated tender response.

Part 2

Amendment Instructions for the Conditions of Contract (Acquisition)	The amendment instructions for the Conditions of Contract (Acquisition) contain guidance for amending the ASDEFCON (Strategic Materiel) template. The Conditions of Contract for the ALM module are therefore be based on the latest version of the ASDEFCON (Strategic Materiel) template, amended in accordance with the instructions. The ALM has been structured this way to maximise consistency and currency with the ASDEFCON templates and minimise the overhead in maintaining the ALM.
Amendment Instructions for the Contract (Acquisition) Attachments	The amendment instructions for the Contract (Acquisition) contain guidance for amending the contract attachments for the ASDEFCON (Strategic Materiel) template. The amendment instructions are only provided in respect of any attachments which require amendments or additional clauses to be inserted. Where the amendment instructions do not refer to an attachment, the standard ASDEFCON (Strategic Materiel) attachment should be used.
Amendment Instructions for the Conditions of Contract (Support)	The amendment instructions for the Conditions of Contract (Support) contain guidance for amending the ASDEFCON (Support) template. The Conditions of Contract for the ALM module are be based on the latest version of the ASDEFCON (Support) template, amended in accordance with the instructions. The ALM has been structured this way to maximise consistency and currency with the ASDEFCON templates and minimise the overhead in maintaining the ALM.
Amendment Instructions for the Contract (Support) Attachments	The amendment instructions for the Contract (Support) contain guidance for amending the contract attachments for the ASDEFCON (Support) template. The amendment instructions are only provided in respect of any attachments which require amendments or additional clauses to be inserted. Where the amendment instructions do not refer to an attachment, the standard ASDEFCON (Support) attachment should be used.

Part 3

Amendment Instructions for the Statement of Work (Acquisition)	Refer to the ALM (Strategic) technical guidance for information on the amendment instructions for the Statement of Work (Acquisition). http://drnet.defence.gov.au/DMO/PP/ASDEFCONandContracting/ASDEFCON/Pages/ASDEFCON-Linkages-Modules.aspx
Amendment Instructions for the Statement of Work (Support)	Refer to the ALM (Strategic) technical guidance for information on the amendment instructions for the Statement of Work (Support). http://drnet.defence.gov.au/DMO/PP/ASDEFCONandContracting/ASDEFCON/Pages/ASDEFCON-Linkages-Modules.aspx

It is intended that there will be a number of ASDEFCON Linkages Modules that link a number of ASDEFCON acquisition and support templates to reflect differing levels of complexity in linked procurements. The ASDEFCON Linkages Module (Strategic) is based on the ASDEFCON (Strategic Materiel) template and the ASDEFCON (Support) template. ALM (Complex), which will 'link' ASDEFCON (Complex Materiel) Vol. 2 and ASDEFCON (Support), and ALM (Complex Short), which will link ASDEFCON (Complex Materiel) Vol. 1 and ASDEFCON (Support Short), will be made available in 2016.

Although they will be released with their own guidance, the information contained in this Guide is generally applicable to the full library of ALMs.

2.2 Tailoring of the ALM

The aim of developing standard tendering and contract documents, such as the ALM, is to standardise, to the maximum extent practicable, the structure, and the terms and conditions used by Defence when conducting procurements. This has the benefit of reducing tendering costs for both Defence and tenderers and allows Defence to adopt a standard portfolio approach when contracting for goods and services in line with considered better practice.

Wherever possible, the form of the ALM should be adhered to and procurement specific tailoring of the ALM should be kept to a minimum. However, when tailoring is necessary, clauses should only be added, modified or deleted after seeking specialist advice from the applicable legal and/or Contracting Services advisor in the first instance or from the ASDEFCON and Contracting Initiatives Help Desk. 'Core' clauses must not be amended or deleted except on specialist advice.

3 KEY CONCEPTS AND RELEVANT ISSUES

3.1 Conditions of Tender

Tender Evaluation Criteria

The tender evaluation criteria contained in the COT of the ALM have been consolidated into a single set and refined to reduce the overlap and duplication that would otherwise arise if separate conditions of tender (with their own sets of evaluation criteria) were issued in respect of the acquisition and support elements of the tendered requirement. Among other things, this approach avoids the tenderers being asked to provide the same information for different elements of the tender.

Combining the evaluation criteria has the further advantage of ensuring a coordinated approach is taken to tender evaluations where the acquisition and support elements of a Materiel System are considered as an integrated package. While the acquisition and support elements of each tender will typically still be separately evaluated, it is anticipated that the evaluation of the acquisition and support elements will be completed by the same evaluation teams. As such, combining the evaluation criteria makes clear that it is the outcome of Defence's evaluation of the combined solution against each evaluation criterion that will inform the outcome of the evaluation phase and ultimately the tender process.

3.2 Conditions of Contract

Design, Development and Production

Contract (Acquisition) clause 3.2

Contract (Support) clause 3.1

Clause 3.2 of Contract (Acquisition) refers to the degree of skill and care with which the Contractor is required to design the supplies under the Contract. This clause also places an obligation on the Contractor to design, develop and produce the supplies so that they are compatible with and do not restrict the performance of existing equipment.

As a 'linked' request for tender exists to solicit a combined acquisition and support solution, the supplies designed, developed and produced under the Contract (Acquisition) must also be compatible with the services provided under the Contract (Support).

To address this, the ASDEFCON Linkages Module expands clause 3.2 so that the contractor is obligated to design and develop supplies that are not only compatible with existing equipment contemplated under the Contract (Acquisition) but also existing equipment referred to in the Contract (Support), which the Contractor knows or ought reasonably to know will be used with deliverables in the Contract (Support) or equipment to be used by the Contractor (Support) to provide the services.

If these amendments are not included in a linked contract there is a risk that if the supplies provided under the Contract (Acquisition) are not compatible for any reason with such other equipment, the Commonwealth will not have a contractual remedy available and may need to negotiate costly rectification work.

Equivalent amendments have been made to the Contract (Support).

Provision and Management of GFM

Contract (Acquisition) clause 3.5

Contract (Support) clause 3.4

Clause 3.5 Contract (Acquisition) and clause 3.4 Contract (Support) impose on the Commonwealth an obligation to provide GFM to the contractor. As the Commonwealth has an obligation to provide the GFM, failure to do so will create an entitlement for postponement for the contractor, except where the Commonwealth's failure to deliver is caused by the contractor.

To ensure that the Commonwealth does not bear the risk for delays to delivery of GFM under one contract (eg Contract (Acquisition)) that is caused by contractor delay under the other contract (eg Contract (Support)), the ALM amends the provisions dealing with delays caused by the Contractor (Acquisition) to include delays caused by the Contractor (Support) under the Contract (Acquisition) and vice versa under the Contract (Support).

Similarly, the ALM amends the exclusions to the warranty provided by the Commonwealth in respect of GFD and Commonwealth Mandated GFM contained in both Contract (Acquisition) and Contract (Support) to include failures, damage, defects and deficiencies caused by either contractor (or their subcontractors, employees and agents).

If these provisions are not amended as specified by the ALM, the Commonwealth would bear the risk of delays, defects or deficiencies etc caused by the Contractor (Support) (or its subcontractors, employees and agents) in respect of GFM under the Contract (Acquisition) and vice versa under the Contract (Support).

Intellectual Property (IP)

Contract (Acquisition) clause 5

Contract (Support) clause 5

Clause 5 of both Contracts seek to provide the Commonwealth with the IP rights to access and use Technical Data (TD) and to sublicense those rights for specified purposes.

It is typical that different levels of IP/TD rights are sought by and granted to the Commonwealth depending on the purpose of the contract and nature of the supplies / services (whether it is for acquisition or support) and depending on the relationship between the IP owner and the Commonwealth (eg if the IP owner is the Contractor, Subcontractor or a third party). In a 'linked' Contract it is important to ensure that the IP/TD rights granted under the Contract (Acquisition) are not inadvertently or otherwise limited by the IP/TD rights granted under the Contract (Support) and vice versa. For example, where the Commonwealth has the IP right to use TD delivered under the Contract (Acquisition) for Defence Purposes, these rights to use the same TD should not be restricted by a more limited right to the same TD under the Contract (Support). To assure this outcome, a statement has been included in the IP clauses of each Contract to state that nothing in the Contract (eg ASDEFCON (Support)) limits the IP/TD rights granted to the Commonwealth under the other Contract (eg ASDEFCON (Acquisition)).

ASDEFCON contracts also generally contain a licence of all Third Party IP. Where the Contractor (Acquisition) and the Contractor (Support) are not the same legal entity, there is a risk that under the Contract (Acquisition) the Contractor (Support) may fall within the definition of 'Third Party'. In order to address this risk, an additional licence for Third Party IP owned by the Contractor (Support) is required to align with the licence provided by the Contractor (Acquisition) in respect of Background and Foreground IP. Drafters should ensure that the scope of the licence for Third Party IP owned by the relevant linked contractor aligns with the scope of the licence from the Contractor for Background and Foreground IP if it is amended from the template position. The grant of a licence for Third Party IP owned by the other contractor should only be removed if both contracts are with the same legal entity.

The ALM also specifies that the Contract (Support) be amended to include the new clause 5.7 ('Additional Intellectual Property') from the Contract Acquisition for consistency and to ensure that contract managers are able to request additional IP under their respective contracts.

Delay clauses

Contract (Acquisition) clause 6.2 (Postponement), 6.3 (Postponement Costs), 6.4 (Schedule Recovery) and 6.5 (Schedule Recovery Costs)

Contract (Support) clause 6.5 (Performance and Schedule Relief), 6.6 (Performance and Schedule Relief Costs), 6.7 (Schedule Relief) and 6.8 (Schedule Recovery Costs)

Clauses 6.2 to 6.5 of Contract (Acquisition) and clauses 6.5 to 6.8 of Contract (Support) impose a contractual obligation on the Contractor to prevent and minimise delay and to mitigate its losses due to delay.

Under the ASDEFCON contracting suite, the Commonwealth bears the risk of delay when the Contractor is delayed in the performance of its obligations under the Contract by an event which is outside of its (or its Subcontractor's) reasonable control, and is not provided for elsewhere in the Contract and could not have been reasonably contemplated by the Contractor.

To ensure that the Commonwealth does not bear the risk of delays caused by the contractor under the other Contract where there are linked Contracts (eg the risk of delay caused by the Contractor (Acquisition) under Contract (Support)), the amendments to the postponement and schedule recovery clauses expand the references to 'the Contractor' to include the Contractor (Support) under the Contract (Acquisition) and vice versa.

For example, the ALM amends the Contract (Acquisition) to provide that the event must be beyond the reasonable control of the Contractor and the Contractor (Support) (including their Subcontractors), is not provided for elsewhere under the Contract or Contract (Support) and it could not have reasonably been contemplated by either contractor before entering the Contract (Acquisition) or the Contract (Support).

If these amendments are not made, the Commonwealth may bear the risk of delays caused by the Contractor (Acquisition) under the Contract (Support) and vice versa.

The postponement cost clauses of both Contract (Acquisition) and Contract (Support) have also been amended to ensure that where a contractor has recovered postponement costs under one Contract, the contractor under the other Contract cannot also recover the same costs from the Commonwealth under the other Contract.

If this amendment is not made there is a risk that Contractors will be able to recover costs caused by the same delay under both Contracts.

Acceptance

Contract (Acquisition) clause 6.7

Contract (Support) clause 6.9

These clauses provide a mechanism by which the Commonwealth can notify the contractor that the supplies or deliverables offered for acceptance meet the requirements of the Contract.

Due to the complex nature of the equipment or platforms acquired under contracts based on the Strategic Materiel template, it is not uncommon for supplies to be accepted by the Commonwealth subject to minor omissions and defects requiring rectification. This may also occur under the Contract (Support) where the Commonwealth wishes to Accept Deliverables despite any minor omissions or defects.

In order to provide flexibility and reduce the risk of delay under the linked contract arrangements, the acceptance clauses of both the Contract (Acquisition) and Contract (Support) have been amended to provide the Commonwealth with the flexibility to accept supplies or deliverables despite the existence of minor defects or omissions and elect to have the minor defects or omissions rectified under the Contract (Support) or the Contract (Acquisition), irrespective of which contract the supplies or deliverables are offered for acceptance by the Commonwealth. In practice, it is expected that this clause will largely be used to have minor omissions and defects in supplies delivered under the Contract (Acquisition) rectified under the Contract (Support). The amendments have been included in both contracts to allow the parties the greatest flexibility, although there may only be limited circumstances such as staged procurements where minor omissions or defects would be passed back to the Contractor (Acquisition) for rectification.

If these amendments are not made, then the Commonwealth will only have contractual recourse against the relevant contractor for the rectification of minor omissions and defects in accepted supplies or deliverables in accordance with the Contract under which they were

accepted. This could limit the flexibility of the Commonwealth and the contractor(s) to deal with the rectification of minor omissions and defects in the most efficient manner.

Mobilisation and Performance Securities

Contract (Acquisition) clause 7.4 and 7.5

Contract (Support) clause 7.4 and 7.5

These clauses provide for the provision of a performance security which enables the Commonwealth to drawdown on a financial security to obtain compensation for loss suffered in the event that the Contractor fails to perform the contract or to recover any debts due to the Commonwealth in relation to the Contract.

The ALM amendments to the Contract (Acquisition) and the Contract (Support) have the effect that where the Commonwealth suffers a loss under one Contract that triggers the Commonwealth's right to drawdown on the security, the Commonwealth is able to drawdown on the security provided under that Contract or the other contract.

Whilst there may only be a limited period of time where securities are provided under both contracts simultaneously, as the security under the Contract (Acquisition) will be returned once work under that contract is completed and a performance security under the Contract (Support) may not be required until the Operative Date, it will enable drafters to align the milestones under the two contracts to ensure that the amount of the securities provided under each contract are not duplicated. Where there is a period of overlap, the value of each performance security may be reduced for that period in consideration of the Commonwealth's ability to call on either performance security. Drafters should ensure that the milestones are appropriately linked, or a concurrent contract milestone is used to ensure that there is no period where the Commonwealth is not able to rely on a financial security under either contract.

Stop Payment

Contract (Acquisition) clause 7.10

Contract (Support) clause 7.8

Clause 7.10 and Clause 7.8 both operate to entitle the Commonwealth to withhold payments under the contract where a Stop Payment Event listed in the relevant Contract occurs.

Because 'linked' acquisition and support contracts are intended to provide the Commonwealth with an integrated materiel solution, realisation of a Stop Payment Event under one contract may impact performance under the other. Accordingly, the stop payment clauses under the Contract (Acquisition), which in Strategic Materiel v2.4 only refer to Stop Payment Milestones, have been amended to align with the stop payment clauses under the Contract (Support), which apply more broadly to Stop Payment Events. The events giving rise to stop payment have been expanded under both contracts to include any events giving rise to stop payment under the other Contract. This allows the Commonwealth to stop all payments under either or both contracts if a stop payment event occurs under one of the contracts. The Stop Payment Events are limited to those which are key for the performance of the Contract. Further, the Stop Payment mechanism, as amended by the ALM, provides the Commonwealth with the discretion to withhold some or all payments due to the Contractor(s) under the Contract(s). If a Stop Payment Event occurs, the Commonwealth Representative should consider which payments should be withheld, and whether it is reasonable to stop payments under both Contracts in respect of that particular Stop Payment Event.

If these amendments are not made and a Stop Payment Event under one of the contracts occurs, the Commonwealth may be required to continue making payments under the other contract while no performance is being achieved.

Incentive Payments

Contract (Acquisition) clause 7.12

Contract (Support) clause 7.10

These clauses detail the process that applies to Incentive Payments under the Contract.

Incentive Payments are payments paid to the Contractor in addition to the Contract Price for superior performance of the Contract and must represent value for money for the Commonwealth. Where linked contracts form part of a single procurement activity (potentially resulting in two Contracts with a single corporate entity), the Commonwealth

should not be obliged to pay Incentive Payments under one of the Contracts while the other is not performing.

To address this, the conditions surrounding a contractor's entitlement to incentive payment have been expanded to include reference to the relevant 'linked' Contract. For example, in order for the Contractor (Support) to receive an incentive payment under the Contract (Support):

- a. the Contractor (Support) must have met all the requirements under the Contract (Support);
- b. the Contractor (Acquisition) must have achieved all milestones under the Contract (Acquisition) during the Review Period; and
- c. the Commonwealth must not have had an entitlement to terminate the Contract (Acquisition) or claim Liquidated Damages under the Contract (Acquisition) during the Review Period.

Changes having the same effect have been made to the Incentive Payment regime under the Contract (Acquisition).

If these changes are not made, the Commonwealth risks being contractually required to pay Incentive Payments under one Contract while dealing with non-performance under the other. This can lead to perverse outcomes where Incentive Payments under one Contract offset any adverse consequences of non-performance under the other Contract.

Liquidated Damages

Contract (Acquisition) clause 7.13

Contract (Support) clause 7.11

The liquidated damages clauses of both Contracts set out the parties' agreement on the amount of damages to be paid by the contractor in the event that the contractor fails to achieve specific milestones on time. Typically a Defence contract based on an ASDEFCON template will provide the Commonwealth with the flexibility to elect to claim liquidated damages as cash or as alternative compensation of the same value.

Accordingly, the liquidated damages provisions in both Contracts have been expanded to allow the Commonwealth greater flexibility by electing to accept agreed compensation under the Contract (Acquisition) or the Contract (Support), irrespective of which Contract triggered the Commonwealth's entitlement to liquidated damages.

This maximises flexibility for the Commonwealth as to how the alternative compensation is received by the Commonwealth by expressly acknowledging that the alternative compensation may be provided under the other Contract noting that the standard ASDEFCON provisions only allow the alternative compensation to be received under the Contract or another contract between the Commonwealth and that contractor. This may not include the linked Contract if the Contracts have not been entered into by the same legal entity.

Liability

Contract (Acquisition) clause 8

Contract (Support) clause 8

These clauses obtain from the Contractor a range of indemnities in favour of the Commonwealth in respect of certain losses, except to the extent that the losses are caused by the Commonwealth, or persons acting through the Commonwealth (other than the Contractor and its employees).

If the Contractor (Acquisition) and the Contractor (Support) are not the same entity, there is a risk that a linked contractor (and its subcontractors, officers, employees and agents) may be considered to be a person through whom the Commonwealth is acting and prevent the Commonwealth from relying on the indemnity in circumstances where the loss is caused by a linked contractor.

Accordingly, small, but significant changes have been made to the indemnities provided by the contractor under these clauses to ensure that the exclusions for the Commonwealth or persons through whom the Commonwealth is acting do not include the linked contractor (and its subcontractors, officers, employees and agents).

If these changes are not made, and a circumstance arises where the indemnity would apply but the loss is caused by the linked contractor (or its subcontractors, officers, employees or agents), there exists the risk that the Contractor may invoke the exclusion to the indemnity by claiming that the linked contractor (and its subcontractors, officers, employees and agents) is a person through whom the Commonwealth is acting, so that the indemnity does not apply and the Commonwealth is liable.

Warranty

Contract (Acquisition) clause 9

Contract (Support) clause 9

These clauses place an obligation on the Contractor to ensure that supplies or services provided under the Contract are fit for the purposes detailed in the Contract.

As a linked request for tender exists to solicit a combined acquisition and support solution, supplies or services delivered under one Contract must be delivered in a manner that is fit for purpose under both Contracts.

The fitness for purpose and performance warranty clauses in clause 9.1 of both contracts have been amended to extend the fit for purpose obligations to ensure that the purposes for which the supplies or services are provided include the purposes detailed in the Contract (Acquisition) and the Contract (Support). This is reasonable because in the case of linked Contracts, the contractors have full visibility of those purposes and develop their proposed solutions to meet the requirements of both Contracts, rather than considering the requirements of each Contract in isolation.

If these amendments are not made, and supplies or services are delivered in a manner that is fit for purpose for one Contract but not the other, there is a risk that the Commonwealth will have no contractual recourse.

The defect warranty clauses in clause 9.2 of both contracts have also been amended to provide that where it is unclear whether a defect has occurred in the supplies under Acquisition or the services under Support, the Commonwealth may seek a remedy under either or both contracts.

If these amendments are not made there is a risk that the Commonwealth will not be able to rely on the warranty provided under either contract if there is uncertainty as to whether the defect arose from the supplies or the services.

Changes to the Contract

Contract (Acquisition) clause 10.1

Contract (Support) clause 10.1

These clauses detail the process for the development and approval of Contract Change Proposals (CCPs).

Although there is no specific additional risk associated with CCPs under a linked contract, the purpose of CCPs as a contractual mechanism to amend the extant contractual relationship, and the nature of linked Contracts, is such that it is important to consider the impact that a change to one contract may have on the other linked Contract.

These clauses have been expanded to recognise that a proposal for a change to the Contract may require consequential changes to the other linked Contract. In these circumstances, the expanded clauses require a contractor to consider and detail any potential impacts on the other Contract and where required, to work with the Contractor (Acquisition) or Contractor (Support) (as applicable) to develop a CCP for the other Contract to be submitted for the Commonwealth's consideration at the same time as the initial CCP. If these clauses are not amended in this way, there is a risk that CCPs may be considered in isolation without an understanding of the impact which the changes have on the other Contract. This could result in uncertainty and delay while the Commonwealth has to manage separate processes to amend the other Contract.

Confidential Information

Contract (Acquisition) clause 10.4

Contract (Support) clause 10.4

These clauses describe the process for dealing with Confidential Information and to place a contractual obligation on both parties to protect Confidential Information provided to them.

As a linked request for tender exists to solicit a combined acquisition and support solution, there will be a need for information be shared between the Commonwealth and both the Contractor (Acquisition) and Contractor (Support).

Accordingly, the Confidential Information clauses have been amended to allow the Commonwealth to share Confidential Information under the Contract (Acquisition) to the Contractor (Support) and vice versa, unless otherwise agreed. Given that the contractors will be required to submit a consolidated tender response, it is expected that there would be very limited information which would be subject to the agreed exceptions. If these amendments are not made, there exists a risk that the Commonwealth may be unable to share Confidential Information between contractors necessary for either administrative or reporting purposes, or the unencumbered performance of the Contract.

Assignment and Novation/ Change of Control

Contract (Acquisition) clause 10.5

Contract (Support) clause 10.5

These clauses prevent the assignment of the contract in whole or part without the written consent of the other party, and place a contractual obligation on the contractor where it is proposing to novate the Contract to notify the Commonwealth of the proposed novation within a reasonable period prior to the novation.

As a linked request for tender exists to solicit a combined acquisition and support solution, there exists the risk that if one Contract is novated, this could impact on the operation of the other linked Contract.

Accordingly, the assignment and novation clauses under the contracts have been amended to require any proposed novation of the contract to detail the impact on the other Contract in addition to the Contract under which the notice is provided.

If these amended clauses are not included, the implications of novation of one of the Contracts on the operation of the other contract may not be fully detailed by the contractor requesting the novation, impairing the ability of the Commonwealth to make a fully informed decision. The Commonwealth would then need to separately request this information in assessing whether to agree to the novation or risk uncertain consequences in respect of the linked Contract if the novation is agreed.

Contract (Support)/Contract (Acquisition) clauses

Contract (Acquisition) clause 10.13 (new)

Contract (Support) clause 10.13 (new)

A new clause has been included for both the Contract (Acquisition) and the Contract (Support) for the relevant contractor to acknowledge the impact defaults or delays by that contractor could have on the Commonwealth under the corresponding Contract. This will facilitate the Commonwealth recovering loss in the event that the contractor defaults or delays under a Contract and this results in the Commonwealth suffering loss under the other Contract as the Commonwealth's loss may include the lost benefit under the other Contract.

The clause also contains a general provision to ensure that nothing in the Contract (Acquisition) limits the Commonwealth's rights under the Contract (Support) and vice versa. These clauses exist to consolidate the linkages between the two Contracts while ensuring that the Commonwealth's rights are not compromised by the existence of these linkages. If the clauses are not included, there is a risk that the Contractor could seek to limit its obligations or the Commonwealth's rights under one Contract by reference to the other Contract.

Resolution of Disputes

Contract (Acquisition) clause 12.1

Contract (Support) clause 12.1

These clauses detail the dispute resolution process to be used to settle a dispute between the Commonwealth and the Contractor prior to commencing court proceedings.

In a linked contract situation, it is likely that any circumstance resulting in a dispute resolution process under one Contract will have an impact, to a greater or lesser extent, on the other Contract.

Accordingly, the disputes clause has been expanded to allow both contractors to participate in any negotiation or alternative dispute resolution process to the extent that the dispute impacts on that contractor. This is an important relational clause to reflect the inclusive nature of the relationships in linked Contracts.

If these expanded clauses are not included and the Contractor (Acquisition) is a separate entity to the Contractor (Support), any dispute resolution process under one Contract risks resulting in unintended consequences to the other Contract. The Commonwealth may also need to run a separate dispute resolution process with each contractor where the disputed issues are the same.

Termination

Contract (Acquisition) clause 12

Contract (Support) clause 12

These clauses set out the circumstances in which the Commonwealth may terminate the Contract or reduce the scope of the Contract and the procedure that must be adopted to terminate in accordance with the contract.

In a procurement using linked Contracts, any circumstance requiring termination of one contract (but in particular the Contract (Acquisition)) may also give rise to a requirement to terminate the other linked contract.

The changes to the termination clauses in the Contract (Acquisition) and the Contract (Support) provide the Commonwealth with the right to terminate the Contract (Acquisition) if the Contract (Support) is to be terminated for default and vice versa.

If these changes are not made and a situation arises where the Commonwealth has a right to terminate one of the Contracts and exercises that right, the Commonwealth risks being required to terminate the other without contractual means for doing so other than a significantly more costly termination for convenience (requiring the Commonwealth to pay the reasonable costs incurred by the contractor that are directly attributable to the termination).

Right of the Commonwealth to Recover Money

Contract (Acquisition) clause 12.4

Contract (Support) clause 12.10

These clauses reserve the right of the Commonwealth to recover any debt owed to it by the contractor by setting off the debt against any claim for payment by the contractor under the Contract.

The Contract (Acquisition) and the Contract (Support) have been amended to allow the Commonwealth to recover a debt owing under the Contract (Acquisition) by setting off the debt against a claim for payment by the Contractor (Support) under the Contract (Support) and vice versa.

If these amendments are not made there is a risk that the Commonwealth will have to pursue recovery of a debt under one Contract, while continuing to make payments under the linked Contract.

3.3 Contract Attachments

Attachment B – Payment

Drafters need to give careful consideration to the milestones during both tender development and contract negotiations to ensure that the key milestone events under each Contract are appropriately linked. The ALM provides some guidance on how this may be achieved through Concurrent Contract Milestones (CCMs), which link the Contract (Acquisition) to the Contract (Support), often with criteria that contain dependencies under both Contracts. For example, when new materiel is delivered for a Contract (Acquisition) milestone, it must be supported by increased capability and capacity under the Contract (Support), implemented by a Contract (Support) milestone. The most prominent example is the linking of the First System Acceptance Audit (First SAA) of the Contract (Acquisition) to the Operative Date (OD) of the Contract (Support). Subsequent SAAs may be linked to subsequent increases in Contract (Support) capability and capacity, which may be referred to as Contractor Materiel Readiness (CMR) Milestones or by some other name. Delivery, followed by an SAA and CMR are often prerequisites to Materiel Release milestones.

Note that the names of the milestones under the Contract (Support) and Contract (Acquisition) are often different (eg, SAA and OD), so an index number for the CCM (eg, CCM#1) is used to identify that both of the milestones are related and used as a CCM.

Drafters also need to ensure that where products are delivered incrementally under the Contract (Acquisition), the Ramp Up provisions under the Contract (Support) are used and appropriately linked to milestones under the Contract (Acquisition) through CCMs rather than fixed dates. This needs to be done to ensure that the Commonwealth is not paying for services which it does not receive the benefit of if there is a delay under the Contract (Acquisition).

Attachment M - Glossary

The ALM contains a number of new glossary terms to be included in the glossary for both the Contract (Acquisition) and the Contract (Support). These definitions are used in the relevant provisions discussed above.

4 SUPPORT AND DISSEMINATION

4.1 Updates

The ALM is a dynamic document that will be amended on an 'as required' basis to reflect changes in legislation, policy and procurement practices.

Template users are also welcome to suggest changes to the template by using a Document Change Proposal proforma. A copy of the form can be downloaded from the address specified at paragraph 4.3.

4.2 Commercial Innovation and Practice Help Desk

Drafters requiring contracting advice or assistance should contact the relevant Executive Director Contracting (EDCON) in their respective Contracting Services area.

For ASDEFCON and Contracting Initiatives advice, including proposed updates to or advice regarding the ASDEFCON templates, please email:

procurement.ASDEFCON@defence.gov.au

4.3 Dissemination of ASDEFCON Linkages Module

The ALM can be downloaded and printed from the CASG intranet Home page via the 'ASDEFCON suite of tendering and contracting templates' at the following address: <http://drnet.defence.gov.au/DMO/PP/ASDEFCONandContracting/ASDEFCON/pages/ASDEFCON.aspx>

or from the CASG internet site by following the 'Contracting' link to the following address: <http://www.defence.gov.au/dmo/DoingBusiness/ProcurementDefence/ContractinginCASG/ASDEFCON/>