



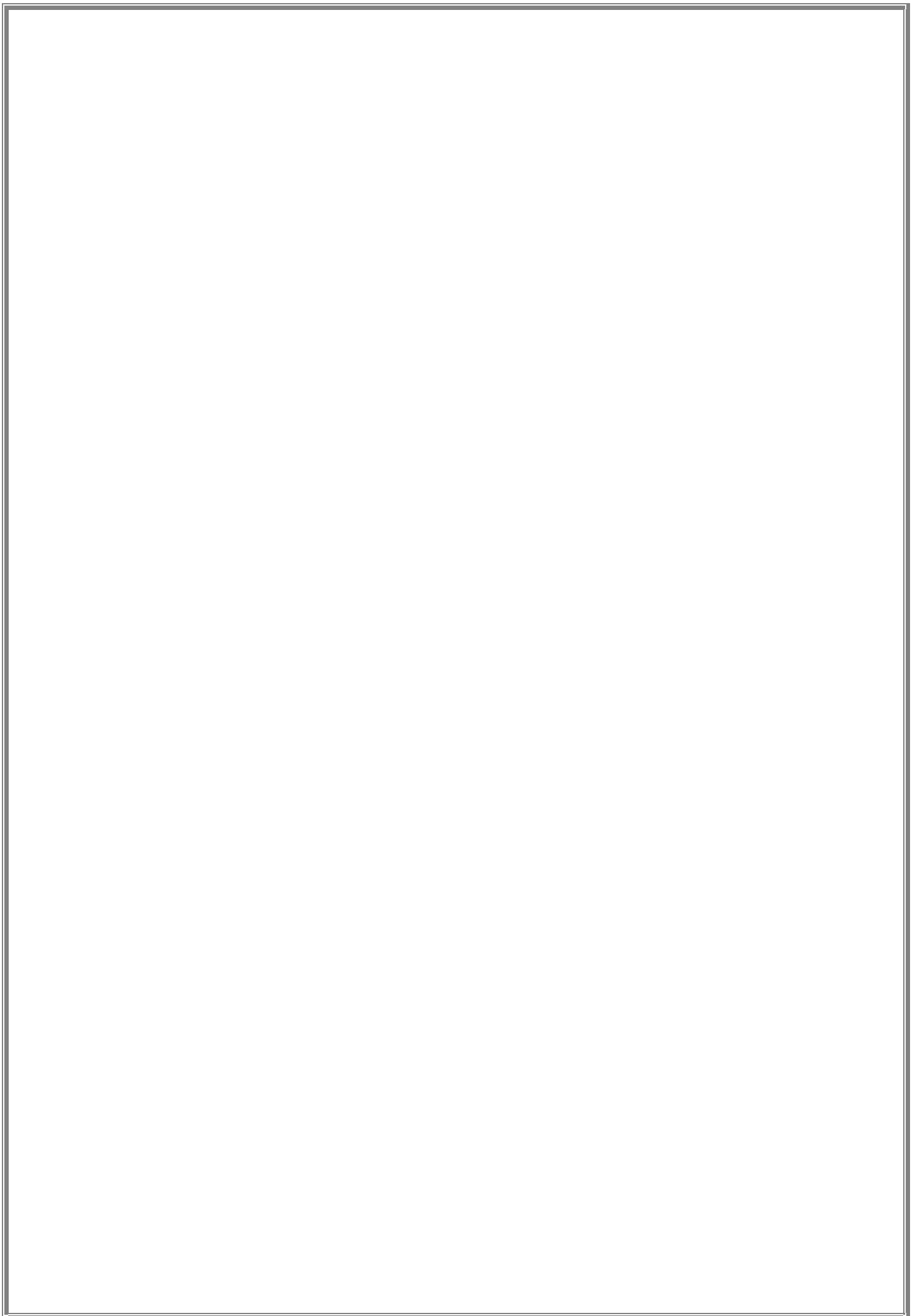
**Australian Government**

**Department of Defence**

# **ASDEFCON (Complex Materiel) HANDBOOK**

Incorporating Guidance On:

Conditions Of Tender  
Draft Conditions Of Contract  
Draft Statement of Work



**AMENDMENT CERTIFICATE – ASDEFCON (Complex Materiel) Handbook**

Amendment			Effected	
No.	Date	Latest Version	Signature	Date



## GENERAL INFORMATION ON HOW TO USE THIS HANDBOOK

### PURPOSE OF THE *ASDEFCON (COMPLEX MATERIEL) HANDBOOK*

The *ASDEFCON (Complex Materiel) Handbook* provides clause by clause guidance on the use of Version 1.3 of *ASDEFCON (Complex Materiel)*, the template designed for use by purchasing officers when undertaking complex acquisitions of equipment and supplies. This version includes the incorporation of the Statement of Work proforma into the *ASDEFCON (Complex Materiel)* template.

The Handbook provides drafters with information to understand the clauses in the template and an explanation of their practical implications for tendering and contract execution as appropriate.

Drafters must be careful when opting to use *ASDEFCON (Complex Materiel)* and its accompanying Handbook that their acquisition requirements fall within the Complex Materiel category as defined by the *Defence Procurement Policy Manual (DPPM)*.

### STRUCTURE OF THE *ASDEFCON (COMPLEX MATERIEL) HANDBOOK*

The *ASDEFCON (Complex Materiel) Handbook* is structured as follows:

- Preliminary pages – including Cover Page, General Information and Amendment Certificate;
- Part 1: Guidance to the Conditions of Tender - including Annexes;
- Part 2: Guidance to the Draft Conditions of Contract - including Attachments; and
- Part 3: Draft Statement of Work – including Annexes.

Parts 1 and 2 provide guidance on the clauses contained in Version 1.3 of *ASDEFCON (Complex Materiel)*. The sections contained within these parts map exactly to the structure and sequence of clauses in *ASDEFCON (Complex Materiel)*. With the exception of the guidance on the Annexes to the Conditions of Tender, guidance on the Volume 1 and 2 provisions is presented together. Due to the significant difference in the Annexes to the Conditions of Tender between Volume 1 and 2, the guidance in this element of the template addresses each volume separately.

Each section in the *ASDEFCON (Complex Materiel) Handbook* is structured using the following standard elements:

- Reference: specifies the clause number applicable to either Volume 1 and Volume 2 of the template.
- Sponsor: specifies the area responsible for the clause in question. This area is a centre of knowledge and subject matter expertise for the topic. Any advice required on the section may be sought from the point of contact listed in Annex A – List of Sponsors and Contacts.
- Status: specifies whether the clause in *ASDEFCON (Complex Materiel)* is Core, Optional or RFT Core.
- Purpose: specifies the intent behind the relevant clause in *ASDEFCON (Complex Materiel)*.
- Policy: lists applicable Defence and Government policies that apply to the relevant section in *ASDEFCON (Complex Materiel)*.
- Guidance: provides detailed information necessary to enable the drafter to understand the meaning and rationale behind the clauses in *ASDEFCON (Complex Materiel)*.
- Drafter's Action: provides an explanation of the actions that a drafter is required to perform in adapting, selecting options or tailoring the clauses for the specific needs of the project.
- Related Clauses: lists relevant clauses in *ASDEFCON (Complex Materiel)* that have a direct connection with the clause in question.

Due to the differences in structure between the two volumes of the *ASDEFCON (Complex Materiel)* template, the Handbook references guidance under clause name rather than clause number. Users should search for guidance under the clause name in the relevant part of the Handbook.

## GENERAL GUIDANCE ON ASDEFCON (COMPLEX MATERIEL) VOLUME 2 SOW

### SCOPE, GENERAL REQUIREMENTS AND PROJECT MANAGEMENT

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Clause 3 'Project Management' within the template offers management processes generally appropriate for low-to-medium risk, complexity and cost projects.

These features do not always co-exist, and there is potential for projects that combine these attributes in any combination (e.g. low cost but medium complexity and risk, high cost but low complexity and risk, either high or low cost with high complexity but low risk, etc). However, there is often some correlation between project cost and project risk. The levels of development, risk, and cost associated with the project should inform considerations on the level of project management required, and hence the ASDEFCON template to be selected, as should the acquisition strategy.

### SYSTEMS ENGINEERING (SE)

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During the project acquisition planning phase, it is necessary to assess the level of risks involved and determine which ASDEFCON template set should be applied. In the *ASDEFCON (Complex Materiel)* Volume 2 SOW template, a relatively wide range of engineering development is possible. The principle behind the Systems Engineering (SE) clause is to scale the amount of management oversight, planning, review, and reporting to a level commensurate with the amount of risk and engineering development.

At the simplest level, the Systems Engineering Management Plan (SEMP) may be used to address the Contractor's plans for managing, as applicable, system development (including Software (SW)), integration, installation, Configuration Management (CM), Verification and Validation (V&V), and Specialty Engineering activities.

As the level of development and engineering risk increases, the drafter may call up separate plans for specific aspects of the development (eg SW, safety, CM). The drafter may require the Systems Requirement Review (SRR) and System Definition Review (SDR), as well as the Preliminary Design Review (PRR) and Detailed Design Review (DDR) to be conducted separately as the level of design increases.

### INTEGRATED LOGISTICS SUPPORT (ILS)

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The templates provide for a limited ILS program, without explicit Support System Definition and Support System Constituent Capability (SSCC) design by the Contractor. These activities, therefore, are either minimal in scope, conducted implicitly by the Contractor, or SSCC design outputs are provided to the Contractor by the Commonwealth, as a basis for subsequent Support Resource analysis.

Commensurate with the purpose of the template, and the limited ILS program risks implicit in this, the template provides for only an ISP and a TDP as a basis for the Commonwealth to maintain visibility into the Contractor's processes used in producing the required ILS products.

The following issues should be considered in the assessment of the expected level of ILS program risk and the selection of the appropriate ASDEFCON SOW template from an ILS perspective:

- a. Support System Constituent Capability Design. If the Commonwealth intends to provide SSCC design outputs to the Contractor, including required maintenance tasks and training needs, this Complex Materiel Volume 2 template would be appropriate.
- b. Support System Developmental Complexity. A significant level of Support System developmental complexity may justify greater levels of Commonwealth visibility of the ILS program than afforded by this template, and one of the *ASDEFCON (Strategic Materiel)* templates may be more appropriate.
- c. Pre-existing Mission System and Support Resources. In the case of a pre-existing Mission System, Support Resources may exist within a relevant support environment in a form which may or may not require modification to suit Defence requirements. The greater the relevance of the existing support environment and Support Resources, the less the Support System development that will be required. In such cases, this template would be appropriate.
- d. Cost. The expected value of the Support Resources being acquired needs to be considered against the cost of managing the acquisition of those resources. The greater the value of the Support Resources being acquired, the greater the justification for selecting a more costly ILS management program.

If no ILS development or analysis is required under the contract, the ILS clause from *ASDEFCON (Complex Materiel)* Volume 1 may be used to replace the ILS clause in this template. The ILS clause in the SOW for ASDEFCON (Complex Materiel) Volume 1 provide for:

- a. conduct of a Training Readiness Review (TNGRR);
- b. conduct of a Facilities Preparedness Review (FACPR);
- c. provision of Codification Data; and
- d. provision of a Disposal Requirements Report.

The COT for *ASDEFCON (Complex Materiel)* Volume 1 requires tenderers to define the required Support Resources in their tender, and for the Commonwealth to 'sign up' to the required Support Resources at Contract signature.

#### CONFIGURATION MANAGEMENT (CM)

Where CM will be required but will be minimal, such as with very low levels of development, an option may be selected to allow CM planning to be addressed in the SEMP rather than through a separate Configuration Management Plan (CMP). In this case, the CMP clause would be marked 'Not Used', but the remainder of the CM clause set would remain in the SOW. Clauses 6.5, 6.6, and 6.7 provide options of referring to either the CMP or the SEMP as the plan for CM activities.

#### VERIFICATION AND VALIDATION (V&V)

This template provides for Verification only of the Supplies (and not Validation), and invokes DIDs scaled to the low levels of complexity and risk of the acquisitions proposed to be progressed using this template.

The templates provide for V&V planning, a Verification Cross Reference Matrix, Test Readiness Reviews (Optional), Failure Reporting and Analysis, and Regression Testing.

#### QUALITY MANAGEMENT PROGRAM (QM)

The template provides for Quality to be assured either by:

- a. controlling the production process during manufacture, relying on the Contractor's work being conducted under a Quality Management System (QMS), which has third party accreditation to a recognised standard, with a project Quality Plan;
- b. controlling the production process during manufacture, relying on the Contractor's work being conducted under a Quality Management System (QMS), which has third party accreditation to a recognised standard, without a project Quality Plan;
- c. relying solely on V&V of the completed Supplies; or
- d. relying on normal commercial practices.

Guidance on selection of the appropriate approach is detailed later in the handbook.

### **DISSEMINATION OF THE *ASDEFCON (COMPLEX MATERIEL)* HANDBOOK**

The *ASDEFCON (Complex Materiel) Handbook* can be downloaded from the DEFWEB at the following address: <http://intranet.defence.gov.au/dmoweb/sites/CPO/>. At this stage it is not intended to issue this version of the Handbook in hardcopy form.

Contracting Policy & Operations Branch maintains a database of those who have registered to obtain controlled hardcopies of publications issued by the Branch, including the ASDEFCON suite of templates and handbooks. Personnel who are currently registered as holders of a hardcopy of *ASDEFCON (Complex Materiel)* will be issued with the next version of the Handbook as it becomes available. Defence personnel who wish to be added to the database or register to receive a copy of the Handbook once it is finalised are requested to complete the 'Contracting Policy and Operations Branch Publication

Register' form (form AD 321, available through the 'Web Forms' system) and return it to the address shown on the form.

### **CONTRACTING POLICY & OPERATIONS BRANCH HELP DESK**

Drafters will have access to a Help Desk facility which has been established to provide advice on contracting matters including issues relating to the ASDEFCON suite of tendering and contracting templates. Contact details for the Contracting Policy & Operations Branch Help Desk are:

- Phone: 1800 100 605; Fax: +61 2 6266 6744; e-mail: [contracting@defence.gov.au](mailto:contracting@defence.gov.au)

Drafters requiring contracting advice should in the first instance approach CPO Branch staff by calling the Contracting Policy & Operations Branch Help Desk. Where appropriate CPO Branch staff may arrange for legal advice to be obtained from a member of the Defence legal panel.

### **CONFIGURATION MANAGEMENT OF THE *ASDEFCON (COMPLEX MATERIEL) HANDBOOK***

The *ASDEFCON (Complex Materiel) Handbook* will be subject to on-going revision over the next few months, with particular attention being paid to the changes that are necessary as a result of the proposed changes to DMO contracting approaches announced by the CEO DMO. Comments on the Handbook are most welcome and should be addressed to the Contracting Policy & Operations Branch Help Desk. It would be appreciated if comments could be provided by completing an ASDEFCON Document Change Proposal (DCP) form, copies of which can be found at the Contracting page of the Defence website at [www.defence.gov.au/dmo](http://www.defence.gov.au/dmo).



**ANNEX A – LIST OF SPONSORS AND CONTACTS**

<b>Sponsors</b>	<b>Contacts</b>
Contracting Policy & Operations	Contracting Policy and Operations Branch Help Desk R2-6-C067, Russell Offices, Canberra ACT 2600 Ph: 1800 100 605 Fx: +61 2 6266 7644 e-mail: <a href="mailto:contracting@defence.gov.au">contracting@defence.gov.au</a>
Standardisation Branch	Standardisation Branch R2-6-C063, Russell Offices, Canberra ACT 2600 Ph: +61 2 6265 2000
Defence Security Authority	International, Industrial and Project Section CP3-4-162, Campbell Park Offices, Canberra ACT 2600 Ph: +61 2 6266 2640 Ph: +61 2 6266 3035
Industry Policy and Programs Branch	Export Facilitation R2-5-B086, Russell Offices, Canberra ACT 2600 Ph: +61 2 6265 5063 Fx: +61 2 6266 7646
Defence Safety Management Agency	Defence Safety Management Agency Helpline BP-1-A019, Brindabella Park, Canberra ACT 2600 Ph: 1800 019 955 Fx: +61 2 6266 8477
Infrastructure Division	Directorate of Construction Contracts BP1-2-B049, Brindabella Park, Canberra ACT 2600 Ph: +61 2 6266 8082 Fx: +61 2 6266 8103
Directorate of Spectrum and Communications Regulation	Directorate of Spectrum and Communications Regulation CP1-4-020, Campbell Park Offices, Canberra ACT 2600 Ph: +61 2 6266 4784 Fx: +61 2 6266 3646
Project Airworthiness Regulation	Project Airworthiness Regulation Director General Technical Airworthiness – ADF R2-2-C147, Russell Offices, Canberra ACT Ph: +61 2 6265 1233 Fx: +61 2 6265 1340
Materiel Finance Division	Directorate of Finance Materiel (Land) VBM-AG-24, Victoria Barracks, Melbourne VIC 3000 Ph: +61 3 9282 6708 Fx: +61 3 9282 5189  Directorate of Finance Materiel (Aerospace) R2-5-A066, Russell Offices, Canberra ACT 2600 Ph: +61 2 6265 3694

<b>Sponsors</b>	<b>Contacts</b>
	<p data-bbox="603 255 842 286">Fx: +61 2 6265 4421</p> <p data-bbox="603 389 1161 510">Directorate of Finance Materiel (Maritime) R2-5-A110, Russell Offices, Canberra ACT 2600 Ph: +61 2 6266 7754 Fax: +61 2 6266 7754</p> <p data-bbox="603 546 1385 667">Directorate of Finance Materiel (Electronics and Weapon Systems) R2-5-A102, Russell Offices, Canberra ACT 2600 Ph: +61 2 6265 2602 Fax: +61 2 6265 2868</p>

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## COVERING LETTER

<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core. The option must be included where the RFT will contain classified material.
<u>Purpose:</u>	To invite a company to submit a tender in response to the RFT issued by the Commonwealth. To notify the company of additional information about the project including the proposed schedule for the project.
<u>Policy:</u>	Nil
<u>Guidance:</u>	
<u>Volume 1</u>	The aim of the covering letter is to provide companies with background information about the project, including the proposed project schedule, and invite companies to submit a tender for the requirement detailed in the RFT.

### RELIANCE ON INFORMATION INCLUDED IN THE COVERING LETTER

The covering letter does not form part of the RFT. Therefore, in accordance with the **Tenderers to Inform Themselves** clause of the conditions of tender, a tenderer should not rely on the information provided in the covering letter when preparing its tender. Notwithstanding this, drafters should ensure that the information included in the covering letter is accurate and not misleading as the Commonwealth may still be subject to a claim based upon estoppel or misrepresentation where misleading information is included in the covering letter. To afford additional protection to the Commonwealth, the covering letter contains an express statement that the proposed project schedule included in the covering letter is subject to change at any time and should not be relied upon by tenderers.

### INFORMATION ON THE COSTS OF TENDERING

The covering letter also requests tenderers to provide details of the costs associated with tendering against the RFT by completing the Cost of Tendering form at Attachment A to the covering letter. To ensure that Commonwealth officers involved with the RFT do not have access to the cost of tendering information provided by tenderers, completed forms should be returned to the Director of Research and Analysis in the Industry Division of the Defence Materiel Organisation.

<u>Volume 2</u>	The aim of the covering letter is to provide companies with background information about the project, including the proposed project schedule, and invite companies to submit a tender for the requirement detailed in the RFT.
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### RELIANCE ON INFORMATION INCLUDED IN THE COVERING LETTER

The covering letter does not form part of the RFT. Therefore, in accordance with the **Tenderers to Inform Themselves** clause of the conditions of tender, a tenderer should not rely on the information provided in the covering letter when preparing its tender. Notwithstanding this, drafters should ensure that the information included in the covering letter is accurate and not misleading as the Commonwealth may still be subject to a claim based upon estoppel or misrepresentation where misleading information is included in the covering letter. To afford additional protection to the Commonwealth, the covering letter contains an express statement that the proposed project schedule included in the covering letter is subject to change at any time and should not be relied upon by tenderers.

### LIST OF CLAUSES THAT DEVIATE FROM ASDEFCON (COMPLEX MATERIEL)

The covering letter notifies tenderers that the RFT has been prepared utilising *ASDEFCON (Complex Material)*. To enable tenderers to easily identify clauses that have been included or amended, a list of clauses that deviate from *ASDEFCON (Complex Materiel)* Volume 2 are included at Attachment A to the covering letter.

## INFORMATION ON THE COSTS OF TENDERING

The covering letter also requests tenderers to provide details of the costs associated with tendering against the RFT by completing the Cost of Tendering form at Attachment B to the covering letter. To ensure that Commonwealth officers involved with the RFT do not have access to the cost of tendering information provided by tenderers, completed forms should be returned to the Director of Research Analysis in the Industry Division of the Defence Materiel Organisation.

Drafter's action: Prior to release of the RFT, drafters must insert the project office address, tenderer's address, RFT Number, a brief description of the Supplies, background information on the project including phase information and the proposed project schedule. Where the RFT will contain classified material, drafters must also include the optional paragraph and insert a list of the classified documents and their classification levels.

Related clauses: The **Contact Officer for RFT Inquiries** clause of the conditions of tender informs tenderers of the Contact Officer for all inquiries in relation to the RFT.

The **Lodgment of Tenders** clause of the conditions of tender advises tenderers of the Tender Closing Time and the tender lodgment procedures applicable to tenders submitted in response to the RFT.

The **Preparation and Transmission of Classified Tenders** clause of the conditions of tender advises tenderers of the source documents that provide guidance on, and the process that applies to, the preparation and transmission of tenders containing classified material.

The **Tenderers to Inform Themselves** clause of the conditions of tender obtains an acknowledgment from tenderers that they have not relied on any warranty or representation made by or on behalf of the Commonwealth except as expressly provided for in the RFT.

## MATRIX OF CHANGES

Reference:

Volume 1 N/A

Volume 2 Attachment A

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To notify tenderers of clauses that deviate from *ASDEFCON (Complex Materiel)* Volume 2.

Policy: Nil

Guidance: The covering letter notifies tenderers that the RFT has been prepared utilising *ASDEFCON (Complex Materiel)*. To enable tenderers to easily identify clauses that have been included or amended, a list of clauses that deviate from *ASDEFCON (Complex Materiel)* are included at Attachment A.

### DETAILS TO BE INCLUDED IN THE MATRIX OF CHANGES

Drafters must insert the following details in the matrix of changes and submit the matrix of changes with the RFT to the Project Director or liability delegate for review:

- a. the amended or new clause number;
- b. a list of other clauses in the RFT affected by the amended or new clause; and
- c. specific details of the amended or new clause including the impact of the amended or new clause, the reason for the change, and the impact of the change on other related provisions in the RFT.

Where the reasons for, or impact of, the change are commercially sensitive to the Commonwealth, the matrix of changes should be modified prior to release of the RFT. The matrix of changes released with the RFT should contain as much information as possible to enable tenderers to understand the reasons for, and impact of, the change without notifying tenderers of information that is commercially sensitive to the Commonwealth.

The Project Director or liability delegate is also responsible for ensuring that the completed Matrix of Changes is provided to CPO Branch staff, either directly to the CPO desk officer who is assisting the RFT development or to CPO Branch through the Contracting Policy & Operations Branch Help Desk (see below). Where *ASDEFCON (Complex Materiel)* is used the Project Director or liability delegate is also responsible for preparing a summary of any significant differences between the final negotiated contract and the RFT as released, including details of the main areas of concern raised during negotiations. Collectively this information will provide feedback on the use of *ASDEFCON* templates and ensure that the suite is subject to continuous improvement and that it reflects 'best practice'.

### SUBMISSION OF ASDEFCON DOCUMENT CHANGE PROPOSALS

Where a drafter believes that a clause in *ASDEFCON (Complex Materiel)* is inappropriate or doesn't meet the requirements of the majority of projects, drafters may propose a change to *ASDEFCON (Complex Materiel)* by submitting an *ASDEFCON* Document Change Proposal (DCP) form which is available at the Contracting page of the Defence website at <http://www.defence.gov.au/dmo>. *ASDEFCON* DCPs should be submitted to the Contracting Policy & Operations Branch Help Desk by e-mail to [contracting@defence.gov.au](mailto:contracting@defence.gov.au). Tenderers may also propose a change to the *ASDEFCON (Complex Materiel) Handbook* by submitting an *ASDEFCON* DCP.

Drafter's action: Prior to the release of the RFT, drafters must complete the matrix of changes.

Related Clauses: Nil



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## GENERAL INFORMATION AND TENDER LODGMENT

### Interpretation of Terms

Reference:

Volume 1 Clause 1.1

Volume 2 Clause 1.1

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To specify how terms contained in the RFT will be interpreted.

Policy: *DPPM Section 2, Chapter 2.1*

Guidance: In accordance with this clause, the RFT will be interpreted in the same manner as in the draft Contract and terms used in the RFT will be given the same meaning as in the draft Contract. Drafters should therefore refer to the definitions contained in the **Definitions** clause of the draft conditions of contract and, if applicable, in the draft SOW and the interpretation provisions contained in the **Interpretation** clause of the draft conditions of contract.

### INCLUSION OF ADDITIONAL CLAUSES IN THE RFT

Where drafters have added additional clauses in the RFT to cover project specific requirements and words within those additional clauses require definition, the relevant definition should be inserted in the RFT prior to its release. Where the term is used within the draft conditions of contract, the definition should be inserted in alphabetical order in the **Glossary** attachment of the conditions of contract. Where the term is used only in the draft SOW, a clause should be included in the draft SOW listing all the definitions applicable in alphabetical order. If the term is used only for one particular clause of the draft conditions of contract or draft SOW, the term should be defined in the clause itself. Drafters must ensure that any definitions included do not conflict with Commonwealth policy or other definitions in the RFT. The Defence Language, provides a consolidated list of common terms and acronyms as used within Defence. Further, drafters should avoid defining new terms when an existing definition will suffice. All definitions must be checked to ensure they can be objectively understood and are not circular.

### USE OF DEFINITIONS IN THE CONDITIONS OF TENDER AND ANNEXES

Terms that are defined in the draft Contract may be used in the conditions of tender and Annexes. A court will interpret the terms in accordance with the definitions in the Contract unless a contrary intention is indicated. Where a term is used in the conditions of tender or Annexes that is not defined in the draft Contract, a definition of the term should be included in the relevant clause of the conditions of tender or in the relevant Annex.

Example:

**Lodgment of Tenders**, conditions of tender – Tenders are to be lodged at [...INSERT TENDER BOX ADDRESS...] on or before [...INSERT TIME...] local time on [...INSERT DATE...] (“the Tender Closing Time”).

### PRECEDENCE OF DEFINITIONS INCLUDED IN PART 1 OF THE RFT

It is also important to note than in accordance with the **Inconsistency** clause of the conditions of tender, are accorded the highest precedence of all the documents making up the RFT. The Annexes to the conditions of tender are the next document in the order of precedence. Therefore where any conflict or discrepancy occurs between a clause in Part 1 of the RFT and a clause in Part 2 of the RFT, the clause in Part 1 will take precedence. Drafters must therefore ensure that definitions included in the conditions of tender or Annexes are not inconsistent with

definitions or clauses contained in the draft conditions of contract, Attachments to the draft Contract or the draft SOW.

#### GENERAL INTERPRETATION PRINCIPLES

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Further guidance on general interpretation principles that would be applied by a court interpreting the RFT is contained in the guidance on the **Definitions** and **Interpretation** clauses of the draft conditions of contract.

Drafter's action: Nil

Related clauses: The **Interpretation** clause of the draft conditions of contract sets out the basic principles by which the draft Contract will be interpreted.

Definitions and abbreviations will be contained in the **Glossary** attachment of the draft conditions of contract.

## Inconsistency

**Reference:**

Volume 1    Clause 1.2

Volume 2    Clause 1.2

**Sponsor:**        Contracting Policy & Operations

**Status:**            Core

**Purpose:**            To specify the precedence of provisions in the event that there is inconsistency between parts of the RFT.

**Policy:**             Nil

**Guidance:**        Where any conflict or discrepancy occurs between two provisions of the RFT, the provision in the higher ranked document will take precedence.

### ORDER OF PRECEDENCE

Under this clause, the parts of the RFT have been listed in order of their importance in explaining how the tender process will be conducted:

- a.        the conditions of tender have the highest precedence as they detail the tendering process that will be followed;
- b.        the Annexes to the conditions of tender have the next highest precedence as they detail the information required from tenderers; and
- c.        the draft Contract (in accordance with the **Precedence of Documents** clause of the draft conditions of contract) is the next in the order of precedence as it details the legal rights and obligations which are intended to apply to the successful tenderer in performing the work.

It is important to note that the draft Contract referred to in this clause includes the **Glossary**, the draft SOW (Part 3 of the RFT) and the other Attachments to the draft conditions of contract. For precedence purposes, any inconsistency within these elements of the draft Contract is resolved in accordance with the **Precedence of Document** clause of the draft conditions of contract (see guidance on the **Precedence of Documents** clause of the draft conditions of contract). At all times during the tender process, however, the documents referred to in a. and b. above, would take precedence over any element of the draft Contract in the event of any inconsistency.

This clause does not assist interpretation where there is inconsistency between provisions contained within a document or group of documents accorded the same precedence. A conflict of this nature will be resolved through interpretation of the RFT as a whole. Therefore, it is important to ensure that there is no conflict or discrepancy internally within a document as well as in the RFT as a whole.

### AVOIDANCE OF INCONSISTENCY

The order of precedence of documents in this clause (and the related order of precedence within the draft Contract set out in the **Precedence of Documents** clause of the draft conditions of contract) is designed to protect the Commonwealth in the event of any inconsistency, however, the order of precedence will not always provide the outcome desired by the Commonwealth or tenderers. Prior to release of a RFT, drafters must therefore read the RFT in its entirety to ensure that no conflict or discrepancy exists between the provisions of the various documents that make up the RFT.

**Drafter's action:**    Nil

**Related clauses:**    The **Precedence of Documents** clause of the draft conditions of contract details the precedence that will apply to documents making up any resultant contract.

### Amendment of RFT

Reference:

Volume 1 Clause 1.3

Volume 2 Clause 1.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To inform tenderers of the Commonwealth's right to amend the RFT or terminate the tender process.

Policy: *DPPM - Section 2, Chapter 2.1 and Section 5, Chapter 5.4*

Guidance: This clause entitles the Commonwealth to:

- a. amend a RFT by giving tenderers timely written notice of the amendment;
- b. seek amended tenders where it amends a RFT after the submission of tenders; and
- c. terminate the tender process at any time.

#### COMMONWEALTH'S ENTITLEMENT TO AMEND OR TERMINATE AN RFT

Under this clause, the Commonwealth is entitled to amend or terminate a RFT at any time before or after the Tender Closing Time specified in the **Lodgment of Tenders** clause of the conditions of tender. Not every amendment to the RFT may require the submission of an amended tender.

This clause requires all amendments to the RFT to be in writing and not through mere verbal undertakings to the tenderers. Following the process set out in this clause will ensure that the Commonwealth has cleared all amendments and that all tenderers are treated equally and fairly.

Where the Commonwealth amends a RFT after the Tender Closing Time and seeks amended tenders, care must be taken so that tenderers are not afforded an opportunity to amend their tenders in any aspects that are not relevant to the amendment notified by the Commonwealth. For instance, where an amendment to a RFT is a correction of a typographical error, it is unlikely that this amendment would impact on the pricing of the tenderer's offer and therefore amendments made by a tenderer relating to pricing should not be accepted. However, where an amendment to the RFT relates to a standard that the successful tenderer will be required to comply with, this may have an impact not only on the tenderer's response to the technical aspects of the RFT but also on the pricing aspects of its offer.

#### IMPLICATIONS OF THE HUGHES CASE AND PROCESS CONTRACTS

Reservation by the Commonwealth of the above rights allows the Commonwealth greater flexibility during the tendering process. This flexibility will be especially important in the event that the Commonwealth is found to have entered into a tender process contract with each of the tenderers, as was the case in *Hughes Aircraft v Airservices Australia (1997) 1 ALR 1* (Hughes case) (see also *Cubic Transportation System v New South Wales [2002] NSWSC 656* (Cubic Transportation case)). The **Tenderers to Inform Themselves** and the **Tender Evaluation** clauses of the conditions of tender make it clear to tenderers that the Commonwealth does not intend the conditions of tender to give rise to a process contract. However, as a court will look to the substance of the conditions of tender rather than its form, a mere statement of intention will not necessarily be sufficient to protect the Commonwealth.

If it is found that a tender process contract exists, the Commonwealth will be obliged to conduct the tender process in accordance with the conditions detailed in the conditions of tender and any implied terms of the process contract. In the

Hughes Case, the court found that there would always be an implied term that the Commonwealth must deal fairly with tenderers.

Even if a process contract is found not to exist, the Commonwealth may be subject to other obligations to accord procedural fairness in its dealings with tenderers. These obligations arise in administrative law and were discussed in *MBA Land Holdings Pty Ltd v Gungahlin Development Authority and Others (2000) ACTFC 89* (The Gungahlin Development Authority case).

The inclusion of this clause therefore ensures that the Commonwealth retains a right to unilaterally vary a RFT or terminate the tender process at any stage even where a tender process contract exists, subject to the Commonwealth's obligation to deal fairly with tenderers.

To ensure that tenderers are treated fairly, the Commonwealth should:

- a. provide timely written notification to all tenderers of any amendments to the RFT. This notification should also include the words "all other provisions of the RFT remain unchanged";
- b. ensure that each tenderer receives notification of an amendment to the RFT within a similar time period to other tenderers;
- c. provide all tenderers with sufficient time to revise their tenders where an amendment is made; and
- d. notify all tenderers in writing of any decision to terminate the tender process as soon as possible after the decision is made.

#### TERMINATION OF THE TENDER PROCESS

Although this clause entitles the Commonwealth to terminate the tender process at any time, advice should always be obtained from Contracting Policy & Operations Branch prior to any action being taken to terminate a tender process. Where the Commonwealth terminates a tender process in accordance with this clause and has otherwise dealt with tenderers in accordance with principles of fairness and the conditions of tender it is unlikely that the Commonwealth will be under an obligation to compensate any tenderer. Notwithstanding, tender processes should be terminated only in exceptional circumstances. Where a claim for compensation is received from a tenderer, advice should be sought from Contracting Policy & Operations Branch before any payment is considered.

Drafter's action: Nil

Related clauses: The **Tenderers to Inform Themselves** clause of the conditions of tender notifies tenderers that they should not rely on any statement as amending the terms of the RFT, unless the RFT is amended in accordance with the **Amendment of RFT** clause of the conditions of tender.

### Contact Officer for RFT Inquiries

Reference:

Volume 1 Clause 1.4

Volume 2 Clause 1.4

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To inform tenderers of the Contact Officer for all inquiries in relation to the RFT.

Policy: Commonwealth Procurement Guidelines and Best Practice Guidance

*DPPM Section 5, Chapter 5.4*

Guidance: Under the *Commonwealth Procurement Guidelines and Best Practice Guidance* a central principle of government procurement is the need to conduct procurement ethically. To ensure that all tenderers are treated equally, information provided to recipients of the RFT must be consistent and equally available to all tenderers. It is therefore important to establish one person as the point of contact for the RFT.

#### RESPONSIBILITIES OF THE CONTACT OFFICER

This clause requires all tenderers to provide questions in writing to the nominated Contact Officer. The clause also makes it clear that tenderers understand that the Commonwealth may circulate any questions received from tenderers and the Commonwealth's answer to those questions, to all tenderers. The Contact Officer should:

- a. inform all tenderers of each question received and the Commonwealth's answer to the question, unless the question relates to a commercial or otherwise confidential aspect of a tenderer's tender; and
- b. not disclose the source of any question except where it is unavoidable i.e. in a tender process involving only two tenderers.

Written records of all inquiries and responses should be kept to ensure an audit trail is maintained. Where a tenderer's question results in an amendment to the RFT, that amendment should be issued promptly to all tenderers in accordance with the **Amendment of RFT** clause of the conditions of tender.

#### CONTACT OFFICER DETAILS TO BE INCLUDED

Drafters must insert the details of the Commonwealth's Contact Officer prior to release of the RFT. Details to be inserted include:

- a. the name and position of the Contact Officer;
- b. the telephone and facsimile number of the Contact Officer;
- c. the address of the Contact Officer; and
- d. where considered appropriate, the e-mail address of the Contact Officer.

#### ACCEPTANCE OF INQUIRIES BY EMAIL

Where drafters wish to include the Contact Officer's e-mail address in this clause, it is important that consideration is given to the security risks associated with electronic transmission of information relating to the RFT. Where the Contact Officer's e-mail address is included in this clause, tenderers should be informed of the security risks associated with electronic transmission of information and advised that any inquiries of a commercial-in-confidence nature or containing sensitive information should not be sent via e-mail. The Contact Officer should always ensure that paper records of e-mail inquiries and e-mail responses to inquiries are kept in order to maintain an audit trail.



Drafter's action: Prior to release of the RFT, drafters must insert the name and contact details, including address, phone and fax number, of the Contact Officer. Drafters may also include the e-mail address of the Contact Officer.

Related clauses: The **Amendment of RFT** clause of the conditions of tender sets out the procedure for amending the RFT.

The **Tenderers to Inform Themselves** clause of the conditions of tender notifies tenderers that they should not rely on any statement as amending the terms of the RFT, unless the RFT is amended in accordance with the **Amendment of RFT** clause of the conditions of tender.

## Industry Briefing

**Reference:**

Volume 1    Clause 1.5

Volume 2    Clause 1.5

**Sponsor:**            Contracting Policy & Operations and Defence Security Authority

**Status:**                Optional. This clause should be used where an industry briefing is planned. Where the briefing will cover classified material the option must also be included.

**Purpose:**                To inform tenderers that an industry briefing will be held and to request specific details from tenderers wishing to attend.

**Policy:**                *DPPM Section 5, Chapter 5.4*

**Guidance:**            Industry briefings provide an opportunity for tenderers to be briefed on aspects of Defence's tendering and contracting requirements for a RFT and to obtain answers to general questions regarding the draft SOW. The number of representatives from each prospective tenderer that may attend an industry briefing is specified in this clause. In determining the number of representatives, consideration should be given to the number of prospective tenderers likely to attend the industry briefing and the size limitations of the proposed venue. Prospective tenderers must provide their name and location and the full name of each of their representatives to the Contact Officer in writing by the time specified.

### CLASSIFIED INDUSTRY BRIEFINGS

Where security classified information will be discussed at an industry briefing, drafters must include the optional clause in the RFT. All representatives of prospective tenderers must possess a personal security clearance at the required security level to be entitled to attend the industry briefing. This clause requires tenderers to submit details of each representative's nationality, date and place of birth, current security clearance held and the Department (Australian or foreign) which issued the security clearance. Prior to the classified industry briefing, the security clearances of all representatives must be confirmed with the Defence Security Authority to ensure that each clearance is still current. Sufficient time should be allowed between the nominations closing date and the date of the industry briefing to enable the Defence Security Authority to confirm each security clearance.

### IMPACTS OF STATEMENTS MADE AT AN INDUSTRY BRIEFING ON THE RFT

This clause notifies tenderers that the purpose of the industry briefing is to provide background information only and that, unless confirmed by the Commonwealth in writing, statements made at the briefing should not be relied upon to amend or add to the RFT. Industry briefings should not be used to disseminate information that all tenderers need to know in order to submit tenders.

This clause seeks to provide the Commonwealth with protection where statements made at the industry briefing are not supported by the RFT. The legal doctrines of estoppel and misrepresentation may still apply, however, and Commonwealth officers should ensure that statements made at the industry briefing are accurate, truthful and consistent with the RFT. In order to minimise the possibility of a successful claim based on estoppel or misrepresentation, presentations and any other documentation to be provided at the industry briefing should be reviewed and approved by Contracting Policy & Operations Branch staff.

### ATTENDANCE AT THE INDUSTRY BRIEFING

It is important to note that attendance at an industry briefing is not a prerequisite for tendering. Under no circumstances should a tender be excluded from consideration because the tenderer did not attend an industry briefing.

Drafter's action: Prior to release of the RFT where this clause is considered necessary, drafters must insert the number of tenderer's representatives that may attend the industry briefing, the time, date and venue for the industry briefing and the closing time and date for nominations. Where classified material will be discussed at the industry briefing, drafters must include the optional clause and insert the security clearance classification level.

Related clauses: The **Amendment of RFT** clause of the conditions of tender sets out the procedure for amending the RFT.

The **Contact Officer for RFT Inquiries** clause of the conditions of tender specifies the Contact Officer to whom nominations must be forwarded in writing.

The **Tenderers to Inform Themselves** clause of the conditions of tender notifies tenderers that they should not rely on any statement as amending the terms of the RFT, unless the RFT is amended in accordance with the **Amendment of RFT** clause of the conditions of tender.

## Part, Joint and Alternative Tenders

### Reference:

Volume 1 Clause 1.6

Volume 2 Clause 1.6

Sponsor: Contracting Policy & Operations

Status: Core.

Purpose: To notify tenderers of the acceptability of part, joint and alternative tenders.

Policy: Nil

Guidance: The Commonwealth prefers to enter into a single contract with one legal entity for performance of the entire requirement.

### ALTERNATIVE TENDERS

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In order to select the appropriate option drafters first need to consider the way the draft SOW and specification have been drafted.

The requirement in the draft SOW and any specifications included in the draft SOW should be stated in functional and performance terms rather than technical terms. Drafters of the SOW and any relevant specifications should, therefore, aim to describe the outcome that is to be achieved by the requirement rather than rigidly define or over-define its expected features, such as physical properties. It is acknowledged however that some requirements cannot be expressed solely in functional or performance terms and therefore a SOW and any specifications may describe the requirement in technical terms.

Where the SOW and any specifications express requirements primarily in functional or performance terms, an alternative tender will be a tender that fails to meet the functional objectives of the requirement. It would therefore be inappropriate to consider alternative tenders and Option A should be selected.

Where the SOW and any specifications express requirements primarily in technical terms, an alternative tender will be a tender that does not offer the features defined in the SOW or specification but may still meet the functional and performance objectives of the requirement. Considering an alternative tender in such circumstances is appropriate, as it may introduce an alternative solution to the requirement that drafters may not have considered when writing the specification. Before selecting Option B drafters should also consider whether there are resources available to consider alternative tenders and how an alternative tender will be evaluated to ensure that it is treated fairly and consistently with other tenders. To be considered by the Commonwealth, an alternative tender must meet the requirements of this clause.

### PART TENDERS

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A part tender is one which addresses only a part of the requirements of the draft Contract. The Commonwealth prefers to enter into contract with a single entity for the entire requirement as this ensures that one entity is legally responsible for the successful delivery of the requirement.

However, there may be circumstances where the Commonwealth may consider part tenders. Option B may be selected where the requirements of the draft contract can be broken down to parts that are separate and independent of each other and require no integration or other work to make them function together in order to meet the requirements of the draft Contract.

**Example:**

In a RFT for the provision of medical supplies (such as bandages, antiseptics, gloves and disposable syringes), the consideration of part tenders by the Commonwealth may be appropriate, as the requirement can be broken down to parts that are separate and independent of each other and requires no integration.

Where integration is required in order to make the supplies function as a whole, the issue of responsibility for integration arises. It is unlikely that a supplier who does not have control over or oversight of the quality of the supplies provided by the other successful supplier will be willing to assume responsibility for the integration of the supplies. The Commonwealth itself may not have the expertise required to integrate the supplies acquired from the two separate suppliers. Therefore, Option A should be selected.

Other issues that may be considered when deciding whether to allow the submission of part tenders relate to the current industry base, the availability of the Supplies, subcontracting arrangements and the potential for limitation of the number of tenderers.

**Example:**

Where a particular part of the Supplies required by the draft SOW is highly specialised and only available from one supplier, the Commonwealth may wish to encourage the supplier to tender for that part of the requirement rather than enter into a subcontracting arrangement with another tenderer. This is because the subcontracting arrangement may prevent the supplier from acting as a Subcontractor to other tenderers and competition may be limited as other tenderers will not be able to tender against the whole requirement.

Where a part tender is successful, the Commonwealth must either enter into a separate contract with the tenderer or mandate the tenderer as a Subcontractor to the Contractor. In either event, the provisions of the RFT and the resultant contract(s) will require amendment to clearly detail the applicable subcontracting arrangements and the responsibilities of the contracting parties.

## JOINT TENDERS

The Commonwealth prefers to enter into contract with a single entity for the entire requirement as this ensures that one entity is legally responsible for the successful delivery of the requirement. Reflecting this preference, this clause notifies tenderers that the Commonwealth will not consider joint tenders. A joint tender is one in which two or more companies tender jointly to perform the requirements of the draft Contract. A tender submitted by a consortium or unincorporated joint venture is a joint tender. A tender submitted by an incorporated joint venture, where two or more companies incorporate a new entity that is part owned by each of them, is not a joint tender. This is because a single entity, that of the incorporated joint venture, is submitting the tender.

Although this clause is a core clause, in some specific circumstances it may be appropriate to allow joint tenders. Issues to be considered by drafters include the current industry base, the availability of the Supplies, subcontracting arrangements and the potential for limitation of the number of tenderers and the creation of shell companies.

A shell company typically has few assets. Where two substantial and experienced companies are likely to want to form a consortium to submit a tender, it may be better for the Commonwealth to encourage the two companies to submit a joint

tender rather than prohibit joint tenders and create an incentive for the companies to create a shell company in order to tender.

**Example:**

Where the existing industry base is such that the contract requirement can not be met by one company through entering into appropriate subcontracting arrangements, it may be appropriate to allow a consortium or unincorporated joint venture to tender. This will be particularly necessary where the requirement necessitates Supplies being provided by two large companies who do not wish to enter into a prime – Subcontractor relationship.

Prior to release of the RFT, drafters must consider the market, the required Supplies and whether the acceptance of joint tenders may be required in the particular circumstances. Where joint tenders will be allowed under the RFT, appropriate changes as outlined below will be required prior to release of the RFT.

#### TENDERS RECEIVED IN CONTRAVENTION OF THIS CLAUSE

Where a tender is received in response to a RFT in contravention of this clause the tender will be excluded from further consideration. Issues to be considered include the requirement to treat all tenderers fairly and equally, the potential for litigation by other tenderers, the competitiveness of the joint or part tender, and the viability of other tenders. Advice should be sought from Contracting Policy & Operations Branch before any action is taken in relation to a joint or part tender that is submitted in contravention of this clause.

#### CHANGES REQUIRED WHERE JOINT TENDERS ARE ALLOWED

Where this clause is amended prior to release of the RFT to allow for joint tenders, the provisions of the RFT must be amended to include optional clauses that enable contracting with each joint tenderer on the basis of joint and several liability. Advice should be sought from Contracting Policy & Operations Branch regarding these optional clauses. By contracting with each joint contractor on the basis of joint and several liability, where the Contract is not performed satisfactorily, the Commonwealth may take action against one of the contracting parties or several of the contracting parties. Each of the joint contractors will be liable for the entire amount of money recoverable by the Commonwealth whether the money is recoverable under the Contract or awarded by a court. This ensures that the Commonwealth can recover losses suffered from one or more of the joint contractors until the Commonwealth is fully compensated for its loss.

Prior to releasing a RFT that allows for the submission of joint tenders or entering into any resultant contract based on a joint tender, contracting advice should be obtained from Contracting Policy & Operations Branch to ensure that the Commonwealth's legal rights are adequately protected.

Drafter's action: Prior to release of the RFT, drafters must select one of the two options in relation to part tenders and alternative tenders.

Related clauses: Nil

**Alterations, Erasures or Illegibility****Reference:**

Volume 1 Clause 1.7

Volume 2 Clause 1.7

**Sponsor:** Contracting Policy & Operations

**Status:** Core

**Purpose:** To advise tenderers that the Commonwealth may exclude from consideration tenders containing alterations or erasures that have not been initialled by the tenderer, or tenders in which pricing or other information is not clearly and legibly stated.

**Policy:** Nil

**Guidance:** Tenders received in response to a RFT provide information that is evaluated by the Commonwealth to determine the tendered solution that offers the best value for money to the Commonwealth. It is therefore important that the Commonwealth can rely on the information provided. Where a tender contains uninitialled alterations or erasures or where prices or other information are not clearly and legibly stated the Commonwealth may not be able to rely upon the information provided.

Although it is arguable that an uncertainty as to what has been tendered may be resolved through seeking clarification, it is important to ensure that no incentive exists for tenderers to submit information in a way that allows the tenderer to influence the interpretation of the information after tenders have closed, when tenderers may potentially have more market information about other tenderers.

A tender will also form the basis of the resultant contract. A contract cannot be formed if there is uncertainty as to its principal elements, particularly price. It is therefore important that tenders are clear and unambiguous and capable of only one interpretation. The Commonwealth is entitled to exclude a tender from further consideration if on receipt of the tender any alteration or erasure is discovered and the tenderer has not clearly initialled the change.

**Drafter's action:** Nil

**Related clauses:** Nil

## Copies of Tenders

### Reference:

Volume 1 Clause 1.8

Volume 2 Clause 1.8

Sponsor: Contracting Policy & Operations and Directorate of Record Management Policy

Status: Core

Purpose: To advise tenderers of the number of copies of the tender and supporting documentation to be submitted, the identification marking requirements for copies and the precedence that will apply between the original and copies in the event of a discrepancy.

Policy: *Administrative Function Disposal Authority (AFDA)* (for tender records of a general administrative nature)

Commonwealth Archives Act 1983

*Defence Record Management Policy POLMAN 3, 3<sup>rd</sup> Edition*

*Defence specific Records Disposal Authorities* (for tender records relating to Defence Core functions – Currently under development by the Directorate of Record Management Policy)

*DPPM Section 6, Chapter 6.1*

Guidance: This clause requests tenderers to provide the original and a number of hard copies of the tender and supporting documentation. At least one copy should be provided with the original tender. The original tender should not be used for the purposes of evaluation but should be stored in a secure area in order to ensure that it is retained in its original condition. Consideration should always be given to the costs to tenderers of providing additional copies, the costs to Defence of printing additional copies and the administrative burden that hard copies place on the tender lodgment and opening procedures. Therefore, drafters should only request the number of copies that are absolutely necessary to conduct the tender evaluation effectively.

Drafters have the option of requesting tenderers to provide an electronically stored copy of the tender and supporting documentation. The electronic copy may be provided on a CD or floppy disk in a format that is readable by the purchasing area, such as Microsoft Office 97 format.

Where there is a discrepancy between a hard copy and the original or an electronic copy and the original, the original will take precedence.

The original tender may be retained by the Commonwealth in its original condition or as a scanned or imaged copy and the original destroyed under conditions set out in *POLMAN 3, 3<sup>rd</sup> Edition, sections 6.22, 6.25 – 6.35, 9.28 – 9.32* in accordance with the disposal authorities issued under the *Commonwealth Archives Act 1983*. Tender records relating to general administrative items are authorised for destruction under the *Administrative Functions Disposal Authority (AFDA) entries 1171 – 1175*, i.e. 7 years after the tender process has been completed for successful tender and 2 years after action has been completed for unsuccessful tenders or tenders that relate to a process that was not completed. Tender records relating to core Defence items, e.g. materiel procurement will be authorised for destruction under Defence specific *Records Disposal Authorities (RDAs)* being developed by the Directorate of Record Management Policy. As a guideline, destruction dates may be kept to the minimum set out in the AFDA entries depending on business need to keep records for the length of the relevant acquisition. It should be noted that in the majority of cases Supplies procured using *ASDEFCON (Complex Materiel)* will be considered as core Defence items.



Drafter's action: Prior to release of the RFT, drafters must insert the number of hard copies of the tender that are required.

Prior to the release of the RFT, drafters must insert the format in which the electronic copy is required.

Related clauses: Nil

## Lodgment of Tenders

### Reference:

Volume 1    Clause 1.9

Volume 2    Clause 1.9

Sponsor:        Contracting Policy & Operations

Status:            Core

Purpose:            To advise tenderers of the Tender Closing Time and the tender lodgment procedures applicable to tenders received in response to the RFT.

Policy:            Current policy is that RFTs and other invitation documents must specify an exact time and date as the Tender Closing Time. Any tender submitted after this time will be marked as a late tender and accepted for evaluation only at the discretion of the Commonwealth.

*DPPM – Section 5, Chapter 5.5 and Annexes 5C, 5F and 5G*

Guidance:        Drafters must ensure that they clearly specify the place for tender lodgment.

Example:	
For postal deliveries: Defence Mail Services Department of Defence CANBERRA ACT 2600	For personal deliveries: Defence Mail Services Queanbeyan Annex 6 Corner Bass and Barrow Street QUEANBEYAN NSW 2620  Attn: Mailroom Manager/Tender Officer

### SELECTION OF THE TENDER CLOSING DATE

Drafters must also specify the tender closing date. The date selected should be a Working Day in the place where tenders are to be lodged. Careful consideration should be given to the time period that is allowed for the preparation and submission of tenders. Where tenderers will be required to submit tenders through secure means, sufficient additional time should be allowed when determining the tender closing date.

### SELECTION OF THE TENDER CLOSING TIME

The tender closing time selected should provide Commonwealth personnel sufficient time following the close of tenders to record and process tenders prior to the close of business and to become aware of any late tenders that are received. The later the tender closing time, the greater the impact it will have on Commonwealth personnel involved with the receipt and opening of tenders and the ability of the Commonwealth to determine whether tenders received were submitted prior to the tender closing time. The exact tender closing time should be specified in this clause. Terms like “close of business” should be avoided, as their definition may be different from organisation to organisation.

### ACCEPTANCE OF LATE TENDERS

Commonwealth officers involved in the tender process should ensure that they are familiar with Defence policy on tender lodgment and opening procedures. Where a tender is submitted late the Tender Lodgment Procedures and Late Tenders policy will be applied by the Commonwealth to determine whether the late tender will be considered by the Commonwealth. The reasons for admitting or not admitting a late tender should be documented in writing and all communications with that tenderer should also be recorded in writing to guard against later dispute over the actions of the Commonwealth in admitting or refusing to consider a late tender.

Advice should be sought from Contracting Policy & Operations Branch prior to any decision being made to consider or not consider a late tender. The Tender Lodgement Procedures and Late Tenders policy is contained in the *DPPM* Version 5.0: 2004.

Drafter's action: Prior to release of the RFT, drafters must insert the time, date and place for submission of tenders.

Related clauses: The **Australian Government Requirements** clause of the conditions of tender requires tenderers to familiarise themselves with specific Commonwealth policies.

## Preparation and Transmission of Classified Tenders

**Reference:**

Volume 1    Clause 1.10

Volume 2    Clause 1.10

**Sponsor:**        Defence Security Authority

**Status:**            Optional. This clause should be included where tenderers may wish to submit security classified information as part of their tender.

**Purpose:**            To advise tenderers of the source documents that provide guidance on, and the process that applies to, the preparation and transmission of tenders containing classified material.

**Policy:**            For Australian tenderers:

*Defence Security Manual*

For overseas tenderers:

Overseas tenderers should consult applicable policy documents issued by their relevant government authorities and the relevant bilateral security agreements.

*DPPM Section 3, Chapter 3.9*

**Guidance:**        This clause provides tenderers with details of how tenders containing security classified information should be prepared and transmitted.

### PREPARATION AND TRANSMISSION OF CLASSIFIED TENDERS

This clause advises tenderers that classified content in tenders should be avoided where possible. Where this is not possible, Australian tenderers are required to prepare and transmit tenders containing classified content in accordance with Defence Security Manual. Overseas tenderers must prepare and transmit tenders containing classified content in accordance with the industrial security regulations issued in their country and use the diplomatic bag arrangements of their own country where transmission is by diplomatic bag.

### SECURITY CLASSIFICATION GRADING DOCUMENTS

This clause requests tenderers to classify information in their tenders in accordance with the **Security Classification Grading Document**, which is included as an Attachment to the draft Contract. In some cases the RFT may not include a Security Classification Grading document at the time of release, particularly where there is no Australian security classified information included in the RFT. Further advice on Security Classification Grading Documents can be obtained by contacting the Defence Security Authority.

### SEPARATE TRANSMISSION OF CLASSIFIED PARTS OF A TENDER

Where only part of a tender response contains classified content, tenderers may segregate that part from the remainder of the tender for separate transmission. Tenderers should note, however, that both parts of the tender must be lodged by the Tender Closing Time. Tenderers should take care to ensure that sufficient time is allowed for transmission of tenders containing classified content, particularly where diplomatic bag arrangements must be used. Where only the unclassified part of a tender is received by the Tender Closing Time, the Tender Lodgment Procedures and Late Tenders policy will apply and the whole tender may be excluded from consideration by the Commonwealth.

**Drafter's action:**    Prior to release of the RFT, drafters should consider whether this clause is necessary.

Related clauses: The **Lodgment of Tenders** clause of the conditions of tender notifies tenderers of the Tender Closing Time and the tender lodgment procedures applicable to tenders received in response to the RFT.

The **Security Classification Grading Document** Attachment to the draft conditions of contract will, if required, contain the agreed Security Classification Grading Document.

## Defence Security Clearance Requirements

Reference:

Volume 1 Clause 1.11

Volume 2 Clause 1.11

Sponsor: Contracting Policy & Operations and Defence Security Authority

Status: Core

Purpose: To notify tenderers of the requirement to be willing to undergo the security clearance process

Policy: *DPPM Section 3, Chapter 3.9*

Guidance: This clause does not impose upon a tenderer a mandatory requirement to undergo the security clearance process. The successful tenderer may be required to perform work on sites with restricted access and to access classified information. In such circumstances the Commonwealth expects a tenderer to undergo the security clearance process to ensure the required safeguards on information and site security are in place.

If a tenderer indicates to the Commonwealth that it is NOT willing to undergo the security clearance process, the Defence Security Authority should be consulted with regards to the current security status of the tenderer and their personnel.

Unless a contrary intention appears in the tenderer's response or the tenderer communicates that the tenderer is unwilling to undergo the security clearance process, this clause reflects the Commonwealth's expectation that a tenderer will undergo the security clearance process.

Drafter's Action: Nil

Related Clauses: The **Preparation and Transmission of Classified Tenders** clause of the conditions of tender and the **Defence Security** clause of the draft conditions of contract.

## Australian Government Requirements

### Reference:

Volume 1    Clause 1.12

Volume 2    Clause 1.12

Sponsor:        Contracting Policy & Operations

Status:            Core

Purpose:            To notify tenderers of Commonwealth policy that applies to the RFT and the requirement placed on the Contractor by the Policy Requirements clause of the draft conditions of contract to comply with Commonwealth policy.

Policy:             See references under Guidance

Guidance:         This clause sets out the Commonwealth policies that a tenderer should be aware of in submitting its tender.

The note to tenderers included in this clause directs tenderers to an electronically available version of the *Defence Procurement Policy Manual*, and to the website that contains the Defence Equity and Diversity Policy.

Drafters should ensure that all Commonwealth policy that a tenderer should be aware of in submitting its tender is referenced in this clause of the conditions of tender and the **Policy Requirements** clause of the draft conditions of contract prior to release of the RFT.

*ASDEFCON (Complex Materiel)* Volume 1 lists the following policy documents which tenders must familiarise themselves with at the tendering stage:

- Australian and New Zealand Supplies policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004;
- Contract Gazettal policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004;
- Defence Equity and Diversity policy as detailed in the *Defence Instruction (General) Personnel 35-3 'Managing and Reporting of Unacceptable Behaviour'*;
- Equal Opportunity for Women in the Workplace policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004;
- Freedom of Information policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004;
- Hazardous Substances policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004;
- Industry Capability Network policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004; and
- Ozone Depleting Substances policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004.

Volume 2            In addition, tenderers must also familiarise themselves with the following policies when utilising *ASDEFCON (Complex Materiel)* Volume 2:

- *Maximising Employment Opportunities for Aboriginal and Torres Strait Islanders* policy as detailed in the *Defence Procurement Policy Manual*, Version 5.0 2004.

And for when acquisition contracts are valued at \$10 million dollars or more:

- Company ScoreCard policy as detailed in the *Defence Company ScoreCard Policy Statement, July 2001*.

## DISCLOSURE OBLIGATIONS FOR COMMONWEALTH CONTRACTS

This clause advises tenderers that, as a Commonwealth agency, Defence is subject to general Commonwealth legislative and administrative accountability and transparency requirements, which may include being required to make disclosures to Parliament and its Committees. Tenderers are informed that, due to these requirements, any contract formed with the Commonwealth (including specific contractual provisions and related matters) may be disclosed to Parliament and its Committees. Any requests by a tenderer for contract or other information to be kept confidential would need to be considered on a case by case basis taking into account the relevant Commonwealth legislative and administrative requirements. Further guidance on these requirements can be obtained from Contracting Policy & Operations Branch.

### Drafter's action:

#### Volume 1

Nil.

#### Volume 2

Prior to release of the RFT, drafters must include the option in this clause where it is expected that a resultant contract will exceed the \$10 million threshold.

### Related clauses:

The **Policy Requirements** clause of the draft conditions of contract requires the Contractor to comply with Commonwealth policies listed in the clause.



## MATTERS CONCERNING TENDER RESPONSE

### Period of Tender

Reference:

Volume 1 Clause 2.1

Volume 2 Clause 2.1

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To identify the period for which a tenderer must hold its tender open for acceptance by the Commonwealth.

Policy: *DPPM Section 5, Chapter 5.5*

*Trade Practices Act 1974*

Guidance: Drafters should include the Commonwealth's preferred tender validity period in this clause.

### SELECTION OF THE TENDER VALIDITY PERIOD

Drafters should ensure that a realistic tender validity period is included, taking into account such factors as the anticipated evaluation period, expected length of negotiations and the time required to obtain all of the necessary approvals to enter into a contract. Excessive validity periods may add considerably to the cost of tendering for tenderers and these costs will eventually be passed on to the Commonwealth in the Contract Price.

### TENDER VALIDITY PERIOD INCLUDED IN THE DECLARATION BY TENDERER

Each tenderer is responsible for entering the period for which its tender will remain open for acceptance in the **Declaration by Tenderer** Annex to the conditions of tender. Tenderers should note the Commonwealth's preferred tender validity period in this clause. A tenderer may be bound by the tender validity period indicated in its Declaration by Tenderer and therefore tenderers should give careful consideration to the time period included. Where the tender validity period offered by the tenderer is a great deal less than that indicated by the Commonwealth in this clause, the Commonwealth may have to consider whether the evaluation of the tender can be completed within the offered validity period. If it cannot be completed and the tenderer is unwilling to extend the validity period the Commonwealth will exclude the tender from further consideration.

### EXTENSION OF THE TENDER VALIDITY PERIOD

Once the period specified in the Declaration by Tenderer expires, the tender is no longer open for acceptance. If the Commonwealth wishes to seek an extension of the tender validity period, it should do so under this clause prior to expiry of the original tender validity period. A tenderer is under no obligation to agree to an extension and may allow its tender to lapse. Where the Commonwealth seeks an extension of the tender validity period, the Commonwealth should attempt to secure the extension on the same terms as the original tendered offer, or where negotiations have commenced, the negotiated offer at the time of the request. Where the Commonwealth seeks an extension of the tender validity period, the Commonwealth will not be responsible for costs and expenses incurred by tenderers in granting or refusing to grant an extension of the tender validity period. A pro forma for requesting an extension of the tender validity period may be found in the *DPPM*.

## ENFORCEABILITY OF THE TENDER VALIDITY PERIOD

It should be noted that since the Commonwealth and the tenderer have not entered into a process contract, the Commonwealth may not be able to enforce the tender validity period specified in the Declaration by Tenderer where the tenderer seeks to revoke its offer prior to expiry of the tender validity period. There is a possibility that the Commonwealth may have a claim under section 52 of the *Trade Practices Act 1974* for the deceptive or misleading conduct of the tendering company or that it may rely on the doctrine of estoppel to enforce the tender validity period, if it can be shown that the Commonwealth has suffered detriment due to revocation of the offer. It is, however, unlikely that the Commonwealth will want to pursue a claim on either basis in order to retain the tenderer in the tender process, as the revocation of its offer indicates a general reluctance on the part of the tenderer to enter into a contract and an ongoing relationship with the Commonwealth. Prior to any action being taken to enforce a tender validity period advice should be sought from Contracting Policy & Operations Branch.

Drafter's action: Prior to release of the RFT, drafters must include the period for which tenders are to remain open for acceptance. While it is desirable that the same period be included in the Declaration by Tender, the tenderer may insert an alternative period.

Related clauses: The **Lodgment of Tenders** clause of the conditions of tender details the Tender Closing Time applicable to tenders submitted in response to the RFT.

In the **Declaration by Tenderer** Annex of the conditions of tender, each tenderer is required to indicate in a Declaration by Tenderer, the period for which its tender will remain open for acceptance.

## Language of Tenders

### Reference:

Volume 1 Clause 2.2

Volume 2 Clause 2.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To advise tenderers that tender responses are to be in English and that measurements, unless otherwise specified, are to be expressed in Australian legal units of measurement.

Policy: *National Measurement Act 1960*

Guidance: The *National Measurement Act 1960* states that, with the exception of imported or exported supplies, contracts entered into in Australia for a measured volume, weight or other physical quantity of goods must be expressed in 'Australian legal units of measurement' otherwise the contract is void.

### USE OF ALTERNATIVE UNITS OF MEASUREMENT

The cost to tenderers of converting all information and documentation to Australian legal units of measurement may be significant. Where it is expected that overseas tenderers are likely to respond to the RFT, it may be appropriate to specify particular areas of the RFT or types of documentation against which information submitted may be provided in the units of measurement used in the tenderer's country of origin. Prior to allowing alternative units of measurement to be used, drafters should carefully consider the effect on the ease of comparison of tenders and the useability and reliability of information provided by tenderers. Where it is considered appropriate to allow alternative units of measurement to be used, these should be specified in Annex A to the SOW.

Before agreeing to alternative units of measurement, drafters need to consider the operation of **Language and Measurement** clause of the draft conditions of contract which requires measurements to be in Australian legal units, although the Commonwealth Representative may subsequently agree alternative units of measurement for imported supplies. However, if alternative units of measurements are specified in Annex A of the SOW this could give rise to ambiguity with the **Language and Measurement** clause. This is because the **Precedence of Documents** clauses in the draft conditions of contract provides that the conditions of contract prevail over the SOW to the extent of any inconsistency. Accordingly, to avoid doubt, the **Language and Measurement** clause of the draft conditions of contract may need to be revised to state 'Except as otherwise set out in the Contract, measurements...'

### REQUIREMENT THAT TENDERS BE SUBMITTED IN ENGLISH

This clause notifies tenderers that any tender submitted must be written in English. Requesting that tenders are submitted in English alleviates the Commonwealth's responsibility for any errors or ambiguities that may occur during the translation of tendered information and ensures that the tenderer retains responsibility for the accuracy of the content of its tender.

Drafter's action: Nil

Related clauses: The **Language and Measurement** clause in the draft conditions of contract provides that all information delivered as part of the Supplies is to

be written in English and that measurements must be in accordance with the *National Measurement Act 1960*, unless otherwise agreed by the Commonwealth Representative.

## Tender Preparation

### Reference:

Volume 1    Clause 2.3

Volume 2    Clause 2.3

Sponsor:        Contracting Policy & Operations

Status:            Core

Purpose:            To outline the information that the tenderer is required to submit in response to the RFT.

Policy:            Nil

### Guidance:

Volume 1            This clause notifies tenderers that any information requested in the RFT should be completed in the detail requested and in the format specified in the Annexes.

#### INFORMATION REQUESTED FROM TENDERERS

The information to be provided by tenderers in response to the RFT is detailed in the Annexes to the conditions of tender. In order to reduce the time and cost of tendering for the Commonwealth and tenderers, drafters should avoid requesting information in excess of what is necessary to evaluate tenders. Drafters should also ensure that all information necessary to evaluate tenders against the tender evaluation criteria in the **Tender Evaluation** clause of the conditions of tender is requested in the Annexes and that the nature and extent of the required information is clear. Ensuring that the tender requirements are clear in the RFT may reduce the need for the Commonwealth to seek clarification during the tender evaluation process, which will in turn reduce the length and cost of the tender process.

Volume 2            This clause provides a checklist for both tenderers and the Commonwealth of information required to be submitted in response to the RFT. It also ensures consistency in the format of tender responses making comparison of tenders during the evaluation process easier.

#### INFORMATION REQUESTED FROM TENDERERS

The information to be provided by tenderers in response to the RFT is detailed in the Annexes to the conditions of tender. In order to reduce the time and cost of tendering for the Commonwealth and tenderers, drafters should avoid requesting information in excess of what is necessary to evaluate tenders. Drafters should also ensure that all information necessary to evaluate tenders against the tender evaluation criteria in the **Tender Evaluation** clause is requested in the Annexes and that the nature and extent of the required information is clear. Ensuring that the tender requirements are clear in the RFT may reduce the need for the Commonwealth to seek clarification during the tender evaluation process, which will in turn reduce the length and cost of the tender process.

#### AMENDMENT OF THE TENDER RESPONSE FORMAT

The format provided in this clause is a guide only and drafters may amend the tender response format to suit their requirements. In determining an appropriate tender response format consideration should be given to the Tender Evaluation Working Group structure and the amount of information that is likely to be provided by tenderers in relation to specific aspects of the RFT.

Drafter's action:

Volume 1 Nil

Volume 2 Drafters may amend the format to suit the acquisition's specific needs and the amount of additional material requested in each Annex.

Where the resultant Contract Price is not expected to exceed the \$5 million threshold, the reference to an Australian Industry Involvement Response Volume should be deleted.

Related clauses: The Annexes to the conditions of tender request information from the tenderer. If the tenderer does not comply with the requirements set out in the conditions of tender or the Annexes, the nature of the non-compliance should be detailed in the **Declaration by Tenderer** Annex to the conditions of tender.

## Tenderers to Inform Themselves

### Reference:

Volume 1 Clause 2.4

Volume 2 Clause 2.4

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To advise tenderers:

- of the obligation to obtain, read and familiarise themselves with the RFT and any documentation referenced in the RFT;
- not to rely on any oral or written representation as amending the terms and conditions of the RFT, unless the RFT is formally amended in accordance with the **Amendment of RFT** clause of the conditions of tender;
- that the Commonwealth will not be responsible for costs and expenses incurred by tenderers in preparing and lodging their tenders; and
- that the RFT does not create a contract between the Commonwealth and each tenderer in relation to the conduct of the tender process.

Policy: *DPPM Section 2, Chapter 2.1 and Section 5, Chapter 5.4*

Guidance: This clause outlines the assumptions upon which each tenderer should base its tender and notifies tenderers of the types of investigations that the Commonwealth assumes each tenderer has made before lodging a tender. These provisions provide protection to the Commonwealth by ensuring that a tenderer is unable to argue that it was unaware of any particular fact that was expressly referred to in the RFT or was discoverable through reasonable inquiries.

### INCLUSION OF MATERIAL IN THE RFT

In the event a tenderer seeks to amend its tender after the Tender Closing Time, this clause may be relied upon by the Commonwealth to take account of circumstances which were notified to tenderers through the RFT or discoverable by the tenderer through the making of reasonable inquiries. It also allows drafters to refer to applicable Commonwealth policy and legislation without including the documents in the RFT. It should be noted that 'reasonable inquiries' is a matter of judgment and if the material will have a significant impact on the tenderer, especially in relation to pricing, it should be expressly referred to, or included, in the RFT.

### RELIANCE ON COMMONWEALTH REPRESENTATIONS

This clause places each tenderer on notice that they are unable to rely on any oral or written representations, or other amendments to the RFT that were not given or made in accordance with the **Amendment of RFT** clause of the conditions of tender. It provides the Commonwealth with protection against claims by a tenderer that it based its tender on Commonwealth representations rather than its own inquiries, or that it expected the Commonwealth to meet its tendering costs.

It should be noted that this clause does not provide absolute protection for the Commonwealth. If a representation or statement is made by the Commonwealth before or after the release of the RFT the legal doctrines of estoppel and misrepresentation may still apply. If a change is required to be made to the RFT, then the RFT should be formally amended through

the process in the **Amendment of RFT** clause of the conditions of tender and the amendment distributed to all recipients of the RFT.

#### THE HUGHES CASE AND PROCESS CONTRACTS

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This clause expresses Defence policy that it does not intend the tender process to create a contractual relationship between the Commonwealth and tenderers. However in the Hughes case, the court looked further than the express terms of the tender to the actual relationship between the parties in the tender process. Therefore a mere statement that it is not the intention of the parties to enter into contractual obligations may not be sufficient to protect the Commonwealth against the existence of a process contract and a resulting claim of breach of contract.

Drafter's action: Nil

Related clauses: The **Amendment of RFT** clause of the conditions of tender sets out the procedure that must be followed to amend a RFT.

The **Industry Briefing** clause of the conditions of tender provides for an option of the Commonwealth to conduct an industry briefing. Tenderers acknowledge in this clause that any statements made by the Commonwealth at the industry briefing which may potentially result in a change to the RFT are subject to the **Tenderers to Inform Themselves** clause of the conditions of tender.

The **Australian Government Requirements** clause of the conditions of tender lists the Commonwealth policies that tenders should familiarise themselves with.



### Use of Tender Documents

Reference:

Volume 1 Clause 2.5

Volume 2 Clause 2.5

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To notify each tenderer of how the Commonwealth may use the information submitted in its tender, including the purposes for which tender documentation may be provided to third parties. To set out the Intellectual Property rights associated with the tender documents.

Policy: *DPPM - Section 5, Chapter 5.7*  
*Freedom of Information Act 1982*

Guidance: For the purposes of tender evaluation and the preparation of any resultant contract, the Commonwealth may:

- a. use, retain and copy tendered information; and
- b. subject to obtaining a deed of confidentiality, provide the tender documentation to third parties.

Notwithstanding the Commonwealth's rights, ownership of the Intellectual Property in the information contained in the tender documents remains unchanged, i.e. remains with the owner of the Intellectual Property. Drafters should ensure that this is appropriately reflected in any deed of confidentiality entered into between the Commonwealth and a third party.

#### USE OF TENDER DOCUMENTATION BY THIRD PARTIES

Under this clause, tender documentation may only be supplied to third parties for the purposes of assisting the Commonwealth in tender evaluation and the preparation of any resultant contract. While the RFT expressly negates the existence of a contractual relationship with the tenderer during the tender process, it is important that the Commonwealth only discloses tender documentation to third parties in accordance with this clause. It should be noted that in the Hughes case, the court looked closely at the purposes for which the tender information could be disclosed to third parties and found that a breach of contract had occurred as the government authority had explicitly promised tenderers to maintain "strict confidentiality" and yet had disclosed tender information for purposes other than those set out in the conditions of tender. Where the Commonwealth needs to disclose tender information to third parties for purposes other than those set out in this clause, the Commonwealth should obtain the written consent of the tenderer prior to any disclosure being made. Promises to keep information "strictly confidential" should not be made as the analysis in the Hughes case shows this will be interpreted to be a greater obligation than one of confidentiality.

Drafter's action: Nil

Related clauses: Attachments to the draft conditions of contract provide draft Deeds that may be appropriate, with relevant tailoring, for use when the Commonwealth needs to obtain a deed of confidentiality as foreshadowed in this clause.

### Substitution of Tenderer

Reference:

Volume 1 N/A

Volume 2 Clause 2.6

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To inform tenderers that upon a joint written request from the tenderer and another legal entity, the Commonwealth may allow substitution of that other legal entity for the tenderer.

Policy: Nil

Guidance: This clause allows the Commonwealth discretion to substitute a tenderer with another legal entity, during the period following the submission of a tender and prior to execution of a contract.

#### EXERCISE OF THE DISCRETION TO ALLOW FOR A SUBSTITUTION

The Commonwealth's discretion is contingent upon the occurrence of one of the events listed in paragraphs **(a)** to **(h)** of the **Contractor Default** clause in the draft conditions of contract, or any other event that has the effect of substantially altering the composition, business or control of the tenderer. The Commonwealth may only exercise this discretion when it has received a joint written request from, or on behalf of, the tenderer and the legal entity requesting the substitution.

#### FAILURE TO OBTAIN A SUBSTITUTION OF TENDERER

This clause provides tenderers with notice that if the circumstances set out in this clause occur and the tenderer fails to request a substitution, or the Commonwealth does not allow the substitution, the Commonwealth may elect not to give any further consideration to the tender. Alternatively the Commonwealth may elect to consider the tender and take into account the impact of the event on the information provided in the tender. As there is a potential for tenderers to be disadvantaged by the exercise of the Commonwealth's discretion, the Commonwealth should seek to ensure that it does not unfairly advantage or disadvantage any tenderer or the entity seeking to be substituted. For this reason this clause also specifies that the Commonwealth will evaluate a tender in its original form except that the impact of the event on the tendered information may be taken into account.

Drafter's action: Nil

Related clauses: Paragraphs **(a)** to **(h)** of the **Contractor Default** clause in the draft conditions of contract outline the events that constitute Contractor default under the Contract and provide a trigger for the Commonwealth to request substitution of the tenderer.

## EVALUATION OF TENDERS

### Cost Investigation of Sole Source Tenders

Reference:

Volume 1 Clause 3.1

Volume 2 Clause 3.1

Sponsor: Contracting Policy & Operations

Status: Optional. To be used where the RFT is sole source.

Purpose: To advise the tenderer that due to the RFT being sole source, the Commonwealth may cost investigate the tender and that the tenderer will be required to facilitate such a cost investigation where required by the Commonwealth.

Policy: Defence policy strongly recommends that all sole source tenders are cost investigated.

*Commonwealth Procurement Guidelines and Best Practice Guidance*

*DPPM - Section 3, Chapter 3.3 and Section 4, Chapter 4.7*

*Financial Management and Accountability Act 1997*

Guidance: Since there is a lack of competition in a sole source tender, conducting a cost investigation of the tender is an effective way to determine whether the tendered price is reasonable and offers value for money in accordance with Commonwealth procurement policy. In an open tender process, the Commonwealth will have alternative mechanisms to satisfy itself that the tender constitutes value for money, such as comparison of tenders and tender pricing. For this reason, it is important that drafters insert this clause where the RFT is sole source.

Since the Commonwealth's right to cost investigate is a discretionary right, it is important that the Commonwealth's resources are sufficient to conduct the cost investigation during the tender validity period. The tenderer is required to facilitate the cost investigation and that cost may be factored into the tendered price.

Drafter's action: Prior to release of a sole source RFT, drafters should insert this clause.

Related clauses: The **Commonwealth Access** clause of the draft conditions of contract provides the Commonwealth with the right to access the Contractor's premises and records to cost investigate Contract change proposals submitted under the Contract.

## Tender Evaluation

### Reference:

Volume 1 Clause 3.2

Volume 2 Clause 3.2

Sponsor: Contracting Policy & Operations and Standardisation Branch

Status: Core

Purpose: To advise tenderers how their tenders will be evaluated. To notify tenderers that the Commonwealth does not have to accept any tender and to set out the grounds on which the Commonwealth may exclude tenders from further consideration.

Policy: It is Defence policy that evaluation criteria not be ranked in the RFT. The Tender Evaluation Plan must always be consistent with the evaluation criteria set out in the RFT. Under no circumstances should new or revised evaluation criteria be used during tender evaluation.

*Commonwealth Procurement Guidelines and Best Practice Guidance*

*Crimes Act 1914*

*Defence CEI – Part 3, Instruction 1*

*DPPM – Section 5, Chapters 5.4 and 5.6*

*Financial Management and Accountability Act 1997*

*Financial Management and Accountability Regulations 1997*

*Public Services Act 1974*

*Trade Practices Act 1974*

### Guidance:

#### Volume 1

This clause sets out the tender evaluation criteria against which tenders will be evaluated. The criteria will be sufficient for the majority of purchases using *ASDEFCON (Complex Materiel)*, however; additional or alternative criteria may be added where appropriate.

#### INCLUSION OF ALTERNATIVE OR ADDITIONAL EVALUATION CRITERIA

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In order to assess the tender against the evaluation criteria in this clause, tenderers are required to provide the information requested in the Annexes. Drafters should note that any additional information required to assess the tender against the criteria in this clause should be included in the relevant Annex. Where alternative or additional criteria are included, drafters should ensure that any information the Commonwealth requires to assess tenders against the criteria is also included in the relevant Annex prior to release of the RFT. Drafters should also consider the impact of removing criteria on the tender evaluation process, and assess whether or not any of the information requested in the Annexes is made redundant due to the removal of the specific criteria. Drafters should ensure that any additional or alternative evaluation criteria in this clause are capable of objective evaluation based on information requested in the RFT.

#### BASIS FOR TENDER EVALUATION

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Under *Financial Management and Accountability Regulation 13*, a person must not enter into a contract under which public money becomes payable unless the proposal to spend public money has been approved under Regulation 9 or 10. Because Defence procurement will involve the expenditure of money the subject of an appropriation, Regulation 9 will usually be the relevant regulation. Regulation 9 prohibits an approver from

approving a proposal to spend public money unless the approver is satisfied that the proposed expenditure is in accordance with the policies of the Commonwealth and will make efficient and effective use of the public money. The Defence Chief Executive Instructions also detail the responsibilities of approvers.

The primary source of Commonwealth policy to which an approver must have regard in the context of a Defence acquisition is the *Commonwealth Procurement Guidelines and Best Practice Guidance*. The *Commonwealth Procurement Guidelines and Best Practice Guidance* provide that value for money is the essential test against which any agency must justify any procurement outcome. Best value for money should not be judged on the basis of price alone and this clause notifies the tenderer that the Commonwealth is not obliged to accept the lowest priced tender. The evaluation criteria against which all tenders will be assessed must be relevant to an assessment of value for money.

The *Commonwealth Procurement Guidelines and Best Practice Guidance* also require agency staff involved with procurement to act ethically in their dealings with suppliers and potential suppliers. It is important to treat all tenderers fairly and even-handedly. For this reason the tender evaluation should be based on the criteria notified to tenderers in the RFT.

It should be noted that in accordance with Defence policy the list of criteria included in this clause is not exhaustive nor in any order of importance. As the list is not exhaustive other criteria may be taken into account when evaluating tenders. However, to ensure that tenderers are treated fairly, attempts should be made to include all relevant evaluation criteria in this clause. Where it can be shown that a tenderer was not treated fairly (refer to the Hughes case, Cubic Transportation case and the MBA Land Holdings case), a tenderer may have grounds to legally challenge the tender process and seek compensation.

#### EXCLUSION OF TENDERS FROM CONSIDERATION

This clause provides the Commonwealth with the right to exclude a tender from consideration where the response is incomplete, non-compliant with essential requirements, or is clearly non-competitive. The exercise of the discretion is subjective having regard to the evaluation criteria specified in the RFT and the submitted tender response. It is important to notify tenderers of all issues that may lead to the exclusion of their tender from further consideration. An attempt by a government department to exclude a tender for failure to comply with an aspect of a tender process where the tenderer had not been informed that a failure to comply could lead to exclusion of the tender was adversely commented on by the court in the MacMillan case. Advice should be sought from Contracting Policy & Operations Branch prior to excluding a tender from consideration. The reasons for excluding a tender from consideration under this clause should be well documented. Drafters should note that there is no obligation on the Commonwealth to exclude a tender for any of the circumstances identified in this clause, however, exercise of the discretion should be consistent across tenderers.

#### UNLAWFULLY OBTAINED INFORMATION AND IMPROPER ASSISTANCE

This clause warns each tenderer that if it uses:

- a. the improper assistance of current or former Commonwealth employees;
- b. unlawfully obtained material; or

information obtained in breach of an obligation of confidentiality to the Commonwealth,

to compile its tender, the Commonwealth may exclude the tender from further consideration.

What constitutes improper assistance will depend on the circumstances. However, assistance given which involves disclosure of information in breach of a person's duties under the *Crimes Act* or *Public Service Act* would clearly be improper. It should also be noted that most consultants and professional service providers to the Commonwealth enter into confidentiality agreements. Therefore information that is disclosed to a tenderer in breach of a consultant's or professional service provider's confidentiality agreement should not be included in a tender or used to compile a tender as the Commonwealth will be entitled to exclude the tender from consideration in accordance with this clause.

#### THE HUGHES CASE AND PROCESS CONTRACTS

This clause makes it clear to tenderers that the Commonwealth does not intend the conditions of tender to give rise to a process contract between the Commonwealth and each tenderer as was found to have existed in Hughes case. Because a court will look to substance rather than form in determining whether a process contract has been created, a mere statement that it is not the intention of the parties to enter into contractual obligations will not necessarily be sufficient to protect the Commonwealth from such a claim. However, it remains the case that Defence does not intend to create process contracts in relation to its tendering processes and this clause informs tenderers of this fact.

#### CLARIFICATION OF TENDERS

This clause provides the Commonwealth with the right to seek clarification from a tenderer where there is any ambiguity or uncertainty in the tender. Information should be sought only for matters requiring evaluation under the RFT process, as requests for excessive data will increase the cost of tendering. The Commonwealth's use of this additional information is limited to the assessment and interpretation of the tender and evaluating the cost and risk to the Commonwealth of accepting the tender. The Commonwealth may also visit a tenderer and its proposed Subcontractors to verify and examine facilities, capabilities and tendered Supplies, to the extent permissible by the tenderer and proposed Subcontractor. Care must be taken so that tenderers are not afforded an opportunity to amend their tenders. Any new information presented which would have the effect of altering the tender submitted must not be taken into account in the evaluation of tenders.

#### REQUESTING SAMPLES OF TENDERED SUPPLIES

It may be possible to obtain a sample of the tendered supplies for the purpose of assisting the Commonwealth with tender evaluation. Drafters may consider the inclusion of the option in this clause where the tendered supplies are commercial-off-the-shelf items that have already been produced or can be easily produced at no significant cost or effort for the tenderer.

A request for a sample of the tendered supplies would not be appropriate where that would involve significant costs for the tenderer to start up its production line. In such a case it may be more appropriate to obtain a sample of the tendered supplies at the Commonwealth's cost or to evaluate the tenderer's proposal without reference to a sample of the tendered supplies.

#### SHORTLISTING OF TENDERS

After an initial evaluation, tenders may be shortlisted. The shortlisting stage is used to decline tenders which are clearly non-competitive and

have no reasonable prospect of exhibiting the best value for money compared to other tenders. The shortlisting process should be conducted in accordance with the Tender Evaluation Plan (TEP). Where tenders will be declined as a result of the shortlisting stage, a shortlisting report should be developed. Declined tenderers should be informed promptly that their tender has been declined.

Volume 2:

This clause sets out the tender evaluation criteria against which tenders will be evaluated. The criteria will be sufficient for the majority of purchases using *ASDEFCON (Complex Materiel)*, however, additional or alternative criteria may be added where appropriate.

INCLUSION OF ALTERNATIVE OR ADDITIONAL EVALUATION CRITERIA

In order to assess the tender against the evaluation criteria in this clause, tenderers are required to provide the information requested in the Annexes. Drafters should note that any additional information required to assess the tender against the criteria in this clause should be included in the relevant Annex. Where alternative or additional criteria are included, drafters should ensure that any information the Commonwealth requires to assess tenders against the criteria is also included in the relevant Annex prior to release of the RFT. Drafters should also consider the impact of removing criteria on the tender evaluation process, and assess whether or not any of the information requested in the Annexes is made redundant due to the removal of the specific criteria. Drafters should ensure that any additional or alternative evaluation criteria in this clause are capable of objective evaluation based on information requested in the RFT.

BASIS FOR TENDER EVALUATION

Under *Financial Management and Accountability Regulation 13*, a person must not enter into a contract under which public money becomes payable unless the proposal to spend public money has been approved under Regulation 9 or 10. Because Defence procurement will involve the expenditure of money the subject of an appropriation, Regulation 9 will usually be the relevant regulation. Regulation 9 prohibits an approver from approving a proposal to spend public money unless the approver is satisfied that the proposed expenditure is in accordance with the policies of the Commonwealth and will make efficient and effective use of the public money. The *Defence CEIs* also details the responsibilities of approvers.

The primary source of Commonwealth policy to which an approver must have regard in the context of a Defence acquisition is the *Commonwealth Procurement Guidelines and Best Practice Guidance*. The *Commonwealth Procurement Guidelines and Best Practice Guidance* provide that value for money is the essential test against which any agency must justify any procurement outcome. Best value for money should not be judged on the basis of price alone and this clause notifies the tenderer that the Commonwealth is not obliged to accept the lowest priced tender. The evaluation criteria against which all tenders will be assessed must be relevant to an assessment of value for money.

The *Commonwealth Procurement Guidelines and Best Practice Guidance* also require agency staff involved with procurement to act ethically in their dealings with suppliers and potential suppliers. It is important to treat all tenderers fairly and even-handedly. For this reason the tender evaluation should be based on the criteria notified to tenderers in the RFT.

It should be noted that in accordance with Defence policy the list of criteria included in this clause is not exhaustive nor in any order of importance. As the list is not exhaustive other criteria may be taken into account when evaluating tenders. However, to ensure that tenderers are treated fairly,

attempts should be made to include all relevant evaluation criteria in this clause. Where it can be shown that a tenderer was not treated fairly (refer to the Hughes case, Cubic Transportation case and the MBA Land Holdings case), a tenderer may have grounds to legally challenge the tender process and seek compensation.

#### EXCLUSION OF TENDERS FROM CONSIDERATION

This clause provides the Commonwealth with the right to exclude a tender from consideration where the response is incomplete, non-compliant with essential requirements, or is clearly non-competitive. The exercise of the discretion is subjective having regard to the evaluation criteria specified in the RFT and the submitted tender response. It is important to notify tenderers of all issues that may lead to the exclusion of their tender from further consideration. An attempt by a government department to exclude a tender for failure to comply with an aspect of a tender process where the tenderer had not been informed that a failure to comply could lead to exclusion of the tender was adversely commented on by the court in the MacMillan case. Advice should be sought from Contracting Policy & Operations Branch prior to excluding a tender from consideration. The reasons for excluding a tender from consideration under this clause should be well documented. Drafters should note that there is no obligation on the Commonwealth to exclude a tender for any of the circumstances identified in this clause, however, exercise of the discretion should be consistent across tenderers.

#### UNLAWFULLY OBTAINED INFORMATION AND IMPROPER ASSISTANCE

This clause warns each tenderer that if it uses:

- a. the improper assistance of current or former Commonwealth employees;
- b. unlawfully obtained material; or
- c. information obtained in breach of an obligation of confidentiality to the Commonwealth,

to compile its tender, the Commonwealth may exclude the tender from further consideration.

What constitutes improper assistance will depend on the circumstances. However, assistance given which involves disclosure of information in breach of a person's duties under the *Crimes Act* or *Public Service Act* would clearly be improper. It should also be noted that most consultants and professional service providers to the Commonwealth enter into confidentiality agreements. Therefore information that is disclosed to a tenderer in breach of a consultant's or professional service provider's confidentiality agreement should not be included in a tender or used to compile a tender as the Commonwealth will be entitled to exclude the tender from consideration in accordance with this clause.

#### THE HUGHES CASE AND PROCESS CONTRACTS

This clause makes it clear to tenderers that the Commonwealth does not intend the conditions of tender to give rise to a process contract between the Commonwealth and each tenderer as was found to have existed in Hughes case. Because a court will look to substance rather than form in determining whether a process contract has been created, a mere statement that it is not the intention of the parties to enter into contractual obligations will not necessarily be sufficient to protect the Commonwealth from such a claim. However, it remains the case that Defence does not intend to create process contracts in relation to its tendering processes and this clause informs tenderers of this fact.



## CLARIFICATION OF TENDERS

This clause provides the Commonwealth with the right to seek clarification from a tenderer where there is any ambiguity or uncertainty in the tender. Information should be sought only for matters requiring evaluation under the RFT process, as requests for excessive data will increase the cost of tendering. The Commonwealth's use of this additional information is limited to the assessment and interpretation of the tender and evaluating the cost and risk to the Commonwealth of accepting the tender. The Commonwealth may also visit a tenderer and its proposed Subcontractors to verify and examine facilities, capabilities and tendered Supplies, to the extent permissible by the tenderer and proposed Subcontractor. Care must be taken so that tenderers are not afforded an opportunity to amend their tenders. Any new information presented which would have the effect of altering the tender submitted must not be taken into account in the evaluation of tenders.

## SHORTLISTING OF TENDERS

After an initial evaluation, tenders may be shortlisted. The shortlisting stage is used to decline tenders which are clearly non-competitive and have no reasonable prospect of exhibiting the best value for money compared to other tenders. The shortlisting process should be conducted in accordance with the Tender Evaluation Plan (TEP). Where tenders will be declined as a result of the shortlisting stage, a shortlisting report should be developed. Declined tenderers should be informed promptly that their tender has been declined.

### Drafter's action:

#### Volume 1

Prior to release of the RFT, drafters must ensure that all necessary criteria are included in this clause.

Where the Commonwealth wishes to have the right to exclude a tender from further consideration should it be non-compliant with a particular requirement, drafters must ensure that the requirement is marked as essential in the specification in the SOW, so as to trigger the Commonwealth's right under this clause.

Prior to release of the RFT, drafters should include the optional clause where a sample of the tendered supplies is required for tender evaluation purposes.

#### Volume 2

Prior to the release of the RFT, drafters must ensure that all necessary criteria are included in this clause.

Where the Commonwealth wishes to have the right to exclude a tender from further consideration should it be non-compliant with a particular requirement, drafters must ensure that the requirement is marked as essential in the specification in the SOW, so as to trigger the Commonwealth's right under this clause.

### Related clauses:

The **Declaration By Tenderer** Annex to the conditions of tender requires the tenderer to declare that its tender has been compiled without improper assistance or unlawfully obtained information.

### Use of Former Defence Personnel in Tender Preparation

Reference:

Volume 1 Clause 3.3

Volume 2 Clause 3.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To advise tenderers that they must seek Defence's approval before allowing former Defence personnel to contribute to a tender response

Policy: *Crimes Act*  
*Criminal Code Act*  
*DPPM Section 3, Chapter 3.13*  
*Defence Workplace Relations Manual (DRB 19)*  
*DI(G) 25-4 Notification of Post Separation Employment*

Guidance: The clause requires tenderers to notify Defence and seek permission before allowing a former Defence employee, who meets certain criteria, to be involved in the preparation of the tender response.

Where a contract may be awarded to a former employee (or a Contractor employing that individual), consideration should be given to that person's previous Defence employment. Potential favouritism, or unfair advantage would be reduced if that person:

- a. had not been employed by Defence in the last two years; and/or
- b. had not been employed by Defence in a role or capacity directly related to the task for which tenders are sought.

The **Use of Former Defence Personnel in Tender Preparation** clause of the conditions of tender places a specific prohibition on the tenderer from using a person who has been involved in the preparation of the Request for Tender documentation unless Defence has given its approval. Clause 3.3 b. refers to a circumstances where the former Defence employee has been involved in the project to which the tender relates in the previous 12 months, and the involvement of such a person is prohibited, unless Defence has given its approval. Clause 3.3 c operates to prohibit any person employed by Defence in the immediately proceeding 6 months, from being included in the preparation of the tender unless Defence has given its approval.

Where ex-Defence staff are employed by existing or potential contractors, issues arise regarding 'inside' knowledge. The *Crimes Act* and the *Criminal Code Act* constrain former Commonwealth employees from passing on information that they obtained by virtue of their employment, and which at the time of ceasing Commonwealth employment, it was their duty not to disclose. In matters relating to Defence procurement, the use by a tenderer of any inside information which has been gained by virtue of an employee's former position with the Commonwealth, can be perceived as giving them an unfair competitive advantage over others tendering for the work.

A distinction however should be drawn between knowledge that is obtained by the nature and environment of the tasks, and knowledge that relates directly to the trade or profession of the employee. Whilst the former knowledge is the legitimate 'property' of the government, and can therefore be protected, the latter is a matter of professional skill which

cannot be constrained. Unfortunately, these two classifications of knowledge are not always easy to delineate.

If there is evidence that a tender was developed with the inappropriate and unauthorised assistance of a former Defence employee, ADF members or service provider and, as a consequence it is believed that the tender should be excluded, the matter should be referred to the chair of the tender evaluation committee, with an explanation of the relevant evidence, reference to any applicable procedural clauses in the RFT and a recommended course of action.

Drafter's Action: Nil

Related clauses: The **Tender Evaluation** clause of the conditions of tender states that tenderers shall not use the improper assistance of employees or former employees of the Commonwealth in compiling their tenders. Under this clause the Commonwealth may not further consider a tender which has been compiled using such assistance.

The **Post Defence Separation Employment** clause of the draft conditions of contract provides guidance on the personnel policy relating to post defence separation employment and the contractual prohibition on the use of former defence personnel in performance of Defence contracts.

## Negotiation

### Reference:

Volume 1 Clause 3.4

Volume 2 Clause 3.4

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To advise tenderers that the Commonwealth may conduct negotiations with one or more tenderers.

Policy: *DPPM Section 5, Chapter 5.7*

Guidance: Generally Defence undertakes negotiations with a single preferred tenderer, and in the event that negotiations with that tenderer are unable to be concluded satisfactorily then the Commonwealth may choose to negotiate with the next most-preferred tenderer.

In certain situations Defence may consider negotiating with more than one shortlisted tenderer. Shortlisted tenderers are those tenderers whose tenders have been evaluated and assessed as being serious contenders for the award of the proposed contract. The option to conduct parallel negotiations with more than one tenderer affords the Commonwealth the opportunity to complete the tender evaluation and contract negotiation processes simultaneously and reduce the time between release of the RFT and Contract signature.

### ISSUES ASSOCIATED WITH NEGOTIATIONS

In all negotiations, it is important that the Commonwealth informs tenderers that any communications or representations made are subject to contract. Careful consideration should be given to all communications and representations made during the negotiation process to ensure that statements do not give rise to claims against the Commonwealth based on misrepresentation or estoppel.

It is also important to ensure that during parallel negotiations, the Commonwealth treats each tenderer fairly and that if any additional information is provided, it is provided by the Commonwealth to all tenderers involved in negotiations. Advice should be sought from Contracting Policy & Operations Branch prior to commencing parallel negotiations.

### PARALLEL NEGOTIATIONS

The Commonwealth should only undertake parallel negotiations where two or more tenderers meet the requirements of the proposed contract and on the basis that no other tenders could be assessed as representing better value for money.

Parallel negotiations can improve those areas of a tender response that are less detailed or satisfactory than the Commonwealth would prefer. If, following detailed evaluation of tenders, parallel negotiations are proposed to be undertaken, the Commonwealth would normally write to the shortlisted tenderers advising them of the process for the conduct of the negotiations (including timeframe, negotiating teams, areas for negotiation, the process for any risk reduction workshops etc). Parallel negotiations must be undertaken consistently with probity requirements to ensure that each tenderer is treated fairly. Further guidance on probity issues is provided below.

It should be noted that the conduct of parallel negotiations is extremely demanding and can be resource intensive, especially for the Commonwealth. While the conduct of prior planning and the maintenance

of configuration control of documentation is important in all negotiations, it is crucial when undertaking parallel negotiations.

#### PROBITY ISSUES

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As noted above, it is important to ensure that during parallel negotiations, the Commonwealth treats each tenderer fairly and that if any additional information is provided, it is provided by the Commonwealth to all tenderers. The Commonwealth must also ensure that it maintains the confidentiality of each tenderer's information. Care should be taken that the Commonwealth does not, even inadvertently, use parallel negotiations to play one tenderer off against the other. The Commonwealth can not consistent with probity requirements, require a tenderer to participate in parallel negotiations where, irrespective of the outcome of the negotiations, the Commonwealth would not in any event rank the tenderer ahead of another tenderer based on the evaluation criteria. In other words, the Commonwealth should not require a tenderer to participate in parallel negotiations simply to maintain competitive tensions with another tenderer.

Advice should be sought from Contracting Policy & Operations Branch prior to commencing parallel negotiations. It is recommended that a probity adviser be engaged where parallel negotiations with two or more shortlisted tenderers will be conducted.

Drafter's action: Nil

Related clauses: The **Amendment of RFT** clause of the conditions of tender informs tenderers of the process for amending a RFT.

### Debriefing of Tenderers

Reference:

Volume 1 Clause 3.5

Volume 2 Clause 3.5

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To inform both unsuccessful tenderers and the successful tenderer of their right to request a written or oral debriefing after the Contract has been awarded. To outline the information the Commonwealth is entitled to disclose in the debrief.

Policy: *Commonwealth Procurement Guidelines and Best Practice Guidance*  
*DPPM – Section 3, Chapter 3.11 and Section 5, Chapters 5.7 and 5.8*  
*Freedom of Information Act 1982*

Guidance: The Commonwealth will only disclose information concerning the successful tenderer that is publicly available.

#### GAZETAL OF CONTRACT INFORMATION

As part of the Commonwealth's obligation to ensure accountability of public money in accordance with the *Commonwealth Procurement Guidelines and Best Practice Guidance*, a description of the contract, the value of the contract and the name of the successful tenderer are required to be disclosed in the Government Gazette. Other than the Contract Price and the name of the successful tenderer, no information about the successful tender or the Contract is required or allowed to be revealed.

#### SENATE ORDER INTO DEPARTMENTAL AND AGENCY CONTRACTS

In response to Senate Order 192 (Department and Agency Contracts) agencies are required to publish on their website a list of all agency contracts valued at or over \$100,000. Details that are published include the name of the supplier, the subject matter of the contract, the value of the contract, whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, a statement of the reason for confidentiality, an estimate of the cost of complying with the order and a statement of the method used to make the estimate.

#### INFORMATION PROVIDED TO A TENDERER IN RELATION TO ITS TENDER

The extent of information that the Commonwealth will disclose to tenderers in regard to their own tender will be limited to information relating to the evaluation criteria outlined in the **Tender Evaluation** clause of the conditions of tender. Drafters should be aware that if additional or alternative evaluation criteria are included in the **Tender Evaluation** clause of the conditions of tender, the Commonwealth will be required to provide feedback to tenderers in their debriefing in regard to the tenderer's performance against the additional or alternative criteria.

#### INFORMATION ACCESSIBLE UNDER THE FOI ACT

It should be noted that a tenderer is also able to obtain information pursuant to the *Freedom of Information Act 1982* (FOI Act). This legislation allows the Australian community access to information in the possession of the Commonwealth Government, limited by certain exceptions including the protection of private and business affairs of other persons or organisations. In terms of tender information, section 43 of the

Act exempts from disclosure documents relating to business, commercial or financial affairs of another person or organisation where this would diminish the commercial value of the information. It is therefore unlikely that a tenderer would be provided with information in excess of that pertaining to its own tender under the FOI Act.

Drafter's action: Nil

Related clauses: Tenderers may contact the Contact Officer specified in the **Contact Officer for RFT Inquiries** clause of the conditions of tender for a debriefing.

The **Tender Evaluation** clause of the conditions of tender sets out the tender evaluation criteria that tenderers will be debriefed against.





**PART 1 – GUIDANCE ON THE ANNEXES TO THE CONDITIONS OF TENDER**  
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**ANNEX A****DECLARATION BY TENDERER****DECLARATION BY TENDERER**

<u>Reference:</u>	Annex A, clause 1
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To provide the format for the declaration to be submitted by each tenderer.
<u>Policy:</u>	<i>Crimes Act 1914</i> <i>Public Service Act 1999</i> <i>Trade Practices Act 1974</i>

Guidance: The declaration submitted in accordance with Annex A to the conditions of tender is the formal acknowledgment by a tenderer that it is submitting a tender to the Commonwealth in response to the RFT.

**PURPOSE OF THE DECLARATION**

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The declaration identifies the:

- a. legal entity submitting the tender;
- b. tender validity period for the tender; and
- c. tenderer's contact officer for inquiries and correspondence in relation to the submitted tender.

The declaration also contains a statement that the tender has been compiled without any improper assistance from current or former Commonwealth employees and without the use of information obtained unlawfully or in breach of an obligation of confidentiality to the Commonwealth.

**IDENTITY OF THE TENDERER**

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The declaration formally identifies the legal entity submitting the tender. Where there has been a shortlisting process prior to release of the RFT, drafters should ensure that the tenderer identified in the declaration is one of the companies shortlisted by the shortlisting process. Otherwise, tenderers excluded from the shortlist may have grounds for commencing legal action.

Confusion can sometimes arise where the tenderer is a part of a group of companies, all of which have similar names. It is important that officers conducting the tender evaluation carefully review the information provided in the declaration and ensure that information submitted in response to the other Annexes, in particular the **Commercial Information to Be Provided by Tenderers** Annex to the conditions of tender, relates to the legal entity specified in the declaration.

Where a tenderer is successful, drafters must ensure, prior to Contract signature, that the company described as the Contractor is the same legal entity that submitted the successful tender. Drafters should check the information included on the front page of the Contract with the information provided by the successful tenderer in its declaration.

**TENDER VALIDITY PERIOD**

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By submitting a tender, the tenderer is making an offer to the Commonwealth to provide the Supplies. Each tenderer must include in its declaration the period for which its offer will remain open for acceptance by the Commonwealth. A tenderer may be bound by the time period indicated in its declaration and therefore tenderers should give careful consideration to the time period included. The Commonwealth's preferred tender validity period must be included in the **Period of Tender** clause of the conditions of tender prior to release of the RFT.

## ANNEX A

### ENFORCEABILITY OF THE TENDER VALIDITY PERIOD

It should be noted that since the Commonwealth and the tenderer have not entered into a process contract, the Commonwealth may not be able to enforce the tender validity period specified in the Declaration by Tenderer where the tenderer seeks to revoke its offer prior to expiry of the tender validity period. There is a possibility that the Commonwealth may have a claim under *section 52 of the Trade Practices Act 1974* for the deceptive or misleading conduct of the tendering company or that it may rely on the principle of estoppel to enforce the tender validity period, if it can be shown that the Commonwealth has suffered detriment due to revocation of the offer. It is, however, unlikely that the Commonwealth will want to pursue a claim on either basis in order to retain the tenderer in the tender process, as the revocation of its offer indicates a general reluctance on the part of the tenderer to enter into a contract and an ongoing relationship with the Commonwealth. Prior to any action being taken to enforce a tender validity period advice should be sought from Contracting Policy and Operations Branch.

### CONTACT OFFICER FOR INQUIRIES AND CORRESPONDENCE

The declaration also identifies the tenderer's contact officer for inquiries and correspondence in relation to the tender. Where the tenderer's contact officer details change during the tender validity period, the new contact details should be provided to the Commonwealth's contact officer identified in the **Contact Officer for RFT Inquiries** clause of the conditions of tender as soon as possible following the change. This will ensure that all correspondence from the Commonwealth during the tender validity period is received by the tenderer on a timely basis.

### IMPROPER ASSISTANCE

The **Tender Evaluation** clause of the conditions of tender warns each tenderer that if it uses:

- a. the improper assistance of current or former Commonwealth employees;
- b. unlawfully obtained material; or
- c. information obtained in breach of an obligation of confidentiality to the Commonwealth,

to compile its tender, the Commonwealth may exclude the tender from further consideration. When signing the declaration, each tenderer is therefore requested to certify that its tender has been compiled without the use of improper assistance from current or former Commonwealth employees and without the use of information obtained unlawfully or in breach of an obligation of confidentiality to the Commonwealth.

What constitutes improper assistance will depend on the circumstances. However, assistance given which involves disclosure of information in breach of a person's duties under the *Crimes Act* or *Public Service Act* would clearly be improper. It should also be noted that most consultants and professional service providers to the Commonwealth enter into confidentiality agreements. Therefore information that is disclosed to a tenderer in breach of a consultant's or professional service provider's confidentiality agreement should not be included in a tender or used to compile a tender as the Commonwealth will be entitled to exclude the tender from consideration in accordance with the **Tender Evaluation** clause of the conditions of tender.

**Drafter's action:** Prior to the release of the RFT, drafters must include the RFT Number in the Declaration by Tenderer. Drafters should not insert any information regarding the tender validity period, as this should be inserted by the tenderer.

**Related clauses:** The **Contact Officer for RFT enquires** clause of the conditions of tender informs tenderers of the Contact Officer for all inquiries in relation to the RFT.

**ANNEX A**

The **Commercial Information to be Provided by Tenderers** annex to the conditions of tender notifies tenderers of the commercial information that is required to be delivered as part of their tender.

The **Technical Information to be Provided by Tenderers** annex to the conditions of tender notifies tenderers of the technical information that is required to be delivered as a part of their tender.

The **Period of Tender** clause of the conditions of tender identifies the Commonwealth's preferred period for which a tenderer must hold its tender open for acceptance by the Commonwealth.

The **Tender Evaluation** clause of the conditions of tender notifies tenderers that tenders compiled with the improper assistance of Commonwealth employees or the use of unlawfully obtained information or information that breaches a confidentiality agreement may be excluded from consideration by the Commonwealth.

A tenderer must state any non-compliances with the terms of the draft RFT in the **Statement of Non-Compliance** Annex to the conditions of tender.



**ANNEX B****STATEMENT OF NON-COMPLIANCE****STATEMENT OF NON-COMPLIANCE**

<u>Reference:</u>	Annex B, clause 1
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To elicit from each tenderer the extent to which it does not comply with the terms of the RFT.
<u>Policy:</u>	Nil
<u>Guidance:</u>	This annex to the conditions of tender requests tenderers to state any non-compliances with the: <ul style="list-style-type: none"> <li>a. conditions of tender;</li> <li>b. Annexes to the conditions of tender;</li> <li>c. draft conditions of contract;</li> <li>d. Attachments to the draft conditions of contract;</li> <li>e. draft SOW; and</li> <li>f. Annexes or Attachments to the draft SOW.</li> </ul>

The Statement of Non-Compliance reveals any areas in which a tenderer is not willing to accept the distribution of risk proposed by the Commonwealth in the draft Contract as well as any areas in which a tenderer can not meet the technical requirements for the Supplies. The Statement of Non-Compliance is therefore critical to the Commonwealth's evaluation of tenders.

**STATEMENT OF NON-COMPLIANCE FORMAT**

Tenderers must state any non-compliance with the terms of the RFT. Where a tenderer does not comply with a clause, the tenderer must state the extent, justification for and impact of the non-compliance. Tenderers are also required to provide full details of any alternative proposal, including an alternative clause where the non-compliance is in relation to a draft condition of contract. This will assist the Commonwealth to understand the extent of, and reasons for, the non-compliance and to determine the level of risk associated with the non-compliance.

Tenderers must include the location of any supporting compliance details that can be found in other areas of the tender in the Statement of Non-Compliance.

Drafter's action: Nil

Related clauses: Nil





**ANNEX C****COMMERCIAL INFORMATION TO BE PROVIDED BY TENDERERS****PRICE AND DELIVERY SCHEDULE**

- Reference:** Annex C, clause 1
- Sponsor:** Contracting Policy & Operations and Materiel Finance Division
- Status:** Core
- Purpose:** To elicit the price and delivery details proposed by each tenderer and to provide each tenderer with an appropriate place to indicate the Exchange Rates applicable to its tender.
- Policy:** It is Defence policy that payments shall be payable in source currency unless foreign currency amounts otherwise payable under the Contract are insignificant. Defence will make a determination of whether the amounts are significant after receipt of tenders. Where the Contract Price is to be payable in Australian currency only, the Contractor will be entitled to claim for fluctuations in the exchange rate between the Base Date and the date for payment.
- It is Defence policy that contracts of up to two years duration should be entered into on a firm price basis. Where a contract is to extend beyond two years the Department's preference is that price variation clauses should be included to recompense the Contractor for increases in the cost of labour and materials. Failure to adopt a price variation clause in a contract which runs for more than two years may result in tenderers including a significant contingency amount to mitigate unforeseeable increases in labour and materials costs.
- A New Tax System (Goods and Services Tax) Act 1999*
- DPPM Section 2, Chapter 2.2*
- Guidance:** Along with the Statement of Compliance, the Price and Delivery Schedule is critical to the evaluation of tenders as it presents each tenderer's proposed price and delivery schedule for the Supplies.

**PRICE AND DELIVERY SCHEDULE FORMAT**

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Prior to release of the RFT, drafters must select one of two options at Table 1 for the format of the Price and Delivery Schedule. Option A must be selected where it is expected that the Supplies will be sourced in Australia and therefore no information is required to be obtained in relation to customs duty and unit prices in foreign currency. Option B must be selected where it is expected that all or some of the Supplies will be imported as it provides the Commonwealth with detailed information on customs duty and unit prices in foreign currency as well as Australian dollars. If drafters are unsure prior to release of the RFT whether Supplies will be sourced in Australia or overseas, drafters should select option B at Table 1.

Prior to release of the RFT, drafters must include at Table 1 a brief description of each item or service required under the proposed contract and the item number in a simple numerical sequence or Contract Work Breakdown Structure numerical sequence, if known. Drafters should also include the number of items required and the proposed delivery point and delivery date for each item if known prior to release of the RFT.

**PRICING AND PRICE BASIS**

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Prices for imported items and services should be stated in foreign currency and all prices must be in Base Date dollars. The Base Date is defined in the draft conditions of contract and should be the date one month prior to the date on which tenders close. The tendered prices should include all the costs of complying with the conditions of tender and providing the Supplies required under the proposed contract. The tendered prices should include all overseas and Australian taxes and charges applicable at the Base Date, including Australian GST.

## ANNEX C

The note to tenderers discusses the application of *A New Tax System (Goods and Services Tax) Act 1999* to the proposed contract. Tenderers must identify in the Price and Delivery Schedule the amount of GST that will be applicable to each item or service as well as a GST exclusive price and GST inclusive price for each item or service.

Drafters must select the appropriate price basis option at clause 1.4 of Annex C.

Option A should be included where the resultant contract will be firm priced and no price variation will be allowed. This option should be selected where it is expected that the Supplies will be sourced wholly in Australia.

Option B allows for price variation reflecting fluctuations in exchange rates only. This Option should be included where it is expected some of the Supplies will be imported or if drafters are unsure of the source of the Supplies.

In accordance with Defence policy, payments under any resultant contract will be made solely in Australian currency only where foreign currency amounts payable under the Contract are insignificant. A determination of whether the amounts are significant will be made by Defence after receipt of tenders. Where the resultant contract is to be payable in Australian currency only, the Contractor will be entitled to claim for fluctuations in exchange rate between the Base Date and the date for payment.

In the event that the resultant Contract is written in Australian dollars and the Contract Price is subject to fluctuations in exchange rates tenderers must provide the following details in the response to the RFT:

- a. the percentage of duty paid tendered price subject to exchange rate variation;
- b. the exchange rate upon which the tendered price is based; and
- c. the name and address of the bank or financial institution whose rates are applicable.

### PRICE VARIATION FOR FLUCTUATIONS IN THE COST OF LABOUR AND MATERIALS

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It should be noted that Volume 1 of *ASDEFCON (Complex Materiel)* does not provide for price variation reflecting fluctuations in the cost of labour and materials. As Volume 1 is intended for use in contracts of no more than two years duration, this clause reflects Defence policy that contracts of up to two years duration should be entered into on a firm price basis. Where it is expected that the resultant contract duration will exceed two years, it is recommended that Volume 2 of *ASDEFCON (Complex Materiel)* be used or that the appropriate clause from that volume be inserted into Volume 1. Further advice can be obtained from Contracting Policy and Operations Branch staff.

### INFORMATION TO BE PROVIDED BY TENDERERS

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Tenderers must complete the Price and Delivery Schedule in accordance with the guidance provided.

### EVALUATION OF TENDERS

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For the purposes of evaluation, foreign currency elements of the tendered price will be calculated at the spot selling rate of exchange against the Australian dollar quoted by the Commonwealth Bank of Australia at the Base Date.

**Drafter's action:** Prior to release of the RFT, drafters should select the appropriate price basis option at clause 1.4 of Annex C.

Prior to release of the RFT, drafters should also include the appropriate option for the format of the **Price and Delivery Schedule** at Table 1. Drafters should also include at Table 1 the item number in a simple numerical sequence or Contract Work Breakdown Structure numerical sequence in column (a), if known, a brief

**ANNEX C**

description of each item or service required in column (b), the number of items required in column (c) and the proposed delivery point and delivery date for each item.

Related clauses: The **Description of Proposed Solution** clause of the conditions of tender requires each tenderer to provide its recommendations with respect to Support Resources and Training.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Price Variation** clause where included, details how payments will be varied for fluctuations in exchange rates.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract will include the agreed **Price and Delivery Schedule**.

**ANNEX C****ECONOMIC ORDER QUANTITY**

- Reference:** Annex C, clause 2
- Sponsor:** Contracting Policy & Operations and Materiel Finance Division
- Status:** Optional
- Purpose:** To provide information on whether alternative quantities of the Supplies will be more economical for the Commonwealth.
- Policy:** Nil
- Guidance:** This clause requests tenderers to indicate whether quantities other than the quantities requested by the Commonwealth in the **Price and Delivery Schedule** at clause 1 of Annex C would represent better value for money to the Commonwealth.
- It is important to note that this request for information and alternative quantities of the Supplies does not bind the Commonwealth. However, where it is clear that alternative quantities will not be accepted this clause should not be included in the RFT.
- Where tenderers are able to offer lower prices per unit for items of the Supplies in alternative quantities than the quantities requested by the Commonwealth they are to provide details in an additional schedule in the format of the Price and Delivery Schedule.
- Drafter's action:** Nil
- Related clauses:** The **Price and Delivery Schedule** clause of the annexes to the conditions of tender elicits price and delivery information for each item of the Supplies.

**ANNEX C****FURTHER QUANTITIES AND OPTIONAL EXTRAS**

<u>Reference:</u>	Annex C, clause 3
<u>Sponsor:</u>	Contracting Policy & Operations and Materiel Finance Division
<u>Status:</u>	Optional. To be included where the <b>Option for Further Quantities and Optional Extras</b> clause of the draft conditions of contract is included to provide the Commonwealth with an option to purchase additional quantities of Supplies and/or optional extras.
<u>Purpose:</u>	To elicit details from tenderers in relation to an option for further quantities and/or optional extras.
<u>Policy:</u>	Nil
<u>Guidance:</u>	It is important to note that this request for information on additional quantities of Supplies and/or optional extras does not bind the Commonwealth. However, where it is clear that additional quantities or optional extras will not be required, this clause, the <b>Option for Further Quantities and Optional Extras</b> clause of the draft conditions of contract and the <b>Schedule of Prices for Further Quantities and Optional Extras</b> at Attachment C should not be included in the RFT.

**INFORMATION TO BE PROVIDED TO TENDERERS**

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Prior to release of the RFT, drafters must include a brief description of the additional quantities of Supplies and/or optional extras that the Commonwealth may require, the quantity required and the proposed delivery points in Attachment C to the draft conditions of contract.

Each tenderer must state whether it is prepared to supply further quantities of the Supplies and/or optional extras. Where a tenderer is prepared to supply further quantities of Supplies and/or optional extras it must provide the same information required in the **Price and Delivery Schedule** clause of the **Commercial Information to be Provided by Tenderers** annex in a separate schedule for the further quantities and optional extras.

Tenderers are also required to specify any additional or varied terms and conditions that will apply to any further quantities or optional extras and the time period during which the Commonwealth may exercise the option to acquire additional quantities and optional extras.

Drafter's action: Nil

Related clauses: The **Option for Further Quantities and Optional Extras** clause of the draft conditions of contract provides the Commonwealth with an option to purchase additional quantities of Supplies and/or optional extras.

The **Schedule of Prices for Further Quantities and Optional Extras** Attachment of the conditions of contract details the agreed Price and Delivery Schedule for the additional quantities of Supplies and/or optional extras, and additional or varied terms that will apply where the Commonwealth exercises its option under the **Option for Further Quantities and Optional Extras** clause of the conditions of contract.

**ANNEX C****COST INVESTIGATION OF SOLE SOURCE TENDERS**

- Reference:** Annex C, clause 4
- Sponsor:** Contracting Policy & Operations and Materiel Finance Division
- Status:** Optional. This requirement may be included where the RFT is sole sourced.
- Purpose:** To require the sole source tenderer to facilitate a cost investigation of its tender by providing relevant information as part of its RFT response.
- Policy:** Defence policy strongly recommends that all sole source tenders are cost investigated.
- Commonwealth Procurement Guidelines and Best Practice Guidance*  
*DPPM – Section 4, Chapter 4.7*  
*Financial Management and Accountability Act 1997*
- Guidance:** Since there is a lack of competition in a sole source tender, conducting a cost investigation of the tender is an effective way to determine whether the tendered price is reasonable and offers value for money in accordance with Commonwealth procurement policy. In an open tender process the Commonwealth will have alternative mechanisms to satisfy itself that the tender constitutes value for money, such as comparison of tenders and tender pricing.
- This clause requires tenderers to provide a cost break-up showing all elements in the tendered price as part of the tender response. In most cases this information will be obtained through the cost investigation conducted as part of the tender evaluation of a sole source RFT. However, in circumstances where there are relatively short timeframes between receipt of tenders, evaluation and Contract signature, requesting this information as part of the RFT response, rather than obtaining it during tender evaluation, may expedite the process of cost investigation.
- Drafter's action:** Nil
- Related clauses:** The **Cost Investigation of Sole Source Tenders** clause of the conditions of tender advises tenderers that the sole source tender may be cost investigated.

**ANNEX C****COMPANY PROFILE / ASSESSMENT OF TENDERER'S ABILITY TO SUPPLY**

- Reference:** Annex C, clause 5
- Sponsor:** Contracting Policy & Operations
- Status:** Core
- Purpose:** To request from tenderers a company profile to assist in tender evaluation.
- Policy:** The financial and corporate viability of tenderers must be considered during the tender evaluation process to assess whether the tenderer will be capable of fulfilling the contractual obligations under any resultant contract.
- DPPM Section 3, Chapter 3.3*
- Guidance:** This clause requests each tenderer to provide information relevant to its commercial, technical and financial capacity to perform any resultant contract as well as details relevant to the tenderer's company profile including:
- a. the tenderer's background, experience and resources relevant to the proposed contract;
  - b. the tenderer including its A.B.N., A.C.N., place of business and place of incorporation; and
  - c. civil or criminal litigation likely to adversely affect the tenderer's performance of any resultant contract.

**INCLUSION OF ADDITIONAL INFORMATION**

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Drafters should note that the list of details included in this clause is not exhaustive, however, drafters should seek advice from Contracting Policy and Operations Branch prior to any additional information being requested. When reviewing the need to expand the list within this clause, drafters should consider the usefulness of the additional information to the tender evaluation and the impact the request for additional information will have on the cost of tendering.

**Drafter's action:** Nil

**Related clauses:** The **Tender Evaluation** clause of the conditions of tender entitles the Commonwealth to exclude from consideration tenders that are assessed as clearly non-competitive.

**ANNEX C****WARRANTY**

<u>Reference:</u>	Annex C, clause 6
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To request from tenderers specific details in relation to the <b>Warranty</b> clause in the draft Contract.
<u>Policy:</u>	Nil
<u>Guidance:</u>	Tenderers must provide the details of the Warranty coverage (if any) being tendered where they differ from that sought in the draft Contract. Where a tenderer is fully compliant with the terms of the draft Contract in respect of Warranty, the tenderer will only have to provide the price for the Warranty coverage. The Commonwealth reserves the right to decline the tendered Warranty coverage and in that case deduct the price nominated from the tendered price.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	The <b>Warranty</b> clause of the draft conditions of contract places an obligation on the Contractor to remedy defects in design, materials or workmanship in the Supplies for a specified period and establishes the process for carrying out remedial work.



**ANNEX C****COMMERCIAL-IN-CONFIDENCE INFORMATION**

- Reference:** Annex C, clause 7
- Sponsor:** Contracting Policy & Operations
- Status:** Core
- Purpose:** To seek information from the tenderers in relation to which parts of the draft Contract they consider to be Commercial-in-Confidence Information.
- Policy:** *DPPM – Section 3, Chapter 3.11*
- Guidance:** The **Commercial-in-Confidence** clause requests tenderers who are proposing contract provisions they consider to be Commercial-in-Confidence Information to identify, for each clause, the reason the provision is considered to be Commercial-in-Confidence Information and provide additional justification as to why the reason applies. Defence has developed six standard reason to classify information as Commercial-in-Confidence Information.
- The six standard reasons are:
- a. commercially sensitive information, disclosure of which is not in the relevant party's best interest;
  - b. details about commercially sensitive pricing information including profit margins and the underlying price basis;
  - c. details about insurance and liability regimes that are commercially sensitive;
  - d. details about intellectual property regimes that are commercially sensitive;
  - e. details about the capability/services being delivered that are commercially sensitive; and
  - f. details about contractual rights and remedies, including warranties, financial guarantees and securities that are commercially sensitive.
- Information that is included in the public domain, for example Total Contract Price or generic template clauses, is not Commercial-in-Confidence Information.
- Drafter's action:** Nil
- Related clauses:** The **Commercial-in-Confidence Information** clause of the draft conditions of contract outlines that Commercial-in-Confidence Information must be protected from unauthorised disclosure and Contractors must not misuse the term 'Commercial-in-Confidence'.
- The **Commercial-in-Confidence Information** Attachment of the draft conditions of contract will list the conditions of contract and Attachments or the parts of the Attachment, that the parties agree at the Effective Date are Commercial-in-Confidence.

**ANNEX C****FACILITY CLEARANCE REQUIREMENT**

- Reference:** Annex C, clause 8
- Sponsor:** Defence Security Authority
- Status:** Optional. To be included where the Contractor will require access to, or will be producing classified material during the performance of the Contract.
- Purpose:** To obtain details of the type and level of facility clearances held by the tenderer and proposed Subcontractors.
- Policy:** *Defence Security Manual*  
*Defence Security Policy*  
*DPPM Section 3, Chapter 3.9 and Annex 3C*
- Guidance:** This clause requests each tenderer to provide details of premises proposed in its tender for the storage of classified material. Each tenderer is also requested to state whether it holds the security clearance required by the proposed contract and, where the required clearance is not held, to advise of its willingness to undergo the procedures for obtaining the clearance required.

**UNWILLINGNESS TO UNDERGO THE SECURITY PROCESS**

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Most tenderers who do not possess the security clearance required in the draft conditions of contract will indicate a willingness to undergo the process for obtaining the required facility security clearance. If, however, a tenderer indicates that it is not willing to undergo such a process, the Commonwealth will have to consider carefully whether refusal makes it impossible for the tenderer to undertake the work and thus warrants the exclusion of the tenderer's proposal from further consideration by the Commonwealth. Further advice on Defence security issues can be obtained by contacting the Defence Security Authority.

- Drafter's action:** Prior to release of the RFT, when COMSEC material will be necessary under any resultant contract, drafters should include the optional note to tenderers.
- Related clauses:** The **Defence Security** clause of the draft conditions of contract details the security requirements of the Contract and the security classification of work to be performed under the Contract.
- The **Defence Security Compliance** clause of the draft SOW requires the Contractor to undertake the work required to comply with the **Defence Security** clause of the draft conditions of contract.

**ANNEX C****AUSTRALIAN INDUSTRY INVOLVEMENT**

- Reference:** Annex C, clause 9
- Sponsor:** Maritime, Land & Weapons Industry Capability and Standardisation Branch
- Status:** Optional. Must be used where the tendered price is expected to be more than \$A5 million.
- Purpose:** To request tenderers to provide a response to the Australian Industry Involvement (All) requirements of the draft Contract
- Policy:** *Australian Industry Involvement Manual*  
Industry Capability Network at <http://www.icn.org.au>.
- Guidance:** Refer to guidance in Complex Materiel Handbook Volume 2.
- Drafter's action:** If the tendered price is expected to be more than \$A5 million, drafters are to seek advice from Standardisation Branch and Contracting Policy & Operations Branch to determine the tender and Contract requirements for All.
- Related clauses:** The **Australian Industry Involvement (All) Management** clause of the draft SOW is an optional clause that details the work requirements related to the All program.



**ANNEX D****TECHNICAL INFORMATION TO BE PROVIDED BY TENDERERS****DESCRIPTION OF PROPOSED SOLUTION**

<u>Reference:</u>	Annex D, clause 1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core, with optional elements.
<u>Policy:</u>	<i>DI(G) LOG 08-15, 'Regulation of technical integrity of Australian Defence Force materiel'</i> <i>DI(G) LOG 03-6, 'Defence Policy on Integrated Logistic Support'</i>
<u>Guidance:</u>	This clause requests each tenderer to provide a range of details pertaining to its proposed solution to assist with evaluation and source selection.

**PRIME EQUIPMENT**

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Clause 1.1 specifies the required information relating (mainly) to the prime-equipment Supplies. Drafters are reminded that the Specification at Annex A to the SOW should include the requirements for not only the prime equipment, but also the Support Resources and Training. Nevertheless, the requirements of clause 1.1 relate mainly to the prime equipment. Drafters should amend clause 1.1, as required, to meet the specific requirements of the project or procurement activity.

In keeping with the scope of *ASDEFCON (Complex Materiel) Volume 1*, the Commonwealth expects that the prime equipment will be Commercial Off The Shelf (COTS) or Military Off The Shelf (MOTS) products, or production-ready Non-Developmental Items (NDIs), where there will be either no development or only minimal non-critical development. (Refer to clause 3.2.4 of the conditions of tender.) As highlighted in the Note to tenderers in clause 1.1, some of the information requested in this clause is to determine whether or not any development is proposed to enable the Commonwealth to evaluate the risks associated with each offer. The Note to tenderers also highlights that the requirement to provide this information should not be interpreted by the tenderer as an invitation to tender developmental solutions. *ASDEFCON (Complex Materiel) Volume 1* should not be used if any development (other than non-critical development) is required because the template does not provide the appropriate management provisions to cover these situations.

Other elements of clause 1.1 are intended to elicit information to identify all of the products and components, and to determine the scope of any other work that may be required to integrate the prime equipment (or other Supplies) with other equipment or into facilities. As obsolescence can be an important consideration and significant cost driver, information relating to the expected remaining life of the products and components is also requested.

Clause 1.2 enables the tenderers to use product brochures to satisfy, in whole or in part, the information requirements of clause 1.1. This approach helps to reduce the cost of tendering; however, clause 1.2 makes it clear that, if the brochures do not provide all of the information, additional information must be provided.

Drafters are advised that clause 3.2.9 provides staff with the ability to request samples of the tendered Supplies for evaluation purposes.

**SUPPORT**

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Clause 1.3 requires each tenderer to provide specific information relating to the availability of support for the Supplies across the domains of engineering support, maintenance support, supply support and training support. This information enables the scope and availability of in-country support to be evaluated (particularly where this support is strategically important or, simply, more cost-effective), and is intended to assist with the future implementation of any required

## ANNEX D

support arrangements. Drafters should amend clause 1.3, as required, to meet the specific requirements of the project or procurement activity.

### INTEGRATED LOGISTIC SUPPORT

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There are a number of different methods that can be used to define the required Support Resources and Training under *ASDEFCON (Complex Materiel) Volume 1*. The simplest approach is to specify the types and quantities of the Support Resources and Training directly in the Price and Delivery Schedule. This approach would be suitable when the support requirements are straightforward, and the Commonwealth team specifying the requirements has sufficient knowledge of the marketplace and the Supplies to be able to define the types and quantities of the Support Resources and Training upfront. Under this approach, clause 1.4 would not be required, and drafters should insert “Not used” into this clause. The requirements of clauses 1.5 to 1.10 would also need to be amended to ensure that only the necessary information was obtained under this approach.

The more complex approach to specifying the types and quantities of the Support Resources and Training requires the drafter to define the support concept directly into the conditions of tender, and then to seek each tenderer’s recommendations with respect to the Support Resources and Training to enable the support concept to be met (in addition to the requirements of the draft Contract). An example support concept is provided in the Note to drafters above clause 1.4. Drafters need only define the support concept to the extent necessary to enable the Support Resources and Training to be properly determined by the tenderers (i.e. the support concept must identify the support drivers). During contract negotiations, the Commonwealth team negotiates the final quantities and types of Support Resources and Training, which are then incorporated into the Contract using the Price and Delivery Schedule. Drafters also need to amend the requirements of clauses 1.5 to 1.10, as required, to meet the specific requirements of the project or procurement activity.

Note that, under this second approach, the support concept plays no further role in the subsequent Contract. As highlighted in the Note to drafters, the support concept must not be included in the final Contract because it has the potential to conflict with the negotiated outcomes.

To mitigate risks associated with not procuring the actual required number of Support Resources (e.g. due to not having a full understanding of the nature of the prime equipment and/or the support requirements at the time of tendering), the **Further Quantities and Optional Extras** clause of the conditions of contract can be used to capture the negotiated price for these Support Resources.

While clause 3.2.4 of the conditions of tender highlights that the Commonwealth expects that the Supplies will be COTS or MOTS products or production-ready NDIs, drafters should be aware that certain ILS-related Supplies (e.g. Training) may need to be developed to meet the specific requirements of the ADO,

**Drafter's action:** Prior to release of the RFT, drafters are to define the specific requirements associated with this clause in accordance with the preceding guidance.

**Related clauses:** Annex A to the draft SOW provides the Specification for the Supplies required under the Contract.

Clause 3.2.4 of the conditions of tender specifies that the Commonwealth anticipates obtaining Supplies that are COTS or MOTS products or production-ready NDIs.

Clause 3.2.9 of the conditions of tender is an optional clause that requests tenderers to provide a sample of the tendered Supplies.

**ANNEX D**

The **Price and Delivery Schedule** clause of the annexes to the conditions of tender elicits price and delivery information for each item of the Supplies.

The **Option for Further Quantities and Optional Extras** clause of the draft conditions of contract provides the Commonwealth with an option to purchase additional quantities of Supplies and/or optional extras.

The **Schedule of Prices for Further Quantities and Optional Extras** Attachment of the conditions of contract details the agreed Price and Delivery Schedule for the additional quantities of Supplies and/or optional extras, and additional or varied terms that will apply where the Commonwealth exercises its option under the **Option for Further Quantities and Optional Extras** clause of the conditions of contract.

## ANNEX D

**OZONE DEPLETING SUBSTANCES AND HAZARDOUS SUBSTANCES**

- Reference:** Annex D, clause 2
- Sponsor:** Contracting Policy & Operations and Defence Safety Management Agency
- Status:** Core
- Purpose:** To request tenderers to provide details of any Hazardous Substances or Ozone Depleting Substances that the tenderer is proposing to include in the Supplies.
- Policy:** Defence Safety Management Agency website at <http://www.defence.gov.au/dpe/dsma>.  
*Defence Safety Manual Volume 1, Part 1, Chapter 8.*  
*DPPM - Section 3, Chapter 3.10 and Annexes 3F and 3G*  
 National Occupational Health and Safety Commission website at <http://www.nohsc.gov.au>  
*Ozone Protection Act 1989*
- Guidance:** The Commonwealth has a legislative obligation as an employer to take all reasonably practicable steps to protect the health and safety of its employees, Contractors and their staff and other persons at or near Defence workplaces. Commonwealth policy also requires Defence to protect the environment wherever possible. Therefore Defence policy states that Supplies should be free from Ozone Depleting Substances and Hazardous Substances to the maximum extent possible.

**INFORMATION TO BE PROVIDED BY TENDERERS**

This clause requests tenderers to indicate whether they are proposing to include any Ozone Depleting Substances or Hazardous Substances in the Supplies. Where tenderers are proposing to include Ozone Depleting Substances or Hazardous Substances in the Supplies, tenderers must also detail what substances are being proposed and how the substances will be managed.

- Drafter's action:** Nil
- Related clauses:** The **Ozone Depleting Substances and Hazardous Substances** clause of the draft SOW places a contractual obligation on the Contractor to provide Supplies that do not contain Ozone Depleting Substances or Hazardous Substances except for substances authorised by the Commonwealth Representative.
- The **Occupational Health and Safety** clause of the draft conditions of contract places an obligation on the Contractor to provide Supplies that do not render the Commonwealth in breach of its Occupational Health and Safety obligations.



**ANNEX D****DISPOSAL REQUIREMENTS**

- Reference:** Annex D, clause 3
- Sponsor:** Standardisation Branch
- Status:** Core
- Purpose:** To obtain details of any aspects of the Supplies that have special disposal requirements due to legislative, regulatory, security, environmental, or any other restrictions.
- Policy:** *DI(G) LOG 07-5 AMDT No 2, 'Disposal of Surplus Assets and Inventory'*
- Guidance:** The implications of any special disposal requirements need to be factored into the source-selection process because these implications can result in hidden costs or the need to implement unplanned arrangements to enable disposal of aspects of the Supplies. In particular, any legislative or environmental implications need to be looked at closely.
- Drafter's action:** Nil
- Related clauses:** The **Disposal Requirements** clause of the draft SOW places a contractual obligation on the Contractor to deliver a report that details any aspects of the Supplies that have special disposal requirements due to legislative, regulatory, security, environmental, or any other restrictions.
- The **Ozone Depleting Substances and Hazardous Substances** clause of the draft SOW places a contractual obligation on the Contractor to provide Supplies that do not contain Ozone Depleting Substances or Hazardous Substances, except for substances authorised by the Commonwealth Representative.

**ANNEX D****FINAL INSPECTION AND TEST PLAN**

- Reference:** Annex D, clause 4
- Sponsor:** Standardisation Branch
- Status:** Optional. To be included only when the **Final Inspection and Test** clause of the draft SOW (clause 7.1) is selected.
- Purpose:** To obtain a draft Final Inspection and Test (FI&T) Plan (FITP) to enable:
- a. evaluation of each tenderer's plan for Verifying that the Supplies satisfy the requirements of the Contract; and
  - b. the approved FITP (subject to any changes during negotiations) to be incorporated into the Contract at Annex F to the SOW.
- Policy:** *DI(G) LOG 02-1, 'Defence Policy on Quality Assurance'*  
*DI(G) OPS 43-1, 'Defence Test and Evaluation Policy'*  
*DMO Verification and Validation Manual*
- Guidance:** FI&T should be included in the draft SOW when the complexity of the Supplies is such to require Verification or Quality to be assured either fully or partly by FI&T of the Supplies before Acceptance. As for all Verification activities, the requirement for FI&T should be selected based on the risk associated with obtaining Supplies that would not meet the requirements of the Contract. For example, it would be atypical to conduct FI&T of commercial off-the-shelf electronic equipment (e.g. general purpose test equipment or computers).
- If FI&T is included in the draft SOW, then this clause must be included in the conditions of tender to ensure that an endorsed FI&TP is able to be placed on Contract at the Effective Date. Note that clauses 4.2 – 4.6 define the requirements for the contents of the FI&TP.
- Drafter's action:** Prior to release of the RFT, drafters should determine whether or not this clause should be included in the conditions of tender based on the **Final Inspection and Test** clause in the draft SOW.
- After the FI&TP has been agreed during negotiations, drafters should attach the agreed FI&TP to the Contract at **Final Inspection and Test Plan** annex to the SOW.
- Related clauses:** The **Final Inspection and Test** clause of the draft SOW details the formal requirements for Verification that will be applicable to any resultant Contract.
- The **Quality Management Program** clause of the draft SOW details the quality requirements that will be applicable to any resultant Contract.

## ANNEX D

## QUALITY STATEMENT

- Reference:** Annex C, clause 5
- Sponsor:** Standardisation Branch
- Status:** Optional. To be included only when the **Contractor Quality Management Responsibilities** clause of the draft SOW (clause 8.1) is selected.
- Purpose:** To elicit from tenderers information on their quality systems, the application of the quality system to the scope of work under the Contract and control of Subcontractors. This information is required in order to establish a level of confidence in the tenderer's capacity to meet the quality requirements of the proposed contract.
- Policy:** AS/NZS ISO 9001:2000  
 DI(G) LOG 02-1 "Defence Policy on Quality Assurance"  
 DPPM Version 5.0 2004
- Guidance:** A quality system will not always be required under a Contract, particularly in those situations where the nature of the Supplies, their production environment, or their application does not warrant it. In these situations, Final Inspection and Test (as optionally required under the **Verification and Validation** clause in the draft SOW) is assessed as suitable to provide adequate Quality Assurance.

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 QUALITY SYSTEM STANDARD REQUIRED FOR THE PROPOSED CONTRACT
 

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The application of a formal and documented quality system to work performed under a contract assists the Contractor in meeting the quality requirements of the Contract. This also gives the Commonwealth a measure of assurance that adequate quality management practices are in place. Without such a quality system, management of quality can be unstructured and quality issues can sometimes be sacrificed in the interests of cost and schedule.

When this clause is selected, tenderers will be required to provide information relating to the tenderer's quality system. The note to tenderers notifies tenderers that the Commonwealth may assess a tenderer's quality system as part of the tender evaluation process. In accordance with the **Quality Management Program** clause of the draft SOW, the Contractor will be required to be Certified to quality system standard AS/NZS ISO 9001:2000.

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 INFORMATION REQUESTED IN THE QUALITY STATEMENT
 

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The Quality Statement is intended to provide the Commonwealth with a specific suite of information for evaluation. This information is focused on the tenderer's quality capabilities while not being burdensome for the tenderer to produce. The Quality Statement seeks a response from the tenderer in three specific areas, namely:

- a. general information on the tenderer's QMS, including details of the tenderer's Certification status;
- b. scope of QMS in relation to the scope of the proposed work; and
- c. quality management of Subcontractors.

- Drafter's action:** Prior to release of the RFT, drafters should determine whether or not this clause should be included in the conditions of tender based on the **Quality Management Program** clause in the draft SOW.

- Related clauses:** The **Quality Management Program** clause of the draft SOW details the quality requirements that will be applicable to any resultant Contract. This clause also sets out the procedure for seeking Commonwealth Representative approval of non-conforming Supplies, materials or work.

The **Final Inspection and Test** clause of the draft SOW details the formal requirements for Verification that will be applicable to any resultant Contract.



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**ANNEX A****DECLARATION BY TENDERER****DECLARATION BY TENDERER**

<u>Reference:</u>	Annex A, clause 1
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To provide the format for the declaration to be submitted by each tenderer.
<u>Policy:</u>	<i>Crimes Act 1914</i> <i>Public Service Act 1999</i> <i>Trade Practices Act 1974</i>

Guidance: The declaration submitted in accordance with Annex A to the conditions of tender is the formal acknowledgment by a tenderer that it is submitting a tender to the Commonwealth in response to the RFT.

**PURPOSE OF THE DECLARATION**

The declaration identifies the:

- a. legal entity submitting the tender;
- b. tender validity period for the tender;
- c. tenderer's contact officer for inquiries and correspondence in relation to the submitted tender; and
- d. clauses in the conditions of tender and Annexes with which the tenderer does not comply.

The declaration also contains a statement that the tender has been compiled without any improper assistance from current or former Commonwealth employees and without the use of information obtained unlawfully or in breach of an obligation of confidentiality to the Commonwealth.

**IDENTITY OF THE TENDERER**

The declaration formally identifies the legal entity submitting the tender. Where there has been a shortlisting process prior to release of the RFT, drafters should ensure that the tenderer identified in the declaration is one of the companies shortlisted by the shortlisting process. Otherwise, tenderers excluded from the shortlist may have grounds for commencing legal action.

Confusion can sometimes arise where the tenderer is a part of a group of companies, all of which have similar names. It is important that officers conducting the tender evaluation carefully review the information provided in the declaration and ensure that information submitted in response to the other Annexes, in particular Annex D to the conditions of tender, relates to the legal entity specified in the declaration.

Where a tenderer is successful, drafters must ensure, prior to Contract signature, that the company described as the Contractor is the same legal entity that submitted the successful tender. Drafters should check the information included on the front page of the Contract with the information provided by the successful tenderer in its declaration. The only circumstances in which the Contractor's details may vary from the details submitted in the declaration is where the Commonwealth has exercised its discretion under the **Substitution of Tenderer** clause of the conditions of tender to allow a substitution of tenderer. In such a case, drafters must ensure that the substituted tenderer's details are included on the front page of the Contract.

**TENDER VALIDITY PERIOD**

By submitting a tender, the tenderer is making an offer to the Commonwealth to provide the Supplies. Each tenderer must include in its declaration the period for

## ANNEX A

which its offer will remain open for acceptance by the Commonwealth. A tenderer may be bound by the time period indicated in its declaration and therefore tenderers should give careful consideration to the time period included. The Commonwealth's preferred tender validity period must be included in the **Period of the Tender** clause of the conditions of tender prior to release of the RFT.

### ENFORCEABILITY OF THE TENDER VALIDITY PERIOD

It should be noted that since the Commonwealth and the tenderer have not entered into a process contract, the Commonwealth may not be able to enforce the tender validity period specified in the Declaration by Tenderer where the tenderer seeks to revoke its offer prior to expiry of the tender validity period. There is a possibility that the Commonwealth may have a claim under *section 52 of the Trade Practices Act 1974* for the deceptive or misleading conduct of the tendering company or that it may rely on the principle of estoppel to enforce the tender validity period, if it can be shown that the Commonwealth has suffered detriment due to revocation of the offer. It is, however, unlikely that the Commonwealth will want to pursue a claim on either basis in order to retain the tenderer in the tender process, as the revocation of its offer indicates a general reluctance on the part of the tenderer to enter into a contract and an ongoing relationship with the Commonwealth. Prior to any action being taken to enforce a tender validity period advice should be sought from Contracting Policy & Operations Branch.

### CONTACT OFFICER FOR INQUIRIES AND CORRESPONDENCE

The declaration also identifies the tenderer's contact officer for inquiries and correspondence in relation to the tender. Where the tenderer's contact officer details change during the tender validity period, the new contact details should be provided to the Commonwealth's contact officer identified in the **Contact Officer for RFT Inquiries** clause of the conditions of tender as soon as possible following the change. This will ensure that all correspondence from the Commonwealth during the tender validity period is received by the tenderer on a timely basis.

### COMPLIANCE WITH THE CONDITIONS OF TENDER

Tenderers must state their compliance with the conditions of tender and Annexes to the conditions of tender in their declaration. Sufficient details of any non-compliances should be provided so that the Commonwealth can assess the extent, justification for and impact of the non-compliance. Tenderers do not have to duplicate this information in the **Statement of Compliance** at Annex B to the conditions of tender.

### IMPROPER ASSISTANCE

The **Tender Evaluation** clause of the conditions of tender warns each tenderer that if it uses:

- a. the improper assistance of current or former Commonwealth employees;
- b. unlawfully obtained material; or
- c. information obtained in breach of an obligation of confidentiality to the Commonwealth,

to compile its tender, the Commonwealth may exclude the tender from further consideration. When signing the declaration, each tenderer is therefore requested to certify that its tender has been compiled without the use of improper assistance from current or former Commonwealth employees and without the use of information obtained unlawfully or in breach of an obligation of confidentiality to the Commonwealth.

What constitutes improper assistance will depend on the circumstances. However, assistance given which involves disclosure of information in breach of a person's duties under the *Crimes Act* or *Public Service Act* would clearly be improper. It should also be noted that most consultants and professional service providers to the Commonwealth enter into confidentiality agreements. Therefore information



**ANNEX A**

that is disclosed to a tenderer in breach of a consultant's or professional service provider's confidentiality agreement should not be included in a tender or used to compile a tender as the Commonwealth will be entitled to exclude the tender from consideration in accordance with clause 3.2.5 of the conditions of tender.

**Drafter's action:** Prior to the release of the RFT, drafters must include the RFT Number in the Declaration by Tenderer. Drafters should not insert any information regarding the tender validity period, as this should be inserted by the tenderer.

**Related clauses:** The **Contact Officer for RFT Inquiries** clause of the conditions of tender details the Commonwealth's contact officer whom should be provided with any new details should the tenderer's contact officer details change during the tender validity period.

The **Period of Tender** clause of the conditions of tender identifies the Commonwealth's preferred period for which a tenderer must hold its tender open for acceptance by the Commonwealth.

The **Substitution of Tenderer** clause of the conditions of tender informs tenderers of the process that applies for the substitution of a tenderer.

The **Tender Evaluation** clause of the conditions of tender notifies tenderers that tenders compiled with the improper assistance of Commonwealth employees or the use of unlawfully obtained information or information that breaches a confidentiality agreement may be excluded from consideration by the Commonwealth.

A tenderer must state its compliance with the terms of the draft Contract in the **Statement of Compliance** at Annex B to the conditions of tender.



**ANNEX B****STATEMENT OF COMPLIANCE****STATEMENT OF COMPLIANCE**

<u>Reference:</u>	Annex B, clause 1
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To elicit from each tenderer the extent to which it complies with the terms and conditions of the draft Contract included in the RFT.
<u>Policy:</u>	Nil
<u>Guidance:</u>	Annex B to the conditions of tender requests tenderers to state their compliance with the: <ul style="list-style-type: none"> <li>a. draft conditions of contract;</li> <li>b. Attachments to the draft conditions of contract;</li> <li>c. draft Statement of Work; and</li> <li>d. Annexes/Attachments to the draft Statement of Work.</li> </ul>

The Statement of Compliance reveals any areas in which a tenderer is not willing to accept the distribution of risk proposed by the Commonwealth in the draft Contract as well as any areas in which a tenderer can not meet the technical requirements for the Supplies. The Statement of Compliance is therefore critical to the Commonwealth's evaluation of tenders.

**STATEMENT OF COMPLIANCE FORMAT**

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Tenderers must state their compliance with each clause using the terminology outlined in Annex B. Where a tenderer does not comply with a clause, the tenderer must state the extent, justification for and impact of the non-compliance. Tenderers are also required to provide full details of any alternative proposal, including an alternative clause where the non-compliance is in relation to a draft condition of contract. This will assist the Commonwealth to understand the extent of, and reasons for, the non-compliance and to determine the level of risk associated with the non-compliance.

Tenderers must include the location of any supporting compliance details that can be found in other areas of the tender in the Statement of Compliance.

Drafter's action: Nil

Related clauses: The **Tender Preparation** clause of the conditions of tender advises tenderers of the format required for tender responses.

Tenderers must state their compliance with the conditions of tender and Annexes to the conditions of tender in their **Declaration by Tenderer** at Annex A to the conditions on tender.



**ANNEX C****FINANCIAL****PRICE AND DELIVERY SCHEDULE**

- Reference:** Annex C, clause 1
- Sponsor:** Contracting Policy & Operations and Materiel Finance Division
- Status:** Core
- Purpose:** To elicit the price and delivery details proposed by each tenderer and to provide each tenderer with an appropriate place to indicate the Exchange Rates applicable to its tender.
- Policy:** It is Defence policy that payments shall be payable in source currency unless foreign currency amounts otherwise payable under the Contract are insignificant. Defence will make a determination of whether the amounts are significant after receipt of tenders. Where the Contract Price is to be payable in Australian currency only, the Contractor will be entitled to claim for fluctuations in the exchange rate between the Base Date and the date for payment.
- It is Defence policy that contracts of up to two years duration should be entered into on a firm price basis. Where a contract is to extend beyond two years the Department's preference is that price variation clauses should be included to recompense the Contractor for increases in the cost of labour and materials. Failure to adopt a price variation clause in a contract which runs for more than two years may result in tenderers including a significant contingency amount to mitigate unforeseeable increases in labour and material costs.
- A New Tax System (Goods and Services Tax) Act 1999*
- DPPM Section 2, Chapter 2.2*
- Guidance:** Along with the Statement of Compliance, the Price and Delivery Schedule is critical to the evaluation of tenders as it presents each tenderer's proposed price and delivery schedule for the Supplies.

**PRICE AND DELIVERY SCHEDULE FORMAT**

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Prior to release of the RFT, drafters must select one of two options at Table 1 for the format of the Price and Delivery Schedule. Option A must be selected where it is expected that the Supplies will be sourced in Australia and therefore no information is required to be obtained in relation to customs duty and unit prices in foreign currency. Option B must be selected where it is expected that all or some of the Supplies will be imported as it provides the Commonwealth with detailed information on customs duty and unit prices in foreign currency as well as Australian dollars. If drafters are unsure prior to release of the RFT whether Supplies will be sourced in Australia or overseas, drafters should select option B at Table 1.

Prior to release of the RFT, drafters must include at Table 1 a brief description of each item or service required under the proposed contract and the item number in a simple numerical sequence or Contract Work Breakdown Structure numerical sequence, if known. Drafters should also include the number of items required and the proposed delivery point and delivery date for each item if known prior to release of the RFT.

**PRICING AND PRICE BASIS**

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Prices for imported items and services should be stated in foreign currency and all prices must be in Base Date dollars. The Base Date is defined in the draft conditions of contract and should be the date one month prior to the date on which tenders close. The tendered prices should include all the costs of complying with the conditions of tender and providing the Supplies required under the proposed contract. The tendered prices should include all overseas and Australian taxes and charges applicable at the Base Date, including Australian GST.

## ANNEX C

The note to tenderers discusses the application of *A New Tax System (Goods and Services Tax) Act 1999* to the proposed contract. Tenderers must identify in the Price and Delivery Schedule the amount of GST that will be applicable to each item or service as well as a GST exclusive price and GST inclusive price for each item or service.

Drafters must select the appropriate price basis option at clause 1.4 of Annex C.

Option A should be included where the resultant contract will be firm priced and no price variation will be allowed. This option should be selected where it is expected that the Supplies will be sourced wholly in Australia and where the duration of any resultant contract will not exceed two years.

Option B allows for price variation reflecting fluctuations in the cost of labour and materials only. This Option should be included where it is expected that the Supplies will be sourced wholly in Australia and where the duration of any resultant contract will exceed two years.

Option C allows for price variation reflecting fluctuations in exchange rates only. This Option should be included where it is expected some of the Supplies will be imported and where the duration of any resultant contract will not exceed two years and where the Contract is best written in Australian Dollars. The DPPM contains additional guide of currency selection.

Option D allows for price variation reflecting fluctuations in exchange rates and in the cost of labour and materials. This Option should be included where it is expected that some of the Supplies will be imported and where the duration of any resultant contract will exceed two years.

It should be noted that while Defence policy creates the expectation that price variation clauses should be used in all contracts of over two years duration, a firm priced approach in relation to fluctuations in the cost of labour and materials may still be valid for low risk or commercial-off-the-shelf procurements. Despite the fact that a resultant contract duration will exceed two years, drafters may select an Option that provides a firm priced approach in relation to fluctuations in the cost of labour and materials, provided that the contract requirement is clearly defined, the cost can be estimated with a high degree of confidence and performance goals are readily identifiable.

In accordance with Defence policy, payments under any resultant contract will be made solely in Australian currency only where foreign currency amounts payable under the contract are insignificant. A determination of whether the amounts are significant will be made by Defence after receipt of tenders. Where the resultant contract is to be payable in Australian currency only, the Contractor will be entitled to claim for fluctuations in exchange rate between the Base Date and the date for payment.

In the event that the resultant contract is written in Australian dollars and the Contract Price is subject to fluctuations in exchange rates tenderers must provide the following details in the response to the RFT:

- a. the percentage of duty paid tendered price subject to exchange rate variation;
- b. the exchange rate upon which the tendered price is based; and
- c. the name and address of the bank or financial institution whose rates are applicable.

### INFORMATION TO BE PROVIDED BY TENDERERS

Tenderers must complete the **Price and Delivery Schedule** in accordance with the guidance provided.

**ANNEX C****EVALUATION OF TENDERS**

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For the purposes of evaluation, foreign currency elements of the tendered price will be calculated at the spot selling rate of exchange against the Australian dollar quoted by the Commonwealth Bank of Australia at the Base Date.

**Drafter's action:** Prior to release of the RFT, drafters should select the appropriate price basis option at clause 1.4 of Annex C.

Prior to release of the RFT, drafters should also include the appropriate option for the format of the Price and Delivery Schedule at Table 1. Drafters should also include at Table 1 the item number in a simple numerical sequence or Contract Work Breakdown Structure numerical sequence in column (a), if known, a brief description of each item or service required in column (b), the number of items required in column (c) and the proposed delivery point and delivery date for each item.

**Related clauses:** The **Schedule of Payments** clause of the **Financial** annex to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the proposed Milestone Dates and the amount of each proposed Milestone Payment.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Price Variation** clause where included, details how payments will be varied for fluctuations in exchange rates and/or the cost of labour and materials.

Attachment B to the draft conditions of contract will include the agreed **Price and Delivery Schedule**.

Attachment D to the draft conditions of contract will include the agreed **Schedule of Payments**.

Drafters must ensure that the items of Supplies referred to in the draft SOW are consistent with the description included in the **Price and Delivery Schedule**.

**ANNEX C****ITEMS FOR WHICH SPECIFIC PRICES ARE REQUIRED**

- Reference:** Annex C, clause 2.
- Sponsor:** Contracting Policy & Operations, Materiel Finance Division, and Standardisation Branch
- Status:** Core. The optional line items should be included where the relevant clauses are included in the draft Contract.
- Purpose:** To elicit the price details for particular items from tenderers.
- Policy:** *DI(G) LOG 03-6 "Defence Policy in Integrated Logistics Support"*
- Guidance:** Tenderers are to include the tendered price for the specific items listed in the **Specific Prices Schedule** clause of the **Financial** annex of the conditions of tender. The Commonwealth may not require the successful tenderer to provide any or all of the items listed in the Specific Prices Schedule. In that case the relevant prices listed in the Schedule will be deducted from the tendered price.
- Drafters may include additional items in the Specific Prices Schedule where the Commonwealth is unsure whether it will require the successful tenderer to provide the items under the resultant contract.
- Lists of Spares, Support and Test Equipment (S&TE), and Training Equipment and the associated prices for these items are elicited under clause 2 of Annex G - see the guidance relating to Annex G. If these items are to be covered by Not To Exceed (NTE) pricing, then separate NTE prices for these items must be sought here.
- Drafter's action:** Drafters must select the appropriate options and include any additional items.
- Related clauses:** The **Price and Delivery** clause of **Financial** annex requests each tenderer to elicit the price schedule that it is proposing.
- The **Support System** clause of Annex G requests tenderers to provide lists of Spares, S&TE, and Training Equipment
- The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract.
- Attachment B of the draft conditions of contract will contain the agreed **Price Schedule**.
- Attachment D of the draft conditions of contract will contain the agreed **Schedule of Payments**.
- Clause 5.3.2 of the draft SOW require NTE prices to be effective.
- Further Reading:** Nil



**ANNEX C****FURTHER QUANTITIES AND OPTIONAL EXTRAS**

<u>Reference:</u>	Annex C, clause 3
<u>Sponsor:</u>	Contracting Policy & Operations and Standardisation Branch
<u>Status:</u>	Optional. To be included where the <b>Option for Further Quantities and Optional Extras</b> clause of the draft conditions of contract is included to provide the Commonwealth with an option to purchase additional quantities of Supplies and/or optional extras.
<u>Purpose:</u>	To elicit details from tenderers in relation to an option for further quantities and/or optional extras.
<u>Policy:</u>	Nil
<u>Guidance:</u>	It is important to note that this request for information on additional quantities of Supplies and/or optional extras does not bind the Commonwealth. However, where it is clear that additional quantities or optional extras will not be required, this clause, the <b>Option for Further Quantities and Optional Extras</b> clause of the draft conditions of contract and the <b>Schedule of Prices for Further Quantities and Optional Extras</b> at Attachment C to the draft conditions of contract should not be included in the RFT.

**INFORMATION TO BE PROVIDED TO TENDERERS**

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Prior to release of the RFT, drafters must include, a brief description of the additional quantities of Supplies and/or optional extras that the Commonwealth may require, the quantity required and the proposed delivery points in Attachment C to the draft conditions of contract.

**INFORMATION TO BE PROVIDED BY TENDERERS**

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Each tenderer must state whether it is prepared to supply further quantities of the Supplies and/or optional extras. Where a tenderer is prepared to supply further quantities of Supplies and/or optional extras it must provide the same information required in the **Price and Delivery Schedule** clause of Annex C to the conditions of tender in a separate schedule for the further quantities and optional extras.

Tenderers are also required to specify any additional or varied terms and conditions that will apply to any further quantities or optional extras and the time period during which the Commonwealth may exercise the option to acquire additional quantities and optional extras.

Drafter's action: Nil

Related clauses: The **Option for Further Quantities and Optional Extras** clause of the draft conditions of contract obtains from the Contractor an offer to supply additional quantities of Supplies and/or optional extras and specifies the terms and conditions that will apply if the Contractor's offer is accepted by the Commonwealth.

Where applicable drafters will include a brief description of the additional quantities of Supplies and/or optional extras, the quantity required and the proposed delivery points at Attachment C to the draft conditions of contract.

Attachment C to the draft conditions of contract will include the agreed **Price and Delivery Schedule** for the additional quantities of Supplies and optional extras and any additional or varied terms.

**ANNEX C****SCHEDULE OF PAYMENTS**

<u>Reference:</u>	Annex C, clause 4
<u>Sponsor:</u>	Contracting Policy & Operations and Materiel Finance Division
<u>Status:</u>	Optional. To be included where a Mobilisation Payment will be considered or where Milestone Payments are to be used under any resultant contract.
<u>Purpose:</u>	To notify tenderers of the Commonwealth's preferred payment regime and to request a schedule of payments from each tenderer.
<u>Policy:</u>	The Commonwealth has a preference for payment on delivery. Where payment on delivery is not appropriate, the Commonwealth prefers to pay by Milestone Payments only, with a Mobilisation Payment where required.
<u>Guidance:</u>	Tenderers should note that, although the Commonwealth has a preference for payment on delivery, in most cases the Commonwealth will accept an alternative payment regime comprising Milestone Payments and a Mobilisation Payment

**INFORMATION TO BE PROVIDED TO TENDERERS**

Where milestones may be considered drafters are to wherever possible, include the Commonwealth's preferred Milestone Dates and Milestone Payments in the **Schedule of Payments** at Attachment D to the draft conditions of contract prior to release of the RFT, where Milestone Payments will be considered under any resultant contract. Milestone Payments should generally be expressed as a percentage of the Contract Price. In selecting appropriate Milestone Dates and Milestone Payments consideration should be given to the:

- a. operational necessity of the Supplies;
- b. Commonwealth's proposed schedule for transition of the Supplies into service;
- c. effect of the proposed payments on the cash flow of the Contractor; and
- d. need to limit the amount of unsecured Commonwealth funds paid to the Contractor.

**INFORMATION TO BE PROVIDED BY TENDERERS**

This clause requests each tenderer to provide its proposed schedule of payments, which may include a Mobilisation Payment and Milestone Payments. Tenderers must detail the amount, purpose and date of any proposed Mobilisation Payment and the amount and date of the proposed Milestone Payments.

This clause also requests each tenderer to outline the relationship between the tenderer's proposed payment regime and the tenderer's anticipated work progress and cash flow under the Contract. This allows tenderers the opportunity to explain their preferred business practice to the Commonwealth. In the event amendments to the proposed Schedule of Payments need to be negotiated, the Commonwealth will have a better understanding of the tenderer's business imperatives.

**EVALUATION OF THE TENDERER'S PROPOSED MOBILISATION PAYMENT**

It is important that any proposal for a Mobilisation Payment is given careful consideration to ensure that the Mobilisation Payment is required by the Contractor and can be justified as follows. Mobilisation Payments are unlikely to be required for commercial-off-the-shelf acquisitions or procurements off a well-established production line where only minor modifications to the Supplies are required. Payment of a Mobilisation Payment will be appropriate where the Contractor or its Subcontractors will experience significant non-recurring ramp up costs including the cost of procuring plant, machinery, materials and facilities for use in the production of the Supplies. The cost of money associated with the required ramp up costs should be considered when determining the need for and amount of any Mobilisation Payment. The effect of the initial ramp up costs for Subcontractors is also important particularly where Small to Medium Enterprises are involved.

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Mobilisation Payments will usually be between 5 and 15% of the Contract Price, however, in determining the appropriate amount for the Mobilisation Payment consideration should be given to the entire payment regime. The Contractor may also be able to claim some of its initial costs through strategically placed Milestones allowing for payment following Progress Certification.

**Drafter's action:** Prior to release of the RFT, drafters should include the relevant options in this paragraph when a Mobilisation Payment or Milestone Payments will be considered under any resultant contract.

**Related clauses:** Options B and C of the **Payment** clause of the draft conditions of contract detail the process that applies to Milestone Payments under the Contract.

The **Mobilisation Payment** clause of the draft conditions of contract details the amortisation process applicable to the Mobilisation Payment, the financial security requirements for the Mobilisation Payment and the Commonwealth's rights to exercise the Mobilisation Payment security.

Attachment D to the draft conditions of contract will wherever possible, include the Commonwealth's preferred Milestone Dates and Milestone Payments in the **Schedule of Payments**.

Attachment D to the draft conditions of contract will include the agreed **Schedule of Payments**.

## ANNEX C

### VARIATIONS FOR FLUCTUATIONS IN THE COST OF LABOUR AND MATERIALS

- Reference:** Annex C, clause 5
- Sponsor:** Contracting Policy & Operations and Materiel Finance Division
- Status:** Optional. To be included where the **Price Variation** clause of the draft conditions of contract is included to allow the Contractor to claim variations for fluctuations in the cost of labour and materials.
- Purpose:** To notify tenderers of the Commonwealth's proposed Price Variation Formula and preferred indices. To request tenderers to provide alternative indices and Price Variation Formula where the proposed formula and indices are not agreed.
- Policy:** It is Defence policy that contracts of up to two years duration should not allow contractors to claim compensation for variations in the cost of labour and materials and should be entered into on a firm price basis. Where a contract is to extend beyond two years the Department's preference is that price variation clauses should be included to recompense the Contractor for increases in the cost of labour and materials. Failure to adopt a price variation clause in a contract which runs for more than two years may result in tenderers including a significant contingency amount to mitigate unforeseeable increases in labour and materials costs.
- DPPM Section 2, Chapter 2.2*
- Guidance:** Prior to release of the RFT, drafters must determine whether the proposed contract should allow the contractor to claim for fluctuations in the cost of labour and materials so that tenders can be submitted in accordance with the selected price basis. Where it is determined that variation for fluctuations in the cost of labour and materials should be allowed for under any resultant contract, the **Price Variation** clause of the draft conditions of contract and this clause should be included in the RFT.

#### SELECTION OF FIRM PRICE OR VARIABLE PRICE BASIS

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While Defence policy creates the expectation that price variation clauses should be used in all contracts of over two years duration, an approach in which such clauses are not included may still be valid for low risk or commercial-off-the-shelf procurements. Use of a firm priced contract for contracts that exceed two years is suitable where the Contract requirement is clearly defined, the cost can be estimated with a high degree of confidence and performance goals are readily identifiable.

A contract that allows for variation in the cost of labour and materials is preferable where it is likely that the Contract Price will be affected by fluctuations in the cost of these elements. This is most likely to occur in contracts of more than two years duration or where the market for labour and materials utilised in the contract requirement is volatile. In such circumstances it is appropriate for the Commonwealth to accept the risk of such fluctuation on value for money grounds, as it avoids the risk of the Contractor including a contingency in the Contract Price.

#### TENDER RESPONSE REQUIREMENTS

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Tenderers must state:

- a. the acceptability of the proposed **Price Variation Formula** Attachment to the draft conditions of contract and any proposed alterations where unacceptable; and
- b. the acceptability of the Commonwealth's preferred indices in the **Price Variation Formula** Attachment to the draft conditions of contract and any alternative indices where unacceptable.

In proposing alternative indices, tenderers should take into consideration the notes provided following the **Price Variation Formula** Attachment to the draft conditions of contract. Tenderers should also note that agreements reached as a result of

**ANNEX C**

workplace enterprise bargaining are not considered to be awards for the purposes of the formula set out in the **Price Variation Formula** Attachment to the draft conditions of contract.

Drafter's action: Nil

Related clauses: Annex C to the conditions of tender will include the relevant Option at the **Price and Delivery Schedule** clause where price variation for fluctuation in the cost of labour and materials will be allowed under any resultant contract.

The **Price Variation** clause of the draft conditions of contract explains how the price variation formula in the **Price Variation Formula** Attachment to the draft conditions of contract is to be applied to payments under the resultant contract and outlines the process that applies to the approval and payment of price variation claims.

The **Price Variation Formula** Attachment to the draft conditions of contract will contain the agreed Price Variation Formula to be applied to payments under the resultant contract.

**ANNEX C****SECURITIES**

- Reference:** Annex C, clause 6
- Sponsor:** Contracting Policy & Operations and Materiel Finance Division
- Status:** Optional. To be included where the Commonwealth will consider giving the contractor a Mobilisation Payment or where the proper performance of the resultant contract will be secured through a performance security or a Deed of Substitution and Indemnity.
- Purpose:** To notify tenderers of the Commonwealth's preferred format for the securities and the deed of substitution and indemnity requested under the draft Contract. To request each tenderer to notify the Commonwealth of any changes that it requires and to provide details of its proposed promisor and/or substituted contractor.
- Policy:** Nil
- Guidance:** This clause requests each tenderer to state:
- a. whether a performance security or Deed of Substitution and Indemnity is proposed;
  - b. the acceptability of the security deeds and any proposed alterations;
  - c. the proposed promisor for the Mobilisation Payment security and performance security (where applicable); and
  - d. the proposed substituted contractor for the Deed of Substitution and Indemnity where applicable.

**USE OF PERFORMANCE SECURITY VERSUS DEED OF SUBSTITUTION**

Tenderers may elect to provide a performance security or a Deed of Substitution and Indemnity as explained in the note to tenderers. Both the performance security and the Deed of Substitution and Indemnity secure the proper performance of the Contract. The performance security provides the Commonwealth with financial relief, whereas the Deed of Substitution and Indemnity entitles the Commonwealth to request that another entity be substituted as the Contractor to perform the Contract.

**FORM OF THE SECURITIES AND DEED OF SUBSTITUTION AND INDEMNITY**

Where tenderers propose amendments to the Mobilisation Security Deed or Performance Security Deed consideration must be given to the standard Defence financial security requirements. Prior to accepting an alternative form of security the proposed terms of the alternative security should be carefully evaluated. Standard Defence financial security requirements include:

- a. The financial security must state the amount of money that is being secured and the event or events that will lead to the release of the security;
- b. The financial security should not include a date for the expiry of the security. However, if a time is included it should refer to an event or an amount of time in relation to an event, i.e. receipt of notice requesting cancellation from the Commonwealth or payment of the whole security. This allows for any change in the schedule;
- c. The financial security should be unconditional and not impose restrictions on the Commonwealth's ability to access the security; and
- d. The financial security should not contain a clause requiring the Commonwealth to notify the Contractor before exercising its rights under the security. A clause of this nature affords the Contractor the opportunity to seek legal remedies to prevent the Commonwealth from exercising its rights under the security.

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Advice should be sought from Contracting Policy & Operations Branch prior to any proposed changes to the Mobilisation Security Deed or Performance Security Deed being agreed.

Tenderers may also propose amendments to the Deed of Substitution and Indemnity. It is important to consider the terms of the proposed alternative Deed of Substitution and Indemnity. Advice should be sought from Contracting Policy & Operations Branch prior to any proposed changes to the Deed of Substitution and Indemnity being agreed.

### ACCEPTABILITY OF THE PROPOSED PROMISOR FOR FINANCIAL SECURITIES

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It is also important that on tender evaluation, the Commonwealth Representative ensures that where the tenderer is proposing a promisor, that the tenderer's proposed promisor is acceptable. Promisors will usually be a bank or financial institution. Issues to be considered in determining the acceptability of a bank or financial institution include the financial viability of the bank or financial institution, the accessibility of funds and the enforceability of the security in the applicable jurisdiction.

The Commonwealth has a preference for an Australian bank or financial institution, however, a foreign Authorised Deposit Taking Institution (ADI) authorised to carry on the business of banking in Australia may be accepted. The Australian Prudential Regulation Authority website ([www.apra.gov.au](http://www.apra.gov.au)) provides a list of all approved ADIs. The risks associated with accepting a foreign bank as a guarantor include the availability of assets held in Australia and the potential problems with enforcing the guarantee in an overseas jurisdiction. Due consideration must therefore be given to the location and nature of the financial institution guaranteeing the security and the Commonwealth must be satisfied that the financial institution is a viable entity capable of providing the funds where required.

### ACCEPTABILITY OF THE PROPOSED SUBSTITUTED CONTRACTOR FOR THE DEED OF SUBSTITUTION AND INDEMNITY

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It is also important that the Commonwealth Representative ensures that where the tenderer is proposing a Substituted Contractor that the tenderer's proposed Substituted Contractor is acceptable. The Substituted Contractor is usually the Contractor's parent company but may be another entity where acceptable to the Commonwealth Representative. Under the Deed the Substituted Contractor agrees to perform the Contract in the place of the Contractor in the event that the Commonwealth is entitled to terminate the Contract for default. Therefore the viability of the company proposed as the Substituted Contractor under the Deed of Substitution and Indemnity and its capacity to perform the proposed contract upon substitution must be fully evaluated to ensure that the Commonwealth is adequately protected.

**Drafter's action:** Prior to release of the RFT, drafters must include the relevant option in this clause where a Mobilisation Payment will be considered under any resultant contract. Prior to release of the RFT, drafters must also include the relevant option where the Commonwealth will require the Contractor's performance of the resultant contract will be secured through either a performance security or a Deed of Substitution and Indemnity.

**Related clauses:** The **Mobilisation Payment** clause of the draft conditions of contract details the financial security requirements for the Mobilisation Payment and the Commonwealth's rights to exercise the Mobilisation Payment security.

Option A of the **Security for Performance** clause of the draft conditions of contract requires the Contractor to provide a financial security to secure its performance of the Contract and details the Commonwealth's right to exercise the security. Option B of the **Security for Performance** clause of the draft conditions

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of contract requires the Contractor to provide a Deed of Substitution and Indemnity to secure its performance of the Contract and details the Commonwealth's right to issue a notice of substitution.

The **Securities** clause of the draft conditions of contract reserves to the Commonwealth certain rights in the event that the Contractor fails to provide the securities required by the **Mobilisation Payment** or **Security for Performance** clauses of the draft conditions of contract or where the Commonwealth exercises its rights under the securities.

Annex A of the **Financial Securities Deeds** Attachment to the draft conditions of contract will, if required, contain the agreed **Mobilisation Security Deed**.

Annex B of the **Financial Securities Deeds** Attachment to the draft conditions of contract will, if required, contain the agreed **Performance Security Deed**.

Annex C of **Financial Securities Deeds** Attachment to the draft conditions of contract will, if required, contain the agreed **Deed of Substitution and Indemnity**.



## ANNEX C

### AGENCY ARRANGEMENTS

- Reference: Annex C, clause 7
- Sponsor: Contracting Policy & Operations
- Status: Core
- Purpose: To notify tenderers of the Commonwealth policy on agency arrangements. To request information from each tenderer on any agency arrangements relevant to the proposed contract that the tenderer has entered into (or contemplates entering into) with an organisation in Australia.
- Policy: Commonwealth policy is to deal directly with the principal in any contractual arrangement rather than have an agent interposed. This policy applies not only to representatives and marketing agencies that may become involved in the original bid process but also to subsidiary companies. This policy ensures that:
- a. the Commonwealth has a direct legal relationship with the company best able to be responsible for the work performed; and
  - b. the price structure of the Contract excludes the funding of any intermediary which does not add value to the work performed.
- A New Tax System (Goods and Services Tax) Act 1999*
- Guidance: This clause requests each tenderer to provide details of any agency arrangement, details of the agent, including its name, address, A.C.N. and A.B.N. and details of any payments in respect of the agency arrangement that are included in the tendered price. Drafters should be aware that tenderers are often reluctant to provide detailed information in relation to agency arrangements. Therefore the information requested in this clause is the minimum required by the Commonwealth. In relation to payments in respect of the agency arrangement, it is important to note that tenderers need not reveal the amount of the payments being made to the agent only that the tendered price does include costs associated with the agency arrangement.

### AGENCY ARRANGEMENTS AND SUBCONTRACTS

Drafters should not confuse an agency arrangement with a subcontracting arrangement. Under an agency arrangement, firm X (the agent) represents firm Y (the principal). The agent acts in the name of the principal and those acts legally bind the principal, unless the principal is entitled in law to deny the obligation. Under a subcontracting arrangement firm X (the Contractor) subcontracts firm Y (the Subcontractor) to perform work for firm X to satisfy its obligations under a contract. Firm Y may not act in firm X's name nor legally bind firm X. The subcontracting relationship is governed by the terms of the Subcontract. Firm X remains responsible for the work performed by the Subcontractor.

### ACCEPTABILITY OF AGENCY ARRANGEMENTS

As Commonwealth policy states that the Commonwealth should deal directly with the principal in any contractual arrangement rather than have an agent interposed, careful consideration should be given by tenderers to teaming arrangements. There may be a situation in which an Australian subsidiary of an overseas company does add value to the contracting process. While this may justify some agency costs in a contract, the Commonwealth prefers to contract with the legal entity best able to manage the risks imposed on it under the contract i.e. the principal, who is in fact performing the contract. This precludes dealing with an agent unless the agent is fully authorised to contract in the name of, and with the full corporate backing of, the principal.

The **GST Agent** clause of the draft conditions of contract provides a mechanism by which the Contractor can notify the Commonwealth Representative of the identity of a resident agent appointed to account for GST on behalf of the Contractor in accordance with Division 57 of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act). Where a tenderer intends to appoint a resident agent,

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tenderers should provide the details of the proposed resident agent in their response to this clause. Tenderers should note, however, that Commonwealth policy on agency arrangements will be taken into account when evaluating tenders that propose a resident agent.

Drafter's action: Nil

Related clauses: The GST Agent clause of the draft conditions of contract identifies the resident agent appointed by an overseas Contractor to account for GST in accordance with Division 57 of the GST Act.

## ANNEX C

### INCENTIVE PAYMENTS

<u>Reference:</u>	Annex C, clause 8
<u>Sponsor:</u>	Contracting Policy & Operations and Materiel Finance Division
<u>Status:</u>	Optional. To be included where the <b>Incentives Payment</b> clause of the draft conditions of contract is included to allow for payment of Incentive Payments under the Contract.
<u>Purpose:</u>	To notify tenderers of the proposed Incentive Payment regime and to request tenderers to provide details in relation to the Incentive Payment provisions.
<u>Policy:</u>	In accordance with the <i>Financial Management and Accountability Act 1997</i> , the Commonwealth may only pay the Contractor Incentive Payments for superior performance of the Contract.  <i>Commonwealth Procurement Guidelines and Best Practice Guidance</i>
<u>Guidance:</u>	The <b>Incentive Payments</b> clause of the draft conditions of contract entitles the Contractor to claim Incentive Payments in addition to the Contract Price for superior performance of any resultant contract.

#### REQUIREMENT FOR SUPERIOR PERFORMANCE OF THE CONTRACT

As Incentive Payments are paid to the Contractor in addition to the Contract Price, to be in accordance with the *Financial Management and Accountability Act 1997*, the Incentive Payment must be for superior performance of the Contract where the superior performance is of benefit to the Commonwealth. This is because the liability approver in approving a proposal to spend public money must have regard to the *Commonwealth Procurement Guidelines and Best Practice Guidance* and ensure that additional payments represent value for money. The Contractor's performance under any resultant contract will be measured in accordance with the assessment periods, weightings and key performance indicators included in Attachment F to the draft conditions of contract.

#### SELECTION OF KEY PERFORMANCE INDICATORS AND WEIGHTINGS

Drafters must include guidance on the key performance indicators for the proposed contract in the **Incentive Payments** Attachment to the draft conditions of contract prior to release of the RFT. Drafters may elect to include only the categories of proposed key performance indicators or detail the specific assessment periods, weightings and key performance indicators proposed by the Commonwealth. In most cases drafters will only be able to include the categories of key performance indicators in the **Incentive Payments** Attachment to the draft conditions of contract. This is because the areas of the proposed contract for which superior performance will be of benefit to the Commonwealth will depend upon each tenderer's proposal. Possible categories of key performance indicators include:

- a. schedule;
- b. quality;
- c. contract relationship including relationship between Defence, the Contractor, Subcontractors and third parties;
- d. innovation under the Contract;
- e. All; and
- f. IP.

Where an election is made to include specific key performance indicators, weightings and assessment periods in the RFT, drafters must ensure that tenderers are not provided with an opportunity to develop their tenders, particularly their proposed schedule, to ensure achievement of the proposed key performance indicators by under-tendering. This will be particularly important in a tendering environment where there is little or no competition.

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Where specific key performance indicators, assessment periods and weightings are included prior to release of the RFT it is essential that drafters ensure that the key performance indicators are objective, measurable and clearly stated. In selecting appropriate weightings for the key performance indicators in each assessment period, it should be noted that the weighting for each key performance indicator may vary depending upon the work being conducted in the assessment period and the importance of the key performance indicator at the relevant stage of the Contract.

**Drafter's action:** Prior to release of the RFT, drafters must include the amount of Incentive Payments payable under any resultant contract expressed as a percentage of the Contract Price.

**Related clauses:** The **Incentive Payments** clause of the draft conditions of contract details the process that applies to Incentive Payments under the Contract.

The **Incentive Payments** Attachment to the draft conditions of contract will, if required, contain the agreed assessment periods, weightings and key performance indicators.

**ANNEX D****COMMERCIAL****COMPANY PROFILE / ASSESSMENT OF TENDERER'S ABILITY TO SUPPLY**

- Reference:** Annex D, clause 1
- Sponsor:** Contracting Policy & Operations
- Status:** Core
- Purpose:** To request from tenderers a company profile to assist in tender evaluation.
- Policy:** The financial and corporate viability of tenderers must be considered during the tender evaluation process to assess whether the tenderer will be capable of fulfilling the contractual obligations under any resultant contract.
- DPPM Section 3, Chapter 3.3*
- Guidance:** This clause requests each tenderer to provide information relevant to its commercial, technical and financial capacity to perform any resultant contract as well as details relevant to the tenderer's company profile including:
- a. the tenderer's background, experience and resources relevant to the proposed contract;
  - b. the tenderer including its A.B.N., A.C.N., place of business and place of incorporation; and
  - c. civil or criminal litigation likely to adversely affect the tenderer's performance of any resultant contract.

**INCLUSION OF ADDITIONAL INFORMATION**

Drafters should note that the list of details included in this clause is not exhaustive, however, drafters should seek advice from Contracting Policy & Operations Branch prior to any additional information being requested. When reviewing the need to expand the list within this clause drafters should consider the usefulness of the additional information to the tender evaluation and the impact the request for additional information will have on the cost of tendering.

**Drafter's action:** Nil

**Related clauses:** The **Tender Evaluation** clause of the conditions of tender entitles the Commonwealth to exclude from consideration tenders that are assessed as clearly non-competitive.

## ANNEX D

**IMPORTED SUPPLIES AND EXPORT APPROVALS**

<u>Reference:</u>	Annex D, clause 2
<u>Sponsor:</u>	Contracting Policy & Operations and Industry Policy and Programs
<u>Status:</u>	Optional. This clause should be included where it is likely that items of the Supplies will be imported.
<u>Purpose:</u>	To request from each tenderer details of items of Supplies that will be imported and details relating to required export approvals.
<u>Policy:</u>	Nil
<u>Guidance:</u>	This clause requests tenderers who are proposing to import items of Supplies to provide: <ul style="list-style-type: none"> <li>a. details of the Supplies being imported;</li> <li>b. evidence that required export approvals will be granted; and</li> <li>c. details of limitations or provisos that could reasonably be expected to be placed in relation to the export of the Supplies.</li> </ul>

EXPORT APPROVALS FROM FOREIGN GOVERNMENTS

It is not uncommon for overseas governments to control the export of goods or technology that may have a military use. There may be administrative processes to be observed such as obtaining the approval of the overseas government before entering into a contract for the supply of the goods or technology in question. For these reasons, the Commonwealth requires some reasonable assurance that an otherwise successful tenderer will not be prevented from entering into a contract because of a failure to obtain the necessary export approvals.

Some countries may be reluctant to grant an export approval for certain types of Supplies. This clause requests an indication from each tenderer that required export approvals will be granted, rather than requesting evidence that the approvals have been granted. Although evidence of the actual granting of an export approval is preferred, some countries will not grant an export approval until the contract is signed. Such evidence may include details of any previously rejected application for, or prior refusal to grant, an export approval for goods similar to the Supplies. The Commonwealth will then be alerted at the time of tender evaluation to potential problems that may affect the granting of export approvals.

Where a tenderer purports to have obtained government agreement for required exports, the advice and assistance of CONDMAT London (for European suppliers) or CONDMAT Washington (for North American suppliers) should be sought if there is any doubt as to the value of such assurances.

Drafter's action: Nil

Related clauses: The **Price and Delivery Schedule** clause of the **Financial** Annex to the conditions of tender requests tenderers to specify the customs duty payable for imported items of Supplies.

The **Export Approvals and Imported Supplies** clause of the draft conditions of contract specifies the date or event by which the Contractor must obtain all necessary export licences or other approvals and details the procedure by which the Contractor must keep the Commonwealth Representative informed of its progress in obtaining the required export licences or other approvals. This clause also provides a mechanism through which an increase or decrease in the rate of customs duty applicable to the Supplies can be recovered or reimbursed by the Commonwealth.

## ANNEX D

**INTELLECTUAL PROPERTY (IP)**

<u>Reference:</u>	Annex D, clause 3
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To elicit from tenderers a list of IP that will be brought into or created under any resultant contract and any limitations on the IP licences granted under the Contract.
<u>Policy:</u>	Defence needs appropriate rights to appropriate technologies at appropriate times. <i>Developing and Sustaining Defence Capability: Defence Intellectual Property Policy 2003.</i>
<u>Guidance:</u>	The agreed IP Plan will form the basis of the <b>Intellectual Property</b> Attachment of the conditions of contract and will be a dynamic document. Changes to the IP Plan, whether initiated by the Contractor or the Commonwealth, must be agreed by the parties in accordance with the Contract change proposal process detailed in the <b>Change to the Contract</b> clause of the draft conditions of contract.

**THE COMMONWEALTH'S IP REQUIREMENTS**

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The Commonwealth's IP requirements are set out in the **Intellectual Property** clause of the draft conditions of contract. Drafters may provide details in this paragraph of any limitations to the IP licence terms that are considered unacceptable to the Commonwealth in relation to the project prior to release of the RFT.

**TENDER RESPONSE REQUIREMENTS**

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This clause requires tenderers to provide a draft IP Plan in the format set out at Table 1. Table 1 requires tenderers to provide the following information in relation to IP that will be brought into or created under any resultant contract:

- a. a description of the IP and the items of the Supplies to which it relates;
- b. identification of the IP as Background or Foreground IP;
- c. identification of the party that owns or will develop IP that will be licensed to the Commonwealth;
- d. identification of the form of the IP; and
- e. any limitations that will apply in relation to the Commonwealth's rights set out in the **Intellectual Property** clause.

It is important to note that although the Commonwealth may accept certain limitations in relation to its rights to modify, develop and manufacture the Supplies, the Commonwealth requires a licence to use, maintain and dispose of the Supplies subject to no restrictions. The Commonwealth should not ordinarily accept limitations to its rights to use, maintain and dispose of the Supplies, as the Commonwealth requires a basic level of IP rights, sufficient to enable normal use and support of the Supplies. Where the tenderer proposes to limit the Commonwealth's rights to use, maintain and dispose of the Supplies, advice should be sought from Contracting Policy & Operations Branch to determine whether the level of rights provided enables the Commonwealth to use and support the Supplies.

Drafter's action: Nil

Related clauses: The **Intellectual Property** clause of the draft conditions of contract contains the IP clauses for the proposed contract. In particular the **Intellectual Property Licence** clause details the licensing arrangements for Background IP and any Foreground IP that is owned by the Contractor and Approved Subcontractors. The **Intellectual**

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**Property Management** clause of the draft SOW details the IP Management requirements for the Contractor.

The **Intellectual Property** Attachment to the draft conditions of contract consists of the IP Plan which outlines the Commonwealth's and Contractor's IP and TD rights.

The **Support System** clause of the **Description of Requirement** Annex requires tenderers to provide a list of TD associated with the proposed Contract.

Under the **Intellectual Property Indemnity** clause of the draft conditions of contract the Contractor takes responsibility for the consequences of loss suffered by the Commonwealth as a result of claims by a third party for infringement of that third party's IP.



## ANNEX D

## LIABILITY

<u>Reference:</u>	Annex D, clause 4
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To notify tenderers of the Commonwealth policy on liability and to seek information from each tenderer in relation to its proposed liability regime.
<u>Policy:</u>	It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk.

In accordance with the *Commonwealth Procurement Guidelines and Best Practice Guidance*, liability should be assessed according to common law principles wherever possible. If limitation of liability is necessary, then it should only be applied on a 'per event' basis, limited in scope and to a clearly defined amount. Agencies are required to undertake a risk assessment, prepare a risk management plan as appropriate and seek legal advice appropriate to the complexity of the purchase before negotiating a limitation of liability.

*Commonwealth Procurement Guidelines and Best Practice Guidance*

<u>Guidance:</u>	Notwithstanding the inclusion of the <b>Limitation of Liability</b> clause in the draft conditions of contract, the Commonwealth retains its preference for liability on the basis of Australian common law. Where a tenderer proposes to limit its liability on an alternative basis to Australian common law, the proposal will be considered on its merits in the context of value for money considerations.
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#### INFORMATION REQUIRED FROM TENDERERS

Prior to release of a RFT, drafters should select one of the Options included in this clause. Option A reflects the Commonwealth preference in relation to the liability and draws the tenderer's attention to the fact that the Contractor's liability under any resultant contract shall be assessed according to common law principles. Option B allows for limitation of the Contractor's liability on the terms set out in the **Limitation of Liability** clause of the draft conditions of contract. Where Option B is included and the tenderer proposes to limit its liability under any resultant contract, this clause requests each tenderer to provide:

- a. details of the terms of its proposed liability regime;
- b. an explanation as to why the tenderer requires a limitation of its liability; and
- c. a cost/benefit analysis of the proposed limitation of liability.

Where a tender is submitted on the basis that, if successful, the tenderer's liability will be limited under the resultant contract, the Commonwealth will use the information sought in this paragraph to assess the risk associated with the tenderer's liability proposal and the cost to the Commonwealth of accepting that risk. The Commonwealth will consider each tenderer's liability proposal on its merits and in the context of value for money considerations.

#### PREFERRED ALTERNATIVE LIABILITY REGIME

As mentioned above, the Commonwealth, in accordance with Commonwealth policy, retains a preference for liability on the basis of Australian common law. Where a tenderer proposes to limit its liability under any resultant contract, the Commonwealth prefers that liability is limited on a 'per event' basis. Under the preferred alternative regime set out in the optional **Limitation of Liability** clause, the Contractor's liability for personal injury and death, loss of, or damage to, third party property and the IP indemnity provided by the Contractor will be determined on the basis of Australian common law. The Contractor's liability under any resultant contract for breach of Contract or for any other common law, equitable or statutory cause of action arising out of the operation of the Contract shall, except in relation to the types of damage mentioned above, be limited to a nominated

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amount for each single occurrence or a series of related occurrences arising from a single cause of action.

### SELECTION OF APPROPRIATE LIABILITY CAP

Prior to release of the RFT, drafters must insert the Commonwealth's preferred liability cap in the **Limitation of Liability** clause of the draft conditions of contract. A risk assessment should be undertaken to determine the amount that is appropriate for the specific requirement. Guidance on the issues that should be considered is contained in the Guidance on the **Limitation of Liability** clause of the draft conditions of contract.

### ALTERNATIVE LIABILITY REGIMES PROPOSED BY TENDERERS

The Commonwealth's preferred and alternative liability regime for procurements based on Volume 2 of the *ASDEFCON (Complex Materiel)* is detailed above. The complex procurement environment differs from the strategic procurement environment in that procurements that are characterised as strategic procurements involve more risk for both parties, both technical and financial. For this reason, the liability regime that may be acceptable to the Commonwealth in the complex procurement environment differs from the liability regime that may be acceptable to the Commonwealth in the strategic environment.

### REQUIREMENT TO UNDERTAKE A RISK ASSESSMENT

Tenderers proposing a liability regime other than Australian common law are required to submit a cost/benefit analysis and an explanation of the need for a limitation of liability. By requiring this information it is hoped that tenderers will be encouraged to consider and adopt the most appropriate risk management strategies for each project rather than pursue a blanket company policy of transferring risk to the Commonwealth through limitation of liability. In addition, any risk assessment undertaken by the tenderer is likely to be a far more informed assessment than could be produced by the Commonwealth acting independently, as a tenderer will have a better understanding than the Commonwealth of the likely risks of its proposal. However, the submission of the tenderer's risk assessment does not remove the requirement under the *Commonwealth Procurement Guidelines and Best Practice Guidance* for departments and agencies considering a limitation of liability to undertake a risk assessment appropriate to the complexity of the purchase.

**Drafter's action:** Prior to release of the RFT, drafters must select one of the options included in this clause. Option A should be selected where the Commonwealth will not accept a limitation of liability regime other than in accordance with common law principles. Option B should be selected where the Commonwealth may accept a limitation of the Contractor's liability on a per event basis and subject to the exceptions listed in the **Limitation of Liability** clause of the draft conditions of contract.

**Related clauses:** The **Insurance** clause of the **Commercial** Annex to the conditions of tender requests tenderers to provide details of current or proposed insurance policies for the contract.

The optional **Limitation of Liability** clause of the draft conditions of contract details the limit on the Contractor's liability under any resultant contract.

The **Insurance** clause of the draft conditions of contract details the insurance policies that must be taken out and maintained by the Contractor during the Contract.

**ANNEX D****INSURANCE**

- Reference:** Annex D, clause 5
- Sponsor:** Contracting Policy & Operations
- Status:** Core
- Purpose:** To notify tenderers of potential insurance requirements for any resultant contract and to seek information from each tenderer in relation to its current or proposed insurance policies for the contract.
- Policy:** It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk.
- Guidance:** This paragraph requests tenderers to provide details of current or proposed insurance policies for any resultant contract including the:
- a. name of the insurance provider;
  - b. type and terms of the insurance policy including specific exclusions; and
  - c. maximum amount of cover, period of insurance and deductible amounts.

The information provided by each tenderer will be used by the Commonwealth during the tender evaluation to assess the level of risk associated with a tender and to determine the necessary insurance requirements for any resultant contract. It is also important when evaluating the insurance details provided by the tenderer that consideration is also given to the tenderers proposed liability scheme at the **Liability** clause of Annex D to the conditions of tender.

**DETERMINING THE INSURANCE REQUIREMENTS FOR THE CONTRACT**

Except for workers compensation and public liability insurance, the insurance requirements for the Contract will be determined based upon the specific contract requirement and the identity of the successful tenderer. Insurance policies that may be required include professional indemnity insurance, insurance for the Supplies, insurance of items of GFM or other Commonwealth property, and product liability insurance. In determining the insurance requirements for the Contract, consideration should be given to the:

- a. financial stability of the Contractor and the Contractor's capacity to effectively self-insure;
- b. type and amount of any global insurance policies held by the Contractor;
- c. magnitude and probability of loss in relation to each specific area of risk under the Contract; and
- d. cost of obtaining insurance coverage.

In the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate. Usual practice is to align the Contractor's insurance with the liability cap under the Contract where such insurance is cost effective for the Commonwealth.

Commonwealth Officers should note that Defence is now covered under the Comcover scheme for loss arising for certain types of liabilities. Advice on Defence's coverage under the Comcover scheme can be obtained by contacting the Defence Insurance Office.

**Drafter's action:** Nil

**Related clauses:** The **Liability** clause of the **Commercial** Annex to the conditions of tender requests each tenderer to provide details in relation to its proposed liability regime.

The **Liability** clause of the draft conditions of contract details the limit on the Contractor's liability under any resultant contract.

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The **Insurance** clause of the draft conditions of contract details the insurance policies that must be taken out and maintained by the Contractor during the Contract.

**ANNEX D****WARRANTY AND LATENT DEFECTS**

<u>Reference:</u>	Annex D, clause 6
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To request from tenderers specific details in relation to the Warranty and Latent Defects clause in the draft Contract.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>Tenderers must provide the details of the Warranty and Latent Defects coverage (if any) being tendered where they differ from that sought in the draft Contract. Where a tenderer is fully compliant with the terms of the draft Contract in respect of Warranty and Latent Defects, the tenderer will only have to provide the price for the Warranty and Latent Defect coverage. The Commonwealth reserves the right to decline the tendered Warranty and Latent Defects coverage and in that case deduct the price nominated from the tendered price.</p>
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	<p>The <b>Warranty</b> clause of the draft conditions of contract places an obligation on the Contractor to remedy defects in design, materials or workmanship in the Supplies for a specified period and establishes the process for carrying out remedial work.</p> <p>The optional <b>Latent Defects</b> of the draft conditions of contract places an obligation on the Contractor to diagnose and correct Latent Defects in the Supplies for a specified period and establishes the process for carrying out remedial work.</p>

**ANNEX D****COMMERCIAL-IN-CONFIDENCE INFORMATION**

- Reference:** Annex D, clause 7
- Sponsor:** Contracting Policy & Operations
- Status:** Core
- Purpose:** To seek information from the tenderers in relation to which parts of the draft Contract they consider to be Commercial-in-Confidence Information.
- Policy:** *DPPM – Section 3, Chapter 3.11*
- Guidance:** The **Commercial-in-Confidence Information** clause of Annex C, requests tenderers who are proposing contract provisions they consider to be Commercial-in-Confidence Information to identify, for each clause, the reason the provision is considered to be Commercial-in-Confidence Information and provide additional justification as to why the reason applies. Defence has developed six standard reasons to classify information as Commercial-in-Confidence Information.
- The six standard reasons are:
- a. commercially sensitive information, disclosure of which is not in the relevant party's best interest;
  - b. details about commercially sensitive pricing information including profit margins and the underlying price basis;
  - c. details about insurance and liability regimes that are commercially sensitive;
  - d. details about intellectual property regimes that are commercially sensitive;
  - e. details about the capability/services being delivered that are commercially sensitive; and
  - f. details about contractual rights and remedies, including warranties, financial guarantees and securities that are commercially sensitive.
- Information that is included in the public domain, for example Total Contract Price or generic template clauses, is not Commercial-in-Confidence Information.
- Drafter's action:** Nil
- Related clauses:** The **Commercial-in-Confidence** clause of the draft conditions of contract outlines that Commercial-in-Confidence Information must be protected from unauthorised disclosure and Contractors must not misuse the term 'Commercial-in-Confidence'.
- The **Commercial-in-Confidence** Attachment to the draft conditions of contract will list the conditions of contract and Attachments or the parts of the Attachment, that the parties agree at the Effective Date are Commercial-in-Confidence.
- Further Reading:** Nil

**ANNEX E****AUSTRALIAN INDUSTRY INVOLVEMENT****AUSTRALIAN INDUSTRY INVOLVEMENT**

- Reference:** Annex E, clause 1
- Sponsor:** Maritime, Land & Weapons Industry Capability and Standardisation Branch
- Status:** Core. Where the tendered price is expected to be in the range of \$4.5- \$5 million.
- Purpose:** To notify tenderers of the All and Industry Capability Network (ICN) policy requirements for the Contract in accordance with the requirements specified in Annex E to the conditions of tender.
- To request tenderers to provide an All Plan in the format specified and to show evidence of consultation with the ICN where the tenderer is not proposing 100% Australian New Zealand content.
- Policy:** *All Manual*
- Industry Capability Network at <http://www.icn.org.au>.
- Guidance:** The **Australian Industry Involvement** Attachment to the draft conditions of contract details the Industry Requirements for the proposed contract and specifies the target or minimum level of All required for the proposed contract. (A 'Target Level' is an expectation of All determined in consultation with the Commonwealth project office to provide guidance to tenderers). Tenderers must provide an All Plan that addresses the Industry Requirements. The All Plan agreed with the successful tenderer will be included in Attachment I to the conditions of contract prior to Contract signature.
- Where the value of the tender is greater than \$5 million and the tenderer is not proposing 100% Australian New Zealand content, the tenderer is required to show evidence that they have consulted with the Industry Capability Network.

**INDUSTRY REQUIREMENTS AND MINIMUM LEVEL OF ALL**

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Drafters must include the endorsed Industry Requirements for the proposed contract and the Target or minimum level of All required for the proposed contract, including preferred levels of Local Content and Strategic Industry Development Activities (SIDAs), in Attachment I to the draft conditions of contract prior to release of the RFT.

The Industry Requirements detailed in the **Australian Industry Involvement** Attachment to the draft conditions of contract should be determined by Industry Capability staff, working closely with the Commonwealth project office and Industry Policy staff. The target level of All should be determined in conjunction with the project office. The project office will have developed a Work Breakdown Structure (WBS) as well as an intimate knowledge of the likely nature of work required to be undertaken by ANZ industry. Industry Capability staff should analyse the information and then determine an appropriate level of All (Local Content and SIDAs). The levels for each element of All will depend on the nature of the project.

**INFORMATION REQUIRED IN THE TENDERED ALL PLAN**

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The All Plan provided by tenderers should address the Industry Requirements and include the following sections:

- a. Overview and Benefits;
- b. Management of the All Plan;
- c. Monitoring of All Achievement;
- d. Industry Requirements;
- e. Australian Industry Involvement Schedule;
- f. Australian Industry Involvement Activity Description Sheets;
- g. Strategic Industry Development Activity Description Sheets;

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- h. All Target Summary;
- i. Overseas and ANZ Subcontractor Overview; and
- j. Commitment to Australian Industry

The purpose of the **Australian Industry Involvement Schedule** at Appendix 1 is to provide All details on all line items in the **Price and Delivery Schedule**. The purpose of the **All Activity Description Sheet** at Appendix 2 is to provide further detailed information on all line items in the **Price and Delivery Schedule**. The purpose of the **SIDA Activity Description Sheet** at Appendix 3 is to provide detailed information on all the SIDAs to be undertaken.

The purpose of the **Overseas and ANZ Company Overview** at Appendix 4 is to provide detailed information of all Subcontractors including Small to Medium Enterprises with proposed contracts worth greater than A\$250,000. Defence uses this information to create profiles on Subcontractors and assess risk to the Commonwealth in the project under past performance guidelines. The information is also sought to monitor the nature and level of Australian industry's involvement in the project.

Drafters should note that the *All Manual* can be found under "Publications" in the Industry Resources section of the DMO website (<http://www.defence.gov.au/dmo>).

**Drafter's action:** If the tendered price is reasonably expected to be less than \$5m, drafters should delete this requirement from the conditions of tender.

**Related clauses:** The **Australian Industry Involvement** clause of the draft conditions of contract places an obligation on the Contractor to implement the agreed **Australian Industry Involvement Plan** Attachment to the draft conditions of contract and achieve the stated levels of Local Content and Strategic Industry Development Activities. This clause also details the liquidated damages that may be claimed by the Commonwealth for failure to achieve the Industry Requirements in the All Plan by Acceptance of the last item of the Supplies. Note: The amount of liquidated damages for each Industry Requirement is to be calculated and provided in the tendering documentation prior to release of the RFT.

The **Australian Industry Involvement Plan** Attachment to the draft conditions of contract will contain the agreed All Plan.

The **Australian Industry Involvement (All) Management** clause of the draft SOW places a contractual obligation on the Contractor to conduct the All Program in accordance with the All Plan. This clause also requires any changes to the All Plan to be processed via CCP action and places a contractual obligation on the Contractor to provide All progress reports either as standalone reports or as part of the Project Status Report.



**ANNEX F****MANAGEMENT****DRAFT PROJECT MANAGEMENT PLAN**

<b><u>Reference:</u></b>	Annex F, clause 1
<b><u>Sponsor:</u></b>	Standardisation Branch
<b><u>Status:</u></b>	Core
<b><u>Policy:</u></b>	Nil
<b><u>Guidance:</u></b>	A draft PMP is required to provide visibility into how the tenderer proposes to manage the project. This plan should not be a 'marketing' document, but should reflect exactly how the project will be managed. This document can be used to identify high-risk subcontracting arrangements as well as many other factors.

The **Draft Project Management Plan** clause of Annex F of the conditions of tender requires each tenderer to provide a draft PMP in accordance with Contract DID for the PMP, DID-PM-MGT-PMP-2. The PMP provides an overview of the different project processes and how they fit together to form a totally integrated management system for the project. As an analogy, it is the key map at the front of a street directory. It should provide an overview and show how all of the detailed processes (maps) fit together. Given its role as the "key map", a PMP should be sought with every RFT.

Commonwealth project office staff should discuss any shortfalls with the PMP during contract negotiations to:

- a. finalise the PMP prior to Contract award to ensure that a sound PMP is placed on Contract; or
- b. ensure that the PMP delivered under the resultant Contract is sound.

Under this last approach, the Contractor will commence activities from the Effective Date before an Approved PMP is obtained. As such, proposed areas of change in the draft PMP need to be discussed before Contract award. If the Commonwealth project office does not plan to obtain a Contract-ready PMP prior to Contract, then the Contract Data Requirements List (CDRL) will need to be amended to specify a delivery time for the PMP after the Effective Date.

**Drafter's action:** Drafters may need to amend the CDRL to reflect the delivery timeframe for the PMP under the Contract, as described in the guidance.

**Related clauses:** The **Project Management Plan** clause of the draft SOW imposes a contractual obligation on the Contractor to submit a PMP for Approval by the Commonwealth Representative and obliges the Contractor to manage the project in accordance with the Approved PMP.

**Further Reading:** See also – *Philosophy Annex A, Lifecycle Thread – Project Planning*.

## ANNEX F

**DRAFT CONTRACT WORK BREAKDOWN STRUCTURE**

- Reference:** Annex F, clause 2
- Sponsor:** Standardisation Branch
- Status:** Core
- Purpose:** To request tenderers to provide a draft Contract Work Breakdown Structure (CWBS).
- Policy:** *DEF(AUST) 5664, 'Work Breakdown Structures for Defence Materiel Projects'*
- Guidance:** One of the major reasons for requiring detailed visibility of the CWBS is to ensure that the tenderer has a sound understanding of the technical control aspects of project management. By examining the CWBS and the subcontracting arrangements, it should be possible to see clear responsibility for the delivery of subsystems or products throughout the product structure of the CWBS. There should be no shared responsibility.
- DEF(AUST) 5664, 'Work Breakdown Structures for Defence Materiel Projects'* is mandatory for use in Defence acquisition contracts where there is design and development. The standard is not applicable for (and, therefore, not mandatory for) contracts for off-the-shelf items (although it is mandatory where integration of off-the-shelf items is required).
- This clause requests tenderers to provide a draft CWBS. Drafters may wish to provide as an Annex to the draft SOW a summary WBS to assist tenderers in the development of the draft CWBS. Drafters should avoid specifying the summary WBS below level 2 because going below this level starts to define a particular solution or implementation and, therefore, encroaches upon the Contractor's design domain. Inappropriate levels of detail in a summary WBS can:
- a. artificially constrain the tenderer's design and, therefore, its tendered offer by implying a particular solution or approach is preferred; and
  - b. cause inappropriate subcontractual arrangements to be implemented because the summary WBS defines particular subsystems or elements of systems.
- Where this optional clause is selected, drafters should prior to release of the RFT include in the draft Statement of Work a clause that imposes a contractual obligation on the Contractor to develop the Contract Work Breakdown Structure (CWBS) within a certain period of time and sets out the process for agreement and use of the CWBS.
- Commonwealth project office staff should discuss the draft CWBS during contract negotiations to ensure that the CWBS delivered under the resultant Contract is sound. Generally, by the time a CWBS is delivered under a Contract, the Contractor has opened most of the control accounts and associated work packages and changes to the CWBS post-Contract award are difficult to achieve. As such, likely changes to the draft CWBS and CWBS Dictionary need to be discussed before Contract award.
- Drafter's action:** Prior to release of the RFT, drafters are to determine whether or not the resultant Contract will involve design and development and, if so, are to include this CWBS clause in the conditions of tender. Drafters may also wish to provide a summary WBS as an Annex to the draft SOW (recommended).
- Related clauses:** The **Contract Work Breakdown Structure** clause of the draft SOW sets out the requirement for the establishment, use and maintenance of a CWBS and CWBS Dictionary under the Contract.

**ANNEX F****DRAFT CONTRACT MASTER SCHEDULE**

<b><u>Reference:</u></b>	Annex F, clause 3
<b><u>Sponsor:</u></b>	Standardisation Branch
<b><u>Status:</u></b>	Core
<b><u>Purpose:</u></b>	To request tenderers to provide a draft Contract Master Schedule (CMS)
<b><u>Policy:</u></b>	Nil
<b><u>Guidance:</u></b>	<p>In the past, the Commonwealth has produced unrealistic schedules and then sought compliance from the tenderers to meet this schedule. The tenderer knows that non-compliance may cause elimination and, therefore, responds as being compliant, knowing full well the schedule is unrealistic. This is a no-win situation and is to be avoided at all cost. If a schedule is to be mandated it should only be proposed after detailed consultation with industry.</p> <p>This clause requests each tenderer to provide a draft CMS as part of its tender which should demonstrate the tenderer's understanding of how the work to be performed under the Contract needs to be organised to meet the Commonwealth's requirements. As such, the CMS provides valuable input into the assessment of risk for each tenderer's proposal.</p> <p>The CMS and the CWBS are the two key deliverables for understanding the Contractor's (and Subcontractors') planned scope of work under the Contract, the plan for undertaking this scope of work, and for the CMS only, the status of the project at any particular time. Under the ASDEFCON philosophy, the Contractor only needs to deliver a single, integrated schedule because the (typically) separate schedules for each of the functional disciplines (e.g. SE, ILS and V&amp;V) have been incorporated into the CMS.</p> <p>The CMS identifies important contract events and their relationship to major contract deliverables/Milestones. Intermediate level schedules may be required to provide better visibility of the Contractor's plan for completing the contracted scope of work. The degree of visibility required by the Commonwealth Representative will need to be determined on a case-by-case basis depending on the risks involved. Access to specified schedule data on an as required basis may be more appropriate than a routine delivery of data at some arbitrary level.</p> <p>Commonwealth project office staff should discuss the CMS during contract negotiations to ensure that the CMS delivered under the resultant contract is sound. Generally, by the time a CMS is delivered under a contract, the Contractor's program of activities is well underway and changes to the CMS post contract award are difficult to achieve. As such likely changes to the draft CMS need to be discussed before contract award.</p>
<b><u>Drafter's action:</u></b>	Nil.
<b><u>Related clauses:</u></b>	The <b>Contract Master Schedule</b> clause of the draft SOW sets out the requirement for the establishment, use and maintenance of a CMS under the Contract.

**ANNEX F****SCHEDULE OF SUBCONTRACTORS**

<u>Reference:</u>	Annex F, clause 4
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To request from each tenderer details of its proposed Approved Subcontractors.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>The <b>Schedule of Subcontractors</b> clause of Annex F of the conditions of tender requests tenderers to provide details for any Subcontractors where the work to be performed by the Subcontractor triggers any of the criteria listed in clause 10.9.3 of the draft conditions of contract. Clause 10.9.3 requires Subcontractors to be approved where:</p> <ol style="list-style-type: none"> <li>the work under the Subcontract will exceed a specified amount; or</li> <li>the Subcontractor will be bringing IP to the proposed Subcontract or creating IP under the proposed Subcontract necessary to enable the Commonwealth to use and support the Supplies.</li> </ol>

**SELECTING THE SUBCONTRACT VALUE AND SPECIFIC TASKS**

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When selecting the subcontract value and specific aspects of the proposed scope of the work to be included in clause 10.9.3 if the draft conditions of contract, drafters should consider the criticality of the tasks that may be subcontracted to the performance of the Contract, the additional contractual obligations under the Contract that relate to Approved Subcontractors and the administrative burden on both parties of having to approve each Approved Subcontractor.

**MANDATING SUBCONTRACTORS**

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It is possible for the Commonwealth to specify that a particular Subcontract must be used by the successful tenderer. Mandating Subcontractors should be avoided unless it is absolutely necessary for the performance of the proposed contract. By mandating a particular Subcontractor, the Commonwealth will limit the commercial freedom of tenderers and the Commonwealth may not achieve value for money. In addition, the Commonwealth may be exposed to greater risk where the mandated Subcontractor fails to perform under a Subcontract as the Commonwealth may be prevented from claiming against the Contract due to the fact that the Subcontractor was mandated by the Commonwealth.

Circumstances in which a Subcontractor may need to be mandated include:

- where a company is the only supplier for a particular item required for incorporation in the Supplies and the Commonwealth wishes to prevent the formation of exclusive teaming arrangements that limit competition at the tendering stage; or
- where the Commonwealth has entered into a previous contract with the supplier of a particular item and is contractually bound to source the item from the supplier.

Where the Commonwealth does not need to mandate the use of a particular Subcontractor, advice should be sought from Contracting Policy & Operations Branch. Changes will need to be made to the **Subcontracts** clause of the draft conditions of contract and associated clauses in the draft conditions of contract to ensure that the Commonwealth is adequately protected and the Commonwealth's responsibility for the performance of the mandated Subcontractor is clearly defined.

Drafter's action: Nil

Related clauses: The **Subcontracts** clause of the draft conditions of contract outlines the circumstances in which the Approved Subcontractors must be used by the Contractor.

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The **Schedule of Approved Subcontractors** Attachment of the draft conditions of contract will contain the agreed details relating to Approved Subcontractors.

Further Reading: Nil

**ANNEX F****RISK ASSESSMENT AND STRATEGY**

- Reference:** Annex F, clause 5
- Sponsor:** Contracting Policy & Operations and Standardisation Branch
- Status:** Core
- Purpose:** To request tenderers to provide a detailed risk assessment for the proposed Contract.
- Policy:** It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk.
- DPPM Version 5.0 2004*
- Project Risk Management Manual (PRMM), Version 1.0, 2004*
- Guidance:** Any tenderer who fails to identify risks probably does not understand the project. Expert advice should be sought for various risk areas. Systems that are built from Commercial-Off-The-Shelf (COTS) are put forward as low risk projects, however, although there is little risk in the COTS component there is a high cost and risk associated with the integration of the COTS products to produce the system.
- The risk assessment provided by tenderers in response to this clause should identify the risks associated with the tendered solution, categorise those risks according to probability and consequence and indicate how and by whom each risk will be managed (i.e. acceptance, transfer or reduction).
- The risk assessment provided by each tenderer will be used by the Commonwealth during the tender evaluation to:
- a. assist with assessing whether or not the tenderer adequately understands the requirement;
  - b. assess the level of risk associated with the tendered solution;
  - c. determine an appropriate risk share for any resultant contract; and
  - d. determine whether any additional contractual requirements are necessary to protect the Commonwealth.
- The tenderer is not required to duplicate the information requested under the **Liability** clause of the **Commercial** Annex to the conditions of tender in relation to risks involved with the tenderers proposed liability regime.
- Drafter's action:** Nil
- Related clauses:** The **Liability** clause of the **Commercial** Annex to the conditions of tender notifies tenderers of the Commonwealth policy on liability and seeks information from tenderers in relation to their proposed liability regime.
- The **Risk Management** clause of the draft SOW requires the Contractor to manage risks in accordance with the Approved RMP.

## ANNEX F

**QUALITY STATEMENT**

**Reference:** Annex F, clause 6

**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To elicit from tenderers information on their quality organisation, quality systems and control of Subcontractors. This information is required in order to establish a level of confidence in the tenderers' capacity to meet the quality requirements of the proposed contract.

**Policy:**

*DI(G) LOG 02-1 "Defence Policy on Quality Assurance"*

*DPPM Version 5.0 2004*

*AS/NZS ISO 9001:2000*

**Guidance:** This clause contains two Options. The selection of the appropriate Option will depend on the selection of the Option at the **Quality Management** clause of the draft SOW. Guidance on the selection of the appropriate Option is contained in the Guidance on the **Quality Management** clause of the draft SOW.

**QUALITY SYSTEM STANDARD REQUIRED FOR THE PROPOSED CONTRACT**

The application of a formal and documented quality system to work performed under a contract assists the Contractor in meeting the quality requirements of the contract. This also gives the Commonwealth a measure of assurance that adequate quality management practices are in place. Without such a quality system, management of quality can be unstructured and quality issues can sometimes be sacrificed in the interests of cost and schedule.

Where Option A is selected in this clause, tenderers will be required to provide information relating to the tenderer's Quality Management System (QMS). The note to tenderers notifies tenderers that the Commonwealth may assess a tenderer's QMS as part of the tender evaluation process. In accordance with the **Quality Management** clause of the draft conditions of contract, the Contractor will be required to be Certified to quality system standard *AS/NZS ISO 9001:2000*. Where software and firmware design and/or development is required the Contractor's quality system will also be required to be structured to control software development.

**INFORMATION REQUESTED IN THE QUALITY STATEMENT**

The Quality Statement is intended to provide the Commonwealth with a specific suite of information for evaluation. This information is focused on the tenderer's quality capabilities while not being burdensome for the tenderer to produce. Under Option A the Quality Statement seeks a response from the tenderer in three specific areas, namely:

- a. general information on the tenderer's QMS, including details of the tenderer's Certification status;
- b. scope of QMS in relation to the scope of the proposed work; and
- c. quality management of Subcontractors.

Under Option B, the Quality Statement seeks general process information relating to the required work under the draft Contract.

**Drafter's action:** Prior to release of the RFT, drafters should select the appropriate option, dependent on the Option that has been selected in the **Quality Management** clause of the draft SOW.

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Related clauses: The **Quality Management** clause of the draft SOW details the quality requirements that will be applicable to any resultant contract. This clause also sets out the procedure for agreement of the Quality Plan, if required, and any subsequent amendments and specifies the mechanism for seeking Commonwealth Representative approval of non-conforming Supplies, materials or work.



**ANNEX F****GOVERNMENT FURNISHED MATERIAL**

- Reference:** Annex F, clause 7
- Sponsor:** Contracting Policy & Operations and Standardisation Branch
- Status:** Optional. To be used when the Commonwealth proposes or mandates GFM for inclusion in, or use during the production of, the Supplies and/or where the Commonwealth is prepared to allow tenderers to request GFM.
- Purpose:** To inform tenderers of GFM that is being mandated or proposed by the Commonwealth for use by the Contractor in relation to the Contract and to allow tenderers to elect to use the proposed GFM and/or request that additional GFM be provided.
- Policy:** The preferred Departmental position is to minimise the provision of GFM to contractors. However, in some circumstances it will not be possible for a contractor to perform the work required under a contract without GFM. Additionally there may be benefits to the Commonwealth in providing GFM (e.g. through standardisation), which are sufficient to offset the risk.
- DI(G) LOG 07-4 "Provision of Material to Contractors".*
- Guidance:** GFM is any equipment, information or data provided to a contractor by the Commonwealth to assist in the performance of a contract. There are three types of GFM:
- a. Commonwealth Mandated GFM;
  - b. Commonwealth proposed GFM; and
  - c. Tenderer proposed GFM.

This clause should be included where the Commonwealth is mandating or proposing GFM and/or where the tenderer may propose GFM. Drafters must select the appropriate options in this clause dependent upon whether the Commonwealth is proposing and/or mandating GFM and whether tenderers may propose additional GFM.

**LIABILITY FOR GFM**

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The **Liability for GFM** clause of the draft conditions of contract sets out the risk allocation between the Commonwealth and the Contractor relating to the provision of GFM. Apart from GFI, which the Contractor uses at its own risk, the Contractor can not be held responsible for defects in the Supplies which result from defects in GFM, unless those defects were caused by the Contractor's or its Subcontractor's negligence, default or unlawful act. For this reason it is the preferred Departmental position to minimise the provision of GFM.

**COMMONWEALTH MANDATED GFM**

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The Commonwealth warrants the fitness for purpose of Commonwealth Mandated GFM under the **Liability for GFM** clause of the draft conditions of contract. Therefore careful consideration should be given to the Contract requirement before mandating GFM for use by the Contractor. It may be appropriate for GFM to be offered as Commonwealth Mandated GFM where:

- a. the Commonwealth mandates that the Contractor incorporate equipment provided by the Commonwealth into the Supplies; or
- b. data is required for the performance of the Contract that can only be provided to the Contractor by the Commonwealth and which cannot be independently verified by the Contractor.

It should be noted that, as the Commonwealth does not warrant the suitability of GFI, GFI can never be Commonwealth Mandated GFM.

Since mandating GFM can limit a tenderer's response to the RFT, the Commonwealth should take care when mandating GFM under the Contract. Where

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the Commonwealth receives a tender that is non-compliant with the Commonwealth's Mandated GFM requirements, but provides a satisfactory solution to the Commonwealth's capability requirements that represents value for money, the Commonwealth has discretion as to whether to exclude the tender from further consideration. If the tender is ultimately successful despite being non-compliant with the Commonwealth's Mandated GFM requirements, and other tenders have been received that meet the Commonwealth's Mandated GFM requirements, those unsuccessful tenderers may have cause for complaint and/or possibly legal action against the Commonwealth. The Commonwealth should therefore only mandate GFM where it is certain that a satisfactory solution cannot be achieved without the use of that particular GFM.

### COMMONWEALTH PROPOSED GFM

The Commonwealth may also propose GFM in the RFT for use by the Contractor in the performance of the Contract. It is important to note that the Contractor is under no obligation to elect to use the proposed GFM and the Commonwealth may elect not to provide the proposed GFM under the resultant contract during tender evaluation. Therefore tenderers are requested in this paragraph to detail the additional cost to be included in the Contract Price where Commonwealth proposed GFM requested by the tenderer will not be provided under the resultant contract.

### TENDERER PROPOSED GFM

Requests from tenderers for the Commonwealth to supply GFM should be evaluated carefully to determine the potential risk to the Commonwealth of providing the material and the value for money to be gained from any such proposal. The evaluation should also take into account the opportunity cost of allowing the Contractor to use Commonwealth material. An opportunity cost is the cost to the Commonwealth of losing the opportunity to use the GFM itself or having to buy it. This may not only be an issue if the Commonwealth could employ the GFM elsewhere but also if the Commonwealth could dispose of the GFM if it were not for the tenderer's request. Consideration should also be given to the need, if GFM is to be provided, for the Commonwealth to ensure the GFM is fully operational and remains so, as the Commonwealth accepts liability for defects in GFM under the Contract except where the Contractor can be shown to have caused the defect.

It is important to note that the Commonwealth is under no obligation to provide GFM requested by the successful tenderer. Therefore tenderers are requested in this paragraph to detail the additional cost to be included in the Contract Price where tenderer proposed GFM will not be provided under the resultant contract.

**Drafter's action:** Prior to release of the RFT, drafters must select the appropriate options in this clause. Where Commonwealth Mandated GFM will be provided under the Contract and/or the Commonwealth is proposing GFM for use in the performance of the Contract, drafters must include a description of the GFM, its purpose, the proposed date for delivery or provision of access to the GFM and the proposed time period for inspection of the GFM in the **Government Furnished Materials** Attachment to the draft conditions of contract.

**Related clauses:** The **Provision and Management of GFM, Liability for GFM and GFM Ownership and Restrictions** clauses of the draft conditions of contract contains the GFM provisions relating to provision, management, liability, ownership and restrictions.

The **Government Furnished Material Management** clause of the draft SOW contains the management and work-related GFM provisions.

The **Government Furnished Material** Attachment to the draft conditions of contract will contain the agreed list of GFM that is to be provided under the

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contract, including quantity, date required, location, time period for inspection and intended purpose of the GFM.

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**GOVERNMENT FURNISHED FACILITIES**

- Reference:** Annex F, clause 8
- Sponsor:** Infrastructure Division and Standardisation Branch
- Status:** Optional. To be used when the Commonwealth proposes or mandates GFF for use during the production of the Supplies and/or where the Commonwealth is prepared to allow tenderers to request GFF.
- Purpose:** To inform tenderers of GFF that is being mandated or proposed by the Commonwealth for use by the Contractor in relation to the Contract and to allow tenderers to elect to use the proposed GFF and/or request that additional GFF be provided.
- Policy:** The preferred Departmental position is to minimise the provision of GFF to contractors. However, in some circumstances it will not be possible for a contractor to perform the work required under a contract without GFF. Additionally, it may be beneficial for strategic reasons for Contractor's to occupy GFF.
- DI(G) ADMIN 35-1 "Procedure for the Use of Defence Estate Assets by Non-Defence Organisations or Individuals including Commercial Contractors"*
- Guidance:** GFF is any facility provided to a contractor by the Commonwealth to assist in the performance of a contract. There are three types of GFF:
- a. Commonwealth mandated GFF;
  - b. Commonwealth proposed GFF; and
  - c. Tenderer proposed GFF.

This clause should be included where the Commonwealth is mandating or proposing GFF and/or where the tenderer may propose GFF. Drafters must select the appropriate options in this clause dependent upon whether the Commonwealth is proposing and/or mandating GFF and whether tenderers may propose additional GFF.

**GFF LICENCE**

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The GFF Licence to be included as Annex C of the **Government Furnished Materials** Attachment details the Commonwealth's and the Contractor's liabilities and responsibilities in relation to GFF provided under the Contract.

**MANDATING GFF**

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Mandating GFF can limit a tenderer's response to the RFT. As such the Commonwealth should take care when mandating GFF under a contract. Where the Commonwealth receives a tender that is non-compliant with the Commonwealth's mandated GFF requirements, but provides a satisfactory solution to the Commonwealth's capability requirements and represents value for money, the Commonwealth has a discretion as to whether to exclude the tender from further consideration. If the tender is ultimately successful despite being non-compliant with the Commonwealth's mandated GFF requirements, and other tenders have been received that meet the Commonwealth's mandated GFF requirements, those unsuccessful tenderers may have cause for complaint and/or possibly legal action against the Commonwealth. The Commonwealth should therefore only mandate GFF where it is certain that a satisfactory solution cannot be achieved without the use of that particular GFF.

**COMMONWEALTH PROPOSED GFF**

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The Commonwealth may also propose GFF in the RFT for use by the Contractor in the performance of the Contract. It is important to note that the Contractor is under no obligation to elect to use the proposed GFF and the Commonwealth may elect not to provide the proposed GFF under the resultant contract during tender evaluation. Therefore tenderers are requested in this clause to detail the additional

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cost to be included in the Contract Price where Commonwealth proposed GFF requested by the tenderer will not be provided under the resultant contract.

**TENDERER PROPOSED GFF**

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Requests from tenderers for the Commonwealth to supply GFF should be evaluated carefully to determine the potential risk to the Commonwealth of providing the GFF and the value for money to be gained from any such proposal. The evaluation should also take into account the opportunity cost of allowing the Contractor to use the Commonwealth facility. An opportunity cost is the cost to the Commonwealth of losing the opportunity to use the GFF itself. This may not only be an issue if the Commonwealth could use the GFF for another purpose but also if the Commonwealth could dispose of the GFF if it were not for the tenderer's request. Consideration should also be given to the need, if GFF is to be provided, for the Commonwealth to ensure the GFF meets the Contractor's requirements.

It is important to note that the Commonwealth is under no obligation to provide GFF requested by the successful tenderer. Therefore tenderers are requested in this clause to detail the additional cost to be included in the Contract Price where tenderer proposed GFF will not be provided under the resultant contract.

**Drafter's action:** Prior to release of the RFT, drafters must select the appropriate options in this clause. Where Commonwealth mandated GFF will be provided under the Contract and/or the Commonwealth is proposing GFF for use in the performance of the Contract, drafters must include a description of the GFF, its purpose, the proposed date for provision of access to the GFF and the proposed time period for inspection of the GFF at Annex B of Attachment H to the draft conditions of contract.

**Related clauses:** The **Government Furnished Facilities** clause of the draft conditions of contract and Attachment H contain the GFF provisions for the Contract.

Annex B of the **Government Furnished Materials** Attachment to the draft conditions of contract will include details of all Commonwealth Mandated GFF and/or Commonwealth proposed GFF including the date required, location, time period for inspection and intended purpose of the GFF.

Annex C of the **Government Furnished Materials** Attachment to the draft conditions of contract will contain the agreed **Government Furnished Facilities Licence Deed**.

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**DRAFT SYSTEMS ENGINEERING MANAGEMENT PLAN**

<u>Reference:</u>	Annex F, clause 9
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To assess the tenderer's system engineering development strategy for the project and its associated risks through the approach, plans and procedures documented in the draft Systems Engineering Management Plan (SEMP).
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>The draft SEMP describes the tenderer's plans and procedures for the management of a fully integrated engineering program in accordance with the draft Contract.</p> <p>The SEMP is used by the Contractor to provide the primary direction and guidance to the technical team responsible for the conduct of the scope.</p> <p>The Commonwealth uses the SEMP as a benchmark against which the Contractor performance and changes in risk can be evaluated. The engineering aspects of the SOW have been aligned with EIS-632. The SEMP is expected to capture the tenderer's internal procedures. The SEMP should also capture the tenderer's proposed tailoring of EIS-632 as applicable to its solution for the Mission System and Support System. In order to adequately assess development risk, a reasonably detailed draft SEMP is required.</p> <p>The SEMP may be finalised during negotiations or soon after the Contract Effective Date, but before any substantial development work is undertaken.</p> <p>If the Commonwealth project office plans to obtain a Contract-ready SEMP prior to Contract, then the Contract Data Requirements List (CDRL) needs to be amended to reflect this approach.</p>
<u>Drafter's action:</u>	Drafter's will need to assess the complexity of the requirement to determine whether a draft SEMP is required. For all but the simplest design programs, a draft SEMP should be obtained. Drafters may also need to amend the CDRL, depending upon the timeframe for obtaining the SEMP.
<u>Related clauses:</u>	<p>The <b>Engineering Organisation and Plan</b> clause of the draft SOW imposes a contractual obligation on the Contractor to submit a SEMP for Approval by the Commonwealth Representative, and obliges the Contractor to ensure that the engineering aspects of the project accord with the Approved SEMP.</p> <p>Annex C to the draft SOW contains the CDRL.</p>
<u>Further Reading:</u>	<p>See also – <i>Philosophy Annex A, Life Cycles Thread – Engineering Management</i></p> <p>See also – <i>Philosophy, Section 10 – Systems Engineering</i></p>

**ANNEX F****DRAFT TECHNICAL DOCUMENTATION TREE**

- Reference:** Annex F, clause 10
- Sponsor:** Standardisation Branch
- Status:** Optional
- Purpose:** To confirm the adequacy of the tenderer's proposed technical documentation structure.
- Policy:** Nil
- Guidance:** The technical documentation tree should identify a hierarchy of specifications and design documentation, which reflects the hierarchy of the tenderer's proposed system design products. This documentation is subsequently to be delivered under the Contract.
- As the technical documentation listed in the TDT defines the only lower level design documentation that is requested, the content of the TDT is key in assessing the adequacy of the tenderer's response and in particular, the visibility to the Commonwealth of the contractor's evolving design under the Contract.
- The TDT acts as a dynamic CDRL under the Contract; hence, it is essential that this data item be finalised before the Effective Date. Alternatively (but not preferably), the TDT could be finalised shortly after the Effective Date. In both cases, the final version should be based on the tendered draft TDT.
- If the Commonwealth project office plans to obtain a Contract-ready TDT prior to Contract, then the Contract Data Requirements List (CDRL) needs to be amended to reflect this approach.
- Drafter's action:** Prior to release of the RFT, drafter's should amend clause and the Technical Documentation Tree clause of the draft SOW if there are any particular project-specific elements that the Commonwealth would expect to see in the design documentation. These element may include constraint s on the format of the documentation (though this should be done with care as the intent is to use the tender-proposed documentation standards wherever possible), particular areas of design that may be expected in the TDT but otherwise may not be included (such as the hierarchy of design documentation for support facilities) and the expected level and detail of the documentation. Any tailoring should be read in conjunction with the existing requirements DID-ENG-SOL-DOCTREE (which in itself should not need tailoring).
- Related clauses:** The **Technical Documentation Tree** clause of the draft SOW imposes a contractual obligation on the Contractor to develop and update a hierarchy of specifications and design documentation, which reflects the hierarchy of System design products.
- Annex C to the draft SOW contains the CDRL.
- Further Reading:** See also – *Philosophy Annex A, Lifecycle Thread – Design Documentation*

**ANNEX F****AUTHORISED/ACCREDITED ENGINEERING ORGANISATION APPLICATION**

- Reference:** Annex F, clause 11
- Sponsor:** AIRREG-DGTA (Aerospace)  
Director of Technical Regulation - Navy (Maritime)  
Director Technical Regulation - Army (Land)
- Status:** Optional (Core for aerospace and land materiel projects)
- Purpose:** To obtain sufficient information to assess how the tenderer intends to become an Authorised/ Accredited Engineering Organisation.
- Policy:** *DI(G) LOG 08-15, 'Regulation of technical integrity of Australian Defence Force materiel'*  
*DI(G) OPS 02-02, 'Australian Defence Force Airworthiness Management'*  
*AAP 7001.053, 'Technical Airworthiness Management Manual (TAMM)'*  
*Technical Regulation of Army Materiel Manual (TRAMM)*  
*ABR 6492, 'Navy Technical Regulations Manual (NTRM)'*  
*DI(A) LOG 12-1, 'Regulation of the Technical Integrity of Land Materiel'*  
*DI(N) LOG 47-3, 'Technical Regulation of Navy Materiel'*
- Guidance:** Where engineering design has the potential to affect seaworthiness, mission-worthiness, airworthiness or other operational parameters that could affect fitness for purpose, the technical regulatory requirements for the applicable environment must be applied. For aerospace and maritime requirements, the Contractor would need to be an Authorised Engineering Organisation (AEO). For land systems, the Contractor would need to be an Accredited Engineering Organisation (AEO) (same acronym used). For electronic systems or joint projects, DI(G) LOG 08-15 provides policy on the application of technical regulatory requirements.
- Unless otherwise agreed by the relevant Technical Regulatory Authorities (TRA(s)), this clause should be included in the conditions of tender if the optional **Authorised / Accredited Engineering Organisation (AEO)** clause is included in the draft SOW.
- Drafter's action:** Drafters are to consult with the relevant TRA(s) on whether this clause is required. When required, the drafter is to tailor the clause on the advice of the TRA before including it in the conditions of tender.
- Related clauses:** The **Authorised / Accredited Engineering Organisation (AEO)** clause of the draft SOW ensures that an appropriate design framework is in place to satisfy the Technical Regulatory Framework (TRF) requirements for ADF Materiel.



## ANNEX F

**AUTHORISED/ACCREDITED MAINTENANCE ORGANISATION APPLICATION**

- Reference:** Annex F, clause 12
- Sponsor:** AIRREG-DGTA (Aerospace)  
Director of Technical Regulation - Navy (Maritime)  
Director Technical Regulation - Army (Land)
- Status:** Optional (Core for aerospace projects where maintenance of technical equipment that has a technical or functional interface with ADF aircraft or aeronautical product will be required under the Contract)
- Purpose:** To obtain sufficient information to assess how the tenderer intends to become an Authorised/ Accredited Maintenance Organisation.
- Policy:** *DI(G) LOG 08-15, 'Regulation of technical integrity of Australian Defence Force materiel'*  
*DI(G) OPS 02-02, 'Australian Defence Force Airworthiness Management'*  
*AAP 7001.053, 'Technical Airworthiness Management Manual (TAMM)'*  
*Technical Regulation of Army Materiel Manual (TRAMM)*  
*ABR 6492, 'Navy Technical Regulations Manual (NTRM)'*  
*DI(A) LOG 12-1, 'Regulation of the Technical Integrity of Land Materiel'*  
*DI(N) LOG 47-3, 'Technical Regulation of Navy Materiel'*
- Guidance:** Where the Contractor will be required to perform maintenance as part of the Contract, the technical regulatory requirements for the applicable environment must be applied.
- For the aerospace environment, the Contractor would need to be an Authorised Maintenance Organisation (AMO).
- For land and maritime environments, the need for a Contractor to become an Accredited (for land) or Authorised (for maritime) Maintenance Organisation (same AMO acronym used) is not compulsory, as explained in the guidance for the optional **Authorised / Accredited Maintenance Organisation (AMO)** clause in the draft SOW.
- For application in the electronic environment, there are no specific technical regulatory requirements; however, where the system is to interface with an aerospace, land, or maritime system or systems, then advice should be sought from the relevant TRA(s) for those environments.
- Unless otherwise agreed by the relevant TRA(s), this clause should be included in the conditions of tender if the optional **Authorised / Accredited Maintenance Organisation (AMO)** clause is included in the draft SOW.
- Drafter's action:** Drafters are to consult with the relevant TRA(s) on whether this clause is required. When required, the drafter is to tailor the clause on the advice of the TRA before including it in the conditions of tender.
- Related clauses:** The **Authorised / Accredited Maintenance Organisation (AMO)** clause of the draft SOW ensures that maintenance activities are performed in accordance with the Technical Regulatory Framework (TRF) requirements for ADF Materiel.

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**DRAFT SOFTWARE MANAGEMENT PLAN**

- Reference:** Annex F, clause 13
- Sponsor:** Standardisation Branch
- Status:** Optional. To be included where a moderate or higher level of software development is likely.
- Purpose:** To confirm that the software engineering capabilities of the tenderer will enable them to meet the requirements of the draft Contract.
- Policy:** Nil
- Guidance:** The software development aspects of the draft SOW have been aligned with *ISO 12207: Software Life Cycle Process*. This standard contains processes, activities and tasks that are to be applied during the acquisition of a system that contains software, a stand-alone software product, and software service and during the supply, development, operation, and maintenance of software products. The inclusion of processes for software acquisition and supply make it highly applicable to DMO. Rather than prescribing process, the standard identifies the key components of the processes to be applied.
- The standard is intended to be tailored and this can occur at several levels. The SMP is expected to capture the tenderer's proposed tailoring of *ISO 12207* including the integration of software safety standards, as applicable for the Contract and the tenderer's internal procedures. It should be expected that tenderers will respond citing national adaptations of the ISO standard such as *IEEE 12207*.
- While the standard includes some guidance on tailoring, specific training in the standard is recommended to perform or understand detailed tailoring. Contact the Director of Software Engineering, Standardisation Branch for details of training courses or advice on tailoring *ISO 12207*.
- The SMP may be finalised during negotiations or soon after the Effective Date.
- If the Commonwealth project office plans to obtain a Contract-ready SMP prior to Contract, then the Contract Data Requirement List (CDRL) needs to be amended to reflect this approach.
- Drafter's action:** Drafter's will need to assess the complexity of the requirement to determine whether a draft SMP is required. Drafters may also need to amend the CDRL, depending upon the timeframe for obtaining the SMP.
- Related clauses:** The **Software Development** clause of the draft SOW imposes a contractual obligation on the Contractor to (optionally) submit a SMP for Approval by the Commonwealth Representative, and obliges the Contractor to ensure that the software aspects of the project accord with the Approved SMP. If software development is only minor in nature, the **Software Development** clause of the draft SOW provides an option for the software development to be managed under the Approved SEMP.
- Annex C of the draft SOW contains the CDRL.
- Further Reading:** See also – *Philosophy Annex A, Lifecycle Thread – Software Management*.

**ANNEX F****DRAFT INTEGRATED SUPPORT PLAN**

- Reference:** Annex F, clause 14
- Sponsor:** Standardisation Branch
- Status:** Optional. To be included only where a complex Integrated Logistics Support (ILS) task or environment is likely.
- Purpose:** To enable the Commonwealth to evaluate the management processes, infrastructure and methods that the tenderer proposes to use to establish, design and implement the proposed Support System solution.
- Policy:** *DPPM – Section 5, Chapter 5.6*  
*DI(G) LOG 03-6, 'Defence Policy on Integrated Logistic Support'*
- Guidance:** The solicitation of draft plans not only assist with assessing the proposed solution, but also assesses the means by which a potential Contractor will manage, design and implement the proposed solution. This assessment enables the Commonwealth to effectively exercise its corporate governance responsibilities by understanding the full extent of its potential exposure in entering into an agreement for the delivery of a proposed solution based on an external agency's capabilities.
- The Integrated Support Plan (ISP) is the primary plan for defining the management processes, infrastructure and methods that the tenderer proposes to utilise to define and develop the required support, and the scope of the ISP is inextricably linked with the effort required to implement the proposed support system solution.
- Drafters should also be aware of the cross-linkages between the ISP and other plans/documents because there may be a need to assess these other plans/documents to fully assess the ILS program. These other plans/documents include, where applicable:
- a. the Verification and Validation Plan (V&VP), which addresses the V&V of the Support System Components;
  - b. the Systems Engineering Management Plan (SEMP), which addresses such aspects as the supportability characteristics of the Mission System and requirements analysis;
  - c. the Contract Master Schedule (CMS), which includes the ILS schedule for the program (and is called up through the ISP);
  - d. the Australian Industry Involvement (All) Plan, which will provide a view of the support solution from a different perspective; and
  - e. the Intellectual Property (IP) Plan, which will provide insight into whether or not the proposed IP arrangements are consistent with the proposed support solution.
- If the Commonwealth, project office does not plan to obtain Contract-ready ILS plans prior to the Contract, then the Contract Data Requirements List (CDRL) will need to be amended to specify the delivery times for these plans after the Effective Date.
- Drafter's action:** Drafter's will need to assess the complexity of the requirement to determine whether a draft ISP is required. Drafters may also need to amend the CDRL, depending upon the timeframe for obtaining the ISP.
- Related clauses:** The **ILS Program Management** clause of the draft SOW details the requirement for the ISP and other ILS program plans.
- Annex C of the draft SOW contains the CDRL.
- Further Reading:** See also – *Philosophy Annex A, Lifecycle Thread – ILS/LSA Management*

## ANNEX F

**DRAFT VERIFICATION AND VALIDATION PLAN**

- Reference:** Annex F, clause 15
- Sponsor:** Standardisation Branch
- Status:** Optional. To be included only where a complex V&V program is likely.
- Purpose:** To assess the tenderer's Verification and Validation (V&V) strategy for the project and its associated risks through the approach, plans and procedures documented in the draft Verification and Validation Plan (V&VP).
- Policy:** *DI(G) OPS 43 1, 'Defence Test and Evaluation Policy'*  
*DMO Verification and Validation Policy*  
*DMO Verification and Validation Manual*
- Guidance:** The draft V&VP is expected to capture the tenderer's proposed V&V strategy including those aspects mandated by the Commonwealth in the draft Contract as well as the tenderer's internal V&V associated with its proposed suppliers and Subcontractors.
- The V&VP may be finalised during negotiations of soon after the Effective Date.
- If the Commonwealth project office plans to obtain a Contract-ready V&VP prior to Contract, then the Contract Data Requirement List (CDRL) needs to be amended to reflect this approach.
- Drafter's action:** Drafter's will need to assess the complexity of the requirement to determine whether a draft V&VP is required. Drafters may also need to amend the CDRL, depending upon the timeframe for obtaining the V&VP.
- Related clauses:** The **Verification and Validation Planning** clause of the draft SOW imposes a contractual obligation on the Contractor to (optionally) submit a V&VP for Approval by the Commonwealth Representative, and obliges the Contractor to conduct all V&V activities for the project in accordance with the Approved V&VP. If Verification is not anticipated to be a significant or critical aspect of the acquisition, the **Verification and Validation Planning** clause of the draft SOW provides an option for the V&V activities to be managed under the Approved SEMP.
- Annex C of the draft SOW contains the CDRL.
- Further Reading:** See also – *Philosophy Annex A, Lifecycle Thread – Verification and Validation*  
 See also – *Philosophy, Section 13 – Verification and Validation*

## ANNEX F

**FACILITY CLEARANCE REQUIREMENT**

- Reference:** Annex F, clause 16
- Sponsor:** Defence Security Authority
- Status:** Optional. To be included where the Contractor will require access to, or will be producing classified material during the performance of the Contract.
- Purpose:** To obtain details of the type and level of facility clearances held by the tenderer and proposed Subcontractors.
- Policy:** *Defence Security Manual*  
*Defence Security Policy*  
*DPPM Section 3, Chapter 3.9 and Annex 3C*
- Guidance:** This clause requests each tenderer to provide details of premises proposed in its tender for the storage of classified material. Each tenderer is also requested to state whether it holds the security clearance required by the proposed contract and, where the required clearance is not held, to advise of its willingness to undergo the procedures for obtaining the clearance required.

**UNWILLINGNESS TO UNDERGO THE SECURITY PROCESS**

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Most tenderers who do not possess the security clearance required in the draft conditions of contract will indicate a willingness to undergo the process for obtaining the required facility security clearance. If, however, a tenderer indicates that it is not willing to undergo such a process, the Commonwealth will have to consider carefully whether refusal makes it impossible for the tenderer to undertake the work and thus warrants the exclusion of the tenderer's proposal from further consideration by the Commonwealth. Further advice on Defence security issues can be obtained by contacting the Defence Security Authority (Communications Security).

- Drafter's action:** Prior to release of the RFT, when COMSEC material will be necessary under any resultant contract, drafters should include the optional note to tenderers.
- Related clauses:** The **Defence Security** clause of the draft conditions of contract details the security requirements of the Contract and the security classification of work to be performed under the Contract.
- The **Defence Security Compliance** clause of the draft SOW requires the Contractor to undertake the work required to comply with the **Defence Security** clause of the draft conditions of contract.

## ANNEX F

**PAST PERFORMANCE**

- Reference:** Annex F, clause 17
- Sponsor:** Industry Policy
- Status:** Optional. This requirement should only be included where the resultant contract will be valued at more than \$10 million.
- Purpose:** To request from tenderers information about their performance and their Approved Subcontractor's performance of recent and current contracts.
- Policy:** *Defence Company ScoreCard Policy Statement*  
*DPPM Version 5.0 2004*  
*Guidance for Reviewing the Performance of Nominated Reference Sites*
- Guidance:** Although most major companies can offer successful projects to prove their past performance, the most important thing to look for is the past performance of the team members who will be actually performing the work on this contract and what they failed on.
- The note to tenderers notifies tenderers that during the tender evaluation the Commonwealth may use:
- a. the information requested by this clause;
  - b. information contained in a Company ScoreCard relating to a tenderer or a proposed Approved Subcontractor; and
  - c. additional supporting information relating to a tenderer's past performance,
- to assess a tenderer's ability to perform the proposed contract.
- Further guidance on Company ScoreCards and evaluation of tenderers in relation to past performance is contained in the "*Defence Company ScoreCard Policy Statement*". Both this document and the "*Guidance for Reviewing the Performance of Nominated Reference Sites*" are available on the Company ScoreCard internet website: [www.defence.gov.au/dmo/id/cscard/csc\\_home.cfm](http://www.defence.gov.au/dmo/id/cscard/csc_home.cfm).
- Clause 17.1 requests tenderers to provide a summary list of up to 10 recent or current contracts which may be a combination of Australian Defence contracts for which the tenderer has a Company ScoreCard and contracts from Reference Sites. In accordance with this clause, the contracts listed should be the tenderer's highest value contracts.
- Where a tenderer lists contracts from Reference Sites, details of the Nominated Reference Sites should be included in the summary list. A Reference Site is an entity external to the tenderer who can provide feedback on the tenderer's performance of a recently performed contract. Further guidance on Reference Sites can be found in "*Guidance for Reviewing the Performance of Nominated Reference Sites*".
- Tenderers should note that this clause requests tenderers who have Company ScoreCards held by Defence to provide the Commonwealth with strategies through which the tenderer will implement performance improvements for the proposed contract and the company's performance overall to address any marginal or unsatisfactory ratings in their Company ScoreCard. It also places a similar requirement on tenderers in relation to proposed Approved Subcontractors. It is important to note, however, that this requirement applies only to the extent that a tenderer is aware of any marginal or unsatisfactory ratings contained in a proposed Approved Subcontractor's Company ScoreCard.
- Tenderers should also note that they may provide additional information on their past performance or the past performance of a proposed Approved Subcontractor in accordance. The Commonwealth may consider any additional information provided by a tenderer at its sole discretion.

**ANNEX F**

Drafter's action: Prior to the release of the RFT, drafters should determine whether or not the the tendered price is reasonably expected to be more than \$10m and, if so, should include this clause in the conditions of tender.

Related clauses: Nil





**ANNEX G****DESCRIPTION OF PROPOSED SOLUTION (CORE)****MISSION SYSTEM**

- Reference:** Annex G, clause 1
- Sponsor:** Standardisation Branch
- Status:** Core
- Purpose:** To provide the Commonwealth with an understanding of the tenderer's proposed solution for the Mission System in terms of its proposed implementation details.
- Policy:** Nil
- Guidance:** There are multiple reasons for requiring each tenderer to provide a description of its proposal for the Mission System at the time of tendering. In particular, this information will provide:
- a. an indication of each tenderer's understanding of the requirements conveyed in the RFT;
  - b. information on how well the tenderer's proposal will satisfy the operational needs, including the risks associated with satisfying these needs;
  - c. information to support the compliance assessment against the specification requirements defined in the Description Of Requirement (DOR) at Annex A to the draft SOW;
  - d. insight into the level of maturity of the proposed solution and the developmental effort and concomitant risks associated with bringing the solution into being;
  - e. valuable input into determining the validity of the tenderer's plans (e.g. SEMP, SMP and V&VP) for the development of the required solution; and
  - f. valuable input into understanding and assessing the tenderer's Australian Industry Involvement (AII) proposal (if applicable).
- Other elements of the **Mission System** clause are intended to elicit information to identify all of the products and components, and to determine the scope of any other work that may be required to integrate the prime equipment (or other Supplies) with other equipment or into facilities. As obsolescence can be an important consideration and significant cost driver, information relating to the expected remaining life of the products and components is also requested.
- Drafters should amend clause 1, as required, to meet the specific requirements of the project or procurement activity.
- Drafter's action:** Prior to release of the RFT, drafters must develop this section as needed for the particular project or procurement activity.
- Related clauses:** The **Description of Requirement** Annex A to the draft SOW includes the operational concepts and specification requirements against which the tenderer's proposed Mission System solution should be based.
- Further Reading:** Nil

**ANNEX G****SUPPORT SYSTEM**

<u>Reference:</u>	Annex G, clause 2
<u>Sponsor:</u>	Standardisation Branch
<u>Purpose:</u>	To enable the Commonwealth to assess the extent to which the tendered solution for the Support System meets the requirements of the RFT and to enable support-related risks in the proposal to be assessed.
<u>Status:</u>	Core
<u>Policy:</u>	<i>DI(G) LOG 03-6, 'Defence Policy on Integrated Logistic Support'</i>
<u>Guidance:</u>	<p>There are multiple reasons for requiring each tenderer to provide a description of its support proposal at the time of tendering. In particular, this information will provide:</p> <ol style="list-style-type: none"> <li>a. an indication of each tenderer's understanding of the requirements conveyed in the RFT;</li> <li>b. information on how well the tenderer's support proposal will provide the requisite support for the Mission System as well as the risks associated with the provision of this support;</li> <li>c. information to support the compliance assessment against the support requirements (and concepts) defined in the Description Of Requirement (DOR) at Annex A to the draft SOW;</li> <li>d. insight into the level of maturity of the proposed solution and the developmental effort and concomitant risks associated with bringing the solution into being;</li> <li>e. valuable input into determining the validity of the tenderer's plans (e.g. ISP) for the development of the required support; and</li> <li>f. if applicable, input for assessing the achievability and sustainability of each tenderer's Australian Industry Involvement (AII) proposal (if applicable).</li> </ol>

Drafters should amend clause 2.1, as required, to meet the specific requirements of the project or procurement activity.

Clause 2.2 requires each tenderer to provide specific information relating to the availability of support for the Supplies across the domains of engineering support, maintenance support, supply support and training support. This information enables the scope and availability of in-country support to be evaluated (particularly where this support is strategically important or, simply, more cost-effective), and is intended to assist with the finalisation of any accompanying Contract (Support) or (perhaps) the future implementation of any required support arrangements. Drafters should amend clause 2.2, as required, to meet the specific requirements of the project or procurement activity.

In addition to the list of reasons provided in paragraph 1 of this guidance, the specific rationale for requesting proposed lists of spares and equipment at the time of tendering is that the inclusion of these lists recognises that the final lists of Spares, S&TE and Training Equipment are (generally) not able to be known at the time of tendering and, therefore, the overall prices for these items are unable to be included in the Contract Price. Drafters should note that each of the elements of Spares, S&TE and Training Equipment are covered by separate Not-To-Exceed (NTE) prices, which each tenderer provides in response to clause 2 of Annex C.

These lists, therefore, provide a contractual framework for managing three significant cost elements under the resultant Contract. Each of these lists provide unit prices for each of the items in the list, which should be incorporated into the final Contract, with accompanying contractual clauses to ensure that the prices will still stand at the time that procurement action for specific items on the lists occurs. (Drafters are advised to seek advice from Contracting Policy & Operations Branch

**ANNEX G**

in developing these clauses.) The NTE prices bound the Commonwealth's exposure at the time of tendering, and enable budgeting for the three separate elements to occur.

When the final lists of Spares, S&TE and Training Equipment are determined under the Contract, these lists and the actual prices associated with these lists would be placed on Contract through CCP action, with the Contract Price adjusted accordingly. Of note, the actual prices would not be able to exceed the NTE prices and appropriate contractual clauses would need to be developed to provide for the management of these NTE prices.

In addition to the list of reasons provided in paragraph 1 of this guidance, the specific rationale for requesting a proposed list of Technical Data at the time of tendering is to assist with evaluating the Intellectual Property (IP) aspects of the tenderer's offer.

The rationale for requesting specific information on Training is covered in paragraph 1 of this guidance.

**Drafter's action:** Prior to release of the RFT, drafters should amend clause 2, as required, to meet the specific requirements of the project or procurement activity.

Prior to release of the RFT, drafters must liaise with Contracting Policy & Operations Branch staff to develop the contractual framework for managing the NTE prices and the individual prices associated with each list. Additionally, this clause may require further development to meet the specific requirements of the project or procurement activity.

**Related clauses:** The **Items for which Specific Prices Are Required** clause of the **Financial** Annex of the conditions of tender requires tenderers to provide the NTE prices for Spares, S&TE and Training Equipment

The **Intellectual Property** clause of the **Financial** Annex of the conditions of tender requires tenderers to provide a list of IP that will be brought into or created under any resultant contract and any limitations on the IP licences granted under the Contract.

The **Description of Requirement** Annex to the draft SOW includes the support concepts and requirements against which the tenderer's proposed support solution should be based.

**Further Reading:** See also – *Overview of Integrated Logistic Support, Version 1.0, May 2004*  
See also – *ASDEFCON Philosophy Volume, Section 11.*

**ANNEX G****ACCESS TO THE RADIO FREQUENCY SPECTRUM**

<u>Reference:</u>	Annex G, clause 3
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional. To be included if access to the radio frequency spectrum is likely to be required.
<u>Purpose:</u>	To evaluate the tenderer's proposed solution to ensure that equipment, systems, sub-systems, Configuration Items (CIs), or end-products will be compliant with the Radio communications Act 1992 and that their in-service spectrum use will be able to be managed to meet the intended operational capability.
<u>Policy:</u>	<i>DI(G) ADMIN 05-9, 'Projects Involving the Provision/Utilisation of Communications-Electronics Equipment – Approval Process' (under review)</i>  <i>DI(G) OPS 07-14, 'Management of the Defence Use of the Radiofrequency Spectrum'</i>  <i>DI(G) OPS 07-16, 'Coordination of Use of the Radiofrequency Spectrum Shared by Defence Telemetry and Other Equipment and Deep Space Tracking Stations in the Radiofrequency Band 2200-2300 MHz'</i>
<u>Guidance:</u>	

**ACCESS TO THE RADIO FREQUENCY SPECTRUM**

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Australian Legislation, Regulations, and the need to co-exist with civilian infrastructure limit access to the radio frequency spectrum by Defence systems. This access is regulated by the government through the Australian Communications Authority in conjunction with the Directorate of Spectrum and Communications Regulation (DSCR), which operates within the Office of the Chief Information Officer and which manages the Defence use of, and access to, this spectrum. Any procured system equipment, systems, sub-system, Configuration Item (CI), or end product that does not conform to either the regulations or to the requirement to co-exist with civil infrastructure will have "operational restrictions" placed on it. The requirement for tenderers to submit detailed information on the proposed system will allow Defence to ensure compliance with legislation and the ability for the system to meet its envisaged capability.

<u>Drafter's action:</u>	Prior to the release of the RFT, drafters need to determine whether or not access to the radio frequency spectrum is likely to be required and, if so, this clause is to be included in the conditions of tender.
<u>Related clauses:</u>	The <b>Access to the Radio Frequency Spectrum</b> clause of the draft SOW defines the work-related requirements that the Contractor must perform with respect to access to the radio frequency spectrum. As a minimum, the Contractor must submit an Equipment Certification to Access Radiofrequency Spectrum (ECARS).

**ANNEX G****OZONE DEPLETING SUBSTANCES AND HAZARDOUS SUBSTANCES**

- Reference:** Annex G, clause 4
- Sponsor:** Contracting Policy & Operations and Defence Safety Management Agency
- Status:** Core
- Purpose:** To request tenderers to provide details of any Hazardous Substances or Ozone Depleting Substances that the tenderer is proposing to include in the Supplies.
- Policy:** Defence Safety Management Agency website at <http://www.defence.gov.au/dpe/dsma>.  
*Defence Safety Manual Volume 1, Part 1, Chapter 8.*  
*DPPM Section 3, Chapter 3.5*  
 National Occupational Health and Safety Commission website at <http://www.nohsc.gov.au>  
*Ozone Protection Act 1989*
- Guidance:** The Commonwealth has a legislative obligation as an employer to take all reasonably practicable steps to protect the health and safety of its employees, Contractors and their staff and other persons at or near Defence workplaces. Commonwealth policy also requires Defence to protect the environment wherever possible. Therefore Defence policy states that Supplies should be free from Ozone Depleting Substances and Hazardous Substances to the maximum extent possible.

**INFORMATION TO BE PROVIDED BY TENDERERS**

This clause requests tenderers to indicate whether they are proposing to include any Ozone Depleting Substances or Hazardous Substances in the Supplies. Where tenderers are proposing to include Ozone Depleting Substances or Hazardous Substances in the Supplies, tenderers must also detail what substances are being proposed and how the substances will be managed.

**Drafter's action:** Nil.

**Related clauses:** The **Ozone Depleting Substances and Hazardous Substances** clause of the draft SOW places a contractual obligation on the Contractor to provide Supplies that do not contain Ozone Depleting Substances or Hazardous Substances except for substances authorised by the Commonwealth Representative.

The **Occupational Health and Safety** clause of the draft conditions of contract places an obligation on the Contractor to provide Supplies that do not render the Commonwealth in breach of its Occupational Health and Safety obligations.

**ANNEX G****DISPOSAL REQUIREMENTS**

<u>Reference:</u>	Annex G, clause 5
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To obtain details of any aspects of the Supplies that have special disposal requirements due to legislative, regulatory, security, environmental, or any other restrictions.
<u>Policy:</u>	<i>DI(G) LOG 07-5 AMDT No 2, 'Disposal of Surplus Assets and Inventory'</i>
<u>Guidance:</u>	The implications of any special disposal requirements need to be factored into the source-selection process because these implications can result in hidden costs or the need to implement unplanned arrangements to enable disposal of aspects of the Supplies. In particular, any legislative or environmental implications need to be looked at closely.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	<p>The <b>Disposal Requirements</b> clause of the draft SOW places a contractual obligation on the Contractor to deliver a report that details any aspects of the Supplies that have special disposal requirements due to legislative, regulatory, security, environmental, or any other restrictions.</p> <p>The <b>Ozone Depleting Substances and Hazardous Substances</b> clause of the draft SOW places a contractual obligation on the Contractor to provide Supplies that do not contain Ozone Depleting Substances or Hazardous Substances, except for substances authorised by the Commonwealth Representative.</p>

## PART 2 – GUIDANCE ON THE DRAFT CONDITIONS OF CONTRACT

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## NAMES OF THE CONTRACTING PARTIES AND THE RECITALS

### Reference:

Volume 1    Recitals

Volume 2    Recitals

Sponsor:        Contracting Policy & Operations

Status:         Core

Purpose:         To provide information about the Contract, including the parties to the Contract and the purpose of the Contract.

Policy:         *DPPM – Section 2, Chapter 2.1*

### Guidance:

Volume 1        The inclusion of the information on the front page of the Contract is critical to ensure that a legally binding contract is formed between the parties and that the Contractor is adequately identified.

### INFORMATION IDENTIFIED ON THE FRONT PAGE OF THE CONTRACT

The front page of the Contract identifies:

- a.        the parties who by their signature are agreeing to be bound by the terms set out in the Contract;
- b.        for taxation purposes, the Australian Business Number (A.B.N.) of the Contractor and the Commonwealth; and
- c.        the purpose of the Contract.

### RECITALS

Paragraphs A, B and C are the recitals for the Contract. Drafters should note that recitals do not have any legal effect and merely 'set the scene' for the Contract. Drafters should therefore ensure that any provisions that are intended to have legal effect are included as a term of the Contract and not as a recital. Recital A provides a brief description of the Commonwealth's requirement. Recitals B and C describe how two of the essential elements of Contract, offer and acceptance have occurred between the parties.

### IDENTIFICATION OF THE CONTRACTOR

The Contractor is identified by the information provided on the front page of the Contract and drafters should therefore ensure that the details included are correct and sufficient to identify the legal entity entering the Contract. Confusion can sometimes arise where the successful tenderer is part of a group of companies, all of which have similar names. To assist in identification of the Contractor, drafters must ensure that the Contractor's A.C.N. or A.R.B.N., as applicable, is included on the front page of the Contract. Where the Contractor is a foreign company, drafters must ensure that the Contractor's A.R.B.N. is included on the front page of the Contract. The A.R.B.N. is a unique identifying number issued to foreign companies in order to carry on business in Australia.

It will also be necessary to quote the Contractor's A.B.N., where one exists, for GST purposes.

In addition, drafters must ensure, prior to Contract signature, that the company described as the Contractor is the same legal entity that submitted the successful tender. Drafters should check the information included on the front page of the Contract with the information provided by the successful tenderer in response to the Declaration by Tenderer Annexes to the conditions of tender.

The inclusion of the information on the front page of the Contract is critical to ensure that a legally binding contract is formed between the parties and that the Contractor is adequately identified.

## Volume 2

Information identified on the front page of the contract.

The front page of the Contract identifies:

- a. the parties who by their signature are agreeing to be bound by the terms set out in the Contract;
- b. for taxation purposes, the Australian Business Number (A.B.N.) of the Contractor and the Commonwealth; and
- c. the purpose of the Contract.

## RECITALS

Paragraphs A, B and C are the recitals for the Contract. Drafters should note that recitals do not have any legal effect and merely 'set the scene' for the Contract. Drafters should therefore ensure that any provisions that are intended to have legal effect are included as a term of the Contract and not as a recital. Recital A provides a brief description of the Commonwealth's requirement. Recitals B and C describe how two of the essential elements of Contract, offer and acceptance have occurred between the parties.

## IDENTIFICATION OF THE CONTRACTOR

The Contractor is identified by the information provided on the front page of the Contract and drafters should therefore ensure that the details included are correct and sufficient to identify the legal entity entering the Contract. Confusion can sometimes arise where the successful tenderer is part of a group of companies, all of which have similar names. To assist in identification of the Contractor, drafters must ensure that the Contractor's A.C.N. or A.R.B.N., as applicable, is included on the front page of the Contract. Where the Contractor is a foreign company, drafters must ensure that the Contractor's A.R.B.N. is included on the front page of the Contract. The A.R.B.N. is a unique identifying number issued to foreign companies in order to carry on business in Australia.

It will also be necessary to quote the Contractor's A.B.N., where one exists, for GST purposes.

In addition, drafters must ensure, prior to Contract signature, that the company described as the Contractor is the same legal entity that submitted the successful tender. Drafters should check the information included on the front page of the Contract with the information provided by the successful tenderer in response to the **Declaration by Tenderer** Annex of the conditions of tender.

The only circumstances in which the Contractor's details may vary from the details submitted in the tender is where the Commonwealth has exercised its discretion under the **Substitution of Tenderer** clause of the conditions of tender to allow a substitution of tenderer. In such a case, drafters must ensure that the substituted tenderer's details are included on the front page of the Contract.

Drafter's action: Prior to Contract Signature, drafters must include the following details:

- a. the name of the Contractor, its A.C.N., A.R.B.N and A.B.N. as applicable and the address of its registered office; and
- b. a brief description of the contracted requirement in recital A.

The execution page contains provision to include the date on which the contract is signed. The execution page is the final page of the draft conditions of contract. It is a good practice for both parties to initial every page of the Contract, so that there is no confusion over which pages of the Contract are the originals as at the Effective Date.

Related clauses:Volume 1

The **Declaration By Tenderer** annex to the conditions of tender contains the Declaration by Tenderer to be submitted by each tenderer with its tender.

The **Execution Page** of the Contract contains the witnessed signatures of the parties to the Contract and the date on which the Contract was signed.

Volume 2

The **Substitution of Tenderer** clause of the conditions of tender details the process by which the Commonwealth may accept a substituted tender.

The **Declaration By Tenderer** Annex to the conditions of tender contains the Declaration by Tenderer to be submitted by each tenderer with its tender.

The **Execution Page** of the Contract contains the witnessed signatures of the parties to the Contract and the date on which the Contract was signed.



## CONTRACT FRAMEWORK

### Definitions

Reference:

Volume 1 Clause 1.1

Volume 2 Clause 1.1

Sponsor: Various

Status: Core

Purpose: To define the meaning of words contained in the Contract by reference to the Glossary Attachment T to the draft conditions of contract.

Policy: Nil

Guidance: The **Definitions** clause refers to the **Glossary** Attachment of the conditions of contract. Unless the contrary intention appears, all words, abbreviations and acronyms in the Contract will have the meaning given to them by the Glossary. The Glossary also contains the definitions of the Work Breakdown Structure (WBS) elements and a list of documents referred to in the Contract.

### GENERAL INTERPRETATION PRINCIPLES

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Guidance on general interpretation principles that would be applied by a court interpreting the Contract is contained in the guidance on the **Glossary** Attachment of the conditions of contract and the **Definitions** clause of the draft conditions of contract.

Drafter's action: Nil

Related clauses: The **Definitions** clause of the conditions of tender states that the RFT will be interpreted in the same manner and its terms will have the same meaning as in the draft Contract.

The **Interpretation** clause of the draft conditions of contract sets out the basic principles by which the Contract will be interpreted.

The **Glossary** Attachment to the draft conditions of contract contains the meanings of all words, abbreviations and acronyms used in the RFT and Contract.

Further Reading: Nil

## Interpretation

### Reference:

Volume 1 Clause 1.2

Volume 2 Clause 1.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To set out the basic principles by which the Contract should be interpreted.

Policy: Nil

Guidance: Drafters should note this clause carefully to understand its effect on the interpretation of headings, words, references etc. that are included in the Contract.

### INTERPRETATION OF THE RFT

Drafters should also remember that the **Interpretation of Terms** clause of the conditions of tender states that the RFT will be interpreted in the same manner and its terms will have the same meaning as in the draft Contract. Therefore the interpretation principles set out in this clause will also apply to the conditions of tender and the Annexes to the conditions of tender.

### HEADINGS

This clause states that headings do not form part of the Contract and are included for reference purposes only. Drafters must therefore ensure that any words that are intended to have legal effect are included in the terms of the Contract and not in the headings.

### REFERENCES TO LEGISLATION AND OTHER DOCUMENTS

Drafters should also note the different interpretation principles that apply to legislation referenced in the Contract and to specifications, publications Commonwealth policy and other documents referenced in the Contract. This clause states that a reference in the Contract to any legislation is to be interpreted as a reference to an Act of the Commonwealth, State or Territory of Australia, including subordinate legislation, as amended from time to time. In contrast, it states that a reference to any specification, publication, Commonwealth policy or other document is to be interpreted as a reference to the version of that specification, publication or Commonwealth policy or document that is in effect on the Effective Date. A reference to a specification, publication or other document will only be interpreted as a reference to the current version where agreed in writing by the parties. The most appropriate place to include such an agreement is in the Contract itself.

#### Example:

The Contractor shall comply with the requirements and procedures of the *Defence Procurement Policy Manual*, as amended from time to time.

Drafters should note that the selection of the Effective Date as the applicable reference date for specifications, publications, Commonwealth policy and other documents represents a compromise in the position of both parties. Tenderers often state a preference for the applicable reference date to be the Base Date so that they tender on the basis of the version of the specification, publication, Commonwealth policy or document that will apply during the Contract. The Commonwealth on the other hand would prefer the most current version of the specification, publication, Commonwealth policy or document to always apply. When considering whether to require the Contractor to comply with the latest version of a specification, publication, Commonwealth policy or document, drafters



should weigh up the importance of the documentation to the performance of the Contract against the cost of requiring tenderers to submit their tenders without certainty as to the applicable documentation.

#### OTHER DRAFTING AIDS

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This clause also includes other usual interpretative provisions such as that a reference to the singular includes the plural, a reference to person includes a body corporate, and a reference to a clause includes a reference to subclauses of that clause.

Drafters should consider the interpretative provisions in this clause where existing clauses are amended or project-specific clauses are included in the Contract to avoid unnecessary duplication when revising or drafting the clauses. For example, this clause ensures that the word 'includes' when used in any form will not be a word of limitation. This makes clear that, when using 'includes' in a clause, drafters do not need to add further words such as 'without limitation' to indicate that the use of 'includes' is not intended to limit the scope of the list or group of issues being dealt with in the particular clause.

Similarly, this clause provides that a reference to a party is to be taken as a reference to a number of related persons. Accordingly, references to the Commonwealth and the Contractor are taken to include their administrators, successors or any person to whom they might assign or novate rights or obligations under the Contract. This avoids any doubt as to whether the Contract can be enforced against those persons and avoids the need to amend the Contract in circumstances where, for example, the Contractor assigns or novates rights or obligations or is placed into administration.

Drafter's action: Nil

Related clauses: The **Interpretation of Terms** clause of the conditions of tender states that the RFT will be interpreted in the same manner and its terms will have the same meaning as in the draft Contract.

The **Definitions** clause of the draft conditions of contract defines the meaning of words contained in the Contract by reference

### Commencement of Operation

Reference:

Volume 1 Clause 1.3

Volume 2 Clause 1.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To indicate when the Contract comes into effect.

Policy: Nil

Guidance: This clause states that the Contract will come into effect on the Effective Date. The Effective Date represents the date from which the obligations and responsibilities of the parties under the Contract commence.

#### DEFINITION OF EFFECTIVE DATE

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The Effective Date is defined as the date on which the Contract is signed, or if signed on different days, on the date of the last signature. The date the Contract will be signed by the last party to sign the Contract should be inserted on the Execution Page of the Contract. This will ensure that both parties are aware of the Effective Date for the Contract.

#### REQUESTS FOR AN ALTERNATIVE EFFECTIVE DATE

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In some circumstances, the successful tenderer may request that the Contract comes into effect on a day later than the date the parties sign the Contract. Where a request of this nature is received, careful consideration should be given to the reasons behind the request. Advice should be sought from Contracting Policy & Operations Branch where a request of this nature is received and where the proposal is agreed, the definition of Effective Date must be amended.

Drafter's action: Nil

Related clauses: Nil

### Entire Agreement

Reference:

Volume 1 Clause 1.4

Volume 2 Clause 1.4

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To limit the parties' agreement to the Contract and ensure that any representations, communications, agreements, statements or understandings not incorporated into the Contract do not form part of the Contract.

Policy: *DPPM- Section 5, Chapter 5.7*

*Trade Practices Act 1974*

Guidance: This clause states that the agreement between the parties will be limited to what is expressly included in the Contract. It aims to protect both parties from any perceived agreements contained in:

- a. conversations between representatives of the parties; or
- b. external documentation (including other agreements) not incorporated into the Contract.

#### INCLUSION OF AGREEMENTS OR STATEMENTS IN THE CONTRACT

Representations, communications, agreements, statements or understandings, whether made prior to or after Contract signature, will not form part of the Contract unless they are expressly incorporated. It is therefore important that drafters ensure that all relevant material is included in the Contract. In particular, where it is desired that material in the successful tender becomes a part of the Contract, such material must be included in the contractual documentation prior to Contract signature.

It is important to note, however, that this clause does not afford absolute protection to either the Commonwealth or the Contractor. The doctrines of estoppel and misrepresentation may still apply. In the case of representations made by the Contractor, section 52 of the *Trade Practices Act 1974* may allow a claim for misleading or deceptive conduct. Commonwealth officers should ensure that statements they make during RFT preparation, tender evaluation, contract negotiations and after signature of the Contract cannot be interpreted by a court to be intended to have legal effect unless they are to be included in the Contract. All discussions with tenderers and the Contractor should be caveated so that it is clear that the discussions are subject to a formal agreement being reached.

Drafter's action: Nil

Related clauses: The **Change to the Contract** clause of the draft conditions of contract states that the Contract may only be varied in accordance with the Contract change proposal process detailed in the **Change to the Contract** clause of the draft conditions of contract.

### Precedence of Documents

Reference:

Volume 1 Clause 1.5

Volume 2 Clause 1.5

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To establish the precedence of provisions in the event that there is inconsistency between the various documents that collectively make up the Contract.

Policy: Nil

Guidance: Where any conflict or discrepancy occurs between two provisions of the Contract, the provision in the higher ranked document will take precedence.

### ORDER OF PRECEDENCE

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Under this clause the various documents making up the Contract have been listed in order of their importance in explaining the rights and obligations of the parties under the Contract:

- a. the conditions of contract are the highest ranked in the order of precedence as they detail the legal rights and obligations of the parties;
- b. the SOW is next in the order of precedence as it sets out in detail the work to be performed by the Contractor and the required functionality to result from that work;
- c. the other Attachments to the Contract are ranked second last in the order of precedence as they provide further information concerning the matters contained in the conditions of contract; and
- d. documents incorporated by express reference as part of the Contract are the lowest ranked in the order of precedence as these documents are usually generic rather than drafted specifically for the project.

It is important to note that any inconsistency between elements of the RFT will be resolved in accordance with the order of precedence set out at the **Inconsistency** clause of the conditions of tender (see guidance on the **Inconsistency** clause of the conditions of tender).

It is important that drafters note that this clause does not assist interpretation where there is inconsistency within a document or group of documents accorded the same precedence. A conflict of this nature will be resolved through interpretation of the Contract as a whole. Therefore, it is important to ensure that there is no conflict or discrepancy internally within a document as well as in the Contract as a whole. The examples below illustrate how this clause will be applied to resolve an inconsistency that is found in the Contract.

**Examples:**

The **Ownership of Intellectual Property** clause of the conditions of contract is inconsistent with a clause in the SOW – the **Ownership of Intellectual Property** clause will take precedence.

The **Acceptance** clause of the conditions of contract is inconsistent with the **Supplies Acceptance Certificate** Attachment – the **Acceptance** clause will take precedence.

The **Entire Agreement** clause of the conditions of contract is inconsistent with the **Change to the Contract** clause of the conditions of contract - precedence will be resolved through interpretation of the Contract as a whole.

A clause in the SOW is inconsistent with the **Price and Delivery Schedule** Attachment, the clause contained in the SOW will take precedence.

**The Price and Delivery Schedule** Attachment is inconsistent with the **Intellectual Property Schedule** Attachment - precedence will be resolved through interpretation of the Contract as a whole.

#### AVOIDANCE OF INCONSISTENCY

The order of precedence in this clause (and the related RFT order of precedence clause set out in the **Interpretation** clause of the conditions of tender) is designed to protect the Commonwealth in the event of any inconsistency, however, the precedence of the documents will not always provide the outcome desired by the Commonwealth. Drafters should therefore read the Contract in its entirety, prior to Contract signature, to ensure that no conflict or discrepancy exists between the provisions of the various documents that make up the Contract.

#### PROJECT SPECIFIC REVISIONS

Revisions or additions to the order of precedence may be considered to address project-specific issues. Before any such amendment is made advice should be sought from Contracting Policy & Operations Branch.

Drafter's action: Nil

Related clauses: The **Inconsistency** clause of the conditions of tender describes the precedence that will apply to documents forming part of the RFT.

**Contracted Requirement****Reference:**

Volume 1 Clause 1.6

Volume 2 Clause 1.6

**Sponsor:** Contracting Policy & Operations

**Status:** Core

**Purpose:** To summarise the work to be performed by the Contractor in return for payment by the Commonwealth of the Contract Price.

**Policy:** *DPPM– Section 2, Chapter 2.1*

**Guidance:** In order for a contract to be formed in law certain essential elements of contract must exist. To establish that the essential element of consideration has been met, this clause describes the consideration payable by the Commonwealth in return for performance of work under the Contract by the Contractor.

**Drafter's action:** Nil

**Related clauses:** Nil

### Option for Further Quantities and Optional Extras

Reference:

Volume 1 Clause 1.7

Volume 2 Clause 1.7

Sponsor: Contracting Policy & Operations

Status: Optional. To be used where the Commonwealth requires an option to acquire additional quantities of Supplies and/or other goods and services not included in the Supplies.

Purpose: To obtain from the Contractor an offer to supply additional quantities of Supplies and/or optional extras and to specify the terms that will apply if the Contractor's offer is accepted by the Commonwealth.

Policy: Nil

Guidance: Under this clause, the Contractor grants the Commonwealth an option to procure additional quantities of Supplies and/or optional extras.

#### PERIOD OF THE OFFER

This option constitutes an offer from the Contractor to the Commonwealth. The Contractor is bound to keep the offer open for acceptance by the Commonwealth for the period specified in this clause. The Commonwealth is under no legal obligation to accept the offer but may elect to do so at any time within the period specified in this clause. The Commonwealth may elect to procure:

- a. additional quantities of Supplies and one or more items of optional extras;
- b. additional quantities of Supplies but no optional extras; or
- c. one or more items of optional extras but no additional quantities of Supplies.

The period specified in this clause will be a matter of negotiation between the Commonwealth and the preferred tenderer. The Commonwealth will prefer that the period specified provides it with enough time and flexibility to consider whether the exercise of this option will represent value for money. Tenderers will most often prefer that the option under this clause be exercised relatively soon after the Effective Date or at the very least before the Contract comes to an end. It is unlikely that tenderers will find a period that extends beyond the period of Contract acceptable.

If the Commonwealth does not elect to exercise the option under this clause within the period specified in this clause, the Contractor's offer will lapse.

#### APPLICABLE TERMS

Where the Commonwealth elects to exercise the option in this clause, the terms of the Contract, including those detailed at the **Schedule of Prices for Further Quantities and Optional Extras** Attachment to the conditions of contract, will apply to the additional quantities of Supplies and/or optional extras acquired by the Commonwealth. The Attachment will contain the negotiated Price and Delivery Schedule for the additional quantities of Supplies and/or optional extras and any additional or varied terms to the Contract. Careful consideration should be given to the terms included in the **Schedule of Prices for Further Quantities and Optional Extras** Attachment to the conditions of contract. Drafters must ensure that the terms are clear, especially where the terms vary the standard terms of the Contract.

#### ACCEPTING THE OFFER

The procedure through which the Commonwealth can exercise the option to procure additional quantities of Supplies and/or optional extras is detailed in this clause. To exercise the option, the Commonwealth must notify the Contractor in

writing, within the period set out in this clause, of the quantity and type of additional Supplies and/or optional extras that it wishes to purchase. Within 30 days of receipt of the Commonwealth's notification, the Contractor must submit a Contract change proposal in accordance with the **Change to the Contract** clause of the conditions of contract. The Contract change proposal received from the Contractor must be reviewed and approved by the Commonwealth Representative in accordance with the **Change of the Contract** clause of the conditions of contract.

It is important to note that the Contract change proposal required by this clause need not be provided or approved within the period specified in this clause. As long as the Commonwealth Representative notifies the Contractor in writing of the additional Supplies and/or optional extras that the Commonwealth wishes to purchase within the period specified in this clause, the Contractor's offer will be accepted by the Commonwealth and a legally binding contract will be formed. However, a Contract change proposal reflecting the accepted offer should be approved by the Commonwealth Representative and signed by both parties to effect a formal change to the Contract to document the contractual undertaking.

**Drafter's action:** Prior to Contract signature, drafters should insert the date by which the option has to be exercised by the Commonwealth.

**Related clauses:** The **Further Quantities and Optional Extras** clause of the annexes to the conditions of tender requests tenderers to provide full details of the additional quantities of Supplies and/or optional extras that they are willing to provide in the format of the Price and Delivery Schedule. The **Further Quantities and Optional Extras** clause of the annexes to the conditions of tender also requests tenderers to state the time period during which the Commonwealth can exercise the option.

The **Schedule of Prices for Further Quantities and Optional Extras** Attachment to the draft conditions of contract will, if required, contain the agreed Price and Delivery Schedule for the additional quantities of Supplies and/or optional extras and any additional or varied terms.



**ROLES AND RESPONSIBILITIES****Commonwealth Representative**Reference:Volume 1 Clause 2.1Volume 2 Clause 2.1Sponsor: Contracting Policy & OperationsStatus: CorePurpose: To explain the role of the Commonwealth Representative in relation to the Contract and to set out the extent of the Commonwealth Representative's powers under the Contract.Policy: *DPPM– Section 6, Chapter 6.1*  
*DRB 47 – Manual of Financial Delegations*Guidance:Volume 1 This clause outlines the role of the Commonwealth Representative, including its responsibilities and authority in relation to the Contract. The Commonwealth Representative, is responsible for administering the Contract on behalf of the Commonwealth and will be the primary point of contact within Defence for the Contractor.**APPOINTMENT OF THE COMMONWEALTH REPRESENTATIVE**

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For low risk acquisitions it is preferable that a single Commonwealth Representative be nominated as having authority for administering the Contract on behalf of the Commonwealth. Contractors should not be encouraged to direct communications to a person other than the Commonwealth Representative. This approach allows the Commonwealth to provide consistent responses to Contractors' queries or issues that arise under the Contract. The division of responsibilities under the Contract into areas such as "finance authority", "contract authority", "technical authority" etc should be for internal administration purposes only.

**AMENDMENT OF DETAILS**

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The Commonwealth Representative for the Contract is detailed in the **Glossary** Attachment of the draft conditions of contract.

As the Commonwealth Representative is the primary point of contact, the details of the Commonwealth Representative must be kept up-to-date. All changes must be made through the Contract variation process detailed in the **Change to the Contract** clause of the conditions of contract. To avoid the need to make constant changes, the definition of 'Commonwealth Representative' included in the definitions section should only detail the position title of the Commonwealth Representative.

**COMPLIANCE WITH DIRECTIONS OF THE COMMONWEALTH REPRESENTATIVE**

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This clause places an obligation on the Contractor to comply with the reasonable directions of the Commonwealth Representative where they are made within the scope of administration of the Contract. It is important to note that in some circumstances the legal doctrines of estoppel or misrepresentation may apply in the context of communications between the Contractor and the Commonwealth Representative. Where the Commonwealth Representative purports to vary or waive a provision of the Contract through representations contained in oral or written communications with the Contractor, it may be reasonable for the Contractor to rely on these representations even if these representations are inconsistent with the provisions of the Contract.

Volume 2

This clause outlines the role of the Commonwealth Representative, including its responsibilities and authority in relation to the Contract. The Commonwealth Representative, or an Authorised Person to whom the Commonwealth Representative has delegated its functions, is responsible for administering the Contract on behalf of the Commonwealth and will be the primary point of contact within Defence for the Contractor.

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**APPOINTMENT, DELEGATION AND AMENDMENT OF DETAILS**

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Under this clause the Commonwealth Representative is responsible for administering the Contract on behalf of the Commonwealth. The Commonwealth Representative for the Contract is detailed in the **Glossary** Attachment of the draft conditions of contract. As the Commonwealth Representative is the primary point of contact, the details of the Commonwealth Representative must be kept up to date. All changes must be made through the Contract variation process detailed in the **Change to the Contract** clause of the conditions of contract. To avoid the need to make constant changes, the definition of 'Commonwealth Representative' included in the **Glossary** Attachment of the draft conditions of contract should only detail the position title of the Commonwealth Representative.

This clause provides that the Commonwealth Representative may delegate its functions, or authorise its functions to be carried out on its behalf. The Commonwealth is required to advise the Contractor in writing of the persons who are delegated functions or authorised to carry out functions on behalf of the Commonwealth Representative (referred to in this clause as 'Authorised Persons') from time to time, and the scope of their delegation and authorisation. It is therefore essential that the scope of any delegation or authorisation to be issued by the Commonwealth Representative is carefully considered and defined prior to proceeding.

It is vital, from a contract management perspective, that the Commonwealth meets its obligations under this clause to ensure that there is no ambiguity in relation to the authority of persons involved in giving directions to the Contractor, and to minimise the risk of the Contractor relying on unauthorised representations from Commonwealth or non-Commonwealth officers regarding the conduct of work under the Contract (see discussion below). This is particularly the case where a Contractor or consultant engaged under another Defence Contract is given authority to issue directions to the Contractor.

It is therefore essential that the scope of any delegation or authorisation to be issued by the Commonwealth Representative is carefully considered and defined prior to notifying the Contractor of the authorisation or delegation. Where the proposed Authorised Person is a non-Commonwealth officer e.g. a Contractor or consultant, the policy contained in the *DPPM Version 5.0 2004* should be referenced.

It should also be noted that where the Commonwealth proposes to appoint a non-Commonwealth officer as the Commonwealth Representative, this clause requires the Commonwealth to obtain the written consent of the Contractor prior to the appointment being made. The Contractor's consent may not be unreasonably withheld. A Contractor would, however, be justified in withholding its consent where the Commonwealth was seeking to appoint one of the Contractor's competitors as the Commonwealth Representative because of the inherent conflict of interest involved in allowing a company's competitor to have Commonwealth Representative type powers over the company.

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**COMPLIANCE WITH DIRECTIONS OF THE COMMONWEALTH REPRESENTATIVE**

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This clause places an obligation on the Contractor to comply with the reasonable directions of:

- a. the Commonwealth Representative where they are made within the scope of administration of the Contract; and
- b. an Authorised Person where they are made within the scope of their delegation or authorisation.

This clause provides that, if given orally, a direction must be confirmed in writing by the Commonwealth Representative or Authorised Person within 14 days. It also notifies the Contractor that the Commonwealth Representative and Authorised Persons do not have the authority to waive any provision of, or release the Contractor from, its obligations under the Contract except in accordance with the Contract variation process detailed in the **Change to the Contract** clause of the draft conditions of contract or the non conforming supplies approval process detailed in the **Commonwealth Representative Approval of Non-Conforming Supplies** clause of the draft SOW

This clause further provides that unless authorised by the Contract or a direction given under this clause, any work performed or cost incurred by the Contractor in response to a communication from the Commonwealth Representative or an Authorised Person is at the Contractor's sole risk. It is important to note, however, that in some circumstances the legal doctrines of estoppel or misrepresentation may apply and it may be reasonable for the Contractor to rely on a representation made by the Commonwealth Representative even though it contravenes this clause.

Drafter's action: Nil

Related clauses: The **Contact Officer for RFT Inquiries** clause of the conditions of tender provides details of the contact officer for the tendering process. In most cases this will be the same person as the Commonwealth Representative.

The **Notices** clause of the draft conditions of contract details how communication required under the Contract can be made between the parties.

## Notices

### Reference:

Volume 1 Clause 2.2

Volume 2 Clause 2.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To provide a process by which communication required under the Contract can be made between the parties.

Policy: *DPPM – Section 4, Chapter 4.6*

Guidance: This clause states how communication can be made under the Contract.

### COMMUNICATION UNDER THE CONTRACT

This clause details the postal addresses and fax numbers for the Commonwealth Representative and Contractor's representative. A communication made in relation to the Contract will only be effective if it is in writing, signed and delivered to the respective party at the address or facsimile number specified in this clause. Therefore it is essential that the details in this clause are kept up-to-date. All changes must be made through the Contract variation process detailed in the **Change to the Contract** clause of the conditions of contract.

This clause deems when various forms of communication will be taken to have been delivered. A communication sent through the post is deemed to have been delivered to the recipient after 3 Working Days if sent within Australia and in 8 Working Days if sent by airmail from one country to another. A communication sent by facsimile is deemed to have been delivered at the time recorded by the receiving facsimile machine unless the sender is otherwise notified within 1 Working Day of the notice being sent.

### COMMUNICATION BY EMAIL

It is important to note that to be effective, a communication under the Contract must be in writing and signed by the party sending the notice. E-mail is therefore not addressed in this clause due to the complex technical issues associated with electronic signatures. Where it is considered appropriate to allow communications to be made by e-mail, procedures must be adopted to address the requirement for signature authentication and the **Notices** clause must be amended to include the e-mail address and deemed delivery time for e-mails. Advice on electronic signatures and signature authentication should be sought from the Directorate of Electronic Business Strategies prior to including any provision allowing for communication by e-mail in the Contract.

Drafter's action: Prior to the release of the RFT, drafters should insert the address and fax number of the Commonwealth Representative. Prior to Contract signature, drafters should ensure that the Contractor provides contact details for its representative for the day to day purposes of the Contract and insert these contact details.

Related clauses: The **Commonwealth Representative** clause of the draft conditions of contract details the role of the Commonwealth Representative in the administration of the Contract.

**PRODUCTION OF THE SUPPLIES****Language and Measurement**Reference:Volume 1 Clause 3.1Volume 2 Clause 3.1Sponsor: Contracting Policy & OperationsStatus: CorePurpose: To specify that all information delivered as part of the Supplies is to be written in English and that Australian units of measurement should be used unless otherwise agreed by the Commonwealth Representative.Policy: *National Measurements Act 1960*Guidance: This clause describes the language and measurements that must be used for information and Supplies delivered under the Contract.**INFORMATION TO BE DELIVERED IN ENGLISH**

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This clause places a contractual obligation on the Contractor to provide information delivered as part of the Supplies in English and to ensure that any translation of information into English is free of ambiguity.

***NATIONAL MEASUREMENTS ACT 1960***

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The *National Measurements Act 1960* stipulates that, other than for imported or exported supplies, contracts entered into in Australia for a measured volume, weight or other physical quantity of goods must be expressed in Australian legal units of measurement where the price has been calculated by reference to that measure, otherwise the Contract entered into is void.

**Example:**

A contract entered into for the supply of x pints of petrol at a price of y cents per pint would be void as litres are the Australian legal unit of measurement.

Reflecting the *National Measurement Act 1960*, this clause requires measurements of physical quantity to be in Australian legal units as prescribed under the *National Measurement Act 1960* or, if Supplies are imported, units of measurement as agreed by the Commonwealth Representative.

**USE OF ALTERNATIVE MEASUREMENTS FOR IMPORTED SUPPLIES**

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Where Supplies are being imported, in many cases it will be appropriate to agree that alternative units of measurement may be used for documentation relating to the imported items of Supplies. Issues to be considered include the reliability and useability of the Supplies where alternative units of measurement are used and the cost to the Commonwealth of requiring that Australian units of measurement are used. Where it is determined that alternative units of measurement are appropriate, the alternative units of measurement and the items of Supplies for which they may be used should be clearly identified in the SOW.

If alternative units of measurement are specified in the SOW, this could give rise to ambiguity with the current wording of this clause. This is because the **Precedence of Documents** clause of the draft conditions of contract provides that the conditions of contract prevail over the SOW to the extent of any inconsistency. Accordingly, to avoid doubt, this clause may need to be revised to state "Except as otherwise set out in the Contract, measurements...".

Drafter's action: Nil

Related clauses: The **Language of Tenders** clause of the conditions of tender states that tender responses are to be in English and that measurements, unless otherwise specified, are to be expressed in Australian legal units of measurement.

The **Inconsistency** clause of the conditions of tender specifies the precedence of provisions in the event that there is an inconsistency between parts of the RFT.

The **Precedence of Documents** clause of the draft conditions of contract establishes the precedence of provision in the event that there is an inconsistency between the various documents that collectively make up the Contract.

## Design, Development and Production

### Reference:

Volume 1 N/A

Volume 2 Clause 3.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To establish the broad standard to which the Supplies will be designed and to place responsibility on the Contractor for compatibility with existing equipment.

Policy: *Aerospace Systems Division QMS Procedure 3-2-1-4*  
*DI(N) Log 47-3 "Technical Regulation of Navy Materiel"*  
*DI(N) TECH 9-1 "Design Approval of RAN Systems and Equipment"*

Guidance: This clause specifies the design standard for the Contract and the compatibility requirements for the Supplies.

### DESIGN STANDARD FOR THE CONTRACT

This clause refers to the degree of skill and care with which the Contractor is required to design the Supplies under the Contract. Where a specific design standard is not specified in the Contract, the Contractor must apply industry best practice relevant to the Supplies. Drafters should include the design standard for the Contract in the SOW wherever possible as the industry best practice relevant to the Supplies may be uncertain and require judicial determination.

### COMPATIBILITY OF THE SUPPLIES

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. Existing equipment is defined as equipment specified or referred to in the Contract or equipment used by the Commonwealth that the Contractor knows or reasonably ought to know will be used with the Supplies. The definition of existing equipment incorporates a reasonable knowledge test, however, the breadth of coverage that will be given to this clause by a court is unknown. Wherever possible, and as far as is practical to do so, drafters should therefore include in the SOW details of all existing equipment with which the Supplies must be compatible to ensure that the Commonwealth's intended use of the Supplies is not limited.

### REQUIREMENT FOR ADDITIONAL DESIGN AND DEVELOPMENT CLAUSES

This clause will generally not sufficiently cover all the design and development issues associated with the performance of the Contract and as such clauses suitable to the specific project requirements should be included in the draft conditions of contract and SOW as appropriate.

Where contracts will involve:

- a. the design of equipment that has a technical or functional interface with ADF aircraft; or
- b. the procurement of RAAF technical equipment without any interfaces with ADF aircraft,

drafters should refer to the *Aerospace Systems Division QMS Procedure 3-2-1-4* which contains guidance on draft Data Item Descriptions and draft clauses to be included in the draft conditions of contract and draft SOW.

For contracts that will involve the procurement of Navy equipment, drafters should refer to *DI(N) TECH 9-1 "Design Approval of RAN Systems and Equipment"* and *DI(N) LOG 47-3 "Technical Regulation of Navy Materiel"*.

Drafter's action: Prior to release of the RFT, drafters should consider whether any project specific design and development clauses should be included in the draft SOW and draft conditions of contract.

Related clauses: The **Scope of Work** clause of the draft SOW requires the Contractor to perform all activities necessary to manage, design, develop, construct, integrate, test, deliver, install and commission the Supplies to the Commonwealth in accordance with the Contract. The draft SOW contains many clauses that impact on the design, development and production of the Supplies including:

- a. **Ozone Depleting Substances and Hazardous Substances;**
- b. **System Definition;**
- c. **System Design;**
- d. **System Implementation;**
- e. **System Analysis, Design and Development;**
- f. **Specialty Engineering; and**
- g. **Contractor Quality Management Program.**

Further Reading: Nil



## Export Approvals and Imported Supplies

### Reference:

Volume 1    Clause 3.2

Volume 2    Clause 3.3

Sponsor:        Contracting Policy & Operations

Status:            Optional

Purpose:            To impose on the Contractor the obligation to obtain all necessary export licences or other approvals and to detail the procedure by which the Contractor must keep the Commonwealth Representative informed of its progress in obtaining the required export licences or other approvals.

Policy:            Nil

### Guidance:

Volume 1            In most cases, due to the laws of the country of manufacture, it is not possible to obtain all export licences or other approvals prior to Contract signature. This clause aims to provide the Commonwealth with enough visibility of the process as is required in lower risk complex procurements.

#### CONTRACTOR TO NOTIFY THE COMMONWEALTH

Under this clause the Contractor is obliged to notify the Commonwealth in writing within 10 days of the revocation, refusal or any qualification of an export licence or other approval.

The wording recognises that it may take some time after the refusal of a licence or approval for the Contractor to become aware of the event. For this reason the Contractor's obligation to notify the Commonwealth within 10 days is activated on the Contractor becoming aware of the occurrence of the event and not on the point in time at which the event actually occurs. Otherwise, the Contractor could potentially be in breach of Contract without being aware of it.

#### TERMINATION FOR DEFAULT OR FRUSTRATION

Where the Contractor is unable to obtain the necessary export licences or other approvals required under the Contract, it must be determined whether the failure to obtain the export licence or other approval is due to an act or omission of the Contractor or is outside the Contractor's reasonable control. Where the failure is determined to be outside the Contractor's reasonable control the doctrine of frustration may apply. Advice should be sought from Contracting Policy & Operations Branch prior to terminating the Contract for breach or in accordance with the doctrine of frustration.

Volume 2            In most cases, due to the laws of the country of manufacture, it is not possible to obtain all export licences or other approvals prior to Contract signature. This clause aims to protect the Commonwealth's interests in such cases by requiring the Contractor to obtain the necessary export licences or other approvals by a specified time. This clause imposes an obligation on the Contractor to notify the Commonwealth of any changes in customs duty applicable to the Supplies. The amount of customs duty payable will be determined by reference to the rate of customs duty applicable at the Base Date.

#### CONTRACTOR TO NOTIFY THE COMMONWEALTH

Under this clause the Contractor is obliged to notify the Commonwealth in writing within 10 days of the revocation, refusal or any qualification of an export licence or other approval.

The wording recognises that it may take some time after the refusal of a licence or approval for the Contractor to become aware of the event. For this reason the Contractor's obligation to notify the Commonwealth within 10 days is activated on the Contractor becoming aware of the occurrence of the event and not on the point

in time at which the event actually occurs. Otherwise, the Contractor could potentially be in breach of Contract without being aware of it.

#### COMMONWEALTH REPRESENTATIVE ASSISTANCE

The Commonwealth Representative may, in some circumstances, be able to offer assistance to the Contractor in securing export approvals from other governments. The Commonwealth Representative may, if requested to do so by the Contractor, provide assistance to facilitate the provision of an export licence or approval. Where assistance is requested by a Contractor, advice on the nature and extent of assistance that can be provided by the Commonwealth should be sought from Industry Division of the Defence Materiel Organisation.

#### TERMINATION FOR DEFAULT OR FRUSTRATION

Where the Contractor is unable to obtain the necessary export licences or other approvals required under the Contract, it must be determined whether the failure to obtain the export licence or other approval is due to an act or omission of the Contractor or is outside the Contractor's reasonable control. The **Contractor Default** clause of the conditions of contract provides the Commonwealth with the right to terminate the Contract for default unless the failure to obtain the export licence was outside the Contractor's reasonable control. Where the failure is determined to be outside the Contractor's reasonable control the doctrine of *frustration* may apply. Advice should be sought from Contracting Policy & Operations Branch prior to terminating the Contract either in accordance with the **Contractor Default** clause or the doctrine of *frustration*. In most cases it will not be appropriate to use the **Termination for Convenience** clause of the conditions of contract to terminate the Contract for convenience where the Contract is frustrated or the Contractor is in default.

#### ALTERATION OF THE RATE OF CUSTOMS DUTY

Where the rate of customs duty applicable to an item of Supplies is altered between the Base Date and the date of entry of the item, this clause provides a mechanism by which:

- a. the Contractor may claim a reimbursement of the amount of any increase in the rate of customs duty; and
- b. the Commonwealth may recover the amount of any decrease in the rate of customs duty as a debt recoverable under the **Right of Commonwealth to Recover Money** clause of the conditions of contract.

#### CONTRACTOR BREACH OF AUSTRALIAN CUSTOMS LEGISLATION

Where the Contractor has breached Australian Customs legislation the Commonwealth will not be liable to reimburse the Contractor for any fines or penalties imposed on the Contractor as a result of the Contractor failing to comply with Australian Customs legislation.

#### DELAY IN THE ENTRY OF SUPPLIES

Where the entry of Supplies through Australian Customs is delayed, the **Postponement** clause of the conditions of contract will apply to determine whether the Contractor is entitled to claim a postponement of the date for delivery of the Supplies and/or a Milestone Date. The Contractor will not be entitled to claim postponement costs under the **Postponement Costs** clause of the conditions of contract. This is due to the fact that "Commonwealth" is defined for the Contract as the Commonwealth represented by the Department of Defence and therefore actions of the Australian Customs Service will not be actions of the Commonwealth as required by the **Postponement Costs** clause.

Drafter's action:

<u>Volume 1</u>	Nil
<u>Volume 2</u>	Prior to Contract signature, drafters must insert the date or event by which the Contractor must obtain all required export licences or other approvals.

Related clauses:

<u>Volume 1</u>	<p>The <b>Price and Delivery Schedule</b> clause of the annexes to the conditions of tender, requests tenderers to indicate whether the Supplies will be sourced in Australia or overseas by completing the relevant column of the schedule and to tender their prices in source currency. The Price and Delivery Schedule will therefore provide the Commonwealth with information on whether Supplies are going to be imported and from where Supplies will be imported. Tenderers are also requested to include the amount of customs duty payable for each item of Supplies in the Schedule.</p> <p>The <b>Taxes and Duties</b> clause imposes an obligation on the Contractor to meet all taxes, duties and government charges imposed or levied in Australia or overseas in connection with the Contract.</p>
<u>Volume 2</u>	<p>The <b>Price and Delivery Schedule</b> clause of the annexes to the conditions of tender, requests tenderers to indicate whether the Supplies will be sourced in Australia or overseas by completing the relevant column of schedule and to tender their prices in source currency. The Price and Delivery Schedule will therefore provide the Commonwealth with information on whether Supplies are going to be imported and from where Supplies will be imported. Tenderers are also requested to include the amount of customs duty payable for each item of Supplies in the schedule.</p> <p>The <b>Taxes and Duties</b> clause of the draft conditions of contract imposes an obligation on the Contractor to meet all taxes, duties and government charges imposed or levied in Australia or overseas in connection with the Contract.</p> <p>The <b>Postponement and Postponement Costs</b> clauses of the draft conditions of contract detail when the Contractor is entitled to claim a postponement of the date for delivery of the Supplies and/or a Milestone Date and to recover postponement costs.</p> <p>The <b>Contractor Default</b> clause of the draft conditions of contract provides the Commonwealth with the right to terminate the Contract for default where the Contractor fails to obtain or ceases to hold an export licence or other approval required to enable it to comply with its obligations under the Contract except where the failure or cessation was outside of the Contractor's reasonable control.</p>

## Provision and Management of GFM

### Reference:

Volume 1    N/A

Volume 2    clause 3.4

### Sponsor:

Contracting Policy & Operations

### Status:

Optional. To be used when GFM is to be supplied for the Contractor. Clauses 3.4 to 3.6 of the draft conditions of contract and clause 3.13 of the draft SOW are optional but interdependent and must be inserted, amended or omitted as a package.

### Purpose:

To impose on the Commonwealth an obligation to provide GFM to the Contractor and to impose an obligation on the Contractor to manage GFM in accordance with clauses 3.4, 3.5 and 3.6 of the draft conditions on contract and clause 3.13 of the draft SOW.

### Policy:

The preferred Departmental position is to minimise the provision of GFM to Contractors. However, in some circumstances it will not be possible for a contractor to perform the work required without GFM.

*DI(G) LOG 07-4 "Provision of Material to Contractors"*

### Guidance:

GFM is any equipment, information or data listed in Attachment H to the conditions of contract that is provided to the contractor by the Commonwealth to assist in the performance of the Contract.

#### PROVISION OF GFM

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The **Provision and Management of GFM** clause of the conditions of contract places a general obligation on the Commonwealth to provide GFM to the Contractor in accordance with clauses 3.4, 3.5 and 3.6 of the conditions of contract and clause 3.13.1 of the SOW. Of these provisions, clause 3.13 of the draft SOW deals with the delivery of GFM by the Commonwealth.

#### MANAGEMENT OF GFM

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Clause 3.4 places a general obligation on the Contractor to manage the GFM provided by the Commonwealth in accordance with clauses 3.4, 3.5 and 3.6 of the conditions of contract and clause 3.13 of the SOW. Of these provisions, 3.13.1 of the SOW deals with the receipt of GFM by the Contractor, clause 3.13.2 of the SOW deals with the use of GFM by the Contractor and clause 3.13.3 of the SOW deals with the care of GFM.

### Drafter's action:

Nil

### Related clauses:

The **Government Furnished Material** clause of the **Management** annex of the conditions of tender, requests tenderers to provide details of the GFM that they require to perform the Contract, including the quantity, date required, location and intended purpose. Tenderers must also identify at the **Items For Which Specific Prices are Required** clause of the **Financial** Annex of the conditions of tender the additional cost to be added to the tendered price should any GFM not be made available.

**Liability for GFM** and **GFM Ownership and Restrictions** clauses of the draft conditions of contract and **Government Furnished Materials Management** clause of the draft SOW contain more detailed GFM provisions.

The **Government Furnished Material** Attachment to the conditions of contract will contain the agreed details on all GFM to be provided under the Contract including the quantity, date, required location, time period for inspection and intended purpose of the GFM.

### Further Reading:

Nil

## Liability for GFM

### References:

Volume 1 N/A

Volume 2 clause 3.5

Sponsor: Contracting Policy & Operations

Status: Optional. To be used when GFM is to be supplied to the Contractor. Clauses 3.4 to 3.6 of the draft conditions of contract and clause 3.13 of the draft SOW are optional but interdependent and must be inserted, amended or omitted as a package. The optional clause 3.5.6 must be included where there is Commonwealth Mandated GFM, and optional clauses 3.5.8 through 3.5.11 must be included if GFI or GFD is to be provided.

Purpose: To allocate liability for GFM between the Commonwealth and the Contractor.

Policy: The preferred Departmental position is to minimise the provision to GFM to Contractors. However, in some circumstances it will not be possible for a contractor to perform the work required under contract without GFM.

*DI(G) LOG 07-4 "Provision of Material to Contractors"*

Guidance: Clause 3.5.1 places an obligation on the Contractor to inform the Commonwealth Representative in writing within 7 days of it becoming aware that any GFM in its care is lost, destroyed, damaged, defective or deficient.

### LIABILITY FOR FAILURE TO DELIVER OR PROVIDE ACCESS TO GFM

Clause 3.5.2 addresses the Commonwealth's liability where the Commonwealth fails to deliver or provide the Contractor with access to GFM at the places and times stated in Attachment H to the draft conditions of contract as required by clause 3.13 of the draft SOW. Where the Commonwealth fails to deliver or provide access to GFM as required by the Contract, the Contractor will be entitled to claim a postponement of the date for delivery of Supplies and/or a Milestone Date and to recover postponement costs in accordance with clauses 6.2 and 6.3 of the conditions of contract unless the failure to deliver or provide access was caused by a default or an unlawful or negligent act or omission of the Contractor, its officers, employees, agents or Subcontractors. It is therefore important to ensure GFM can be supplied by the Commonwealth at the time and place specified in Attachment H of the draft conditions of contract. The process for submission and consideration of any such claims is set out in clauses 6.2 and 6.3 of the conditions of contract.

### LIABILITY FOR LOST, DESTROYED, DAMAGED OF DEFECTIVE GFM

Clauses 3.5.3 and 3.5.5 addresses the parties' liability for lost, destroyed, damaged, defective or deficient GFM. Under clauses 3.5.3 and 3.5.5, the Commonwealth will be liable for the loss or destruction of, damage to or defects or deficiencies in GFM except to the extent that the loss, destruction, damage, defectiveness, or deficiency was caused by a default or an unlawful or negligent act or omission of the Contractor, its officers, employees, agents or Subcontractors. It should be noted that where the Contractor has care, custody and control of GFM it may be quite difficult to prove the GFM was damaged by the Contractor's default or unlawful or negligent act.

### COMMONWEALTH MANDATED GFM

In addition to the Commonwealth's liability under clauses 3.5.2 and 3.5.3, in clause 3.5.4 the Commonwealth warrants that Commonwealth Mandated GFM will be fit for the purpose for which the GFM has been mandated under the Contract. As the Commonwealth warrants the fitness for purpose of Commonwealth Mandated GFM, careful consideration should be given to the Contract requirement before mandating GFM for use by the Contractor. It may be appropriate for GFM to be classed as Commonwealth Mandated GFM where:

- a. the Commonwealth mandates that the Contractor incorporate equipment provided by the Commonwealth into the Supplies; or,
- b. data is required for the performance of the Contract that can only be provided to the Contractor by the Commonwealth and which can not be independently verified by the Contractor.

It should be noted that as the Commonwealth does not warrant the suitability of GFI, GFI can never be Commonwealth Mandated GFM.

The warranty provided by the Commonwealth in the optional clause 3.5.4 will not apply where the GF is not fit for purpose as a result of:

- a. the Contractor's failure to properly inspect and test the GFM as required by the Contract;
- b. the Contractor's misuse of the GFM;
- c. a failure caused by a modification or integration action of the Contractor; or,
- d. any other failure within the Contractor's control.

The above restrictions are placed on the Commonwealth's warranty to ensure that the Commonwealth is not liable where an action by the Contractor renders GFM that was fit for purpose on delivery, no longer fit for purpose.

#### REPAIR OF DAMAGED, DEFECTIVE OR DEFICIENT GFM

The powers provided by clause 3.5.6 allow the Commonwealth Representative greater flexibility to rectify inadequate GFM in the most cost effective and least time-consuming manner.

Where GFM in the care of the Contractor is damaged, defective or deficient, under clause 3.5.6 the Commonwealth Representative may in writing, require the Contractor to transport, dispose of, or repair the GFM. Where the Contractor is liable under clause 3.5.5, the Contractor will bear the cost of any work performed. In all other cases, the work will be performed at the cost of the Commonwealth. In either case, the parties shall agree the cost of the work prior to it being undertaken by the Contractor. This is important because, if the Contractor is liable under clause 3.5.5, the parties need to agree whether the value of this work will discharge or partially discharge the Contractor's liability. By contrast, if the Commonwealth is liable for the cost of the work, the Commonwealth will want to know how much it is going to cost and also satisfy itself that using the Contractor to do the work is the most cost effective option.

#### Example

Where a piece of GFE has a minor defect which can easily be fixed by the Contractor, the most cost effective and time efficient solution would probably be to require the Contractor to remedy the defect, subject to the parties agreeing on the cost of the work. Requesting that the GFE be returned to the Commonwealth, having the defect rectified by a third party and then returning the GFE to the Contractor would probably be more time consuming and less cost effective.

#### IMPACT OF GFM ON PRODUCTION AND FUNCTIONALITY OF SUPPLIES

Clause 3.5.7 places the responsibility for ensuring that GFM does not adversely impact on the production, delivery or functionality of the Supplies on the Contractor. This clause aims to ensure that, where GFM is supplied in accordance with the Contract, the Commonwealth is not liable for the Contractor's use of the GFM. This clause has to be read along with the Commonwealth's warrant of Commonwealth Mandated GFM in clause 3.5.4, however, clause 3.5.7 will still apply where the Contractor uses Commonwealth Mandated GFM contrary to the

purposes detailed in the **Government Furnished Material** Attachment of the conditions of contract.

#### GFI AND GFD

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Clauses 3.5.8 to 3.5.11 outline specific limitations that apply to GFI and GFD. Clauses 3.5.8 and 3.5.9 notify the Contractor that the Commonwealth does not warrant the suitability of GFI and as such the Contractor uses the GGFI at its own risk. In contrast, clauses 3.5.10 and 3.5.11 notify the Contractor that the Commonwealth warrants that GFD will be fit for its intended purpose as specified in Attachment H to conditions of contract.

Careful consideration should therefore be given to whether documentation provided under the Contract should be classified as GFI or GFD. As noted previously, as the Commonwealth does not warrant the suitability of GFI, GFI can never be Commonwealth Mandated GFM. Therefore documentation should be classified as GFD where it is required for the performance of the Contract, it can only be provided to the Contractor by the Commonwealth and it can not be independently verified by the Contractor.

Drafter's action: Nil

Related clauses: The **Management** Annex of the conditions of tender requests tenders to provide details of the GFM that they require to perform the Contract, including the quantity, date required, location and intended purpose. Tenderers must also identify in the **Financial** Annex of the conditions of tender the additional cost to be added to the tendered price should any GFM not be made available.

**Provision and Management of GFM** and **GFM Ownership and Restrictions** clauses of the draft conditions of contract and **Government Furnished Material Management** clause of the draft SOW contain additional GFM provisions.

**Government Furnished Material** Attachment of the conditions of contract will contain the agreed detail on all GFM to be provided under the Contract including the quantity, date required, location, time period for inspection and intended purpose of the GFM.

Further Reading: Nil

## GFM Ownership and Restrictions

### Reference:

Volume 1    N/A

Volume 2    clause 3.6

Sponsor:        Contracting Policy & Operations

Status:            Optional. To be used when GFM is to be supplied to the Contractor. Clauses 3.4 and 3.6 of the draft conditions of contract and clause 3.13 of the draft SOW are optional but interdependent and must be inserted, amended or omitted as a package. The optional clause 3.6.2 a (v) must be included where GFI or GFD is to be provided.

Purpose:            To notify the Contractor that GFM remains the property of the Commonwealth and to outline the restrictions on the Contractor's use of GFM.

Policy:            The preferred Departmental position is to minimise the provision of GFM to contractors. However, in some circumstances it will not be possible for a contractor to perform the work required under a contract without GFM.

*DI(G) LOG 07-4 "Provision of Material to Contractors"*

Guidance:        GFM is any equipment, information or data listed in Annex A to Attachment H to the draft conditions of contract that is provided to the Contractor by the Commonwealth to assist in the performance of the Contract.

### OWNERSHIP OF GFM

Clause 3.6.1 notified the Contractor that GFM remains the property of the Commonwealth and places an obligation on the Contractor to preserve any identification marks on the GFM. Even where the GFM is incorporated into Supplies which have not vested in the Commonwealth, unless the GFM is consumable and has been consumed.

### RESTRICTIONS ON USE OF GFM

Clause 3.6.2 places restrictions on the Contractor's use of the GFM. Under clause 3.6.2 the Contractor can not, without Commonwealth Representative's prior written consent:

- a.            use GFM other than for the purposes of the Contract;
- b.            modify the GFM;
- c.            transfer possession or control of GFM;
- d.            move GFM from the original delivery location;
- e.            communicate GFI or GFD to another party (if applicable); or
- f.            create a lien, charge, mortgage or encumbrance over GFM.

It is therefore important to ensure that where the performance of the Contract requires that GFM be moved from the original delivery location, transferred or communicated to a third party, or modified, that the Commonwealth Representative's prior written approval is given in sufficient time to prevent delay in the performance of the Contract. Where the tendered solution requires any of the above, the most appropriate form of prior written approval would be the inclusion of a provision in the Contract to allow for one of the actions listed above, to be undertaken by the Contractor.

Where a request for the Commonwealth Representative's approval is made by the Contractor under clause 3.6.2, the Commonwealth Representative should grant its consent or notify the Contractor of its refusal within a reasonable time period. The Commonwealth Representative's approval should also not be unreasonably withheld. If the Contractor is delayed in its performance of the Contract by the Commonwealth Representatives's failure to grant written approval, then the



Contractor may be entitled to claim a postponement of delivery of the Supplies and/or a Milestone Date and to recover postponement costs in accordance with clauses 6.2 and 6.3 of the conditions of contract.

#### INTELLECTUAL PROPERTY IN GFM

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Clause 3.6.3 is included to protect the Intellectual Property rights of third parties. Clause 3.6.3 places an obligation on the Commonwealth Representative to notify the Contractor of any Intellectual Property rights applicable to the GFM. Clause 3.6.3 also places an obligation on the Contractor not to act contrary to the existence of those rights. In every case the contract under which the Commonwealth originally acquired the equipment, material or data being provided as GFM should be checked to determine what Intellectual Property rights the Commonwealth has in respect of the intended GFM.

Where the Commonwealth is providing GFM to the Contractor which is subject to third party Intellectual Property rights, it is important to ensure that the Commonwealth's Intellectual Property licence permits it to provide the equipment, data or information to the Contractor for the performance of the Contract. In no circumstances should GFM that is subject to Intellectual Property rights be provided to a Contractor where the Commonwealth does not have the required licensing right or where the licensing rights of the Commonwealth are unknown. Where the Commonwealth does provide GFM for use by the Contractor contrary to the Intellectual Property rights of a third party, in most cases the Commonwealth will be liable to the third party Intellectual Property owner for breach of the Intellectual Property licence. In addition, the Contractor may be sued by the third party Intellectual Property owner for infringing the owner's Intellectual Property, in which case the Contractor may be able to recover any loss it suffers as a result, from the Commonwealth.

Drafter's action: Nil

Related clauses: The **Management** Annex of the conditions of tender requests tenders to provide details of the GFM that they require to perform the Contract, including the quantity, date required, location and intended purpose. Tenderers must also identify in **Financial** Annex of the conditions of tender the additional cost to be added to the tendered price should any GFM not be made available.

The **Provision of Government Furnished Materials** and **Liability of Government Furnished Materials** clauses of the draft conditions of contract and the **Government Furnished Materials Management** clause of the draft SOW contain additional GFM provisions.

**Postponement** and **Postponement Costs** clauses of the draft conditions of contract detail when the Contractor is entitled to claim as postponement of the date for delivery of the Supplies and/or a Milestone Date and to recover postponement costs.

**Government Furnished Materials** Attachment of the conditions of contract will contain the agreed detail on all GFM to be provided under the Contract including the quantity, date required, location, time period for inspection and intended purpose of the GFM.

Further Reading: Nil

## Government Furnished Facilities

### Reference:

Volume 1 N/A

Volume 2 Clause 3.7

### Sponsor:

Infrastructure Division of Corporate Services Infrastructure Group

### Status:

Optional. To be used when GFF is to be made available to the Contractor.

### Purpose:

To place a contractual obligation on the Commonwealth to grant the Contractor a licence to use GFF for the performance of the Contract in the form of the deed at the **Government Furnished Facilities Licence Deed** Attachment to the conditions of contract.

### Policy:

The preferred Departmental position is to minimise the provision of GFF to Contractors. However, in some circumstances it will not be possible for a Contractor to perform the work required under a contract without GFF.

*DI(G) ADMIN 35-1 "Procedures for the Use of Defence Estate Assets by Non-Defence Organisations or Individuals including Commercial Contractors"*

### Guidance:

This clause places an obligation on the Commonwealth to grant the Contractor a non-exclusive licence to occupy and use the GFF in the form of the deed at the **Government Furnished Facilities Licence Deed** of the **Government Furnished Materials** Attachment to the conditions of contract. Head Infrastructure Division will determine what facilities can be offered and the basis on which they are offered. The recommendation of the organisation establishing the main contract will be considered when determining availability of GFF.

### MODIFICATION OF GFF LICENCE

The standard GFF licence may require modification to meet the overall objectives of the Contract. The licence should not be modified without obtaining advice from the Infrastructure Division.

### COMMERCIAL RENT

GFF may be either Commonwealth Mandated GFF or Commonwealth or Contractor proposed GFF. Where the GFF is Commonwealth Mandated GFF, the Contractor will be required to pay a one-off fee of \$1.00 to enter into the licence. This is a token that ensures the requirement for consideration to support the licence is met, while recognising that the Contractor is not using the facilities by choice. Where the GFF is Commonwealth or Contractor proposed GFF, the Contractor will be required to pay a commercial rent as consideration for the licence where the Contractor elects to use the GFF as part of its performance of the Contract. The rental rates for the GFF will be paid under the GFF licence, however, the Commonwealth will be required to reimburse the Contractor for the cost of the licence as part of the Contract Price. The reimbursement amount should be specified in the **Price and Delivery Schedule** Attachment to the conditions of contract.

### FAILURE TO PROVIDE ACCESS TO GFF

Where the Commonwealth fails to provide access to GFF as required by the Contract, the Contractor will be entitled to claim a postponement of the date for delivery of Supplies and/or a Milestone Date and to recover postponement costs unless the failure to provide access was caused by a default or an unlawful or negligent act or omission of the Contractor, its officers, employees, agents or Subcontractors. It is therefore important to ensure that all GFF can be supplied by the Commonwealth at the time specified in the **Government Furnished Facilities** annex of the **Government Furnished Materials** Attachment to the conditions of contract.

Drafter's action: Nil

Related clauses: The **Government Furnished Facilities** clause of the annexes to the conditions of tender requests tenderers to provide details of the GFF that they require to perform the Contract. In addition, tenderers must provide details of the proposed use of the GFF and any other requirements that tenderers require relevant to the use of the GFF. Where the Commonwealth proposes GFF, the commercial rent applicable for that GFF must be included in the **Government Furnished Facilities** clause. Tenderers must also identify the additional cost to be added to the tendered price should any GFF not be made available.

The **Provision and Management of GFM, Liability for GFM and GFM Ownership and Restrictions** clauses of the draft conditions of contract contains GFM provisions.

The **Postponement** and the **Postponement Costs** clauses of the draft conditions of contract detail when the Contractor is entitled to claim a postponement of the date for delivery of the Supplies and/or a Milestone Date and to recover postponement costs.

The **Government Furnished Materials** Attachment to the draft conditions of contract includes details of all GFF to be provided under the Contract including the date required, location, time period for inspection and intended purpose of the GFF.

The **Government Furnished Facilities Licence Deed** annex to the **Government Furnished Materials** Attachment to the draft conditions of contract includes the GFF Licence Deed required by the **Government Furnished Facilities** clause.



**AUSTRALIAN INDUSTRY INVOLVEMENT****Australian Industry Involvement****Reference:**

Volume 1    N/A  
Volume 2    Clause 4.1

**Sponsor:**            Industry Policy

**Status:**                Core. However, where this template is used for acquisitions valued at less than \$5 million, this clause should not be included, as Industry Requirements and Strategic Industry Development Activities are not applicable for such acquisitions.

**Purpose:**                To place a contractual obligation on the Contractor to implement the agreed All Plan at Attachment I to the conditions of contract and achieve the stated levels of Local Content and Strategic Industry Development Activities. To detail the liquidated damages that may be claimed by the Commonwealth where the Contractor fails to achieve the Industry Requirements in the All Plan before Acceptance of the last item of Supplies.

**Policy:**                 *All Manual*  
*A New Tax System (Goods and Services Tax) Act 1999*  
*Defence CEIs Part 5 Instruction 2 and 3*  
*DRB 47*  
*Financial Management and Accountability Act 1997*

**Guidance:**              This clause places a contractual obligation on the Contractor to implement the All Plan. The All plan details the activities that the Contractor will undertake to achieve the Industry Requirements and meet the target level of Australian Industry Involvement for the particular requirement. It is important to note that the completion of the All Plan by the Contractor does not relieve the Contractor from responsibility for completion of the Supplies or from liability for defects in Supplies provided by Australian and New Zealand industry. It should also be noted that Acceptance of the Supplies does not relieve the Contractor from meeting its obligations under the All Plan.

**CLAIMING LIQUIDATED DAMAGES**

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If the Contractor fails to achieve the Industry Requirements in the All Plan by System Acceptance the Contractor will be in breach of Contract and the Commonwealth will be entitled to recover damages for that breach. To provide certainty and avoid the costs associated with litigation, the parties may through a liquidated damages clause agree on the amount of damages to be recovered in the event of a failure by the Contractor to achieve the Industry Requirements.

This clause entitles the Commonwealth to elect to claim liquidated damages or another agreed form of compensation where the Contractor fails to achieve the Industry Requirements in the All Plan and the failure is not due to circumstances beyond the reasonable control of the Contractor nor circumstances reasonably foreseeable at the Effective Date. The amount of liquidated damages that may be claimed for specific Industry Requirements must be specified in the **Liquidated Damages** Attachment to the conditions of contract prior to Contract signature.

It should be noted that, although these clauses have been categorised as core clauses in the template, for some acquisitions of minor capital equipment or militarily non-significant projects, liquidated damages for failing to achieve the Industry Requirements in the All Plan may not be required. However, before amending the clauses in the template drafters should consult staff of the Industry Policy Branch.

### LIQUIDATED DAMAGES BECOME A DEBT DUE ONLY UPON ELECTION

In accordance with s.34 of the *Financial Management and Accountability Act 1997* once liquidated damages are triggered under a contract they are considered to be a 'debt' due to the Commonwealth. To ensure that liquidated damages specified in Attachment G to the conditions of contract will not become a 'debt' due to the Commonwealth immediately upon the Contractor failing to achieve the relevant Industry Requirement, the following statement has been included in this clause: *"No amount will be owing to the Commonwealth until the Commonwealth makes an election under clause X.X.7 to recover liquidated damages"*. The inclusion of this statement ensures that the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract will only become a 'debt' due to the Commonwealth at the time the Commonwealth makes an election to claim the liquidated damages. By granting the Commonwealth an election to claim liquidated damages or another agreed form of compensation, this clause also allows the Commonwealth and Defence industry greater flexibility in the collection and management of liquidated damages.

### TIME PERIOD TO MAKE THE ELECTION

It should be noted that the Commonwealth must make an election under this clause prior to Acceptance of the last item of the Supplies. Where the Commonwealth fails to make an election by Acceptance of the last item of the Supplies, the Commonwealth will no longer be entitled to claim liquidated damages in accordance with this clause but may still be entitled to claim damages at law where it has suffered loss as a result of the breach of Contract.

### ELECTING TO CLAIM ALTERNATIVE FORMS OF COMPENSATION

In accordance with this clause, the Commonwealth may elect to claim an alternative form of compensation to the equivalent value of the liquidated damages specified at the **Liquidated Damages** Attachment to the conditions of contract. The Commonwealth may also elect to claim a combination of liquidated damages and alternative forms of compensation to the equivalent value of the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract. It should be noted, however, that both parties must agree to the alternative form of compensation. The Commonwealth can not compel the Contractor to provide alternative compensation or dictate its form. Where the Commonwealth and the Contractor can not agree to an alternative form of compensation, the Commonwealth will be entitled to claim the liquidated damages specified at the **Liquidated Damages** Attachment to the conditions of contract as long as the time period specified in this clause has not expired. Where the time period specified is close to expiry, it may be in the best interests of the Commonwealth to elect to claim the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract rather than risk losing the right to claim any compensation for the Contractor's breach of Contract.

### REACHING AGREEMENT ON ALTERNATIVE COMPENSATION

Careful consideration should be given to the form of any alternative compensation prior to an agreement being reached with the Contractor. Issues to be considered include:

- a. estimating the value of the compensation;
- b. the usefulness of the compensation to the Commonwealth;
- c. costs associated with the compensation that would be borne by the Commonwealth (e.g. storage, maintenance, fuel, training etc);
- d. whether the compensation is within the scope of the Contract;
- e. whether the compensation will be provided under the current Contract or another contract;

- f. what delivery dates, functional/performance requirements, warranties, liquidated damages etc should be agreed with the Contractor and included in the relevant contract; and
- g. whether electing to claim the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract would better compensate the Commonwealth for the loss it has suffered as a result of the Contractor's breach of Contract.

Where the Commonwealth elects to claim compensation in lieu of liquidated damages, this clause places an obligation on the Contractor to prepare a Contract change proposal to affect a change to the Contract and any other contract between the Commonwealth and the Contractor which may be affected. This clause also states that where the compensation is to be provided in the form of goods and/or services, the goods and services will be incorporated into the Supplies under the relevant contract. This clause ensures that the standard warranty and other relevant contractual provisions will apply unless expressly varied.

#### WAIVING OR WRITING OFF DEBTS

The Commonwealth may, in accordance with *Part 5 Instructions 2 and 3* of the *Defence CEIs*, decide to write-off or waive debts (including liquidated damages owed to the Commonwealth). Further guidance on the write-off and waiver of debts is contained in the guidance on the **Right of the Commonwealth to Recover Money** clause of the draft conditions of contract. It is important to remember, however, that liquidated damages will not become a 'debt' due to the Commonwealth until the Commonwealth makes an election under the **Liquidated Damages** clause of the draft conditions of contract to recover the liquidated damages.

#### DECISION MAKING AUTHORITY

All decisions relating to the recovery, trade-off, allocation, waiver or write-off of liquidated damages must be referred to Branch Head level or higher. *DRB 47* lists the delegates who are entitled to write-off liquidated damages in accordance with *Part 5 Instruction 2* of the *Defence CEIs*. All requests for the waiver of liquidated damages must be referred to the Minister for Finance through the Assistant Secretary Personnel Service Delivery in Corporate Services and Infrastructure Group in accordance with *Part 5 Instruction 3* of the *Defence CEIs*.

#### ENFORCEABILITY OF LIQUIDATED DAMAGES

To be enforceable against the Contractor in law, the liquidated damages amount must represent a genuine pre-estimate of the loss likely to be suffered by the Commonwealth as a result of the failure by the Contractor to achieve the Industry Requirement. The calculation of the amount of liquidated damages is therefore critical to the enforceability of this clause. The amount will be regarded as a genuine pre-estimate if it is shown to have been calculated on the basis of the likely loss to be suffered, even if the actual loss suffered does not equal the pre-estimate. Drafters must ensure that, having calculated the amount of liquidated damages, the method of calculation is retained. This evidence will be required should the Contractor ever attempt to claim that the liquidated damages do not represent a genuine pre-estimate of loss.

Because the Commonwealth is not a company which trades with a view to profit, it can sometimes be difficult to identify the loss suffered by the Commonwealth. To lessen the chances of an argument over whether the Commonwealth suffered loss, this clause establishes the Contractor's agreement that the Commonwealth will suffer loss and damage should the Industry Requirements in the All Plan not be met.

#### GST IMPLICATIONS

The amount of liquidated damages included in the **Liquidated Damages** Attachment to the conditions of contract must include a component for GST.

Further guidance on GST and the application of the *A New Tax System (Goods and Services Tax) Act 1999* to liquidated damages is contained in the guidance on the **Liquidated Damages and Other Compensation** clause of the draft conditions of contract.

#### LIABILITY CAP FOR LIQUIDATED DAMAGES AND OTHER COMPENSATION

Drafters should also note that tenderers often seek to cap their liability in relation to liquidated damages by setting a cap on the amount of liquidated damages that are payable under the Contract. It should be noted that although the Commonwealth has a preference for assessing the Contractor's liability on the basis of common law, the optional **Limitation of Liability** clause of the draft conditions of contract allows for the limitation of a Contractor's liability under the Contract. Adopting the **Limitation of Liability** clause of the draft conditions of contract would mean that liquidated damages under the Contract would be limited to the amount of the cap for each single occurrence or related series of occurrences of a failure to meet an Industry Requirement.

Careful evaluation of a tenderer's proposal to limit its liability for liquidated damages is required to ascertain whether the proposed cap on liability in the **Limitation of Liability** clause of the draft conditions of contract reduces the value of the liquidated damages clause to the extent that the Commonwealth would do better to exclude the **Liquidated Damages and Other Compensation** clause of the draft conditions of contract and rely on its general contractual rights to sue for breach of the Contract and recover damages.

Drafter's action: Nil.

Related clauses: The **Australian Industry Involvement** annex to the conditions of tender requests tenderers to provide their All proposal for the Contract.

The **Liquidated Damages and Other Compensation** clause of the draft conditions of contract sets 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.

The **Limitation of Liability** clause of the draft conditions of contract proposes a cap for liability under the Contract.

The **Liquidated Damages** Attachment to the draft conditions of contract will contain the agreed amount of liquidated damages recoverable against each Industry requirement. These amounts should be GST inclusive.

The **Australian Industry Involvement Plan** Attachment to the draft conditions of contract will contain the agreed All Plan



**INTELLECTUAL PROPERTY****Ownership of Intellectual Property**Reference:Volume 1 Clause 4.1Volume 2 Clause 5.1Sponsor: Contracting Policy & OperationsStatus: CorePurpose: To acknowledge that the Contract does not affect the ownership of either Background or Third Party IP. To detail the ownership arrangements for Foreground IP.Policy: IP arrangements should reflect the critical role of Australian Industry in building national Defence capability. Defence needs appropriate rights to appropriate technologies at appropriate times, and Defence acknowledges that ownership is only one way of securing such rights. Wherever possible, Defence supports Intellectual Property arrangements that reflect the critical role of Australian industry in building national Defence capability and assists Australian industry to exploit Intellectual Property to the benefit of national Defence capability.*DPPM – Section 3, Chapter 3.6**Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*Guidance:Volume 1**BACKGROUND IP AND THIRD PARTY IP**

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This clause states that ownership of Background IP and Third Party IP will remain with the party that owned the IP prior to it being brought into the Contract. It is assumed that these parties are in the best position to manage and successfully exploit the IP.

**FOREGROUND IP**

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This clause provides for Contractor ownership of all Foreground IP, as it is envisaged that Volume 1 of *ASDEFCON (Complex Materiel)* is to be used as a template for the procurement of Supplies where significant IP is not created under the Contract. Where the Commonwealth wishes to own Foreground IP, it is recommended that Volume 2 of *ASDEFCON (Complex Materiel)* be used as a template, as it allows for ownership of Foreground IP by the Commonwealth.

Volume 2**BACKGROUND IP AND THIRD PARTY IP**

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This clause states that ownership of Background IP and Third Party IP will remain with the party that owned the IP prior to it being brought into the Contract. It is assumed that these parties are in the best position to manage and successfully exploit the IP.

**FOREGROUND IP**

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This clause provides for two options in relation to the ownership of Foreground IP. Option A provides for the Commonwealth to own Foreground IP which it may decide to do for strategic reasons. Option B provides for the situation where the Commonwealth may decide for strategic reasons not to own Foreground IP. The Commonwealth may wish to own Foreground IP where:

- a. national security or strategic objectives demand strict control over dissemination of IP;

- b. technology is immature and Defence needs to retain ownership to keep its options open for the future development and application of the technology;
- c. IP has multiple applications and Defence wishes to retain ownership to ensure exploitation of the full range of possible, desirable applications of the technology; and
- d. prior obligations exist regarding ownership of IP.

Where the Commonwealth decides to own Foreground IP, Option A grants the Commonwealth exclusive rights to apply for and register worldwide any Foreground IP in which it has ownership.

Drafter's action:

Volume 1

Nil

Volume 2

Prior to release of the RFT, drafters must select the appropriate Option.

Related clauses:

Volume 1

The **Intellectual Property Licence** clause of the conditions of contract details the licensing arrangements for Background IP and Foreground IP that is owned by the Contractor.

Volume 2

The **Intellectual Property Licence** clause of the conditions of contract details the licensing arrangements for Background IP and any Foreground IP that is owned by the Contractor.

## Intellectual Property Licence

### Reference:

Volume 1 Clause 4.2

Volume 2 Clause 5.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To detail the licensing arrangements for any Foreground IP owned by the Contractor and the licensing arrangements for all Background IP and Third Party IP.

Policy: Defence needs appropriate rights to appropriate technologies at appropriate times, and Defence acknowledges that ownership is only one way of securing such rights. Wherever possible Defence supports Intellectual Property arrangements that reflect the critical role of Australian industry in building national Defence capability and assists Australian industry to exploit Intellectual Property to the benefit of national Defence capability.

Guidance: *DPPM – Section 3, Chapter 3.6*  
*Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*

Volume 1 This clause sets out the licensing arrangements for:

- a. the Contractor's Background IP and Foreground IP; and
- b. Third Party IP.

### LICENSING ARRANGEMENTS FOR CONTRACTOR IP

Under this clause, the license required to be granted in relation to the Contractor's Background IP and Foreground IP is a royalty free, irrevocable, worldwide, perpetual and non exclusive licence, including the right to sublicense. It is important to note that the Commonwealth is granted a licence to use, maintain and dispose of the Supplies subject to no restrictions. The Commonwealth should not ordinarily accept limitations to its rights to use, maintain and dispose of the Supplies, as the Commonwealth requires a basic level of IP rights, sufficient to enable normal use and support of the Supplies.

It should be noted that the Commonwealth is not granted a licence to modify, develop and manufacture the Supplies. Where the Commonwealth requires more extensive licence rights, it is recommended that Volume 2 of *ASDEFCON (Complex Materiel)* be used as a template.

It should be noted that the terms 'use', 'maintain', and 'dispose' are not defined and so they are to be given their normal, ordinary meanings in the context of the Contract.

The licence granted to the Commonwealth under this clause also allows the Commonwealth to complete the Supplies where the Contract is terminated and to rectify defects and omissions in the Supplies where it elects to do so in accordance with its rights under the **Acceptance**, and **Warranty** clauses of the conditions of contract.

### LICENSING ARRANGEMENTS FOR THIRD PARTY IP

This clause recognises that the Contractor will not usually be able to secure for the Commonwealth a licence in respect of Third Party IP on the same terms as the licences required to be provided in relation to Contractor IP. Therefore, the clause requires the Contractor to ensure that the Commonwealth is granted a licence to exercise all Third Party IP on the best available commercial terms.

### LICENSING ARRANGEMENTS FOR SUBCONTRACTOR IP

It should be noted that according to the definition of Third Party IP contained in the **Glossary** Attachment of the draft conditions of contract, any IP brought into or created under the Contract by a Subcontractor will be considered to be Third Party IP and therefore the Commonwealth will only be granted a licence in relation to Subcontractor IP on the best available commercial terms. Where significant IP will be brought to or created under the Contract, it is recommended that the Commonwealth obtain more extensive licence rights and therefore, Volume 2 of *ASDEFCON (Complex Materiel)* should be used as a template.

### LIST OF BACKGROUND, FOREGROUND AND THIRD PARTY IP

It should be noted that although tenderers are not required to provide a list of all Background, Foreground and Third Party IP with their tender response, such a list must be provided no later than the submission of the final claim for payment under the Payment clause. When delivered by the Contractor, drafters should include this list at the Intellectual Property Schedule Attachment to the conditions of contract.

This clause provides an incentive to the Contractor to do so by reserving to the Commonwealth a right to withhold payment of the final claim for payment under the Payment clause where the Contractor fails to comply with its obligation in this clause. Where the Commonwealth Representative withholds payment of the final claim for payment, the Contractor is entitled to dispute the Commonwealth Representative's decision by following the dispute resolution procedures in the Resolution of Disputes clause of the conditions of contract.

#### Volume 2

This clause sets out the licensing arrangements for:

- a. the Contractor's Background IP and any Foreground IP owned by the Contractor (where Option B);
- b. Approved Subcontractors' Background IP and any Foreground IP owned by Approved Subcontractors (where Option B is selected); and
- c. Third Party IP.

### LICENSING ARRANGEMENTS FOR CONTRACTOR IP

Under this clause, the licence required to be granted in relation to the Contractor's Background IP and any Foreground IP that is owned by the Contractor (where Option B is selected) is a royalty free, irrevocable, worldwide, perpetual and non exclusive licence, including the right to sublicense. It is important to note that the Commonwealth is granted a licence to use, maintain and dispose of the Supplies subject to no restrictions. However, this clause allows for limitations to be applied by the Contractor in relation to the Commonwealth's rights to modify, develop and manufacture the Supplies. Where the Contractor requires limitations to apply to the Commonwealth's rights to modify, develop and manufacture, these must be listed in the IP Plan. The Commonwealth should not ordinarily accept limitations to its rights to use, maintain and dispose of the Supplies as the Commonwealth requires a basic level of IP rights, sufficient to enable normal use and support of the Supplies.

It should be noted that the terms 'use', 'maintain', 'dispose', 'modify', 'develop' and 'manufacture' are not defined and so they are to be given their normal, ordinary meanings in the context of the Contract.

The licence granted to the Commonwealth under this clause also allows the Commonwealth to complete the Supplies where the Contract is terminated (other than in accordance with the **Termination for Convenience** clause of the conditions of contract) and to rectify defects and omissions in the Supplies where it elects to do so in accordance with its rights under the **Progress Certification, Acceptance, Warranty and Latent Defects** clauses of the conditions of contract.

### LICENSING ARRANGEMENTS FOR SUBCONTRACTOR IP

Approved Subcontractors are listed in the **Schedule of Approved Subcontractors** Attachment to the conditions of contract. The **Subcontracts** clause of the conditions of contract sets out the circumstances in which Subcontractors must be Approved. Normally, if Subcontractors will bring IP to the Contract or create IP that is necessary to properly use and support the Supplies, then they should be Approved Subcontractors.

This clause requires the Contractor to ensure that the agreed IP arrangements are flowed down to the Subcontractor. Again, Commonwealth rights in relation to modifying, developing and manufacturing the Supplies are subject to the limitations set out in the IP Plan. Where Option A has been selected the Contractor must ensure that that ownership of Foreground IP created by the Approved Subcontractor vests in the Commonwealth, and that the Commonwealth is granted a licence in respect of the Subcontractor's Background IP on the same terms as the Contractor's licence to the Commonwealth. Where Option B has been selected the Contractor must ensure that the Subcontractor grants the Commonwealth a licence of both Foreground and Background IP, again on the same terms as the Contractor's licence to the Commonwealth.

To give effect to these requirements, the Contractor is required, where requested by the Commonwealth, to obtain from the Approved Subcontractor, a signed deed in the form of the deed at the **Approved Subcontractor Intellectual Property Deed** annex to the **Agreed Deeds** Attachment to the conditions of contract and provide that signed deed to the Commonwealth.

### LICENSING ARRANGEMENTS FOR THIRD PARTY IP

This clause recognises that the Contractor will not usually be able to secure for the Commonwealth a licence in respect of Third Party IP on the same terms as the licences required to be provided in relation to Contractor and Approved Subcontractor IP. Therefore, the clause requires the Contractor to ensure that the Commonwealth is granted a licence to exercise all Third Party IP on the best available commercial terms.

### COMMERCIALISATION

This clause confirms that the manufacturing rights granted to the Commonwealth do not permit the Commonwealth to commercialise the licensed IP. It should be noted however, that the licence granted to the Commonwealth under this clause allows the Commonwealth to manufacture the Supplies for Defence purposes. Advice should be sought from Contracting Policy & Operations Branch before exercising the Commonwealth's IP rights to manufacture the Supplies.

### GRANTING OF A LICENCE FOR COMMONWEALTH OWNED FOREGROUND IP

This clause also allows the Commonwealth to grant a licence to the Contractor or an Approved Subcontractor to exercise Commonwealth owned Foreground IP. Advice should be sought from Contracting Policy & Operations Branch before granting a licence to Commonwealth owned IP.

Drafter's action: Nil

Related clauses:

Volume 1

The **Acceptance** clause of the draft conditions of contract entitles the Commonwealth to have remedial work performed at the expense of the Contractor to rectify minor defects and omissions in the Supplies where the Contractor fails to do so as required by this clause.

The **Warranty** clause of the draft conditions of contract entitles the Commonwealth to perform or have performed remedial work at the expense of the Contractor

where the Contractor fails to remedy the defects in the Supplies within the period allowed.

The **Payment** clause of the draft conditions of contract details the process under which claims for payments will be paid.

The **IP Schedule** Attachment to the conditions of contract lists the IP that is brought into or created under the Contract.

## Volume 2

The **Intellectual Property** clause of the annexes to the conditions of tender requires tenderers to provide a list of all the IP that will be brought into or created under any resultant contract.

The optional **Progress Certification** clause of the draft conditions of contract entitles the Commonwealth to have remedial work performed at the expense of the Contractor to rectify minor defects and omissions in the Supplies where the Contractor fails to do so as required by this clause.

The **Acceptance** clause of the draft conditions of contract entitles the Commonwealth to have remedial work performed at the expense of the Contractor to rectify minor defects and omissions in the Supplies where the Contractor fails to do so as required by this clause.

The **Warranty** clause of the draft conditions of contract entitles the Commonwealth to perform or have performed remedial work at the expense of the Contractor where the Contractor fails to remedy the defects in the Supplies within the period allowed.

The **Latent Defects** clause of the draft conditions of contract entitles the Commonwealth to perform or have performed remedial work at the expense of the Contractor where the Contractor fails to remedy a Latent Defect in the Supplies within the period allowed.

The **Subcontracts** clause of the draft conditions of contract sets out the circumstances in which Subcontractors must be approved. Approved Subcontractors are listed in the **Schedule of Approved Subcontractors** Attachment to the Contract.

The **IP Plan** Attachment to the conditions of contract lists the IP that is brought into or created under the Contract.

The **Approved Subcontractor Intellectual Property Deed** annex of the **Agreed Deeds** Attachment to the draft conditions of contract will include the Approved Subcontractor Intellectual Property Deed.

### Provision of Technical Data

#### Reference:

Volume 1 Clause 4.3

Volume 2 Clause 5.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To place a contractual obligation on the Contractor to provide all Technical Data necessary to enable the Commonwealth to exercise its IP rights in relation to the Supplies.

Policy: Defence will target rights to military and civilian technologies that enable Defence and Australian industry to develop new capabilities and support existing capabilities throughout their life cycles. As part of accessing technologies Defence will require access to the appropriate Technical Data so as to utilise the technology.

*DPPM – Section 3, Chapter 3.6*

*Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*

#### Guidance:

Volume 1 This clause places a contractual obligation on the Contractor to deliver to the Commonwealth Representative all the Technical Data to enable the Commonwealth to exercise its IP rights for the purposes permitted by the licences obtained under the **Intellectual Property Licence** clause of the conditions of contract.

It should be noted that under this clause, the Contractor's obligations extend to the provision of Technical Data that relates to Third Party IP as well as the Contractor's own Background IP and Foreground IP.

Volume 2 This clause places a contractual obligation on the Contractor to deliver to the Commonwealth Representative:

- a. all the Technical Data that relates to the Foreground IP that vests in the Commonwealth (where Option A is selected at clause 5.1 of the conditions of contract); and
- b. all the Technical Data that is necessary for the Commonwealth to exercise its IP rights for the purposes permitted by the licences obtained under the **Intellectual Property Licence** clause of the conditions of contract.

It should be noted that under this clause, the Contractor's obligations extend to the provision of Technical Data that relates to Approved Subcontractor IP and Third Party IP as well as the Contractor's own Background IP and Foreground IP.

#### OTHER CIRCUMSTANCES IN WHICH TECHNICAL DATA MUST BE PROVIDED

Where the Commonwealth terminates the Contract for default under the **Contractor Default** clause of the conditions of contract, the **Contractor Default** clause requires the Contractor to provide the Commonwealth with Technical Data produced prior to the date of termination within 30 days after receipt of notice of termination or other period agreed by the parties.

#### ESCROW

Suppliers may protect their IP by proposing an Escrow option. Escrow involves the Commonwealth and the supplier entering into a written legal undertaking to keep items (e.g. technical data) in the custody of a neutral party until pre-defined conditions are met. Such arrangements are used in limited situations e.g. whether

the technical data is commercially sensitive at the item of Contract signature but becomes less sensitive over time.

Optional escrow clauses including an Escrow Agreement Deed exist in *ASDEFCON (Strategic Materiel)* and where these clauses are considered desirable these can be included. Before inclusion of the *ASDEFCON (Strategic Materiel)* clauses, advice should be sought from Contracting Policy & Operations Branch staff.

Clause 5.3 places a contractual obligation upon the Contractor to comply with the SOW, and to deliver to the Commonwealth Representative before the nominated date all other Technical Data considered necessary by the Commonwealth to enable it to exercise its IP rights. This clause makes it clear that the Commonwealth is able to provide Technical Data to a third party for the purpose of the Commonwealth exercising its IP rights.

#### COMPLIANCE WITH THE SOW

There are a number of clauses in the SOW that identify how Supplies are to be delivered. Contractors must comply with all of these requirements in delivering Technical Data. For example, the **General Requirements** clause of the SOW provides requirements for the delivery of Data Items and Annex C of the SOW, Data Requirements List further clarifies these requirements.

Clause 5.3.3 of the SOW deals specifically with the implementation of Technical Data Requirements including delivering data in accordance with the Technical Data Plan (TDO), providing Software Updates and Software Design Data, maintaining a Data Accession List (DAL), updating and developing a Technical Data List (TDL) and Publications Tree, and the option of including escrow arrangements. Drafters requiring further guidance should refer to the guidance provided in relation to clause 5.3.3 of the SOW.

#### DELIVERING OTHER TECHNICAL DATA

Clause 5.4.2 also obliges the Contractor to deliver, before the data specified in the clause (or by Final Acceptance), additional Technical Data considered necessary by the Commonwealth to fully exercise its IP right under the Contract. This clause ensures that the Contractor is under an obligation to provide Technical Data to the Commonwealth within the Contract Price, e.g. where for whatever reason it has not been identified in the TDL for delivery to the Commonwealth to exercise its IP rights. The Technical Data may not have been listed in the DAL. Even if the information is included in the DAL, clause 5.4.2 can potentially be used by the Commonwealth to require delivery of the Technical Data within the Contract Price. Accordingly, the onus is on the Contractor to ensure that the TDL fully sets out all of the Technical Data the Commonwealth needs to exercise its rights under the Contract.

#### OTHER CIRCUMSTANCES IN WHICH THE TECHNICAL DATA MUST BE PROVIDED

Where the Commonwealth terminates the Contract for default under clause 12.2 of the conditions of contract, clause 12.2.2d of the conditions of contract requires the Contractor to provide the Commonwealth with Technical Data produced prior to the date of termination, within 30 days after the receipt of the notice of termination or other period agreed by the parties.

**Drafter's action:** Prior to the release of the RFT, drafters must nominate in clause 5.3.2 the date by which the Contractor is to provide all other Technical Data considered necessary by the Commonwealth to exercise its rights under the Contract (e.g. the date could be at least 1 month before Final Acceptance).

**Related clauses:**

**Volume 1**

The **Intellectual Property** clause of the draft conditions of contract contains the Intellectual Property clauses for the Contract. In particular, **the Ownership of Intellectual Property** and **Intellectual Property Licence** clauses detail the entity



that will own Foreground IP and the Intellectual Property licence rights to the Commonwealth.

## Volume 2

The **Intellectual Property** clause of the **Commercial Annex`** to the conditions of tender notifies tenderers of the requirement to provide an IP Plan in accordance with the relevant Data Item Description. (DID).

The **Intellectual Property** clause of the draft conditions of contract contains the Intellectual Property

The **Intellectual Property** clause of the annexes to the conditions of tender requires tenderers to provide a list of all the IP that will be brought into or created under any resultant contract.

The **Intellectual Property** clause of the draft conditions of contract contains the Intellectual Property clauses for the Contract. In particular, the **Ownership of Intellectual Property** and **Intellectual Property Licence** clauses of the draft conditions of contract detail the entity that will own Foreground IP and the Intellectual Property licence rights to the Commonwealth.

The **Contractor Default** clause of the draft conditions of contract sets out the Commonwealth rights in relation to Technical Data where the Commonwealth terminates the Contract for default of the Contractor.

### Release to Third Parties

Reference:

Volume 1 Clause 4.4

Volume 2 Clause 5.4

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To impose an obligation on the Commonwealth to obtain a deed of confidentiality prior to release of Contractor (or Approved Subcontractor where applicable), owned IP to third parties.

Policy: Defence can build national Defence capability by helping to develop sustainable Australian industry.

For industry, Intellectual Property is an economic asset that gives a short-term competitive edge that may be the keystone of the business. Industry is especially sensitive to loss of the competitive edge through disclosure of its Intellectual Property to competitors.

While it may be at times necessary for Defence to release Contractor owned Intellectual Property, Defence will only do so after undertaking steps to ensure the security of the Intellectual Property.

*DPPM – Section 3, Chapter 3.6*

*Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*

*ASDEFCON (Strategic Materiel).*

Guidance:

Volume 1 This clause requires the Commonwealth to obtain a deed of confidentiality from any third parties to whom it intends to release Contractor IP. This is a precautionary measure to protect the Contractor's IP from unauthorised disclosure. A proforma IP Deed of Confidentiality can be found in the **Intellectual Property Deed of Confidentiality** Annex to the **Agreed Deeds and Forms** Attachment to the conditions of contract of *ASDEFCON (Strategic Materiel)*.

Volume 2 This clause requires the Commonwealth to obtain a deed of confidentiality from any third parties to whom it intends to release Contractor or Approved Subcontractor IP. This is a precautionary measure to protect the Contractor's or Approved Subcontractor's IP from unauthorised disclosure. A proforma IP Deed of Confidentiality can be found in the **Intellectual Property Deed of Confidentiality** Annex to the **Agreed Deeds and Forms** Attachment to the conditions of contract of *ASDEFCON (Strategic Materiel)*.

Drafter's action: Nil

Related clauses: The **Intellectual Property** clause of the draft conditions of contract contains the Intellectual Property clauses for the Contract.

**DELIVERY, ACCEPTANCE AND OWNERSHIP****Delivery**Reference:Volume 1 Clause 5.1Volume 2 Clause 6.1Sponsor: Contracting Policy & OperationsStatus: CorePurpose: To indicate when, where and on what basis the Supplies are to be delivered by the Contractor.Policy: *DPPM – Section 6, Chapter 6.1*Guidance:

Volume 1 It is important to note that delivery differs from Acceptance under the Contract. Delivery refers to the physical movement of the Supplies into the Commonwealth's custody. Acceptance refers to the procedure by which the Commonwealth determines that the Supplies fulfil the requirements of the Contract.

FAILURE TO DELIVER SUPPLIES IN ACCORDANCE WITH THE CONTRACT

The **Delivery** clause places a contractual obligation on the Contractor to deliver Supplies in accordance with the Contract and to comply with the delivery requirements set out in the Price and Delivery Schedule Attachment to the conditions of contract. Any failure by the Contractor to deliver Supplies on the delivery dates and to the delivery points specified in the Price and Delivery Schedule Attachment to the conditions of contract will place the Contractor in breach of the Contract.

SELECTION OF DELIVERY DATE

It is important to note that under the **Acceptance** clause of the conditions of contract the Commonwealth Representative is allowed 21 days from the date of delivery to Accept or reject the Supplies.

RISK OF LOSS OR DAMAGE TO THE SUPPLIES

It is also important to note that under the **Ownership and Risk** clause of the conditions of contract, risk of loss or damage to the Supplies will pass to the Commonwealth when the Contractor has delivered the Supplies to the Commonwealth in accordance with the Price and Delivery Schedule at Attachment B to the conditions of contract. Drafters should give careful consideration to the delivery locations for Supplies to ensure that the Commonwealth Representative can:

- a. effectively Acceptance test the Supplies in the delivery location within the 21 days allowed under the Acceptance clause of the conditions of contract; and
- b. implement appropriate risk management strategies given that the risk of loss or damage to the Supplies passes to the Commonwealth on delivery.

Volume 2

It is important to note that delivery differs from Acceptance under the Contract. Delivery refers to the physical movement of the Supplies into the Commonwealth's custody. Acceptance refers to the procedure by which the Commonwealth determines that the Supplies fulfil the requirements of the Contract.

FAILURE TO DELIVER SUPPLIES

This clause places a contractual obligation on the Contractor to deliver Supplies in accordance with the Contract and to comply with the delivery requirements set out in the **Price and Delivery Schedule** Attachment to the conditions of contract. Any failure by the Contractor to deliver Supplies on the delivery dates and to the

delivery points specified in the **Price and Delivery Schedule** Attachment to the conditions of contract will place the Contractor in breach of the Contract. The Contractor may, however, claim a postponement of the date for delivery of Supplies where the Contractor's performance under the Contract has been delayed by circumstances outside the Contractor's reasonable control.

#### SELECTION OF DELIVERY DATE

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The selection of the delivery date of the Supplies will depend on whether Milestones and Milestone Dates have been specified under the Contract.

Where no Milestones and Milestone Dates have been specified under the Contract, there are no specific restrictions on the selection of the date of delivery other than the project's particular requirements.

However, where Milestones and Milestone Dates have been specified under the Contract, drafters must carefully consider the delivery date of the Supplies that is to be specified in the **Price and Delivery Schedule** Attachment to the conditions of contract. It is important to note that under the **Acceptance** clause of the conditions of contract the Commonwealth Representative is allowed 21 days from the date of delivery to Accept or reject the Supplies. As such where Supplies will be Accepted as part of a Milestone, the delivery date for Supplies must be at least 21 days prior to the Milestone Date to allow the Contractor to meet the Milestone on the specified Milestone Date. Where the delivery date for the Supplies is not at least 21 days prior to the Milestone Date and the Commonwealth takes the full 21 days to Accept the Supplies as it is entitled to do under the **Acceptance** clause of the conditions of contract, the Contractor would be considered as having failed to meet the Milestone on the Milestone Date. Drafters must therefore ensure that the delivery dates proposed by the successful tenderer are appropriate.

#### RISK OF LOSS OR DAMAGE TO THE SUPPLIES

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It is also important to note that under the **Ownership and Risk** clause of the conditions of contract, risk of loss or damage to the Supplies will pass to the Commonwealth when the Contractor has delivered the Supplies to the Commonwealth in accordance with the Price and Delivery Schedule Attachment to the conditions of contract. Drafters should give careful consideration to the delivery locations for Supplies to ensure that the Commonwealth Representative can:

- a. effectively Acceptance test the Supplies in the delivery location within the 21 days allowed under the Acceptance clause of the contract; and
- b. implement appropriate risk management strategies given that the risk of loss or damage to the Supplies passes to the Commonwealth on delivery.

Drafter's action: Nil

#### Related clauses:

##### Volume 1

The **Price and Delivery Schedule** clause of the annexes to the conditions of tender requires tenders to provide delivery information.

The **Acceptance** clause of the draft conditions of contract details the Acceptance process for the Supplies.

Under the **Ownership and Risk** clause of the draft conditions of contract, risk of loss or damage to the Supplies passes to the Commonwealth on delivery of the Supplies in accordance with the **Price and Delivery Schedule** Attachment to the draft conditions of contract.

The negotiated Price and Delivery Schedule will be included at **Price and Delivery Schedule** Attachment to conditions of contract.

Volume 2

The **Price and Delivery Schedule** clause of the annexes to the conditions of tender requires tenders to provide delivery information.

The **Postponement** clause of the draft conditions of contract details when the Contractor is entitled to claim a postponement of the date for delivery of the Supplies.

The **Acceptance** clause of the draft conditions of contract details the Acceptance process for the Supplies.

Under the **Ownership and Risk** clause of the draft conditions of contract, risk of loss or damage to the Supplies passes to the Commonwealth on delivery of the Supplies in accordance with the **Price and Delivery Schedule** Attachment to the draft conditions of contract.

The optional **Liquidated Damages and Other Compensation** clause of the draft conditions of contract sets out the parties agreement on the amount of damages to be paid by the Contractor in the event that the Contractor fails to achieve delivery of specific items by the date set out at the **Price and Delivery Schedule** Attachment to the draft conditions of contract.

The negotiated Price and Delivery Schedule will be included at the **Price and Delivery Schedule** Attachment to the draft conditions of contract and the Milestone Dates and associated payments applicable to the Supplies (if any) are detailed in the **Schedule of Payments** Attachment to the draft conditions of contract.

## Postponement

**Reference:**

Volume 1    N/A

Volume 2    Clause 6.2

**Sponsor:**            Contracting Policy & Operations

**Status:**                Core

**Purpose:**                To impose an obligation on the Contractor to inform the Commonwealth Representative in writing of any delay under the Contract and to require the Contractor to mitigate its losses due to delay. To indicate in what circumstances the Contractor may claim a postponement of the date for delivery of the Supplies and/or a Milestone Date and to set out the procedure for such a claim.

**Policy:**                 Nil

**Guidance:**              This clause provides a mechanism for the Contractor to claim a postponement of the date of delivery of the Supplies where an unforeseen delay occurs that is beyond the reasonable control of the Contractor. Where Milestones are included in the Contract, the Contractor may, when claiming a postponement of the date of delivery of the Supplies, also claim a postponement of one or more of affected Milestone Dates under the Contract. If postponement claims are accepted, it must be noted that Liquidated damages cannot be applied to the original date. They now only apply to the revised date.

### NOTIFICATION OF DELAYS UNDER THE CONTRACT

The Contractor must advise the Commonwealth Representative in writing of the cause and nature of any delay within 7 days of the Contractor becoming aware of the delay. Within a further 14 days the Contractor must advise the Commonwealth Representative in writing of the steps the Contractor intends to take to contain the delay, the anticipated duration of the delay and whether the Contractor will be claiming postponement of a date for delivery and/or a Milestone Date. Where the Contractor fails to notify the Commonwealth Representative within the time periods specified, the Contractor will be in breach of Contract and may no longer be entitled to a postponement. Where the Contractor fails to comply with this clause, advice should be sought from Contracting Policy & Operations Branch prior to any action being taken by the Commonwealth Representative.

### CIRCUMSTANCES IN WHICH POSTPONEMENT MAY BE CLAIMED

This clause details the circumstances in which the Contractor may claim a postponement of the date for delivery of Supplies and/or a Milestone Date and details the procedure for claiming the postponement. To be entitled to claim a postponement of the date for delivery of Supplies and/or a Milestone Date the Contractor must have been delayed by an event beyond its or its Subcontractor's reasonable control which is not provided for elsewhere in the Contract and could not have been reasonably contemplated by the Contractor. The Contractor must also:

- a.            submit a Contract change proposal within 21 days of providing the notice under this clause requesting a postponement of the date for delivery of Supplies and/or the Milestone Date;
- b.            demonstrate that with regard to the Contract Price and other relevant circumstances, the Contract can not be performed to meet the delivery date and/or Milestone Date;
- c.            have taken all reasonable steps to minimise the delay and mitigate its losses; and
- d.            support the claim with substantiating documentation.

### POSTPONEMENT OF MILESTONE DATES

For the purposes of this clause any reference to the “date of delivery of the Supplies” is to be read as a reference to any Milestone Dates affected by the postponement of the date of delivery of the Supplies. Therefore, where Milestones and Milestone Dates have been specified under the Contract and where the Contractor is granted a postponement of the date of delivery of the Supplies, a corresponding postponement of any Milestone Dates that are linked to the “date of delivery of the Supplies” should also be granted.

### DELAYS THAT AFFECT MORE THAN ONE DELIVERY OR MILESTONE DATE

Where the delay affects more than one delivery date or Milestone Date this clause requires the Contractor to submit with its Contract change proposal a revised Price and Delivery Schedule and Schedule of Payments, as appropriate. It is very important to ensure that all affected delivery and Milestone Dates are contained in the Contract change proposal and postponed appropriately in relation to the delay. Where the effect of a delay is not appropriately taken into account and reflected in the Contract, time under the Contract could be set at large and the Commonwealth's right to terminate the Contract could be adversely affected. Further advice on this issue should be obtained from Contracting Policy & Operations Branch prior to a postponement claim being granted under this clause.

### DELAYS THAT AFFECT KEY PERFORMANCE INDICATORS

Where the **Incentive Payments** clause has been included in the contract, it is important to note that schedule based key performance indicators may be affected by the granting of postponement claims in accordance with this clause. Where the Contractor successfully claims a postponement of the date for delivery of Supplies and/or a Milestone Date a key performance indicator relating to the Milestone Date will also be affected. Contract change proposals submitted by the Contractor in accordance with this clause should take into account the effect that the postponement will have on the key performance indicators under the Contract and propose a change to the **Incentive Payments** Attachment to the conditions of contract as appropriate. Further guidance on this issue can be obtained by referring to the guidance provided for the **Incentive Payments** clause of the draft conditions of contract or by contacting Contracting Policy & Operations Branch.

### CHALLENGING POSTPONEMENT CLAIMS

As this clause imposes a contractual obligation on the Contractor to prevent and minimise delay and to mitigate its losses due to delay, the Commonwealth may challenge claims for a postponement of the date for delivery of Supplies and/or a Milestone Date where the Contractor could have absorbed the delay in its schedule or rescheduled so that the delay did not impact upon the delivery or Milestone Date. However, it is important to note that any rescheduling must be reasonable having regard to the Contract Price and any other relevant circumstances. This clause also allows the Commonwealth to challenge a claim for postponement costs resulting from a delay caused by an act or omission of the Commonwealth where the Contractor fails to minimise the delay and mitigate its losses.

### REJECTION OF POSTPONEMENT CLAIMS

The Commonwealth Representative must evaluate any Contract change proposal provided by the Contractor in accordance with the **Change to the Contract** clause of the conditions of contract. It is important to note that the Commonwealth Representative should only reject a claim for a postponement of the date for delivery of Supplies and/or a Milestone Date where the Contractor can not establish the requirements of this clause or where the Contractor does not comply with the process and timeframes specified in this clause. Where the Commonwealth Representative rejects the Contract change proposal, the Contractor is entitled to dispute the Commonwealth Representative's decision by

following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

Drafter's action: The optional clauses should be included when Milestones or Milestone Dates have been specified under the Contract.

Related clauses:

Volume 2

The **Delivery** clause of the draft conditions of contract places a contractual obligation on the Contractor to deliver Supplies in accordance with the delivery requirements set out in the Price and Delivery Schedule at the **Price and Delivery Schedule** Attachment to the draft conditions of contract.

The **Postponement Costs** clause of the draft conditions of contract specifies the circumstances in which the Contractor is entitled to claim postponement costs.

The **Liquidated Damages and Other Compensation** clause of the draft conditions of contract sets out the parties agreement on the amount of damages to be paid by the Contractor.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract sets out the delivery dates for Supplies.

The **Schedule of Payments** Attachment to the draft conditions of contract sets out the Milestone Dates and associated payments applicable to the Supplies.



## Postponement Costs

### Reference:

Volume 1 N/A

Volume 2 Clause 6.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To allow the Contractor in specific circumstances to claim postponement costs to reflect unavoidable additional costs imposed on the Contractor as a result of a delay caused by an act or omission of the Commonwealth.

Policy: Nil

Guidance: Under this clause, the Contractor is only entitled to claim postponement costs for delays which are caused by an act or omission of the Commonwealth in relation to the Contract. Where a delay is caused by an event that is not due to an act or omission of the Commonwealth in relation to the Contract then the Contractor will not be entitled to postponement costs but may be entitled to a postponement of the delivery and/or Milestone Date.

### CIRCUMSTANCES IN WHICH POSTPONEMENT COSTS MAY BE CLAIMED

To be entitled to claim postponement costs under this clause, the Contractor must:

- a. obtain a postponement of the date for delivery of Supplies and/or a Milestone Date under the Postponement clause;
- b. demonstrate that the delay was caused by an act or omission of the Commonwealth in relation to the Contract;
- c. notify the Commonwealth Representative in writing of the quantum of the postponement costs immediately following the determination of the costs but no later than 6 months from the granting of the relevant postponement claim; and
- d. support the claim with substantiating documentation.

Where the Contractor fails to notify the Commonwealth Representative within the time period specified, the Contractor may no longer be entitled to claim postponement costs. Where the Contractor fails to comply with this clause, advice should be sought from Contracting Policy & Operations Branch prior to any action being taken by the Commonwealth Representative.

### REJECTION OF CLAIMS FOR POSTPONEMENT COSTS

Within 30 days of receipt of a claim for postponement costs, the Commonwealth Representative must grant the claim and notify the Contractor of the amount of postponement costs awarded or reject the claim and notify the Contractor of the reasons for the rejection. It is important to note that the Commonwealth Representative should only reject a claim for postponement costs where the Contractor can not establish the requirements of this clause or where the Contractor does not comply with the process and timeframes specified in the clause. The Contractor is entitled to dispute the decision of the Commonwealth Representative by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

### ACTS OR OMISSIONS OF THE COMMONWEALTH

The Contractor is only entitled to claim postponement costs for delays that are caused by an act or omission of the Commonwealth in relation to the Contract. It is important to note that the "Commonwealth" is defined for the Contract as the Commonwealth represented by the Department of Defence and therefore actions of other government departments and agencies will not be actions of the Commonwealth as required by the **Postponement Costs** clause.

**Examples:**

The Commonwealth has promised to provide electronic equipment for incorporation into the Supplies, as GFM, to the Contractor. The company providing the electronic equipment to the Commonwealth is late in delivering the equipment. The Commonwealth therefore fails to provide the electronic equipment to the Contractor by the date specified in the Contract. The Contractor will be entitled to claim postponement costs because the delay results from an act or omission of the Commonwealth.

The Contractor has a facility in which it is manufacturing the Supplies to be delivered under the Contract. The facility is hit by a cyclone and significant delays are experienced by the Contractor. The Contractor will not be able to claim postponement costs from the Commonwealth but would be entitled to claim a postponement in accordance with the **Postponement** clause of the conditions of contract.

The Contractor is required to import items of Supplies under the Contract. Due to a failure by officers of the Australian Customs Service, the passing of the Supplies through customs is delayed. Even though the Contractor is not responsible for the delay, the Contractor will not be able to claim postponement costs as the Australian Customs Service is not the "Commonwealth" as defined on the front page of the Contract. The Contractor would be entitled to claim a postponement in accordance with the **Postponement** clause of the conditions of contract and could take separate action against the Australian Customs Service to recover its losses due to the delay.

Drafter's action: Nil

Related clauses: The **Postponement** clause of the draft conditions of contract details the circumstances in which the Contractor may claim a postponement of the date for delivery of the Supplies and/or a Milestone Date.

## Progress Certification

### Reference:

Volume 1 N/A

Volume 2 Clause 6.4

Sponsor: Contracting Policy & Operations

Status: Optional. To be included where Milestones will be used under the Contract and progressive achievement of Milestones will be certified by Progress Certification prior to Supplies being Accepted.

Purpose: To detail the conditions under which Supplies will be Progress Certified and the procedure that will apply to Progress Certification.

Policy: *DPPM – Section 6, Chapter 6.1*

Guidance: In order to include this clause, drafters should ensure that Option B or C is selected in the **Payment** clause of the conditions of contract. Progress Certification has been designed for use in conjunction with Milestones and is not necessary or practical when payments under the Contract will only be made following delivery. Where Milestones are used under the Contract, Progress Certification provides a mechanism by which the Commonwealth Representative can provide feedback to the Contractor on progress of a particular Milestone, make payment to the Contractor and vest Supplies in the Commonwealth without such feedback, payment or ownership being construed as Acceptance of the Supplies.

### REQUIREMENTS FOR PROGRESS CERTIFICATION

The **Schedule of Payments** Attachment to the conditions of contract lists all the Milestones that are subject to Progress Certification and includes the corresponding payment amount. To achieve Progress Certification the Contractor must achieve the Milestone in accordance with the requirements detailed in the **Schedule of Payments** Attachment to the conditions of contract and complete and present a signed Progress Certificate to the Commonwealth Representative. It is important to note that in accordance with this clause Progress Certification does not constitute Acceptance of the Supplies nor does it bind the Commonwealth to any later Acceptance of the Supplies. This makes it clear that Progress Certification in relation to particular Supplies does not limit the Commonwealth Representative's right to later reject those Supplies when later offered for Acceptance.

This clause specifies the time period in which the Commonwealth Representative must determine whether the Contractor has achieved the Milestone and advise the Contractor in writing. This clause, makes it clear that the Commonwealth Representative may still issue a Progress Certificate despite the existence of minor omissions or defects in the Supplies, however, the Contractor must remedy any minor omissions or defects within the time period specified in this clause. Where the Contractor fails to do so, this clause entitles the Commonwealth to have remedial work performed at the expense of the Contractor. This clause makes it clear that such remedial work does not affect the Contractor's warranties and other obligations under the **Warranties and Support of the Supplies** clause of the conditions of contract (e.g. to produce Supplies that conform to the requirements of the Contract).

Where the Contractor fails to achieve the Milestone, this clause places an obligation on the Commonwealth Representative to advise the Contractor in writing of the reasons for the failure. The Contractor is entitled to dispute the Commonwealth Representative's decision to not grant the Contractor Progress Certification by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

## SELECTION OF PROGRESS CERTIFICATION MILESTONES

Payment against Milestones that are subject to Progress Certification assists the Contractor in maintaining a neutral cashflow. However, careful consideration should be given to the selection of Milestones under the Contract. Under the **Ownership and Risk** clause of the conditions of contract where option B or C has been selected, ownership of Supplies forming part of a Milestone passes to the Commonwealth upon payment of the relevant Milestone. Progress Certification Milestones can therefore be selected so that Supplies or partially completed Supplies are included in a Progress Certification Milestone. Ownership of those Supplies will then pass to the Commonwealth on payment of the Milestone Payment and prior to actual Acceptance of the Supplies. This will ensure that public funds are protected and will lessen the risk of the Commonwealth being an unsecured creditor in the event of default by the Contractor.

## LIQUIDATED DAMAGES FOR PROGRESS CERTIFICATION MILESTONES

It should also be noted that where the Contractor fails to achieve delivery of the Supplies and therefore a Milestone included in the **Liquidated Damages** Attachment to the conditions of contract by the date specified the Commonwealth will be entitled to claim the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract. As Milestones subject to Progress Certification are designed to provide feedback and allow for payment of the Contractor and vesting of ownership of Supplies in the Commonwealth prior to Acceptance of the Supplies, it is less likely that the Commonwealth will suffer loss where a Progress Certification Milestone rather than an Acceptance Milestones is not achieved as scheduled but could be an indication for schedule trouble. Where it is considered appropriate to claim liquidated damages for failure to achieve a Progress Certification Milestone careful consideration should be given to the calculation of the liquidated damages as to be enforceable they must represent a genuine pre-estimate of the Commonwealth's loss.

Drafter's action: Nil

Related clauses: The **Schedule of Payments** clause of the annexes to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the proposed Milestone Dates and the amount of each proposed Milestone Payment.

The **Schedule of Payments** Attachment to the draft conditions of contract details the Commonwealth's preferred Milestone Dates and payments.

The **Acceptance** clause of the draft conditions of contract details the conditions under which Supplies will be Accepted and the procedure that will apply to Acceptance.

The optional **Final Acceptance** clause of the draft conditions of contract details the conditions under which Final Acceptance will be granted and the procedure that will apply to Final Acceptance.

The **Ownership and Risk** clause of the draft conditions of contract details when ownership of Supplies passes to the Commonwealth.

Options B and C of the **Payment** clause of the draft conditions of contract detail the process under which Milestone Payments will be paid.

The optional **Liquidated Damages and Other Compensation** clause of the draft conditions of contract notifies the Contractor that the Commonwealth will be entitled to claim liquidated damages where the Contractor delays delivery of the Supplies beyond the date specified in the **Liquidated Damages** Attachment to the draft conditions of contract.

The **Schedule of Payments** Attachment to the draft conditions of contract lists all the Milestones that are subject to Progress Certification and includes the amount of any payment that will be made upon the achievement of Progress Certification. It is

important that the mechanism that will signify the achievement of each Milestone and entitle a Contractor to payment is included in the **Schedule of Payments** Attachment to the conditions of contract, prior to Contract signature.

The **Progress Certification** Attachment to the draft conditions of contract will, if required, contain the agreed Progress Certificate.

## Acceptance

### Reference:

Volume 1    Clause 5.2

Volume 2    Clause 6.5

Sponsor:        Contracting Policy & Operations

Status:         Core

Purpose:         To detail the conditions under which Supplies will be Accepted and the procedure that will apply to Acceptance.

Policy:         *DPPM – Section 6, Chapter 6.1*

### Guidance:

Volume 1        Acceptance provides a mechanism by which the Commonwealth Representative can notify the Contractor that the Supplies offered for Acceptance meet the requirements of the Contract.

#### REQUIREMENTS FOR ACCEPTANCE OF SUPPLIES

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This clause notifies the Contractor that all Supplies delivered by the Contractor shall be subject to Acceptance. To obtain Acceptance of Supplies, the Contractor must complete and present a signed Supplies Acceptance Certificate to the Commonwealth Representative and provide supporting evidence that the Supplies meet the requirements of the Contract.

This clause specifies the time period in which the Commonwealth Representative must determine whether the Contractor has met the requirements for Acceptance and advise the Contractor in writing.

Where the Contractor fails to meet the requirements of Acceptance, this clause places an obligation on the Commonwealth Representative to advise the Contractor in writing of the reasons for the failure and the extent of the non-conformance. Under this clause where Supplies are rejected, the Commonwealth Representative may require the Contractor to retake possession of the Supplies. The Contractor is entitled to dispute the Commonwealth Representative's decision to not Accept the Supplies by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

Volume 2        Acceptance provides a mechanism by which the Commonwealth Representative can notify the Contractor that the Supplies offered for Acceptance meet the requirements of the Contract. The Acceptance clause included in Volume 2 of the template applies irrespective of whether Milestones are used under the contract. It should be noted however, that there are certain considerations that need to be taken into account when Milestones are used under the Contract and these are set out below.

#### REQUIREMENTS FOR ACCEPTANCE OF SUPPLIES

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This clause places an obligation on the Contractor to deliver Supplies to the Commonwealth for Acceptance at the delivery points and dates detailed in the **Price and Delivery Schedule** Attachment to the conditions of contract. To obtain Acceptance of Supplies, the Contractor must complete and present a signed Supplies Acceptance Certificate to the Commonwealth Representative and provide supporting evidence that the Supplies meet the requirements of the Contract, including confirmation of successful completion of Acceptance testing required by the Contract.

This clause specifies the time period in which the Commonwealth Representative must determine whether the Contractor has met the requirements for Acceptance and advise the Contractor in writing. This clause makes it clear that the Commonwealth Representative may still Accept Supplies despite the existence of minor omissions or defects in the Supplies, however, the Contractor must remedy

any minor omissions or defects within the time period specified in this clause. Where the Contractor fails to do so, this clause entitles the Commonwealth to have remedial work performed at the expense of the Contractor. This clause makes it clear that such remedial work does not affect the Contractor's warranties and other obligations under the **Warranties and Support of the Supplies** clause of the conditions of contract (e.g. to remedy other defects during the Warranty period).

Where the Contractor fails to meet the requirements of Acceptance, this clause places an obligation on the Commonwealth Representative to advise the Contractor in writing of the reasons for the failure and the extent of the non-conformance. To ensure that Acceptance of the Supplies can occur as quickly as possible, the Contractor must advise the Commonwealth Representative of its proposed course of action to meet the requirements of Acceptance and the Commonwealth Representative must either reject the proposal or instruct the Contractor to complete the proposed course of action. The timeframes and process to be followed are detailed in these clauses. Where Supplies are rejected, the Commonwealth Representative may require the Contractor to retake possession of the Supplies. The Contractor is entitled to dispute the Commonwealth Representative's decision to not Accept the Supplies by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

#### ACCEPTANCE WHEN USING MILESTONES UNDER THE CONTRACT

Where Milestones are being used under the Contract, drafters must select Option B or C in the **Payment** clause of the conditions of contract and include the **Schedule of Payments** Attachment to the conditions of contract. The **Schedule of Payments** Attachment to the conditions of contract lists all the Milestones that are subject to Acceptance and includes the amount of any payment that will be made upon the achievement of Acceptance. It is important to note that all Supplies need not be included in an Acceptance Milestone in Attachment D to the conditions of contract, however, all Supplies must be listed in the **Price and Delivery Schedule** Attachment to the conditions of contract. In accordance with the **Delivery** clause of the conditions of contract, the Contractor must deliver Supplies to the Commonwealth for Acceptance at the delivery dates and points detailed in the **Price and Delivery** Attachment to the conditions of contract. Where Supplies are included in Milestones, the delivery dates contained in the **Price and Delivery** Attachment to the conditions of contract for the relevant Supplies must be at least 21 days prior to the Milestone Dates included in the **Schedule of Payments** Attachment to the conditions of contract as this clause allows the Commonwealth Representative 21 days from delivery to Accept or reject the Supplies.

#### SELECTION OF ACCEPTANCE MILESTONES

Careful consideration should be given to the selection of Milestones and delivery dates under the Contract. Under Options B and C of the **Ownership and Risk** clause of the conditions of contract ownership of Supplies forming part of a Milestone passes to the Commonwealth upon payment of the relevant Milestone.

#### REPASSING OF OWNERSHIP IN REJECTED SUPPLIES

Where Milestones will be used under the Contract and certain Milestones are nominated for Progress Certification, the **Ownership and Risk** clause entitles the Commonwealth to elect to repass ownership of Supplies to the Contractor where Supplies that have vested in the Commonwealth following payment for a Progress Certification Milestone are subsequently rejected when submitted for Acceptance. The election should be made at the time of notifying the Contractor of the rejection of Supplies or as soon as possible after that. Unreasonable delay in notification of an election to repass ownership may result in the Commonwealth losing the right to do so. However, advice should be sought from Contracting Policy & Operations Branch prior to ownership of Supplies being repassed to the Contractor pursuant to this clause.

## LIQUIDATED DAMAGES AND ACCEPTANCE

It should also be noted that where the Contractor fails to deliver any item of Supplies by the date specified in the **Price and Delivery Schedule** Attachment to the conditions of contract, the Commonwealth will be entitled to claim the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract. As the Commonwealth often commences use of Supplies following Acceptance and the vesting of ownership of the Supplies in the Commonwealth, the Commonwealth will in many circumstances suffer loss where Acceptance is not achieved. Where it is considered appropriate to claim liquidated damages for failure to deliver any item of Supplies careful consideration should be given to the calculation of the liquidated damages as to be enforceable they must represent a genuine pre-estimate of the Commonwealth's loss.

Drafter's action: Nil

Related clauses:

### Volume 1

The **Ownership and Risk** clause of the draft conditions of contract details when ownership of Supplies passes to the Commonwealth.

The **Payment** clause of the draft conditions of contract details the process under which claims for payments will be paid.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract contains the delivery points and dates for delivery of Supplies.

The **Supplies Acceptance Certificate** Attachment to the draft conditions of contract will contain the Supplies Acceptance Certificate.

### Volume 2

The Commonwealth's preferred Milestone Dates and payments will be set out in the **Schedule of Payments** clause of the annexes to the conditions of tender. This paragraph also requests tenderers to provide a proposed Schedule of Payments that includes the proposed Milestone Dates and the amount of each proposed Milestone Payment.

The optional **Progress Certification** clause of the draft conditions of contract details the conditions under which Progress Certification will be provided by the Commonwealth and the procedure that will apply to Progress Certification.

The optional **Final Acceptance** clause of the draft conditions of contract details the conditions under which Final Acceptance will be granted and the procedure that will apply to Final Acceptance.

The **Ownership and Risk** clause of the draft conditions of contract details when ownership of Supplies passes to the Commonwealth.

The **Payment** clause of the draft conditions of contract details the process under which claims for payment will be paid.

The optional **Liquidated Damages and Other Compensation** clause of the draft conditions of contract notifies the Contractor that the Commonwealth will be entitled to claim liquidated damages where the Contractor delays achievement of a Milestone beyond the date specified in the Liquidated Damages Attachment to the draft conditions of contract.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract contains the delivery points and dates for delivery of Supplies.

The **Schedule of Payments** Attachment to the draft conditions of contract lists all the Milestones that are subject to Acceptance and includes the amount of any payment that will be made upon the Acceptance of Supplies. It is important that the mechanism that will signify the achievement of each Milestone and entitle a Contractor to payment is included in the **Schedule of Payments** Attachment to the draft conditions of contract prior to Contract signature.



The **Supplies Acceptance Certificate** Attachment to the draft conditions of contract will include the Supplies Acceptance Certificate.

## Final Acceptance

### Reference:

Volume 1 N/A

Volume 2 Clause 6.6

Sponsor: Contracting Policy & Operations

Status: Optional. This clause should only be used where Milestone Payments will be used under the Contract and Final Acceptance is required.

Purpose: To detail the conditions under which Final Acceptance will be granted and the procedure that will apply to Final Acceptance

Policy: *DPPM – Section 6, Chapter 6.1*

Guidance: The Final Acceptance Milestone represents the final Milestone of the Contract. Final Acceptance provides a mechanism by which the Commonwealth can notify the Contractor that it has fulfilled all of its obligations under the Contract and make the final payment to the Contractor. Final Acceptance also provides the Commonwealth with a mechanism by which it can withhold the final payment due to the Contractor until all of the Contractor's obligations under the Contract have been fulfilled, and the Supplies function and have been integrated as required by the Contract.

### THE FINAL ACCEPTANCE MILESTONE PAYMENT

The payment that will be made on achievement of Final Acceptance will be detailed in the **Schedule of Payments** Attachment to the conditions of contract. Careful consideration should be given to the amount of the payment. The payment should be between 5-15% of the Contract Price depending upon the complexity of the requirement and the level of risk associated with the procurement.

### REQUIREMENTS FOR FINAL ACCEPTANCE

To be granted Final Acceptance, the Contractor must:

- a. have achieved all previous Milestones and Acceptance of all Supplies in accordance with the Acceptance clause;
- b. demonstrate that the Supplies function and have been integrated as required by the Contract;
- c. demonstrate that it has fulfilled its obligations under Contract, except to the extent that the obligations expressly, or by implication, survive the Final Acceptance Milestone;
- d. complete and present a signed Final Acceptance Certificate; and
- e. provide supporting evidence including confirmation of successful completion of Final Acceptance testing required by the Contract.

This clause specifies the time period in which the Commonwealth Representative must advise the Contractor in writing of whether it has achieved Final Acceptance. Where the Contractor fails to achieve Final Acceptance, the Commonwealth Representative must advise the Contractor in writing of the reason for the failure. These clauses set out the process and timeframes under which the Contractor must advise the Commonwealth Representative of its proposed remedy and the Commonwealth Representative must reject the proposal or instruct the Contractor to complete the proposed course of action. Under this clause, where Final Acceptance is rejected, the Commonwealth Representative may require the Contractor to retake possession of Supplies. The Contractor is entitled to dispute the Commonwealth Representative's decision to not grant the Contractor Final Acceptance by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

## OPTIONS WHERE FINAL ACCEPTANCE IS NOT ACHIEVED

It should be noted that where the Contractor fails to achieve Final Acceptance the Commonwealth is not entitled to reject the previously Accepted Supplies. The Final Acceptance Milestone may be included in the **Liquidated Damages** Attachment to the conditions of contract so that the Commonwealth will be entitled to claim liquidated damages where Final Acceptance is not achieved as scheduled. Careful consideration should be given to the amount of liquidated damages that are included in the **Liquidated Damages** Attachment to the conditions of contract. To be enforceable liquidated damages must represent a genuine pre-estimate of the Commonwealth's loss.

In addition to claiming liquidated damages or where liquidated damages are considered inappropriate, the Commonwealth should ensure that it does not waive its right to terminate the Contract for default and set time under the Contract at large. Where a Contractor fails to achieve Final Acceptance, the Commonwealth may be able to terminate the contract for default under the Contractor Default clause of the conditions of contract or at common law. Prior to terminating the Contract advice should be sought from Contracting Policy & Operations Branch to ensure that the Commonwealth has the legal right to terminate.

## INCLUSION OF ADDITIONAL REMEDIES

The payment attached to the Final Acceptance Milestone should be a sufficient incentive for the Contractor to complete the Contract. However, where the Contract involves an extensive amount of integration of Supplies to create a functioning system or the timeframe for in-service use of the Supplies is critical, it may be advisable to review the protection for the Commonwealth under the Contract. It may be necessary to include additional terms in the Contract to protect the Commonwealth where the Contractor fails to achieve Final Acceptance. These additional terms may include the ability to repass ownership in previously Accepted Supplies or the ability to terminate the Contract and recover previous Milestone Payments. As this will impact upon a number of core clauses in the Contract, advice should be sought from Contracting Policy & Operations Branch before redrafting the Contract in this manner.

Drafter's action: Nil

Related clauses:

Volume 2

The **Schedule of Payments** clause of the annexes to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the proposed Milestone Dates and the amount of each proposed Milestone Payment.

The optional **Progress Certification** clause of the draft conditions of contract details the conditions under which Progress Certification will be provided by the Commonwealth and the procedure that will apply to Progress Certification.

The **Acceptance** clause of the draft conditions of contract details the conditions under which Supplies will be Accepted and the procedure that will apply to Acceptance.

The **Payment** clause of the draft conditions of contract details the process under which claims for payment will be paid.

The optional **Liquidated Damages and Other Compensation** clause of the draft conditions of contract notifies the Contractor that the Commonwealth will be entitled to claim liquidated damages where the Contractor delays delivery of any item of the Supplies beyond the date specified in the **Liquidated Damages** Attachment to the draft conditions of contract.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract contains the delivery points and dates for delivery of Supplies.

The **Schedule of Payments** Attachment to the draft conditions of contract lists the Milestone that is subject to Final Acceptance and includes the amount of the payment that will be made upon Final Acceptance.

The **Final Acceptance Certificate** Attachment to the draft conditions of contract will include the Final Acceptance Certificate.

## Ownership and Risk

### Reference:

Volume 1 Clause 5.3

Volume 2 Clause 6.7

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To advise when ownership of the Supplies passes from the Contractor to the Commonwealth and to advise when the risk of loss or damage to the Supplies is transferred between the parties.

Policy: It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk.

*DPPM – Section 6, Chapter 6.1*

### Guidance:

Volume 1 The **Ownership and Risk** clause aims to protect the Commonwealth by passing ownership of Supplies that have been paid for by the Commonwealth to the Commonwealth at the earliest opportunity, while allocating the risk of loss or damage to the Supplies to the party in the best position to manage the risk.

#### OWNERSHIP

Under this clause ownership of Supplies passes to the Commonwealth upon payment of the claim relating to those Supplies.

This clause is subject to the **Intellectual Property** clause of the conditions of contract. Intellectual Property forms part of the Supplies pursuant to the definition of “Supplies” set out in the **Glossary** Attachment of the conditions of contract. Ownership of any Intellectual Property included in the Supplies is not governed by this clause. The ownership of Intellectual Property included in the Supplies is governed by the **Ownership of Intellectual Property** clause of the conditions of contract which states that all Intellectual Property included in the Supplies, remains with or vests in the Contractor or a third party, as the case may be.

#### TITLE TO THE SUPPLIES

It is also important to note that in accordance with this clause, any item of Supplies that passes to the Commonwealth must be free of any registered or unregistered charge, lien, mortgage or other encumbrance. To ensure that the Commonwealth is able to determine that it is receiving good title to Supplies, the **Payment** clause of the conditions of contract requires the Contractor, when submitting a claim for payment, to provide the Commonwealth Representative with documentation establishing that the claim is in accordance with the Contract and this may include documentation establishing that the Contractor is able to pass title to the Supplies to the Commonwealth on payment of the claim for payment.

#### RISK

This clause also aims to allocate the risk of loss of or damage to the Supplies to the more appropriate party under the Contract. As the Commonwealth is not in a position to minimise the risk of loss and damage to the Supplies until the Supplies are in the Commonwealth's possession, under this clause, the risk of loss of or damage to the Supplies resides with the Contractor until the Supplies are delivered to the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment to the conditions of contract. Where Supplies are not delivered to the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment to the conditions of contract, the risk of loss or damage to the Supplies will remain with the Contractor.

If the Contractor wishes to deliver Supplies for Acceptance at an earlier date than listed in the **Price and Delivery Schedule** Attachment to the conditions of

contract, the Contractor must submit a Contract change proposal altering the date for delivery of the Supplies. If the Contractor fails to do this, risk will reside with the Contractor until the later date detailed in the Price and Delivery Schedule.

Under this clause, where the Commonwealth Representative rejects Supplies as not conforming to the requirements of the Contract, or the Contractor retakes possession of the Supplies after delivery to the Commonwealth, the risk of loss of, or damage to the Supplies will revert to the Contractor on repossession or 7 days after the issue of a notice under the **Acceptance** clause of the conditions of contract, whichever is the earlier. Under the **Acceptance** clause of the conditions of contract, the Commonwealth Representative may require the Contractor to retake possession of rejected Supplies within 7 days of the notice of rejection. This clause operates to ensure that the latest that the risk of loss of, or damage to, the Supplies will transfer to the Contractor is at the end of the 7 day period. Therefore, if the Contractor repossesses the Supplies before the end of the 7 day period, risk will transfer when the repossession occurs.

Examples:

The **Price and Delivery Schedule** Attachment to the conditions of contract states that Item X should be delivered to the Commonwealth on the 13 January at Depot C. Instead the Contractor delivers the Supplies on the 10 January to Depot C. Risk of loss of or damage to the Supplies will not pass to the Commonwealth until the 13 January.

The **Price and Delivery Schedule** Attachment to the conditions of contract states that Item X should be delivered to the Commonwealth on the 13 January at Depot C. Instead the Contractor delivers the Supplies on the 13 January to Depot A. Risk of loss of or damage to the Supplies will not pass to the Commonwealth until the Supplies are delivered to Depot C.

The Contractor delivers Item A for Acceptance by the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment to the conditions of contract. The risk of loss of or damage to the Supplies passes to the Commonwealth at the time of delivery. The Supplies do not conform to the requirements of the Contract and the Commonwealth rejects the Supplies. The Contractor retakes possession of the Supplies at the request of the Commonwealth within the 7 days required by the **Acceptance** clause of the conditions of contract. Risk of loss of or damage to the Supplies re-passes to the Contractor when it retakes possession.

## Volume 2

This clause aims to protect the Commonwealth by passing ownership of Supplies that have been paid for by the Commonwealth to the Commonwealth at the earliest opportunity, while allocating the risk of loss or damage to the Supplies to the party in the best position to manage the risk.

### OWNERSHIP

The selection of the appropriate option in this clause will depend on the selection of an option in the **Payment** clause of the conditions of contract. Generally, under this clause, ownership of Supplies passes to the Commonwealth upon payment of the claim relating to those Supplies. More specifically, where Milestones are not used under the Contract and Option A is selected in the **Payment** clause of the conditions of contract, ownership of Supplies will pass to the Commonwealth following the approval and payment of the claim that relates to those Supplies. Where Milestones are used under the Contract and Option B is selected in the **Payment** clause of the conditions of contract, ownership of Supplies that are included in a Milestone will pass to the Commonwealth following the approval and payment of the claim that relates to that Milestone. Where payment will be made using a combination of payments following delivery and Acceptance and Milestone payments and Option C is selected in the **Payment** clause of the conditions of contract, option C should be selected in this clause.

**Examples:**

Item A is included in a Milestone subject to Progress Certification. Item A will vest in the Commonwealth on payment of the relevant Milestone Payment.

Item B is not included in a Milestone, because Milestones are not used under the Contract or because despite the use of Milestones, the Schedule of Payments at Attachment D to the conditions of contract does not list item B as part of a particular Milestone. Item B is Accepted in accordance with the **Acceptance** clause of the conditions of contract. Item B will vest in the Commonwealth on payment of the claim that relates to item B.

Item C is included in a Milestone subject to Acceptance. Item C will vest in the Commonwealth on payment of the relevant Milestone Payment.

**Example:**

The Contract Price will be paid using a combination of Milestone Payments and payments after delivery and Acceptance. Option C is selected in the **Payment and Ownership and Risk** clauses of the conditions of contract.

The Contractor intends to make claims for payment under the **Payment** clause of the conditions of contract in relation to work being undertaken to produce Items Y and Z.

Item Y is included in a Milestone subject to Progress Certification. The Milestone is scheduled for achievement on 21 November 2002. The Commonwealth Representative signs the Progress Certificate certifying achievement of the Milestone on 9 December 2002. The Contractor submits a claim for payment in accordance with the **Payment** clause of the conditions of contract on 11 December 2002. The Contractor is paid the amount of the Milestone Payment on 9 January 2003 and the ownership of the Supplies forming part of the Milestone, including Item Y, passes to the Commonwealth on 9 January 2003.

Item Z is not included in a Milestone subject to Progress Certification or Acceptance. In accordance with the **Price and Delivery Schedule** Attachment the Contractor delivers Item Z to the Commonwealth on 1 January 2003. The Commonwealth Representative Accepts Item Z in accordance with the **Acceptance** clause of the conditions of contract and signs the Supplies Acceptance Certificate on 20 January 2003. The Contractor submits a claim for payment in accordance with the **Payment** clause of the conditions of contract on 22 January 2003. The Contractor is paid the amount on the claim for payment on 22 February 2003 and the ownership of item Z passes to the Commonwealth on 22 February 2003.

This clause is subject to the **Intellectual Property** clause of the conditions of contract. Intellectual Property forms part of the Supplies pursuant to the definition of "Supplies" set out in the **Glossary** Attachment of the conditions of contract. This clause does not govern ownership of any Intellectual Property included in the Supplies. The ownership of Intellectual Property included in the Supplies is governed by the **Ownership of Intellectual Property** clause of the conditions of contract. Ownership of all Background IP remains with the Contractor, Subcontractor or third party, as the case may be, while ownership of Foreground IP will, depending on which option is selected, vest in the Contractor or Approved Subcontractor or in the Commonwealth. It should also be noted that even where Option A is selected in the **Ownership of Intellectual Property** clause of the conditions of contract and ownership of Foreground IP vests in the Commonwealth, ownership of Foreground IP passes at the time the Foreground IP is created and not upon payment of a claim that relates to the Supplies that include the Foreground IP.

## REPASSING OF OWNERSHIP IN THE SUPPLIES

The optional clause should be included where the **Progress Certification** clause of the conditions of contract has been included. Under this clause where Supplies that have vested in the Commonwealth following payment for a Progress Certification Milestone are subsequently rejected when submitted for Acceptance, the Commonwealth Representative may elect to repossess ownership of the Supplies to the Contractor. The election should be made at the time of notifying the Contractor of the rejection of Supplies or as soon as possible after that. Unreasonable delay in notification of an election to repossess ownership may result in the Commonwealth losing the right to do so.

As ownership of Supplies provides the Commonwealth with a tangible asset in return for payments made under the Contract, careful consideration should be given to the Commonwealth's interests and the risks associated with being an unsecured creditor prior to ownership of Supplies being repassed to the Contractor. Advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth Representative exercising its rights under this clause.

## TITLE TO THE SUPPLIES

It is also important to note that in accordance with this clause, any item of Supplies that passes to the Commonwealth must be free of any registered or unregistered charge, lien, mortgage or other encumbrance. To ensure that the Commonwealth is able to determine that it is receiving good title to Supplies, the **Payment** clause of the conditions of contract requires the Contractor, when submitting a claim for a payment, to provide the Commonwealth Representative with documentation establishing that the claim is in accordance with the Contract and this may include documentation establishing that the Contractor is able to pass title to the Supplies to the Commonwealth on payment of the claim for payment.

## RISK

This clause also aims to allocate the risk of loss of or damage to the Supplies to the more appropriate party under the Contract. As the Commonwealth is not in a position to minimise the risk of loss and damage to the Supplies until the Supplies are in the Commonwealth's possession, under this clause, the risk of loss of or damage to the Supplies resides with the Contractor until the Supplies are delivered to the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment to the conditions of contract. Where Supplies are not delivered to the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment, the risk of loss or damage to the Supplies will remain with the Contractor.

If the Contractor wishes to deliver Supplies for Acceptance at an earlier date than listed in the **Price and Delivery Schedule** Attachment to the conditions of contract, the Contractor must submit a Contract change proposal altering the date for delivery of the Supplies. If the Contractor fails to do this, risk will reside with the Contractor until the later date detailed in the Price and Delivery Schedule.

Under this clause, where the Commonwealth Representative rejects the Supplies as not conforming to the requirements of the Contract, or the Contractor retakes possession of the Supplies after delivery to the Commonwealth, the risk of loss of, or damage to the Supplies will revert to the Contractor on repossession or 7 days after the issue of a notice under the **Acceptance** clause of the conditions of contract, whichever is the earlier. Under the Acceptance clause of the conditions of contract, the Commonwealth Representative may require the Contractor to retake possession of rejected Supplies within 7 days of the notice of rejection. This clause operates to ensure that the latest that the risk of loss of, or damage to, the Supplies will transfer to the Contractor is at the end of the 7 day period. Therefore, if the Contractor repossesses the Supplies before the end of the 7 day period, risk will transfer when the repossession occurs.



**Examples:**

The **Price and Delivery Schedule** Attachment to the conditions of contract states that Item X should be delivered to the Commonwealth on 13 January at Depot C. Instead the Contractor delivers the Supplies on 10 January to Depot C. Risk of loss of or damage to the Supplies will not pass to the Commonwealth until 13 January.

The **Price and Delivery Schedule** Attachment to the conditions of contract states that Item X should be delivered to the Commonwealth on 13 January at Depot C. Instead the Contractor delivers the Supplies on 13 January to Depot A. Risk of loss of or damage to the Supplies will not pass to the Commonwealth until the Supplies are delivered to Depot C.

The Contractor delivers Item A for Acceptance by the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment to the conditions of contract. The risk of loss of or damage to the Supplies passes to the Commonwealth at the time of delivery. The Supplies do not conform to the requirements of the Contract and the Commonwealth rejects the Supplies. The Contractor retakes possession of the Supplies at the request of the Commonwealth within the 7 days required by the Acceptance clause of the conditions of contract. Risk of loss of or damage to the Supplies repasses to the Contractor when it retakes possession.

**Drafter's action:****Volume 1**

Nil

**Volume 2**

Drafters should select the appropriate option depending on the selection made at the **Payment** clause of the draft conditions of contract.

Drafters should include the optional clause where the **Progress Certification** clause of the draft conditions of contract is included.

**Related clauses:****Volume 1**

The **Intellectual Property** clause of the draft conditions of contract details the Intellectual Property rights of the Commonwealth under the Contract.

The **Acceptance** clause of the draft conditions of contract details the conditions under which Supplies will be Accepted and the procedure that will apply to Acceptance.

The **Payment** clause of the draft conditions of contract details the process under which claim for payment will be paid.

The **Insurance** clause of the draft conditions of contract details any insurance required to be taken out by the Contractor in relation to the Supplies.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract contains the delivery points and dates for delivery of Supplies.

**Volume 2**

The **Intellectual Property** clause of the draft conditions of contract details the Intellectual Property rights of the Commonwealth under the Contract.

The optional **Progress Certification** clause of the draft conditions of contract details the conditions under which Progress Certification will be provided by the Commonwealth and the procedure that will apply to Progress Certification.

The **Acceptance** clause of the draft conditions of contract details the conditions under which Supplies will be Accepted and the procedure that will apply to Acceptance.

The **Payment** clause of the draft conditions of contract details the process under which claims for payment will be paid.

The **Insurance** clause of the draft conditions of contract details any insurance required to be taken out by the Contractor in relation to the Supplies.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract contains the delivery points and dates for delivery of Supplies.

The optional **Schedule of Payments** Attachment to the draft conditions of contract lists the Milestones that are subject to Progress Certification, Acceptance and Final Acceptance and includes the amount of the payment that will be made upon achievement of each Milestone.

## PRICE AND PAYMENT

### Price and Price Basis

#### Reference:

Volume 1 Clause 6.1

Volume 2 Clause 7.1

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To identify the Contract Price and detail whether the Contract Price will be subject to price variations.

Policy: It is Defence policy that payments shall be payable in source currency unless foreign currency amounts otherwise payable under the Contract are insignificant. A determination of whether the amounts are significant will be made by Defence after receipt of tenders. Where the Contract is to be payable in Australian currency only, the Contractor will be entitled to claim for fluctuations in the exchange rate between the Base Date and the date for payment.

It is Defence policy that contracts of up to two years duration should not allow Contractor's to claim compensation for variations in the cost of labour and materials. Where a contract is to extend beyond two years the Department's preference is that price variation clauses should be included to cater for increases or decreases in the cost of labour and materials. Failure to adopt a price variation clause in a contract which runs for more than two years may result in tenderers including a significant contingency amount to mitigate unforeseeable increases in labour and materials costs.

#### Guidance:

Volume 1 The Contract Price is set out in the **Price and Delivery Schedule** Attachment to the conditions of contract. The Commonwealth must pay the Contractor in accordance with the payment provisions in the **Price and Payment** clause of the conditions of contract. For further guidance read the Guidance on the other **Price and Payment** clause provisions.

#### SELECTION OF FIRM PRICE OR VARIABLE PRICE BASIS

Under Option A, the Contract is entered into on a firm price basis. Unless the Commonwealth approves a change to the Contract Price in accordance with the **Change to the Contract** clause of the conditions of contract, the Contract Price will not be subject to any claims for price variation.

Under Option B, the Contract is entered into a variable price basis and the parties can utilise the mechanism set out in the optional Price Variation clause of the conditions of contract to establish variations to the Contract Price reflecting fluctuations in exchange rates.

A variable price contract is preferable where it is likely that the Contract Price will be affected by fluctuations in exchange rates applicable to the Contract. Where the Supplies are imported from overseas but paid for in Australian currency because such foreign currency amounts are considered to be insignificant, fluctuations in the relevant exchange rates will affect the Contract Price. Defence generally accepts the risk in relation to movement in exchange rates and accepts the variation of the Contract Price to reflect such fluctuations.

The selection of the appropriate option will depend on whether the Supplies will be imported from overseas and payment of the Contract Price will be made in Australian currency. If so, Option B should be selected. If the Supplies will be imported from overseas and payment of the Contract Price will be made in source currency, or if the Supplies will be wholly sourced in Australia, Option A should be selected.

It should be noted that Volume 1 does not include a provision for price variation reflecting fluctuations in the cost of labour and materials. As Volume 1 is intended for use in contracts of no more than two years duration, the Price Variation clause of the conditions of contract and in turn the Price and Price Basis clause reflects Defence policy that contracts of up to two years duration should be entered into on a firm price basis. Where drafters intend to use the Volume 1 template as a basis for a contract with a duration greater than two years, careful consideration should be given to the inclusion of a price variation clause that allows price variation for fluctuations in the cost of labour and materials. Such a clause can be found as an Option in the Price Variation clause included in the Volume 2 template.

## Volume 2

The Contract Price is set out in the **Price and Delivery Schedule** Attachment to the conditions of contract. The Commonwealth must pay the Contractor in accordance with the payment provisions in the **Price and Payment** clause of the conditions of contract. For further guidance read the Guidance on the other **Price and Payment** clause provisions.

### SELECTION OF FIRM PRICE OR VARIABLE PRICE BASIS

Under Option A, the Contract is entered into on a firm price basis. Unless the Commonwealth approves a change to the Contract Price in accordance with the **Change to the Contract** clause, the Contract Price will not be subject to any claims for price variation.

Under Option B, the Contract is entered into on a variable price basis and the parties can utilise the mechanism set out in the optional **Price Variation** clause to establish variations to the Contract Price reflecting fluctuations in exchange rates and/or fluctuations in the cost of labour and materials.

While Defence policy creates the expectation that price variation clauses should be used in all contracts of over two years duration, a firm priced approach may still be valid for low risk or commercial-off-the-shelf procurements. Use of a firm price for contracts that exceed two years is suitable where the Contract requirement is clearly defined, the cost can be estimated with a high degree of confidence, and performance goals are readily identifiable.

A variable price contract is preferable where it is likely that the Contract Price will be affected by fluctuations in the cost of labour and materials. This is most likely to occur in contracts of more than two years duration or where the market for labour and materials utilised in the Contract requirement is volatile. In such circumstances it is appropriate for the Commonwealth to accept the risk of such fluctuation on value for money grounds, as it avoids the risk of the Contractor including excessive contingency in the Contract Price.

A variable price contract is also preferable where it is likely that the Contract Price will be affected by fluctuations in exchange rates applicable to the Contract. Where the Supplies are imported from overseas but paid for in Australian currency because such foreign currency amounts are considered to be insignificant, fluctuations in the relevant exchange rates will affect the Contract Price. Defence generally accepts the risk in relation to movement in exchange rates and accepts the variation of the Contract Price to reflect such fluctuations.

The selection of the appropriate option will depend on the following considerations:

- a. the Supplies will be imported from overseas and payment of the Contract Price will be made in Australian currency; or
- b. the contract will be of a duration greater than two years.

If either or both of these considerations apply to the Contract, Option B should be selected. If none of these considerations apply to the Contract, Option A should be selected.

**Drafter's action:** Prior to release of the RFT, drafters should select either Option A or B. Selection of the appropriate option will also depend on whether the optional **Price Variation** clause of the conditions of contract is selected.

**Related clauses:** Tenderers are requested to complete the **Price and Delivery Schedule** clause of the annexes to the conditions of tender.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Price Variation** clause, where included, details how the Contract Price will be varied.

The **Change to the Contract** clause of the draft conditions of contract states that the Contract may only be varied in accordance with the process detailed in the **Change to the Contract** clause.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract will include the agreed Price and Delivery Schedule.

## Payment

### Reference:

Volume 1 Clause 6.2

Volume 2 Clause 7.2

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Core

Purpose: To detail the process that applies to payments under the Contract.

Policy: The Commonwealth has a preference for payment on delivery.

It is Defence policy that accounts should be paid 30 days from the receipt of a correctly rendered invoice.

*Defence CEI Part 2 Instruction 4.*

### Guidance:

#### Volume 1

Payment of the Contract Price under the Contract may comprise of a single payment following delivery and Acceptance of all the Supplies or a number of payments following each progressive delivery and Acceptance of the Supplies.

#### REQUIRED DOCUMENTATION FOR A PAYMENT

Under this clause all claims for payment submitted by the Contractor must be accompanied by a Supplies Acceptance Certificate signed by both parties and other relevant documentation necessary to establish the claim is in accordance with the Contract. In addition to the Supplies Acceptance Certificate, required documentation may include plans, reports, other certificates and evidence of insurance or financial securities. Claims for payment submitted under this clause must comply with the tax invoice requirements detailed in the **Taxes and Duties** clause of the conditions of contract.

Required documentation may also include documentation establishing that the Contractor is able to pass title to the Supplies that relate to that claim for payment upon payment of that claim. It is important to note that in order for the Commonwealth to receive title to the Supplies from the Contractor, the Contractor must have received title to the Supplies from their original owner. The documentation required to establish that the Contractor can pass good title to the Supplies to the Commonwealth will therefore depend upon the source of the Supplies and the method of their acquisition. Documentation required by the Commonwealth Representative to provide evidence of good title may include the relevant Subcontract, records and documentation establishing payment of Subcontractors or suppliers, and records and documentation establishing acceptance by the Contractor of the Supplies or components of the Supplies.

#### APPROVAL OF A CLAIM FOR PAYMENT

This clause sets out the procedure and time period that applies to the approval of a claim for a payment. The Commonwealth Representative may approve the whole, or part of, a claim for payment. In accordance with Defence policy, claims for payment should be paid 30 days after the receipt of the claim for payment.

#### REJECTION OF A CLAIM FOR PAYMENT

It is important to note that the Commonwealth Representative should only reject a claim for payment where the claim is not accompanied by the documentation required by this clause. Where the Commonwealth Representative rejects a claim for payment, the Commonwealth Representative must notify the Contractor in writing, of the reasons for the rejection and the actions to be taken by the Contractor in order for the claim to be paid. The Contractor must immediately undertake the required actions and submit a revised claim for payment. The Contractor is entitled to dispute the decision of the Commonwealth Representative

to reject the claim for payment by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

#### MILESTONE PAYMENTS

It should be noted that Defence policy allows for payment of the Contract Price through Milestone Payments. However, Volume 1 of ASDEFCON (Complex Materiel) does not contain any provisions for payment of the Contract Price through Milestone Payments, as it has been drafted for use in relatively low value, short duration contracts where payment on delivery and Acceptance will suffice.

Where Milestone Payments are desirable it is recommended that Volume 2 of ASDEFCON (Complex Materiel) be used as a basis for the tender and contract documentation.

#### Volume 2

Payment of the Contract Price under the Contract may comprise payment following delivery and Acceptance, payment through Milestone Payments only, or a combination of both.

#### REQUIRED DOCUMENTATION FOR A PAYMENT

Under this clause all claims for payment submitted by the Contractor must be accompanied by either a Progress Certificate, Supplies Acceptance Certificate or Final Acceptance Certificate signed by both parties and other relevant documentation necessary to establish the claim is in accordance with the Contract. The **Schedule of Payments** Attachment to the conditions of contract should identify the documentation that must accompany each claim for Payment. In addition to the Progress Certificate, Supplies Acceptance Certificate or Final Acceptance Certificate, required documentation may include plans, reports, other certificates and evidence of insurance or financial securities. Claims for payment submitted under this clause must comply with the tax invoice requirements detailed in the **Taxes and Duties** clause of the conditions of contract.

Required documentation may also include documentation establishing that the Contractor is able to pass title to the Supplies that relate to that claim for payment upon payment of that claim. It is important to note that in order for the Commonwealth to receive title to the Supplies from the Contractor, the Contractor must have received title to the Supplies from their original owner. The documentation required to establish that the Contractor can pass good title to the Supplies to the Commonwealth will therefore depend upon the source of the Supplies and the method of their acquisition. Documentation required by the Commonwealth Representative to provide evidence of good title may include the relevant Subcontract, records and documentation establishing payment of Subcontractors or suppliers, and records and documentation establishing acceptance by the Contractor of the Supplies or components of the Supplies.

#### APPROVAL OF A CLAIM FOR PAYMENT

These clauses set out the procedure and time periods that apply to the approval of a claim for a payment. The Commonwealth Representative may approve the whole, or part of, a claim for payment. In accordance with Defence policy, claims for payment should be paid 30 days after the receipt of the claim for payment.

This clause reflects Defence policy and sets out three options. The selection of the appropriate option will depend on how payments will be made under the Contract.

Option A should be selected when Milestones are not used under the Contract and payment will be made following delivery and Acceptance of the Supplies. The Contractor may deliver all the Supplies at the end of the Contract or it may progressively deliver Supplies at certain time intervals specified in the **Price and Delivery Schedule** Attachment to the conditions of contract. Option A provides for payment 30 days after Acceptance of the Supplies or submission of the claim for payment, whichever occurs last.

Option B should be selected when all the Supplies to be delivered under the Contract will be included as deliverables under specific Milestones listed in the

**Schedule of Payments** Attachment to the conditions of contract. Option B provides for payment 30 days after achievement of the Milestone or submission of the claim, whichever occurs last.

Option C should be selected where only some of the Supplies will be included as deliverables under Milestones listed in the **Schedule of Payments** Attachment to the conditions of contract. Option C provides for payment for these Supplies 30 days after achievement of the Milestone or submission of the claim for payment, whichever occurs last. For the Supplies that have not been listed as deliverables under Milestones but will be delivered progressively throughout the Contract, Option C provides for payment for these Supplies 30 days after the Acceptance of those Supplies or submission of the claim for payment, whichever occurs last. Option C also sets out the percentage of the Contract Price that will be paid as Milestone Payments or after delivery and Acceptance of the Supplies.

Where Milestone Payments will be made under the Contract and Option B or C is selected, careful consideration should be given to the amount of each Milestone Payment, as well as to the specific deliverables that will be required to be delivered under each Milestone. Drafters should ensure that the deliverables delivered under each Milestone provide the Commonwealth with a tangible asset in return for payments made under the Contract.

Where payments are made earlier or later than 30 days, the early and late payment provisions of the **Early and Late Payment** clause of the conditions of contract will apply.

#### REJECTION OF A CLAIM FOR PAYMENT

It is important to note that the Commonwealth Representative should only reject a claim for a payment where the claim is not accompanied by the documentation required by this clause. Where the Commonwealth Representative rejects a claim for a payment, the Commonwealth Representative must notify the Contractor of the reasons for the rejection and the actions to be taken by the Contractor in order for the claim to be paid. The Contractor must immediately undertake the required actions and submit a revised claim for payment. The Contractor is entitled to dispute the decision of the Commonwealth Representative to reject the claim for payment by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

#### AMORTISATION OF MILESTONE PAYMENTS

It is also important to note that where the Contractor has been paid a Mobilisation Payment under the optional **Mobilisation Payment** clause of the conditions of contract, payments due to the Contractor will be amortised against the Mobilisation Payment in accordance with the **Mobilisation Payment** clause of the conditions of contract. All payments will therefore be deemed to have been paid to the Contractor until the total amount of the approved payments claims equal the amount of the Mobilisation Payment.

#### EARNED VALUE PAYMENTS

It should be noted that *ASDEFCON (Complex Materiel)* does not contain any provision for payment of the Contract Price through Earned Value Payments. Where payment on delivery is not appropriate, the Commonwealth prefers to pay by Milestone Payments only, with a Mobilisation Payment where required. *ASDEFCON (Complex Materiel)* reflects this preference. Payment on an earned value basis will be inappropriate where the Contract is valued at less than \$20 million as the cost of implementing the Earned Value Management System will not be cost effective. Payment on an earned value basis may also be inappropriate where sufficient resources to verify Earned Value Payment under the Contract are not available.

It should be noted the requirement of an Earned Value Management System under the Contract does not mean that the Contract must include Earned Value Payments. However, Earned Value Payments cannot be made under the Contract



without the existence of a validated Earned Value Management System that meets the requirements of *DEFAUST 5658* or *DEFAUST 5657*. Where payments on an earned value basis are desirable to allow the Contractor to better maintain a predominantly neutral cash-flow under the Contract, the Earned Value Payment clauses in *ASDEFCON (Strategic Materiel)* may be included. Before inclusion of the *ASDEFCON (Strategic Materiel)* clauses, advice should be sought from Contracting Policy & Operations Branch to determine the amendments required to this clause and other contract clauses.

Drafter's action:

Volume 1

Nil

Volume 2

Option A, B or C should be selected depending on whether the Contract Price is to be paid after delivery and Acceptance of the Supplies, in Milestone Payments, or a combination of the two. Where Option C is selected drafters must include the percentage of the Contract Price that will be paid as Milestone Payments and the percentage of the Contract Price that will not be allocated to Milestones and will be paid following delivery and Acceptance of the Supplies.

Related clauses:

Volume 1

The **Price and Delivery Schedule** clause of the annexes to the conditions of tender requests tenderers to provide a proposed Price and Delivery Schedule.

Volume 2

The optional **Schedule of Payments** clause of the annexes to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the proposed Milestone Dates and the amount of each proposed Milestone Payment.

The optional **Progress Certification** clause, the **Acceptance** clause and the optional **Final Acceptance** clause of the draft conditions of contract detail the conditions under which Progress Certification, Acceptance and Final Acceptance will be provided by the Commonwealth and the procedure that will apply.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Price Variation** clause of the draft conditions of contract, where included, details how payments will be varied for fluctuations in exchange rates and/or the cost of labour and materials, the **Early and Late Payment** clause of the draft conditions of contract details the interest that will be payable where a payment under the Contract is made early or late, and the **Mobilisation Payment** clause of the draft conditions of contract, where included, details the Mobilisation Payment amount.

The negotiated Schedule of Payments must be included at the **Schedule of Payments** Attachment to the draft conditions of contract prior to Contract signature. The Schedule of Payments must identify the documentation required for each claim for a Milestone Payment.

## Price Variation

### Reference:

Volume 1 Clause 6.3

Volume 2 Clause 7.3

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Optional. This clause should be included when the Supplies will be imported from overseas and payment of the Contract Price will be made in Australian currency, or the contract will be of a duration greater than two years.

Purpose: To outline the process that applies to the approval and payment of price variation claims.

Policy: It is Defence policy that contracts of up to two years duration should not allow contractor's to claim compensation for variations in the cost of labour and materials. Where a contract is to extend beyond two years the Department's preference is that price variation clauses should be included to cater for increases or decreases in the cost of labour and materials. Failure to adopt a price variation clause in a contract which runs for more than two years may result in tenderers including a significant contingency amount to mitigate unforeseeable increases in labour and materials costs.

It is Defence policy that payments shall be payable in source currency unless foreign currency amounts otherwise payable under the Contract are insignificant. A determination of whether the amounts are significant will be made by Defence after receipt of tenders. Where the Contract is to be payable in Australian currency only, the Contractor will be entitled to claim for fluctuations in the exchange rate between the Base Date and the date for payment.

*DPPM – Section 2, Chapter 2.2 and Section 3, Chapter 3.3*

### Guidance:

Volume 1 Prior to release of the RFT, drafters must determine at the **Price and Price Basis** clause of the conditions of contract whether the Contract should be firm priced or variable so that tenders can be submitted in accordance with the selected price basis. Where Option B is selected at the **Price and Price Basis** clause of the conditions of contract, drafters must also include the optional clause.

A variable priced contract is preferable where it is likely that the Contract Price will be affected by fluctuations in exchange rates. Exchange rate movements can be significant and unpredictable but it is a manageable risk. Defence policy is to accept the risk of contract price variation as a result of fluctuations in exchange rates. This ensures that contractors will not add any contingencies to the Contract Price to protect themselves from unpredictable fluctuations in the exchange rates that apply to the Contract Price.

#### REQUIREMENTS FOR PRICE VARIATION FOR FLUCTUATIONS IN EXCHANGE RATES

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In accordance with this clause the Contractor is required to submit a separate claim for payment of price variation reflecting fluctuations in exchange rates no later than one month after the submission of the final claim for payment under the **Payment** clause of the conditions of contract. Where the Contractor fails to make a claim for payment of price variation within that period the Commonwealth will not be liable to reimburse the Contractor for the relevant variation amount.

Option A of the **Price Variation** clause may be selected where the contract will be completed within 12 months of the Base Date. Where Option A is selected, the Contractor is only entitled to claim for fluctuations in exchange rates that occur between the Base Date and the date 14 days after the Effective Date. The Contractor is not entitled to claim price variation for fluctuations in exchange rates that occur after this date and may include some contingency in the Contract Price

to account for this fact. Defence generally accepts this risk as it is outweighed by the advantage that it provides ease of contract administration to the Commonwealth.

Option B of this clause should be selected where the contract will not be completed within 12 months of the Base Date. Where Option B is selected, the Contractor is only entitled to claim for fluctuations in the cost of labour and materials that occur between the Base Date and the date on which the overseas supplier's account is settled. Where a Contractor does not settle the overseas supplier's account within 3 months from the date of the overseas supplier's invoice, the Department's policy is that the Contractor should not derive benefit from this delay in the form of increased price variation. Accordingly, where a Contractor is late in settling its overseas supplier's account, the date at which price variation is to be calculated is the date 3 months after the date of the overseas supplier's invoice. A copy of this invoice must accompany the Contractor's claim for price variation.

Drafters may also select Option B where the contract will be completed within 12 months of the Base Date. The advantage of ease of contract administration and convenience provided by Option A may be eroded by the amount of contingency included in the Contact Price by the Contractor.

#### APPROVAL OF A CLAIM FOR PRICE VARIATION

This clause sets out the procedure and time periods that apply to the submission and approval of a claim for price variation. Claims for payment submitted under this clause must comply with the tax invoice requirements detailed in the **Taxes and Duties** clause of the conditions of contract. In accordance with Defence policy, claims for payment should be paid 30 days after the receipt of the claim for payment.

#### REJECTION OF A CLAIM FOR PRICE VARIATION

It is important to note that the Commonwealth Representative should only reject a claim for price variation where the claim is not submitted in accordance with this clause. Where the Commonwealth Representative rejects a claim for price variation, the Commonwealth Representative must notify the Contractor of the reasons for the rejection. The Contractor is entitled to dispute the decision of the Commonwealth Representative to reject the claim for payment by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

#### RECOVERY OF PRICE DECREASES BY THE COMMONWEALTH

This clause makes it clear that, if the application of the price variation formula results in a payment decrease, the amount of the decrease is a debt due to the Commonwealth and may be recovered in accordance with the **Right of the Commonwealth to Recover Money** clause of the conditions of contract.

The Commonwealth Representative should ensure that price variations are calculated in accordance with the formula in relation to each payment so that it is able to verify the amount of the price variation claim by the Contractor, and if the application of the formula results in a price decrease, recover the amount of the decrease from the Contractor. Under this clause the Contractor shall notify the Commonwealth where the price variation results in a credit to the Commonwealth.

#### PRICE VARIATION FOR FLUCTUATIONS IN THE COST OF LABOUR AND MATERIALS

Volume 1 of *ASDEFCON (Complex Materiel)* has been drafted for use in contracts of under two years duration, it does not contain any provisions that allow for price variation for fluctuations in the cost of labour and materials. Where a resultant contract will be of over two years duration, drafters should consider the **Price Variation** clause contained in Volume 2 and the guidance for Volume 2 set out below.

Volume 2

Prior to release of the RFT, drafters must determine at the **Price and Price Basis** clause of the conditions of contract whether the Contract should be firm priced or variable so that tenders can be submitted in accordance with the selected price basis. Where Option B is selected at the **Price and Price Basis** clause of the conditions of contract, drafters must select either one or both of the Options set out in this clause.

While Defence policy creates the expectation that price variation clauses should be used in all contracts of over two years duration, a firm priced approach may still be valid for low risk or commercial-off-the-shelf procurements. Use of a firm priced contract for contracts that exceed two years is suitable where the Contract requirement is clearly defined, the cost can be estimated with a high degree of confidence, and performance goals are readily identifiable.

A variable priced contract is preferable where it is likely that the Contract Price will be affected by fluctuations in the cost of labour and materials. This is most likely to occur in contracts of more than two years duration, or where the market for labour and materials utilised in the Contract requirement is volatile. In such circumstances it is appropriate for the Commonwealth to accept the risk of such fluctuation on value for money grounds, as it avoids the risk of the Contractor including excessive contingency in the Contract Price.

A variable priced contract is also preferable where it is likely that the Contract Price will be affected by fluctuations in exchange rates. Exchange rate movements can be significant and unpredictable but it is a manageable risk. Defence policy is to accept the risk of contract price variation as a result of fluctuations in exchange rates. This ensures that contractors will not add any contingencies to the Contract Price to protect themselves from unpredictable fluctuations in the exchange rates that apply to the Contract Price.

#### REQUIREMENTS FOR PRICE VARIATION FOR FLUCTUATIONS IN THE COST OF LABOUR AND MATERIALS

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In accordance with this clause the Contractor is required to submit a separate claim for payment of price variation reflecting fluctuations in the cost of labour and materials no later than three months after the publication of the final indices for the relevant period. The applicable indices are detailed in the **Price Variation Formula** Attachment to the conditions of contract. The Contractor is also required to advise the Commonwealth in writing if the amount calculated by the Contractor is a credit to the Commonwealth. Where the Contractor fails to make a claim for payment of price variation within that period the Commonwealth will not be liable to reimburse the Contractor for the relevant variation amount.

The Contractor is only entitled to claim for fluctuations in the cost of labour and materials that occur between the Base Date and the date that the Commonwealth Accepts the Supplies. Each of the Options in this clause specifies the period for which the Contractor will be entitled to claim price variation. The selection of the appropriate Option in this clause will depend on the Option selected at the **Payment** clause of the conditions of contract.

Price variation of claims relating to payments that will be made following delivery and Acceptance of the Supplies is baselined against the date at which the Commonwealth is scheduled to Accept the Supplies, which in accordance with the **Acceptance** clause of the conditions of contract occurs 21 days after the delivery date of the Supplies set out in the **Price and Delivery Schedule** Attachment to the conditions of contract. Where the Contractor is late in delivering the Supplies, the Department's policy is that the Contractor should not derive benefit from this delay in the form of increased price variation. Accordingly, where the Contractor is late in delivering the Supplies, the date at which price variation is to be calculated is the date at which Acceptance should have occurred. Where the Contractor delivers the Supplies earlier than the date set out in the Price and Delivery Schedule, the Contractor shall receive price variation calculated between the base date and the date at which the Supplies were actually Accepted.

Price variation of claims relating to Milestone Payments is baselined against the date at which the Milestone is scheduled for completion in the Price and Delivery Schedule. Where a Contractor is late in achieving a Milestone, the Department's policy is that the Contractor should not derive benefit from this delay in the form of increased price variation. Accordingly, where a Contractor is late in achieving a Milestone, the date at which price variation is to be calculated is the date at which achievement of the Milestone should have occurred. Where a Milestone is achieved early, the Contractor shall receive price variation calculated between the Base Date and the date at which the Milestone was achieved.

The amount of any variation claim will be calculated in accordance with the formula at the **Price Variation Formula** Attachment to the conditions of contract.

#### REQUIREMENTS FOR PRICE VARIATION FOR FLUCTUATIONS IN EXCHANGE RATES

In accordance with this clause the Contractor is required to submit a separate claim for payment of price variation reflecting fluctuations in exchange rates no later than one month after the submission of the final claim for payment under the **Payment** clause of the conditions of contract. The Contractor is also required to advise the Commonwealth in writing if the amount calculated by the Contractor is a credit to the Commonwealth. Where the Contractor fails to make a claim for payment of price variation within that period the Commonwealth will not be liable to reimburse the Contractor for the relevant variation amount.

The Contractor is only entitled to claim for fluctuations in exchange rates that occur between the Base Date and the date on which the overseas supplier's account is settled. Where a Contractor does not settle the overseas supplier's account within 3 months from the date of the overseas supplier's invoice, the Department's policy is that the Contractor should not derive benefit from this delay in the form of increased price variation. Accordingly, where a Contractor is late in settling its overseas supplier's account, the date at which price variation is to be calculated is the date 3 months after the date of the overseas supplier's invoice. A copy of this invoice must accompany the Contractor's claim for price variation.

#### APPROVAL OF A CLAIM FOR PRICE VARIATION

This clause sets out the procedure and time periods that apply to the approval of a claim for price variation. Claims for payment submitted under this clause must comply with the tax invoice requirements detailed in the **Taxes and Duties** clause of the conditions of contract. In accordance with Defence policy, claims for payment should be paid 30 days after the receipt of the claim for payment. Where payments are made earlier or later than 30 days, the early and late payment provisions in the **Early and Late Payment** clause of the conditions of contract will apply.

#### REJECTION OF A CLAIM FOR PRICE VARIATION

It is important to note that the Commonwealth Representative should only reject a claim for price variation where the claim is not submitted in accordance with this clause. Where the Commonwealth Representative rejects a claim for price variation, the Commonwealth Representative must notify the Contractor of the reasons for the rejection. The Contractor is entitled to dispute the decision of the Commonwealth Representative to reject the claim for payment by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

#### RECOVERY OF PRICE DECREASES BY THE COMMONWEALTH

This clause makes it clear that, if the application of the price variation formula results in a payment decrease, the amount of the decrease is a debt due to the Commonwealth and may be recovered in accordance with the **Right of the Commonwealth to Recover Money** clause of the conditions of contract.

The Commonwealth Representative should ensure that price variations are calculated in accordance with the formula in relation to each payment so that it is able to verify the amount of the price variation claim by the Contractor, and if the application of the formula results in a price decrease, recover the amount of the decrease from the Contractor. Under this clause the Contractor shall notify the Commonwealth where the price variation results in a credit to the Commonwealth.

#### Drafter's action:

##### Volume 1

Prior to release of the RFT, drafters include this clause if the Contract will be a variable price contract. Where this clause is included drafters should select either Option A or Option B.

Prior to Contract signature, drafters should include the relevant foreign currencies and the relevant financial institution that will be used to calculate price variation.

##### Volume 2

Prior to release of the RFT drafters, should include this clause if the Contract will be a variable price contract. Where this clause is included, drafters should select either one or both of the options.

Prior to Contract signature, where the Contractor will be entitled to claim price variation for fluctuations in exchange rates, drafters should, include the relevant foreign currencies and the relevant financial institution that will be used to calculate price variation.

#### Related clauses:

##### Volume 1

The **Price and Delivery Schedule** clause of the annexes to the conditions of tender requests tenderers to provide information required in the event that the Contract is written in Australian currency.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Price and Price Basis** clause of the draft conditions of contract specifies whether the Contract will be on a firm price or variable price basis.

##### Volume 2

The **Price and Delivery Schedule** clause of the **Financial** annex to the conditions of tender requests tenderers to provide information required in the event that the Contract is written in Australian currency.

The **Variations for Fluctuations in the Cost of Labour and Materials** clause of the **Financial** annex to the conditions of tender requests tenderers to provide the tenderer's preferred indices for the price variation formula at the **Price Variation Formula** Attachment to the draft conditions of contract.

The optional **Schedule of Payments** clause of the **Financial** annex to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the proposed dates and amount of each proposed Milestone Payment.

The **Schedule of Payments** Attachment to the draft conditions of contract will include the agreed **Schedule of Payments**.

The **Price Variation Formula** Attachment to the draft conditions of contract will include the negotiated Price Variation Formula where the price variation for fluctuations in the cost of labour and materials option is used.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Price and Price Basis** clause of the draft conditions of contract specifies whether the Contract will be on a firm price or variable price basis, and the **Early and Late Payment** clause of the draft conditions of contract details the interest that will be payable where a payment under the Contract is made early or late.

The **Right of Commonwealth to Recover Money** clause of the draft conditions of contract contains the right of the Commonwealth to recover money, where the application of the price variation formula results in a credit to the Commonwealth.

## Mobilisation Payment

### Reference:

Volume 1 N/A

Volume 2 Clause 7.4

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Optional

Purpose: To detail the amortisation process applicable to Mobilisation Payments, the financial security requirements for Mobilisation Payments and the Commonwealth's rights to exercise the Mobilisation Payment security.

Policy: The Commonwealth has a preference for payment on delivery. Where payment on delivery is not appropriate, the Commonwealth prefers to pay by Milestone Payments only, with a Mobilisation Payment where required.

It is Defence policy that accounts should be paid 30 days from the receipt of a correctly rendered invoice.

Guidance: A Mobilisation Payment is a mechanism by which the Contractor can receive funding to procure items required for it to fulfil its contractual obligations prior to achievement of milestones, delivery or Acceptance of any Supplies.

### APPROPRIATENESS AND AMOUNT OF THE MOBILISATION PAYMENT

It is important that any proposal for a Mobilisation Payment is given careful consideration to ensure that the Mobilisation Payment is required by the Contractor and can be justified in accordance with the following guidance. Mobilisation Payments are unlikely to be required for commercial-off-the-shelf acquisitions or procurements off a well established production line where only minor modifications to the products are required. Mobilisation Payments will usually be between 5 and 15% of the Contract Price, however, in determining the appropriate amount for the Mobilisation Payment consideration should be given to the entire payment regime. For further guidance on the use of Mobilisation Payments, and the appropriate amount of a Mobilisation Payment, reference should be had to the guidance provided in relation to the **Schedule of Payments and Securities** clause of Annex C to the conditions of tender.

### AMORTISATION OF PAYMENTS AGAINST THE MOBILISATION PAYMENT

Only one Mobilisation Payment will be payable under the Contract. The amount and date of the payment will be detailed in the **Schedule of Payments** at Attachment C to the conditions of contract. Where the Mobilisation Payment is made earlier or later than required, the early and late payment provisions at the **Early and Late Payment** clause of the conditions of contract will apply. The Mobilisation Payment will be offset by the amount of each claim for payment paid by the Commonwealth, until the amount of claims paid equals the amount of the Mobilisation Payment.

#### Example:

The Contract Price is \$60 million and is payable through Milestone Payments. The Commonwealth pays the Contractor a Mobilisation Payment of 10% of the Contract Price. The amount of the Mobilisation Payment is therefore \$6 million.

The Contractor then claims payment of the first Milestone Payment under the Contract of \$3 million. The Commonwealth approves the claim and the payment is deemed to have been paid.

Following successful completion of the second Milestone, the Contractor then claims the second Milestone Payment of \$2 million. The Commonwealth approves the claim and the payment is deemed to have been paid.

The Contractor then claims its third Milestone Payment under the Contract of \$2 million. The Commonwealth approves the claim. \$1 million is deemed to have been paid and the Commonwealth makes payment of \$1 million, 30 days after receipt of the claim for payment.



## FORM OF THE MOBILISATION SECURITY DEED

The Mobilisation Payment will be paid to the Contractor prior to delivery or Acceptance of any Supplies and vesting of ownership of Supplies in the Commonwealth. To prevent the Commonwealth from being an unsecured creditor, this clause requires the Contractor, prior to payment of the Mobilisation Payment, to provide the Commonwealth with an unconditional financial security for the Mobilisation Payment. The financial security must be from a bank or financial institution acceptable to the Commonwealth Representative and in the form of the Mobilisation Security Deed at the **Financial Security Deeds** Attachment to the conditions of contract.

It is important that the Commonwealth Representative ensures that the Contractor's proposed bank or financial institution is acceptable. Issues to be considered in determining the acceptability of a bank or financial institution include the financial viability of the bank or financial institution, the accessibility of funds and the enforceability of the Mobilisation Security Deed in the applicable jurisdiction. For further guidance on the acceptability of the proposed promisor, reference should be had to the guidance provided in relation to the **Securities** paragraph of the annexes to the conditions of tender.

A tenderer may propose amendments to the standard Mobilisation Security Deed. It is important to ensure that the security required under the Contract meets Defence's standard financial security requirements. Prior to any changes being made to the Mobilisation Security Deed, advice should be sought from Contracting Policy & Operations Branch. For further guidance on the standard Defence financial security requirements, reference should be had to the guidance provided in relation to the **Securities** clause of the annexes to the conditions of tender.

## AMOUNT OF THE MOBILISATION SECURITY

The note to drafters provides guidance on the amount of the financial security that will be required to secure the Mobilisation Payment. Where the Mobilisation Payment will be greater than \$2 million, the amount of the financial security should be 50% of the Mobilisation Payment. While this approach carries some risk in the early stages of the Contract when the Contractor has not delivered Supplies of sufficient value to the Commonwealth, it also reduces some of the costs that are passed on to the Commonwealth where high value financial securities are required under the Contract.

Where the Mobilisation Payment will be less than \$2 million, the amount of the financial security should be equal to the Mobilisation Payment. As the amount of the Mobilisation Payment is lower, the costs associated with the provision of the financial security that will be passed on to the Commonwealth as part of the Contract Price are also lower so that the risk of securing only 50% of the Mobilisation Payment may not be justified.

Where the Commonwealth is concerned about the financial viability of the Contractor, the Commonwealth may wish to secure the entire amount of the Mobilisation Payment notwithstanding that the Mobilisation Payment is greater than \$2 million.

## EXERCISING RIGHTS UNDER THE MOBILISATION SECURITY DEED

The Mobilisation Payment security is exercisable by the Commonwealth to recover debts under the Contract or to obtain repayment of the non-amortised portion of the Mobilisation Payment where the Contractor fails to perform the Contract. The Commonwealth should not exercise the security in any other circumstances or the Contractor may have grounds for legal action against the Commonwealth. Advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth exercising its rights under the security. Careful consideration should also be given to the amount that the Commonwealth should demand under the security.

## RELEASE OF THE MOBILISATION SECURITY

In accordance with this clause, the security provided by the Contractor in relation to the Mobilisation Payment will be released by the Commonwealth on amortisation of the Mobilisation Payment.

Drafter's action: Prior to Contract signature, drafters should include the amount of the financial security that will be required to secure the Mobilisation Payment.

### Related clauses:

#### Volume 2

The **Securities** clause of the annexes to the conditions of tender requests tenderers to state the proposed promisor and the acceptability of the Mobilisation Security Deed.

The **Schedule of Payments** clause of the **Financial** annex to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the amount, purposes of and date of the proposed Mobilisation Payment.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. The **Securities** clause of the draft conditions of contract reserves to the Commonwealth certain rights in the event that the Contractor fails to provide the securities required by the **Mobilisation Payment** clause of the draft conditions of contract or the Commonwealth exercises its rights under the securities.

The **Schedule of Payments** Attachment to the draft conditions of contract will include the agreed Schedule of Payments.

The **Financial Security Deeds** Attachment to the draft conditions of contract, where a Mobilisation Payment will be made, will include the agreed Mobilisation Security Deed.

## Security for Performance

### Reference:

Volume 1 N/A

Volume 2 Clause 7.5

### Sponsor:

Contracting Policy & Operations and Materiel Finance Division

### Status:

Optional. Drafters should include in the RFT where security for the performance is required.

### Purpose:

To require the Contractor to provide a financial security or a Deed of Substitution and Indemnity to secure its performance of the Contract and to detail the Commonwealth's right to exercise the security or to issue a notice of substitution.

### Policy:

The Commonwealth requires the Contractor to provide either a performance security or a Deed of Substitution and Indemnity to secure performance of the Contract.

### Guidance:

A Contractor may elect to provide a performance security under Option A of this clause or a Deed of Substitution and Indemnity under Option B of this clause in accordance with **Variations for Fluctuations in the Cost of Labour and Materials** clause of the **Financial** Annex of the conditions of tender.

### USE OF PERFORMANCE SECURITY VERSUS DEED OF SUBSTITUTION

Both the performance security and the Deed of Substitution and Indemnity secure the proper performance of the Contract. The performance security provides the Commonwealth with financial relief, whereas the Deed of Substitution and Indemnity entitles the Commonwealth to request that the entity (the Substituted Contractor) providing the Deed of Substitution and Indemnity be substituted as the Contractor to perform the Contract.

### FORM OF THE PERFORMANCE SECURITY DEED

If the Contractor elects to provide a performance security, this clause requires the Contractor to provide the performance security from a bank or financial institution acceptable to the Commonwealth Representative in the form of a Performance Security Deed at the **Financial Security Deeds** Attachment to the conditions of contract. It is important that the Commonwealth Representative ensures that the Contractor's proposed bank or financial institution is acceptable. Issues to be considered in determining the acceptability of a bank or financial institution include the financial viability of the bank or financial institution, the accessibility of funds and the enforceability of the Performance Security Deed in the applicable jurisdiction. For further guidance on the acceptability of the proposed promisor, reference should be had to the guidance provided in relation to the **Securities** clause of the annexes to the conditions of tender.

A tenderer may propose amendments to the standard Performance Security Deed. It is important to ensure that the security required under the Contract meets the Commonwealth's standard financial security requirements. Prior to any changes being made to the Performance Security Deed, advice should be sought from Contracting Policy & Operations Branch. For further guidance on the standard Defence financial security requirements, reference should be had to the guidance provided in relation to the **Securities** clause of the **Financial** annex to the conditions of tender.

### AMOUNT OF THE PERFORMANCE SECURITY

Drafters should include the amount of the required performance security prior to release of the RFT. The amount of the performance security may be expressed as a percentage of the Contract Price or as a specified value. In determining the security required, consideration should be given to the likely magnitude of loss in the event that a Contractor fails to perform the Contract and the relative cost of providing the performance security. It is important that a comprehensive risk

analysis is undertaken as the cost of obtaining and maintaining the performance security will affect the overall price of the Supplies. The amount of the performance security should be sufficient to provide the Contractor with a reasonable disincentive to breach the Contract.

#### SELECTION OF DATE FOR COMMENCEMENT AND RELEASE OF SECURITY

Prior to release of the RFT, drafters must also select the date by which the performance security is required and the date for release of the performance security. Careful consideration should be given to the selection of both dates. The security for performance will usually be required shortly after the Effective Date, often at the first Milestone. Performance securities will usually be kept in place until Acceptance of the last item of Supplies is achieved (or Final Acceptance if relevant).

#### EXERCISING RIGHTS UNDER THE PERFORMANCE SECURITY DEED

The performance security is exercisable by the Commonwealth to recover debts under the Contract and to obtain compensation for loss suffered in the event that the Contractor fails to perform the Contract. The Commonwealth should not exercise the security in any other circumstances or the Contractor may have grounds for legal action against the Commonwealth. Advice should therefore be sought from Contracting Policy & Operations Branch prior to the Commonwealth exercising its rights under any security. Careful consideration should also be given to the amount that the Commonwealth should demand under the performance security in respect of a particular failure to perform.

#### FORM OF THE DEED OF SUBSTITUTION AND INDEMNITY

If the Contractor elects to provide a Deed of Substitution and Indemnity, the Contractor is required to provide a deed in the form of the deed at the **Financial Security Deeds** Attachment from the substituted contractor detailed in the Contract. Where a tenderer proposes amendments to the standard Deed of Substitution and Indemnity it is important to ensure that the deed provided by the Contractor meets the Commonwealth's requirements. Prior to any changes being made to the Deed of Substitution and Indemnity, advice should be sought from Contracting Policy & Operations Branch.

#### ACCEPTABILITY OF THE PROPOSED SUBSTITUTED CONTRACTOR

The substituted contractor will usually be the Contractor's parent company but may be another entity acceptable to the Commonwealth Representative. Under the Deed the substituted contractor agrees to perform the Contract in the place of the Contractor in the event that the Commonwealth is entitled to terminate the Contract for default. Therefore the viability of the company proposed as substituted contractor under the Deed of Substitution and Indemnity and its capacity to perform the Contract upon substitution must be fully evaluated to ensure that the Commonwealth is adequately protected.

#### ISSUE OF A NOTICE OF SUBSTITUTION

The Commonwealth Representative may issue a notice of substitution where it is entitled to issue a notice of termination for default under the **Contractor Default** clause of the conditions of contract or at common law. It is important to note that the notice of substitution may be issued where the Commonwealth is entitled to issue a notice of termination, and the power does not require the actual issue of a notice of termination. Indeed, it is likely that the right to issue a notice of substitution will be lost if a notice of termination is issued to the Contractor. Where all of the parties agree, the substituted contractor may also be substituted for the Contractor at any time in accordance with this clause.

In some circumstances it may be preferable to terminate the Contract for default rather than issue a notice of substitution. Issues to be considered include the continuing ability of the substituted contractor to perform the Contract from both a financial and technical perspective, the existing delay in the delivery of Supplies

under the Contract and the likely damages recoverable by the Commonwealth if it terminates the Contract for default. Advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth Representative issuing a notice of termination or substitution under the Contract.

#### SECURITIES REQUIRED FOLLOWING SUBSTITUTION

The **Deed of Substitution and Indemnity** clause at the **Financial Security Deeds** Attachment to the conditions of contract requires the substituted contractor, upon substitution, to provide a replacement security for the security provided by the Contractor under the **Mobilisation Payment** clause of the conditions of contract where the security has not already been released by the Commonwealth. The security provided by the Contractor will be released upon receipt of the replacement security from the substituted contractor. In addition, the Deed of Substitution and Indemnity requires the substituted contractor to provide a performance security to secure its performance of the Contract. Where the substituted contractor fails to provide the required securities, this clause entitles the Commonwealth to terminate the Contract for default pursuant to the **Contractor Default** clause of the conditions of contract.

**Drafter's action:** If security for the performance of the contract is required the tenderer will only be required to provide a performance security or a Deed of Substitution or Indemnity, not both. Prior to Contract signature, depending on the successful tenderer's response, Option A or Option B should be included.

Prior to Contract signature, where Option A is included, the amount of the performance security, and the event that will lead to its release should also be included. Where Option B is included, the name of the substituted contractor should also be included.

**Related clauses:** The **Securities** clause of the **Financial** annex to the conditions of tender requests tenderers to state whether they will provide a performance security or a Deed of Substitution and Indemnity, the proposed substituted contractor or promisor, and the acceptability of the Deed of Substitution and Indemnity.

The **Securities** clause of the draft conditions of contract reserves to the Commonwealth certain rights in the event that the Contractor fails to provide the securities required by the **Security for Performance** clause of the draft conditions of contract or the Commonwealth exercises its rights under the securities.

The **Financial Security Deeds** Attachment to the draft conditions of contract where the Contractor elects to provide a performance security, will include the agreed Performance Security Deed. The **Financial Security Deeds** Attachment to the draft conditions of contract where the Contractor elects to provide a Deed of Substitution and Indemnity, will include the agreed Deed of Substitution and Indemnity.

## Securities

### Reference:

Volume 1 N/A

Volume 2 Clause 7.6

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Optional. To be included where the Mobilisation Payment and Security for Performance clauses of the draft conditions of contract is included to allow for security of the performance under the Contract.

Purpose: To reserve to the Commonwealth certain rights in the event that the Contractor fails to provide the securities required by the Mobilisation Payment and Security for Performance clauses of the conditions of contract or the Commonwealth exercises its rights under the securities.

Policy: Nil

Guidance: This clause provides protection for the Commonwealth in the event that it exercises its right under the Mobilisation Payment security or the Security for Performance. It also notifies the Contractor of the Commonwealth's rights in the event that the Contractor fails to provide a security required by the Contract.

### FAILURE TO PROVIDE THE SECURITIES REQUIRED BY THE CONTRACT

This clause notifies the Contractor that if it fails to provide or maintain any security required by the **Mobilisation Payment** and **Security for Performance** clauses of the conditions of contract, the Commonwealth Representative may withhold all or part of any payment under the Contract until the Contractor provides the required security. It should also be noted that where the Contractor fails to provide or maintain a financial security required under these clauses, the Contractor will be in breach of Contract and the Commonwealth may have additional rights including termination of the Contract for default. Where the Contractor fails to provide or maintain a security required by the **Mobilisation Payment** and **Security for Performance** clauses of the conditions of contract, advice should be sought from Contracting Policy & Operations Branch prior to any action being taken by the Commonwealth Representative.

Given the importance of financial securities and the protection that they afford to the Commonwealth, the Commonwealth should take all steps available to it to ensure that the Contractor obtains and maintains the required security. Careful consideration should therefore be given to withholding future payments under the Contract where a security is not provided or maintained by the Contractor. The **Waiver** clause of the conditions of contract acts to protect the Commonwealth from being prevented from exercising its right to withhold future payments in the event that the Commonwealth does not immediately exercise its rights under this clause. However, to ensure that the Commonwealth's rights to withhold future payments will not be prejudiced, advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth electing not to exercise its right to withhold future payments under this clause.

### COMMONWEALTH LIABILITY WHERE RIGHTS ARE EXERCISED

This clause provides protection for the Commonwealth in the event that it exercises its rights under either the Mobilisation Payment security or the performance security. It has a twofold effect. First, it requires the Contractor to release the Commonwealth from liability for loss or damage suffered by the Contractor which results from the Commonwealth exercising its rights under a security unless the Commonwealth was not entitled to draw down against the security. Second, it preserves the Commonwealth's right to recover from the Contractor the balance of amounts owed to the Commonwealth or losses suffered by the Commonwealth in the event the securities provided under the Contract are insufficient.

It is important to note that the Commonwealth will only be protected by this clause in circumstances where the Commonwealth was entitled to exercise its rights under the security. Advice should therefore be sought from Contracting Policy & Operations Branch prior to any action being taken in relation to a financial security.

Drafter's action: No input is required prior to the release of the RFT. Prior to Contract signature, drafters should assess whether this clause is still applicable.

Related clauses: The **Mobilisation Payment** and **Security for Performance** clauses of the draft conditions of contract detail when a Mobilisation Payment security or performance security must be provided by the Contractor, the amount, commencement date and release date of the security and the Commonwealth's rights to exercise the securities.

The **Financial Security Deeds** Attachment to the draft conditions of contract will, if required, contain the agreed Mobilisation Payment security and performance security.

## Time of Payment

### Reference:

Volume 1 Clause 6.4

Volume 2 Clause 7.7

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Core

Purpose: To place an obligation on the Commonwealth to notify the Contractor of the date each payment is made.

Policy: Nil

### Guidance:

Volume 1 This clause places an obligation on the Commonwealth to notify the Contractor of the date on which a payment is made. It is important that the Commonwealth notifies the Contractor when a payment is made as the notification of the payment date will reduce the risk of the payment being considered to be a late payment.

Volume 2 This clause places an obligation on the Commonwealth to notify the Contractor of the date on which a payment is made. It is important that the Commonwealth notifies the Contractor when a payment is made as the notification of the payment date will reduce the risk of the payment being considered to be a late payment.

Where a payment is made late, the early and late payment provisions of the **Early and Late Payment** clause of the conditions of contract will apply.

Drafter's action: Nil

### Related clauses:

Volume 1 The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract will contain the agreed Schedule of Payments and Delivery schedule.

Volume 2 The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Early and Late Payment** clause of the draft conditions of contract details how an amount required for payment will be modified where a payment is made early or late.

The **Price and Delivery Schedule** Attachment to the draft conditions of contract will contain the agreed Delivery schedule.

The **Schedule of Payments** Attachment to the draft conditions of contract will contain the agreed Schedule of Payments.



## Early and Late Payment

### Reference:

Volume 1 N/A

Volume 2 Clause 7.8

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Core

Purpose: This clause sets out the amount of interest that will be payable by the Contractor and the Commonwealth, respectively, in the event of early or late payment of amounts due under the Contract.

Policy: The Commonwealth's standard terms of payment are 30 days from the receipt of a correctly rendered invoice. The Department of Finance and Administration sourced overdraft rate should be used for early payments and the Australian Taxation Office sourced General Interest Charge should be used for late payments.

*Commonwealth Procurement Guidelines and Best Practice Guidance*

Guidance: This clause sets out the amount of interest that the parties agree will be payable to the Contractor and the Commonwealth in the event of an early or late payment.

### SELECTION OF THE APPROPRIATE INTEREST RATE

Where payment of an amount due under a contract is made late, interest shall be made payable by the Commonwealth. The interest payment will be calculated in accordance with the formula in this clause using the Australian Tax Office sourced General Interest Charge that can be accessed at the Australian Taxation Office's website.

Where payment of an amount due under a contract is made early, interest shall be made payable to the Commonwealth. The interest payment will be calculated in accordance with the formula in this clause using the overdraft rate applied to Commonwealth Agencies by the Department of Finance and Administration. This rate can be accessed at the Chief Finance Officer Group website

It should be noted that the amount of interest payable to, or by the Commonwealth does not represent a reduction or an increase to the Contract Price for GST purposes. Therefore, an adjustment note does not need to be issued.

### ADVANCE PAYMENTS AND EARLY AND LATE PAYMENTS

An early payment should not be confused with an advance payment or a Mobilisation Payment. A Mobilisation Payment is made in advance of satisfactory performance or delivery of Supplies. An early payment is the early payment of any amount that is due under the Contract. A late payment is the late payment of any amount that is due under the Contract.

This clause states that any payment made later than sixty days after the due date will be in breach of Contract. This clause seeks to protect the Commonwealth from a claim of breach of Contract where payment is late by less than sixty days on the basis that this clause provides adequate compensation to the Contractor in such cases. If, however, the Commonwealth fails to make the payment within the sixty days then the Commonwealth will be in breach of Contract for which the Contractor may take legal action (e.g. to seek damages for that breach and/or potentially to terminate the contract). Therefore, notwithstanding the ability of the Commonwealth to pay 'late', it remains in the Commonwealth's best interest to pay claims within 30 days of a correctly rendered invoice.

Where the required interest payment resulting from an early or late payment is not offset by or paid as a part of the actual payment, this clause entitles the Commonwealth to adjust the next approved payment under the Contract.

Drafter's action: Nil

Related clauses: The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract.

## Incentive Payments

### Reference:

Volume 1    N/A

Volume 2    Clause 7.9

### Sponsor:

Contracting Policy & Operations and Materiel Finance Division

### Status:

Optional. To be included where it is considered appropriate to pay the Contractor Incentive Payments for superior performance of the Contract.

### Purpose:

To detail the process that applies to Incentive Payments under the Contract.

### Policy:

In accordance with the *Financial Management and Accountability Act 1997*, the Commonwealth may only pay the Contractor Incentive Payments for superior performance of the Contract.

*Commonwealth Procurement Guidelines and Best Practice Guidance*

*DPPM - Section 2, Chapter 2.2*

### Guidance:

This clause entitles the Contractor to claim Incentive Payments for superior performance of the Contract in addition to the Contract Price.

#### REQUIREMENT FOR SUPERIOR PERFORMANCE OF THE CONTRACT

As Incentive Payments are paid to the Contractor in addition to the Contract Price, to be in accordance with the *Financial Management and Accountability Act 1997* (FMA Act), the Incentive Payment must be for superior performance of the Contract where the superior performance is of benefit to the Commonwealth. This is because additional payments must meet the value for money test laid down in the *Commonwealth Procurement Guidelines and Best Practice Guidance*, to which approvers must have regard in approving proposals to spend public money.

#### KEY PERFORMANCE INDICATORS, WEIGHTINGS, ASSESSMENT PERIODS

The Contractor's performance will be measured in accordance with the assessment periods, weightings and key performance indicators listed in the **Incentive Payments** Attachment to the conditions of contract. The maximum amount payable as Incentive Payments under the Contract is specified in this clause.

Prior to Contract signature, drafters must include the negotiated key performance indicators, weightings, assessment periods and Incentive Payments payable for each assessment period at the **Incentive Payments** Attachment to the conditions of contract. It is essential that drafters ensure that the key performance indicators are objective, measurable and clearly stated. Further guidance on the selection of key performance indicators, weightings, assessment periods and the Incentive Payments payable for each assessment period is contained in the guidance on the **Incentive Payments** Attachment to the conditions of contract.

#### ENTITLEMENT TO CLAIM AN INCENTIVE PAYMENT

The procedure for claiming an Incentive Payment is detailed in this clause. Where the Contractor is not awarded an Incentive Payment for an assessment period the amount of the Incentive Payment will not be payable by the Commonwealth in any subsequent assessment period. To ensure that the Contractor cannot be paid an Incentive Payment where it has achieved the agreed key performance indicators but is performing poorly in other areas, the Contractor will not be entitled to receive an Incentive Payment where during an assessment period the Contractor has not achieved a due Milestone or the Commonwealth is entitled to claim liquidated damages or terminate the Contract for default.

#### PROCESSING CLAIMS FOR AN INCENTIVE PAYMENT

In accordance with this clause, the Contractor must provide the Commonwealth Representative with a written statement of its achievement of the key performance

indicators and evidence to support the statement at the end of each assessment period. On receipt of the Contractor's written statement, the Commonwealth Representative must assess the Contractor's performance for the assessment period and notify the Contractor of the amount of any Incentive Payment that has been awarded to the Contractor. The Contractor is entitled to dispute the decision of the Commonwealth Representative by following the dispute resolution procedures in the **Resolution of Disputes** clause of the conditions of contract.

Where the Commonwealth informs the Contractor that it is entitled to an Incentive Payment, the Contractor must submit a claim for payment. Claims for payment submitted under this clause must comply with the tax invoice requirements detailed in the **Taxes and Duties** clause of the conditions of contract and will be paid 30 days from receipt of the claim.

#### IMPACT OF POSTPONEMENTS ON INCENTIVE PAYMENTS

It is important to note that schedule based key performance indicators may be affected by the granting of postponement claims in accordance with the **Postponement** clause of the conditions of contract. Where the Contractor successfully claims a postponement of the date for delivery of Supplies and/or a Milestone Date, a key performance indicator relating to the Milestone Date will also be affected. Where the key performance indicator is directly linked to the Milestone Date or delivery date then no change will need to be made to the description of the key performance indicator.

Example:  
KPI 12 - To achieve Milestone Y, 3 months prior to the scheduled Milestone Date.

Where the key performance indicator is not directly linked to the Milestone Date or delivery date, the Contractor should propose a change to the description of the key performance indicator in the Contract change proposal submitted in accordance with the **Postponement** clause of the conditions of contract.

Example:  
KPI 3 - To achieve Acceptance of Item X by 21 December 2003

It is important to note that the achievement by the Contractor of the key performance indicator by the postponed date may no longer represent a value for money benefit for the Commonwealth as required by the FMA Act. However, as the Commonwealth is contractually bound to pay the Contractor an Incentive Payment where it meets the key performance indicators detailed in the **Incentive Payments** Attachment to the conditions of contract and the Contractor has been granted a postponement because the delay was not within its reasonable control, the Commonwealth should agree to the schedule based key performance indicator being postponed by the same period as the delivery date or Milestone.

When selecting key performance indicators, consideration should be given to the risk of postponement claims and the impact that they will have upon the superior benefit of the early achievement of a Milestone or early Acceptance of Supplies.

**Drafter's action:** Prior to release of the RFT, the maximum amount payable as Incentive Payments should be included. When Milestone Payments and liquidated damages will be used under the Contract, drafters should include the appropriate options.

Related clauses: The **Incentive Payments** clause of the annexes to the conditions of tender requests tenderers to propose assessment periods, key performance indicators and weightings.

The **Price and Payments** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract.

The **Incentive Payments** Attachment to the draft conditions of contract will contain the agreed assessment periods, weightings and key performance indicators.

## Liquidated Damages and Other Compensation

### Reference:

Volume 1 N/A

Volume 2 Clause 7.10

Sponsor: Contracting Policy & Operations, Materiel Finance Division and Treasury and Tax Management

Status: Optional. To be included where the Commonwealth will suffer loss if the Contractor delays delivery of any item of Supplies beyond the date set out at the **Price and Delivery Schedule** Attachment to the conditions of contract and it is appropriate for the Commonwealth to recover the loss from the Contractor.

Purpose: To 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 delivery of specific items by the date set out at the **Price and Delivery Schedule** Attachment to the conditions of contract.

Policy: *Accounts Receivable and Debt Management Procedures Manual*  
*A New Tax System (Goods and Services Tax) Act 1999*  
*Defence CEIs Part 5 Instructions 2 and 3*  
*DPPM – Section 6, Chapter 6.1*  
*DRB 47 – Manual of Financial Delegations*  
*Financial Management and Accountability Act 1997*

Guidance: If the Contractor fails to deliver an item of the Supplies by the date specified in the **Price and Delivery Schedule** Attachment to the draft conditions of contract, the Contractor will be in breach of Contract and the Commonwealth will be entitled to recover damages for that breach. To provide certainty and avoid the costs associated with litigation, the parties may, through this clause, agree on the amount of damages to be recovered in the event of a failure by the Contractor to achieve delivery of the Supplies on time.

### LIQUIDATED DAMAGES BECOME A DEBT DUE UPON ELECTION

Where the Contractor fails to deliver an item of the Supplies by the date listed in the **Liquidated Damages** Attachment to the conditions of contract, this clause entitles the Commonwealth to elect to claim liquidated damages or another agreed form of compensation. Once liquidated damages are triggered under a contract they are considered to be an amount owing to the Commonwealth (i.e. 'a debt due to the Commonwealth') for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act). This means Defence will be required to pursue recovery of such amounts unless they are waived by the Finance Minister under section 34 of the FMA Act.

To ensure that liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract will not become a debt due to the Commonwealth immediately upon the Contractor failing to achieve the relevant Milestone, the following statement has been included in this clause: "No amount shall be owing to the Commonwealth until the Commonwealth elects, in accordance with clause X.X.X., to recover liquidated damages". The inclusion of this statement ensures that the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract will only become a debt due to the Commonwealth at the time the Commonwealth makes an election to claim the liquidated damages. By granting the Commonwealth an election to claim liquidated damages or another agreed form of compensation, this clause also allows the Commonwealth and Defence industry greater flexibility in the collection and management of liquidated damages.

### TIME PERIOD TO MAKE THE ELECTION

It should be noted that this clause imposes a time period in which the Commonwealth must make an election in accordance with this clause. The Commonwealth must make its election within:

- a. the period of four months after the end of the relevant period of delay; or
- b. four months after notification by the Contractor that its liability limit in relation to liquidated damages has been reached.

This clause provides that the expression 'relevant period of delay' can refer to either the whole period of each delay for which liquidated damages are recoverable by the Commonwealth under this clause, or one or more periods within the whole period of delay which the Commonwealth may nominate in writing to the Contractor, as the case requires. This definition makes it clear that the Commonwealth does not have to wait until the end of the delay (which could be a considerable amount of time) or the liquidated damages cap is reached before it can decide whether to levy liquidated damages or agree alternative compensation with the Contractor.

Instead, the clause makes it clear that the Commonwealth has a right to make elections in accordance with this clause on an ongoing basis so that liquidated damages or alternative compensation can be claimed closer to the time at which the Commonwealth is actually suffering loss.

In practice, this means that the Commonwealth could nominate specified individual periods (e.g. monthly) within the overall period of delay and elect to levy liquidated damages for each individual period, or enter into discussions regarding alternative compensation, within 4 months of the end of each of those specified periods. This process could then continue for each individual component of the whole period of delay.

If the Commonwealth fails to make an election within the relevant time period to recover the liquidated damages in accordance with this clause, the recoverable liquidated damages, becomes a debt owed to the Commonwealth by the Contractor. On the next day after the expiration of the period mentioned, the Commonwealth is entitled to rely on the provisions of the **Right of the Commonwealth to Recover Money** clause of the conditions of contract.

The Commonwealth would, however, still be entitled to claim damages at law where it has suffered loss as a result of the breach of Contract, but this would only cover loss for causes other than the Contractor's delay in delivering the Supplies (see the guidance on Claiming Liquidated Damages as the Sole Remedy for Delay below). It is important for the Commonwealth to be aware of the relevant election period set out in this clause, and to ensure that the Commonwealth's rights are protected by seeking compensation (either as liquidated damages or alternative compensation) for the delay from the Contractor.

### ELECTING TO CLAIM ALTERNATIVE FORMS OF COMPENSATION

In accordance with this clause, the Commonwealth may elect to claim an alternative form of compensation to the equivalent value of the liquidated damages specified at the **Liquidated Damages** Attachment to the conditions of contract. The Commonwealth may also elect to claim a combination of liquidated damages and alternative forms of compensation to the equivalent value of the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract. It should be noted, however, that both parties must agree to the alternative form of compensation. The Commonwealth cannot compel the Contractor to provide alternative compensation or dictate its form.

When seeking to agree with the Contractor on any form of alternative compensation, care should be taken to ensure that the Commonwealth does not take any action or make any statement that could endanger the Commonwealth's right to subsequently claim liquidated damages in the event that no agreement can

be reached. Where the Commonwealth and the Contractor cannot agree to an alternative form of compensation, the Commonwealth will be entitled to elect to claim the liquidated damages specified at the **Liquidated Damages** Attachment to the conditions of contract as long as the time periods specified in this clause have not expired. Where the time periods specified in this clause are close to expiry, it may be in the best interests of the Commonwealth to elect to claim the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract rather than risk losing the right to claim any compensation for the Contractor's delay.

#### REACHING AGREEMENT ON ALTERNATIVE COMPENSATION

Careful consideration should be given to the form of any alternative compensation prior to an agreement being reached with the Contractor. Issues to be considered include:

- a. estimating the value of the compensation;
- b. the usefulness of the compensation to the Commonwealth;
- c. costs associated with the compensation that would be borne by the Commonwealth (e.g. storage, maintenance, fuel, training etc);
- d. whether the compensation is within the scope of the Contract;
- e. whether the compensation will be provided under the current Contract or another contract;
- f. what delivery dates, functional/performance requirements, warranties, liquidated damages etc should be agreed with the Contractor and included in the relevant contract; and
- g. whether electing to claim the liquidated damages specified in the **Liquidated Damages** Attachment to the conditions of contract would better compensate the Commonwealth for the loss it has suffered as a result of the Contractor's delay.

Where the Commonwealth elects to claim compensation in lieu of liquidated damages, this clause places an obligation on the Contractor to prepare a Contract change proposal to affect a change to the Contract and any other contract between the Commonwealth and the Contractor which may be affected. This clause also states that where the compensation is to be provided in the form of goods or services, the goods and services will be incorporated into the Supplies under the relevant contract. This clause ensures that the standard warranty and other relevant contractual provisions will apply unless expressly varied.

#### WAIVING OR WRITING OFF DEBTS

The Commonwealth may, in accordance with *Part 5 Instruction 2* and *3* of the *Defence CEIs*, decide to write-off or waive debts (including liquidated damages owed to the Commonwealth). Further guidance on the write-off and waiver of debts is contained in the guidance on the **Right of Commonwealth to Recover Money** clause of the draft conditions of contract. It is important to remember, however, that liquidated damages will not become a debt due to the Commonwealth until the Commonwealth makes an election to recover the liquidated damages under this clause.

#### DECISION MAKING AUTHORITY

All decisions relating to the recovery, trade-off, allocation, waiver or write-off of liquidated damages must be referred to Branch Head level or higher. *DRB 47* lists the delegates who are entitled to write-off liquidated damages in accordance with *Part 5 Instruction 2* of the *Defence CEIs*. All requests for the waiver of liquidated damages must be referred to the Minister for Finance through the Assistance Secretary Personnel Service Delivery in Corporate Services and Infrastructure Group in accordance with *Part 5 Instruction 3* of the *Defence CEIs*.



### CLAIMING LIQUIDATED DAMAGES AS THE SOLE REMEDY FOR DELAY

It is important to note that in accordance with this clause, the Commonwealth's right to claim liquidated damages for delay is the sole remedy of the Commonwealth for loss or damage suffered as a result of a delay during the period in which liquidated damages accrue. This clause does not limit the Commonwealth's remedies in respect of a delay in delivery of Supplies for which an entitlement to recover liquidated damages does accrue under the Contract or where the loss or damage suffered by the Commonwealth is caused other than by the Contractor's delay in delivering the Supplies. This clause also does not limit the Commonwealth's right to terminate the Contract for convenience in accordance with the **Termination for Convenience** clause of the conditions of contract or to terminate the Contract for default.

### ENFORCEABILITY OF LIQUIDATED DAMAGES

To be enforceable against the Contractor in law, the liquidated damages amounts included in the **Liquidated Damages** Attachment to the conditions of contract must represent a genuine pre-estimate of the loss likely to be suffered by the Commonwealth as a result of the failure by the Contractor to achieve the Milestone on time. The calculation of the amount of liquidated damages is therefore critical to the enforceability of this clause. For guidance on the calculation of liquidated damages, reference should be had to the guidance provided in relation to the **Liquidated Damages** Attachment to the conditions of contract.

Because the Commonwealth is not a company that trades with a view to profit, it can sometimes be difficult to identify the loss suffered as a result of a failure to deliver on time. To lessen the chances of an argument over whether the Commonwealth suffered loss, this clause has been included to establish the Contractor's agreement that the Commonwealth will suffer loss and damage should there be a failure to deliver an item of the Supplies by the date specified in the **Price and Delivery Schedule** Attachment to the conditions of contract.

### INCLUSION OF INFORMATION IN THE LIQUIDATED DAMAGES ATTACHMENT

Where a genuine pre-estimate of loss can be made, the date for delivery of an item and the genuine pre-estimate of loss should be included in the **Liquidated Damages** Attachment to the conditions of contract. The date for delivery of an item may be the date for delivery specified in the **Price and Delivery Schedule** Attachment to the conditions of contract or where the Commonwealth allows the Contractor a grace period, a date later than the date for delivery specified in the Price and Delivery Schedule. Where the Contract allows for a grace period in relation to the delivery of particular Supplies and the Contractor fails to deliver those Supplies within that grace period, the Commonwealth will be entitled to claim liquidated damages from the date for delivery specified in **Price and Delivery Schedule** Attachment to the conditions of contract. Liquidated damages are applied from the date detailed in **Price and Delivery Schedule** Attachment to the conditions of contract rather than the date in the **Liquidated Damages** Attachment to the conditions of contract to ensure that the Commonwealth is fully compensated for the loss it suffers as a result of the delay in the delivery of the Supplies.

If no genuine pre-estimate of loss can be made in relation to the delivery of particular Supplies, those Supplies should not be included in the **Liquidated Damages** Attachment to the conditions of contract. Where particular Supplies are not included in the **Liquidated Damages** Attachment to the conditions of contract, the Commonwealth will only be able to recover damages for the Contractor's failure to deliver those Supplies if the Commonwealth can show that it has suffered loss as result of the breach of Contract.

### GST IMPLICATIONS

Under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), the Commonwealth will be liable to pay GST to the Australian Taxation Office where it

claims liquidated damages under the Contract. This liability arises because this clause makes liquidated damages the Commonwealth's sole remedy for loss or damage resulting from delay. By agreeing to restrict its remedies to liquidated damages, the Commonwealth is effectively waiving its right to claim damages at common law. As the waiver of a right constitutes a 'taxable supply' under the GST Act, the Commonwealth is therefore liable to pay GST to the Australian Taxation Office. The amount of GST payable to the Australian Tax Office will be 1/11 of the liquidated damages that are not claimed and should be included in the liquidated damages amounts specified in the **Liquidated Damages** Attachment to the conditions of contract.

Example:

Milestone 21 is included in the **Liquidated Damages** Attachment to the conditions of contract. The associated liquidated damages listed in the **Liquidated Damages** Attachment to the conditions of contract is \$1100 per day (inclusive of GST). The Contractor delays achievement of Milestone 21 by 10 days. The Commonwealth is entitled to claim \$11000 (inclusive of GST).

If the Commonwealth elects to claim the entirety of the liquidated damages either in cash or by deducting the amount of the liquidated damages owed from the next payment under the Contract then 1/11 or \$1000 must be remitted to the Australian Taxation Office as GST.

If the Commonwealth elects to claim 30% of the liquidated damages (i.e. \$3300 in cash or deducted from the next payment under the Contract) and alternative compensation valued at 70% of the liquidated damages (i.e. goods/services valued at \$7700) then:

- a. 1/11 of the liquidated damages or \$300 must be remitted to the Australian Taxation Office as GST; and
- b. 1/11 of the waived liquidated damages or \$700 must be remitted to the Australian Taxation Office as GST.

The Commonwealth must provide the Contractor with a valid tax invoice in accordance with the **Taxes and Duties** clause of the conditions of contract when claiming liquidated damages or alternative compensation. Where the liquidated damages are deducted from the next payment due under the Contract or where alternative forms of compensation are claimed by the Commonwealth, it is important to remember that the Commonwealth will be required to remit the required GST amount to the Australian Taxation Office in Australian dollars.

Where alternative forms of compensation are included in the Contract or another contract with the Contractor, GST will be payable by the Contractor in relation to goods and services that constitute 'taxable supplies' under the GST Act. Where the contract is GST inclusive, the relevant GST amounts should therefore be added to the Contract Price.

Defence staff can obtain further advice on GST issues from the Defence Tax Management Office in the Treasury and Tax Management Branch of Chief Finance Officer Group.

#### **LIABILITY CAP FOR LIQUIDATED DAMAGES**

Drafters should also note that tenderers often seek to cap their liability in relation to liquidated damages by setting a cap on the amount of liquidated damages that are payable under the Contract. It should be noted that although the Commonwealth has a preference for assessing the Contractor's liability on the basis of common law, the **Limitation of Liability** clause of the conditions of contract (when included) proposes to cap the Contractor's liability, including its liability for liquidated damages, under the Contract to an aggregate amount.

The amount of the cap must be included prior to release of the RFT. Issues to be considered when determining an appropriate cap include:

- a. the likelihood of the Contractor failing to meet the required Contract schedule or All Industry Requirements;
- b. the genuine pre-estimate of loss that the Commonwealth will suffer where particular Supplies are delivered late or Industry Requirements are not achieved; and
- c. the impact of the cap on the tendered price.

A tenderer may propose an alternative liability cap in its tender. Careful evaluation of any alternative proposal is required to ascertain whether the concession in the form of the cap on liability reduces the value of the liquidated damages clause to the extent that the Commonwealth would do better to exclude the **Liquidated Damages and Other Compensation** clause and rely on its general contractual rights to sue for breach of the Contract and recover damages.

Drafter's action: Nil

Related clauses: The **Australian Industry Involvement** clause of the draft conditions of contract details the liquidated damages that may be claimed by the Commonwealth where the Contractor fails to achieve the Industry Requirements in the All Plan by System Acceptance.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract.

The **Limitation of Liability** clause of the draft conditions of contract proposes a cap for the liquidated damages under the Contract.

The **Liquidated Damages** Attachment to the draft conditions of contract will contain the agreed amount of liquidated damages recoverable for selected Supplies under the Contract. The **Liquidated Damages** Attachment to the draft conditions of contract will also include the agreed amount of liquidated damages applicable for relevant Supplies and the date for delivery of the relevant Supplies. These amounts should be GST inclusive.

## Taxes and Duties

### Reference:

Volume 1    Clause 6.5

Volume 2    Clause 7.11

Sponsor:        Contracting Policy & Operations and Materiel Finance Division

Status:            Core

Purpose:            To state that all taxes, duties and government charges imposed or levied in Australia or overseas in connection with the Contract are the Contractor's responsibility. This includes responsibility for the payment of the applicable Australian Goods and Services Tax (GST).

Policy:            The Commonwealth is notionally liable to pay GST to its suppliers and collect GST from purchasers of its goods or services in accordance with Australian tax legislation.

*A New Tax System (Goods and Services Tax) Act 1999*

*Defence CEI Part 1 Instruction 3*

*DPPM – Section 3, Chapter 3.7*

Guidance:        Drafters should note that 'taxes, duties and government charges' include customs duty payable where Supplies do not originate in Australia; and any other tax, duty or government charge imposed either in Australia or overseas in connection with the Contract. These taxes, duties and government charges will be payable by the Contractor and must be included in the Contract Price.

### CHARGING GST

In order to charge GST, the Contractor must have an Australian Business Number (A.B.N.) and be registered for GST with the Australian Taxation Office (ATO). Registration for GST is required by entities that satisfy the registration requirements of the GST legislation. As a general rule, entities carrying on an enterprise in Australia with a turnover of \$50,000 (\$100,000 for non-profit organisations) must register for GST. Entities with a turnover of less than \$50,000 may choose to register for GST. Registration for GST entitles that Contractor to charge GST and claim input tax credits on the purchases of goods and services it makes for the purpose of carrying on its business. Amounts of GST collected by the Contractor must be remitted to the ATO and can be offset against any input tax credits which the Contractor is entitled to receive in a given tax period.

Details of entities registered for an A.B.N. and GST can be checked via the Internet at: <http://www.abr.business.gov.au/>

### REQUIREMENT TO ISSUE TAX INVOICES

Central to the operation of the GST legislation is the issuance of tax invoices relating to taxable supplies by suppliers. To obtain payment of a GST amount from the Commonwealth, the Contractor is required to submit a valid tax invoice with each claim for payment. The Contractor is required on the tax invoice to identify the amount of GST claimed as a separate line item.

The GST amount identified on the invoice represents the amount of GST that Defence will be entitled to claim as an input tax credit from the ATO when it lodges its monthly Business Activity Statement (BAS). It should be noted that a valid tax invoice must be held by the Defence before it lodges its BAS in order for it to claim an input tax credit for the amount of GST paid. If Defence does not hold a valid tax invoice at the time it lodges the BAS, it will not be entitled to claim an input tax credit in that or subsequent tax periods, until it does receive a valid tax invoice from the Supplier.

## ADJUSTMENTS

Where the Contractor incorrectly states or otherwise revises the amount of GST paid or payable by the Commonwealth, the Contractor is required to issue the Commonwealth with an adjustment note. The adjustment note must be in accordance with the GST legislation.

## TAXABLE SUPPLIES BY THE COMMONWEALTH

It should be noted that the application of the GST legislation is extremely broad. It will capture transactions under a Contract, which flow either from the Commonwealth to the Contractor or from the Contractor to the Commonwealth. The GST legislation makes the supplier of a 'taxable supply' liable to account for GST. The GST legislation does not provide a supplier with a statutory right to collect GST from the recipient of the supply. For this reason, the Commonwealth has to ensure that if it makes a 'taxable supply' to the Contractor, it has taken GST into account or is able to recover its GST liability as an additional amount under the Contract. The **Taxes and Duties** clause provides the Commonwealth with such a contractual mechanism and it is therefore extremely important that this clause is not deleted or amended unless advice has been obtained from Contracting Policy & Operations Branch. Any amount to be paid by the Contractor under the **Taxes and Duties** clause may be recovered by the Commonwealth as a debt under the **Right of Commonwealth to Recover Money** clause of the conditions of contract.

## DEFENCE'S AUSTRALIAN BUSINESS NUMBER

Each Commonwealth department has been allocated a separate A.B.N. by the ATO. The A.B.N. is used to identify which government department has entered into a particular transaction. It is therefore important to ensure that the Department of Defence's A.B.N. is recorded in the parties clause located on the front page of the Contract. The A.B.N. for the Department of Defence is 68 706 814 312.

Drafter's action: Nil

Related clauses: The **Price and Delivery Schedule** clause of the **Financial** annex of the conditions of tender requests tenderers to tender prices on a GST inclusive basis.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular the **GST Agent** clause of the draft conditions of contract details the contractual requirements that apply where the Contractor appoints a resident agent under the Contract.

## GST Agent

### Reference:

Volume 1    N/A

Volume 2    7.12

### Sponsor:

Contracting Policy & Operations and Materiel Finance Division

### Status:

RFT Core. This clause must be included in all RFTs but depending upon the successful tenderer's response may not be required in the Contract.

### Purpose:

The purpose of this clause is to record the identity of a resident agent appointed by an overseas Contractor to account for GST in accordance with Division 57 of the *A New Tax System (Goods and Services Tax) Act 1999*.

### Policy:

The Commonwealth prefers not to have any agent interposed between itself and the Contractor, however, the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) provides an overseas entity with the right to appoint a resident agent and have that resident agent account for GST on the overseas entity's behalf.

*DPPM – Section 3, Chapter 3.7*

### Guidance:

As noted, it is Commonwealth policy not to have an agent interposed between the Commonwealth and the Contractor. The GST Act however provides an overseas Contractor with the right to appoint a resident agent to account for GST purposes on its behalf. It is for this reason that the GST resident agent clause must be included in all RFTs.

### APPOINTING A RESIDENT AGENT

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The appointment of a resident agent will not relieve the Contractor from registering in its own capacity for an A.B.N. and for GST where it satisfies the registration requirements of the GST Act. The primary reason that the GST Act allows an overseas entity to appoint a resident agent is the view held by the ATO that it is easier to enforce Australian taxation legislation upon a resident of Australia as opposed to a non-resident.

This clause provides a mechanism by which the identity of the resident agent appointed by a Contractor is recorded in the Contract. Drafters will be required to insert the relevant details of the resident agent prior to Contract signature. This clause clearly indicates to the Contractor that the appointment of a resident agent will not relieve it of its liabilities or obligations under the Contract. It places an obligation on the Contractor to ensure that its resident agent provides the Commonwealth with all necessary documentation it requires for a claim for payment to be considered in accordance with the **Taxes and Duties** clause of the conditions of contract, and that the resident agent complies with Division 57 of the GST Act.

### PAYMENTS UNDER THE CONTRACT

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This clause states that the Commonwealth will make all payments otherwise due to the Contractor under the payment clauses of the conditions of contract to the resident agent. This clause also obtains the Contractor's agreement that such payments to the resident agent shall discharge to the extent of the payment, the Commonwealth's liability to the Contractor for those Supplies. This clause places a contractual obligation upon the Contractor to inform the Commonwealth within 14 days if it appoints a resident agent and to provide the relevant details of that resident agent as required by this clause. This clause places an obligation on the Contractor to supply the Commonwealth with a copy of the agreement between it and the resident agent. The agreement provided does not need to contain prices.

### OBTAINING SPECIALIST GST ADVICE

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It should be noted that a GST resident agent cited in the Contract may have certain statutory or common law agency obligations in relation to the Supplies whether or

not the actual supplier (i.e. the Contractor or a Subcontractor) is known to the Commonwealth. Accordingly, persons may be unwilling to act as GST resident agents for Contractors without appropriate safeguards. This would be a matter for the Contractor and the resident agent. As such the note to tenderers in this clause recommends that tenderers make their own inquiries regarding the suitability of proposing a GST resident agent.

Drafter's action: Prior to Contract signature, drafters must insert the name, address, telephone number, fax number and A.C.N. and A.B.N. of the resident agent

Related clauses: The **Taxes and Duties** clause of the draft conditions of contract details the process by which the Contractor can claim GST as an amount additional to the Contract Price.

**INSURANCE AND LIABILITY****Indemnity**Reference:

Volume 1 Clause 7.1

Volume 2 N/A

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To obtain from the Contractor an indemnity in favour of the Commonwealth against loss or damage arising from a default or negligent or unlawful act or omission of the Contractor, its officers, employees, agents or Subcontractors.

Policy: It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk. An express indemnity from the Commonwealth to the Contractor should never be offered in a RFT and an indemnity should only be negotiated in response to a request from a tenderer in circumstances where commercial insurance is either unavailable or inappropriate.

*Defence Safety Manual Volume 1, Part 1, Chapter 8.*

*Defence Safety Management Agency website at*

*Defence CEI Part 4 Instruction 4*

*DPPM – Section 3, Chapter 3.2*

*Financial Management and Accountability Regulations*

Guidance: An indemnity is a promise whereby one party undertakes to meet the financial cost of loss and damage suffered by the indemnified party.

**EXTENT OF THE INDEMNITY**

Under the **Indemnity** clause the Contractor assumes liability for any Commonwealth loss, damage, costs and expenses arising out of a default or an unlawful or negligent act or omission by the Contractor, its officers, employees, agents or Subcontractors, except to the extent that the Commonwealth's loss or damage resulted from an unlawful or negligent act, or omission of the Commonwealth, or a person acting through the Commonwealth.

This indemnity protects the Commonwealth from loss, damage, costs and expenses resulting from claims:

- a. by Contractor's employees in respect of death of, or personal injury to, employees of the Contractor who are undertaking work under the Contract;
- b. by any person in respect of loss or damage to a third party's property or third party personal injury or death;
- c. by a third party against the Commonwealth that the Commonwealth's use of IP rights under the Contract has infringed that third party's IP;

except to the extent that an unlawful or negligent act or omission of the Commonwealth, or a person acting through the Commonwealth contributed to the Commonwealth's loss or damage.

**DEFENCE OCCUPATIONAL HEALTH AND SAFETY REQUIREMENTS**

Where work under the Contract will be carried out in premises owned by the Commonwealth, it is important to ensure that appropriate occupational health and safety procedures are observed. The Commonwealth must ensure that employees of the Contractor are provided with a safe environment in which to work. Further guidance can be obtained by contacting the Defence Safety Management Agency on 1800 019 955.



## INSURANCE COVERAGE

Under common law employers have responsibility for the safety of their employees in the workplace and should therefore be insured or registered with the appropriate statutory authority in order to meet this responsibility.

Prior to Contract signature, consideration should be given to the need for the Contractor to obtain insurance in relation to third party property damage, personal injury and death. Consideration should be given to the financial stability of the Contractor, the capacity of the Contractor to effectively self-insure, the type and amount of any global insurance policies held by the Contractor, the magnitude and likelihood of loss in relation to third party property damage, personal injury and death and the cost of obtaining insurance coverage. In the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate.

Commonwealth officers should note that Defence is now covered under the Comcover scheme for loss arising from certain types of liabilities. Advice on Defence's coverage under the Comcover scheme can be obtained by contacting the Defence Insurance Office.

## REQUEST FOR RECIPROCAL INDEMNITY

Careful consideration should be given to any request from a tenderer for an indemnity for loss resulting from the Commonwealth's negligence and advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth providing an indemnity to the Contractor by an authorised official as provided for in the *Defence CEI Part 4 Instruction 4*.

Careful consideration must be given to the granting of an indemnity as, if the indemnity is invoked the Commonwealth will be committed to spending public money. The indemnity may possibly be invoked at any time during the life of the Contract, which may be a number of years. As the Commonwealth is therefore, in effect, committing public monies that have not yet been appropriated the indemnity will invoke the Operation of Regulation 10 of the *Financial Management and Accountability Regulations*. For guidance on the compliance with Regulation 10 please contact the Contracting Policy & Operations Branch.

Where the Commonwealth does provide an indemnity to the Contractor, a financial limit on the indemnity should be imposed and in accordance with the CEIs, the indemnity must be registered on the Defence Portfolio wide register, administered by the Director Costing and Analysis, Accounting Policy and Practices Branch of the Chief Finance Officer Group.

Drafter's action: Nil

Related clauses: The **Insurance** clause of the draft conditions of contract places an obligation on the Contractor to insure or register with the appropriate statutory authority against liability for death of, or injury to, persons employed by the Contractor.

## Contractor's Employees

Reference:

Volume 1    N/A

Volume 2    Clause 8.1

Sponsor:        Contracting Policy & Operations

Status:            Core

Purpose:            To obtain from the Contractor an indemnity in favour of the Commonwealth in respect of employees of the Contractor who are undertaking work under the Contract.

Policy:            It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk. An express indemnity from the Commonwealth to the Contractor should never be offered in a RFT and an indemnity should only be negotiated in response to a request from a tenderer in circumstances where commercial insurance is either unavailable or inappropriate.

*Defence CEIs Part 4 Instruction 4*

*Defence Safety Management Agency website at <http://dsma.dcb.defence.gov.au>*

*Defence Safety Manual Volume 1, Part 1, Chapter 8.*

*DPPM – Section 3, Chapter 3.2*

*Financial Management and Accountability Regulations*

Guidance:        An indemnity is a promise whereby one party undertakes to meet the financial cost of loss and damage suffered by the indemnified party.

### INDEMNITY FOR CONTRACTOR EMPLOYEES

The requirements of this clause reflect an employer's common law responsibility for employees and should therefore not pose any problem to tenderers. Under the indemnity the Contractor assumes liability for death of, or personal injury to, employees of the Contractor who are undertaking work under the Contract, except to the extent that the death or injury resulted from an unlawful or negligent act or omission of the Commonwealth or a person acting through the Commonwealth.

### DEFENCE OCCUPATIONAL HEALTH AND SAFETY REQUIREMENTS

Where work under the Contract will be carried out in premises owned by the Commonwealth, it is important to ensure that appropriate occupational health and safety procedures are observed. The Commonwealth must ensure that employees of the Contractor are provided with a safe environment in which to work. Further guidance can be obtained by contacting the Defence Safety Management Agency on 1800 019 955.

### REQUEST FOR RECIPROCAL INDEMNITY

Careful consideration should be given to any request from a tenderer for an indemnity for loss resulting from the Commonwealth's negligence and advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth providing an indemnity to the Contractor.

Careful consideration must be given to the granting of an indemnity as, if the indemnity is invoked the Commonwealth will be committed to spending public money. The indemnity may possibly be invoked at any time during the life of the Contract, which may be a number of years. As the Commonwealth is therefore, in effect, committing public monies that have not yet been appropriated the indemnity will invoke the Operation of Regulation 10 of the *Financial Management and Accountability Regulations*. For guidance on the compliance with Regulation 10 please contact the Contracting Policy & Operations Branch.

Where the Commonwealth does provide an indemnity to the Contractor, a financial limit on the indemnity should be imposed and in accordance with the *Defence CEs*, the indemnity must be registered on the Defence Portfolio wide register, administered by the Director Costing and Analysis, Accounting Policy and Practices Branch of the Chief Finance Officer Group.

Commonwealth officers should note that Defence is now covered under the Comcover scheme for loss arising from certain types of liabilities. Advice on Defence's coverage under the Comcover scheme can be obtained by contacting the Defence Insurance Office on 1800 990 900.

Drafter's action: Nil

Related clauses: The **Insurance** clause of the draft conditions of contract places an obligation on the Contractor to insure or register with the appropriate statutory authority against liability for death of, or injury to, persons employed by the Contractor.

## Property Damage and Public Risk

### Reference:

Volume 1 N/A

Volume 2 Clause 8.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To obtain from the Contractor an indemnity in favour of the Commonwealth against loss or damage arising from a default or negligent or unlawful act or omission of the Contractor, its officers, employees, agents or Subcontractors in relation to property damage, personal injury and death, and associated costs and expenses of settling a claim.

Policy: It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk. An express indemnity from the Commonwealth to the Contractor should never be offered in a RFT and an indemnity should only be negotiated in response to a request from a tenderer in circumstances where commercial insurance is either unavailable or inappropriate.

*Defence CEIs Part 8 Instructions 6 and 7*

*DPPM – Section 3, Chapter 3.2*

*Financial Management and Accountability Regulations.*

Guidance: An indemnity is a promise whereby one party undertakes to meet the financial cost of loss and damage suffered by the indemnified party.

### INDEMNITY FOR PROPERTY DAMAGE AND PERSONAL INJURY

Under this clause, the Contractor takes responsibility for the consequences of work performed under the Contract, whether the work is being performed by the Contractor itself or by one of its Subcontractors unless it can show that the Commonwealth or a third party, other than its Subcontractors, was at fault. The Commonwealth is therefore only protected from loss resulting from claims by any person in respect of loss or damage to the person's property or in respect of personal injury or death where the loss results from a default or unlawful or negligent act or omission of the Contractor, or its officers, employees, agents or Subcontractors.

### REQUEST FOR RECIPROCAL INDEMNITY

Careful consideration should be given to any request from a tenderer for an indemnity for loss resulting from the Commonwealth's negligence and advice should be sought from Contracting Policy & Operations Branch prior to discussions with a tenderer, or prior to the Commonwealth providing an indemnity to the Contractor.

Careful consideration must be given to the granting of an indemnity as, if the indemnity is invoked the Commonwealth will be committed to spending public money. The indemnity may possibly be invoked at any time during the life of the Contract, which may be a number of years. As the Commonwealth is therefore, in effect, committing public monies that have not yet been appropriated the indemnity will invoke the Operation of Regulation 10 of the *Financial Management and Accountability Regulations*. For guidance on the compliance with Regulation 10 please contact the Contracting Policy & Operations Branch.

Where the Commonwealth does provide an indemnity to the Contractor, a financial limit on the indemnity should be imposed and in accordance with the *Defence CEIs*, the indemnity must be registered on the Defence Portfolio wide register, administered by the Director Costing and Analysis, Accounting Policy and Practices Branch of the Chief Finance Officer Group.

## INSURANCE COVERAGE

Prior to Contract signature, consideration should be given to the need for the Contractor to obtain insurance in relation to the third party property damage, personal injury and death. Consideration should be given to the financial stability of the Contractor, the capacity of the Contractor to effectively self-insure, the type and amount of any global insurance policies held by the Contractor, the magnitude and likelihood of loss in relation to third party property damage, personal injury and death and the cost of obtaining insurance coverage. In the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate.

Commonwealth officers should note that Defence is now covered under the Comcover scheme for loss arising from certain types of liabilities. Advice on Defence's coverage under the Comcover scheme can be obtained by contacting the Defence Insurance Office on 1800 990 900.

Drafter's action: Nil

Related clauses: The **Insurance** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide details of currently held or proposed insurance policies. The insurance policies required for performance of the Contract will be negotiated with the successful tenderer.

The **Insurance** clause of the draft conditions of contract will specify any insurance policies required to be taken out by the Contractor.

## Care of the Supplies

### Reference:

Volume 1 N/A

Volume 2 Clause 8.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To place a contractual obligation on the Contractor to make good any loss or damage to the Supplies that occurs while risk resides with the Contractor, unless the damage is a direct consequence of an excepted risk.

Policy: It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk.

*DPPM – Section 3, Chapter 3.2*

Guidance: Under this clause, the Contractor must make good any damage to, or loss of, the Supplies where the risk resides with the Contractor and the loss or damage was not caused by an excepted risk. In accordance with the **Ownership and Risk** clause of the conditions of contract, risk of loss or damage to the Supplies will reside with the Contractor until the Supplies are delivered to the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment to the conditions of contract and also where the Contractor retakes possession of the Supplies.

### INCLUSION OF ADDITIONAL 'EXCEPTED RISKS'

Excepted risks are defined in this clause and include negligent acts of the Commonwealth, war, contamination by radioactivity and confiscation by a government. The Commonwealth is accepting the risk of loss or damage to the Supplies in relation to the events listed in this clause. Careful consideration should therefore be given to any proposal to extend the list of excepted risks and advice should be sought from Contracting Policy & Operations Branch prior to any additional events being included.

### INSURANCE COVERAGE

Under this clause, the Contractor will be responsible for the Supplies, regardless of whether it has take out any insurance in respect of the Supplies. Careful consideration should be given to the need for the Contractor to obtain insurance for loss or damage to the Supplies, the type of coverage sought and the dollar amount of the coverage. Issues to be considered include the financial stability of the Contractor, the capacity of the Contractor to effectively self-insure, the type and amount of any global insurance policies held by the Contractor, the magnitude and likelihood of loss in relation to the Supplies and the cost of obtaining insurance coverage. In the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate.

The Department of Defence is currently not covered for damage to Commonwealth military equipment under the Comcover scheme. Advice on changes to Defence's coverage can be obtained by contacting the Defence Insurance Office on 1800 990 900.

Drafter's action: Nil

Related clauses: The **Insurance** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide details of currently held or proposed insurance policies. The insurance policies required for performance of the Contract will be negotiated with the successful tenderer.

The **Ownership and Risk** clause of the draft conditions of contract, states that loss or damage to the Supplies will reside with the Contractor until the Supplies are delivered to the Commonwealth in accordance with the **Price and Delivery Schedule** Attachment to the draft conditions of contract and also where the Contractor retakes possession of the Supplies.

The **Insurance** clause of the draft conditions of contract will specify any insurance policies required to be taken out by the Contractor.

## Intellectual Property Indemnity

### Reference:

Volume 1 N/A

Volume 2 Clause 8.4

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To obtain from the Contractor an indemnity in favour of the Commonwealth against any loss suffered as a result of a claim against the Commonwealth for infringement of IP rights.

Policy: It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk. An express indemnity from the Commonwealth to the Contractor should never be offered in a RFT and an indemnity should only be negotiated in response to a request from a tenderer in circumstances where commercial insurance is either unavailable or inappropriate.

*Defence CEI Part 8 Instruction 8.6 and 8.7*

*DPPM – Section 3, Chapter 3.2*

*Financial Management and Accountability Regulations*

Guidance: An indemnity is a promise whereby one party undertakes to meet the financial cost of loss and damage suffered by the indemnified party. Under this clause, the Contractor takes responsibility for the loss suffered by the Commonwealth as a result of claims by a third party against the Commonwealth that the Commonwealth's use of IP rights under the Contract has infringed that third party's IP.

### REQUEST FOR RECIPROCAL INDEMNITY

Careful consideration should be given to any request from a tenderer for a reciprocal indemnity in relation to IP provided by the Commonwealth and advice should be sought from Contracting Policy & Operations Branch prior to either discussions with a tenderer or the Commonwealth providing an indemnity to the Contractor.

Careful consideration must be given to the granting of an indemnity as, if the indemnity is invoked the Commonwealth will be committed to spending public money. The indemnity may possibly be invoked at any time during the life of the Contract, which may be a number of years. As the Commonwealth is therefore, in effect, committing public monies that have not yet been appropriated the indemnity will invoke the Operation of Regulation 10 of the *Financial Management and Accountability Regulations*. For guidance on the compliance with Regulation 10 please contact the Contracting Policy & Operations Branch.

Where the Commonwealth does provide an indemnity to the Contractor a financial limit on the indemnity should be imposed and in accordance with the *Defence CEIs*, the indemnity must be registered on the Defence Portfolio wide register, administered by the Director Costing and Analysis, Accounting Policy and Practices Branch in the Chief Finance Officer Group.

### INSURANCE COVERAGE

Prior to Contract signature, consideration should be given to the need for the Contractor to obtain insurance in relation to the IP indemnity in this clause. In determining the insurance requirements, consideration should be given to the financial stability of the Contractor, the capacity of the Contractor to effectively self-insure, the type and amount of any global insurance policies held by the Contractor, the magnitude and likelihood of loss in relation to third party IP infringement and the cost of obtaining insurance coverage. In the first instance



advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate.

It should be noted that Defence is now covered under the Comcover scheme for loss arising from certain types of liabilities. Advice on Defence's coverage under the Comcover scheme can be obtained by contacting the Defence Insurance Office on 1800 990 900.

Drafter's action: Nil

Related clauses: The **Insurance** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide details of currently held or proposed insurance policies. The insurance policies required for performance of the Contract will be negotiated with the successful tenderer.

The **Intellectual Property** clauses of the draft conditions of contract contains the various Intellectual Property clauses for the Contract.

The **Insurance** clause of the draft conditions of contract will specify any insurance policies required to be taken out by the Contractor.

## Limitation of Liability

### Reference:

Volume 1    N/A

Volume 2    Clause 8.5

Sponsor:        Contracting Policy & Operations

Status:            Optional

Purpose:            To limit the Contractor's liability under the Contract.

Policy:            It is Commonwealth policy that risk should be allocated to and managed by the party in the best position to manage the risk.

In accordance with the *Commonwealth Procurement Guidelines and Best Practice Guidance*, liability should be determined according to common law principles wherever possible. If a limitation of liability is necessary, then it should only be applied on a 'per event' basis. Agencies are required to undertake a risk assessment commensurate with the complexity of the purchase before negotiating a limitation of liability.

*Commonwealth Procurement Guidelines and Best Practice Guidance*

*DPPM – Section 3, Chapter 3.2*

Finance Circular 1997/06: Potential Liabilities and Losses

Guidance:        In line with Commonwealth policy, risk is allocated under the Contract to the party in the best position to manage the risk. Notwithstanding the inclusion of this clause in the draft conditions of contract, the Commonwealth retains its preference for liability to be determined on the basis of Australian common law. Where a tenderer proposes to limit its liability on an alternative basis to Australian common law, the proposal will be considered on its merits in the context of value for money considerations.

### PREFERRED ALTERNATIVE LIABILITY REGIME

This clause contains the Commonwealth's preferred liability regime where a tenderer proposes to limit liability. Under this clause, the Contractor's liability for personal injury and death, loss of, or damage to, third party property and the IP indemnity provided by the Contractor under the **Intellectual Property Indemnity** clause of the conditions of contract will be determined on the basis of Australian common law. The Contractor's liability for breach of Contract or for any other common law, equitable or statutory cause of action arising out of the operation of the Contract shall be limited to a nominated amount for each single occurrence or a series of related occurrences arising from a single cause of action. Limitation of the Contractor's liability on a 'per event' basis accords with the *Commonwealth Procurement Guidelines and Best Practice Guidance* and provides more protection to the Commonwealth than a limitation of the Contractor's liability on an aggregate basis, as it ensures that the Commonwealth will have some recourse for every cause of action.

### SELECTION OF THE APPROPRIATE LIABILITY LIMIT

Careful consideration should be given to the liability limit to be included, particularly as discussed below, for the 'other' breaches of contract or statute or negligent acts or omissions. A risk assessment should be undertaken to determine an appropriate amount and to ensure that the other limits are appropriate for the specific project. The *Commonwealth Procurement Guidelines and Best Practice Guidance* requires agencies to protect the Commonwealth's interests through undertaking a risk assessment, preparing a risk management plan as appropriate and seeking legal advice appropriate to the complexity of the purchase. The risk needs to be assessed so the likelihood and consequences of the risk eventuating are fully understood.

Issues to be considered when determining an appropriate cap for the obligations and warranties of the draft conditions of contract include:

- a. the length of the specified warranty and latent defects periods;
- b. the nature of the Supplies warranted and therefore the kind of defects likely to arise and the potential cost of fixing or replacing those Supplies if they are defective or otherwise not fit for purpose;
- c. the extent to which the Supplies will have been progressively tested, validated and verified prior to Acceptance under the Contract;
- d. the nature and type of the Supplies being provided by the Contractor;
- e. the likelihood and consequences of risks associated with the production of the Supplies prior to their delivery to the Commonwealth;
- f. the likelihood of the Contractor failing to meet the required Contract schedule or All Industry Requirements;
- g. the genuine pre-estimate of loss that the Commonwealth will suffer where particular Supplies are not delivered on time or Industry Requirements are not achieved;
- h. the nature and type of GFM, GFF or other Commonwealth property provided to or used by the Contractor in relation to the Contract;
- i. the likelihood and consequences of risks associated with the use of the GFM, GFF or other Commonwealth property;
- j. the likelihood of the Contractor being able to complete the Contract as required;
- k. the likelihood and impact of breaches of significant provisions in the Contract, such as the Defence Security clause and the Commercial-in-Confidence clause;
- l. the likelihood and impact of breaches of relevant statutory provisions such as Occupational Health and Safety statutory requirements;
- m. the likelihood and impact of risks that are specific or peculiar to the procurement in question; and
- n. the impact of the cap on the tendered price.

#### ASSESSING ALTERNATIVE TENDERER PROPOSALS

A tenderer may propose to limit its liability on an aggregate basis or propose a different liability cap. Careful consideration should be given to each proposal to ensure that the Commonwealth is adequately protected and is assuming risk appropriate to the specific contract. A tenderer may also propose to limit its liability in relation to personal injury, third party property damage or under an indemnity. As such limitations are against Defence policy a proposal of this nature should only be accepted in exceptional circumstances following a detailed risk analysis.

#### AMOUNT OF A LIMITATION OF LIABILITY CAP

A tenderer may attempt to link the size of the cap to the profit being made on the project and thus limitations are often put forward as multiples or fractions of the Contract Price. There is no link between the liability or damage which may be suffered and the Contract Price so such considerations are highly artificial. Any such proposal should be the subject of a risk assessment so that the likely magnitude of loss is known.

In line with Commonwealth policy, if in a particular case a small monetary cap is accepted the likelihood of the Commonwealth having to bear some loss may be so great that it is a contingent liability which must be recorded in the accounts in the same way as if the Commonwealth had given an indemnity. The *Finance Circular 1997/06: Potential Liabilities and Losses* then applies.

## RISK ASSESSMENTS

Guidance on the conduct of risk assessments can be obtained from the Risk Management section in the Materiel and Policy Services Branch of the Defence Materiel Organisation.

The basis of a risk assessment is to identify the possible scenarios in a project that might expose the Commonwealth to loss, the likelihood of the scenarios arising and the consequences for the Commonwealth if they do arise (e.g. the amount of the potential Commonwealth loss). Once this assessment has been undertaken, the Commonwealth will then need to decide how to manage the identified risks.

In each case, the Commonwealth must consider what a sufficient liability cap would be in each circumstance so as to evaluate what is being offered by each tenderer. This would then form the basis for a decision as to whether the cap can be justified.

## USAGE OF UNDEFINED LEGAL TERMS

When assessing alternative liability proposals, it is important to understand the effect of clauses and terms being put forward by tenderers as often they are developed by overseas lawyers or parent companies to suit foreign jurisdictions and do not necessarily make sense in the Australian law context. Tenderers may propose to limit or exclude liability for things like 'consequential loss', 'special damages', 'indirect loss' or 'economic loss'. These terms do not have a well defined meaning in Australian law and should not be included in the Contract as the interpretation that will be afforded to these terms by a court should it be required to interpret the limitation of liability clause is uncertain and may not be favourable to the Commonwealth. Instead of using undefined legal terms, a specific and clear statement of the required area of loss for which the Contractor requires its liability to be limited should be included.

For example, in relation to 'economic loss', the kinds of loss that the Contractor may wish to exclude could include: loss of profit, loss of productivity, cost of repair in foreign countries, loss of use, expense in obtaining substitute equipment, cost of maintaining existing equipment, cost of maintaining project office and payments to third parties for firefighting, rescue, environmental clear-up etc. It will be a matter of considering any such exclusion on a case by case basis.

It is therefore much simpler to use the model set out in this clause and have a monetary cap as the sole limitation without other exclusions. However, any exclusion proposed by a tenderer must be the subject of a risk assessment and considered on a case by case basis. For example, a specifically defined loss in an exclusion clause could cut across what the Commonwealth would otherwise be entitled to be awarded as direct loss, and so may already be covered by one or other of the limitations in this clause. If an exclusion is agreed, the clause must be carefully drafted so that it has a clear meaning in law as well as to ensure it is understood by the parties.

## INSURANCE COVERAGE

Once the liability cap is determined, careful consideration should be given to the insurance coverage required for the Contract. In determining the insurance requirements for a Contract, consideration should be given to the financial stability of the Contractor, the capacity of the Contractor to effectively self-insure, the type and amount of any global insurance policies held by the Contractor, the magnitude and likelihood of loss in relation to each specific area of risk and the cost of obtaining insurance coverage. In the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate. Usual practice is to align the Contractor's insurance with the liability cap under the Contract where such insurance is cost effective for the Commonwealth.

Commonwealth officers should note that Defence is now covered under the Comcover scheme for loss arising from certain types of liabilities. Advice on

Defence's coverage under the Comcover scheme can be obtained by contacting the Defence Insurance Office on 1800 990 900.

#### DETERMINATION OF THE AMOUNT TO BE INCLUDED IN THIS CLAUSE

This clause places an obligation on both parties to negotiate in good faith to amend the liability cap specified where a change to the contract is proposed:

- a. that will by itself or cumulatively with previous changes represent an increase in the Contract Price of more than a specified amount; or
- b. that varies the SOW.

In determining an appropriate amount for inclusion drafters should consider the original Contract Price, the price variation mechanisms under the Contract and the change in risk profile that is likely to arise from price variation changes or other changes not affecting the SOW. The specified amount should be expressed as a percentage and should in most cases be between 10% and 20% of the original Contract Price.

#### NEGOTIATION OF REVISED LIABILITY CAPS AND LIQUIDATED DAMAGES

When a change to the Contract is proposed by either party that falls within this clause, in most cases alteration of both the liability cap and liquidated damages amounts in the **Liquidated Damages** Attachment of the draft conditions of contract (when included) will be required. Issues that should be considered by the Commonwealth when determining an appropriate revised liability cap include:

- a. the change in risk profile to the Commonwealth and Contractor;
- b. the impact of any change in risk profile on the liability cap;
- c. the ability of the Contractor to insure against the risk; and
- d. the associated insurance costs to the Commonwealth.

When liquidated damages are used under the Contract, issues that should be considered by the Commonwealth when determining appropriate revised liquidated damages amounts include:

- a. whether the proposed change will affect the dates already included in the **Liquidated Damages** Attachment to the conditions of contract;
- b. whether the current liquidated damages amounts in the **Liquidated Damages** Attachment to the conditions of contract reflect a genuine pre-estimate of the Commonwealth's likely loss in the event of a delay by the Contractor in delivering the Supplies affected by the proposed change;
- c. whether additional/new Supplies should be included in the **Liquidated Damages** Attachment to the conditions of contract as a result of the proposed change; and
- d. what would be a genuine pre-estimate of the Commonwealth's likely loss if those additional/new Supplies were not delivered by the Contractor as scheduled.

It should be noted, however, that where an agreement can not be reached in relation to the revision of the liability cap and/or liquidated damages amounts, the Commonwealth retains the right, under the **Change to Contract** clause of the conditions of contract, to reject the proposed change to the Contract.

**Drafter's action:** Prior to release of the RFT, drafters must insert the amount of the liability cap.

Prior to release of the RFT, drafters should also insert the amount by which the Contract Price must be increased for this clause to operate.

**Related clauses:** The **Liability** clause of the **Commercial** annex to the conditions of tender provides further guidance on Commonwealth and Defence policy in relation to limitation of liability and requests tenderers to specify their proposal for liability under the

Contract, including an explanation of any limitation on liability and a cost benefit analysis of the proposed limitation.

The **Insurance** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide details of currently held or proposed insurance policies. The insurance policies required for performance of the Contract will be negotiated with the successful tenderer.

The **Insurance and Liability** clause of the draft conditions of contract contains all the indemnities provided by the Contractor under the Contract. Any insurance policies required to be taken out by the Contractor will be included in the **Insurance** clause prior to Contract signature.

## Insurance

### Reference:

Volume 1    Clause 7.2

Volume 2    Clause 8.6

Sponsor:        Contracting Policy & Operations

Status:            Core

Purpose:            To detail the insurance policies that must be taken out and maintained by the Contractor during the Contract.

Policy:            *DPPM – Section 3, Chapter 3.2*

Guidance:        This clause details the insurance requirements for the Contract and drafters must ensure that all insurance requirements are detailed in this clause prior to Contract signature.

### WORKERS COMPENSATION INSURANCE

This clause places a contractual obligation on the Contractor to take out and maintain workers compensation insurance or register with the appropriate statutory authority that provides coverage for workers. Under this clause the Contractor must ensure that each of its Subcontractors is similarly insured.

### PUBLIC LIABILITY INSURANCE

This clause also places a contractual obligation on the Contractor to take out and maintain public liability insurance for a specified amount. In determining the amount of public liability cover, consideration should be given to the financial stability of the Contractor, the magnitude and likelihood of loss in relation to each specific area of risk and the cost of obtaining insurance coverage. In the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate.

### OTHER TYPES OF INSURANCE COVERAGE

Details of any additional insurance policies required to be held and maintained by the Contractor should be included in this clause prior to Contract signature. Insurance policies that may be required include professional indemnity insurance, insurance for the Supplies, insurance of items of GFM, GFF (when provided under the Contract) or other Commonwealth property and product liability insurance. In determining the insurance requirements for a Contract, consideration should be given to the financial stability of the Contractor, the capacity of the Contractor to effectively self-insure, the type and amount of any global insurance policies held by the Contractor, the magnitude and likelihood of loss in relation to each specific area of risk and the cost of obtaining insurance coverage. In the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate. Usual practice is to align the Contractor's insurance with the liability cap under the Contract where such insurance is cost effective for the Commonwealth.

### PERIOD OF INSURANCE AND GLOBAL POLICIES

Drafters should ensure that the period of any insurance policy required under this clause in relation to the Supplies or other Commonwealth property does not extend past the point in time where risk of loss or damage passes to the Commonwealth. Where an existing global insurance coverage of the Contractor is accepted for the Contract by the Commonwealth, only a percentage of the cost of the policy should be passed on to the Commonwealth as part of the Contractor's overheads. In no circumstances should the Commonwealth agree to pay for all or a large percentage of the cost of the global insurance coverage.

## INSURANCE POLICY REQUIREMENTS AND SUBROGATION

It should also be noted that the Commonwealth no longer requires that it is a party to any insurance policy obtained by the Contractor for the Contract and therefore no cross liability provision in which the insurer agrees to waive all rights of subrogation against the Commonwealth is required. As the Commonwealth is not a party to the insurance policy, it will be able to act on its own behalf in any litigation in relation to a claim covered by the insurance policy. Where the Commonwealth is concerned about the financial viability of the Contractor and wishes to be a secured creditor then consideration should be given to whether being a party to an insurance policy provides the Commonwealth with added protection. Where consideration is being given to including the Commonwealth as a party to an insurance policy, in the first instance advice should be sought from Contracting Policy & Operations Branch who may in turn arrange for expert insurance advice where appropriate.

Defence is now covered under the Comcover scheme for loss arising from certain types of liabilities. Advice on Defence's coverage under the Comcover scheme can be obtained by contacting the Defence Insurance Office on 1800 990 900.

Drafter's action: Prior to release of the RFT drafters should include the additional insurance policies required to be held and maintained by the Contractor.

### Related clauses:

Volume 1 The **Insurance and Liability** clause of the draft conditions of contract contains the indemnity provided by the Contractor under the Contract.

Volume 2 The **Insurance** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide details of currently held or proposed insurance policies. The insurance policies required for performance of the Contract will be negotiated with the successful tenderer.

The **Insurance and Liability** clause of the draft conditions of contract contains all the indemnities provided by the Contractor under the Contract and any limitation placed on the Contractor's liability under the Contract.





**WARRANTIES AND SUPPORT OF THE SUPPLIES****Fitness for Purpose**Reference:Volume 1 Clause 8.1Volume 2 Clause 9.1Sponsor: Contracting Policy & OperationsStatus: CorePurpose: To place an obligation on the Contractor to ensure that Supplies provided under the Contract are fit for the purposes detailed in the Contract.Policy: *DPPM – Section 2, Chapter 2.1*Guidance:Volume 1 This clause places an obligation on the Contractor to provide Supplies under the Contract that are fit for the purposes detailed in the Contract**INCLUSION OF PURPOSES IN THE CONTRACT**

This clause offers protection to the Commonwealth by introducing a test of reasonableness that will be applied in order to determine the purposes for which the Commonwealth may use the Supplies. While tenderers may prefer that the Commonwealth explicitly state in the Contract the purposes for which the Commonwealth intends to use the Supplies, this may not always be necessary. In many circumstances the purposes for which the Commonwealth intends to use the Supplies may be easily and clearly established by examining the nature of the Supplies. For example, where the Commonwealth is acquiring waterproof fabric, it would be reasonably expected that the waterproof fabric would be used in wet weather conditions and therefore the waterproof fabric should be fit for use in wet weather conditions.

Where the Commonwealth intends to use the Supplies for a purpose that may not be reasonably established by examining the nature of the Supplies, the Commonwealth should detail the purpose or purposes for which the Supplies will be used in the Contract. The most appropriate place to include the purposes for which the Supplies will be used is in the SOW. Drafters must ensure that the purposes for which the Supplies will be used are clearly stated in sufficient detail so that there is no ambiguity or uncertainty.

**REMEDIES OF THE COMMONWEALTH**

Under this clause, the Contractor is under an obligation to ensure and warrants that the Supplies will be fit for the purposes detailed in the Contract. As such the Commonwealth will be entitled to claim damages for breach of the warranty where the Supplies are not fit for the purposes for which Supplies of that kind would be reasonably expected to be applied by the Commonwealth including any purposes described in the Contract. In addition to damages, the Commonwealth may be entitled to terminate the Contract for default under the **Contractor Default** clause of the conditions of contract, or at common law where it can be established that the Contractor's failure to deliver Supplies that are fit for purpose was an essential condition of the Contract or the breach of the warranty was a fundamental breach of the Contract. Advice should be sought from Contracting Policy & Operations Branch prior to any action being taken to litigate for damages or terminate the Contract for default.

Volume 2 This clause places an obligation on the Contractor to provide Supplies under the Contract that are fit for the purposes detailed in the Contract.

## INCLUSION OF PURPOSES IN THE CONTRACT

To ensure that the Commonwealth receives the full protection offered by this clause it is essential that the purpose or purposes for which the Supplies will be used by the Commonwealth are detailed in the Contract. The most appropriate place to include the purposes for which the Supplies will be used is in the SOW. Where the project has an Operational Concept Document (OCD), the OCD should be included as an Annex to the SOW. Where an OCD has not been developed, drafters must ensure that the purposes for which the Supplies will be used are clearly stated in sufficient detail so that there is no ambiguity or uncertainty.

A clear statement of agreement between the parties as to the purposes for which the Supplies will be used is necessary to ensure that the Commonwealth can rely on this clause to seek remedies against the Contractor where the Supplies can not be used for the stated purposes.

## REMEDIES OF THE COMMONWEALTH

Under this clause the Contractor is under an obligation to ensure and warrants that the Supplies will be fit for the purposes detailed in the Contract. As such the Commonwealth will be entitled to claim damages for breach of the warranty where the Supplies are not fit for the purposes described in the Contract. In addition to damages, the Commonwealth may be entitled to terminate the Contract for default under the **Contractor Default** clause of the conditions of contract or at common law where it can be established that the Contractor's failure to deliver Supplies that are fit for purpose was an essential condition of the Contract or the breach of the warranty was a fundamental breach of the Contract. Advice should be sought from Contracting Policy & Operations Branch prior to any action being taken to litigate for damages or terminate the Contract for default.

Drafter's action: Nil

### Related clauses:

#### Volume 1

The **Warranties** clause of the draft conditions of contract contains all the warranties provided by the Contractor under the Contract.

Where the Commonwealth intends to use the Supplies for a purpose that may not be reasonably established by examining the nature of the Supplies, a clear statement of the purpose or purposes for which the Supplies will be used by the Commonwealth will be included in the draft SOW. Following negotiation and refinement of the draft SOW, the agreed purposes will be included in the draft SOW.

#### Volume 2

The **Warranty and Support of the Supplies** clause of the draft conditions of contract contains all the warranties provided by the Contractor under the Contract.

A clear statement of the purpose or purposes for which the Supplies will be used by the Commonwealth will be included in the draft SOW. Following negotiation and refinement of the draft SOW, the agreed purposes will be included in the draft SOW.

## Warranty

### Reference:

Volume 1    Clause 8.2

Volume 2    Clause 9.2

Sponsor:        Contracting Policy & Operations

Status:            Core

Purpose:            To place an obligation on the Contractor to remedy defects in design, materials or workmanship in the Supplies for a specified period and to establish the process for carrying out remedial work.

Policy:            *DPPM – Section 6, Chapter 6.1*

### Guidance:

Volume 1            Under this clause the Contractor agrees to remedy defects in design, materials and workmanship in the Supplies notified to it by the Commonwealth Representative within the specified warranty period by repair, replacement or modification.

### SELECTION OF THE WARRANTY PERIOD

Careful consideration should be given to the warranty period that will apply for the Contract. The warranty period will commence upon Acceptance of the Supplies. In determining an appropriate warranty period consideration should be given to the type of Supplies being procured, the standard commercial warranty period, the cost of the proposed warranty and the repair and maintenance requirements in any through life support contract.

### DEFECTS ARISING FROM COMMONWEALTH NEGLIGENCE

The warranty in this clause does not extend to defects in the Supplies that arise from the Commonwealth's negligent or wilful damage of the Supplies. Whether the defect in the Supplies arises from the Contractor's defective design, materials or workmanship or a wilful or negligent act of the Commonwealth will depend upon the relevant facts. In most cases it will be clear where responsibility for the defect in the Supplies lies, however, Commonwealth officers should ensure that the Supplies are used in accordance with any limitations placed on the Supplies and for the purpose or purposes detailed in the Contract.

### RECTIFYING DEFECTS IN SUPPLIES

Where the Contractor rectifies a defect in the Supplies under the warranty in this clause the cost of performing the remedial work, including packing and freight, will be borne by the Contractor unless otherwise agreed by the Commonwealth Representative. Where the Commonwealth Representative is concerned that the rectified Supplies do not comply with the requirements of the Contract, the Commonwealth Representative may require the Contractor to carry out tests as provided for under the Contract to determine the compliance of the Supplies with the Contract. Consideration should be given to whether the additional testing of the rectified Supplies is necessary prior to the Commonwealth Representative requiring the Contractor to test the Supplies. It is important to note that that Commonwealth will bear the cost of the testing where the Supplies are found to comply with the requirements of the Contract. The Contractor will only be responsibly for the cost of the testing where the Supplies do not comply with the requirements of the Contract.

Where as a result of the Contractor's efforts to rectify a defect, other Supplies are affected, this warranty will also extend to those incidental effects. There is an obligation of the Contractor in this clause to remedy by repair, replacement or modification any Supplies affected by corrective actions taken by the Contractor.

### FAILURE TO RECTIFY A DEFECT IN THE SUPPLIES

If the Contractor fails to remedy a defect in the Supplies within the nominated period following notification by the Commonwealth Representative of the defect, clause 8.2.4 entitles the Commonwealth to perform or have performed the necessary remedial work at the Contractor's expense. Careful consideration should be given to the time period inserted in this clause, as the Contractor must be provided with sufficient time to remedy defects notified to it by the Commonwealth Representative. Issues to be considered include the complexity of the Supplies, the operational importance of the Supplies and the time required for the Contractor to access and assess the Supplies prior to commencing the remedial work. This clause also makes it clear that such remedial work does not affect the Contractor's warranties and other obligations under this clause (e.g. to remedy other defects during the Warranty Period).

### ADDITIONAL RIGHTS OF THE COMMONWEALTH

Under this clause it is made clear that the rights and remedies provided for do not limit the rights and remedies available to the Commonwealth at common law or under statute. Tenderers may propose to remove this clause or exclude or limit the rights and remedies available to the Commonwealth where the Supplies are defective. Careful consideration should be given to any proposal from a tenderer of this nature and advice should be sought from Contracting Policy & Operations Branch prior to any changes being agreed. The Commonwealth will retain limited protection under statute in relation to defects in the Supplies, however, in most cases statutory rights and remedies will be unsuitable to the complex procurement environment.

#### Volume 2

Under this clause the Contractor agrees to remedy defects in design, materials and workmanship in the Supplies notified to it by the Commonwealth Representative within the specified warranty period by repair, replacement or modification.

### SELECTION OF THE WARRANTY PERIOD

Careful consideration should be given to the warranty period that will apply for the Contract. The warranty period will commence upon Acceptance of the Supplies. In determining an appropriate warranty period consideration should be given to the type of Supplies being procured, the standard commercial warranty period, the cost of the proposed warranty and the repair and maintenance requirements in any through life support contract.

### DEFECTS ARISING FROM COMMONWEALTH NEGLIGENCE

The warranty in this clause does not extend to defects in the Supplies that arise from the Commonwealth's negligent or wilful damage of the Supplies. Whether the defect in the Supplies arises from the Contractor's defective design, materials or workmanship or a wilful or negligent act of the Commonwealth will depend upon the relevant facts. In most cases it will be clear where responsibility for the defect in the Supplies lies, however, Commonwealth officers should ensure that the Supplies are used in accordance with any limitations placed on the Supplies and for the purpose or purposes detailed in the Contract.

### RECTIFYING DEFECTS IN SUPPLIES

Where the Contractor rectifies a defect in the Supplies under the warranty in this clause the cost of performing the remedial work, including packing and freight will be borne by the Contractor unless otherwise agreed by the Commonwealth Representative. Where the Commonwealth Representative is concerned that the rectified Supplies do not comply with the requirements of the Contract, the Commonwealth Representative may require the Contractor to carry out tests to determine the compliance of the Supplies with the Contract. Consideration should be given to whether testing of rectified Supplies is necessary prior to the Commonwealth Representative requiring the Contractor to test the Supplies. It is important to note that the Commonwealth will bear the cost of the testing where the Supplies are found to comply with the requirements of the Contract. The Contractor

will only be responsible for the cost of the testing where the Supplies do not comply with the requirements of the Contract.

#### FAILURE TO RECTIFY A DEFECT IN THE SUPPLIES

If the Contractor fails to remedy a defect in the Supplies within the nominated period following notification by the Commonwealth Representative of the defect, clause 9.2.5 entitles the Commonwealth to perform or have performed the necessary remedial work at the Contractor's expense. Careful consideration should be given to the time period inserted in this clause, as the Contractor must be provided with sufficient time to remedy defects notified to it by the Commonwealth Representative. Issues to be considered include the complexity of the Supplies, the operational importance of the Supplies and the time required for the Contractor to access and assess the Supplies prior to commencing the remedial work. This clause also makes it clear that such remedial work does not affect the Contractor's warranties and other obligations under the **Warranties and Support of the Supplies** clause (e.g. to remedy other defects during the Warranty Period).

#### EXTENSION OF THE WARRANTY PERIOD FOR RECTIFIED SUPPLIES

Where Supplies are remedied in accordance with this clause, the Contractor is required to remedy any further defects in the remedied Supplies notified to the Contractor before the expiry of the warranty period or during a period of half the original warranty period commencing on the date of return of the remedied Supplies to the Commonwealth.

##### Example:

The Contractor warrants the Supplies for 3 years following Acceptance of the Supplies. The Supplies are Accepted by the Commonwealth on 1 November 2001. A defect is notified to the Contractor on 30 March 2002 and the remedied Supplies are returned to the Commonwealth on 1 July 2002. The original warranty period ends on the 31 October 2004. The remedied Supplies will therefore be warranted by the Contractor under the **Warranty** clause until 31 October 2004.

A second defect is notified to the Contractor on 20 March 2003 and the remedied Supplies are returned to the Commonwealth on 1 June 2003. The original warranty period ends on the 31 October 2004. Half the original warranty period is 18 months. The extended warranty period of the remedied Supplies will therefore end on 30 November 2004.

A third defect in the Supplies is notified to the Contractor on 20 October 2004 and the remedied Supplies are returned to the Commonwealth on 1 January 2005. The extended warranty period ended on 30 November 2004. Half the original warranty period is 18 months. The warranty on the remedied Supplies will therefore be extended again until 30 June 2006.

#### ADDITIONAL RIGHTS OF THE COMMONWEALTH

Under this clause it is made clear that the rights and remedies provided for do not limit the rights and remedies available to the Commonwealth at common law or under statute. Tenderers may propose to remove this clause or exclude or limit the rights and remedies available to the Commonwealth where the Supplies are defective. Careful consideration should be given to any proposal from a tenderer of this nature and advice should be sought from Contracting Policy & Operations Branch prior to any changes being agreed. The Commonwealth will retain limited protection under statute in relation to defects in the Supplies, however, in most cases statutory rights and remedies will be unsuitable to the complex procurement environment.

#### RECTIFICATION OF DEFECTS IN GFM

When GFM will be provided to the Contractor under the Contract, the optional clause makes it clear that the Contractor's obligations under this clause to remedy

defects in Supplies do not extend to remedying defects in GFM incorporated into the Supplies. The parties' responsibilities for remedying defects in GFM are dealt with under the **Liability for GFM** clause of the conditions of contract.

Drafter's action:

Volume 1 Prior to release of the RFT, drafters must include the warranty period in this clause, and the period in which the Contractor must remedy defects notified to it in accordance with this clause.

Volume 2 Prior to release of the RFT, drafters must include the warranty period in this clause, the warranty period that will apply to remedied Supplies and the period in which the Contractor must remedy defects notified to it in accordance with this clause.

Related clauses:

Volume 1 The **Warranty** clause of the **Commercial Information to be Provided by Tenderers** annex to the conditions of tender requests tenderers to provide details of the warranty coverage being proposed for the Supplies and to specify the amount being tendered to cover the warranty.

Volume 2 The **Warranty and Latent Defects** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide details of the warranty and Latent Defects coverage being proposed for the Supplies and to specify the amount tendered to cover the warranty and Latent Defects warranty.

The **Warranty and Support of Supplies** clause of the draft conditions of contract contains all the warranties provided by the Contractor under the Contract.

The **Government Furnished Material** clause of the draft conditions of contract imposes a contractual obligation on the Contractor in relation to the care of GFM in its care, custody or control.

### Notification of Defects

Reference:

Volume 1 N/A

Volume 2 Clause 9.3

Sponsor: Contracting Policy & Operations

Status: Optional

Purpose: To place an obligation on the Contractor to notify the Commonwealth Representative for a specified time of any defect in the Supplies of which it becomes aware that will affect or is likely to affect the operation of the Supplies or the safety of personnel.

Policy: Nil

Guidance: This clause places an obligation on the Contractor to notify the Commonwealth Representative of defects affecting both the operation of the Supplies and the safety of personnel. This requirement is consistent with the Commonwealth's obligations to its employees under occupational health and safety legislation.

#### NOTIFICATION OF DEFECTS

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Under this clause, where the Contractor becomes aware of any defect it must notify the Commonwealth immediately and provide a written statement of the nature of the defect, its cause and effect and proposed remedial action within a further 28 days. Where the period for notification of defects extends past the 'life' of the Commonwealth Representative, then the Contractor must be advised of the new contact point for correspondence.

#### PERIOD OF NOTIFICATION REQUIREMENT

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Drafters must include the period for which the Contractor must notify the Commonwealth Representative of defects in this clause. The notification period commences on the Effective Date rather than at delivery or Acceptance of the Supplies to enable defects experienced by other users operating the Supplies to be taken into account at the earliest opportunity, possibly even resulting in a Contract amendment to require redesign of the Supplies. A common period included in Defence contracts is the number of years of the expected life of type of the Supplies. However, in determining the period consideration should be given to the likely cost associated with the requirement and the terms and conditions of any through life support contract.

#### RECTIFICATION OF DEFECTS UNDER THE WARRANTY AND LATENT DEFECTS CLAUSES

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Defects notified to the Commonwealth Representative in accordance with this clause may qualify for rectification under the **Warranty** clause or the **Latent Defects** clause of the conditions of contract. Defects in design, materials or workmanship in the Supplies that are discovered during the warranty period must be remedied by the Contractor under the **Warranty** clause. Latent Defects in the Supplies that are discovered during the latent defect period must be diagnosed and corrected by the Contractor under the **Latent Defects** clause.

Drafter's action: Drafters must include the notification period in this clause.

Related clauses: The **Warranties and Support of the Supplies** clause of the draft conditions of contract contains all the warranties provided by the Contractor under the Contract. In particular the **Warranty** clause places an obligation on the Contractor to remedy defects in design, materials or workmanship in the Supplies for a specified period and the **Latent Defects** clause of the draft conditions of contract places an obligation on the Contractor to remedy Latent Defects in the Supplies for a specified period.



## Latent Defects

### Reference:

Volume 1 N/A

Volume 2 Clause 9.4

### Sponsor:

Contracting Policy & Operations

### Status:

Optional. To be included where the Commonwealth requires the Contractor to remedy Latent Defects.

### Purpose:

To place an obligation on the Contractor to diagnose and correct Latent Defects in the Supplies for a specified period and to establish the process for carrying out remedial work.

### Policy:

Nil

### Guidance:

Under this clause, the Contractor agrees that where the Commonwealth Representative notifies it of a Latent Defect within the specified period it will, as required at its own expense, redesign the Supplies, correct the Supplies by repair, replacement or modification and make any correction, modification or replacement of any other Supplies, affected by the Latent Defect.

### DEFINITION OF A LATENT DEFECT

A Latent Defect is defined in the **Definitions** clause of the conditions of contract as a deficiency in design, materials or workmanship not discoverable by reasonable care or inspection prior to Acceptance which causes a software failure or a failure of Supplies other than software which falls outside the incidence of random failures to be expected from those Supplies. Latent Defects usually affect all units of an item of the Supplies. Technical advice should be sought where it is suspected that a failure falls within the definition of a Latent Defect.

### INCLUSION OF LATENT DEFECT WARRANTY AND THE WARRANTY PERIOD

It should be noted that the inclusion of this clause will impact upon the cost of the Supplies. In determining whether to include this clause consideration should be given to the type of Supplies being procured, the cost associated with the requirement and the repair and maintenance provisions in any through life support contract. Where it is determined that a Latent Defect warranty is appropriate, consideration should be given to the length of the warranty period required under the Contract.

### FAILURE TO RECTIFY LATENT DEFECT IN THE SUPPLIES

If the Contractor fails to remedy a Latent Defect in the Supplies within the period required by the Commonwealth Representative in its notice to the Contractor, this clause entitles the Commonwealth to perform or have performed the necessary rectification work at the Contractor's expense. In selecting the time period to be included in a notice under this clause the Commonwealth Representative must ensure that the Contractor is provided with sufficient time to rectify the Latent Defect. Consideration should be given to the complexity of the Supplies, the significance and impact of the Latent Defect, the operational importance of the Supplies and the time required for the Contractor to access and assess the Supplies prior to commencing the remedial work. This clause also makes it clear that such remedial work does not affect the Contractor's warranties and other obligations under the **Warranties and Support of the Supplies** clause (e.g. to remedy other defects during the Latent Defect warranty period).

### Drafter's action:

Drafters must include the period for which Latent Defects will be rectified by the Contractor in this clause.

### Related clauses:

The **Warranty and Latent Defects** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide details of the warranty and

Latent Defects coverage being proposed for the Supplies and to specify the amount tendered to cover the warranty and Latent Defects warranty.

The **Warranties and Support of the Supplies** clause of the draft conditions of contract contains all the warranties provided by the Contractor under the Contract. In particular the **Warranty** clause of the draft conditions of contract places an obligation on the Contractor to remedy defects in design, materials or workmanship in the Supplies for a specified period.

## Support Period

### Reference:

Volume 1 N/A

Volume 2 Clause 9.5

### Sponsor:

Contracting Policy & Operations

### Status:

Optional. To be included where the Commonwealth requires the Contractor to support the Supplies for a period after delivery but does not intend to negotiate a separate support agreement with the Contractor prior to Contract signature.

### Purpose:

To place an obligation on the Contractor to support the Supplies for a specified period following delivery.

### Policy:

Nil

### Guidance:

Where ever possible a comprehensive through life support contract should be signed at the same time as the Contract for the Supplies as the Commonwealth will be in a better position to negotiate a support agreement that represents the best value for money. If the Commonwealth waits until the Contract for the Supplies is signed, the Commonwealth's bargaining power will be reduced unless support for the Supplies can be obtained from a number of suppliers. Where a through life support contract is signed along with the Contract for the Supplies, the Support Period clause should not be included.

### SUPPORT PERIOD FOR THE SUPPLIES

Under this clause the Contractor undertakes to support the Supplies for a specified period by providing facilities for the supply of sufficient quantities of spare parts and support equipment to maintain the Supplies in effective operation. The Support period also refers to the maintenance of Technical Data delivered under the Contract. Careful consideration should be given to the duration of the support period. A common support period requested by Defence is the number of years of the expected life of type of the Supplies. However, consideration should be given to the cost of requiring the Contractor to support the Supplies and the alternative sources of support available to the Commonwealth.

The Contractor must include a similar requirement in all Approved Subcontracts to ensure that the rights provided to the Commonwealth by this clause are available from Approved Subcontractors.

### INABILITY TO PROVIDE THE REQUIRED SUPPORT

This clause places an obligation on the Contractor to notify the Commonwealth within a specified time period where the Contractor's ability to provide the support requirements may be adversely affected. The Contractor must also provide the Commonwealth with the opportunity to place final orders where a final production run will occur.

It should be noted, however, that this clause does not bind the Commonwealth to order any quantities of spare parts or support equipment from the Contractor.

### Drafter's action:

Drafters must include the period for which the Contractor will support the Supplies in this clause and also the period in which the Contractor must notify the Commonwealth that its ability to provide the support may be adversely affected.

### Related clauses:

The **Warranties and Support of the Supplies** clause of the draft conditions of contract contains all the warranties provided by the Contractor under the Contract.

**CONTRACT MANAGEMENT****Change to the Contract**Reference:Volume 1 Clause 9.1Volume 2 Clause 10.1Sponsor: Contracting Policy & OperationsStatus: CorePurpose: To notify the Contractor that the Contract may only be varied in accordance with this clause and to detail the process relating to development and approval of Contract change proposals.Policy: *DPPM - Section 6, Chapter 6.1*Guidance:Volume 1 All changes to the Contract must be proposed and approved in accordance with this clause.VARIATION OF THE CONTRACT

This clause notifies the Contractor that the Contract may only be varied in writing signed by both parties. However, it should be noted that this clause does not completely protect the Commonwealth as the legal doctrines of estoppel or misrepresentation may apply in some circumstances.

COST INVESTIGATION OF CONTRACT CHANGE PROPOSALS

It is also important to note that the **Commonwealth Access** clause of the conditions of contract provides the Commonwealth Representative or any person authorised by the Commonwealth Representative with the right to access the Contractor's premises, records and accounts to investigate the reasonableness of the proposed prices and costs in the Contract change proposal.

Volume 2 All changes to the Contract must be proposed and approved in accordance with this clause.VARIATION OF THE CONTRACT

This clause notifies the Contractor that the Contract may only be varied in accordance with this clause and that the Contractor should not rely on any other action which purports to amend the Contract. However, it should be noted that this clause does not completely protect the Commonwealth as the legal doctrines of estoppel or misrepresentation may apply in some circumstances.

APPROVAL OF CONTRACT CHANGE PROPOSAL

This clause provides the process for submitting and approving Contract change proposals. Under this clause both the Commonwealth Representative and the Contractor may propose a change to the Contract. All Contract change proposals must be in the form of the **Contract Change Proposal** Attachment to the conditions of contract and, where the change is to the SOW is being proposed, must be accompanied by an engineering change proposal in the format set out at the **Engineering Change Proposal** Attachment to the conditions of contract.

This clause states that the Contractor will meet the cost of preparation of Contract change proposals required under the Option **for Further Quantities** clause, the **Australian Industry Involvement** clause, the **Postponement** clause, the **Liquidated Damages** clause and the **Subcontracts** clauses of the conditions of contract, as well as those Contract change proposals which are required to address any non-performance by the Contractor. It should be noted that as some of the clauses set out above are optional, this clause should be amended where some or all of these optional clauses are not included in the contract.

Other than the Contract change proposals mentioned in this clause, the Commonwealth will meet the cost of preparation of Contract change proposals that are approved by the Commonwealth Representative whether they are proposed by the Commonwealth or proposed by the Contractor and approved by the Commonwealth Representative and all Contract change proposals required by the Commonwealth even when they are not subsequently approved.

#### COST INVESTIGATION OF CONTRACT CHANGE PROPOSALS

It is also important to note that the **Commonwealth Access** clause of the conditions of contract provides the Commonwealth Representative or any person authorised by the Commonwealth Representative with the right to access the Contractor's premises, records and accounts to investigate the reasonableness of the proposed prices and costs in the Contract change proposal.

Drafter's action: Nil

#### Related clauses:

Volume 1 The **Commonwealth Access** clause of the draft conditions of contract details the access rights of the Commonwealth when investigating the reasonableness of the proposed prices and costs in the Contract change proposal.

Volume 2 The **Commonwealth Access** clause of the draft conditions of contract details the access rights of the Commonwealth when investigating the reasonableness of the proposed prices and costs in the Contract change proposal.

The **Contract Change Proposal** Attachment to the draft conditions of contract will include the negotiated Contract change proposal proforma.

### Condition as to Disclosure by the Contractor

Reference:

Volume 1 N/A

Volume 2 Clause 10.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To place a contractual obligation on the Contractor to notify the Commonwealth of any event actual or threatened that may affect the Contractor's ability to perform the Contract, including conflicts of interest, and to set out the process for dealing with such events.

Policy: *DPPM – Section 3, Chapter 3.13*

Guidance: This clause has been included in the Contract to assist the Commonwealth Representative to manage the Contract by ensuring that it is provided with early notification of conflicts of interest and other problems arising under the Contract.

#### REQUIREMENT TO DISCLOSE

This clause places an obligation on the Contractor to disclose to the Commonwealth in writing any event or occurrence actual or threatened during the performance of the Contract that may materially affect the Contractor's ability to perform the Contract. This clause is designed to ensure that the Commonwealth is notified of any occurrence that may affect the performance of the Contract at the time the Contractor becomes aware of the problem. The Commonwealth will then be aware of any problem prior to the point in time where the Contractor's performance under the Contract is affected and the Contractor is in default. The Commonwealth may therefore be able to assist the Contractor with the potential problem at an early stage so that action can be taken to minimise the impact of the problem on the Contract.

#### CONFLICTS OF INTEREST

Without limiting the Contractor's obligation to disclose such problems, this clause deals specifically with disclosure of conflicts of interest. The clause requires the Contractor to undertake that, as at the date of the Contract, the Contractor is not aware of any conflict of interest that would affect its performance of the Contract, whether by itself, or any of its employees, officers, agents or Subcontractors. In addition, the Contractor must notify the Commonwealth immediately it becomes aware of a conflict or possible conflict so that the Commonwealth also becomes aware of the conflict as early as possible. The Commonwealth may then be able to assist the Contractor to put in place strategies to deal with the conflict.

#### DEALING WITH CONFLICTS OR OTHER PROBLEMS

If a conflict or other problem arises, this clause requires the Contractor to inform the Commonwealth of the steps it proposes to deal with the matter. If the Commonwealth considers that those steps are inadequate, it may direct the Contractor to resolve the conflict or problem in another way.

#### COMMONWEALTH REMEDIES

Where the Contractor fails to disclose matters that may materially affect the performance of the Contract as required by this clause, or contrary to its undertaking, the Contractor did in fact have a conflict of interest at the date of the Contract, the Contractor may be in breach of Contract. Unless the matter is fundamental to the performance of the Contract, the breach is unlikely to give rise to a right to terminate the Contract. The Commonwealth may, however, be entitled to damages for the breach but again the amount of such damages would depend upon the loss suffered by the Commonwealth as a result of the breach which will depend upon the circumstances in each case. The obligation placed on the Contractor by these clauses serves more as a timely reminder to the Contractor

that the Commonwealth expects them to disclose actual or threatened conflicts of interest or other problems at an early stage.

However, this clause does provide the Commonwealth with the power to terminate the Contract in certain circumstances. If the Contractor is unable or unwilling to resolve the conflict or other problem in the manner required by the Commonwealth under that clause, the Commonwealth may terminate the Contract by giving a notice of termination for default as permitted by the **Contractor Default** clause of the conditions of contract.

Drafter's action: Nil

Related clauses: The **Company Profile/Assessment of Tenderer's Ability to Supply** clause of the annexes to the conditions of tender requests tenderers to disclose matters that might adversely impact on the tenderer's performance of any resultant contract.

The **Contractor Default** clause of the draft conditions of contract permits the Commonwealth to terminate the Contract if the Contractor commits a breach for which the Contract provides a notice for termination for default may be given.

## Waiver

### Reference:

Volume 1 Clause 9.2

Volume 2 Clause 10.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To protect the rights of a party to the Contract in the event that a party fails to enforce a provision of the Contract.

Policy: *DPPM – Section 6, Chapter 6.1*

Guidance: This clause notifies both parties that neither party may assume that they no longer need to abide by a provision of the Contract or the Contract as a whole where the other party fails to enforce a provision of the Contract.

### ESTOPPEL

It is important to note however, that this clause does not provide absolute protection for a party who fails to enforce a provision. Where it is reasonable for a party to rely on a representation of another party that they need not comply with a provision of the Contract, the legal doctrine of estoppel may apply, even though the representation does not accord with the Contract change requirements of the **Change to the Contract** clause of the conditions of contract.

#### Example:

The Contractor fails to obtain the export approvals required for the performance of the Contract by the date specified in the **Export Approvals and Imported Supplies** clause of the conditions of contract. Under the **Contractor Default** clause of the conditions of contract, the Commonwealth is entitled to terminate the Contract for default where the failure to obtain the export approvals was within the Contractor's reasonable control. However, the Contractor is otherwise performing the Contract so the Commonwealth does not believe its interests would be best served by terminating. Instead the Commonwealth sets a new time limit for obtaining the export approvals. In these circumstances, the **Waiver** clause would operate to preserve the Commonwealth's right to terminate the Contract should the Contractor fail to obtain the export approvals by the new date.

The Contractor informs the Commonwealth that, due to issues with the US Department of State, it is unable to obtain one of the required export approvals by the date specified in the **Export Approvals and Imported Supplies** clause of the conditions of contract. The Commonwealth Representative writes to the Contractor stating that the parties should look at other ways in which the Contractor can perform the Contract without obtaining the export approval. The Contractor does nothing further as it is waiting on advice from the Commonwealth Representative. Some months later the Contractor's performance declines and the Commonwealth attempts to terminate the Contract under the **Contractor Default** clause of the conditions of contract.

In these circumstances, the actions of the Commonwealth Representative may have gone beyond a mere failure to enforce a provision of the Contract at a particular time and amount to a representation that export approvals are no longer required on which the Contractor has relied to its detriment. Therefore the Contractor may be able to claim that the Commonwealth is estopped from exercising its right to terminate the Contract for default for the Contractor's failure to obtain the export approval. In these circumstances, the Commonwealth would normally seek to reserve its rights under the contract (i.e. to terminate the contract for failure to obtain export approvals) pending any investigation or other action proposed to be taken by the Commonwealth. Even so, the Commonwealth would still need to exercise its reserved rights within a reasonable time.



### PRESERVING THE COMMONWEALTH'S POSITION

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It is important therefore for the Commonwealth Representative to do all things necessary to comply with the provisions of the Contract and where necessary to enforce the Commonwealth's rights under the Contract. Where the Commonwealth Representative has the discretion to enforce a right of the Commonwealth and it decides not to do so, care must be taken to ensure that its future position is not compromised. This must be put in writing to the contractor stating that the Commonwealth reserves its rights under the contract. Advice should be sought from Contracting Policy & Operations Branch prior to a Commonwealth Representative exercising its discretion not to enforce a right of the Commonwealth under the Contract.

Drafter's action: Nil

Related clauses: Nil

### Commercial-in-Confidence Information

Reference:

Volume 1 Clause 9.3

Volume 2 Clause 10.4

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To describe the process for dealing with Commercial-in-Confidence Information and to place a contractual obligation on both parties to protect Commercial-in-Confidence Information provided to them.

Policy: *Department of Finance and Administration Guidance on Confidentiality of Contractor's Commercial Information*

*DPPM - Section 3, Chapter 3.11*

Guidance: Commercial-in-Confidence Information is defined in the Definitions clause of the conditions of contract as information that is by its nature confidential or the receiving party knows or ought to know is confidential.

#### PROTECTION OF COMMERCIAL-IN-CONFIDENCE INFORMATION

This clause places a contractual obligation on both parties to protect Commercial-in-Confidence Information that is received or produced by them except where disclosure of the information is required by law, statutory or portfolio duties, or where disclosure is required so that the Commonwealth can exercise its Intellectual Property rights under the Contract.

The reference to statutory and portfolio duties has been included in this clause to recognise the fact that Defence may be required under statute or as part of its portfolio duties to disclose "Commercial-in-Confidence Information" provided by the Contractor to parliamentary committees or other government agencies such as the Australian National Audit Office.

This clause places a contractual obligation on both parties to obtain the written consent of the other party prior to disclosing Commercial-in-Confidence Information to a third party unless the third party is a legal adviser or the disclosure is allowed by one of the exceptions listed. In granting its consent, the Commonwealth may require the Contractor to arrange for the third party to enter into a confidentiality agreement. A proforma deed of confidentiality can be found at Annex M to Attachment I to the conditions of contract of *ASDEFCON (Strategic Materiel)*.

The obligation on the Commonwealth to keep Commercial-in-Confidence Information confidential will involve taking reasonable measures to safeguard the information from unauthorised access and seeking consent from the other party in accordance with this clause prior to releasing it to a third party. The Commonwealth Representative should implement appropriate procedures to ensure Commercial-in-Confidence Information provided under the Contract is adequately protected.

#### USE OF TERM "COMMERCIAL-IN-CONFIDENCE"

This clause makes it clear to the Contractor that it must not misuse the term "Commercial-in-Confidence" or the Contractor's equivalent term marking information to be supplied to the Commonwealth. This clause and the common law will apply to determine whether information is Commercial-in-Confidence Information and should be protected as such. This clause is included to prevent the Commonwealth from being unable to use documentation provided to it under the Contract because the documentation has been incorrectly marked as "Commercial-in-Confidence". This clause also protects the Commonwealth where the Contractor uses a different term to "Commercial-in-Confidence" such as "Company X-in-Confidence".

Whether information provided or produced under the Contract is "Commercial-in-Confidence" depends upon the nature of the information and whether it is reasonable to assume that the party providing or producing the information would wish it to be kept confidential. Sensitive commercial information should be marked as "Commercial-in-Confidence" but a decision as to whether the information is confidential will be based on the legal nature and character of the information, not how it is marked.

#### PROVISIONS AGREED TO BE COMMERCIAL-IN-CONFIDENCE

Under this clause, the Commonwealth and the Contractor are able to identify the parts, if any, of the Contract and its Attachments that the parties agree will be Commercial-in-Confidence Information as at the Effective Date. These must then be specified in the **Commercial-in-Confidence** Attachment to the Contract.

In determining whether to classify any contractual provision as Commercial in Confidence Information, the Commonwealth should have regard to the Department of Finance and Administration *Guidelines on Confidentiality*. These guidelines propose four tests that **must all** be met before information can be designated as Commercial in Confidence Information. The four tests to be satisfied are:

- a. The information which is proposed as Commercial in Confidence must be specific, not a global or blanket claim;
- b. The information must have the necessary quality of confidentiality, in so far as there is a continuing benefit of non disclosure;
- c. The impact of disclosure would cause a significant detriment to the relevant party; and
- d. The information was provided on the basis of an understanding that it would be kept confidential.

Information that is in the public domain, for example Total Contract Price or generic template clauses, is not Commercial-in-Confidence Information.

Six standard reasons why a clause may be classified as Commercial in Confidence have been developed for use by drafters, once the information has been identified as Commercial in Confidence Information. These are that the material contains:

- a. commercially sensitive information, disclosure of which is not in the relevant party's best interest;
- b. details about commercially sensitive pricing information including profit margins and the underlying price basis;
- c. details about insurance and liability regimes that are commercially sensitive;
- d. details about intellectual property regimes that are commercially sensitive;
- e. details about the capability/services being delivered that are commercially sensitive; and
- f. details about contractual rights and remedies, including warranties, financial guarantees and securities and liquidated damages that are commercially sensitive.

Drafter's action: Nil

Related clauses: The **Intellectual Property** clause of the draft conditions of contract details the Commonwealth's Intellectual Property rights under the Contract.

## Assignment and Novation

### Reference:

Volume 1 Clause 9.4

Volume 2 Clause 10.5

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To prevent the assignment of the Contract in whole or part without the written consent of the other party. To place a contractual obligation on the Contractor where it is proposing to novate the Contract to notify the Commonwealth Representative of the proposed novation within a reasonable period prior to the novation.

Policy: Nil

Guidance: The tender evaluation process aims to ensure that the Commonwealth enters into Contract with a tenderer that is capable of providing the requirement on a value for money basis. Therefore the Commonwealth may be reluctant to assign or novate the Contract to another party.

### LEGAL PRINCIPLES OF ASSIGNMENT AND NOVATION

Assignment means the transfer by a party to a contract of their contractual rights to another person. It should be noted that a party cannot assign its obligations under a contract. Obligations must be 'novated'. Accordingly, a deed of novation will be required if a party wants to transfer all its rights and obligations under a contract to a third party. A novation is effectively the substitution of another entity for a party named in the contract. At law, novation can only occur where both parties to the contract agree to the novation whereas, unless the contract provides otherwise, a party can assign its rights under the contract to another person without the consent of the other party to the contract. Therefore this clause has been included to prevent the Contractor or the Commonwealth from assigning the Contract, in whole or in part, without first obtaining the written consent of the other party.

#### Examples:

Company A has entered into a contract with the Commonwealth for the supply of tanks. The Contract Price is \$300 million.

Assignment: If this clause is not included Company A can assign its right to payment of the \$300 million to Company B without the prior consent of the Commonwealth. Company A can not, however, assign its obligation to deliver the tanks to the Commonwealth to Company B.

Novation: With the consent of the Commonwealth, Company A can novate the Contract to Company B so that Company B is substituted for Company A under the Contract and Company B assumes all the rights and obligations of Company A.

It is unlikely that the Commonwealth will need to assign its rights under a Contract or novate the Contract to another party. A need may arise where a statutory authority or Commonwealth corporation takes over responsibility for the Contract.

### ASSIGNMENT OF THE CONTRACT

Any request by the Contractor to allow an assignment of the Contract in whole or in part should be considered carefully to assess the impact of the assignment on the Contractor's performance of the Contract and the Commonwealth. The Commonwealth is not obliged to consent to any assignment proposed by the Contractor but any refusal to allow an assignment should not be unreasonable.

It should be noted that in accordance with the **Contractor Default** clause of the conditions of contract, the Commonwealth may terminate the Contract for default

where the Contractor makes an assignment without the Commonwealth Representative's prior written consent.

#### NOVATION OF THE CONTRACT

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This clause also places an obligation on the Contractor to notify the Commonwealth Representative within a reasonable period where the Contractor is seeking to novate the Contract to another party. Careful consideration should be given by the Commonwealth to any request by the Contractor to allow a novation. Issues for consideration include the Contractor's current performance under the Contract, the financial stability of the proposed party to be substituted for the Contractor, the ability of the proposed party to perform the Contract and deliver the Supplies, the impact on Subcontract arrangements, any taxation issues, the impact on securities provided under the Contract and the Commonwealth's previous relationship with the proposed party.

The Commonwealth is not obliged to consent to any proposed novation of the contract, however, where the Contractor is unable to perform the Contract, novation of the Contract to another entity may be preferable to termination for default.

Drafter's action: Nil

Related clauses: The **Contractor Default** clause of the draft conditions of contract entitles the Commonwealth to terminate the Contract for default where the Contractor assigns it rights under the Contract without obtaining the Commonwealth's prior written consent.

## Negation of Employment and Agency

### Reference:

Volume 1 Clause 9.5

Volume 2 Clause 10.6

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To negate the existence of an employment, partnership or agency relationship under the Contract and to place a contractual obligation on the Contractor not to represent otherwise.

Policy: The Commonwealth is entering into a contract for service by a Contractor and it is not appropriate for a relationship of employment, partnership or agency to be implied.

*DPPM Section 1, Chapter 1.4*

Guidance: This clause places a contractual obligation on the Contractor to not represent itself or allow its officers, employees, agents or Subcontractors to represent themselves as being employees, partners or agents of the Commonwealth.

### EMPLOYMENT, PARTNERSHIP OR AGENCY RELATIONSHIP

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This clause negates the existence of an employment, partnership or agency relationship, however, it should be noted that whether a partnership, employment or agency relationship exists will be determined at law and an express statement in the Contract to the contrary may not be sufficient to override the legal nature of the substantive relationship between the parties. An express statement is nonetheless advisable as it indicates that it was not the intention of the parties to form such a relationship. It is also important that additional clauses included in the Contract or statements made by the parties do not create a presumption on the part of a third party that a partnership, employment or agency relationship exists between the Commonwealth and the Contractor or its officers, employees, agents or Subcontractors.

### CREATION OF A LIMITED AGENCY ARRANGEMENT

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In some circumstances it may be necessary to create a limited agency arrangement under the Contract so that the Contractor may act as a representative of the Commonwealth for a specific aspect of the Contract. Where a limited agency arrangement is created, clear limitations must be placed on the authority of the Contractor to act as the Commonwealth's agent. Prior to an agency arrangement being created under the Contract, advice should be sought from Contracting Policy & Operations Branch to ensure that the Commonwealth is adequately protected and the limits of the agency arrangement are clear to both parties.

In no circumstances should an employment or partnership arrangement be entered into by the Commonwealth with a Contractor.

Drafter's action: Nil

Related clauses: Nil

## Commonwealth Access

### Reference:

Volume 1 Clause 9.6

Volume 2 Clause 10.7

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To set out the circumstances in which the Commonwealth Representative may have access to the Contractor's or its Approved Subcontractor's premises, records and accounts and to set out the Contractor requirements that the Commonwealth Representative or a person authorised by the Commonwealth Representative must comply with.

Policy: Nil

### Guidance:

Volume 1 This clause places a contractual obligation on the Contractor to permit the Commonwealth Representative or a person authorised by the Commonwealth Representative to access its premises and access and copy records and accounts in connection with the performance of the work under the Contract.

### SPECIFIC ACCESS REQUIREMENTS

This clause details some specified circumstances in which the Commonwealth Representative may require access to the Contractor's premises, records and accounts but it should be noted that the Commonwealth's rights are not limited by this clause. Circumstances in which the Commonwealth Representative may require access include, performing quality audits and Surveillance activities, and investigating the reasonableness of costs in Contract change proposals.

This clause should not be invoked unreasonably by the Commonwealth Representative to gain access to premises, records or accounts which do not support other rights provided for in the Contract. It should be noted that the words "in connection with performance of work under the Contract" limit the Commonwealth Representative's access rights to premises, accounts and records which are connected to the performance of work under the Contract. Therefore the Commonwealth Representative can not use this clause to gain access to general information about the Contractor or to obtain information about other existing or proposed contracts.

#### Example:

The Contractor proposes a change to the Contract through the **Change to the Contract** clause of the conditions of contract. The Commonwealth Representative is entitled to access Contractor accounts and records to determine whether the prices quoted in the Contract change proposal are reasonable and represent value for money for the Commonwealth.

### COMPLIANCE WITH REASONABLE CONTRACTOR REQUIREMENTS

This clause places an obligation on the Commonwealth to comply with and to require any person authorised by the Commonwealth Representative to comply with any reasonable Contractor safety and security requirements or codes of behaviour.

Volume 2 This clause places a contractual obligation on the Contractor to permit the Commonwealth Representative or a person authorised by the Commonwealth Representative to access its premises and access and copy records and accounts in connection with the performance of the work under the Contract. Under this clause the Contractor must ensure that all Approved Subcontracts provide the

Commonwealth Representative with similar access rights, including the right to copy.

#### SPECIFIC ACCESS REQUIREMENTS

This clause details some specified circumstances in which the Commonwealth Representative may require access to the Contractor's premises, records and accounts but it should be noted that the Commonwealth's rights are not limited by this clause. Circumstances in which the Commonwealth Representative may require access include inspecting and removing GFM, performing quality audits, validating progress against the All Plan, investigating the reasonableness of costs in Contract change proposals and determining steps necessary to register or otherwise protect Intellectual Property. It should be noted that under this clause the Contractor may request a copy of any cost investigation report.

This clause should not be invoked unreasonably by the Commonwealth Representative to gain access to premises, records or accounts which do not support other rights provided for in the Contract. It should be noted that the words "in connection with performance of work under the Contract" limit the Commonwealth Representative's access rights to premises, accounts and records which are connected to the performance of work under the Contract. Therefore the Commonwealth Representative can not use this clause to gain access to general information about the Contractor or to obtain information about other existing or proposed contracts.

#### Examples:

The Contractor proposes a change to the Contract through use of the Contract change proposal process in the **Change to Contract** clause of the conditions of contract. The Commonwealth Representative is entitled to access Contractor accounts and records to determine whether the prices quoted in the Contract change proposal are reasonable and represent value for money for the Commonwealth.

The Contract Price is firm. The Commonwealth Representative should not request access to Contractor accounts and records to determine the appropriateness of the Contract Price or the profit margin of the Contractor.

Government Furnished Material has been provided to the Contractor under the Contract which, with the Commonwealth's consent, has been provided by the Contractor to an Approved Subcontractor for incorporation into the Supplies. The Commonwealth Representative is entitled to access the Approved Subcontractor's premises to inspect the GFM.

The Contractor claims a postponement of the date for delivery of Supplies and the affected Milestone Date under the **Postponement** clause of the conditions of contract. The Commonwealth Representative is entitled to access the Contractor's premises, accounts and records to determine whether the Contractor can absorb the delay elsewhere in the Contract.

#### COMPLIANCE WITH REASONABLE CONTRACTOR REQUIREMENTS

This clause places an obligation on the Commonwealth to comply with and to require any person authorised by the Commonwealth Representative to comply with any reasonable Contractor or Subcontractor safety and security requirements or codes of behaviour.

#### Drafter's action:

##### Volume 1

Nil

##### Volume 2

Prior to release of the RFT, where GFM will be provided under the Contract, drafters must include the relevant Option in this clause.

#### Related clauses:

Nil



### Contractor Access

Reference:

Volume 1 N/A

Volume 2 Clause 10.8

Sponsor: Contracting Policy & Operations

Status: Optional. To be included where the Contractor's personnel may be required to enter Commonwealth places, areas or facilities.

Purpose: To set out the circumstances in which the Contractor's personnel will be allowed to enter Commonwealth places, areas or facilities and the Commonwealth requirements that the Contractor's employees must comply with.

Policy: Nil

Guidance: This clause places a contractual obligation on the Commonwealth to provide the Contractor's employees with access to Commonwealth places, areas or facilities where it is required for the performance of the Contract. Under this clause the Contractor must seek written permission from the Commonwealth at least 8 days prior to entry being required except where the premises are Government Furnished Facilities in which case the Government Furnished Facilities clause of the conditions of contract will apply.

#### RIGHT TO CLAIM A POSTPONEMENT FOR FAILURE TO ALLOW ACCESS

It should be noted that this clause entitles the Commonwealth Representative to withdraw access rights to any Commonwealth places, areas or facilities at any time and for any period. Where the Contractor is delayed in the performance of the Contract due to a failure by the Commonwealth to provide the Contractor's personnel with access to Commonwealth places, areas or facilities, the Contractor may be entitled to a postponement of the date for delivery of Supplies and/or a Milestone Date and postponement costs under the **Postponement** and **Postponement Costs** clauses of the conditions of contract.

#### COMPLIANCE WITH COMMONWEALTH REQUIREMENTS

This clause places an obligation on the Contractor to ensure that its personnel comply with any relevant Commonwealth safety and security requirements, regulations, standing orders, or codes of behaviour for the Commonwealth places, areas or facilities. Under this clause where the Commonwealth Representative notifies the Contractor of any special security or access provisions that apply to particular Commonwealth places, areas or facilities, the Contractor must comply with those provisions.

Drafter's action: Nil

Related clauses: The **Government Furnished Facilities** clause of the draft conditions of contract and the **Government Furnished Materials** Attachment to the draft conditions of contract detail the Contractor's rights to access Government Furnished Facilities.

## Subcontracts

### Reference:

Volume 1 Clause 9.7

Volume 2 Clause 10.9

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To inform the Contractor of the Commonwealth's requirements when Subcontractors are involved in the production of the Supplies and to outline the requirement to use only Approved Subcontractor's for certain aspects of the Contract.

Policy: *Equal Opportunity for Women in the Workplace Act 1999*

### Guidance:

#### Volume 1

This clause prohibits the Contractor from Subcontracting out the entirety of the work to be performed under the Contract. This clause has been included to prevent the Contractor from merely acting as a 'receiver of money' from the Commonwealth on behalf of the various Subcontractors. To ensure that the involvement of the Contractor in the procurement adds value, the Contractor must perform some of the work under the Contract itself.

#### RESPONSIBILITY FOR WORK PERFORMED BY SUBCONTRACTORS

Under this clause, the Contractor retains full responsibility for the work performed under the Contract regardless of whether it Subcontracts out that work. It should be noted that the Commonwealth is not approving the suitability of Subcontractors to perform work under the Contract and this clause makes it clear that the Contractor retains responsibility for the performance of the Contract. This is important as the Commonwealth has a contractual relationship with the Contractor but not with the Subcontractors. In the event of a default in relation to the work, the Commonwealth may claim against the Contractor even where the work was performed by a Subcontractor, and the Contractor must then pursue any remedy it may have against the Subcontractor. This clause ensures that the Contractor cannot defend a claim by the Commonwealth in relation to the Contract by asserting that a Subcontractor was at fault.

#### MANDATING SUBCONTRACTORS

It is important to note that this clause is not suitable in its current form where the Commonwealth is mandating the use of a particular Subcontractor. Mandating Subcontractors should be avoided unless it is absolutely necessary for the performance of the Contract. For guidance on the risks associated with mandating Subcontractors and the circumstances in which the Commonwealth may be required to mandate a Subcontractor, reference should be had to the guidance provided in relation to the **Schedule of Subcontractors** clause of the annexes to the conditions of tender in Volume 2 of *ASDEFCON (Complex Materiel)*.

Where the Commonwealth does need to mandate the use of a particular Subcontractor, advice should be sought from Contracting Policy & Operations Branch on required changes to this clause and associated clauses in the Contract to ensure that the Commonwealth is adequately protected and the Commonwealth's responsibility for the performance of the mandated Subcontractor is clearly detailed.

#### FLOWDOWN OF REQUIREMENTS TO SUBCONTRACTORS

As the Contractor is responsible for the performance of its Subcontractors, it is in the Contractor's interests to ensure that all significant Subcontracts include provisions that mirror the Contract. In certain circumstances, a right under the Contract is considered so important to the Commonwealth that the Commonwealth places a contractual obligation on the Contractor to ensure that the clause is

directly flowed down to all Subcontractors. In Volume 1 of *ASDEFCON (Complex Materiel)* the security requirements under the **Defence Security** clause of the conditions of contract are required to be flowed down for Subcontractors requiring access to classified material.

#### OTHER GENERAL ISSUES ASSOCIATED WITH SUBCONTRACTS

In accordance with Commonwealth policy, this clause prohibits the Contractor from entering into a Subcontract with a Subcontractor who does not comply with the *Equal Opportunity for Women in the Workplace Act 1999*.

#### Volume 2

This clause prohibits the Contractor from Subcontracting out the entirety of the work to be performed under the Contract. This clause has been included to prevent the Contractor from merely acting as a 'receiver of money' from the Commonwealth on behalf of the various Subcontractors. To ensure that the involvement of the Contractor in the procurement adds value, the Contractor must perform some of the work under the Contract itself.

#### WORK TO BE PERFORMED BY APPROVED SUBCONTRACTORS

Approved Subcontractors are listed in the **Schedule of Approved Subcontractors** Attachment to the conditions of contract. This clause prevents the Contractor from Subcontracting work to Subcontractors who are not Approved Subcontractors without first obtaining the Commonwealth Representative's written approval where:

- a. The work under the Subcontract will exceed a specified amount;
- b. the work relates to specific aspects of the Contract; or
- c. the Subcontractor will be bringing or creating IP under the proposed Subcontract necessary to enable the Commonwealth to use and support the Supplies.

When selecting the Subcontract value and specific aspects of the Contract to be included in this clause, drafters should consider the criticality of the Subcontractors, the additional contractual obligations under the Contract that relate to Approved Subcontractors and the administrative burden of having to approve each Approved Subcontractor.

#### PROCESS FOR OBTAINING APPROVAL OF SUBCONTRACTORS

A tenderer may propose a list of Approved Subcontractors in its response to the **Schedule of Subcontractors** clause of the annexes to the conditions of tender. Subcontractors proposed during the tender process that are approved by the Commonwealth will be listed in the **Schedule of Approved Subcontractors** Attachment to the conditions of contract prior to Contract signature. Where the Contractor wishes to Subcontract work to a Subcontractor falling within one of the categories in this clause that is not listed in the **Schedule of Approved Subcontractors** Attachment to the conditions of contract, the Contractor must obtain the Commonwealth Representative's written approval. The written approval must be in the form of a Contract change proposal requesting the inclusion of the Subcontractor as an Approved Subcontractor in the **Schedule of Approved Subcontractors** Attachment to the conditions of contract. The Commonwealth Representative must approve or reject the Contract change proposal in accordance with the **Change to the Contract** clause of the conditions of contract. The Commonwealth Representative's approval should not be unreasonably withheld.

#### RESPONSIBILITY FOR WORK PERFORMED BY SUBCONTRACTORS

Under this clause, the Contractor retains full responsibility for the work performed under the Contract regardless of whether it Subcontracts out that work. It should be noted that the Commonwealth is not approving the suitability of Approved Subcontractors to perform work under the Contract and this clause makes it clear that the Contractor retains responsibility for the performance of the Contract. This

is important, as the Commonwealth has a contractual relationship with the Contractor but not with the Subcontractors. In the event of a default in relation to the work, the Commonwealth may claim against the Contractor even where the work was performed by a Subcontractor, and the Contractor must then pursue any remedy it may have against the Subcontractor. This clause ensures that the Contractor cannot defend a claim by the Commonwealth in relation to the Contract by asserting that a Subcontractor was at fault.

#### MANDATING SUBCONTRACTORS

It is important to note that this clause is not suitable in its current form where the Commonwealth is mandating the use of a particular Subcontractor. Mandating Subcontractors should be avoided unless it is absolutely necessary for the performance of the Contract. For guidance on the risks associated with mandating Subcontractors and the circumstances in which the Commonwealth may be required to mandate a Subcontractor, reference should be had to the guidance provided in relation to the **Schedule of Subcontractors** clause of the annexes to the conditions of tender.

Where the Commonwealth does need to mandate the use of a particular Subcontractor, advice should be sought from Contracting Policy & Operations Branch on required changes to this clause and associated clauses in the Contract to ensure that the Commonwealth is adequately protected and the Commonwealth's responsibility for the performance of the mandated Subcontractor is clearly detailed.

#### FLOWDOWN OF REQUIREMENTS TO SUBCONTRACTORS

As the Contractor is responsible for the performance of its Subcontractors, it is in the Contractor's interests to ensure that all significant Subcontracts include provisions that mirror the Contract. In certain circumstances, a right under the Contract is considered so important to the Commonwealth that the Commonwealth places a contractual obligation on the Contractor to ensure that the clause is directly flowed down to all Subcontractors or Approved Subcontractors. Areas requiring flow down include:

- a. the right of the Commonwealth Representative to access Approved Subcontractor premises, records and accounts relating to work under the Contract;
- b. the security requirements under the **Defence Security** clause of the conditions of contract for Subcontractors requiring access to classified material; and
- c. the right to terminate all Approved Subcontracts for convenience in accordance with the **Termination for Convenience** clause of the conditions of contract.

#### OTHER GENERAL ISSUES ASSOCIATED WITH SUBCONTRACTS

Under this clause the Contractor must notify the Commonwealth if any Subcontract is terminated, repudiated or rescinded and must complete the work itself or organise another Subcontract. This clause entitles the Commonwealth Representative to request a copy of any Subcontract from the Contractor which need not show prices. In accordance with Commonwealth policy, this clause prohibits the Contractor from entering into a Subcontract with a Subcontractor who does not comply with the *Equal Opportunity for Women in the Workplace Act 1999*.

Drafter's action:

Volume 1 Nil

Volume 2 Prior to release of the RFT, drafters must insert in this clause the amount above which the total value of all work with a Subcontractor must exceed before the Subcontractor is required to be included as an Approved Subcontractor. Similarly, drafters must insert the specific types of work a Subcontractor must perform before the Subcontractor is classified as an Approved Subcontractor.

Related clauses:

Volume 1 Nil

Volume 2 The **Schedule of Subcontractors** clause of the **Management** annex to the conditions of tender requests tenderers to provide details of Subcontractors who will be required to be listed as Approved Subcontractors in the **Schedule of Approved Subcontractors** Attachment to the draft conditions of contract.

The **Schedule of Approved Subcontractors** Attachment to the draft conditions of contract will contain the agreed list of Approved Subcontractors.

## Defence Security

### Reference:

Volume 1    Clause 9.8

Volume 2    Clause 10.10

Sponsor:        Defence Security Authority

Status:            Core. The optional clauses must be included where COMSEC materiel is required under the Contract.

Purpose:            To state the security requirements of the Contract.

Policy:            *ACSI 53 – Australian Communications-Electronic Security Instructions 53*  
*Defence Security Manual*  
*DPPM – Section 3, Chapter 3.9*

Guidance:        This clause details the security requirements of the Contract and the security classification of work to be performed under the Contract. It places an obligation on the Contractor to ensure that the requirements of this clause are flowed down to all Subcontractors that require access to security classified information in order to fulfil their duties under the Contract.

### SELECTION OF APPROPRIATE OPTION

Unless drafters know that all tenderers will be either all overseas Contractors or all Australian Contractors, a choice between A, B, C and D for this clause can not be made before the release of the RFT. In Australia, Facility Security Clearances and Personnel Facility Clearances only apply where classified work will be at the CONFIDENTIAL level or higher. Prior to Contract signature drafters should select from the following clause options:

- a.        Option A is used for when the Contract is placed with an Australian Contractor and a Facility Clearance is required.
- b.        Option B is for when the Contract is placed with an overseas Contractor.
- c.        Option C is used when the Contract is placed with an Australian Contractor and a Personnel Facility Clearance is required.
- d.        Option D is for when the Contract only involves RESTRICTED information and the Contractor is not in the Defence Industrial Security Program.

If the Contractor will be required to possess a Facility Security Clearance, drafters should include Options A and B in the RFT and select the option corresponding to the identity of the Contractor prior to Contract signature.

### CLASSIFICATION OF MATERIAL UNDER THE CONTRACT

This clause places an obligation on the Contractor to classify and protect all material in its possession relating to the performance of the Contract according to the **Security Classification Grading Document** Attachment to the conditions of contract. The Contractor must obtain the prior written consent of the originator through the Commonwealth Representative prior to releasing security classified information to a third party and must report to the Commonwealth Representative any known or suspected disclosure or loss of security classified information.

### TERMINATION FOR BREACH OF THE DEFENCE SECURITY CLAUSE

Under this clause the Commonwealth may terminate the Contract for default if there has been a breach or non-observance of the security requirements by the Contractor, or their officers, employees or agents or Subcontractors. The clause provides that the Commonwealth Representative may terminate the Contract without the need to issue a prior notice requiring the default to be remedied. The clause requires an objective test, i.e. that there must have been an actual breach

of the security requirements. So for example, it would not be enough for the Commonwealth Representative simply to have formed an opinion that a breach had occurred, if in fact there had not been a breach. Advice should be sought from Contracting Policy & Operations Branch prior to a notice of termination being issued to terminate the Contract for default.

#### DEFENCE SECURITY REQUIREMENTS FOR SUBCONTRACTORS

This clause details the facility clearance requirements for Subcontractors who will be required to have access to classified information under the Contract. The requirements differ depending upon whether the Subcontractor is an Australian based or an overseas based Subcontractor. This clause places an obligation on the Contractor to ensure that the requirements of this clause are included in all Subcontracts where the Subcontractor will require access to security classified information. If the Contractor fails to ensure that its Subcontractors obtain appropriate facility security clearances, the Contractor will be in breach of Contract and the Commonwealth may terminate the Contract in accordance with this clause without prior issue of a notice requiring the default to be remedied.

Drafter's action: Prior to release of the RFT, drafters must choose an option, where possible, in line with the guidance.

Prior to release of the RFT, drafters must include the classification level of work to be performed under the Contract if either Option A, B or C is selected. A description of the facilities to be covered must also be included if either Option A or B are selected.

Related clauses: The **Facility Clearance Requirement** clause of the **Management** annex to the conditions of tender requests tenderers to provide details of premises proposed for the storage of security classified information and the clearances held by the tenderer and proposed Subcontractors who will require access to security classified information.

The **Security Classification Grading Document** Attachment to the draft condition of contract will, if required, contain the agreed Security Classification Grading Document.

### Contractor's Performance

Reference:

Volume 1 N/A

Volume 2 Clause 10.11

Sponsor: Industry Policy

Status: Optional. This clause should only be included where the contract will be valued at more than \$10 million.

Purpose: To place an obligation on the Contractor and the Commonwealth to discuss performance of the Contract in relation to each relevant Company Scorecard at formal contract review meetings.

Policy: *Company Scorecard Performance Parameters*

*Defence Company ScoreCard Policy Statement July 2001*

*Guidance for Reviewing the Performance of Nominated Reference Sites*

Guidance: One of the major aims of the Company Scorecard System is to promote regular performance dialogue between Defence and its contractors. To further this aim, this clause places an obligation on both parties to discuss the Contractor's performance as part of the regular contract review meeting process. By discussing the Contractor's progress at regular contract review meetings, the risk of any "surprises" occurring when a Contractor is provided with its scorecard will be minimised. Further guidance on the parameters that should be considered when compiling a Company Scorecard and reviewing Contractor Performance is contained in the *Company Scorecard Performance Parameters* document, which can be found in the Policy area of the Industry Resources section of the DMO website at <http://www.defence.gov.au/dmo>.

Drafter's action: Nil

Related clauses: The **Past Performance** clause of the **Management** annex to the conditions of tender requests Tenderers to provide information about their performance and their Approved Subcontractor's performance of recent and current contracts.



## Post Defence Separation Employment

### Reference:

Volume 1 10.5

Volume 2 10.12

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To advise Contractors of the requirement to seek Defence's approval before allowing former Defence personnel to contribute to the performance of a contract.

Policy: *Crimes Act*

*DPPM - Section 3, Chapter 3.13*

*Defence Workplace Relations Manual (DRB 19)*

*DI(G) 25-4 Notification of Post Separation Employment*

Guidance: Defence has policies in place dealing with the acceptance of employment with Defence related industries by former Defence employees.

Where ex-Defence staff are employed by existing or potential Contractors, issues arise regarding 'inside' knowledge. The *Crimes Act* and *The Criminal Code Act* constrain former Commonwealth employees from passing on information that they obtained by virtue of their employment, which at the time of ceasing Commonwealth employment, it was their duty not to disclose.

However, a distinction should be drawn between knowledge that is obtained by the nature and environment of the tasks, and knowledge that relates directly to the trade or profession of the employee. The former knowledge is the legitimate 'property' of the government, and can be protected, the latter is a matter of professional skill which cannot be constrained. Unfortunately, these two classifications of knowledge are not always easy to delineate.

Both civilian and military employees are required by Defence policy to discuss proposed post separation employment with the potential for a conflict of interest with the Department and may, depending upon the outcome of the discussions, be required to lodge a formal request to take up such employment. In deciding whether to grant approval, the Commonwealth Representative, in conjunction with the appropriate *DRB 19* or *DI(G) PERS 25-4* delegate, must consider the factors listed in this clause. Failing to consider these factors could result in Defence being in breach of Contract and liable to the Contractor for damages or Defence being subject to claims from individuals in relation to detriment to their post separation employment prospects. In granting approval, restrictions of up to 24 months may be placed on the use of former Defence employees on specific contracts. Any questions arising in connection with the application of this clause should be referred to the Contracting Policy & Operations Branch Help Desk.

### APPLYING THE CRITERIA

Where an application is made to the Commonwealth Representative, for a former Defence employee to contribute to the preparation or performance of a tender or Contract, this clause requires the Commonwealth Representative to have regard to the criteria in this clause.

The following sections provide some general guidance on the intent and operation of each of the criteria listed. The guidance below should be read in conjunction with the post separation policy in *DRB19* and *DI(G) PERS 25-4*. If there is a perceived conflict between this guidance and the provisions of *DRB19* or *DI(G) PERS 25-4*, the latter should take precedence.

The first criterion in this clause requires Defence to consider the following;

- a. the character and duration of the engagement, services or work performed by the Employee or Service Provider in the period specified in clause X.X.2 (a) or (b).

This clause requires Defence to take into account the kind of activities undertaken by the employee or service provider while involved with Defence. It applies slightly differently depending on whether such a person is excluded from working with the Defence contractor by any of the sub-clauses.

A former employee or service provider is prevented from performing services under the Contract if, in the preceding 24 months, that person was involved in the preparation or management of the Contract, the selection of the contractor or the performance of the project or activity to which the Contract relates.

Under this clause a person is excluded if they were an employee of Defence in the 12 months preceding the request for approval. This clause applies even when the employee was not involved in the preparation or management of the Contract or the selection of the contractor.

If the nature of the work performed by the employee or service provider was related to or otherwise connected with the Contract or selection process, then Defence would be likely to withhold approval. Approval cannot be unreasonably withheld. For example, if an ADF member provided technical specifications but had no direct role in the selection of the Contractor, there is an appreciably lower risk of conflict of interest or probity issues occurring than where the ADF member was directly engaged in the selection process. However, the ADF member's proximity to the Contract would still be sufficient to favour withholding approval. In contrast to this, if an Employee had performed administrative functions or technical work that was not material to the Contract or the selection process, there would be little risk of a conflict of interest or a probity issue. This would favour the employee or service provider being approved to take up the employment opportunity.

The second criterion Defence is required to consider is;

- b. any information provided by the Contractor about the character and duration of the services to be performed by the Employee or Service Provider under this Contract

Defence must take into account the nature of the activities proposed to be performed by the employee or service provider under the Contract. If the employee or service provider is to be involved in activities closely connected with their activities while an employee or service provider, Defence may refuse to approve their involvement in the Contract.

For example, if an employee or service provider was engaged by Defence to design technical specifications for helicopters, and then proposed to work for a contractor in connection with the supply of clothing, there would be no real risk of a conflict of interest or of a probity issue.

The third criterion Defence is required to consider is;

- c. the potential for real or perceived conflicts of interest or probity objections if the Employee or Service Provider performs or contributes to the performance of the Contract.

This clause requires Defence to assess whether there is risk of an actual conflict of interest or probity issue arising in respect to this clause and also assess the potential for perceived conflicts of interest and probity concerns if the Employee or Service Provider is engaged on the relevant Contract. It does not require Defence to consider how a situation may appear if the relevant facts are unreasonably interpreted. The relevant test is whether or not there could be an actual or

perceived conflict of interest or probity issues judging the known facts in a reasonable way.

As a general rule, Defence should err on the side of caution and withhold approval where it believes that a reasonable person may perceive a risk of a conflict of interest existing if approval is given to the Employee or Service Provider.

The fourth criterion Defence is required to consider is;

- d. any information provided by the Contractor concerning any significant effect which withholding approval will have on the Employee or Service Provider's employment opportunities or the performance of the Contract.

This clause aims to ensure that Defence takes into account the effect on an employee or service provider's reasonable employment opportunities by withholding approval. This is particularly important where there is a possibility that if approval is withheld, the employee or service provider will be denied work in their chosen field. For most people this will not be an issue. However, in the highly specialised area of Defence materiel it is possible that the only employment option for some employees or service providers is to work on the Defence Contract at issue. Similarly, the Contractor may not be able to perform the Contract without the relevant employee or service provider.

For example, an employee or service provider specialising in software design for F111 weapon systems may show that if the person cannot work on the outsourced contract for maintenance of those weapon systems, the person cannot use his or her expertise anywhere else.

When assessing the impact of the individual's work opportunities it is not appropriate to take account of employment opportunities in other fields which may be open to the employee or service provider where he/she abandons their area of expertise or must accept a significant salary reduction. In addition, it is not appropriate to consider employment opportunities open to the individual in other cities, states or countries which would require relocation of the employee or service provider and their family.

It is advisable to seek assistance from the Contracting Policy & Operations Branch where the employee or service provider will be denied employment in a field of expertise if approval is not given or where there are concerns about conflicts of interest or probity issues if approval is given.

Drafter's action: Nil

Related clauses: The **Tender Evaluation** clause of the conditions of tender states that tenderers shall not use the improper assistance of employees or former employees of the Commonwealth in compiling their tenders. Under this clause the Commonwealth may not consider a tender further where it has been compiled using such assistance.

The **Use of Former Defence Personnel in Tender Preparation** clause of the conditions of tender requires the tenderer to seek prior written approval from Defence in certain circumstances before allowing former Defence employees, ADF members or service providers to Defence to contribute to a tender response to a Defence requirement.

**POLICY AND LAW****Applicable Law****Reference:**Volume 1 Clause 10.1Volume 2 Clause 11.1**Sponsor:** Contracting Policy & Operations**Status:** Core**Purpose:** To set out which laws will apply to the Contract and the jurisdiction of the relevant State/Territory Courts in determining disputes. To ensure the *United Nations Convention for the International Sale of Goods* does not apply to the Contract.**Policy:** *DPPM – Section 2, Chapter 2.2 and Section 6, Chapter 6.8***Guidance:** The parties to a contract may specify that the laws of a particular jurisdiction will apply to the contract provided there is some reasonable connection between the contract and the jurisdiction chosen. That connection may be the place where the contract is made or the place where the contract is carried out.**SELECTION OF APPROPRIATE JURISDICTION**

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Defence preference is for the laws of the ACT to apply to Defence contracts. This is possible to justify provided the Contract is made in the ACT (that is, the contract is signed in the ACT by the last party to sign). This does not mean that court proceedings in relation to the Contract need necessarily occur in an ACT court. Any court may hear a matter provided that in doing so it applies the laws of the ACT.

Where the application of ACT law cannot be justified, drafters should specify the most appropriate Australian jurisdiction. There may be some hesitancy on the part of an overseas tenderer to accept the application of laws with which the company may be unfamiliar and some tenderers may request that the law of an overseas jurisdiction be specified. The law of an overseas jurisdiction should not be used unless the jurisdictional connection required by law can not be established with an Australian jurisdiction. In such a situation advice must be obtained from Contracting Policy & Operations Branch on the impact of the application of the proposed laws. Contracting Policy & Operations Branch will in turn seek advice from a lawyer familiar with the laws being proposed. Before a proposal to specify an overseas jurisdiction may be accepted, the draft Contract must be rewritten to minimise any adverse impact on the Commonwealth of the application of the law of the overseas jurisdiction.

**UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS**

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The *UN Convention on the International Sale of Goods* contains provisions that may conflict with the terms and conditions contained in contracts that have been developed based upon *ASDEFCON (Complex Materiel)* or terms that are not in the best interests of the Commonwealth. Advice should be sought from Contracting Policy & Operations Branch prior to amending this clause.

**Drafter's action:** Prior to release of the RFT, drafters must include the jurisdiction that they wish to apply to the Contract.**Related clauses:** Nil

### Compliance with Laws

Reference:

Volume 1 N/A

Volume 2 11.2

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To impose on the Contractor a contractual obligation to comply with all laws in the jurisdictions in which the work under the Contract is carried out.

Policy: *DPPM – Section 2, Chapter 2.2 and Section 6, Chapter 6.8*

Guidance: This clause places a contractual obligation on the Contractor to comply at all times with the laws of the jurisdictions in which the work done under the Contract is performed.

#### RIGHT TO TERMINATE FOR BREACH OF LEGISLATION

This clause may provide the Commonwealth with grounds for terminating the Contract at common law where the Contractor fails to comply with the laws of the jurisdiction where the work is being performed and the particular breach would be considered by a court to be a breach of an essential term or a fundamental breach of contract. This may depend on the nature of the law not being complied with or the extent or effect of the non-compliance. This issue may be particularly important where the Contractor is unable to comply with both the Contract and the laws of the relevant jurisdiction. Advice must be obtained from Contracting Policy & Operations Branch prior to any action being taking where a Contractor breaches this provision.

Drafter's action: Nil

Related clauses: Nil

## Policy Requirements

### Reference:

Volume 1 Clause 10.2

Volume 2 Clause 11.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To impose on the Contractor the contractual obligation to comply with all Commonwealth policy of general application listed in this clause.

Policy: Commonwealth policy of general application includes:

- a. Company ScoreCard policy (for acquisition contracts valued at \$10 million or more);
- b. Defence Equity and Diversity;
- c. Equal Opportunity for Women in the Workplace
- d. Freedom of Information;
- e. use of Hazardous Substances and Ozone Depleting Substances; and
- f. Maximising Employment Opportunities for Aborigines and Torres Strait Islanders (for contracts valued at \$5 million or more).

Guidance: Relevant Commonwealth policy will be listed in this clause.

### CONTRACTOR COMPLIANCE WITH POLICIES

It should be noted that the Contractor need only comply with the Commonwealth policy of general application listed in this clause. The Contractor need not comply with Commonwealth policy in its performance of other contracts with government or commercial entities unless obliged to do so under those contracts.

### AMENDMENT OF THE POLICIES

The policy to be complied with by the Contractor may not be amended following signature of the Contract except by Contract change proposal in accordance with the **Change to the Contract** clause of the conditions of contract. Where consideration is being given to requiring the Contractor to comply with amended policy documentation through approval of a Contract change proposal, drafters should weigh up the importance of the policy to the performance of the Contract against the additional costs associated with the Contractor complying with the amended policy.

### REMEDIES FOR BREACH OF THIS CLAUSE

In the event the Contractor breaches the requirement to abide by relevant Commonwealth policy the Commonwealth may be able to seek damages for the breach if the Commonwealth has suffered loss or damage. In most cases, it is unlikely that a breach of this clause will be considered sufficiently fundamental to give rise to a right to terminate the Contract for default. Advice should be sought from Contracting Policy & Operations Branch prior to any action being taken against the Contractor for breach of this clause of the conditions of contract.

### Drafter's action:

Volume 1 Nil

Volume 2 Prior to release of the RFT where the contract is likely to be valued at \$10 million or more, drafters must include the option covering Company Scorecards.

Related clauses: Nil

**Occupational Health and Safety (OH&S)****Reference:**

Volume 1 Clause 10.3

Volume 2 Clause 11.4

**Sponsor:** Contracting Policy & Operations and Defence Safety Management Agency

**Status:** Core

**Purpose:** To impose a contractual obligation on the Contractor to assist the Commonwealth in complying with its OH&S obligations.

**Policy:** The *Occupational Health and Safety (Commonwealth Employment) Act 1991* imposes a statutory duty on the Commonwealth as an employer to take all reasonably practicable steps to protect the health and safety of its employees, Contractors and their staff and other persons at or near Defence workplaces.

Defence Safety Management Agency website at  
<http://www.dsma.dcb.defence.gov.au>

*Defence Safety Manual, Volume 1, Part 1, Chapter 8.*

*DPPM – Section 3, Chapter 3.10*

**Guidance:** This clause imposes a contractual obligation on the Contractor to perform the Contract in such a way that Commonwealth employees are able to participate in any necessary inspections of work under the Contract and the Supplies can be used for their intended purpose without the Commonwealth being rendered in breach of its OH&S obligations.

**Drafter's action:** Nil

**Related clauses:** The **Ozone Depleting Substance and Hazardous Substances** clause of the draft SOW details the Ozone Depleting Substance and Hazardous Substances that may be included in the Supplies.

### **Severability**

**Reference:**

Volume 1    Clause 10.4

Volume 2    Clause 11.5

**Sponsor:**            Contracting Policy & Operations

**Status:**                Core

**Purpose:**                To express the agreement of the parties that any part of the Contract which is, or becomes, illegal, invalid or unenforceable may be severed and shall not be taken to affect the remainder of the Contract.

**Policy:**                 Nil

**Guidance:**             The clause sets out what will happen in the event a part of the Contract is or becomes illegal, invalid or unenforceable within the jurisdiction applicable to the Contract. The clause states that the Contract shall be read as if the offending part has been severed so that the legality, validity or enforceability of the remainder of the Contract is not affected.

This clause should be effective in most circumstances. Advice should be obtained from Contracting Policy & Operations Branch prior to asserting that any part of the Contract has been severed because it is illegal, invalid or unenforceable.

**Drafter's action:**    Nil

**Related clauses:**    Nil





**DISPUTES AND TERMINATION****Resolution of Disputes**Reference:Volume 1 Clause 11.1Volume 2 Clause 12.1Sponsor: Contracting Policy & OperationsStatus: CorePurpose: To detail the dispute resolution process to be used to settle a dispute between the Commonwealth and the Contractor prior to commencing court proceedings.Policy: *DPPM – Section 6, Chapter 6.8*Guidance:

Volume 1 This clause provides the mechanism by which parties to the Contract must deal with disputes under the Contract. The clause ensures that the parties initially attempt to use Alternative Dispute Resolution (ADR) procedures to settle their dispute without recourse to the courts at first instance.

FORMS OF ALTERNATIVE DISPUTE RESOLUTION

There are several forms of ADR ranging from arbitration, which resembles formal litigation, to informal negotiations. Where a dispute arises under the Contract, advice should be obtained from Contracting Policy & Operations Branch on the most appropriate method of resolving the dispute.

Volume 2 This clause provides the mechanism by which parties to the Contract must deal with disputes under the Contract. The clause ensures that the parties initially attempt to use Alternative Dispute Resolution (ADR) procedures to settle their dispute without recourse to the courts at first instance.

CIRCUMSTANCES IN WHICH COURT PROCEEDINGS MAY BE COMMENCED

A party is only entitled to commence court proceedings when:

- a. the party is seeking urgent relief such as an injunction;
- b. the other party to the Contract fails to comply with this clause; or
- c. ADR has failed under this clause.

FORMS OF ALTERNATIVE DISPUTE RESOLUTION

There are several forms of ADR ranging from arbitration, which resembles formal litigation, to informal negotiations. Where a dispute arises under the Contract, advice should be obtained from Contracting Policy & Operations Branch on the most appropriate method of resolving the dispute.

Drafter's action: NilRelated clauses: The **Applicable Law** clause of the draft conditions of contract specifies what jurisdiction shall be applicable in governing any litigation or arbitration of a dispute arising under the Contract.

## Contractor Default

### Reference:

Volume 1    Clause 11.2

Volume 2    Clause 12.2

Sponsor:        Contracting Policy & Operations

Status:            Core

Purpose:            To set out the procedure and the circumstances under which the Commonwealth may terminate the Contract or reduce the scope of the Contract for the Contractor's default.

Policy:            *DPPM – Section 6, Chapter 6.1*

### Guidance:

Volume 1        Advice should be obtained from Contracting Policy & Operations Branch before any decision is made to terminate the Contract under this clause or by exercising a general right at common law.

### TERMINATION UNDER THE CONTRACT OR AT COMMON LAW

This clause sets 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 rights given by the contract itself. However it should be noted that the Commonwealth is not obliged to follow the processes detailed in this clause to terminate the contract, and may be able to terminate at common law if the relevant breach gives rise to a common law right of termination.

### TERMINATION OR REDUCTION IN SCOPE

This clause is drafted to give the Commonwealth a range of options in the event the Contractor is in default. On the occurrence of any of the prescribed events the Commonwealth may, by notice to the Contractor, immediately terminate the Contract as a whole or reduce the scope of the Contract to remove the part that is affected by the default. Issues to be considered prior to electing to reduce the scope of the Contract include the effect of the reduction of scope on the relationship between the parties, the usefulness of the remainder of the requirement to the Commonwealth, the viability for the Contractor of performing the remainder of the work under the Contract and the likelihood of the Contractor defaulting on the remainder of the work.

### EVENTS ALLOWING FOR TERMINATION FOR DEFAULT

This clause allows the Commonwealth to terminate the Contract immediately by notice in writing in the event the Contractor:

- a.            becomes insolvent or bankrupt, becomes subject to any form of external administration, or assigns its rights other than in accordance with the Contract; or
- b.            commits any breach of the Contract that gives rise to termination for default.

Under the provisions of this clause, the Commonwealth Representative may give the Contractor notice to remedy a failure where the Contractor fails to take action to remedy a default.

If the Contractor has not taken action to remedy its failure within 14 days of the notice the Commonwealth Representative may issue a notice terminating the Contract for default. If the Contractor takes action in respect of the first notice but fails to remedy the default within the period specified by the Commonwealth Representative in the notice, the Commonwealth Representative may also issue a notice terminating the Contract for default. It is important that legal advice be

sought in relation to drafting the notice of default because if not drafted correctly the notice could be invalid and the Commonwealth could potentially be seen to be repudiating the contract. For example, the notice must specify the relevant default with sufficient particularity (i.e. not simply that the Contractor has failed to deliver Supplies in accordance with the Contract).

#### WAIVER OF RIGHTS UNDER THIS CLAUSE

The **Waiver** clause of the conditions of contract may help to protect the Commonwealth from being prevented from exercising its right to terminate or reduce the scope of the Contract in the event the Commonwealth does not immediately exercise its rights under this clause, or extends the time periods referred to in this clause. However, to ensure that the Commonwealth's rights to terminate will not be prejudiced, advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth electing not to exercise its rights on the occurrence of an event detailed in this clause or the Contractor being given a greater period of time to remedy a default than provided for in this clause.

#### RECOVERY OF DAMAGES

This clause also makes it clear that once the Contract is terminated the parties will be relieved from future performance of the Contract and the Commonwealth's right to recover damages suffered as a result of the Contractor's breach of Contract will not be affected (and vice versa).

In accordance with this clause the Commonwealth will be entitled to recover "full contractual damages" where awarded by a court. The reference to "full contractual damages", which includes damages for all losses resulting from the failure of the Contractor to carry out its obligations under the Contract, is inserted to make it clear that the Commonwealth can recover all its loss if it terminates for default under this clause of the conditions of contract notwithstanding that the Commonwealth may not have been able to terminate the contract for the particular breach at common law.

#### Volume 2

Advice should be obtained from Contracting Policy & Operations Branch before any decision is made to terminate the Contract under this clause or by exercising a general right at common law.

#### TERMINATION UNDER THE CONTRACT OR AT COMMON LAW

This clause sets 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 rights given by the contract itself. However it should be noted that the Commonwealth is not obliged to follow the processes detailed in this clause to terminate the contract, and may be able to terminate at common law if the relevant breach gives rise to a common law right of termination.

#### TERMINATION OR REDUCTION IN SCOPE

This clause is drafted to give the Commonwealth a range of options in the event the Contractor is in default. On the occurrence of any of the prescribed events the Commonwealth may, by notice to the Contractor, immediately terminate the Contract as a whole or reduce the scope of the Contract to remove the part that is affected by the default. Issues to be considered prior to electing to reduce the scope of the Contract include the effect of the reduction of scope on the relationship between the parties, the usefulness of the remainder of the requirement to the Commonwealth, the viability for the Contractor of performing the remainder of the work under the Contract and the likelihood of the Contractor defaulting on the remainder of the work.

### EVENTS ALLOWING FOR TERMINATION FOR DEFAULT

This clause allows the Commonwealth to terminate the Contract immediately by notice in writing in the event the Contractor:

- a. becomes insolvent or bankrupt, becomes subject to external administration, is wound up by order of a court, suffers execution against any of its assets or ceases to carry on business, enters into an arrangement with its creditors or goes into liquidation;
- b. fails to obtain or ceases to hold any relevant licence, approval, authorisation or consent required to enable it to comply with its obligations under the Contract except where the failure or cessation was outside the Contractor's reasonable control; or
- c. commits any breach of the Contract that gives rise to termination for default, or assigns its rights other than in accordance with the Contract.

Under the provisions of this clause, the Commonwealth Representative may give the Contractor notice to remedy a failure where the Contractor fails to:

- a. commence work under the Contract,
- b. proceed at a rate of progress sufficient for the Contract to be completed on time; or
- c. take action to remedy a default.

If the Contractor has not taken action to remedy its failure within 30 days of the notice the Commonwealth Representative may issue a notice terminating the Contract for default. If the Contractor takes action in respect of the first notice but fails to remedy the default within the period specified by the Commonwealth Representative in the notice, the Commonwealth Representative may also issue a notice terminating the Contract for default. It is important that legal advice be sought in relation to drafting the notice of default because if not drafted correctly the notice could be invalid and the Commonwealth could potentially be seen to be repudiating the contract. For example, the notice must specify the relevant default with sufficient particularity (i.e. not simply that the Contractor has failed to deliver Supplies in accordance with the Contract).

### WAIVER OF RIGHTS UNDER THIS CLAUSE

The **Waiver** clause of the conditions of contract may help to protect the Commonwealth from being prevented from exercising its right to terminate or reduce the scope of the Contract in the event the Commonwealth does not immediately exercise its rights under this clause, or extends the time periods referred to in this clause. However, to ensure that the Commonwealth's rights to terminate will not be prejudiced, advice should be sought from Contracting Policy & Operations Branch prior to the Commonwealth electing not to exercise its rights on the occurrence of an event detailed in this clause or the Contractor being given a greater period of time to remedy a default than provided for in this clause.

### REPAYING THE MOBILISATION PAYMENT AND RECOVERY OF DAMAGES

Where the Contract is terminated for default, and a Mobilisation Payment has been made under the Contract, this clause requires the Contractor to repay the amount of the Mobilisation Payment that has not been offset in accordance with the **Mobilisation Payment** clause of the conditions of contract. This clause also makes it clear that once the Contract is terminated the parties will be relieved from future performance of the Contract and the Commonwealth's right to recover damages suffered as a result of the Contractor's breach of Contract will not be affected (and vice versa).

In accordance with this clause the Commonwealth will be entitled to recover "full contractual damages" where awarded by a court. The reference to 'full contractual damages', which includes damages for all losses resulting from the failure of the Contractor to carry out its obligations under the Contract, is inserted to make it

clear that the Commonwealth can recover all its loss if it terminates for default under this clause of the conditions of contract notwithstanding that the Commonwealth may not have been able to terminate the contract for the particular breach at common law. However, the amount of damages that can be recovered by the Commonwealth will be subject to the liability caps in the **Limitation of Liability** clause (if included) and the process set out in the **Termination for Convenience** clause of the conditions of contract.

#### TERMINATION FOR DEFAULT OR SUBSTITUTION

Where the Contractor has provided a Deed of Substitution and Indemnity under the **Security for Performance** clause of the conditions of contract and the Commonwealth is entitled to issue a notice of termination under this clause or at common law, the Commonwealth may elect to issue a notice of substitution instead of terminating the Contract for default. If a notice of substitution is issued the person guaranteeing the Contractor's performance under the Deed of Substitution and Indemnity will be substituted for the Contractor under the Contract and all the Contractor's rights and obligations under the Contract will be transferred to that person. Advice should be sought from Contracting Policy & Operations Branch prior to a decision being made to issue a notice of substitution or termination.

#### Drafter's action:

Volume 1 Nil

Volume 2 Where a Mobilisation Payment has been paid under the Contract, drafters must include the Option in this clause.

#### Related clauses:

Volume 1 The **Waiver** clause of the draft conditions of contract seeks to protect the rights of a party to the Contract in the event that a party fails to enforce a provision of the Contract.

Volume 2 The **Limitation of Liability** clause of the draft conditions of contract sets out the liability cap for the Contract.

The **Waiver** clause of the draft conditions of contract seeks to protect the rights of a party to the Contract in the event that a party fails to enforce a provision of the Contract.

The **Security for Performance** clause of the draft conditions of contract requires the Contractor to provide a Deed of Substitution and Indemnity to secure its performance of the Contract and details the Commonwealth's right to issue a notice of substitution.

### Termination for Convenience

Reference:

Volume 1 N/A

Volume 2 Clause 12.3

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To allow the Commonwealth to terminate the Contract or reduce the scope of the Contract at its convenience.

Policy: *DPPM – Section 2, Chapter 2.1*

Guidance: In the Defence environment, the circumstances governing acquisition priorities may change rapidly. This clause provides a mechanism for the Commonwealth to terminate the Contract or reduce the scope of the Contract in reaction to a change in circumstances or potentially for any other reason, and to compensate the Contractor for legitimate costs incurred by it as a result of such termination or reduction in scope. This clause also requires the Contractor to secure an equivalent right of termination and equivalent compensation provisions in all Approved Subcontracts.

#### LIABILITY OF THE COMMONWEALTH UPON TERMINATION

This clause recognises that the Contractor may suffer loss from the termination because it is in possession of Supplies, or has undertaken work, at the time of termination for which it has not been paid under the Contract. Where the Commonwealth exercises its rights under this clause, the Contractor must stop work in accordance with the notice, comply with any directions given by the Commonwealth and mitigate all loss, costs and expenses, including those arising from affected Subcontracts. The Commonwealth will be liable only for payments for work conducted before the effective date of termination and any other reasonable costs incurred by the Contractor that are directly attributable to the termination. Under no circumstances will the Contractor be entitled to future lost profits. The Contractor must be able to substantiate any claim to the satisfaction of the Commonwealth Representative.

**Example:**

In order to meet the Contract schedule, the Contractor orders steel in week 7 of the Contract so that it will be available for use in the production of the Supplies in week 12. If the Contract is terminated under the **Termination for Convenience** clause in week 9, the Contractor will be entitled to claim compensation for the cost of the steel but must mitigate its loss by trying to cancel the order or sell the steel at the best available price.

#### EXERCISING THE COMMONWEALTH'S RIGHT TO TERMINATE

The Commonwealth's right to terminate or reduce the scope of the Contract under this clause should be exercised only in exceptional circumstances and not where the Contractor is in default such that the **Contractor Default** clause of the conditions of contract or the common law would apply to enable the Commonwealth to terminate for default. Issues to be considered in relation to termination for convenience include the impact the termination or reduction in scope will have on any future relationship with the Contractor and the Commonwealth's place in the commercial market.

In addition, it may be that the Commonwealth would be required to act in good faith and in accordance with a duty of fair dealing in exercising its power to terminate for convenience. Accordingly, even though this clause provides for reasonable compensation to be paid to the Contractor on termination for convenience, a court

may also require the Commonwealth to show that the actual decision to exercise the power to terminate for convenience was undertaken in good faith in the circumstances of the case. Advice should therefore be sought from Contracting Policy & Operations Branch prior to any decision being made to terminate the Contract or reduce the scope of the Contract under this clause.

#### TERMINATION OR REDUCTION IN SCOPE

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Issues to be considered prior to electing to reduce the scope of the Contract include the effect of the reduction of scope on the relationship between the parties, the usefulness of the remainder of the requirement to the Commonwealth, the viability for the Contractor of performing the remainder of the work under the Contract and the likelihood of the Contractor defaulting on the remainder of the work.

Where the Commonwealth decides to reduce the scope of the Contract, it may give the Contractor such directions as it thinks fit in relation to the subsequent performance of the Contract. This allows the Commonwealth some flexibility to shape the remainder of the Contract to fit the Commonwealth's requirements in light of the changed acquisition priorities which led to the reduction. However, the directions must relate to the Contractor's performance of the Contract as written. Should the Commonwealth wish the Contractor to perform work not originally contemplated under the Contract, the procedure set out in the **Change to the Contract** clause of the conditions of contract must be followed.

Drafter's action: Nil

Related clauses: The **Contractor Default** clause of the draft conditions of contract sets out the procedure and the circumstances under which the Commonwealth may terminate the Contract or reduce the scope of the Contract for the Contractor's default.



## Right of Commonwealth to Recover Money

### Reference:

Volume 1    Clause 11.3

Volume 2    Clause 12.4

Sponsor:        Contracting Policy & Operations and Materiel Finance Division

Status:            Core

Purpose:            To reserve the right of the Commonwealth to recover any payment or debt owed to it by the Contractor and to entitle the Commonwealth to recover interest on the debt.

Policy:            It is Commonwealth policy that all agreements between the Commonwealth and other legal entities should include a provision allowing the Commonwealth to be compensated for any loss suffered through non payment of an amount due.

*Accounts Receivable and Debt Management Procedures Manual*

*Defence CEIs Part 5, Instructions 2 and 3*

*DPPM – Section 6, Chapter 6.1*

*DRB 47 Manual of Financial Delegations*

### Guidance:

Volume 1        This clause provides the Commonwealth with the right to withhold moneys from the Contractor to satisfy debts due to the Commonwealth under the Contract.

#### RECOVERY OF DEBTS

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Under this clause the Commonwealth can recover a debt in two ways:

- a.            deduct the money owed from a payment under the Contract; or
- b.            issue the Contractor with a notice requesting payment of the debt.

If the Contractor wishes to dispute the deduction it may do so in accordance with the dispute resolution procedures detailed in the **Resolution of Disputes** clause of the conditions of contract.

It should be noted that this clause makes it clear that this clause does not in any way limit the Commonwealth's right to recover money owed by the Contractor at common law.

#### CLAIMING OF INTEREST OF DEBTS

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This clause entitles the Commonwealth to claim interest on any debt owed to the Commonwealth. The rate at which interest is to be charged is the Department of Finance and Administration sourced overdraft rate current at the date the payment was due.

#### WAIVING OR WRITING OFF DEBTS DUE TO THE COMMONWEALTH

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In accordance with the *Part 5 Instruction 2* of the *Defence CEIs* the Commonwealth may write-off debts in particular circumstances where:

- a.            it is unlikely that the debt will be legally recoverable, e.g. because the Contractor would not reasonably be found liable on a common law basis; or,
- b.            it is uneconomical to pursue the recovery of the debt e.g. the cost of pursuing the debt would be greater than the amount of the debt.

Further guidance on the write-off of debts is contained in *Part 5 Instruction 2* of the *Defence CEIs*.

The Commonwealth may also waive debts in accordance with *Part 5 Instruction 3* of the *Defence CEIs* where:

- a. it is determined that there has been no actual loss to the Commonwealth;  
or
- b. there are other morally compelling grounds for the waiver of the debt.

Morally compelling grounds could include a situation where the Contractor's cashflow would be severely impacted by the recovery of the debt or where the long-term strategic relationship between the Contractor and the Commonwealth would be adversely affected. Further guidance on the waiver of debts is contained in *Part 5 Instruction 3* of the *Defence CEIs*.

#### DECISION MAKING AUTHORITY

*DRB 47* lists the delegates who are entitled to write-off debts under *Part 5 Instruction 2* of the *Defence CEIs*. All requests for the waiver of debts must be referred to the Minister for Finance through the Assistant Secretary Personnel Service Delivery in Corporate Services and Infrastructure Group in accordance with *Part 5 Instruction 3* of the *Defence CEIs*.

#### Volume 2

This clause *provides* the Commonwealth with the right to withhold moneys from the Contractor to satisfy debts due to the Commonwealth under the Contract.

#### RECOVERY OF DEBTS

Under this clause the Commonwealth can recover a debt in three ways:

- a. deduct the money owed from a payment under the Contract;
- b. issue the Contractor with a notice requesting payment of the debt; or
- c. where the debt is not fully recovered by methods a. and b., exercise its rights under any security provided in accordance with the Mobilisation Payment or Security for Performance clauses of the conditions of contract.

In accordance with this clause, the Commonwealth must advise the Contractor in writing if it has deducted an amount from a payment or security. Notification should be provided after the deduction is made to protect the Commonwealth from an action by the Contractor to prevent the deduction. If the Contractor wishes to dispute the deduction it may do so in accordance with the dispute resolution procedures detailed in the **Resolution of Disputes** clause of the conditions of contract.

It should be noted that this clause does not in any way limit the Commonwealth's right to recover money owed by the Contractor at common law.

#### CLAIMING OF INTEREST OF DEBTS

This clause entitles the Commonwealth to claim interest on any debt owed to the Commonwealth. The rate at which interest is to be charged is the Department of Finance and Administration sourced overdraft rate current at the date the payment was due.

#### WAIVING OR WRITING OFF DEBTS DUE TO THE COMMONWEALTH

In accordance with *Part 5 Instruction 2* of the *Defence CEIs*, the Commonwealth may write-off debts in particular circumstances where:

- a. it is unlikely that the debt will be legally recoverable, e.g. because the Contractor would not reasonably be found liable on a common law basis;  
or
- b. it is uneconomical to pursue the recovery of the debt, e.g. the cost of pursuing the debt would be greater than the amount of the debt.

Further guidance on the write-off of debts is contained in *Part 5 Instruction 2* of the *Defence CEIs*.

The Commonwealth may also waive debts in accordance with *Part 5 Instruction 3* of the Defence CEIs where:

- a. it is determined that there has been no actual loss to the Commonwealth;  
or
- b. there are other morally compelling grounds for the waiver of the debt.

Morally compelling grounds could include a situation where the Contractor's cashflow would be severely impacted by the recovery of the debt or where the long-term strategic relationship between the Contractor and the Commonwealth would be adversely affected. Further guidance on the waiver of debts is contained in *Part 5 Instruction 3* of the *Defence CEIs*.

#### DECISION MAKING AUTHORITY

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*DRB 47* lists the delegates who are entitled to write-off debts under *Part 5 Instruction 2* of the *Defence CEIs*. All requests for the waiver of debts must be referred to the Minister for Finance through the Assistant Secretary Personnel Service Delivery in Corporate Services and Infrastructure Group in accordance with *Part 5 Instruction 3* of the *Defence CEIs*.

Drafter's action: Nil

#### Related clauses:

Volume 1 The **Resolution of Disputes** clause of the draft conditions of contract sets out the procedure for the resolution of disputes arising under the Contract.

Volume 2 The **Early and Late Payment** clause of the draft conditions of contract details the interest that will be payable where a payment under the Contract is made early or late.

The **Resolution of Disputes** clause of the draft conditions of contract sets out the procedure for the resolution of disputes arising under the Contract.

## Survivorship

Reference:

Volume 1 Clause 11.4

Volume 2 Clause 12.5

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To identify those clauses that will survive the termination or expiration of the Contract.

Policy: Nil

Guidance: There are some terms of the Contract which should continue to operate past the date of termination or expiration of the Contract.

### CLAUSES SURVIVING TERMINATION OR EXPIRATION

This clause states that provisions of the Contract that expressly or by implication are intended to survive the termination or expiration of the Contract and any rights arising on termination or expiration will survive. Clauses that will survive include:

- a. Commercial-in-Confidence Information;
- b. Intellectual Property;
- c. Right of the Commonwealth to Recover Money;
- d. Defence Security ;
- e. warranties under the Contract;
- f. guarantees, licences, indemnities; and
- g. financial and performance securities provided under the Contract.

It should be noted that the list in this clause is not exclusive and the nature of each clause would be considered by a court to determine whether it will survive the termination or expiration of the Contract.

For the purposes of this clause expiration means that date on which the last specific contractual obligation occurs. This will usually be upon expiry of any support period or Latent Defects warranty period or at Final Acceptance where those options are not selected.

Drafter's action: Nil

Related clauses: Nil



**EXECUTION PAGE**

<u>Reference:</u>	Execution Page
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To demonstrate the parties' agreement to be bound by the terms and conditions set out in the Contract and the dates on which both parties signed.
<u>Policy:</u>	<i>Corporations Act 2001.</i> <i>Defence CEIs.</i> <i>DRB 47 Manual of Defence Delegations.</i> <i>DPPM – Section 5, Chapter 5.7</i>
<u>Guidance:</u>	There are a number of ways in which a company may execute a contract. However, unless the correct execution clause is used the Contractor may not be legally bound. Drafters should note that the following provides an overview of the common ways in which contracts are executed. It is not an exhaustive summary of the law relating to the execution of contracts and in particular does not deal with the law of agency which may operate to bind either the Commonwealth or the Contractor in circumstances where a person is held out by a party as having actual or apparent authority to execute the Contract on behalf of that party.

**EXECUTION OF THE CONTRACT AS A DEED**

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Drafters should also note that *ASDEFCON (Complex Materiel)* has not been drafted to be executed as a deed and so this commentary does not deal with the special requirements for the valid execution of a deed. The parties to a deed generally have a longer period of time in which to commence claims based on the deed than parties to a contract. It may be appropriate to execute the Contract as a deed when it is intended that the Contract will be in effect for a long period, for example, a period greater than six years (which is a common limitation period on commencing claims in relation to contracts). However, drafters should note that the limitation period runs from the time the claim first arises and not from the commencement of the contract. Drafters should also note that there are limitations on the remedies which can be obtained for a breach of a deed. Advice should be obtained from Contracting Policy & Operations Branch if drafters believe a deed would be more appropriate.

**EFFECTIVE METHODS FOR EXECUTING THE CONTRACT**

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The guidance below generally relates to execution of the Contract by a company incorporated under the *Corporations Act 2001*, except for the guidance on powers of attorney. Drafters should obtain advice from Contracting Policy & Operations Branch as to the correct execution clause to be used for an overseas Contractor.

A Contract may be executed by an Australian company in one of four ways:

- a. by affixing its company seal;
- b. by company officers signing the Contract;
- c. by an individual acting with the company's express or implied authority signing on the behalf of the company; or
- d. by signature of an individual with a power of attorney authorising the individual to bind the Contractor.

Drafters should seek advice from Contracting Policy & Operations Branch on the correct execution clause to be used.

**EXECUTION BY AFFIXING THE COMPANY SEAL**

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An Australian company may sign a contract by affixing its company seal. The seal is a stamp which includes the name of the company and its Australian Company

Number (A.C.N). The company's constitution may set out the way in which the company seal may be affixed. For example, the constitution may require that the company's Board of Directors pass a resolution authorising the affixing of the seal to a Contract. Normally, the seal must be affixed in the presence of two directors or a director and the secretary of the company in order to be valid. These people indicate their presence by signing the Contract next to the seal.

However, it should be noted that Australian companies have not been required to have a company seal since amendments to the Corporations Law in 1998. Some companies, therefore will not execute contracts in this way.

Example:  
 The seal of  
 [...INSERT COMPANY NAME  
 AND A.C.N...]  
 is hereby affixed in accordance  
 with its constitution by  
 [...NAME OF DIRECTOR...]  
 in the presence of  
 [...NAME OF DIRECTOR/ SECRETARY...]

#### EXECUTION BY SIGNATURES OF COMPANY OFFICERS

If an Australian company does not have a seal or if it does but opts not to use it, the Contract can be executed by certain company officers signing the document. The Contract must either be signed by two directors of the company or, one director and the secretary of the company. Where a proprietary company has a sole director who is also the company secretary that person can sign the Contract.

Example:  
 SIGNED for and on behalf of  
 [...INSERT COMPANY NAME  
 AND A.C.N./A.B.N...]  
 by  
 [NAME OF COMPANY OFFICER AND POSITION]  
 in the presence of:  
 [NAME OF WITNESS]  
 and by  
 [NAME OF COMPANY OFFICER AND POSITION]  
 in the presence of:  
 [NAME OF WITNESS]

#### ASSUMPTIONS CONCERNING PROPER EXECUTION

Affixing the company seal or having the specified company officers sign the Contract are preferred over other ways of executing a contract. The reason for this is that using either of these methods will, in certain circumstances, allow the Commonwealth to rely on some important assumptions concerning proper execution.

Provided that the Contract is executed in either of these two ways a person, who does not know that the Contract was not properly executed, can assume that it has been correctly executed. A person may also assume that anyone who signs the

Contract and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices, where they are making that assumption for the purpose of assuming the Contract has been properly executed.

#### EXECUTION BY A PERSON WITH ACTUAL OR EXPRESS AUTHORITY

Under the *Corporations Act* a person dealing with an Australian company is entitled to rely on a document as binding the company if it is signed by an individual acting with the company's express or implied authority and on behalf of the company. In contracts of high value it is reasonable for drafters to request that the company provide evidence of the officer's authority to bind the company, should the company wish to execute the Contract in this manner. Advice should be obtained from Contracting Policy & Operations Branch as to whether the Commonwealth can rely on the officer's authority to bind the company.

Example:  
 SIGNED for and on behalf of  
 [...INSERT COMPANY NAME  
 AND A.C.N./A.B.N...]  
 by  
 [NAME OF COMPANY OFFICER]  
 in the presence of:  
 [NAME OF WITNESS]

#### EXECUTION BY A PERSON WITH A POWER OF ATTORNEY

In some cases the company will issue a power of attorney authorising a person to bind the company in certain circumstances. Drafters should ask to see a copy of the power of attorney in order to check that it is current, it appears to be executed in a way which will bind the company and the circumstances it covers include the Contract in question.

Example:  
 SIGNED for and on behalf of  
 [...INSERT COMPANY NAME  
 AND A.C.N./A.B.N...] by  
 [...NAME OF PERSON...]  
 who is authorised by Power  
 of Attorney [NUMBER OR DATE]  
 and who states [HE/SHE] has no  
 notice of its revocation  
 in the presence of  
 [NAME OF WITNESS]

#### SIGNATURE OF THE CONTRACT BY THE COMMONWEALTH

It is best practice for the delegate exercising the financial Liability delegation to sign the Contract. However, there is no legal requirement for this to be the case. There may be situations in which the delegate who has exercised the Liability delegation is unable to sign the Contract and it is perfectly acceptable for another Commonwealth employee to sign in their place. In other situations, it may be more appropriate from a public relations standpoint, for a more senior person to sign the



Contract. Any queries on this point should be referred to the Contracting Policy & Operations Branch Help Desk.

#### FINAL REVIEW OF THE CONTRACT PRIOR TO SIGNATURE

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Drafters should ensure that prior to Contract signature the Contract documents are checked for accuracy and completeness. Sufficient time should be allowed between completion of negotiations and Contract signature to enable the parties to check the final Contract. It is important not to rush this final checking process.

#### INITIALLING OF INDIVIDUAL PAGES

It is good practice for both parties to initial each page of the Contract, so that there is no confusion over which pages of the Contract are the originals as at the effective date.

#### PROMULGATION AND STORAGE OF EXECUTED CONTRACTS

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Generally at least two copies of the Contract will need to be executed, one for each party. For the Commonwealth, the Commonwealth Representative shall retain the original, with a copy being provided to the relevant area within the Contracting Policy & Operations Branch.

Drafter's action: Prior to Contract signature, drafters must insert the correct execution clauses for each party.

Related clauses: Nil



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**STATEMENT OF WORK****Reference:**

Volume 1 Attachment A

Volume 2 Attachment A

**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To detail the work to be performed and the Supplies to be delivered under the Contract.

**Policy:** *DPPM Section 5, Chapter 5.2*

**Guidance:** This Attachment to the draft conditions of contract is the Commonwealth's SOW. After evaluation and prior to Contract signature, this Attachment will become the amalgamation of the draft SOW at Part 3 and the successful tenderer's response.

**Drafter's action:** Drafters must ensure a draft SOW is included within the RFT. Prior to Contract signature, drafters must include the negotiated SOW. The SOW should be based on the draft SOW and the successful tenderer's response.

**Related clauses:** Nil





## PRICE AND DELIVERY SCHEDULE

### Reference:

Volume 1 Attachment B

Volume 2 Attachment B

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Core

Purpose: To specify the price and delivery terms for the Supplies.

Policy: Nil

Guidance: In order to show that a contract has been formed at law, the parties must be able to demonstrate that there has been an offer, acceptance of that offer and that there is consideration. Offer and acceptance can only be demonstrated where there is certainty as to the terms being offered and accepted. Therefore, the information contained in this Attachment is crucial in order to demonstrate the formation of a legally binding contract.

### INFORMATION TO BE INCLUDED IN THE PRICE AND DELIVERY SCHEDULE

No information should be included in this Attachment prior to release of the RFT.

Prior to Contract signature, drafters must include the negotiated Price and Delivery Schedule at this attachment. The Schedule should be based on the guidance provided in the **Price and Delivery Schedule** clause of the conditions of tender and the successful tenderer's response. Information contained in the Price and Delivery Schedule should include:

- a. a description of each item or service to be provided under the Contract;
- b. the quantity of each item to be provided under the Contract;
- c. the GST exclusive unit price of each item or service;
- d. the customs duty payable for each imported item (if applicable);
- e. the GST amount applicable for each item or service;
- f. the GST inclusive unit price of each item or service;
- g. the total price of each item or service;
- h. the delivery date and delivery point for each item or service; and
- i. the value of Local Content in each item or service.

As this Attachment sets out the delivery dates applicable to the Supplies and a failure to meet those delivery dates will result in the Contractor being in breach of Contract and may result in the Contractor being liable for damages, drafters must ensure that the information included in the Price and Delivery Schedule is accurate and unambiguous.

Drafter's action: Prior to Contract signature, drafters must include the negotiated Price and Delivery Schedule in this Attachment. The Schedule will be based on the guidance provided in the **Price and Delivery Schedule** clause to the conditions of tender and the successful tenderer's response.

### Related clauses:

Volume 1 The **Price and Delivery Schedule** clause of the conditions of tender requests each tenderer to detail the price and delivery regime it is proposing.

The **Delivery** clause of the draft conditions of contract places an obligation on the Contractor to deliver Supplies in accordance with the Contract and to comply with the delivery requirements in the Price and Delivery Schedule at this Attachment.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract.

## Volume 2

The **Price and Delivery Schedule** clause of the conditions of tender requests each tenderer to detail the price and delivery regime it is proposing.

Where applicable, the **Schedule of Payments** clause of the conditions of contract requests tenderers to provide a proposed Schedule of Payments that includes the proposed Mobilisation payment, the proposed Milestone Dates and the amount of each proposed Milestone Payment.

The **Delivery** clause of the draft conditions of contract places an obligation on the Contractor to deliver Supplies in accordance with the Contract and to comply with the delivery requirements in the Price and Delivery Schedule at this Attachment.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract.

The **Schedule of Payments** Attachment to the draft conditions of contract will contain the agreed negotiated Schedule of Payments.

Drafters must ensure consistency between the items of Supplies referred to in the **SOW** Attachment to the draft conditions of contract and the descriptions included in column (b) of the Price and Delivery Schedule consistent with the Schedule of Payments.

**SCHEDULE OF PRICES FOR FURTHER QUANTITIES AND OPTIONAL EXTRAS**Reference:Volume 1 Attachment CVolume 2 Attachment CSponsor: Contracting Policy & Operations and Materiel Finance DivisionStatus: Optional. To be included where the **Option for Further Quantities and Optional Extras** clause of the draft conditions of contract is included to provide the Commonwealth with an option to purchase additional quantities of Supplies and/or optional extras.Purpose: To detail the agreed Price and Delivery Schedule for the additional quantities of Supplies and/or optional extras, and any additional or varied terms that will apply where the Commonwealth exercises its option under the **Option for Further Quantities and Optional Extras** clause of the conditions of contract.Policy: NilGuidance: Where it is clear that additional quantities and optional extras will not be required, the **Further Quantities and Optional Extras** clause of the conditions of tender, the Option for Further Quantities and Optional Extras clause of the draft conditions of contract and this Attachment should not be included in the RFT.**INFORMATION TO BE INCLUDED IN THIS ATTACHMENT**

The Commonwealth may be in a position to specify the additional Supplies and/or optional extras required prior to release of the RFT. If so, drafters are to include prior to release of the RFT the additional Supplies and/or optional extras required by the Commonwealth. If the Commonwealth is not in a position to specify the additional Supplies and/or optional extras required prior to release of the RFT, then no information should be included in this Attachment. Prior to Contract signature drafters must include the negotiated Price and Delivery Schedule for the additional quantities of Supplies and/or optional extras. The Schedule will be based on the guidance provided in the **Further Quantities and Optional Extras** clause of the conditions of tender and the successful tenderer's response. Information should include:

- a. a description of each item or service;
- b. the quantity of each item;
- c. the GST exclusive unit price of each item or service;
- d. the customs duty payable for each imported item (if applicable);
- e. the GST amount applicable for each item or service;
- f. the GST inclusive unit price of each item or service;
- g. the total price of each item or service;
- h. the delivery date and delivery point for each item or service; and
- i. the value of Local Content in each item or service.

In addition to the negotiated Price and Delivery Schedule, this Attachment will contain any additional or varied terms and conditions to the Contract that will apply should the Commonwealth exercise its option to purchase additional quantities of the Supplies and/or optional extras. Careful consideration should be given to the terms and conditions included in this Attachment. Drafters must ensure that the terms and conditions are clear, especially where the terms and conditions vary the standard terms and conditions of the Contract.

Drafter's action: Prior to release of the RFT, if the Commonwealth is in position to specify the additional Supplies and/or optional extras required, drafters are to include the

additional Supplies and/or optional extras required by the Commonwealth. If the Commonwealth is not in a position to specify the additional Supplies and/or optional extras required prior to release of the RFT, then no information should be included in this Attachment.

Prior to Contract signature, drafters must include the negotiated Price and Delivery Schedule for the additional quantities of Supplies and/or optional extras and any additional or varied terms and conditions at this Attachment.

Related clauses: The **Further Quantities and Optional Extras** clause of the annexes to the conditions of tender details the additional quantities of Supplies and/or optional extras required by the Commonwealth and requests tenderers to provide full details of the additional quantities of Supplies and/or optional extras that they are willing to provide in the format of the Price and Delivery Schedule.

The **Option for Further Quantities and Optional Extras** clause of the draft conditions of contract obtains from the Contractor an offer to supply additional quantities of Supplies and/or optional extras and specifies the terms and conditions that will apply if the Contractor's offer is accepted by the Commonwealth.

## SCHEDULE OF PAYMENTS

### Reference:

Volume 1 N/A

Volume 2 Attachment D

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Optional

Purpose: To specify when payments by the Commonwealth are due under the Contract.

Policy: The Commonwealth has a preference for payment on delivery. Where payment on delivery is not appropriate, the Commonwealth's preference is for a combination of payment on delivery and Milestone Payments or payments by Milestone Payments only, with a Mobilisation Payment where required.

Guidance: It should be noted that although the Commonwealth has a preference for payment on delivery, the Commonwealth will accept an alternative payment regime comprising of Milestone Payments and payment on delivery and acceptance, with a Mobilisation Payment where required.

### INFORMATION TO BE INCLUDED IN THIS ATTACHMENT

This Attachment should only be included where one of the following has occurred:

- a. Option B or C in the **Payment** clause of the conditions of contract has been selected for inclusion; or
- b. the **Mobilisation Payment** clause of the conditions of contract has been selected for inclusion.

If the Commonwealth is in a position to specify its proposed Milestones and Milestone Dates prior to release of the RFT, drafters are to include this information in this Attachment prior to release of the RFT. If the Commonwealth is not in position to do so, then no information should be included in this Attachment prior to release of the RFT.

Prior to Contract signature drafters must include the negotiated Schedule of Payments in this Attachment. This should be based on the **Schedule of Payments** clause of the conditions of tender and the successful tenderer's response. This Attachment should contain:

- a. the amount, purpose and date of the Mobilisation Payment (if any); and
- b. the amount and date of the Milestone Payments including whether they are subject to Progress Certification, Acceptance or System Acceptance.

The Milestone Dates should be expressed in terms of their relationship to the Effective Date (i.e. Effective Date + nn months) and the Milestone Payments should be linked to well defined Milestones which relate to Supplies which are capable of vesting in the Commonwealth under the **Ownership and Risk** clause of the conditions of contract.

Incentive Payments should not be included in this Attachment, as they do not form part of the Contract Price. The negotiated key performance indicators, assessment periods, weightings and incentive payments payable for each assessment period should be detailed in the **Incentive Payments** Attachment to the conditions of contract prior to Contract signature.

### APPROPRIATENESS AND AMOUNT OF THE MOBILISATION PAYMENT

It is important that any proposal for a Mobilisation Payment is given careful consideration to ensure that the Mobilisation Payment is required by the Contractor in order for it to fulfil its contractual obligations. Mobilisation Payments will usually be between 5 and 15% of the Contract Price, however, in determining the amount of the Mobilisation Payment consideration should be given to the entire payment regime. For further guidance on the appropriateness of any proposed Mobilisation

Payment, reference should be made to the guidance provided in relation to the **Schedule of Payments** clause of the conditions of tender.

**Drafter's action:** If the Commonwealth is in a position to specify its proposed Milestones and Milestone Dates prior to release of the RFT, drafters are to include this information in this Attachment prior to release of the RFT. If the Commonwealth is not in position to do so, then no input is required prior to release of the RFT.

Prior to Contract signature, drafters must include the negotiated Schedule of Payments in this Attachment. The Schedule should be based on the guidance provided in the **Schedule of Payments** clause of the conditions of tender and the successful tenderer's response.

**Related clauses:** The **Schedule of Payments** clause of the **Financial** annex to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the proposed amount and dates for Milestone Payments, and the amount, purpose and date of any Mobilisation Payment.

The **Payment** clause of the draft conditions of contract details the process that applies to payments under the Contract.

The **Mobilisation Payment** clause of the draft conditions of contract details the amortisation process applicable to the Mobilisation Payment, the financial security requirements for the Mobilisation Payment and the Commonwealth's rights to exercise the Mobilisation Payment security.

## PRICE VARIATION FORMULA

### Reference:

Volume 1 N/A

Volume 2 Attachment E

Sponsor: Contracting Policy & Operations

Status: Optional. This Attachment is to be included where the Commonwealth has agreed to pay for fluctuations in the cost of labour and materials over the life of the Contract in accordance with the Price Variation clause of the draft conditions of contract.

Purpose: To explain the application of price variation to payments made under the Contract.

Policy: It is Defence policy that contracts of up to two years duration should not allow contractor's to claim compensation for variations in the cost of labour and materials. Where a contract is to extend beyond two years the Department's preference is that price variation clauses should be included to recompense the Contractor for increases in the cost of labour and materials. Failure to adopt a price variation clause in a contract which runs for more than two years is likely to result in tenderers including a significant contingency amount to mitigate unforeseeable increases in labour and materials costs over the life of the Contract.

*DPPM Section 2, Chapter 2.2*

Guidance: The **Price Variation** clause of the conditions of contract states that the formula in this Attachment must be applied to calculate the price variation applicable for payments under the **Payment** clause of the conditions of contract.

### USE OF SINGLE OUTPUT INDEX PREFERRED

The Department's preference is that output indices (reflecting variations in the cost of an item produced) be used to calculate price variation of both labour and materials under a contract. Output indices do not require adjustment for productivity gains (as these are reflected in the cost of the item) and they enable the parties to simplify the calculation of price variation claims as per the single index formula in this Attachment.

### USE OF MULTIPLE INDICES

Where a single output index is deemed inappropriate by the parties the alternative is to utilise separate input (reflecting variation in the cost of inputs used to produce an item e.g. labour and materials) or output indices to calculate labour and materials price variation as per the multiple indices formula in this Attachment. Where multiple indices are used it is necessary for the parties to agree what percentage of the Contract Price will be attributed to the cost of labour, local materials and imported materials. Additionally the parties will need to identify indices that are acceptable for application to these three categories which collectively make up the Contract Price.

### CALCULATING PRICE VARIATION CLAIMS

When calculating price variation claims it is recommended that calculations are rounded to four decimal places. This ensures that calculations are made on the same basis by the parties and rounding is not used to the detriment of the other.

Policy questions and requests for advice on calculation of price variation should be directed to Contracting Policy and Operations Branch.

### ACCEPTABLE INDICES

Indices which are acceptable to the Department are identified in the notes to this Attachment. It is Departmental policy not to accept private association indices because:

- a. the results of private association wages surveys are closely guarded by the association and non members are often refused access to the results;
- b. the survey sample can be subject to changes in composition thereby invalidating the relative nature of the measure; and
- c. depending on the skill level and employment conditions of the individual, the often high wage rate increases reflected in the survey may not be paid to the individual employees under contract.

Further advice on acceptable indices can be obtained from Contracting Policy and Operations Branch or the Australian Bureau of Statistics (ABS) on Client Services telephone 1300 135 070. The ABS Internet address is <http://www.abs.gov.au>.

#### ALTERNATIVE COST INVESTIGATION METHOD

Where suitable indices cannot be agreed upon by the parties to the Contract an alternative approach is to conduct a once a year cost investigation to determine what real increases in wages have occurred and use these results to vary the Contract Price. This is not the Department's preferred approach due to the administrative burden assumed by the Commonwealth but it may provide an equitable solution where a compromise between the parties cannot be achieved. Where this approach is taken regard must be had to whether any part of the wage increases were due to productivity increases. Where a wage increase is offset by a productivity increase, it may not be fair to pass on the wage increase to the Commonwealth through higher prices.

Drafter's action: Nil

Related clauses: The **Variations for Fluctuations in the Cost of Labour and Materials** clause of the **Financial** annex to the conditions of tender requests tenderers to provide the tenderer's preferred indices for the price variation formula at this Attachment.

The **Price and Payment** clause of the draft conditions of contract contains the various clauses that deal with payment under the Contract. In particular, the **Price Variation** clause of the draft conditions of contract details how price variation will apply to the Contract and which elements of the Contract Price shall be subject to price variation.



**INCENTIVE PAYMENTS**Reference:Volume 1 N/AVolume 2 Attachment FSponsor: Contracting Policy & Operations and Materiel Finance DivisionStatus: Optional. To be included where the Incentive Payments clause of the draft conditions of contract is included to allow for payment of Incentive Payments under the Contract.Purpose: To detail the key performance indicators, assessment periods, weightings and Incentive Payments payable for each assessment period.Policy: In accordance with the *Financial Management and Accountability Act 1997*, the Commonwealth may pay the Contractor Incentive Payments only for superior performance of the Contract.*DPPM Section 2, Chapter 2.2**Financial Management and Accountability Act 1997*Guidance: The **Incentive Payments** clause of the conditions of contract entitles the Contractor to claim Incentive Payments in addition to the Contract Price for superior performance of the Contract.**INFORMATION TO BE INCLUDED IN THIS ATTACHMENT**

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Drafters should include the Commonwealth's preferred assessment periods, proposed key performance indicators and weightings (if any) in this Attachment prior to release of the RFT. Prior to Contract signature drafters must include the negotiated key performance indicators, weightings, assessment periods and the Incentive Payment payable for each assessment period. The information included should be based upon the guidance contained in the **Incentive Payments** clause of the annexes to the conditions of tender and the successful tenderer's response.

**SELECTION OF KEY PERFORMANCE INDICATORS AND WEIGHTINGS**

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In most cases, drafters will only include categories of key performance indicators rather than identify specific key performance indicators in the **Incentive Payments** clause of the conditions of tender prior to release of the RFT. This is because the areas of the proposed contract for which superior performance by the Contractor will be of benefit to the Commonwealth will depend upon each tenderer's proposal.

It is essential that drafters ensure that the key performance indicators negotiated for the Contract are objective, measurable and clearly stated. Categories on which key performance indicators may be based include:

- a. schedule;
- b. quality;
- c. contract relationship including relationship between Defence, the Contract, Subcontractors and third parties;
- d. innovation under the Contract;
- e. All;
- f. IP; and
- g. government procurement policies including policy on Occupational Health and Safety, the environment, employment of Aboriginal and Torres Strait Islanders, equity and diversity and security.

When selecting the weightings for the key performance indicators for each assessment period it should be noted that the weightings for each key performance indicator may vary depending upon the work being conducted in the assessment

period and the importance of the key performance indicator at the relevant stage of the Contract.

#### SELECTION OF THE INCENTIVE PAYMENTS FOR ASSESSMENT PERIODS

Prior to Contract signature drafters must also include the negotiated Incentive Payments payable for each assessment period. In accordance with the **Incentive Payments** clause of the draft conditions of contract, the maximum amount payable as Incentive Payments under the Contract must be apportioned over the assessment periods. It should be noted that the amount need not be apportioned equally over the assessment periods but may be distributed based upon the importance of the key performance indicators in the various assessment periods and the relevant stage of the Contract.

**Drafter's action:** Prior to release of the RFT, drafters should include the Commonwealth's preferred assessment periods, proposed key performance indicators and weightings (if any). Prior to Contract signature drafters must include the negotiated key performance indicators, weightings, assessment periods and the Incentive Payment payable for each assessment period.

**Related clauses:** The **Incentive Payments** clause of the **Financial** annex to the conditions of tender notifies tenderers of the proposed Incentive Payment regime and requests tenderers to provide details in relation to the Incentive Payment provisions.

The **Incentive Payments** clause of the draft conditions of contract details the process that applies to the payment of Incentive Payments under the Contract.

**LIQUIDATED DAMAGES**Reference:Volume 1 N/AVolume 2 Attachment GSponsor: Contracting Policy & Operations, Materiel Finance Division and Industry PolicyStatus: Optional. This clause is to be included in all RFTs where the Australian Industry Involvement clause of the draft conditions of contract is included.

As a further option, the **For Failure to Achieve Delivery** clause should be included where the Commonwealth will suffer loss if delivery of any item of Supplies is not achieved on time and it is appropriate to recover the loss from the Contractor.

Purpose: To specify the amount of liquidated damages that will apply for failure to achieve specific Industry Requirements. To specify the amount of liquidated damages that will apply for failure to achieve delivery of Supplies.Policy: *A New Tax System (Goods and Services Tax) Act 1999*  
*DPPM Section 6, Chapter 6.1*Guidance: If the Contractor fails to deliver any item of Supplies by the relevant date specified in the **Schedule of Payments** Attachment to the conditions of contract or to achieve the Industry Requirements specified in the **Australian Industry Involvement** Attachment to the conditions of contract by Acceptance of the last item of Supplies, the Contractor will be in breach of Contract. The Commonwealth will be entitled to recover damages for that breach where it can be shown that the Commonwealth has suffered loss as a result of the breach. To provide certainty and avoid the costs associated with litigation, the parties may, through a liquidated damages clause, agree on the amount of damages to be recovered in the event of a failure by the Contractor to deliver Supplies on time or to achieve the Industry Requirements by Acceptance of the last item of Supplies.**INFORMATION TO BE INCLUDED IN THIS ATTACHMENT**

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Prior to release of the RFT, drafters must insert details of the relevant Industry Requirements to which liquidated damages are to apply, the amount of liquidated damages that is to apply for each Industry Requirement and any other specific conditions which are to apply.

Where the optional section – Failure to Achieve Delivery – is included in the RFT, drafters must insert details of the Supplies to which liquidated damages are to apply, the rate of liquidated damages or formula for the calculation of the liquidated damages that is to apply for each item of Supplies and any other specific conditions which are to apply. It should be noted that the date by which an item of Supplies must be delivered may be the date specified in the **Schedule of Payments** Attachment to the conditions of contract or where the Commonwealth allows the Contractor a grace period, the date stipulated in this Attachment.

Prior to Contract signature, drafters must include the negotiated liquidated damages details based upon the information in the Attachment and the successful tenderer's response.

**ENFORCEABILITY OF LIQUIDATED DAMAGES**

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To be enforceable against the Contractor in law, the liquidated damages amounts included in this Attachment must represent a genuine pre-estimate of the loss likely to be suffered by the Commonwealth as a result of the failure by the Contractor to deliver any item of the Supplies on time, or achieve the Industry Requirements by Acceptance of the last item of Supplies. The calculation of the amount of liquidated damages is therefore critical to the enforceability of the **Liquidated Damages** and **Australian Industry Involvement** clauses of the draft conditions of contract.

## CALCULATION OF LIQUIDATED DAMAGES

A liquidated damages amount will be regarded as a genuine pre-estimate if it can be shown to have been calculated on the basis of the likely loss to be suffered, even if the actual loss suffered does not equal the pre-estimate. Drafters must ensure that, having calculated the amount of liquidated damages, the method of calculation is retained. This evidence will be required should the Contractor ever attempt to claim that the liquidated damages do not represent a genuine pre-estimate of loss.

Because the Commonwealth is not a company that trades with a view to profit, it can sometimes be difficult to identify the loss suffered as a result of a failure to deliver on time. To lessen the chances of an argument over whether the Commonwealth suffered loss, the **Liquidated Damages** and **Australian Industry Involvement** clauses of the conditions of contract have been included to establish the Contractor's agreement that the Commonwealth will suffer loss and damage should there be a failure to deliver Supplies on time or a failure to achieve the Industry Requirements in the All Plan.

Generally, where one amount is specified to apply to each failure to deliver Supplies regardless of the item of Supplies in question, it will be difficult to show that the amount represents a genuine pre-estimate of loss. For example, a court would find it difficult to accept, without further explanation, why the loss suffered by the Commonwealth when the Contractor failed to deliver technical manuals on time was the same as the loss suffered when the Contractor failed to complete an aircraft on time. It is therefore important to consider each item of Supplies to be delivered to determine whether it is likely that the Commonwealth will suffer loss if delivery of Supplies is not achieved on time and to determine what that loss is likely to be.

In some cases the rate of liquidated damages to be applied may be better expressed as a formula.

**Example:**

If the Contractor is contracted to supply training equipment and material by a certain date in order for a Commonwealth training course to commence, the loss suffered by the Commonwealth may be measured by the difference in cost between training its members at its own facility and having them trained at the nearest private training facility. An estimate of the difference in cost may be made but the loss will depend on the number of members to be trained. If it is not possible to make a genuine pre-estimate of the likely number of members to be trained, the parties may agree to use a formula:

$$LD = \$300.00 \times P$$

where LD is the liquidated damages to be applied;

\$300.00 is the difference in cost between training its members at its own facility and having them trained at the nearest private training facility; and

P is the number of members requiring training during the period of delay.

Caution should be exercised when using a formula to calculate liquidated damages. A formula should not be used to disguise an inability to arrive at a genuine pre-estimate of loss as this will affect the ability of the Commonwealth to enforce the clause and will remove certainty which is the main advantage of using a liquidated damages clause.

## INCLUSION OF SUPPLIES AND INDUSTRY REQUIREMENTS

Where a genuine pre-estimate of loss can be determined for an item of Supplies or Industry Requirement, it may be included in this Attachment. If no genuine pre-

estimate of loss can be determined for an item of Supplies or Industry Requirement it should not be included in this Attachment.

Where an item of Supplies or Industry Requirement is not included in this Attachment, the Commonwealth will only be able to recover damages for the Contractor's failure to deliver the item of Supplies or achieve the Industry Requirement if the Commonwealth can show that it has suffered loss as a result of the breach of Contract.

#### INCLUSION OF A GST AMOUNT

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The amount of liquidated damages included in this Attachment must include a component for GST. Under the *A New Tax System (Goods and Services Tax) Act 1999*, where the Commonwealth claims liquidated damages under the Contract it will be liable to pay GST to the Australian Taxation Office.

**Drafter's action:** Prior to release of the RFT, drafters must insert details of the relevant Industry Requirements to which liquidated damages are to apply, the amount of liquidated damages that is to apply for each Industry Requirement and any other specific conditions which are to apply.

Where the optional section – Failure to Achieve Delivery – is included in the RFT, drafters must insert details of the items of Supplies to which liquidated damages are to apply, the rate of liquidated damages or formula for the calculation of the liquidated damages that is to apply for each item of Supplies and any other specific conditions which are to apply.

Prior to Contract signature, drafters must include the negotiated liquidated damages details based upon the information in the Attachment and the successful tenderer's response. These amounts should be GST inclusive.

**Related clauses:** The **Australian Industry Involvement** clause of the draft conditions of contract details the liquidated damages that may be claimed by the Commonwealth where the Contractor fails to achieve the Industry Requirements in the All Plan by Acceptance of the last item of Supplies.

The **Liquidated Damages** clause of the draft conditions of contract sets out the parties agreement on the amount of damages to be paid by the Contractor in the event that the Contractor fails to deliver specific items of Supplies on time.

The **Limitation of Liability** clause of the draft conditions of contract proposes a cap for liquidated damages under the Contract.



**GOVERNMENT FURNISHED MATERIALS AND GOVERNMENT FURNISHED FACILITIES****ANNEX A - GOVERNMENT FURNISHED MATERIAL**Reference:

<u>Volume 1</u>	N/A
<u>Volume 2</u>	Attachment H

Sponsor: Contracting Policy & Operations

Status: Optional. To be included where the Commonwealth proposes or mandates GFM for inclusion in, or use during the production of, the Supplies and/or where the Commonwealth is prepared to allow tenderers to request GFM.

Purpose: To specify the GFM that will be provided to the Contractor for use in the production of the Supplies.

Policy: The preferred Departmental position is to minimise the provision of GFM to Contractors. However, in some circumstances it will not be possible for a Contractor to perform the work required under the Contract without GFM.

*DI(G) LOG 07-4 "Provision of Material to Contractors"*

Guidance: GFM is any equipment, information or data provided to a Contractor by the Commonwealth to assist in the performance of a contract. There are three types of GFM:

- a. Commonwealth Mandated GFM;
- b. Commonwealth proposed GFM; and
- c. Contractor proposed GFM.

LIABILITY FOR GFM

The **Government Furnished Material** clause of the conditions of contract sets out the risk allocation between the Commonwealth and the Contractor relating to the provision of GFM. Apart from GFI, which the Contractor uses at its own risk, the Contractor can not be held responsible for defects in the Supplies which result from defects in GFM, unless those defects were caused by the Contractor's or its Subcontractor's negligence, default or unlawful act. For this reason it is the preferred Departmental position to minimise the provision of GFM.

INFORMATION TO BE INCLUDED IN THIS ATTACHMENT

Prior to release of the RFT, a list of Commonwealth Mandated GFM and/or Commonwealth proposed GFM should be included in the format set out in this Attachment.

Drafter's action: Prior to release of the RFT, drafters must include the list of Commonwealth mandated GFM and/or Commonwealth proposed GFM. Prior to Contract signature, drafters must include a description of the GFM to be provided under the Contract, its purpose, the date for delivery or provision of access to the GFM, the proposed time period for inspection of the GFM and the date of return of the GFM.

Related clauses: The **Government Furnished Material** clause of the **Management** annex to the conditions of tender informs tenderers of GFM that is being mandated or proposed by the Commonwealth for use by the Contractor in relation to the Contract and allows tenderers to elect to use the proposed GFM and/or request that additional GFM be provided.

The **Government Furnished Material** clause of the draft conditions of contract contains the GFM provisions for the Contract.

The **Glossary** Attachment of the draft conditions of contract defines the meaning of words contained in the Contract.

The **Government Furnished Material Management** clause of the draft SOW contains the GFM management requirements of the Contract.



**ANNEX B - GOVERNMENT FURNISHED FACILITIES**Reference:Volume 1 N/AVolume 2 Attachment HSponsor: Infrastructure DivisionStatus: Optional. To be included where the Commonwealth proposes or mandates GFF for use during the production of the Supplies and/or where the Commonwealth is prepared to allow tenderers to request GFF.Purpose: To specify the GFF that will be provided to the Contractor for use in the production of the Supplies.Policy: The preferred Departmental position is to minimise the provision of GFF to Contractors. However, in some circumstances it will not be possible for a Contractor to perform the work required under the Contract without GFF.*DI(G) ADMIN 35-1 "Procedures for the Use of Defence Estate Assets by Non-Defence Organisations or Individuals including Commercial Contractors"*Guidance: There are three types of GFF:

- a. Commonwealth mandated GFF;
- b. Commonwealth proposed GFF; and
- c. Contractor proposed GFF.

**INFORMATION TO BE INCLUDED IN THIS ATTACHMENT**

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Prior to release of the RFT, a list of Commonwealth mandated GFF and/or Commonwealth proposed GFF should be included in the format set out in this Attachment

Prior to Contract signature drafters must include the Commonwealth mandated GFF and Commonwealth and Contractor proposed GFF that will be provided under the Contract in the **Government Furnished Materiel** Attachment to the conditions of contract. Drafters must ensure that the description of the GFF, its purpose, the date for provision of access to the GFF, the proposed time period for inspection of the GFF and the date of return of the GFF are clearly stated in the **Government Furnished Materiel** Attachment to the conditions of contract.

Drafter's action: Prior to release of the RFT, drafters should include details of Commonwealth mandated GFF and/or Commonwealth proposed GFF. Prior to Contract signature, drafters must include a description of the GFF to be provided under the Contract, its purpose, the proposed date for provision of access to the GFF, the proposed time period for inspection of the GFF and the date of return of the GFF.

Related clauses: The **Government Furnished Facilities** clause of the **Management** annex to the conditions of tender informs tenderers of GFF that is being mandated or proposed by the Commonwealth for use by the Contractor in relation to the Contract and allows tenderers to elect to use the proposed GFF and/or request that additional GFF be provided.

The GFF Licence Deed at the **Government Furnished Materiel** Attachment of the draft conditions of contract contains the GFF provisions for the Contract.

The **Government Furnished Materiel Management** clause of the draft SOW contains the GFM management requirements for the Contract.



**ANNEX C - GOVERNMENT FURNISHED FACILITIES LICENCE**Reference:Volume 1 N/AVolume 2 Attachment HSponsor: Infrastructure DivisionStatus: Optional. To be included where GFF is being mandated or offered for use in the performance of the Contract.Purpose: To establish a contractual relationship which specifies the responsibilities of each party for the Commonwealth facilities provided to the Contractor for use in the performance of the Contract.Policy: The preferred Departmental position is to minimise the provision of GFF to Contractors. However, in some circumstances it will not be possible for a Contractor to perform the work required under the Contract without GFF.*DI(G) ADMIN 35-1 "Procedures for the Use of Defence Estate Assets by Non-Defence Organisations or Individuals including Commercial Contractors"*Guidance: Head Infrastructure Division will determine what facilities can be offered and the basis on which they are offered. The recommendation of the organisation establishing the Contract will be considered when determining availability of GFF.**INFORMATION TO BE INCLUDED IN THIS ATTACHMENT**

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The Standard Licence Agreement for use by Contractors of Defence Facilities ("the standard Defence GFF licence") should be included in part 3 of this Attachment prior to release of the RFT after consultation with Infrastructure Division staff. A list of Commonwealth mandated GFF and/or Commonwealth proposed GFF should be included in part 2 of this Attachment.

Prior to Contract signature drafters must include the negotiated GFF licence in part 3 of this Attachment. The GFF licence should be based upon the Standard Licence Agreement for use by Contractors of Defence Facilities included in the RFT and the successful tenderer's response.

**MODIFICATION OF THE STANDARD GFF LICENCE**

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The standard Defence GFF licence can be obtained from <http://defweb.cbr.defence.gov.au/im/> and advice on this licence can be obtained from Infrastructure Division.

The standard GFF licence may require modification to meet the overall objectives of the proposed contract. The licence should not be modified without Infrastructure Division advice.

Tenderers may also propose amendments to the GFF licence contained within the RFT. Where amendments are proposed, advice should be obtained from the Infrastructure Division prior to any amendments being agreed by the Commonwealth.

**EXECUTION OF THE GFF LICENCE**

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Drafters should note that as the GFF licence is a deed it must be executed as such. Drafters should refer to the guidance on execution of deeds contained at the end of the guidance on this Attachment.

Drafter's action: Prior to release of the RFT, drafters must include a GFF Licence. Prior to Contract signature, drafters must include the negotiated GFF licence.Related clauses: The **Government Furnished Facilities** clause of the **Management** annex of the conditions of tender, requests tenderers to provide details of the GFF that they

require to perform the Contract, including the date required, location, time period for inspection and intended purpose. Where the Commonwealth proposes GFF, the commercial rent applicable for that GFF must be included in the **Government Furnished Facilities** clause of the **Management** annex to the conditions of tender.

Tenderers must also identify in the **Government Furnished Facilities** clause of the conditions of tender the additional cost to be added to the tendered price should any GFF not be made available.

The **Government Furnished Facilities** Attachment to the draft conditions of contract contains details of all GFF to be provided under the Contract including the date required, location, time period for inspection and intended purpose of the GFF.

**AUSTRALIAN INDUSTRY INVOLVEMENT PLAN**Reference:Volume 1 N/AVolume 2 Attachment ISponsor: Industry PolicyStatus: CorePurpose: To contain the agreed Australian Industry Involvement Plan for the Contract.Policy: All Manual*DPPM Section 3, Chapter 3.12*Guidance: The All Plan outlines the Industry Requirements for the Contract and the agreed levels of Local Content and Strategic Industry Development Activities to be provided under the Contract.**INFORMATION TO BE INCLUDED IN THIS ATTACHMENT**

The **Australian Industry Involvement** Annex to the conditions of tender requests tenderers to provide an All Plan in the format specified in that Annex E. Prior to release of the RFT drafters should include in this Attachment the endorsed Industry Requirements, the weightings associated with each Industry Requirement, the All target and the preferred levels of Local Content and Strategic Industry Development Activities for the project.

Prior to Contract signature drafters should include the negotiated All Plan in this Attachment. The plan should be based on the information contained in the Australian Industry Involvement Annex to the conditions of tender and the successful tender's response. Information that should be contained in the All Plan includes:

- a. overview and benefits;
- b. management of the All Plan;
- c. Monitoring of All Achievement;
- d. Industry Requirements;
- e. Australian Industry Involvement Schedule;
- f. Australian Industry Involvement Activity Description Sheets;
- g. Strategic Industry Development Activity Description Sheets;
- h. All Target Summary;
- i. Overseas and ANZ Subcontractor Overview; and
- j. Commitment to Australian Industry.

Drafter's action: Prior to release of the RFT drafters should include in this Attachment the endorsed Industry Requirements, the weightings associated with each Industry Requirement, the All target and the preferred levels of Local Content and Strategic Industry Development Activities for the project. Prior to Contract signature, drafters must include the negotiated All Plan.

Related clauses: The **Australian Industry Involvement** Annex to the conditions of tender requests tenderers to provide an All Plan in the specified format.

The **Australian Industry Involvement** clause of the draft conditions of contract places a contractual obligation on the Contractor to deliver an All program to meet the objectives set out in this clause and achieve the stated levels of Local Content

and Strategic Industry Development Activities. The **Australian Industry Involvement** clause also details the liquidated damages that may be claimed by the Commonwealth where the Contractor fails to achieve the Industry Requirements in the All Plan by Acceptance of the last item of Supplies.

The **Liquidated Damages** Attachment to the draft conditions of contract details the liquidated damages that may be claimed by the Commonwealth where the Contractor fails to achieve specific Industry Requirements by Acceptance of the last item of Supplies. The **Australian Industry Involvement** clause of the draft SOW contains the All Plan requirement of the Contract.

**INTELLECTUAL PROPERTY SCHEDULE / INTELLECTUAL PROPERTY PLAN**Reference:Volume 1 Attachment DVolume 2 Attachment JSponsor: Contracting Policy & OperationsStatus: CorePurpose: To allow the Commonwealth to accurately capture all IP involved in a specific project and to facilitate the management of IP in Defence.Policy: Defence needs appropriate rights to appropriate technologies at appropriate times.  
DPPM – *Section 3, Chapter 3.6*  
*Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*Guidance:Volume 1 The Intellectual Property Schedule (IP) Schedule will consist of an amalgamation of this Attachment and the Contractor's response.INFORMATION TO BE INCLUDED IN ATTACHMENT D OF VOLUME 1

The IP Schedule contains the following information:

- a. item number in simple numerical sequence;
- b. description of the IP and the items of the Supplies to which it relates;
- c. the IP rights acquired by the Commonwealth in relation to the Supplies (use, maintain and dispose); and
- d. whether there is any Commonwealth or Third Party IP incorporated into the Supplies.

The Contractor is not required to provide the information required in the **Intellectual Property Schedule** Attachment as part of its tender response or at Contract signature but at any time prior to submission of the final claim for payment under the **Payment** clause of the conditions of contract. Provided the Contractor does so, the Commonwealth will be able to maintain accurate records of the IP it owns or holds a licence for.

The Contractor may choose to provide the information for this Attachment at Contract signature or at some other point before submission of the final claim for payment. The Commonwealth may, as good contract management practice, request from the Contractor prior to the end of the Contract to ensure that this Attachment contains up-to-date information and that any changes in the IP Schedule that have occurred between the submission of this Attachment and the end of the Contract are reflected in the Intellectual Property Schedule.

Volume 2 The Intellectual Property Plan (IP Plan) will consist of an amalgamation of the **Intellectual Property** clause of the **Commercial** annex to the conditions of tender and the preferred tenderer's response.INFORMATION TO BE INCLUDED IN ATTACHMENT J OF VOLUME 2

No information should be included in this attachment prior to release of the RFT. Prior to Contract signature drafters must include the negotiated IP Plan. The IP Plan includes the following information:

- a. item number in simple numerical sequence or in Contract Work Breakdown Structure;
- b. description of the IP and the items of the Supplies to which it relates;
- c. whether the IP is Background or Foreground IP;

- d. the source of the Foreground or Background IP;
- e. the form of the IP; and
- f. any limitations that apply in relation to the rights to modify, develop and manufacture.

#### MAINTAINING AND UPDATING THE IP PLAN

The **IP Plan** clause of the conditions of contract imposes an obligation on the Contractor to maintain and update the IP Plan set out in this Attachment by submitting Contract change proposals to reflect any changes to the information contained in the IP Plan that was agreed at Contract signature. For example, Foreground IP may be created during or in connection with the Contract that was not envisaged at Contract signature and was not included in the IP Plan at Part 1 of this attachment. It is important that the IP Plan be amended to include this new Foreground IP so that the Commonwealth has accurate records of the IP it owns or holds a licence for, as well as records of any limitations that may apply in relation to the exercise of the rights obtained under the **Intellectual Property** clause.

#### Drafter's action:

- Volume 1 No input is required prior to release of the RFT. Prior to submission of the final claim for payment, the IP Schedule provided by the Contractor must be included.
- Volume 2 No input is required prior to release of the RFT. Prior to Contract signature, the negotiated IP Plan must be included.

#### Related clauses:

- Volume 1 The **Intellectual Property** clause of the draft conditions of contract contains the IP clauses for the Contract.
- Volume 2 The **Intellectual Property** clause of the **Commercial** annex to the conditions of tender requests tenderers to provide a list of Intellectual Property that will be brought into or created under any resultant contract.
- The **Intellectual Property** clause of the draft conditions of contract contains the IP clauses for the Contract.
- The **Intellectual Property Management** clause of the draft SOW contains the IP Plan requirements for the Contract.



**SCHEDULE OF APPROVED SUBCONTRACTORS**Reference:

Volume 1 N/A

Volume 2 Attachment K

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To list the Approved Subcontractors under the Contract.

Policy: Nil

Guidance: The **Schedule of Subcontractors** clause of the annexes to the conditions of tender requests each tenderer to provide details of proposed Approved Subcontractors.

**WORK TO BE PERFORMED BY APPROVED SUBCONTRACTORS**

The **Subcontracts** clause of the conditions of contract prevents the Contractor from Subcontracting work to Subcontractors who are not Approved Subcontractors for work exceeding a certain amount, work relating to specific aspects of the Contract or where the Subcontractor will be bringing IP or creating IP under the proposed Subcontract necessary to enable the Commonwealth to use and support the Supplies without first obtaining the Commonwealth Representative's written approval. Therefore it is essential that all Subcontractors meeting the above requirements are included in this Attachment either before Contract signature or after Contract signature by way of a Contract change proposal.

Drafter's action: Nil

Related clauses: The **Schedule of Subcontractors** clause of the **Management** annex to the conditions of tender requests tenderers to provide details of Subcontractors who will be required to be listed as Approved Subcontractors in this Attachment.

The **Subcontracts** clause of the draft conditions of contract informs the Contractor of the Commonwealth's requirements when Subcontractors are involved in the production of the Supplies and outlines the requirement to use only Approved Subcontractors for certain aspects of the Contract.



**AGREED DEEDS****ANNEX A - APPROVED SUBCONTRACTOR INTELLECTUAL PROPERTY DEED**Reference:Volume 1 N/AVolume 2 Attachment LSponsor: Contracting Policy & OperationsStatus: CorePurpose: To allow the Commonwealth to gain access to any Approved Subcontractor IP listed in the deed.Policy: Defence needs appropriate rights to appropriate technologies at appropriate times.  
*Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*Guidance: This deed is a tripartite deed between an Approved Subcontractor, the Contractor and the Commonwealth. It allows for an Approved Subcontractor to license the Commonwealth to exercise IP rights in Approved Subcontractor owned Background and Foreground IP. Clauses in this deed are similar to the **Intellectual Property** clause of the draft conditions of contract. For additional guidance, drafters should refer to the guidance on relevant subclauses of the **Intellectual Property** clause in the Handbook.INFORMATION TO BE INCLUDED IN THIS ATTACHMENT

No further information should be included in this Attachment prior to release of the RFT.

Prior to Contract signature drafters must include the negotiated Approved Subcontractor IP Deed in this Attachment. The deed should be based upon the deed contained in this Attachment and the successful tenderer's response.

AMENDMENT OF THE APPROVED SUBCONTRACTOR IP DEED

Any proposal from a tenderer to alter the terms of Defence's standard Approved Subcontractor IP Deed should be carefully evaluated. The Approved Subcontractor IP Deed and the draft conditions of contract have similar definitions and terms. The Approved Subcontractor IP Deed should not be altered unless the proposed amendment is consistent with an amendment made to the corresponding clauses and definitions in the draft conditions of contract.

Where the Contractor or an Approved Subcontractor propose a change to the deed included in this Attachment after Contract signature, careful consideration should be given to the request and the potential impact on the Commonwealth's Intellectual Property rights under the Contract. Where the proposed change is acceptable to the Commonwealth, a Contract change proposal should be agreed by the parties to the Contract.

Prior to any changes being made to the Approved Subcontractor IP Deed, whether prior to Contract signature or by way of a Contract change proposal, advice should be sought from Contracting Policy and Operations Branch.

FAILURE TO DELIVER AN APPROVED SUBCONTRACTOR IP DEED

The **Intellectual Property Licence** clauses of the conditions of contract places an obligation on the Contractor to ensure that the Commonwealth is granted a licence from each Approved Subcontractor. This clause also allows the Commonwealth the request that the Contractor arrange for an Approved Subcontractor to execute a deed substantially in the form set out at this Attachment and provide the deed to the Commonwealth. It should be noted that the requirement for an executed deed from an Approved Subcontractor is at the Commonwealth's discretion. Where the Contractor fails to deliver a deed from an Approved Subcontractor in the form of

the Approved Subcontractor IP Deed after a request has been made by the Commonwealth, the Contractor will be in breach of Contract and the Commonwealth may claim damages where it has suffered loss as a result of the breach.

Advice should be sought from Contracting Policy and Operations Branch prior to any action being taken to claim damages.

#### COMPLETION OF THE SCHEDULES TO THE DEED

Schedules 1 and 2 of the Approved Subcontractor IP Deed are to be completed by drafters prior to signature of the deed. The Schedules are to contain the following information:

- a. the negotiated IP Plan must be included in Schedule 1; and
- b. the negotiated **Progress Certification, Acceptance, Notification of Defects, Support Period and Termination for Convenience** clauses of the draft conditions of contract must be included in Schedule 2.

As the Approved Subcontractor is not a party to the Contract between the Commonwealth and the Contractor and there is no privity of contract, it is essential that the above information is included in the Schedules to the deed to ensure that the Approved Subcontractor fully understands its rights and responsibilities under the deed.

#### EXECUTION OF THE APPROVED SUBCONTRACTOR IP DEED

Drafters should note that as the Approved Subcontractor IP Deed is a deed it must be executed as such. Drafters should refer to the guidance on execution of deeds contained at the end of the guidance on the Attachments.

Drafter's action: No input is required prior to release of the RFT.

Prior to Contract signature, the negotiated Approved Subcontractor IP Deed must be included.

Related clauses: Tenderers may propose Approved Subcontractors in their responses to the **Schedule of Subcontractors** clause of the **Management** annex to the conditions of tender.

The **Intellectual Property** clause of the draft conditions of contract contains the IP clauses for the Contract. In particular, the **Intellectual Property Licence** clause of the draft conditions of contract requires the Contractor to ensure that the Commonwealth is granted a licence from each Approved Subcontractor and at the request of the Commonwealth arrange for an Approved Subcontractor to execute a Deed in the form set out in this Attachment.

**ANNEX B – NOT USED**



**CERTIFICATES****ANNEX A - PROGRESS CERTIFICATE**Reference:Volume 1 N/AVolume 2 Attachment MSponsor: Contracting Policy & OperationsStatus: Optional. To be included where progressive achievement of Milestones will be certified by Progress Certification prior to Supplies being Accepted and the Progress Certification clause is included in the draft conditions of contract.Purpose: To identify the form to be used by the Contractor and the Commonwealth Representative to signify Progress Certification.Policy: NilGuidance: Progress Certification provides a mechanism by which the Commonwealth Representative can provide feedback to the Contractor on progress of a particular Milestone, make payment to the Contractor and vest Supplies in the Commonwealth without such feedback, payment or ownership being construed as Acceptance of the Supplies.

An electronic form of the Progress Certificate can be found as web form *AD181* on the Defence Web Forms System on <http://pubsdb.cbr-dps.defence.gov.au/wfs/>.

**AMENDMENT OF THE STANDARD PROGRESS CERTIFICATE**

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The standard Progress Certificate is the recommended form for the Progress Certificate, however, drafters may substitute another more appropriate certificate where necessary. Where changes are made to the standard Progress Certificate, drafters must ensure that there is no conflict between the Contract definitions of 'Progress Certification' and 'Acceptance' on the one hand and what the certificate purports to certify, through its wording, on the other. Prior to any changes being made to the Progress Certificate, advice should be sought from Contracting Policy and Operations Branch to ensure no conflict is created between the draft conditions of contract and the Progress Certificate.

Drafter's action: No input is required prior to release of the RFT. Prior to Contract signature, drafters must insert the negotiated Progress Certificate.Related clauses: The **Progress Certification** clause of the draft conditions of contract details the conditions under which Supplies will be Progress Certified and the procedure that will apply to Progress Certification.

The **Schedule of Payments** Attachment to the draft conditions of contract lists all the Milestones that are subject to Progress Certification and includes the amount of any payment that will be made upon the achievement of Progress Certification. It is important that the mechanism which will signify the achievement of each Milestone and entitle a Contractor to payment is included in the Attachment.

Annex B of this Attachment contains the **Supplies Acceptance Certificate** for the Contract and Annex C of this Attachment contains the **Final Acceptance Certificate** for the Contract.





**ANNEX B - SUPPLIES ACCEPTANCE CERTIFICATE**Reference:

Volume 1 Attachment E

Volume 2 Attachment M

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To identify the form to be used by the Contractor and the Commonwealth Representative to signify Acceptance of the Supplies.

Policy: Nil

Guidance: Acceptance provides a mechanism by which the Commonwealth Representative can notify the Contractor that the Supplies offered for Acceptance meet the requirements of the Contract and warranty period commences.

An electronic form of the Supplies Acceptance Certificate can be found as web form *SG001* on the Defence Web Forms System on <http://pubsdb.cbr-dps.defence.gov.au/wfs/>.

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**AMENDMENT OF THE STANDARD SUPPLIES ACCEPTANCE CERTIFICATE**

The standard Supplies Acceptance Certificate is the recommended form for the Supplies Acceptance Certificate, however, drafters may substitute another more appropriate certificate where necessary. Where changes are made to the standard Supplies Acceptance Certificate, drafters must ensure that there is no conflict between the Contract definitions of 'Progress Certification', 'Acceptance' and 'Final Acceptance' on the one hand and what the certificate purports to certify, through its wording, on the other. Prior to any changes being made to the Supplies Acceptance Certificate, advice should be sought from Contracting Policy and Operations Branch to ensure no conflict is created between the draft conditions of contract and the Supplies Acceptance Certificate.

Drafter's action: No input is required prior to release of the RFT. Prior to Contract signature, drafters must insert the negotiated Supplies Acceptance Certificate.

Related clauses:

Volume 1 The **Acceptance** clause of the draft conditions of contract details the conditions under which Supplies will be Accepted and the procedure that will apply to Acceptance.

Volume 2 The **Acceptance** clause of the draft conditions of contract details the conditions under which Supplies will be Accepted and the procedure that will apply to Acceptance.

The **Schedule of Payments** Attachment to the draft conditions of contract lists all the Milestones that are subject to Acceptance and includes the amount of any payment that will be made upon Acceptance. It is important that the mechanism which will signify the achievement of each Milestone and entitle a Contractor to payment is included in this Attachment.

Annex A of this Attachment contains the **Progress Certificate** for the Contract and Annex C of this Attachment contains the **Final Acceptance** Certificate for the Contract.



**ANNEX C - FINAL ACCEPTANCE CERTIFICATE**Reference:Volume 1 N/AVolume 2 Attachment MSponsor: Contracting Policy & OperationsStatus: Optional. To be included when the **Final Acceptance** clause is included in the draft conditions of contract.Purpose: To identify the form to be used by the Contractor and the Commonwealth Representative to signify Final Acceptance.Policy: NilGuidance: The Final Acceptance Milestone represents the final Milestone of the Contract. Final Acceptance provides a mechanism by which the Commonwealth can notify the Contractor that it has fulfilled all of its obligations under the Contract and make the final payment to the Contractor. Final Acceptance also provides the Commonwealth with a mechanism by which it can withhold the final payment due to the Contractor until all the Contractor's obligations under the Contract have been fulfilled and the Supplies function and integrate as required by the Contract.

An electronic form of the Final Acceptance Certificate can be found as web form AD182 on the Defence Web Forms System on <http://pubsdb.cbr-dps.defence.gov.au/wfs/>

**AMENDMENT OF THE STANDARD FINAL ACCEPTANCE CERTIFICATE**

The standard Final Acceptance Certificate is the recommended form for the Final Acceptance Certificate, however, drafters may substitute another more appropriate certificate where necessary. Where changes are made to the standard Final Acceptance Certificate, drafters must ensure that there is no conflict between the Contract definitions of 'Progress Certification', 'Acceptance' and 'Final Acceptance' on the one hand and what the certificate purports to certify, through its wording, on the other. Prior to any changes being made to the Final Acceptance Certificate, advice should be sought from Contracting Policy and Operations Branch to ensure no conflict is created between the draft conditions of contract and the Final Acceptance Certificate.

**CERTIFICATION**

The standard Final Acceptance Certificate requires the Contractor to certify that, other than the claims specifically mentioned in the Final Acceptance Certificate, the Contractor has no further claims outstanding against the Commonwealth. This is so the Commonwealth will know, when deciding whether to sign the Final Acceptance Certificate, whether or not the Contractor has any outstanding claims for payment. Normally, the only outstanding claims expected to be set out in the Final Acceptance Certificate would be for the Final Acceptance Milestone and any related price variation claim, for which the Commonwealth would make payment following its endorsement of the Supplies Acceptance Certificate.

However, the Final Acceptance Certificate also makes provision for the Contractor to list other outstanding claims which the Contractor may have against the Commonwealth. Depending on the nature of any such claims, the Commonwealth would need to consider whether it can endorse the Final Acceptance Certificate in accordance with the **Final Acceptance** clause. Advice should be sought from Contracting Policy and Operations Branch where any uncertainty exists regarding the Commonwealth's endorsement of the Final Acceptance Certificate.

Drafter's action: No input is required prior to release of the RFT. Prior to Contract signature, drafters must insert the negotiated Final Acceptance Certificate.

Related clauses: The **Final Acceptance** clause of the draft conditions of contract details the conditions under which Final Acceptance will be granted and the procedure that will apply to Final Acceptance.

The **Schedule of Payments** Attachment to the draft conditions of contract lists the Milestone that will be subject to Final Acceptance and includes the amount of the payment that will be made upon Final Acceptance. It is important that the mechanism which will signify the achievement of each Milestone and entitle a Contractor to payment is included in this Attachment.

Annex A of this Attachment contains the **Progress Certificate** for the Contract and Annex B of this Attachment contains the **Supplies Acceptance Certificate** for the Contract.

## CONTRACT CHANGE PROPOSAL

### Reference:

Volume 1 N/A

Volume 2 Attachment N

Sponsor: Contracting Policy & Operations

Status: Core

Purpose: To provide a proforma to be used for all Contract change proposals.

Policy: *DPPM - Section 6, Chapter 6.1*

Guidance: All changes to the Contract must be proposed and approved in accordance with the Change to the Contract clause of the conditions of contract. All Contract change proposals must be in the form of the Contract change proposal set out at this Attachment, and where a change to the SOW is being proposed, must be accompanied by an Engineering change proposal.

Drafter's action: No input is required prior to release of the RFT. Prior to Contract signature, drafters must insert the negotiated Contract Change Proposal.

Related clauses: The **Change to the Contract** Clause of the draft conditions of contract notifies the Contractor that the Contract may only be varied in accordance with the Change to the Contract clause and details the process for the proposal and approval of Contract change proposals.

The **Engineering Change Proposal** Attachment to the draft conditions of contract will contain the agreed Engineering change proposal proforma.



## ENGINEERING CHANGE PROPOSAL

### Reference:

Volume 1 N/A

Volume 2 Attachment O

Sponsor: Contracting Policy & Operations and Standardisation Branch

Status: Core

Purpose: To provide a proforma to be used where a change to the SOW is being proposed.

Policy: *DI(G) LOG 08-4, Defence Policy on Configuration Management*

Guidance: All changes to the Contract must be proposed and approved in accordance with the Change to the Contract clause of the conditions of contract. All Contract change proposals must be in the form of the Contract change proposal at the Contract Change Proposal Attachment to the conditions of contract and, where a major configuration change is being proposed, must be accompanied by an Engineering Change Proposal (ECP) in the form of the ECP proforma detailed at this Attachment.

Drafter's action: Prior to release of the RFT, drafters must include the ECP proforma. Drafters should note that there is no standard ECP proforma across the ADO; however, the configuration-management practices of the Maritime, Land and Air environments will normally dictate a specific proforma for use in those environments. Drafters must draft an ECP proforma suitable to the specific requirements of the Contract.

Related clauses: The **Change to the Contract** clause of the draft conditions of contract notifies the Contractor that the Contract may only be varied in accordance with the that clause and details the process for the proposal and approval of Contract change proposals.

The **Contract Change Proposal** Attachment to the draft conditions of contract will contain the agreed Contract change proposal proforma.

The **Configuration Control** clause of the draft SOW details the configuration control requirements of the Contract.





**SECURITIES****ANNEX A - MOBILISATION SECURITY DEED**Reference:

<u>Volume 1</u>	N/A
<u>Volume 2</u>	Attachment P

Sponsor: Contracting Policy & Operations and Materiel Finance Division

Status: Optional. This Attachment should be included where the Commonwealth will consider a Mobilisation Payment.

Purpose: To specify the format for the Mobilisation Security Deed to be provided by the Contractor under the **Mobilisation Payment** clause of the conditions of contract where a Mobilisation Payment is made to the Contractor.

Policy: The Commonwealth has a preference for payment on delivery. Where payment on delivery is not appropriate, the Commonwealth's preference is for a combination of payment on delivery and Milestone Payments or payments by Milestone Payments only, with a Mobilisation Payment where required.

All Mobilisation Security Deeds are to be lodged with Corporate Services and Infrastructure Group, Territory Corporate Services, Financial Services Branch, Accounting Operation (AO) Section located at the Tuggeranong Churches Centre T1-1-094.

*Defence CEI Part 2 Instruction 6*

Guidance: A Mobilisation Payment is a mechanism by which the Contractor can receive funding to procure items required for it to fulfil its contractual obligations prior to delivery or Acceptance of any Supplies.

**REQUIREMENT FOR THE MOBILISATION SECURITY DEED**

The Mobilisation Payment will be paid to the Contractor prior to delivery or Acceptance of any Supplies and vesting of ownership of Supplies in the Commonwealth. To prevent the Commonwealth from being an unsecured creditor, the **Mobilisation Payment** clause of the conditions of contract requires the Contractor, prior to payment of the Mobilisation Payment, to provide the Commonwealth with an unconditional financial security from a bank or financial institution acceptable to the Commonwealth Representative in the form of the Mobilisation Security Deed at this Attachment.

**INFORMATION TO BE INCLUDED IN ANNEX A OF THIS ATTACHMENT**

No further information should be included in Annex A of this Attachment prior to release of the RFT.

Prior to Contract signature drafters must include the negotiated **Mobilisation Security Deed** in Annex A of this Attachment. The Mobilisation Security Deed should be based upon the proposal contained at this Attachment and the successful tenderer's response.

**ACCEPTABILITY OF PROPOSED PROMISOR**

It is important that the Commonwealth Representative ensures that the successful tenderer's proposed bank or financial institution is acceptable to the Commonwealth. Issues to be considered in determining the acceptability of a bank or financial institution include the financial viability of the bank or financial institution, the accessibility of funds and the enforceability of the Mobilisation Security Deed in the applicable jurisdiction. For further guidance on the acceptability of the proposed promisor, reference should be had to the guidance provided in relation to the **Securities** clause of Annex C to the conditions of tender.

### AMENDMENT OF THE STANDARD MOBILISATION SECURITY DEED

The Commonwealth's standard Mobilisation Security Deed is set out at this Attachment. Drafters may substitute another more appropriate Deed where necessary. Tenderers may also propose amendments to the standard Mobilisation Security Deed distributed with the RFT.

Prior to any changes being made to the Mobilisation Security Deed, advice should be sought from Contracting Policy and Operations Branch. For further guidance on the standard Defence financial security requirements and the acceptability of proposed amendments to the deed, reference should be had to the guidance provided in relation to the **Securities** clause of the annexes to the conditions of tender.

### EXECUTION OF THE MOBILISATION SECURITY DEED

Drafters should note that as the Mobilisation Security Deed is a deed it must be executed as such. Drafters should refer to the guidance on execution of deeds contained at the end of the guidance on the Attachments.

### EXERCISING RIGHTS UNDER THE MOBILISATION SECURITY DEED

The Mobilisation Payment security is exercisable by the Commonwealth to recover debts under the Contract or to obtain repayment of the non-amortised portion of the Mobilisation Payment where the Contractor fails to perform the Contract. The Commonwealth can not exercise the security in any other circumstances or the Contractor may have grounds for legal action against the Commonwealth. Advice should be sought from Contracting Policy and Operations Branch prior to the Commonwealth exercising its rights under the security.

**Drafter's action:** No input is required prior to release of the RFT. Prior to Contract signature, drafters must insert the negotiated Mobilisation Security Deed in Annex A of this Attachment.

**Related clauses:** The **Securities** clause of the **Financial** annex to the conditions of tender requests tenderers to state the acceptability of the Mobilisation Security Deed, the proposed promisor, and the cost associated with the provision of a Mobilisation Payment security that is included in the tendered price.

The **Schedule of Payments** clause of the **Financial** annex to the conditions of tender requests tenderers to provide a proposed Schedule of Payments that includes the amount, purposes of and date of the proposed Mobilisation Payment.

The **Mobilisation Payment** clause of the draft conditions of contract details the amortisation process applicable to Mobilisation Payments, the financial security requirements for Mobilisation Payments and the Commonwealth's rights to exercise the Mobilisation Payment security.

The **Securities** clause of the draft conditions of contract reserves to the Commonwealth certain rights in the event that the Contractor fails to provide the securities required by the **Mobilisation Payment** and **Security for Performance** clauses of the draft conditions of contract or the Commonwealth exercises its rights under the securities.

**ANNEX B - PERFORMANCE SECURITY DEED**Reference:Volume 1 N/AVolume 2 Attachment PSponsor: Contracting Policy & Operations and Materiel Finance DivisionStatus: Optional. This Attachment should be included where the **Security for Performance** clause is included in the draft conditions of contract.Purpose: To specify the format for the Performance Security Deed to be provided by the Contractor under the **Security for Performance** clause of the conditions of contract where the tenderer has chosen the option of providing a performance security.Policy: The Commonwealth requires the Contractor to provide either a performance security or a Deed of Substitution and Indemnity under the **Security for Performance** clause of the draft conditions of contract.

All performance securities are to be lodged with Corporate Services and Infrastructure Group, Territory Corporate Services, Financial Services Branch, Accounting Operation (AO) Section located at the Tuggeranong Churches Centre T1-1-094.

*Defence CEI Part 2 Instruction 6*

Guidance: A Contractor may elect to provide a performance security or a Deed of Substitution and Indemnity in accordance with the **Securities** clause of the **Financial** annex to the conditions of tender.USE OF PERFORMANCE SECURITY VERSUS DEED OF SUBSTITUTION

Both the performance security and the Deed of Substitution and Indemnity secure the proper performance of the Contract. The performance security provides the Commonwealth with financial relief, whereas the Deed of Substitution and Indemnity entitles the Commonwealth to request that another entity be substituted as the Contractor to perform the Contract.

ACCEPTABILITY OF PROPOSED PROMISOR

It is important that the Commonwealth Representative ensures the successful tenderer's proposed bank or financial institution is acceptable to the Commonwealth. Issues to be considered in determining the acceptability of a bank or financial institution include the financial viability of the bank or financial institution, the accessibility of funds and the enforceability of the Performance Security Deed in the applicable jurisdiction. For further guidance on the acceptability of the proposed promisor, reference should be had to the guidance provided in relation to the **Securities** clause of the annexes to the conditions of tender.

AMENDMENT OF THE STANDARD PERFORMANCE SECURITY DEED

Drafters may substitute another more appropriate Deed where necessary. Tenderers may also propose amendments to the Performance Security Deed included in this Attachment.

Prior to any changes being made to the Performance Security Deed, advice should be sought from Contracting Policy and Operations Branch. For further guidance on the standard Defence financial security requirements and the acceptability of proposed amendments to the deed, reference should be had to the guidance provided in relation to the **Securities** clause of the **Financial** annex to the conditions of tender.

## EXECUTION OF THE PERFORMANCE SECURITY DEED

Drafters should note that as the Performance Security Deed is a deed it must be executed as such. Drafters should refer to the guidance on execution of deeds contained at the end of the guidance on the Attachments.

## EXERCISING RIGHTS UNDER THE PERFORMANCE SECURITY DEED

The performance security is exercisable by the Commonwealth to recover debts under the Contract and to obtain compensation for loss suffered in the event that the Contractor fails to perform the Contract. The Commonwealth can not exercise the security in any other circumstances or the Contractor may have grounds for legal action against the Commonwealth. Advice should therefore be sought from Contracting Policy and Operations Branch prior to the Commonwealth exercising its rights under any security.

**Drafter's action:** No input is required prior to release of the RFT. Prior to Contract signature, drafters should verify whether this attachment is necessary based on the result of contract negotiations.

**Related clauses:** The **Securities** clause of the **Financial** annex to the conditions of tender requests tenderers to state the acceptability of the Performance Security Deed and the proposed promisor.

Option A of the **Security for Performance** clause of the draft conditions of contract requires the Contractor to provide a financial security to secure its performance of the Contract and details the Commonwealth's right to exercise the security.

The **Securities** clause of the draft conditions of contract reserves to the Commonwealth certain rights in the event that the Contractor fails to provide the securities required by the **Mobilisation Payment** and **Security for Performance** clauses of the draft conditions of contract or the Commonwealth exercises its rights under the securities.

**ANNEX C - DEED OF SUBSTITUTION AND INDEMNITY**Reference:Volume 1 N/AVolume 2 Attachment PSponsor: Contracting Policy & Operations and Materiel Finance DivisionStatus: Optional. This Attachment should be included where the **Security for Performance** clause is included in the draft conditions of contract.Purpose: To specify the format for the Deed of Substitution and Indemnity to be provided by the Contractor under the **Security for Performance** clause of the conditions of contract.Policy: The Commonwealth requires the Contractor to provide either a performance security or a Deed of Substitution and Indemnity under the **Security for Performance** clause of the draft conditions of contract.

All Deeds of Substitution and Indemnity are to be lodged with Corporate Services and Infrastructure Group, Territory Corporate Services, Financial Services Branch, Accounting Operation (AO) Section located at the Tuggeranong Churches Centre T1-1-094.

*Defence CEI Part 2 Instruction 6*

Guidance: A Contractor may elect to provide a performance security or a Deed of Substitution and Indemnity in accordance with the **Securities** clause of the annexes to the conditions of tender.USE OF PERFORMANCE SECURITY VERSUS DEED OF SUBSTITUTION

Both the performance security and the Deed of Substitution and Indemnity secure the proper performance of the Contract. The performance security provides the Commonwealth with financial relief, whereas the Deed of Substitution and Indemnity entitles the Commonwealth to request that another entity be substituted as the Contractor to perform the Contract.

ACCEPTABILITY OF PROPOSED SUBSTITUTED CONTRACTOR

It is important that the Commonwealth Representative ensures that the tenderer's proposed Substituted Contractor is acceptable. The Substituted Contractor is usually the Contractor's parent company but may be another entity where acceptable to the Commonwealth Representative. Under the Deed the Substituted Contractor agrees to perform the Contract in the place of the Contractor in the event that the Commonwealth is entitled to terminate the Contract for default. Therefore the viability of the company proposed as Substituted Contractor under the Deed of Substitution and Indemnity and its capacity to perform the proposed contract upon substitution must be fully evaluated to ensure that the Commonwealth is adequately protected.

AMENDMENT OF THE STANDARD DEED OF SUBSTITUTION AND INDEMNITY

Drafters may substitute another more appropriate Deed where necessary. Tenderers may also propose amendments to the Deed of Substitution and Indemnity included in the RFT.

Advice should be sought from Contracting Policy and Operations Branch prior to any changes to the Deed of Substitution and Indemnity being made.

ISSUE OF A NOTICE OF SUBSTITUTION

Under the **Security for Performance** clause of the conditions of contract, the Commonwealth Representative may issue a notice of substitution where it is entitled to issue a notice of termination for default under the **Contractor Default** clause of the conditions of contract or at common law. It is important to note that the notice of substitution may be issued where the Commonwealth is *entitled* to

issue a notice of termination, and the power does not require the actual issue of a notice of termination. Indeed, it is likely that the right to issue a notice of substitution will be lost if a notice of termination is issued to the Contractor. Where all of the parties agree, the Substituted Contractor may also be substituted for the Contractor at any time in accordance with the **Security for Performance** clause of the conditions of contract.

In some circumstances it may be preferable to terminate the Contract for default rather than issue a notice of substitution. Issues to be considered include the continuing ability of the Substituted Contractor to perform the Contract from both a financial and technical perspective, the existing delay in the delivery of Supplies under the Contract and the likely damages recoverable by the Commonwealth if it terminates the Contract for default. Advice should be sought from Contracting Policy and Operations Branch prior to the Commonwealth Representative issuing a notice of termination or substitution under the Contract.

#### EXECUTION OF THE DEED OF SUBSTITUTION AND INDEMNITY

Drafters should note that as the Deed of Substitution and Indemnity is a deed it must be executed as such. Drafters should refer to the guidance on execution of deeds contained at the end of the guidance on the Attachments.

**Drafter's action:** No input is required prior to release of the RFT. Prior to Contract signature, drafters should verify whether this attachment is necessary based on the result of contract negotiations.

**Related clauses:** The **Securities** clause of the **Financial** annex to the conditions of tender requests tenderers to state the acceptability of the Deed of Substitution and Indemnity and the proposed Substituted Contractor.

Option B of the **Security for Performance** clause of the draft conditions of contract requires the Contractor to provide a Deed of Substitution and Indemnity to secure its performance of the Contract and to detail the Commonwealth's right to issue a notice of substitution.

**SECURITY CLASSIFICATION GRADING DOCUMENT**Reference:Volume 1 Attachment FVolume 2 Attachment QSponsor: Defence Security AuthorityStatus: Optional. To be included where classified material will be produced or provided under the Contract.Purpose: To provide a Security Classification Grading Document to be used by the Contractor to classify any material in its possession relating to the performance of the Contract.Policy: Defence Security PolicyGuidance: Drafters should include the Security Classification Grading Document in this Attachment prior to release of the RFT where classified material will form part of the tenders received. Advice on development of a Security Classification Grading Document can be sought from the Defence Security Authority.**CLASSIFICATION OF MATERIAL UNDER THE CONTRACT**

The **Defence Security** clause of the conditions of contract places an obligation on the Contractor to classify and protect all information in its possession relating to the performance of the Contract according to the Security Classification Grading Document at this Attachment. Drafters must include a Security Classification Grading Document in this Attachment prior to Contract signature where classified material will be produced by the Contractor or provided to the Contractor under the Contract.

Drafter's action: Prior to release of the RFT, where classified material will form part of the tenders received, drafters should include the Security Classification Grading Document in this Attachment.

Prior to Contract signature, where classified material will be produced by the Contractor or provided to the Contractor under the Contract, drafters must include a Security Classification Grading Document in this Attachment.

Related clauses:Volume 1

The **Preparation and Transmission of Classified Tenders** clause of the conditions of tender advises tenderers of the source documents that provide guidance on, and the process that applies to, the preparation and transmission of tenders containing classified material.

The **Facilities Clearance Requirement** clause of the **Commercial Information to be Provided by Tenderers** annex to the conditions of tender requests tenderers to provide details of premises proposed for the storage of classified material and the clearances held by the tenderer and proposed Subcontractors who will require access to classified material.

The **Defence Security** clause of the draft conditions of contract states the security requirements for the Contract.

Volume 2

The **Preparation and Transmission of Classified Tenders** clause of the conditions of tender advises tenderers of the source documents that provide guidance on, and the process that applies to, the preparation and transmission of tenders containing classified material.

The **Facilities Clearance Requirement** clause of the **Management** annex to the conditions of tender requests tenderers to provide details of premises proposed for

the storage of classified material and the clearances held by the tenderer and proposed Subcontractors who will require access to classified material.

The **Defence Security** clause of the draft conditions of contract states the security requirements for the Contract.



**COMMERCIAL IN CONFIDENCE INFORMATION**Reference:Volume 1 Attachment GVolume 2 Attachment RSponsor: Contracting Policy & OperationsStatus: CorePurpose: To contain the provisions that are agreed by the parties to be Commercial-in-Confidence in the Contract.Policy: *DPPM – Section 3, Chapter 3.11*  
*Defence Security Instruction 10/2001*  
*Defence Security Instruction 2/2003*Department of Finance and Administration *Guidelines on Confidentiality*Guidance: Under the **Commercial-In-Confidence Information** clause of the conditions of contract, the Commonwealth and the Contractor are able to identify the parts, if any, of the Contract and its Attachments that the parties agree will be Commercial-in-Confidence Information as at the Effective Date. These parts must then be specified in this Attachment.

In determining whether to classify any contractual provision as Commercial in Confidence Information, the Commonwealth should have regard to the Department of Finance and Administration *Guidelines on Confidentiality*. These guidelines propose four tests that **must all** be met before information can be designated as Commercial in Confidence information. The four tests to be satisfied are:

- a. The information which is proposed as Commercial in Confidence must be specific, not a global or blanket claim;
- b. The information must have the necessary quality of confidentiality, in so far as there is a continuing benefit of non disclosure;
- c. The impact of disclosure would cause a significant detriment to the relevant party; and
- d. The information was provided on the basis of an understanding that it would be kept confidential.

Six standard reasons for confidentiality have been identified for use by drafters viz that the material contains:

- a. commercially sensitive information, disclosure of which is not in the relevant party's best interest;
- b. details about commercially sensitive pricing information including profit margins and the underlying price basis;
- c. details about insurance and liability regimes that are commercially sensitive;
- d. details about intellectual property regimes that are commercially sensitive;
- e. details about the capability/services being delivered that are commercially sensitive; and
- f. details about contractual rights and remedies, including warranties, financial guarantees and securities and liquidated damages that are commercially sensitive.

Drafters should select the appropriate category for inclusion in the 'reasons for classification' column of the attachment.

Information which is in the public domain, for example Total Contract Price or generic template clauses, is not Commercial-in-Confidence Information.

The provisions that have been agreed to be Commercial-in-Confidence Information and included in this Attachment of the Contract may lose their confidential nature over time or as the Contract is subsequently amended.

Where information has been classified as Commercial in Confidence, this has implications for the handling and protection of the information. Users should refer to the Defence Security Instructions listed under Policy for information regarding storage, handling and protection of Commercial in Confidence Information.

**Drafter's action:** Prior to release of the RFT, drafters should include the appropriate category for inclusion in the 'reasons for classification' column of the Attachment.

**Related clauses:** A tenderer must provide a list of all contract provisions considered to be Commercial-in-Confidence Information and which are therefore proposed for listing in this Attachment in accordance with the terms of the **Commercial-in-Confidence Information** clause of the annexes to the conditions of tender.

The **Commercial-in-Confidence Information** clause of the draft conditions of contract outlines that Commercial-in-Confidence Information must be protected from unauthorised disclosure and Contractors must not misuse the term 'Commercial-in-Confidence'.

## RESIDENT PROJECT PERSONNEL

### Reference:

Volume 1 N/A

Volume 2 Attachment S

Sponsor: Contracting Policy & Operations and Standardisation Branch

Status: Optional. To be included where the Commonwealth requires Resident Project Personnel (RPP) to be collocated with the Contractor at the Contractor's Premises.

Purpose: To specify the numbers of RPP, terms of reference, and duration of their collocation with the Contractor.

Policy: Drafters should be aware that Commonwealth policy prohibits the inclusion within the Contract Price of travel or accommodation costs associated with the movement of Commonwealth personnel. Any such costs must be separately programmed and funded by the Commonwealth Representative from the appropriate element of project funding. This prohibition does not extend to the allocation of facilities at the Contractor's premises.

Guidance: Drafters are advised to read the guidance that accompanies the **Resident Project Personnel** clause of the draft SOW.

The inclusion of the numbers of RPP and the duration of their collocation at the Contractor's premises enables the Contractor to cost this requirement as a part of its tender response.

The terms of reference ensure that the exact scope of authority of the RPP is evident to all parties to ensure that the requirement of the Contract are not inadvertently compromised by the RPP. This scope of authority should be documented in this Attachment, with any additional terms of reference provided to the RPP in writing by the Commonwealth Representative.

Drafter's action: Prior to the release of the RFT, drafters are to insert the number of RPP, terms of reference, and duration of their collocation with the Contractor.

Related clauses: The **Commonwealth Representative** clause of the draft conditions of contract relates to the authority of Commonwealth staff under the Contract, including 'Authorised Persons'.

The **Resident Project Personnel** clause of the draft SOW sets out the requirements for the Contractor to provide support to any RPP, who will be collocated at the Contractor's premises during the Contract.

Further reading: Nil



**GLOSSARY**Reference:Volume 1 Attachment HVolume 2 Attachment TSponsor: Contracting Policy & Operations and Standardisation BranchStatus: Core. Optional clauses to be included as appropriate.

Purpose: This Attachment has multiple purposes, including:

- a. to define the meaning of acronyms and abbreviations;
- b. to define the meaning of words contained in the Contract;
- c. to incorporate the referenced documents; and
- d. to include the Commonwealth's summary WBS Dictionary.

Policy: NilGuidance:

Volume 1 The **Glossary** attachment to the conditions of contract contains the following elements that are used throughout the Contract, including the Contract Attachments:

- e. acronyms and abbreviations;
- f. definitions of words; and
- g. referenced documents.

**ACRONYMS, ABBREVIATIONS AND DEFINITIONS**

Drafters should ensure that only those acronyms, abbreviations and definitions that appear in the final Contract are included in the acronym list. As stated in the Note to drafters, the Source Reference column should be removed prior to release of the RFT to ensure that the acronyms, abbreviations and definitions are not limited in their applicability, and should also not be included in any resultant Contract. Additionally, any acronyms, abbreviations and definitions that only apply to the conditions of tender should be removed in the final version of the Contract.

General Interpretation Principles

If a court is required to interpret the Contract, it will interpret the terms in accordance with the definitions set out in the Contract unless a contrary intention is indicated. Where terms are not specifically defined in the Contract, a court will apply the ordinary dictionary meaning or legally defined meaning, where applicable. A court will also endeavour to interpret terms consistently throughout the Contract where such an interpretation is reasonable. Drafters must therefore ensure that any terms used in the Contract are defined appropriately and used consistently throughout the document. In the event of any inconsistency, the definition contained in the **Glossary** will apply unless a contrary intention is clearly indicated.

Example

*The Commonwealth shall notify its Acceptance of any proposed amendment to the Quality Plan within 30 days of receipt of the proposal.*

As 'Acceptance' is defined to have a specific meaning in the **Glossary**, a drafter wishing to include the above sentence should replace the word 'Acceptance' with an undefined word such as 'agreement' to avoid using a defined term inconsistently with its defined meaning.

### Definitions that apply only to a particular clause

Drafters should note that where a definition will apply only for a particular clause the definition should be defined in the clause itself. Drafter must clearly describe the extent of the term's applicability. Where the same term is used in other areas of the Contract the term will be given its ordinary dictionary meaning.

#### Example

*In this clause 5.14, 'Sunrise Date' means a date or a point in time however described that is specified as such in the IP Plan.*

*For the purposes of this clause 8.4 'infringement' includes unauthorised acts which would, but for the application of section 163 of the Patents Act 1990, section 40A of the Design Act 1906, section 183 of the Copyright Act 1968, and section 35 of the Circuits Layout Act 1989, constitute an infringement.*

In addition to including the definition in the particular clause, the definition must also be referred to in the **Glossary**.

#### Example

*Sunrise Date for clause 5.8 of the conditions of contract, has the meaning given by clause 5.8.1.*

*Infringement for clause 8.4 of the conditions of contract has the meaning given by clause 8.4*

### Use of Multiple Definitions

As a court will endeavour to interpret terms consistently throughout the Contract drafters should avoid using multiple definitions for a term as this may lead to ambiguity. Where a specific clause requires a term to have a different meaning and multiple definitions cannot be avoided, the alternative definition and the circumstances in which it will apply must be clearly stipulated.

#### Example

*Notwithstanding the definition of 'Acceptance' in **Glossary Attachment**, for the purposes of this clause 9.8, 'Acceptance' means the approval by the Commonwealth Representative of the Project Management Plan.*

### Use of Singular and the Plural

Drafters should note the operation of the **Interpretation** clause of the draft conditions of contract, particularly that the singular includes the plural and vice-versa. The plural of a defined term will be interpreted based upon the definition of that term. Drafters therefore do not need to define both the singular and plural versions of a word.

**Example**

The phrase *'the Supplies or any of them'* is unnecessary because the operation of the **Interpretations** clause would allow the interpretation of *'the Supplies'* as singular or plural.

**Interpretation of Terms in the RFT**

Drafters should also remember that the **Interpretations of Terms** clause of the conditions of tender states that the RFT will be interpreted in the same manner and its terms will have the same meaning as in the draft Contract. Therefore drafters must ensure that the terms defined in the **Glossary** attachment are used consistently in the conditions of tender including the Tender Data Requirements List (TDRL) and Annexes to the TRDL.

**Inclusion of Additional Definitions**

Where drafters have added additional clauses in the RFT or Contract to cover project specific requirements and words within those additional clauses require definition, the relevant definition should be inserted in alphabetical order in this Attachment. Drafters should note, however, that where a definition is used only for a particular clause, the definition should be defined in the clause itself and referenced in the **Glossary**. Drafters must ensure that any such definitions do not contradict other definitions or Commonwealth policy.

**REFERENCED DOCUMENTS**

Drafters should ensure that only those referenced documents that appear in the final Contract are included in the list of reference documents. As stated on the Note to drafters, the Source Reference column should be removed prior to release of the RFT to ensure that the referenced documents are not limited in their applicability and should also not be included in any resultant Contract. Drafters should also avoid duplicating those standards that may be referenced in the **Description of Requirement** to avoid potential conflicts between various parts of the Contract.

**Volume 2**

The **Glossary** attachment to the conditions of contract contains the following elements that are used throughout the Contract, including the Contract Attachments:

- a. acronyms and abbreviations;
- b. definitions of words;
- c. referenced documents; and
- d. summary WBS Dictionary.

**ACRONYMS, ABBREVIATIONS AND DEFINITIONS**

Drafters should ensure that only those acronyms, abbreviations and definitions that appear in the final Contract are included in the acronym list. As stated in the Note to drafters, the Source Reference column should be removed prior to release of the RFT to ensure that the acronyms, abbreviations and definitions are not limited in their applicability, and should also not be included in any resultant Contract. Additionally, any acronyms, abbreviations and definitions that only apply to the conditions of tender should be removed in the final version of the Contract.

**General Interpretation Principles**

If a court is required to interpret the Contract, it will interpret the terms in accordance with the definitions set out in the Contract unless a contrary intention is indicated. Where terms are not specifically defined in the Contract, a court will apply the ordinary dictionary meaning or legally defined meaning, where applicable. A court will also endeavour to interpret terms consistently throughout

the Contract where such an interpretation is reasonable. Drafters must therefore ensure that any terms used in the Contract are defined appropriately and used consistently throughout the document. In the event of any inconsistency, the definition contained in the **Glossary** will apply unless a contrary intention is clearly indicated.

Example

*The Commonwealth shall notify its Acceptance of any proposed amendment to the Quality Plan within 30 days of receipt of the proposal.*

As 'Acceptance' is defined to have a specific meaning in the **Glossary**, a drafter wishing to include the above sentence should replace the word 'Acceptance' with an undefined word such as 'agreement' to avoid using a defined term inconsistently with its defined meaning.

Definitions that apply only to a particular clause

Drafters should note that where a definition will apply only for a particular clause the definition should be defined in the clause itself. Drafter must clearly describe the extent of the term's applicability. Where the same term is used in other areas of the Contract the term will be given its ordinary dictionary meaning.

Example

*In this clause 5.14, 'Sunrise Date' means a date or a point in time however described that is specified as such in the IP Plan.*

*For the purposes of this clause 8.4 'infringement' includes unauthorised acts which would, but for the application of section 163 of the Patents Act 1990, section 40A of the Design Act 1906, section 183 of the Copyright Act 1968, and section 35 of the Circuits Layout Act 1989, constitute an infringement.*

In addition to including the definition in the particular clause, the definition must also be referred to in the **Glossary**.

Example

*Sunrise Date for clause 5.8 of the conditions of contract, has the meaning given by clause 5.8.1.*

*Infringement for clause 8.4 of the conditions of contract has the meaning given by clause 8.4*

Use of Multiple Definitions

As a court will endeavour to interpret terms consistently throughout the Contract drafters should avoid using multiple definitions for a term as this may lead to ambiguity. Where a specific clause requires a term to have a different meaning and multiple definitions cannot be avoided, the alternative definition and the circumstances in which it will apply must be clearly stipulated.



Example

Notwithstanding the definition of 'Acceptance' in **Glossary** Attachment, for the purposes of this clause 9.8, 'Acceptance' means the approval by the Commonwealth Representative of the Project Management Plan.

Use of Singular and the Plural

Drafters should note the operation of the **Interpretation** clause of the draft conditions of contract, particularly that the singular includes the plural and vice-versa. The plural of a defined terms will be interpreted based upon the definition of that term. Drafters therefore do not need to define both the singular and plural versions of a word.

Example

The phrase '*the Supplies or any of them*' is unnecessary because the operation of the **Interpretations** clause would allow the interpretation of '*the Supplies*' as singular or plural.

Interpretation of Terms in the RFT

Drafters should also remember that the **Interpretations of Terms** clause of the conditions of tender states that the RFT will be interpreted in the same manner and its terms will have the same meaning as in the draft Contract. Therefore drafters must ensure that the terms defined in the **Glossary** attachment are used consistently in the conditions of tender including the Tender Data Requirements List (TDRL) and Annexes to the TRDL.

Inclusion of Additional Definitions

Where drafters have added additional clauses in the RFT or Contract to cover project specific requirements and words within those additional clauses require definition, the relevant definition should be inserted in alphabetical order in this Attachment. Drafters should note, however, that where a definition is used only for a particular clause, the definition should be defined in the clause itself and referenced in the **Glossary**. Drafters must ensure that any such definitions do not contradict other definitions or Commonwealth policy.

REFERENCED DOCUMENTS

Drafters should ensure that only those referenced documents that appear in the final Contract are included in the list of reference documents. As stated on the Note to drafters, the Source Reference column should be removed prior to release of the RFT to ensure that the referenced documents are not limited in their applicability and should also not be included in any resultant Contract. Drafters should also avoid duplicating those standards that may be referenced in the **Description of Requirement** to avoid potential conflicts between various parts of the Contract.

WBS DICTIONARY

Drafters need to update this part of the Attachment to provide for definitions for the elements of the summary WBS included in the **Draft Contract Work Breakdown Structure (CWBS) and CWBS Dictionary** clause of Annex F of the draft conditions of tender. Any changes to these definitions that arise during the contract negotiations should be incorporated into the resultant Contract.

As stated in the Note to drafters at the front of the Attachment, the Status column should be removed prior to the release of the RFT to ensure that they are not limited in their applicability and should also not be included in any resultant Contract.

**Drafter's action:** Prior to release of the RFT drafters must include the appropriate optional definitions. Prior to contract signature, drafters must update the definitions and remove the definitions for the conditions of tender. Drafters must also remove the references to the columns entitled 'Source Reference' and 'Status' prior to release of the RFT.

**Related clauses:**

**Volume 1** The **Interpretation of Terms** clause of the conditions of tender states that the RFT will be interpreted in the same manner and its terms will have the same meaning as in the draft Contract.

The **Definitions** clause of the draft conditions of contract defines the meaning of the words contained in the Contract by reference to the **Glossary** Attachment.

The **Interpretation** clause of the draft conditions of contract sets out the basic principles by which the Contract will be interpreted.

**Volume 2** The **Interpretation of Terms** clause of the conditions of tender states that the RFT will be interpreted in the same manner and its terms will have the same meaning as in the draft Contract.

The **Definitions** clause of the draft conditions of contract defines the meaning of the words contained in the Contract by reference to the **Glossary** Attachment.

The **Interpretation** clause of the draft conditions of contract sets out the basic principles by which the Contract will be interpreted.

The **Draft Contract Work Breakdown Structure (CWBS) and CWBS Dictionary** clause of Annex F of the conditions of tender contains the summary WBS for the project.

**Further reading:** Nil

**EXECUTION OF DEEDS**

<u>Reference:</u>	N/A
<u>Sponsor:</u>	Contracting Policy & Operations
<u>Status:</u>	N/A
<u>Purpose:</u>	To provide guidance on the execution of deeds that may be required under the Contract.
<u>Policy:</u>	<i>Corporations Act</i>
<u>Guidance:</u>	Various clauses of the draft conditions of contract require the Contractor to provide deeds to fulfil its obligations under the Contract.

An Australian company may sign a deed by affixing its company seal. The company's constitution may set out the way in which the company seal may be affixed. For example, the constitution may require that the company's Board of Directors pass a resolution authorising the affixing of the seal to a deed. Normally, the seal must be affixed in the presence of two directors or a director and the secretary of the company in order to be valid. These people indicate their presence by signing the deed next to the seal.

Example execution clause:  
 The seal of  
 [...INSERT COMPANY NAME AND A.C.N/A.B.N....]  
 is hereby affixed in accordance with its constitution by  
 [...NAME OF DIRECTOR...]  
 in the presence of  
 [...NAME OF DIRECTOR/ SECRETARY...]

Advice should be obtained from Contracting Policy and Operations Branch as to any limitations on the use of the company's seal and the correct wording of the execution clause for a particular company.

It should be noted that Australian companies have not been required to have a company seal since amendments to the Corporations Law in 1998. Some companies, therefore, will not execute contracts in this way. If an Australian company does not have a seal or if it does but opts not to use it, the deed can be executed by certain company officers signing the document. The deed must either be signed by two directors of the company or, one director and one company secretary of the company. Where a proprietary company has a sole director who is also the company secretary that person can sign the deed.

Example execution clause:  
 SIGNED SEALED and DELIVERED  
 by [...INSERT COMPANY NAME AND A.C.N./A.B.N....]  
 {signature}  
 [NAME OF COMPANY OFFICER AND POSITION]  
 in the presence of:  
 {signature}  
 [NAME OF WITNESS]  
 {signature}  
 [NAME OF COMPANY OFFICER AND POSITION]  
 in the presence of:  
 {signature}  
 [NAME OF WITNESS]

Affixing the company seal or having the specified company officers sign the deed are to be preferred over other ways of executing the deed. The reason for this is that using either of these methods will, in certain circumstances, allow the Commonwealth to rely on some important assumptions concerning proper execution.

Provided that the deed is executed in either of these two ways a person, who does not know that the deed was not properly executed, can assume that it has been correctly executed. A person may also assume that anyone who signs the deed and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices, where they are making that assumption for the purpose of assuming the deed has been properly executed.

Under the *Corporations Act* a person dealing with an Australian company is entitled to rely on a document as binding the company if it is signed by an individual acting with the company's express or implied authority and on behalf of the company. If drafters are uncertain as to the authority of the person proposing to sign the deed, drafters should either request that the company provide evidence of the officer's authority to bind the company or seek legal advice as to whether the Commonwealth can rely on the person's authority to bind the Company.

Example execution clause:  
SIGNED, SEALED AND DELIVERED  
for and on behalf of  
[...INSERT COMPANY NAME AND A.C.N./A.B.N...]  
by  
[NAME OF COMPANY OFFICER]  
in the presence of:  
[NAME OF WITNESS]

In some cases the company will issue a power of attorney authorising a person to bind the company in certain circumstances. Drafters should ask to see a copy of the power of attorney in order to check that it is current, it appears to be executed in a way which will bind the company and the circumstances it covers include the deed in question.

Example execution clause:  
SIGNED, SEALED AND DELIVERED  
for and on behalf of  
[...INSERT COMPANY NAME AND A.C.N./A.B.N...] by  
[...NAME OF PERSON...]  
who is authorised by Power of Attorney [NUMBER OR DATE]  
and who states [HE/SHE] has no notice of its revocation  
in the presence of  
[NAME OF WITNESS]

Advice should be obtained from Contracting Policy and Operations Branch on the power of attorney, especially where issued by an overseas company. Drafters should also obtain advice from Contracting Policy and Operations Branch as to the correct execution clause to be used for an overseas company. Drafters should ensure that prior to signature the deeds are checked for accuracy and completeness.

Further information about deeds is provided in the section on the Execution Page in the guidance on the conditions of contact.

Drafter's action: Nil

Related clauses:

Volume 1 N/A

Volume 2 The Government Furnished Facilities Licence Deed Attachment to the draft conditions of contract establishes a contractual relationship which specifies the responsibilities of each party for the Commonwealth facilities provided to the Contractor for use in the performance of the Contract.

The **Approved Subcontractor Intellectual Property Deed** Attachment to the draft conditions of contract allows for an Approved Subcontractor to license the Commonwealth to exercise IP rights in Approved Subcontractor owned Background IP and Foreground IP.

The **Mobilisation Security Deed** Attachment to the draft conditions of contract specifies the format for the Mobilisation Security Deed to be provided by the Contractor where a Mobilisation Payment is made to the Contractor.

The **Performance Security Deed** Attachment to the draft conditions of contract specifies the format for the Performance Security Deed to be provided by the Contractor where the Contractor's performance of the Contract will be secured through a financial security.

The **Deed of Substitution and Indemnity** Attachment to the draft conditions of contract specifies the format for the Deed of Substitution and Indemnity to be provided by the Contractor where the Contractor's performance of the Contract will be secured through an undertaking by the Contractor's parent company or a third party.



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**SCOPE****Purpose**

<u>Reference:</u>	Clause 1.1
<u>Sponsor:</u>	Contract Policy & Operations and Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To define the purpose of the SOW (SOW).
<u>Policy:</u>	Nil
<u>Guidance:</u>	The <b>Purpose</b> clause defines the purpose of the SOW and should not require amendment for inclusion in the RFT.
<u>Drafter's action:</u>	The <b>Purpose</b> clause is to be included in the RFT without alteration.
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

**Background**

<u>Reference:</u>	Clause 1.2
<u>Sponsor:</u>	Contract Policy & Operations and Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To provide background information on the project that may be useful to the Contractor.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>This clause in the SOW provides a brief overview of the background to the project, including its genesis and broad objectives. For example, precursor projects could be summarised, as well as other broad Defence initiatives with which the project is intended to align (e.g. "The project is intended to be consistent with the objectives of the Defence Common Operating Environment.").</p> <p>As this clause is not intended to be contractual in nature, "shall" statements should not be used. Care must also be taken to ensure that statements made in this clause do not conflict with other elements of the Contract. One way to avoid this is to out-reference to other documents (e.g. "Joint Project XXXX is seeking to provide the world's best multi-user, remote-controlled mouse trap, as described in the Description of Requirement (DOR) at Annex A to the SOW.").</p> <p>As a guide, this clause should be reasonably short, with sufficient information to establish the background and "set the scene" for the project, but should not provide excessive information that could compromise other parts of the Contract.</p>
<u>Drafter's action:</u>	Drafters are to develop an appropriate background clause for inclusion in the draft SOW.
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

## GENERAL REQUIREMENTS

### Scope of Work

<u>Reference:</u>	Clause 2.1
<u>Sponsor:</u>	Contract Policy & Operations and Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To define the Contractor's overall scope of work under the Contract.
<u>Policy:</u>	Nil
<u>Guidance:</u>	This clause should define the Contractor's overall scope of work under the Contract, covering such activities as design, development, installation, integration, testing, verification, modelling, simulation, conducting reviews, etc.

Note that this is intended to provide a high-level definition of what is required, to set the context for the remainder of the SOW. Drafters should ensure that these clauses cover the complete scope of Supplies required under the Contract, noting that this may be the only clause where specific Supplies are actually identified.

This clause should call up the relevant system specification(s) in the appropriate context. The Description of Requirements at Annex A should be referenced because this may be the only place in the Contract where the respective systems are explicitly required to accord with their specifications.

In developing these clauses, drafters should be aware that the Contractor is not required to deliver a Support System. As explained in the ASDEFCON (Strategic Materiel) Handbook Philosophy volume, if the Contractor is required to design the Support System, it is only required to deliver the physical products (including services such as Training) necessary to enable the Support System to operate. The Support System does not come into existence until these physical products are integrated with the existing support infrastructure. For the Commonwealth elements of the Support System, the Commonwealth would normally have a role in this integration (e.g. through transition activities). For the In-Service Support (ISS) contractor elements of the Support System, the Contractor would have responsibility for the implementation of these elements. For all of these reasons, this clause of the Contract should also specify any activities that the Contractor is not required to perform, as well as any activities that the Commonwealth is required to perform that impact upon the Contractor's activities under the Contract. Finally, care should be taken in generating these scope clauses to avoid creating conflicts with other clauses in the Contract.

The clause may identify major program phases (e.g. such as increments in an incremental delivery process) or a number and/or phasing of output products.

This clause should address the major product and service deliverables of the program (i.e. it does not include the Contract Data Requirements because these requirements are spelt out elsewhere).

Sample clauses, in addition to the existing clause 2.1.1, might look something like the following:

(For the first major end item (e.g. platform)): *"The Contractor shall deliver [the required number of] [Mission System #1] that meet the requirements of the SS, when the Mission System is operated in accordance with the DOR and is supported in accordance with the implemented Support System."* Additional words may need to be added to this clause to specify the location for the delivery of each Mission System, if not specified elsewhere.

Similar clauses would be inserted for each other major end item required under the Contract (e.g. simulator, operating support capability, etc). Drafters should ensure that all major stand-alone end items are identified and linked to their appropriate specification (e.g. if DSTO is to be provided with some level of capability to support the new Mission System, then this element would also be identified here). Drafters should ensure that these clauses clearly enunciate which elements of the Contract

represent Supplies and whether or not ownership will transfer to the Commonwealth. Typical examples, where there may be some doubt in this regard, include an in-country Software Support Facility operated by an ISS contractor (i.e. Contractor (Support) / Subcontractor (Support)) and Spares that are provided to the Contractor (Support) / Subcontractor (Support). Guidance from CPO should be sought when drafting clauses to address these types of issues.

(For the Support System): *“The Contractor shall deliver Support System elements, as required under the Contract.”* Of note, the physical products that are required to implement the Support System are (designed,) developed and delivered in accordance with other clauses of the SOW, and do not need to be specified here.

(For those related activities being performed by the Commonwealth): *“The Commonwealth will [for example]:*

- a. provide all of the Commonwealth facilities required to implement the Capability;
- b. incorporate codification data onto SDSS;
- c. provide ADO personnel to undergo training at the places and times agreed between the parties;
- d. etc.

(For those specific aspects of work related to the Contract that are explicitly excluded from the Contract): *“The Contractor is not required to [for example]:*

- a. provide representation during Acceptance Validation activities being managed by the Commonwealth;
- b. modify *any element of infrastructure outside the walls of building XYZ at Naval Establishment ...;*
- c. etc.

**Drafter's action:** Drafters need to revise the generic words in clause 2.1.1 to reflect the above issues.

**Related clauses:** The **Contracted Requirement** clause of the conditions of contract obligates the Contractor to provide the Supplies and to fulfil all of its other obligations under the Contract for the Contract Price.

**Further Reading:** See also – *Capability Definition Documents Guide*

## Delivery of Supplies

<u>Reference:</u>	Clause 2.2
<u>Sponsor:</u>	Contract Policy & Operations and Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose an obligation on the Contractor to package Supplies and mark the packaging appropriately in accordance with the nature of the specific Supplies.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>This clause specifies requirements for packaging and marking of Supplies for initial delivery (under the acquisition Contract), and should not be confused with the Packaging requirements under clause 5 of the draft SOW (refer clauses 5.2.8.2 and 5.3.2.1). Clause 5 defines requirements for packaging when the packaging itself is a Supply, whereas this clause 2.2 addresses the packaging used to package other Supplies (e.g. Spares), and this packaging is not, in and of itself, a Supply. The clause interacts with numerous clauses in the conditions of contract (refer Related clauses), which relate to care, custody, liability, taxes, duties, customs, export approvals, etc. In the main, this clause 2.2 provides for the administrative activities associated with packaging and marking, whereas all of the liabilities, duties, etc are covered under the conditions of contract.</p> <p>The Note to drafters highlights that this clause is not intended to include exhaustive marking and consignment documentation requirements, as has been specified in other Defence Contracts. Additional requirements should be included, however, where the regulatory framework dictates these requirements (e.g. for explosive ordnance).</p> <p>In keeping with the ASDEFCON (Strategic Materiel) principle of utilising the Contractor's own processes where applicable, the Defence packaging standard (i.e. DEF(AUST) 1000C) has deliberately not been mandated. Under the conditions of contract, the Contractor is responsible for delivering Supplies to the designated point of delivery, in a serviceable condition, and by the due date, while meeting all other costs and requirements of the Contract within the Contract price. As such, the specification of a packaging standard, which has the potential to conflict with the Contractor's duty of care under the Contract, is not deemed to be appropriate. Of note, for those items of Packaging that are Supplies under clause 5 of the draft SOW, the Defence packaging standard has been mandated.</p>
<u>Drafter's action:</u>	Drafters should determine whether or not additional clauses are required to accord with regulatory requirements; however, as indicated by the Note to drafters, these additional requirements should be kept to a minimum. If not, clause 2.2 is to be included in the RFT without alteration.
<u>Related clauses:</u>	<p>The <b>Export Approvals and Imported Supplies</b> clause of the conditions of contract relates to export approvals associated with the Supplies and imported supplies and customs entry.</p> <p>The <b>Delivery</b> clause of the conditions of contract relates to delivery of Supplies.</p> <p>The <b>Acceptance</b> and <b>Final Acceptance</b> clauses of the conditions of contract relate to Acceptance of Supplies.</p> <p>The <b>Ownership and Risk</b> clause of the conditions of contract relates to ownership and risk with respect to the Supplies.</p> <p>The <b>Taxes and Duties</b> clause of the conditions of contract relate to taxes and duties associated with the Supplies.</p> <p>The <b>Care of the Supplies</b> clause of the conditions of contract relates to care of the Supplies.</p> <p>The <b>Integrated Logistics Support</b> clause of the draft SOW contains numerous clauses relating to Packaging, where the packaging itself is the Supply.</p>

Further Reading: Nil

**Deliverable Data Items**

<u>Reference:</u>	Clause 2.3
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To define the framework and requirements for deliverable data items.
<u>Policy:</u>	<i>DI(G) LOG 03-2, 'Computer-aided Acquisition and Logistic Support'</i>
<u>Guidance:</u>	<p>Consideration should be given to the delivery of data items via electronic means such as a Contractor Integrated Technical Information Service (CITIS) to effect electronic delivery. Additional clauses will be required to be included to invoke a CITIS. See <i>DI(G) LOG 03-2</i> and <i>MIL-STD-974</i>.</p> <p>For further discussion regarding deliverable data items, see the guidance contained in Annex C to the SOW (CDRL).</p>
<u>Drafter's action:</u>	Apart from the potential differences in delivery method using electronic means, this clause does not need any tailoring. The clauses are tightly integrated and complex, and have been agreed with Defence industry. Any proposed variations to the clauses should be strongly resisted. The majority of the work associated with tailoring of the CDRL is reflected in Annex C to the draft SOW and the associated guidance.
<u>Related clauses:</u>	Annex C to the draft SOW incorporates the CDRL.
<u>Further Reading:</u>	See also – <i>MIL-STD-974, Contractor Integrated Technical Information Service</i>
	<b>2.3.1 - DEVELOPMENT AND SUBMISSION OF DATA ITEMS</b>
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to produce, deliver and update all data items in accordance with the Contract Data Requirements List (CDRL).
<u>Policy:</u>	Nil.
<u>Guidance:</u>	Guidance on the CDRL is provided at Annex C to this part of the Handbook, which explains the use of the CDRL and the data fields contained within the CDRL.
<u>Drafter's action:</u>	Clause 2.3.1 is to be included in the RFT without alteration.
<u>Related clauses:</u>	All other clauses within clause 2.3 of the draft SOW. Annex C to the draft SOW incorporates the CDRL.
<u>Further Reading:</u>	See also – <i>Annex C to Guidance on the SOW, Contract Data Requirements List (CDRL)</i>
	<b>2.3.2 - REVIEW, APPROVAL/NON-APPROVAL, AND ACCEPTANCE OF DATA ITEMS</b>
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To advise the Contractor of the Commonwealth's actions with respect to data items.
<u>Policy:</u>	Nil
<u>Guidance:</u>	Clause 2.3.2 advises the Contractor that the Commonwealth Representative will Review; Approve or not Approve; or Accept or reject; or provide a Contract change proposal (CCP) for Commonwealth approval in accordance with clause 10.1 of the conditions of contract. The processes associated with the Review, Approval, Acceptance and CCP approval of data items is set out in clauses 2.3.3, 2.3.4, 2.3.5 and 2.3.6, respectively. Guidance as to the types of data items that should be

subject to these processes is provided in the guidance pertaining to the CDRL at Annex C to this part of the Handbook.

**Drafter's action:** Clause 2.3.2 is to be included in the RFT without alteration.

**Related clauses:** All other clauses within clause 2.3 of the draft SOW.

Annex C to the draft SOW incorporates the CDRL.

**Further Reading:** See also – *Annex C to Guidance on the SOW, Contract Data Requirements List (CDRL)*

### 2.3.3 - DATA ITEM REVIEW

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To advise the Contractor of the meaning of data item Review, and to impose an obligation on the Contractor to respond to any review comments provided by the Commonwealth Representative.

**Policy:** Nil

**Guidance:** Guidance as to the types of data items that should be subject to data item Review is provided in the guidance pertaining to the CDRL at Annex C to this part of the Handbook.

Clause 2.3.3 enables the Commonwealth to provide comments on those data items that are subject to Review, without “buying into” the Contractor’s developmental processes. The Contractor is recognised as the Design Authority under the Contract and, as such, is required to exercise expert judgement in response to the Commonwealth’s comments. The Commonwealth, on the other hand, does not hold itself up as an expert either:

- a. in the technical domains pertinent to the Contract; or
- b. in the application of the Contractor’s processes in the design and development of the solution.

The Commonwealth is relying upon the expert judgement of the Contractor to evaluate the Commonwealth Representative’s comments and to respond accordingly using that expert judgement. The provisions of clause 2.3.3 are based upon this role differentiation, and act to protect the Commonwealth in those situations where review comments could be construed as “over-stepping the mark”.

In general, the Commonwealth should limit its review comments on data items consistent with the principles of Clear Accountability In Design (CAID). This philosophy and the rationale for its adoption in ASDEFCON (Strategic Materiel) and ASDEFCON (Complex Materiel) are explained further in Section 10.4 of the ASDEFCON (Strategic Materiel) Handbook Philosophy volume.

Clause 2.3.3.1d requires the Contractor to address the Commonwealth’s review comments; however, the clause does not require the Contractor to incorporate the comments into the data item. If the Contractor does not incorporate the review comment, however, the Commonwealth Representative should expect the Contractor to advise how it has addressed the Commonwealth’s concerns and, if no action has been taken, to advise why not.

**Drafter's action:** Clause 2.3.3 is to be included in the RFT without alteration.

**Related clauses:** All other clauses within clause 2.3 of the draft SOW.

Annex C to the draft SOW incorporates the CDRL.

**Further Reading:** See also – *Annex C to Guidance on the SOW, Contract Data Requirements List (CDRL)*.



### 2.3.4 - DATA ITEM APPROVAL

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To advise the Contractor of: <ol style="list-style-type: none"> <li>a. the meaning of data item Approval,</li> <li>b. the Commonwealth's obligations with respect to data items that are subject to Approval by the Commonwealth, and</li> <li>c. the scope of the Commonwealth's rights with respect to non-Approval of data items.</li> </ol> <p>To impose an obligation on the Contractor to respond to any notification of non-Approval of a data item.</p>

Policy: Nil

Guidance: The guidance under the preceding clause is equally as applicable under this clause.

Specific attention is drawn to clause 2.3.4.4, which outlines the scope of the Commonwealth's rights with respect to data items that are subject to Approval. This clause was inserted after consultation with industry representatives to address their concerns with prior Approval practices, and to ensure that the Commonwealth was only able to non-Approve data items for substantive reasons. The agreed reasons, which require judgement in their application by the Commonwealth Representative (as stated in the clause), provide for the full range of possible substantive reasons. For example, the Commonwealth would not be able non-Approve a data item for minor grammatical or spelling problems; however, it would be able to non-Approve the same data item if the grammatical and spelling problems were so widespread that the data item was not "clearly understandable". Clearly, this issue becomes more important if a data item will be delivered to the Commonwealth for support purposes (e.g. a technical manual). It is for these reasons that the clause explicitly allows for subjective judgement and specifies the Commonwealth Representative (i.e. the customer's representative) as the final arbiter. In matters of contention, of course, the Commonwealth Representative should be addressing his/her concerns with the Contractor in parallel with submitting the formal review comments.

Drafter's action: Clause 2.3.4 is to be included in the RFT without alteration.

Related clauses: All other clauses within clause 2.3 of the draft SOW.

Annex C to the draft SOW incorporates the CDRL.

The **Delivery** clause of the conditions of contract sets out the provisions with respect to delivery of Supplies.

The **Acceptance** clause of the conditions of contract sets out the provisions with respect to Acceptance of Supplies.

Further Reading: See also – *Annex C to Guidance on the SOW, Contract Data Requirements List (CDRL)*

### 2.3.5 - DATA ITEM ACCEPTANCE

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To place a contractual obligation on the Contractor to process data items, which are subject to Acceptance, in accordance with the provisions of this clause.
<u>Policy:</u>	Nil
<u>Guidance:</u>	The guidance under clauses 2.3.3 and 2.3.4 is also relevant here.

Drafter's action: Clause 2.3.5 is to be included in the RFT without alteration.

Related clauses: All other clauses within clause 2.3 of the draft SOW.

Annex C to the draft SOW incorporates the CDRL.

The **Delivery** clause of the conditions of contract sets out the provisions with respect to delivery of Supplies.

The **Acceptance** clause of the conditions of contract sets out the provisions with respect to Acceptance of Supplies.

Further Reading: See also – *Annex C to Guidance on the SOW, Contract Data Requirements List (CDRL)*

### 2.3.6 - DATA ITEMS DELIVERED UNDER CONTRACT CHANGE PROPOSALS

Sponsor: Standardisation Branch

Status: Core

Purpose: To impose a contractual obligation on the Contractor to deliver those data items requiring a Contract change proposal to do so in accordance with clause 10.1 of the conditions of contract.

Policy: Nil

Guidance: Clause 2.3.6 addresses those data items that necessitate a change to the Contract. Examples of these data items include:

- a. the System Specification (to establish this specification as the Functional Baseline for the Mission System); and
- b. provisioning lists, which document the exact range and quantities of items (e.g. Spares, Packaging, Support and Test Equipment and Training Equipment) that will be procured under the Contract.

Drafter's action: Clause 2.3.6 is to be included in the RFT without alteration.

Related clauses: All other clauses within clause 2.3 of the draft SOW.

Annex C to the draft SOW incorporates the CDRL.

Further Reading: See also – *Annex C to Guidance on the SOW, Contract Data Requirements List (CDRL)*

### 2.3.7 - DATA ITEM UPDATES

Sponsor: Standardisation Branch

Status: Core

Purpose: To impose a contractual obligation on the Contractor to maintain the accuracy, completeness and currency of all data items delivered under the Contract in accordance with the CDRL.

Policy: Nil.

Guidance: Attention is drawn to clauses 2.3.7.3 and 2.3.7.4. The first clause states that any proposed amendments to data items shall be subject to the same Review and Approval processes specified in clause 2.3. This means that the guidance under 2.3.3 and 2.3.4 is equally applicable here with respect to the proposed amendment. The second clause states that, until a proposed amendment to an Approved data item is Approved, the original data item remains in effect. This second clause provides protection to the Commonwealth in those situations where the Contractor might wish to step away from the agreed position documented in an Approved data item (e.g. for reasons of cost). Clause 2.3.7.4 prevents this from occurring without Commonwealth consent.

Drafter's action: Clause 2.3.7 is to be included in the RFT without alteration.

Related clauses: All other clauses within clause 2.3 of the draft SOW.

Annex C to the draft SOW incorporates the CDRL.

The **Delivery** clause of the conditions of contract sets out the provisions with respect to delivery of Supplies.

The **Acceptance** clause of the conditions of contract sets out the provisions with respect to Acceptance of Supplies.

Further Reading: See also – Annex C to Guidance on the SOW, Contract Data Requirements List (CDRL)

**Not Used**

Reference: Clause 2.4

### **Ozone Depleting Substances and Hazardous Substances**

<u>Reference:</u>	Clause 2.5
<u>Sponsor:</u>	Contracting Policy & Operations and Defence Safety Management Agency
<u>Status:</u>	Core
<u>Purpose:</u>	To detail the Ozone Depleting Substances and Hazardous Substances that may be included in the Supplies.
<u>Policy:</u>	<i>DPPM - Section 3 Chapter 3.10 and Chapter 3.16.</i> Annex D to Chapter 1 of Part 5 of Volume 1 of the Defence Safety Manual (SAFETYMAN) Ozone Protection Act 1989
<u>Guidance:</u>	The Commonwealth has a legislative obligation as an employer to take all reasonably practicable steps to protect the health and safety of its employees, Contractors and their staff and other persons at or near Defence workplaces. Commonwealth policy also requires Defence to protect the environment where ever possible. Therefore Defence policy states that Supplies should be free from Ozone Depleting Substances and Hazardous Substances to the maximum extent possible.

#### Ozone Depleting Substances

Drafters may select between the two options for Ozone Depleting Substances. Wherever possible, drafters should select the first option, which requires the Contractor to provide Supplies that are free of Ozone Depleting Substances. Where the use of Ozone Depleting Substances can not be avoided due to the nature of the Supplies, the second option should be selected. The second option places a contractual obligation on the Contractor to provide Supplies that do not contain Ozone Depleting Substances, except for substances authorised by the Commonwealth Representative and listed in the specified Annex to the SOW. If one of the two options is selected by the drafter, the 'Notes to tenderers' included in the Draft SOW should be deleted.

However, where there is doubt as to whether such substances may be included in tendered Supplies, both optional clauses should be included in the RFT draft SOW and the 'Notes to tenderers' included in the Draft SOW should be retained. Depending on Tenderers' responses to the optional clauses, the appropriate option should then be selected for inclusion in the Contract SOW.

Substances classed as Ozone Depleting Substances are listed in Schedules 1 and 3 of the Ozone Protection Act 1989. It should be noted that quotas are imposed on individual companies in relation to the importation and manufacture of Ozone Depleting Substances.

#### Hazardous Substances

The criteria for determining whether a substance is hazardous are detailed in NOHSC: 1008 (1999) "Approved Criteria for Classifying Hazardous Substances".

Drafters may select between the two options for Hazardous Substances. Wherever possible, drafters should select the first option, which requires the Contractor to provide Supplies that are free of Hazardous Substances. Where the use of Hazardous Substances can not be avoided due to the nature of the Supplies, the second option should be selected. The second option places a contractual obligation on the Contractor to provide Supplies that do not contain Hazardous Substances except for substances authorised by the Commonwealth Representative and listed in the specified Annex to the SOW. If one of the two options is selected by the drafter, the 'Notes to tenderers' included in the Draft SOW should be deleted.

However, where there is doubt as to whether such substances might be included in tendered Supplies, both optional clause sets should be included in the RFT draft

SOW and the 'Notes to tenderers' included in the Draft SOW should be retained. Depending on Tenderers' responses to the optional clauses, the appropriate options should then be selected for inclusion in the Contract SOW.

Where the second option is selected, the Contractor must also comply with any conditions set out in the Annex and ensure that:

- a. full details of Hazardous Substances included in the Supplies are provided to the Commonwealth Representative;
- b. all documentation supporting the Supplies clearly identifies the nature of the hazard; and
- c. all Supplies containing Hazardous Substances are labelled to clearly identify the nature of the substance and the associated hazards.

In addition to the requirement to only use authorised Hazardous Substances, clause 2.5.4 of the second option places an obligation on the Contractor to notify the Commonwealth Representative where it becomes aware of a non-Hazardous Substance that could be substituted for a Hazardous Substance being incorporated in the Supplies. Where it is considered appropriate to use the alternative non-Hazardous Substance, a Contract Change Proposal (CCP) should be submitted and Approved in accordance with clause 10.1 of the conditions of contract.

#### General Environmental Requirement

Clause 2.5.5 places an obligation on the Contractor to deliver Supplies that do not emit fumes, liquids, solids, heat, noise, electromagnetic or other radiation which could be detrimental to personnel, the environment or the operation of other equipment. It is important to note that the requirement in clause 2.5.5 is only applicable to the extent it is consistent with the function of the Supplies. Where Supplies will contravene clause 2.5.5, a clear statement of the nature and the extent of the allowable emission should be included in the SOW to ensure both parties understand the nature and impact of the emission and to enable the Commonwealth to put in place procedures to minimise the environmental and/or safety risks associated with the Supplies.

**Drafter's action:** Drafters may select between the two options for both Ozone Depleting Substances and Hazardous Substances, or leave both optional clause sets in the RFT draft SOW and allow the tenderer to respond as appropriate.

Where the second option is selected for either Ozone Depleting Substances or Hazardous Substances, drafters should include the details of any Hazardous Substances or Ozone Depleting Substances (as applicable) that are authorised for inclusion in the Supplies in an Annex to the SOW prior to release of the RFT. The relevant Annex reference must be included in clause 2.5.

**Related clauses:** The **Ozone Depleting Substances and Hazardous Substances** clause of the **Description of Proposed Solution** Annex of the conditions of tender requests tenderers to provide details of any Hazardous Substances or Ozone Depleting Substances that are proposed for inclusion in the Supplies.

'Ozone Depleting Substances' and 'Hazardous Substances' are defined in the **Glossary** Attachment of the conditions of contract.

The **Occupational Health and Safety** clause of the conditions of contract places an obligation on the Contractor to provide Supplies that do not render the Commonwealth in breach of its Occupational Health and Safety obligations.

**Further Reading:** Defence Safety Management Agency website at:

<http://www.defence.gov.au/dpe/dsma/>

National Occupational Health and Safety Commission website at:

<http://www.nohsc.gov.au>

**Not Used**

Reference: Clause 2.6





**PROJECT MANAGEMENT****Contractor's Project Management Organisation**

<u>Reference:</u>	Clause 3.1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to establish and maintain discrete project-management arrangements with suitable capability to perform the Contract.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>The Commonwealth expects that the Contractor will manage the resultant Contract using sound project-management principles and practices, given the likely scope and cost associated with Defence acquisition contracts. This clause provides the overarching obligation within which any other subordinate elements (e.g. the SE organisation or the ILS organisation) must operate.</p> <p>The conditions of this clause should apply to the Contractor and all Approved Subcontractors. The Contractor should flow down all requirements of this clause to all Approved Subcontractors.</p> <p>The template provides options to require the Contractor to identify either:</p> <ol style="list-style-type: none"> <li>a. only a Project Manager with suitable capability and authority to perform the Contract, which is appropriate only where the complexity of the resultant Contract will be low, and development and ILS activities will be minimal; or</li> <li>b. a discrete project management organisation, which is appropriate for contracts of higher complexity, and where development and ILS activities of any significance or complexity will be involved.</li> </ol>
<u>Drafter's action:</u>	Drafters are to select the option at clause 3.1 that is appropriate to the proposed acquisition. Drafters must assess whether the loss of visibility of the Contractor's management arrangements resulting from selection of Option A is likely to be significant in the context of the proposed acquisition, or whether the likely tenderers are in fact likely to be able or need to establish a discrete broader project management organisation.
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

### **Project Planning**

<u>Reference:</u>	Clause 3.2
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that the Contractor (and the Commonwealth Project Office) has realistic plans at all times.
<u>Policy:</u>	DMO policy requires a sound, project-management approach be adopted by the Contractor for the management of its contractual obligations. Specific policy for project management is outlined in relevant Process Reference Pages of the DMO's Standard Acquisition Management System (SAMS) and can be accessed through the DMO Quality and Environmental Management System (QEMS). In the ensuing sub-sections, where no specific policy is identified, this overarching policy is relevant.
<u>Guidance:</u>	There are no 'winners' in a project having unrealistic plans. Unrealistic plans will result in the Contractor appearing not to perform and the Commonwealth Representative appearing not to be doing their job, which will then reflect badly on DMO senior management and will ultimately result in having to replan. Replanning is an expensive exercise in terms of budget and schedule and should be avoided if there are other means of bringing the project back into line with the existing plan.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

#### **3.2.1 - NOT USED**

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#### **3.2.2 - PROJECT MANAGEMENT PLAN**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to submit a Project Management Plan (PMP) for Approval by the Commonwealth Representative and to manage the project in accordance with the Approved PMP.
<u>Policy:</u>	See Section 3.2.
<u>Guidance:</u>	<p>The PMP, including or supplemented by subordinate plans, is used by the Contractor to provide direction and guidance to the Contractor's management team responsible for conduct of the work. The PMP is also used by the Commonwealth Representative to gain visibility of the Contractor's planning and to provide input into Commonwealth Representative planning.</p> <p>The PMP is Approved by the Commonwealth Representative, and should provide an overview of the different project processes and how they fit together to form a totally integrated management system for the project. As an analogy it should be like the key map at the front of a street directory. It should provide an overview and show how all of the detailed processes (maps) fit together.</p> <p>Note that a distinction is made between the PMP and the detailed planning documents. The PMP is a 'how' document describing the Contractor's approach to the management of the project. The detailed planning documents will include other documents such as the WBS, WBS Dictionary, Schedule, etc. Depending on the complexity of the project, the PMP may range from 20 to 100 pages in length, whereas the detailed planning documents may contain the equivalent of many more pages of data.</p>
<u>Drafter's action:</u>	Clause 3.2.1 is to be included in the RFT without alteration.

**Related clauses:** Annex F-1 of the conditions of tender requests each tenderer to provide a draft PMP.

**Further Reading:** See also – ASDEFCON Strategic Materiel Handbook - Philosophy Annex A, Lifecycle Thread – Project Planning

### 3.2.3 - CONTRACT MASTER SCHEDULE

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To impose a contractual obligation on the Contractor to submit a Contract Master Schedule (CMS) for Approval by the Commonwealth Representative and to use the Approved CMS as the primary schedule for managing the Contract.

**Policy:** See Section 3.2.

**Guidance:** The CMS describes the Contractor's planned sequence of activities, milestones and decision points to enable the objectives of the Contract to be met. Additionally, the CMS defines the current project schedule status, comparing the current schedule with the Contracted schedule. The CMS also compares the current schedule status with any applicable baseline schedule. DID-PM-DEF-CMS-2 provides more detail on the scope of coverage of the CMS.

The CMS and the Contract Work Breakdown Structure (CWBS) are the two key deliverables for understanding the Contractor's (and Subcontractors') planned scope of work under the Contract, the plan for undertaking this scope of work, and (for the CMS only), the status of the project at any particular time. Under the ASDEFCON philosophy, the Contractor only needs to deliver a single, integrated schedule because the (normally) separate schedules for each of the functional disciplines (e.g. SE, ILS and V&V) have been incorporated into the CMS.

Annex F-3 of the conditions of tender optionally requests each tenderer to provide a draft CMS as part of its tender response. The draft CMS would normally provide one of the inputs for determining the payment schedule under the Contract (e.g. by defining the dates for Milestone payments and by defining the basis within which cash-flow issues can be addressed); however, its major function during the tender phase is to assist with the assessment of risk

Clause 3.2.3 details the procedure and timeframes that apply for the submission, agreement and amendment of the CMS. Specific attention is drawn to clause 3.2.3.5, which allows the Contractor to amend the Approved CMS without first obtaining Commonwealth Approval. This clause provides the Contractor with the flexibility to manage the project as contingencies arise. Nevertheless, this clause also recognises that there are two parties to a Contract, and the Contractor cannot amend the schedule, without first obtaining the Commonwealth's Approval if the Commonwealth will be affected. This obligation on the Contractor means that, for projects that run into difficulties, the Commonwealth is not automatically required to meet its end of the contractual bargain when the Contractor wishes to accelerate the schedule. For example, if a Contractor were to apply more resources to a project and, therefore, be able to undertake more activities in parallel, this could have significant implications for the Commonwealth. Coincident deliveries of multiple data items, for example, could place a Commonwealth project office under considerable stress, given that the CDRL would normally state that the Commonwealth Representative has only a set number of days to provide responses. Additionally, parallel testing activities in multiple locations could be equally problematic. For these reasons, clause 3.2.3.5 has been inserted into the draft SOW to ensure that the implications of any changes on the Commonwealth can be appropriately addressed with the Contractor.

Clause 3.2.3.3 specifies Open Plan Professional as the Commonwealth's preferred scheduling software package. Nevertheless, the clause recognises that there are a great number of scheduling packages that could be used by a contractor. In keeping with the ASDEFCON principle of utilising the Contractor's own processes where applicable, drafters should consider whether or not any alternative software

packages proposed by a tenderer will meet the requirements of the project. Advice should be sought from the Director of Project Management Systems, Standardisation Branch before any alternative software package is agreed.

**Drafter's action:** Clause 3.2.3.3 of the draft SOW is to be amended, prior to Contract signature, to incorporate the agreed scheduling software package into the clause.

**Related clauses:** 'Effective Date' is defined in the **Glossary** Attachment of the conditions of contract.  
The **Draft Contract Master Schedule** clause of the **Management** Annex of the conditions of tender requests each tenderer to provide a draft CMS.  
Clause 3.2.4 (Optional) of the draft SOW sets out the requirement for the establishment, use and maintenance of a CWBS.

**Further Reading:** See also – ASDEFCON Strategic Materiel Handbook - Philosophy Annex A, Lifecycle Thread – Project Planning

### 3.2.4 - CONTRACT WORK BREAKDOWN STRUCTURE

**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To impose a contractual obligation on the Contractor to submit a Contract Work Breakdown Structure (CWBS) for agreement by the Commonwealth Representative and to manage the project in accordance with the agreed CWBS. The clause also establishes the conditions under which the CWBS may be amended without first seeking Commonwealth Approval.

**Policy:** See Section 3.2.

**Guidance:** The CWBS provides the mechanism for the integration of technical control with cost and schedule control for the project. It provides the integration framework for all project activities.

Although it is the Contractor who develops the CWBS, the Commonwealth Representative must be able to review any proposed CWBS to ensure that it satisfies all of the Commonwealth's technical, as well as cost and schedule, control objectives.

The CWBS consists of product elements and service elements. All products and services identified by the SOW must be contained within the CWBS somewhere.

To achieve integrated technical, cost and schedule control within a project:

- a. the specification tree, which defines the products to be built and their interfaces at all levels within the product structure for the Mission System, must be traceable to the customer's originating requirements;
- b. the kernel of the CWBS must consist of the hierarchy of the products defined by the specification tree;
- c. costs and schedules must be associated with the products in the product structure for the Mission System such that each product in the hierarchy has an associated specification, cost and schedule (and, thus, each product CWBS element can be considered as either an internal subcontract or an external subcontract to the organisation);
- d. each CWBS element must have a corresponding CWBS dictionary entry, which describes the total scope of work associated with that WBS element (noting that, for a product, this will include the specification for that product); and
- e. the CWBS should be structured such that a single person or organisation can be held responsible for the delivery of any product or system, as defined by the specification tree.

The CWBS may require amendment during the course of the Contract. Any proposed significant amendment of the CWBS will require negotiation with the

Commonwealth and a CCP to implement. However, it is important that the Contractor is able to amend the CWBS, below an agreed level (inserted in SOW clause 3.2.4.3), without first seeking Commonwealth approval. The amendments must be consistent with the Approved CWBS such that the integration of project technical control with cost and schedule control, established by the Approved CWBS, is not compromised.

Annex F-3 of the conditions of tender optionally requests each tenderer to provide a draft CWBS as part of its tender response. For complex projects, the draft CWBS is a key deliverable during the tender phase because it assists with understanding each tenderer's proposed scope of work and with assessing of each tenderer's risk profile.

**Drafter's action:** Clause 3.2.4 is to be included in the RFT without alteration.  
Nil

**Related clauses:** The **Draft Contract Master Schedule** clause of the **Management** annex of the conditions of tender optionally requires tenderers to provide a draft CWBS as part of their tender responses.

Clause 3.2.3 of the draft SOW sets out the requirement for the establishment, use and maintenance of a CMS.

**Further Reading:** See also – ASDEFCON Strategic Materiel Handbook - Philosophy Annex A, Lifecycle Thread – Project Planning

See also – *DEF(AUST) 5664, Work Breakdown Structures for Defence Materiel Projects*

**3.2.5 - NOT USED**

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**3.2.6 - NOT USED**

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**3.2.7 - NOT USED**

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**Project Monitoring and Control**

<u>Reference:</u>	Clause 3.3
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to submit regular status reports.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>Contract progress or status reports provide the primary mechanism for the Commonwealth to monitor Contractor performance. Project Status Reports enable the Commonwealth to monitor Contractor progress throughout the project.</p> <p>Where unsatisfactory progress under the contract is notified to the Contractor by the Commonwealth, the Contractor is obligated to advise corrective measures and results in future progress reports.</p>
<u>Drafter's action:</u>	The <b>Project Monitoring and Control</b> clause of the draft SOW is to be included in the RFT without alteration.
<u>Related clauses:</u>	Clause 3.5.3 of the draft SOW sets out the requirements for Subcontractor status reporting.
<u>Further Reading:</u>	Nil

**Not Used**

Reference: Clause 3.4

### **Subcontractor Management**

<u>Reference:</u>	Clause 3.5
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that effective Subcontract management practices are implemented.
<u>Policy:</u>	Effective Subcontractor management and the provision of insight into Subcontractor activities and management practices is one of the philosophies underpinning ASDEFCON. This approach is consistent with international standards, and is explained in Section 10.3 of the Philosophy volume of the <i>ASDEFCON (Strategic Materiel)</i> Handbook.
<u>Guidance:</u>	To enable the planning and reporting requirements, which have been imposed on the Contractor in other clauses of the draft SOW, to be satisfied, it is necessary that the Contractor flows similar requirements to Approved Subcontractors to meet contractual reporting requirements.

Drafter's action: Nil

Related clauses: Nil

Further Reading: Nil

#### **3.5.1 - SUBCONTRACTOR PLANNING**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core, but clause 3.5.1.2 is not used.
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to flow requirements to Approved Subcontractors to develop a Project Management Plan and manage the Subcontract in accordance with that plan.
<u>Policy:</u>	Nil.
<u>Guidance:</u>	Subcontractor project planning is just as important as detailed planning of each WBS element for the Contractor. This planning may extend to the development of a Subcontract Project Management Plan, a Subcontract Master Schedule and a Subcontract WBS.  The Contractor is required to ensure that the Approved Subcontractors execute their Subcontracts in accordance with their Project Management Plans.
<u>Drafter's action:</u>	Clause 3.5.1 is to be included in the RFT without alteration.
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

#### **3.5.2 - SUBCONTRACTOR MONITORING AND CONTROL**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to ensure that Approved Subcontractors perform monitoring and control activities and implement corrective actions if required.
<u>Policy:</u>	Nil
<u>Guidance:</u>	It is important that the burden of monitoring Approved Subcontractor performance is not left to the Commonwealth. The Contractor must ensure that Approved Subcontractors have appropriate progress monitoring processes in place.



Where Approved Subcontractor performance deviates from plans, the Contractor is required to react and ensure that the Approved Subcontractor implements corrective actions as required.

Drafter's action: Clause 3.5.2 is to be included in the RFT without alteration.

Related clauses: The **Project Monitoring and Control** clause of the draft SOW sets out the requirement for the Contractor to report corrective action measures to the Commonwealth.

Further Reading: Nil

### 3.5.3 - SUBCONTRACT STATUS REPORTING

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Sponsor: Standardisation Branch

Status: Core

Purpose: To impose a contractual obligation on the Contractor to ensure that Approved Subcontractors produce status reports and report that status to the Commonwealth.

Policy: Nil

Guidance: Subcontract status reports provide the primary mechanism for the Contractor to monitor Approved Subcontractor performance. The Contractor is required to include Subcontractor Status Reports in Project Status Reports to give the Commonwealth visibility of Approved Subcontractor performance.

Drafter's action: Clause 3.5.3 is to be included in the RFT without alteration.

Related clauses: The **Project Monitoring and Control** clause of the draft SOW sets out the requirement for the preparation and delivery of Project Status Reports.

Further Reading: Nil

### **Risk Management**

<u>Reference:</u>	Clause 3.6
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to address Risk Management in the PMP for agreement by the Commonwealth Representative and to manage the project risks in accordance with the Approved Plan.
<u>Policy:</u>	<i>DPPM – Section 3, Chapter 3.2</i> <i>Project Risk Management Manual</i>
<u>Guidance:</u>	Risk management is defined as “minimising the uncertainty in any outcome”, although this definition can lead to a lack of appropriate focus at times. Uncertainty is controlled by a number of different processes and factors, not just through the risk-management process as such.

In minimising the uncertainty in a project, it is necessary to find out what is under control in the project and what is not under control. The answers to these questions will be a function of the project type, the procedures used, and the experience of the project team conducting the work.

In conducting an independent review of a project, the initial view would look something like the diagram below. That is, with no visibility of what is under control and what is not, the whole project seems to be full of uncertainties.



Figure 3-1 – Uncertainty without Control Mechanisms

Putting standard processes and controls in place, with experienced team members will reduce uncertainties. Thus, once the project is examined and it is discovered that there are sound project-management and systems-engineering controls in place, much of the uncertainty is removed or reduced. The use of a risk-management approach will further reduce the uncertainties in the project as shown in the diagram below. The grey area of cloud remaining outside of the processes represents the remaining uncertainties.

It is important to note that the degree of control achievable in any domain such as project management or systems engineering will depend on the talent and experience of the staff members exercising that control. The more experienced the staff is, the less will be the number of ‘unknown unknowns’ and hence risk. Thus, if it is known that the project manager is not greatly experienced, then the higher the risk will be to the project and the greater will be the burden on risk management. Thus, the risk-management approach will need to be tailored to the experience of the Contractor’s project team.

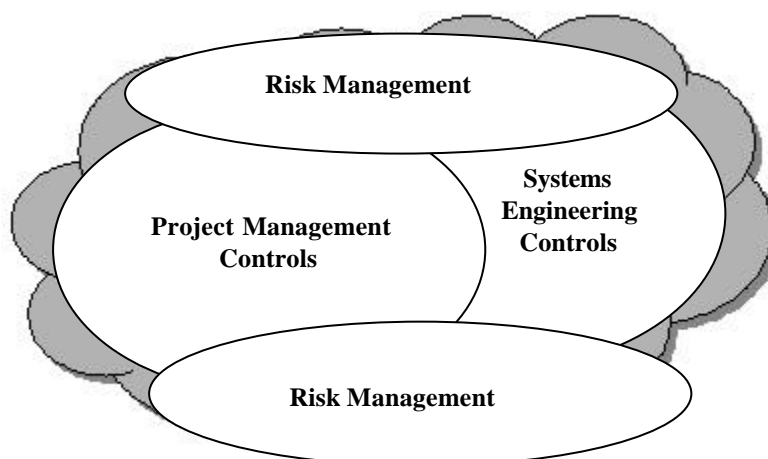


Figure 3-2 – Bringing Uncertainty Under Control

### 3.6.1 - RISK MANAGEMENT PLANNING

The Risk Management planning aspects of an ASDEFCON (Complex Materiel) Volume 2 project are addressed in the Risk Management Plan (RMP).

The RMP identifies how the Contractor will manage risks for the project and describes the control mechanisms that the Contractor will put in place. Although the RMP may identify generic risk areas such as software development, it does not contain risks in itself. The RMP will identify the format of the Contractor's Risk Register, which will be used as the source of information for the documentation of risks in the Contractor's Project Status Reports.

The Commonwealth Representative must review the risk-management aspects of the RMP to ensure that it satisfies the objectives of the Commonwealth in minimising the uncertainties associated with the project.

The Contractor's RMP and Risk Register should provide input to the project risk-management process managed by the Commonwealth. The project RMP and Risk Register or Log should provide links to the Contractor's documents.

Project Status Reports will provide updates on risks and risk management for the duration of the Contract.

Drafter's action: The **Risk Management** clause is to be included in the RFT without alteration.

Related clauses: The **Risk Assessment and Strategy** clause of Annex F of the conditions of tender requests a detailed risk assessment from each tenderer.

Further Reading: Nil

**Issue Management**

<u>Reference:</u>	Clause 3.7
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that the many day-to-day project issues are being managed.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>In this context, 'issues' are items whose progress needs to be monitored, but are not included in project plans because they are either too short-term or too insignificant. They do not appear in the Risk Register because they are technically not risk, as they do not represent any cost or schedule threat to the project at this point in time.</p> <p>The PMP shall describe the Contractor's processes and tools used for managing issues for this project. Typical issues include:</p> <ol style="list-style-type: none"><li>a. action items from meetings;</li><li>b. corrective actions;</li><li>c. issues arising from the metrics collection and analysis;</li><li>d. issues arising from deviation of progress against plan;</li><li>e. issues arising from reviews of process application; and</li><li>f. issues arising from correspondence.</li></ol> <p>The Commonwealth Representative does not wish to have visibility of all project issues, but it does need to know that there is a rigorous process in place to ensure that issues will be addressed in a timely manner.</p> <p>It is most likely that the Contractor will use some sort of database to track issues and to allocate Action Items to various team members.</p>
<u>Drafter's action:</u>	The <b>Issue Management</b> clause of the draft SOW is to be included in the RFT without alteration.
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

### Maintenance of Contractual Documents

<u>Reference:</u>	Clause 3.8
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to apply strict configuration control to contract and subcontract documents.
<u>Policy:</u>	<i>DPPM – Section 6, Chapter 6.1</i>
<u>Guidance:</u>	<p>There is always a need to be able to produce an up-to-date, readable version of ‘today’s Contract’. There is also a need to be able to produce a clean, readable version of the Contract as it was at any point in time in the past.</p> <p>There have been a number of instances in which it has not been possible to produce a copy of the required version of a Contract because the approach to Contract amendment has been to simply attach the Contract change notices to the original Contract. This has ultimately led to later changes unknowingly affecting previous changes because it was not possible to read the Contract as it stood when the later change was proposed.</p> <p><i>DPPM – Section 6, Chapter 6.1</i> discusses contract variations in general.</p>
Drafter's action:	Nil
Related clauses:	Nil
Further Reading:	Nil

#### 3.8.1 - CONFIGURATION MANAGEMENT OF THE CONTRACT

<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that a clean copy of any version of the Contract, now or at any previous time, can be produced as needed.
<u>Policy:</u>	<i>DPPM – Section 6, Chapter 6.1</i>
<u>Guidance:</u>	<p>This clause obligates the Contractor to maintain a configured copy of the Contract, which incorporates all approved Contract Change Proposals, and maintain an archive of all superseded versions of the Contract. It is imperative that the Commonwealth Commonwealth Representative does the same.</p> <p>It should be noted that the requirement for the Contractor to maintain the configuration of the Contract does not remove the need for the Commonwealth to do the same. It is imperative that the Commonwealth maintains copies of the current and past versions of the Contract as described in this clause.</p>
<u>Drafter's action:</u>	Clause 3.8.1 is to be included in the RFT without alteration.
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

#### 3.8.2 - SUBCONTRACT CONFIGURATION MANAGEMENT

<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that a clean copy of any version of any Subcontracts, now or at any previous time, can be produced as needed.
<u>Policy:</u>	<i>DPPM – Section 6, Chapter 6.1 “Contract Management”</i>
<u>Guidance:</u>	The same reasons for maintaining the configuration of the Contract apply to Subcontracts. This clause ensures that the Contractor maintains subcontract documents with the same rigour as maintaining Contract documents.

Drafter's action: Clause 3.8.2 is to be included in the RFT without alteration.

Related clauses: Nil

Further Reading: Nil

**Customer Liaison**

<u>Reference:</u>	Clause 3.9
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose contractual obligations on the Contractor for the conduct of regular progress meetings, and extraordinary meetings as assessed as necessary.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>Regular, formally conducted meetings between the Commonwealth and the Contractor may be extremely important to the success of the project as they enable issues to be discussed face-to-face and enable the Commonwealth to monitor Contractor progress.</p> <p>However, in low complexity, risk and cost projects, the cost and commitment to regular progress meeting may not be necessary. Project status reports, normal forms of communication and extraordinary meetings as required may be a cost-effective alternative.</p> <p>Commonwealth project officers attending meetings should be wary of making any commitments that could estop the Commonwealth or should, in fact, be contract variations. <i>DPPM – Section 6, Chapter 6.1</i> discusses estoppel.</p> <p>As the Contractor is required to produce agendas for meetings, it is important that any Commonwealth agenda items are advised to the Contractor such that these items are given the necessary time at the meeting.</p> <p>Similarly, as the Contractor is required to produce the minutes for meetings it is important that the Commonwealth thoroughly review the minutes before Approval to ensure that the outcomes of the meeting are correctly recorded. This may require Commonwealth representatives to take detailed notes during the meetings for subsequent comparison with the Contractor's minutes.</p>
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

**3.9.1 - PROGRESS MEETINGS (OPTIONAL)**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to conduct regular progress meetings and establishes the process for the conduct of the meetings.
<u>Policy:</u>	Nil
<u>Guidance:</u>	<p>It may be important that regular progress meetings are held with the Contractor. The interval at which the meetings are held should be determined based on a trade off between the cost of holding the meetings and the risk of reduced reaction speed to issues that develop between meetings. If needed, progress meetings should be held every 3 months at a minimum and more often if necessary, particularly at the start of a project.</p> <p>In projects that are of low complexity, risk or cost, regular progress meetings may not be necessary as Project Status Reports, regular correspondence and extraordinary meetings (as required) may be a cost-effective alternative.</p> <p>The location of progress meetings should generally be at the Contractor's premises, as this will most likely keep the travel costs to a minimum and allow "side meetings" to be held with members of the Contractor team on other issues, if required.</p>

**Drafter's action:** Drafters are to determine whether regular progress meetings are warranted on the basis of the complexity, risk and cost of the project. If these are assessed as low, then clause 3.9 may be omitted from the draft SOW, in favour of monitoring progress via Project Status Reports, normal forms of communication and extraordinary meetings as required. If required, however, clause 3.9.1 is to be included in the RFT without alteration, except for the inclusion of the periodicity for progress meetings in clause 3.9.1.1.

**Related clauses:** Nil

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook Philosophy Volume, Section 3.3 – Integrated Management Framework*

### 3.9.2 - EXTRAORDINARY MEETINGS

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To establish the process for the conduct of extraordinary meetings.

**Policy:** Nil

**Guidance:** An extraordinary meeting is one not scheduled in the Contract and may be called by either the Commonwealth or the Contractor. When agreeing to the location for an extraordinary meeting, the nature of the issue to be discussed and Contractor and Commonwealth travel budgets need to be taken into account.

**Drafter's action:** Clause 3.9.2 is to be included in the RFT without alteration.

**Related clauses:** Nil

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook Philosophy Volume, Section 3.3 – Integrated Management Framework*

### 3.9.3 - NOT USED

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**Not Used**

Reference: Clause 3.10

**Not Used**

Reference: Clause 3.11

### Transition into Operational Service

<u>Reference:</u>	Clause 3.12
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional
<u>Purpose:</u>	To impose an obligation on the Contractor to manage its own transition activities and to participate in the Commonwealth's transition activities. To enhance the likelihood that Transition into Operational Service will proceed smoothly and efficiently.
<u>Policy:</u>	Nil.
<u>Guidance:</u>	Transition is a typical area of risk in Defence acquisition projects, and the clauses in the ASDEFCON (Complex Materiel) RFT Template provide a minimum set of requirements to ensure that the Contractor will be an integral part of the Transition process.

The scope of the Contractor's transition activities will be dependent upon the Contractor's (and Subcontractors') involvement in support activities. Even if the Contractor is not being contracted by the Commonwealth to provide support (e.g. under a Contract (Support)), the Contractor (and Subcontractors) will nevertheless have to transition the products that have been produced under this Contract from an acquisition, project-based environment to a support environment.

Options are provided for transition planning, if required, to be addressed either in the PMP or in a separate Contractor Transition Plan, depending on the anticipated complexity of the transition activities.

Guidance below on the Contractor's Transition Plan should be taken as a guide for any transition planning included in a PMP.

#### 3.12.1 - CONTRACTOR TRANSITION PLANNING (OPTIONAL)

Clause 3.12.1 of the draft SOW places an obligation on the Contractor to develop a Contractor Transition Plan (CTXP) or a section of the PMP for the management of its Transition activities, and to conduct these activities in accordance with the CTXP or PMP, as appropriate.

While most DIDs under ASDEFCON templates are not intended to be tailored, the CTXP DID will need to be tailored to align with the envisaged scope of involvement by the Contractor and Subcontractors in future support activities. The DOR, which documents the agreed concept for logistics support, should have documented the division of support responsibilities between the Commonwealth and industry. Furthermore, if either interim support arrangements are included under this Contract or a separate Contract(LS) will be enacted with the Contractor, then these documents will further define the Contractor's and Subcontractors' involvement in support. In conjunction with the DOR, these documents provide the framework within which the design or development of the Support System will occur. This will define the full scope of each party's support responsibilities, which will, in turn, determine the scope of the Contractor's own Transition activities as well as its involvement in the Commonwealth's Transition activities.

The Commonwealth Representative should be aware that the CTXP will be a significant source of information for the Commonwealth Representative's own Transition Plan. In particular, the CTXP will provide a consolidated description of support responsibilities under each of the Support System Constituent Capabilities.

Of note, DID-PM-TRANS-CTXP embraces the requirements for a Software Transition Plan (by incorporating DI-IPSC-81429A), which is often included as a separate requirement under the SE clause of the SOW. Drafters should ensure that any potential overlaps in this area are addressed prior to RFT release.

#### 3.12.2 - TRANSITION MEETING (OPTIONAL)

Clause 3.12.2 of the draft SOW is an optional requirement, which places an obligation on the Contractor to attend a Pre-Transition Meeting. Tentatively, the timeframe for this Pre-Transition Meeting has been set at 120 days before the first Test Readiness Review (TRR) for the Mission System (or other time to be agreed between the parties). This timeframe was selected because it represented a suitable balance between the developmental maturity of both the Mission and Support Systems and the likely date for Acceptance into Operational Service. Nevertheless, the Commonwealth Representative may select an alternative timeframe if the nature and scope of, and the risks associated with, the Transition activities warrant the selection of an alternative date.

Attention is drawn to clause 3.12.2.1d, which addresses the requirement for any Transition Meetings subsequent to the initial Pre-Transition Meeting. It is recommended that this issue be addressed during Contract negotiations to ensure that this requirement is bounded and agreed by both parties. Clause 6.2.3.1h of DID-PM-TRANS-CTXP addresses this requirement, and the Draft CXP would provide an ideal location to document this agreement.

As highlighted in the Notes to drafters under this clause, the location for the Pre-Transition Meeting (or any subsequent Transition Meeting) needs to be determined (and the clauses may also require amending accordingly if this issue is not addressed in the Draft CXP). Given the nature of many Transition activities, it may be appropriate to conduct these meetings at the address of the In-Service support agency, which, in general, would be the Commonwealth agency having responsibility for the provision of In-Service support.

### 3.12.3 - TRANSITION REGISTER (OPTIONAL)

Clause 3.12.3 of the draft SOW is an optional requirement, which places an obligation on the Contractor to develop, deliver and update a Transition Register in accordance with the Approved CXP. Transition normally involves a significant number of small activities, and the obligation to provide a Transition Register has been included in the RFT Template to provide a mechanism by which this large number of activities can be managed (without cluttering the Contract Master Schedule (CMS)). Of note, the draft CDRL currently defines a weekly delivery schedule for the Transition Register after the initial Pre-Transition Meeting under clause 3.12.2 of the draft SOW; however, the Commonwealth Representative may wish to define a differing delivery schedule (perhaps linked to the phase of the project, increasing in frequency as the date for Transition into Operational Service approaches).

**Drafter's action:** Drafters must determine whether Contractor transition planning is required, and then whether this can be adequately accommodated in the PMP or warrants a separate CXP, and either omit or include clause 3.12.1, tailored as required.

Drafters must also determine the applicability of the optional clauses.

**Related clauses:** Nil

**Further Reading:** Ni

**Government Furnished Material (GFM) Management**

<u>Reference:</u>	Clause 3.13
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional. To be used when GFM is to be supplied to the Contractor. Clauses 3.13.1 to 3.13.3. are optional but interdependent and must be inserted, amended or omitted as appropriate.
<u>Purpose:</u>	To impose contractual obligations on the Contractor for the delivery, receipt, use and care of GFM.
<u>Policy:</u>	The preferred Departmental position is to minimise the provision of GFM to contractors. However, in some circumstances it will not be possible for a contractor to perform the work required under a Contract without GFM.  <i>DI(G) LOG 07-4 "Provision of Material to Contractors"</i>
<u>Guidance:</u>	GFM is any equipment, information or data listed in the <b>Government Furnished Material</b> Attachment to the conditions of contract that is provided to the Contractor by the Commonwealth to assist in the performance of the Contract.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

**3.13.1 - DELIVERY AND RECEIPT OF GFM (OPTIONAL)**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional. To be used when GFM is to be supplied to the Contractor. Clauses 3.13.1 to 3.13.5 are optional but interdependent and must be inserted, amended or omitted as appropriate.
<u>Purpose:</u>	To impose contractual obligations on the Contractor for the receipt, inspection and functional testing of GFM.
<u>Policy:</u>	<i>DI(G) LOG 07-4 "Provision of Material to Contractors"</i>
<u>Guidance:</u>	Under clause 3.13.1, the Commonwealth must deliver or provide the Contractor with access to GFM at the places and times stated in Attachment H to the conditions of contract. Where the Commonwealth fails to deliver or provide access to GFM at the places and times stated in Attachment H to the conditions of contract, it is likely that the Contractor will be entitled to claim a postponement of the date for delivery of Supplies and/or a Milestone date and to recover postponement costs unless the failure to deliver or provide access was caused by a default or an unlawful or negligent act or omission of the Contractor, its officers, employees, agents or Subcontractors. It is important, therefore, to ensure that all GFM can be supplied by the Commonwealth at the time and place specified in the <b>Government Furnished Material</b> Attachment to the conditions of contract.  On receipt of the GFM, the Contractor must inspect the GFM for physical damage, defects and deficiencies within the timeframes specified in Attachment H to the conditions of contract and report its satisfaction or dissatisfaction with the GFM to the Commonwealth Representative in writing. Clause 3.13.1.6 places an additional requirement on the Contractor to carry out appropriate functional testing of GFE. It is important that these inspections and tests are carried out so that the parties are able to determine who is responsible for any later defect in GFM.  Clause 3.13.1.6 requires that GFE is tested by the Contractor at a determined number of days prior to the date that work is to be commenced in relation to the GFE, to determine that the GFE is serviceable for use as required by the Contract. The words "to the extent feasible" have been included so that the Contractor will not be rendered in breach of contract where it is not feasible for the GFE to be functionally tested, for example, where the GFE must operate with Supplies which have not yet been completed. However, it is important that the Contractor

functionally tests GFE as early as possible to ensure that the project schedule is not affected. Where a Contractor submits a postponement claim in relation to deficient GFE, the Contractor's actions, including in relation to the functional testing of the deficient GFE, will be taken into account in determining whether the postponement claim should be granted. Where the Contractor fails to inspect the GFM as required by clause 3.13.1.4 or carry out the functional tests on GFE as required by clause 3.13.1.6 the Contractor will be in breach of Contract. The Commonwealth's remedy in respect of such a breach will depend upon the circumstances and effect of the breach. In accordance with conditions of contract clause 3.6.14, the Commonwealth's warranty in relation to the fitness for purpose of Commonwealth Mandated GFM will also not apply where the Contractor fails to inspect and test the GFM as required by clause 3.13.1.

Where the GFM provided by the Commonwealth is damaged, deficient or defective, the Contractor may be entitled to claim a postponement of the date for delivery of Supplies and/or a Milestone date and to recover postponement costs. It is important, therefore, to ensure that all GFM provided by the Commonwealth is not damaged, defective nor deficient and is serviceable for its intended use. However, if the Contractor fails to inspect GFM as required by clause 3.13.1.4 or functionally test GFE as required by clause 3.13.1.6, the Contractor's entitlement to a postponement claim may be affected.

**Drafter's action:** If the **Government Furnished Material Management** clause of the draft SOW is required, clause 3.13.1 is to be included in the draft SOW without alteration.

Prior to Contract signature, drafters must include details at Attachment H of conditions of contract of all GFM to be provided under the Contract including the quantity, date required, location, time period for inspection and intended purpose of the GFM.

**Related clauses:** The **Government Furnished Material** clause of the **Management** Annex of the conditions of tender requests tenderers to provide details of the GFM that they require to perform the Contract, including the quantity, date required, location and intended purpose. Tenderers must also identify in the **Government Furnished Material** clause of Annex F of the conditions of tender the additional cost to be added to the tendered price should any GFM not be made available.

The **Glossary** Attachment to the conditions of contract contains definitions of GFD, GFE, GFI, GFM and Commonwealth Mandated GFM.

The **GFM Ownership and Restrictions** clause of the conditions of contract contains additional GFM provisions.

The **Postponement** and **Postponement Costs** clauses of the conditions of contract detail when the Contractor is entitled to claim a postponement of the date for delivery of the Supplies and/or a Milestone date and to recover postponement costs.

**Further Reading:** Nil

3.13.2 - USE OF GFM (OPTIONAL)

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**Sponsor:** Standardisation Branch

**Status:** Optional. To be used when GFM is to be supplied to the Contractor. Clauses 3.13.1 to 3.13.3 are optional but interdependent and must be inserted, amended or omitted as appropriate.

**Purpose:** To outline how the Contractor is to use the GFM, including the standard of care that will apply.

**Policy:** *DI(G) LOG 07-4 "Provision of Material to Contractors"*

**Guidance:** Under clause 3.13.2, the Contractor must incorporate GFM into the Supplies and use GFM in the production of the Supplies with a high degree of professional skill and care and in accordance with the Contract. This aligns with the standard of

care required of the Contractor in the **Design, Development and Production** clause of the conditions of contract.

Clause 3.13.2.2 places an obligation on the Contractor to return GFM that has not been incorporated into the Supplies or consumed in the production of the Supplies to the Commonwealth as directed by the Commonwealth Representative. Requirements for the return of GFM may be incorporated in the Contract or provided in writing to the Contractor during the performance of the Contract.

**Drafter's action:** If the **Government Furnished Material Management** clause of the draft SOW is required, clause 3.13.2 is to be included in the draft SOW without alteration.

**Related clauses:** The **Government Furnished Material** clause of the **Management** Annex of the conditions of tender requests tenderers to provide details of the GFM that they require to perform the Contract, including the quantity, date required, location and intended purpose. Tenderers must also identify in the **Government Furnished Material** clause of the **Management** Annex of the conditions of tender the additional cost to be added to the tendered price should any GFM not be made available.

The **Glossary** Attachment of the conditions of contract contains definitions of GFD, GFE, GFI, GFM and Commonwealth Mandated GFM.

The **GFM Ownership and Restrictions** clause of the conditions of contract contains additional GFM provisions.

**Further Reading:** Nil

3.13.3 - CARE OF GFM (OPTIONAL)

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**Sponsor:** Standardisation Branch

**Status:** Optional. To be used when GFM is to be supplied to the Contractor. Clauses 3.13.1 to 3.13.3 are optional but interdependent and must be inserted, amended or omitted as appropriate.

**Purpose:** To impose a contractual obligation on the Contractor in relation to the care of GFM in its care, custody or control.

**Policy:** *DI(G) LOG 07-4 "Provision of Material to Contractors"*

**Guidance:** Clause 3.13.3.1 places a contractual obligation on the Contractor to take all reasonable care of GFM that is in its care, custody or control. GFM will be in the Contractor's care, custody or control where the Contractor has received delivery of, or access to, the GFM and the GFM is in the Contractor's or its officer's, agent's, employee's or Subcontractor's custody or control.

Clause 3.13.3.3 requires the Contractor to institute, maintain and apply a system for managing GFM. Clause 3.13.3.4 requires the Contractor to carry out physical stocktakes of GFM when requested by the Commonwealth Representative in writing.

**Drafter's action:** If the **Government Furnished Material Management** clause of the draft SOW is required, clause 3.13.3 is to be included in the draft SOW without alteration.

**Related clauses:** The **Government Furnished Material** clause of the **Management** Annex of the conditions of tender requests tenderers to provide details of the GFM that they require to perform the Contract, including the quantity, date required, location and intended purpose. Tenderers must also identify in the **Government Furnished Material** clause of the **Management** Annex of the conditions of tender the additional cost to be added to the tendered price should any GFM not be made available.

The **Glossary** Attachment to the conditions of contract contains definitions of GFD, GFE, GFI, GFM and Commonwealth Mandated GFM.

The **GFM Ownership and Restrictions** clause of the conditions of contract contains additional GFM provisions.

Further Reading: Nil



### **Australian Industry Involvement (All) Management**

<u>Reference:</u>	Clause 3.14
<u>Sponsor:</u>	Industry Policy
<u>Status:</u>	Optional
<u>Purpose:</u>	To place a contractual obligation on the Contractor to comply with the Australian Industry Involvement (All) management requirements.  Two options are provided, either simple or complex All programs.
<u>Policy:</u>	<i>All Manual</i>  <i>DPPM - Section 3, Chapter 3.12</i>
<u>Guidance:</u>	<u>Option A, for complex All programs.</u>

The **Australian Industry Involvement Plan** clause of Annex E of the conditions of tender requires the tenderer to submit a draft All Plan that will be incorporated into the Contract at the Effective Date.

The **Australian Industry Involvement (All) Management** clause of the draft SOW places a contractual obligation on the Contractor to:

- a. implement the contracted All Plan;
- b. enhance the All Plan where possible, and amend as necessary as a consequence of contract change proposals; and
- c. deliver All Reports in accordance with CDRL Line Number MGT-710 and the agreed format.

The **Australian Industry Involvement (All) Management** clause of the draft SOW also advises the Contractor of two reviews that may be carried out by the Commonwealth. Firstly, an All Review may be carried out prior to or following the delivery of the first All Progress Report. This review seeks to assess and verify that the Contractor has:

- a. implemented the contracted All Plan satisfactorily; and
- b. that the methodologies for capturing, recording and reporting the All data are appropriate.

In addition, to validate activities and the achievement of Industry Requirements claimed in the All Progress Reports, All Performance Reviews are carried out annually. These All Performance Reviews are an in-depth review to ensure:

- a. activities claimed to be carried out have been actually performed;
- b. capabilities set in place can be demonstrated; and
- c. Industry Requirements claimed can be verified.

Note: These reviews are arranged through, and only carried out with, the authority of the Commonwealth Representative.

Reviews also aim to promote a working relationship with the Contractor, with the intention that both parties will work together, as a team, to ensure the Industry Requirements and other industry objectives are achieved.

#### Option B for simple All programs.

The **Australian Industry Involvement Plan** clause of the **Australian Industry Involvement** Annex of the conditions of tender requires the tenderer to submit a draft All Plan that will be incorporated into the conditions of contract at the Effective Date.

The **Australian Industry Involvement (All) Management** clause of the draft SOW places a contractual obligation on the Contractor to:

- a. implement the contracted All Plan,

- b. implement any updates to the All Plan via a CCP, and
- c. to report on the All Program in Project Status Reports.

**Drafter's action:** The **Australian Industry Involvement (All) Management** clause of the draft SOW is to be included in the draft SOW if the project cost is estimated to be over \$5M threshold for All.

If omitted from the RFT Draft SOW because the project cost was estimated to be less than \$5M, but tendered prices exceed \$5M, the option at COT Annex E for the Commonwealth to seek information from tenderers on how they propose to address All requirements may be exercised. In this case, an All Plan may result, and one of the options of this clause (potentially Option B) should be included in the Contract SOW.

Drafters need to assess the nature of the All program likely to result from this tender.

- a. If the All program is likely to be complex and of high value, requiring high levels of Commonwealth visibility and oversight, drafters should select Option A. This will result in a detailed All Plan, and separate detailed reporting on the program.
- b. If the All program is likely to be simple and of low value, requiring limited levels of Commonwealth visibility and oversight, drafters should select Option B. This will result in simple a tabular All Plan, and reporting on the program incorporated into Project Status Reports.

**Related clauses:** The **Australian Industry Involvement Plan** clause of the **Australian Industry Involvement** Annex of the conditions of tender optionally:

- a. requests tenderers to provide their All proposal for the Contract, or
- b. advises tenderers that the Commonwealth may request a tenderer whose tendered price exceeds \$5 million to provide additional information after receipt of tenders on how it proposes to address Australian Industry Involvement requirements.”

The **Australian Industry Involvement** clause of the conditions of contract places an obligation on the Contractor to achieve the stated levels of Local Content and Strategic Industry Development Activities. The **Australian Industry Involvement** clause also details the liquidated damages that may be claimed by the Commonwealth for failure to achieve the Industry Requirements in the All Plan by Final Acceptance.

The agreed All Plan must be included at the **All Plan** Attachment prior to Contract signature.

**Further Reading:** See also – *Defence Needs of Australian Industry – June 2001*

## Intellectual Property (IP) Management

### 3.15.1 – INTELLECTUAL PROPERTY PLAN

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<u>Reference:</u>	Clause 3.15
<u>Sponsor:</u>	Contract Policy & Operations
<u>Status:</u>	Core
<u>Purpose:</u>	To impose an obligation on the Contractor to comply with the IP Management requirements.
<u>Policy:</u>	Defence IP management will be clear, consistent and traceable.

*DPPM – Section 3, Chapter 3.6*

*Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*

<u>Guidance:</u>	<p>Clause 3.15.1.1 requires the Contractor to comply with the Approved IP Plan. The draft Plan will be submitted by the tenderer in accordance with the <b>Intellectual Property</b> clause of the <b>Commercial</b> Annex of the conditions of tender, and will be incorporated into the Contract as the <b>Intellectual Property</b> Attachment at effective date.</p> <p>Clause 3.15.1.2 obligates the Contractor where they have proposed a change to the Approved IP Plan to raise a Contract change proposal in accordance with the <b>Change to the Contract</b> clause of the conditions of contract.</p> <p>Clause 3.15.3. requires the Contractor to report on progress and status of the IP program in the PSRs.</p>
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#### General

It is important to note that, where the Contractor cannot fulfil its IP obligations under the Contract, the Contractor will be in breach of Contract. The Commonwealth Representative is under no obligation to accept any remedies proposed by the Contractor; however, the Commonwealth Representative should act reasonably when rejecting corrective actions. Where the Contractor fails to propose a correction action agreeable to the Commonwealth Representative or fails to implement the corrective action in accordance with the Contract change proposal, the Contractor will be in breach of Contract and the Commonwealth will be entitled to claim damages where it has suffered loss as a result of the breach. The Commonwealth may also be entitled to terminate the Contract for default as provided for by clause 12.2 of the conditions of contract. Advice should be sought from CPO branch prior to any action being taken to claim damages or terminate the Contract for default.

#### 3.15.2 - NOT USED

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<u>Drafter's action:</u>	Drafters are to include clause 3.15.1 into the Draft SOW without alteration. Option A of the <b>Intellectual Property</b> clause of the <b>Commercial</b> Annex of the conditions of tender must also be selected, to require tenderers to submit the appropriate draft IP Plan.
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Prior to Contract signature, drafters must insert the negotiated IP Plan at **Intellectual Property** Attachment to the conditions of contract.

<u>Related clauses:</u>	<p>The <b>Intellectual Property</b> clause of the <b>Commercial</b> Annex of the conditions of tender requires each tenderer to submit a draft IP Plan.</p> <p>The <b>Intellectual Property</b> clause of the conditions of contract contains the IP clauses for the Contract. In particular, the <b>Intellectual Property Licence</b> clause of the conditions of contract details the Intellectual Property licences that must be provided by the Contractor to the Commonwealth and the <b>Provision of Technical Data</b> clause of the conditions of contract details the Technical Data to be provided under the Contract.</p>
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Clause 5.3.3 of the draft SOW contains clauses dealing with Technical Data.

Further Reading: Nil

**Defence Security Compliance**

<u>Reference:</u>	Clause 3.16
<u>Sponsor:</u>	Defence Security Authority
<u>Status:</u>	Optional
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to ensure that all security procedures, training, facilities and clearance requests are established and maintained to meet the requirements of clause 10.10 of the conditions of contract.
<u>Policy:</u>	Defence Security Manual (DSM). <i>DPPM – Section 3, Chapter 3.9</i>
<u>Guidance:</u>	The security requirements of the Contract are specified in clause 10.10 of the conditions of contract. This clause requires the Contractor to undertake the work required to comply with clause 10.10 of the conditions of contract.
<u>Drafter's action:</u>	If required, clause 3.16 is to be included in the RFT without alteration.
<u>Related clauses:</u>	The <b>Facility Clearance Requirement</b> clause of the <b>Management</b> Annex of the conditions of tender requires each tenderer to provide details of the type and level of facility clearances held by the tenderer and proposed Subcontractors.  The <b>Defence Security</b> clause of the draft conditions of contract details the security requirements of the Contract and the security classification of work to be performed under the Contract.
<u>Further Reading:</u>	Nil

### Resident Project Personnel

<u>Reference:</u>	Clause 3.17
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to provide support to any Resident Project Personnel (RPP), who will be collocated at the Contractor's premises during the Contract.
<u>Policy:</u>	Drafters should be aware that Commonwealth policy prohibits the inclusion within the Contract Price of travel or accommodation costs associated with the movement of Commonwealth personnel. Any such costs must be separately programmed and funded by the Commonwealth Representative from the appropriate element of project funding. This prohibition does not extend to the allocation of facilities at the Contractor's premises.
<u>Guidance:</u>	<p>The inclusion of RPP at the Contractor's premises is strongly recommended for projects that involve design and development. RPP can assist with activities, such as:</p> <ol style="list-style-type: none"><li>requirements interpretation;</li><li>human engineering issues (particularly issues relating to the human machine interface and human workload analysis);</li><li>the monitoring of the Contractor's activities under the Contract;</li><li>representing the Commonwealth at Contractor meetings; and</li><li>representing the Commonwealth during Acceptance Verification and Validation activities.</li></ol>

In selecting RPP, the Commonwealth Representative should ensure that staff are selected that have appropriate qualifications, experience, and understanding of the requirements of the project. A minimal team should embrace the core disciplines of PM, SE and ILS, whereas, a larger team, should consider the inclusion of more specialist staff, such as software, configuration management, quality assurance, Australian Industry Involvement, etc, commensurate with the assessment of project risks.

The Commonwealth Representative needs to ensure that the exact scope of authority of the RPP is evident to all parties to ensure that the requirements of the Contract are not inadvertently compromised by the RPP. This scope of authority should be documented in the Contract at the **Resident Project Personnel** Attachment with any additional terms of reference provided to the RPP in writing by the Commonwealth Representative.

The Commonwealth Representative needs to closely monitor the activities of the RPP to ensure that the RPP do not become overly aligned to the Contractor and, subsequently, cease to represent the best interests of the Commonwealth.

The Commonwealth has a statutory duty to provide its employees with a safe workplace, whether that workplace is located on Commonwealth premises or elsewhere. Under clause 3.17.3, the Contractor is obliged to provide Commonwealth personnel with facilities of an equal standard to those provided for Contractor's personnel of a similar status which take into account requirements for health, safety and comfort. Where drafters are concerned that the obligation placed on the Contractor under clause 3.17.3 will not be sufficient for the Commonwealth to meet its statutory obligations to provide its employees with a safe workplace, drafters must set out in clause 3.17.3 the appropriate standard for the facilities to be provided. Generally, this will be necessary only in the case of an overseas Contractor in a jurisdiction that imposes a lower standard for occupational health and safety matters than is imposed on Australian employers.

Clause 3.17.5 places an obligation on the Commonwealth to comply with and require Commonwealth officers to comply with safety and security arrangements, regulations and codes of behaviour that apply to the Contractor's premises. Where Commonwealth officers require security clearances to enter the Contractor's premises, clause 3.17.4 places an obligation on the Contractor to provide all reasonable assistance to facilitate the arranging of such clearances where the Contractor's premises are located outside of Australia.

Drafter's action: If required, the **Resident Project Personnel** clause of the draft SOW is to be included in the RFT without alteration.

Drafters need to identify, the **Resident Project Personnel** Attachment to the Contract, the numbers of RPP, terms of reference, and duration of their collocation with the Contractor.

Related clauses: The **Commonwealth Representative** clause of the conditions of contract relates to the authority of Commonwealth staff under the Contract, including 'Authorised Persons'.

The **Resident Project Personnel** Attachment to the conditions of contract details all of the requirements associated with RPP.

Further Reading: Nil





**SYSTEMS ENGINEERING****Systems Engineering Management**

<u>Reference:</u>	Clause 4.1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core with optional clauses.
<u>Purpose:</u>	To require the Contractor to undertake adequate and effective systems-engineering processes in the management of engineering development work under the Contract and to allow the Commonwealth appropriate insight into these processes.
<u>Policy:</u>	It is Defence policy for a systems-engineering approach to be taken in requirements definition, systems development and design-and-engineering processes for developmental systems. This requirement is underpinned in the Capability Systems Life Cycle Management (CSLCM) Manual 2002. Specific policy for systems engineering is outlined in relevant Process Reference Pages of the DMO's Standard Acquisition Management System (SAMS) and can be accessed through the DMO Quality and Environmental Management System (QEMS). The DMO uses <i>EIA-632 "Processes for Engineering a System"</i> as its systems-engineering standard.  In the ensuing sub-sections, where no specific policy is identified, the above mentioned overarching policy is relevant.
<u>Guidance:</u>	See guidance on subclauses.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

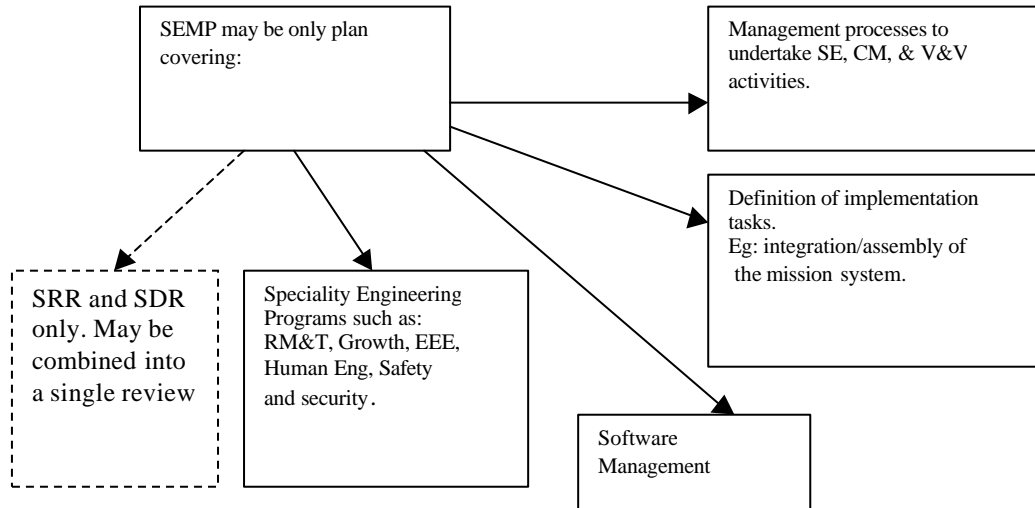
**4.1.1 - ENGINEERING ORGANISATION AND PLAN**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that the Contractor adequately plans the engineering activities for the project and conducts the activities in accordance with the plan. This should include adequate planning and oversight of Subcontractor activities.
<u>Policy:</u>	See Section 4.1
<u>Guidance:</u>	The requirements of this clause of the SOW should apply to the design and development of the Mission System as well as to significant end items of technical equipment that form part of the Support System. These elements should be clearly defined in the <b>Scope of Work</b> clause of the draft SOW.  At the simpler engineering level using the <i>ASDEFCON (Complex Materiel)</i> Volume 2 SOW, the Contractor is not required to review and apply all of the high level process requirements of EIA-632. Many either do not apply, or would impose an unwarranted amount of effort and corresponding cost of tender preparation and project management. Hence the note to tenderers only highlights the potential benefit of referring to EIA-632, and there is no mandatory clause calling up EIA-632.  The SEMP is the highest level document that defines the engineering processes for the program. It defines other programs and their associated plans, such as the Systems Safety Program, the Human Engineering Program, the Integrated RM&T Program, and Growth Program. The SEMP needs to define the interrelationship and use of these subordinate programs and plans.  The SOW employs a unique SEMP, (DID-ENG-MGT-SEMP-2). At the simpler engineering level, where separate plans may not be warranted, options provide for the SEMP to be the only SE plan, covering the majority of engineering activities

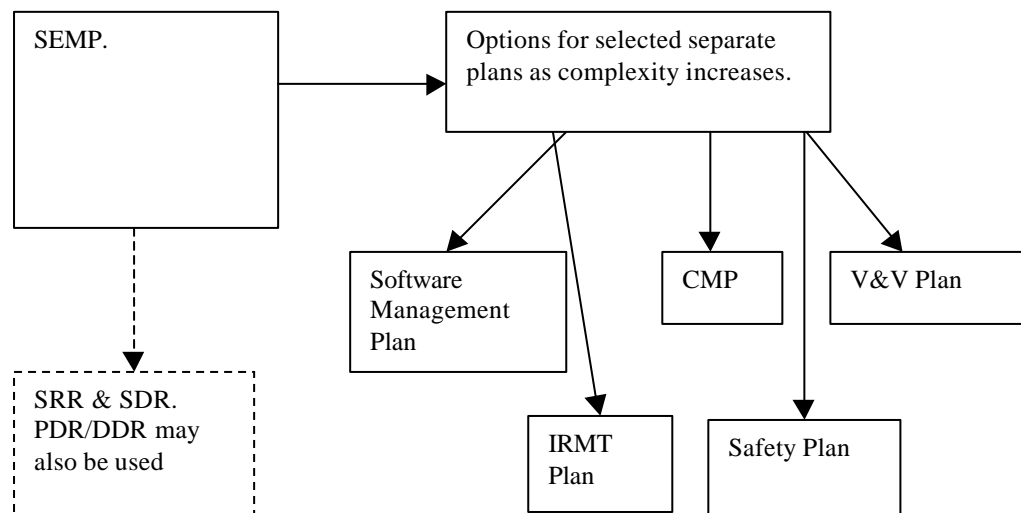
including software development, Configuration Management (CM), Verification and Validation (V&V, System Reviews, and specialist engineering activities. The SEMP may be used to describe the Contractor's methodology, processes and sequence of activities for some or all of these topics.

This is illustrated in Figure 4-1:



**Figure 4-1- SE Plans for Lower Complexity Procurements**

As the level of engineering development increases, more plans may be called up, as illustrated in Figure 4-2:



**Figure 4-2 - SE Plans for Higher Complexity Procurements**

While programs are stipulated for all of the above activities, generally only reports will be required to describe the outcomes of the activities. In order to provide the timeliest warning of impending problems, these reports will be called up

progressively at project reviews and a final report will be required at the Test Readiness Review.

While separate plans may be necessary for safety and security at any level of engineering, other plans are more likely to be called up as the level of engineering and development increase as shown in Figure 4-2. The guiding rationale is to constrain management oversight and tendering costs to a level commensurate with the level of engineering development and risk.

The formal technical review processes used in the *ASDEFCON (Complex Materiel)* SOW are much simpler than that for the Strategic Materiel SOW. Once again, the aim is to scale the level of management oversight to the level of development and risk. Generic entry and exit criteria, which apply to all of the reviews, are included in the SOW. Furthermore, the objectives for each review are covered in the SOW clause applicable to that review, and the Contractor is required to define entry/exit criteria and subjects for discussion in the SEMP. The System Requirements Review (SRR) and System Definition Review (SDR) are always called up, although at the simplest level they may be carried out simultaneously. As the level of engineering development increases and the design process becomes more protracted, either or both the Preliminary Design Review (PDR) and Detailed Design Review (DDR) may be called up.

The critical decisions will be the level of reviews to be applied, whether or not software development requires a separate plan, and whether or not Configuration Management and V&V should be managed within the SEMP.

**Drafter's action:** Clause 4.1.1 is to be included in the RFT without alteration.

**Related clauses:** The **Draft Systems Engineering Management Plan** clause of the **Management Annex** of the conditions of tender optionally requests each tenderer to provide a draft SEMP.

The **Scope of Work** clause of the draft SOW defines the broad scope of work required under the Contract.

Clause 3.2.3 of the draft SOW addresses the requirements for the Contract Master Schedule (CMS).

Clause 4.1.1 of the draft SOW addresses the requirements for engineering management.

Clause 4.1.5 of the draft SOW addresses the conduct of System Reviews.

**Further Reading:** See also - *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Engineering Management*

#### 4.1.2 - ENGINEERING SCHEDULE

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To ensure that the project schedule adequately reflects the engineering activities and reflects the key program technical events.

**Policy:** See Section 4.1

**Guidance:** There are two types of relevant engineering schedule, known in earlier standards as the systems engineering master schedule (SEMS) and system engineering detailed schedule (SEDS). The SEMS was intended to reflect the required program sequence of activities and milestones and their inter-relationships, providing the logical basis for a time-based schedule. This time-based schedule, or SEDS, showed durations of activities and would include 'artificial' dependencies generated by limited resources (i.e. activities that would therefore need to be conducted as a series activity rather than in parallel).

The *ASDEFCON (Complex Materiel)* Volume 2 template does not use these terms but captures the time-based engineering schedule in the overall project schedule

(CMS) of SOW clause 3.2.3 and captures the relevant events and relationships in the SEMP for the SE reviews, the CMP for the configuration audits, the V&VP for the Test Readiness Reviews (TRRs), and the ISP for the ILS reviews. If the CM and V&V requirements are incorporated into the SEMP, this plan would also then address the configuration audits and TRRs.

**Drafter's action:** Clause 4.1.2.2 may need elaboration to identify project-specific milestones of interest. Otherwise, clause 4.1.2 is to be included in the RFT without alteration.

**Related clauses:** Clause 3.2.3 of the draft SOW addresses the requirements for the Contract Master Schedule (CMS).

Clause 4.1.5 of the draft SOW addresses the conduct of System Reviews.

The **Systems Definition** clause of the draft SOW addresses the requirements for System Definition.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Engineering Management*

4.1.3 - AUTHORISED/ACCREDITED ENGINEERING ORGANISATION (OPTIONAL)

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**Sponsor:** AIRREG-DGTA (Aerospace)

Director of Technical Regulation - Navy (Maritime)

Director Technical Regulation - Army (Land)

**Status:** Optional (Core for aerospace and land materiel projects)

**Purpose:** To ensure an appropriate design framework is in place to satisfy the Technical Regulatory Framework (TRF) requirements for ADF Materiel.

**Policy:** *DI(G) LOG 08-15 Regulation of Technical Integrity of ADF Materiel*  
*DI(G) OPS 02-02 Australian Defence Force Airworthiness Management*  
*AAP 7001.053, Technical Airworthiness Management Manual (TAMM)*  
*Technical Regulation of Army Materiel Manual (TRAMM)*  
*ABR 6492 - Navy Technical Regulations Manual*  
*DI(A) LOG 12-1 Regulation of the Technical Integrity of Land Materiel*  
*DI(N) LOG 47-3 Technical Regulation of Navy Materiel*

**Guidance:** Where engineering design has the potential to affect seaworthiness, mission-worthiness, airworthiness or other operational parameters that could affect fitness for purpose, the technical regulatory requirements for the applicable environment must be applied. For aerospace and maritime requirements, the Contractor would need to be an Authorised Engineering Organisation (AEO). For land systems, the Contractor would need to be an Accredited Engineering Organisation (AEO) (same acronym used). For electronic systems or joint projects, *DI(G) LOG 08-15* provides policy on the application of technical regulatory requirements.

If technical regulatory requirements are not applicable, then the standard clauses in the SOW Template should be replaced with a single clause stating 'Not used'.

If technical regulatory requirements are applicable, drafters should seek advice from the relevant Technical Regulatory Authority(ies) to ensure that the Contract clauses included in the SOW, and associated DIDs, represent the most up-to-date requirements for contracting.

**Aerospace:**

The objective of this clause is to ensure an appropriate engineering framework is in place to enable the continued technical and operational airworthiness of aircraft. All Contracts that include design of technical equipment that has a technical or functional interface with ADF aircraft must invoke a contractual requirement for the

Contractor to become an AEO and comply with *AAP 7001.053, Technical Airworthiness Management Manual (TAMM) Regulation 3*

AIRREG-DGTA is the primary point of contact for advice regarding the applicability of the technical airworthiness regulations to Engineering. Aerospace Systems Division QMS Procedure 3-2-1-4 contains guidance on Draft Data Item Descriptions and draft clauses to be included in the SOW.

For aerospace systems (including guided weapons systems covered under aerospace regulations), a Letter of Engineering Authority is issued with the Engineering Authority Certificate. In clause 4.1.3, "Letter of Engineering Authority" should be selected in the draft clauses where applicable.

#### Land:

The objective of this clause is to ensure an appropriate engineering framework is in place to enable the continued technical and operational mission worthiness of nominated systems. Contracts for the nominated systems will be required to require the Contractor to become an AEO and comply with the Technical Regulation of Army Materiel Manual.

Advice from Director Technical Regulation – Army (DTR-A) should be sought when applying these clauses.

Unlike the TAMM for aerospace systems, the TRAMM does not require the Contractor to be issued with a "Letter of Engineering Authority" from the Commonwealth; however, the Contractor is required to meet the requirements of the TRAMM, in accordance with the Approved AEO Application.

#### Maritime:

The objective of this clause is to ensure an appropriate engineering framework is in place to enable the continued technical and operational seaworthiness of vessels. Any materiel or capability system that will be used on or integrated into a maritime platform will require the Contractor to become an Authorised Engineering Organisation (AEO) and comply with the ABR 6492.

Advice from the Director of Technical Regulation - Navy (DTR-N) should be sought when applying these clauses.

#### Electronic:

Electronic systems fitted to various platforms may be subjected to more than one of these requirements and clause 4.1.3.1 should be amended accordingly to include the relevant references, or a new clause added, to explain any particular division of responsibilities for technical regulatory requirements.

**Drafter's action:** Drafters are to consult with the relevant TRA(s) on whether this clause is required. When required, the drafter is to tailor the clause on the advice of the TRA before including it in the draft SOW.

**Related clauses:** The **Authorised/Accredited Engineering Organisation Application** clause of the **Management** Annex of the conditions of tender optionally requests each tenderer to provide an AEO Application.

Clause 4.1.1 of the draft SOW addresses the requirements for engineering management.

Clause 4.6.4 of the draft SOW addresses the requirements for human engineering.

Clause 4.6.5 of the draft SOW addresses the requirements for electromagnetic environmental effects.

Clause 4.6.6 of the draft SOW addresses the requirements for system safety.

Clause 4.6.8 of the draft SOW addresses the requirements for Aircraft Type Certification.

**Further Reading:** See also - *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Threads – Airworthiness Regulatory Requirements.*

#### 4.1.4 - AUTHORISED/ACCREDITED MAINTENANCE ORGANISATION (OPTIONAL)

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**Sponsor:** AIRREG-DGTA (Aerospace)

Director of Technical Regulation - Navy (Maritime)

Director Technical Regulation - Army (Land)

**Status:** Optional (Core for aerospace projects where maintenance of technical equipment that has a technical or functional interface with ADF aircraft or aeronautical product will be required under the Contract)

**Purpose:** To ensure that maintenance activities are performed in accordance with the Technical Regulatory Framework (TRF) requirements for ADF Materiel.

**Policy:** *DI(G) LOG 08-15, Regulation of Technical Integrity of ADF Materiel*  
*DI(G) OPS 02-02, Australian Defence Force Airworthiness Management*  
*AAP 7001.053, Technical Airworthiness Management Manual (TAMM)*  
*Technical Regulation of Army Materiel Manual (TRAMM)*  
*ABR 6492 - Navy Technical Regulations Manual*  
*DI(A) LOG 12-1 Regulation of the Technical Integrity of Land Materiel*  
*DI(N) LOG 47-3 Technical Regulation of Navy Materiel*

**Guidance:** Where the Contractor will be required to perform maintenance as part of the Contract, the technical regulatory requirements for the applicable environment must be applied. For the aerospace environment, the Contractor would need to be an Authorised Maintenance Organisation (AMO). For land and maritime environments, the need for a Contractor to become an Accredited (for land) or Authorised (for maritime) Maintenance Organisation (same AMO acronym used) is not compulsory, as explained below.

If technical regulatory requirements are not applicable, then the standard clauses in the SOW Template should be replaced with a single clause stating 'Not used'.

If technical regulatory requirements are applicable, drafters should seek advice from the relevant Technical Regulatory Authority(ies) to ensure that the Contract clauses included in the SOW, and associated DIDs, represent the most up to date requirements for contracting.

#### Aerospace:

The objective of this clause is to ensure an appropriate maintenance-management framework is in place to enable the continued technical and operational airworthiness of aircraft. All Contracts that include maintenance of technical equipment that has a technical or functional interface with ADF aircraft or aeronautical product must invoke a contractual requirement for the Contractor to become an AMO and comply with AAP 7001.053, Technical Airworthiness Management Manual (TAMM) Regulation 4.

AMNTREG-DGTA is the primary point of contact for advice regarding the applicability of the technical airworthiness regulations to maintenance. Aerospace Systems Division QMS Procedure 3-2-1-11 contains guidance on Draft Data Item Descriptions and draft clauses to be included in the SOW.

For aerospace systems (including guided weapons systems covered under aerospace regulations), a Maintenance Authority Certificate is required to be issued in accordance with the TAMM.

#### Land:

The objective of this clause is to ensure an appropriate maintenance-management framework is in place to enable the continued technical and operational mission worthiness of nominated systems. Contracts for the nominated systems may require the Contractor to become an AMO but this is not compulsory. Contractors will be required to provide evidence of their ability to deliver compliant maintenance services in accordance with the Technical Regulation of Army Materiel Manual.

Advice from Director Technical Regulation – Army (DTR-A) should be sought when applying these clauses.

Maritime:

The objective of this clause is to ensure an appropriate maintenance-management framework is in place to enable the continued technical and operational seaworthiness of vessels. Contracts for ships and submarines may require the Contractor to become an Authorised Maintenance Organisation (AMO) but this is not compulsory. Contractors will be required to provide evidence of their ability to deliver compliant maintenance services in accordance with ABR 6492.

Advice from the Director of Technical Regulation - Navy (DTR-N) should be sought when applying these clauses.

Electronic:

The technical regulatory requirements for electronic systems are dependent on the specific interface with aerospace, land and maritime systems. Advice should be sought from the relevant technical regulatory authorities for these environments. Drafters should refer to paragraphs 10 and 11 of DI(G) LOG 08-15, which specifically address multiple environment situations. This DID should then be tailored according to the relevant aerospace, land, and/or maritime environment(s).

Drafter's action: Drafters are to consult with the relevant TRA(s) on whether this clause is required. When required, the drafter is to tailor the clause on the advice of the TRA before including it in the draft SOW.

Related clauses: The **Authorised/Accredited Maintenance Organisation Application** clause of Annex F of the conditions of tender optionally requests each tenderer to provide an AMO Application.

Clause 4.1.1 of the draft SOW addresses the requirements for engineering management.

Clause 4.6.4 of the draft SOW addresses the requirements for human engineering.

Clause 4.6.5 of the draft SOW addresses the requirements for electromagnetic environmental effects.

Clause 4.6.6 of the draft SOW addresses the requirements for system safety.

Clause 4.6.8 of the draft SOW addresses the requirements for Aircraft Type Certification.

Further Reading: See also - *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Airworthiness Regulatory Requirements.*

4.1.5 - CONDUCT OF SYSTEM REVIEWS

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Sponsor: Standardisation Branch

Status: Core

Purpose: To require the Contractor to conduct Mandated System Reviews and other Internal System Reviews in accordance with the SOW. The participation of the Commonwealth Representative is essential for all Mandated System Reviews and, at the discretion of the Commonwealth Representative, for Internal System Reviews.

Policy: See Section 4.1

Guidance: Clause 4.1.5 defines the procedural requirements for the conduct of System Reviews.

A System Review means, in accordance with the Glossary, “an event at which the progress of the technical effort (including that of engineering and integrated logistics support) is assessed relative to its governing plans and technical and contractual requirements”.

A *Mandated* System Review means a System Review that is mandated by the Commonwealth in the Contract.

An *Internal* System Review means a System Review, other than a Mandated System Review, that the Contractor or Subcontractor conducts as part of the program of activities for the Contract.

The intent, where necessary, and where possible, is to encourage progressive development and Commonwealth review of products associated with a particular development phase. The formal System Review meeting should be a checkpoint that ensures all activities have been addressed.

Note that the term “System Review” replaces the earlier terms such as “Technical Review”. System Reviews include system engineering reviews, configuration audits and ILS reviews.

ILS participation from both Commonwealth and Contractor teams at Mandated System Reviews ensures coordination between the ILS and SE Programs. Supportability characteristics of the Mission System design are addressed in these reviews, and the impact of the Mission System design on the Support System can be evaluated under whole-of-capability terms.

Note that the SOW allows for optional clauses to ensure that the Commonwealth is invited to Internal System Reviews and is provided with documented feedback. This should be considered based on the program risk areas and the value of Commonwealth insight into such areas. These clauses are relevant and should be invoked where the Contractor may be conducting additional reviews (e.g. such as formal requirements reviews with major subcontractors or reviews associated with each build of a multiple-build development strategy). They are not intended to apply to lower-level design review processes such as individual document reviews; however, they may have applicability during the lower-level development processes, for example in respect to formal inspections or design walkthroughs for a critical software element. The key element in these clauses is that the Commonwealth involvement is optional - the Commonwealth may be invited but should assess its attendance on an as-available and component criticality / risk basis.

The SOW template defines a number of options for the range of Mandated System Reviews, which could include:

- a. SRR – System Requirements Review – at the simplest level, the SRR requirements may be addressed at the same time as the SDR;
- b. SDR – System Definition Review;
- c. PDR – Preliminary Design Review (optional);
- d. DDR – Detailed Design Review (optional);
- e. PPR – Provisioning Preparedness Review for Spares, Support and Test Equipment, and Training Equipment;
- f. FACRR – Facilities Readiness Review (optional);
- g. TNGRR – Training Readiness Review;
- h. TRR – Test Readiness Review (optional - see the V&V clause for application);
- i. FCA – Functional Configuration Audit (for both Mission System and Support System Components) (optional); and



- j. PCA – Physical Configuration Audit (for both Mission and Support System Components) (optional).

Depending on the particular program, other reviews may also need to be considered. For example, a Production Readiness Review (PRR) may be needed for a program that has a significant production element, and Ground Test Readiness Reviews and Flight Test Readiness Reviews may need to be conducted for acquisitions involving aircraft. The most important issue is to consider the set of Mandated System Reviews that gives the Commonwealth sufficient insight into the development of the Contractor's solution. The Mandated System Reviews need to occur often enough to ensure that the Commonwealth has appropriate insight before the Contractor has committed significant effort and is unable to modify its activities. This needs to be balanced by appropriate intervals between Mandated System Reviews to ensure that the Contractor has made useful progress towards defining or implementing the solution.

For this SOW template, the formal DMO checklists used with ASDEFCON (Strategic Materiel) are too demanding; the Contractor will be tasked through the SEMP (-2 version, clause 6.2.8.2) to propose suitable entry and exit criteria and review actions for the SRR and SDR (also PDR and DDR if required). The SOW also contains generic entry and exit clauses within clause 4.1.5 to this effect.

**Drafter's action:** Clauses 4.1.5.1 to 4.1.5.8 are to be included in the draft SOW without alteration.

Drafters also need to consider the optional attendance and visibility of Internal System Reviews (i.e. as reflected in clauses 4.1.5.11 and 4.1.5.12 of the SOW). Refer to the discussion of this in the guidance above.

If work on the Contract is being undertaken at a number of locations, consideration should be given to the most suitable location to meet the review objectives of the Mandated Reviews (e.g. Contractor or Subcontractor premises). This should be reflected in a tailoring of clause 4.1.5.1 in the SOW and should not necessarily be chosen based on the lowest cost of travel for personnel. The location should consider the best setting with access to the appropriate people and equipment to ensure the success of the review, but at acceptable cost to the Commonwealth.

**Related clauses:** Clause 4.2.3 of the draft SOW addresses the System Requirements Review.

Clause 4.2.4 of the draft SOW addresses the System Definition Review.

Clause 4.3.1 of the draft SOW addresses the Preliminary Design Review.

Clause 4.3.2 of the draft SOW addresses the Detailed Design Review.

Clause 5.1.2.2 of the draft SOW addresses the ILS Mandated System Reviews.

The **Configuration Status Accounting** clause of the draft SOW addresses Configuration Audits, which include FCA/PCA for the Mission System and for Support System Components.

Clause 7.1.4 of the draft SOW addresses optional Test Readiness Reviews.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Design Solution*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - System Reviews*

See also – *MIL-STD-1521B Technical Reviews and Audits for Systems, Equipments, and Computer Software*

4.1.6 - NOT USED

4.1.7 - NOT USED

4.1.8 - NOT USED

**System Definition**

<u>Reference:</u>	Clause 4.2
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To establish the Contractor's requirements for System Definition during the system definition phase of the Contract. This includes management and use of the Description of Requirements (DOR), the validation of system requirements, and the requirements for System Reviews in this phase.
<u>Policy:</u>	See Section 4.1.
<u>Guidance:</u>	See guidance on subclauses.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

**4.2.1 - DESCRIPTION OF REQUIREMENT (DOR)**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To define the management of the Description of Requirement (DOR) in the Contract.
<u>Policy:</u>	<i>Capability Systems Life Cycle Management (CSLCM) Manual, 2002</i>
<u>Guidance:</u>	<p>For this SOW template, the Commonwealth is required to produce a Description of Requirement (DOR), which includes a Part A (Specification) and a Part B (Operational and Support Concepts). The DOR may take several forms and could include an Operational Concept Document (OCD) and Function and Performance Specification (FPS) in accordance with the Capability Definition Documents (CDD) Guide. The philosophy behind the DOR is to permit a flexible method of stating the Commonwealth's requirements using the best data available, and without the cost and complexity of writing a full OCD where one does not exist. Note, however, that the inclusion of the operational and support concepts at Part B of the DOR is essential under this template to assist with determining fitness for purpose and for determining the Support Resource requirements under the ILS clauses. The DOR is described further in this handbook under Guidance on Annexes to the SOW.</p> <p>These clauses highlight that the DOR Part B (Operational and Support Concepts) and the System Specification (SS), which is derived by the Contractor, are to remain in lockstep over the life of the Contract. This approach has been adopted because the operational and support concepts are a significant determinant of the fitness for purpose of the resulting Mission System(s).</p> <p>A mechanism exists for the Contractor to raise a CCP to implement changes to the DOR Part B during the system definition phase, where there are inconsistencies between the SS and the Operational and Support Concepts (e.g. where these concepts are found to be unfeasible). If the proposed change to the DOR is likely to affect the Capability being provided, the CCP may need to be approved by the sponsor and/or end-user. Changes may be proposed prior to the SRR or SDR. See clause 4.2.2.4.</p>
<u>Drafter's action:</u>	Clause 4.2.1 is to be included in the RFT without alteration.
<u>Related clauses:</u>	All of the other clauses within clause 4.2.
<u>Further Reading:</u>	<p>See also – <i>ADO LSA Manual, Part 3, Chapter 3, Annex A, 'Use Study Report Outline'</i></p> <p>See also – Capability Definition Documents Guide</p>

#### 4.2.2 - SYSTEM REQUIREMENTS VALIDATION

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To require the Contractor to develop and validate a System Specification (SS) for the Mission System, with a formal framework of requirements traceability to the DOR Parts A and B. This also addresses the establishment of the SS as the Functional Baseline for the Mission System and the use of approved change control methods to address inconsistencies.
<u>Policy:</u>	<i>Capability Systems Life Cycle Management (CSLCM) Manual, 2002</i>
<u>Guidance:</u>	<p>Clause 4.2.2 requires the Contractor to develop a System Specification, which encapsulates a clear, unambiguous set of requirements that define the Mission System and that can be used as a basis for further development and verification.</p> <p>The Contractor is expected to develop and validate a set of requirements for the Mission System (i.e. the System Specification (SS)) based on the DOR Part A (Specification) and the DOR Part B (Operational and Support Concepts). The activities associated with requirements development and requirements validation are described in more detail in EIA-632.</p> <p>Drafters and users of the ASDEFCON (Complex Materiel) template are advised to also review the requirements-validation sections of EIA 632, including Sections 4.3 and 4.5.2 and the sub elements of Annex C that help to clarify each of the relevant requirements in that standard (i.e. Requirements 14, 15, 16, 19, 25, 26, 27 and 28). The requirements-validation processes for the Mission System will be conducted in accordance with the Contractor's SEMP. SE staff in Commonwealth project offices need to ensure that a viable and integrated requirements-validation program is being planned.</p> <p>The requirements-validation process is one of the most significant elements of the design process for the Mission System. Inadequate requirements are a well-known cause of project failure, and the requirements-validation process is intended to ensure that both the individual requirements and the set of requirements are valid and understood by all parties. There are likely to be new and modified requirements arising out of the requirements-validation phase, as well as requirements that need to be deleted. These changes could also result in changes to the Contract Price (through Contract Change Proposals (CCPs)), and the Commonwealth project teams should view any such changes with diligence and maturity.</p> <p>In developing the SS, the Contractor is required to maintain traceability to the input documents. Every requirement in the DOR must trace to the SS ("downward traceability") with accompanying rationale for any changes or refinements. The SS should contain more detail than the DOR much of which may come from appropriate interpretation of the DOR,. Also the SS must have upwards traceability to the DOR, again with appropriate rationale for any interpretations. For the more complex designs the traceability is expected to be captured in the Requirements Traceability Matrix (RTM), which is an option at SOW clause 4.5.2.</p> <p>The DOR represents DMO's agreement with Defence Capability (or other internal or external) staff on the technical requirements for the Capability to be delivered. As such, it is not normally expected to change over the life of the Contract. However, during the Contractor's development activities it may be necessary for the Contractor to propose SS requirements that would be in conflict or limit the generality of the DOR (typically due to the feasibility of implementations). Although this is ideally done through pre-contract activities, such as contract negotiations, in all cases the Commonwealth Representative needs to gain internal Defence approval. The SOW template allows for this process through clause 4.2.2.4, which asks the Contractor to submit a deviation for Commonwealth Representative approval.</p>

Following agreement to the SS (typically at the SDR), the Contractor is required to raise a CCP in accordance with clause 10.1 of the conditions of contract to establish the SS as the Functional Baseline for the Mission System and hence the basis for development and Verification of the Mission System. The SS is considered to be accepted by the Commonwealth only after approval of this CCP. Note that, as the DOR Part A provides the basis of DMO's internal contract with Capability Systems, the DOR Part A is expected to remain on Contract and any future changes to the SS should modify the corresponding traceability (which is addressed in clause 4.2.2.3).

Note that, through the requirements validation process, deficiencies may also be identified in the DOR Part A. As stated earlier, the DOR Part A is not normally expected to change over the life of the Contract. Clause 4.2.2.4 specifies that any proposed requirements in the SS that conflict with the DOR Part A need to be addressed through the mechanism of a deviation (through clause 8.4 of the draft SOW) to resolve such deficiencies. These deviations would undergo an approval process and, if ratified, form part of the rationale for traceability required under clause 4.2.2.3.

**Drafter's action:** Clause 4.2.2 is to be included in the RFT without alteration.

**Related clauses:** Clause 4.5.2 of the draft SOW is an optional requirement that addresses design traceability.

The **Change to the Contract** clause of the draft conditions of contract provides the provisions for Contract Change Proposals.

**Further Reading:** See also – *EIA-632, Processes for Engineering a System*

#### 4.2.3 - SYSTEM REQUIREMENTS REVIEW

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To require the Contractor to undertake a System Requirements Review (SRR) as a Mandated System Review.

**Policy:** See Section 4.1

**Guidance:** The SRR is intended to validate that the set of stakeholder requirements is complete, consistent with the Commonwealth's intent and is understood by the supplier/developer of the system.

For this template, the requirements of the SRR should be relatively simple and the Contractor will define the required checklist items for SRR in the SEMP. The review must be conducted in accordance with SOW clause 4.1.4. At the simplest level of engineering, the drafter should consider whether or not this review can be combined with the SDR.

**Drafter's action:** Drafters will need to consider whether to combine the SRR and SDR or hold them separately. The key issue is to apply this reduced level of management oversight only at the lowest level of engineering design and risk, and drafters should consult MPS sponsors and other specialists as appropriate. If the SRR is required, clause 4.2.3 is to be included in the RFT without alteration.

**Related clauses:** Clause 4.1.4 of the draft SOW addresses the conduct of System Reviews.

Clause 4.2.3 of the draft SOW addresses the requirements for System Requirements Review.

Clause 6.1.3 of the SEMP DID addresses the requirements for System Reviews and Audits.

**Further Reading:** See also – System Review Guide for Australian Defence Contract (Strategic Materiel), Version 1.0, September 2003

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – System Reviews*

See also – *EIA-632, Processes for Engineering a System*

See also – *ASDEFCON (Strategic Materiel) Checklist – System Requirements Review*

#### 4.2.4 - SYSTEM DEFINITION REVIEW

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<b><u>Sponsor:</u></b>	Standardisation Branch
<b><u>Status:</u></b>	Core
<b><u>Purpose:</u></b>	To require the Contractor to undertake a System Definition Review as a Mandated System Review.
<b><u>Policy:</u></b>	See Section 4.1
<b><u>Guidance:</u></b>	<p>The System Definition Review (SDR) is conducted to evaluate the optimisation, traceability, correlation, completeness, and the risk of the allocated requirements, including the corresponding test and support requirements in fulfilling the system/subsystem requirements (the functional baseline) for the Mission System. The review encompasses the total system requirements (i.e. operations/maintenance/test/training hardware, computer software, facilities, personnel, and preliminary logistics-support considerations). Also included is a summary review of the SE management activities (e.g. mission and requirements analysis, functional analysis, requirements allocation, manufacturing methods/process selection, program risk analysis, system/cost effectiveness analysis, logistics support analysis, intra- and inter-system interface studies, integrated test planning, specialty discipline studies, and Configuration Management) which produced the above system definition products.</p> <p>Although the System Specification will, generally, be agreed at the SDR, it is not formally incorporated into the Contract until the relevant CCP has been submitted by the Contractor and approved by the Commonwealth Representative.</p> <p>Drafters should note that simplified entry and exit criteria are given for this review at SOW clause 4.1.4 and that the requirements for the Contractor to propose review content are at clause 6.1.3 of the SEMP-2.</p> <p>Refer to SRR guidance for more details.</p>
<b><u>Drafter's action:</u></b>	<p>Drafters will need to consider carefully the point at which the SRR and SDR may be combined into one review. The key issue is to apply this reduced level of review and management oversight only at the lowest level of engineering design and risk, and drafters should consult MPS sponsors and other specialists as appropriate.</p> <p>Drafters should include clause 4.2.4 in the RFT without alteration.</p>
<b><u>Related clauses:</u></b>	<p>Clause 4.1.4 of the draft SOW addresses the conduct of System Reviews.</p> <p>Clause 6.1.3 of the SEMP DID addresses the requirements for System Reviews and Audits.</p>
<b><u>Further Reading:</u></b>	<p>See also – <i>System Review Guide for Australian Defence Contract (Strategic Materiel), Version 1.0, September 2003</i></p> <p>See also – <i>ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – System Reviews</i></p> <p>See also – <i>EIA-632, Processes for Engineering a System</i></p> <p>See also – <i>ASDEFCON (Strategic Materiel) Checklist – System Definition Review</i></p>

**System Design**

<u>Reference:</u>	Clause 4.3
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that the Contractor undertakes appropriate design reviews during their system design phase as Mandated System Reviews and that the entry and exit criteria for these reviews meet agreed DMO objectives.
<u>Policy:</u>	See Section 4.1.
<u>Guidance:</u>	See guidance on subclauses.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

**4.3.1 - PRELIMINARY DESIGN REVIEW**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To require the Contractor to undertake a Preliminary Design Review (PDR) as a Mandated System Review
<u>Policy:</u>	See Section 4.1
<u>Guidance:</u>	<p>The PDR is conducted to evaluate the basic design approach for a configuration item or for a functionally related group of configuration items. The PDR is used to ensure that all sub-system and enabling product building blocks have been defined appropriately and that all sub-system building block designs satisfy their parent requirements. It also ensures that approaches to the next level of design have been appropriately planned and that risks are identified with appropriate mitigation strategies in place.</p> <p>When the engineering design is relatively simple and the level of risk is correspondingly low, the PDR should not be required. As the design and risk levels increase and the time required to carry out the design work becomes more significant, the PDR will be needed to provide oversight of the development work.,</p>
<u>Drafter's action:</u>	Clause 4.3.1 should be included in the RFT without alteration.
<u>Related clauses:</u>	<p>Clause 4.1.4 of the draft SOW addresses the conduct of System Reviews.</p> <p>Clause 6.1.3 of the SEMP DID addresses the requirements for System Reviews and Audits.</p>
<u>Further Reading:</u>	<p>See also – <i>System Review Guide for Australian Defence Contract (Strategic Materiel), Version 1.0, September 2003</i></p> <p>See also – <i>ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – System Reviews</i></p> <p>See also – <i>EIA-632, Processes for Engineering a System</i></p> <p>See also – <i>ASDEFCON (Strategic Materiel) Checklist – Preliminary Design Review</i></p>

**4.3.2 - DETAILED DESIGN REVIEW**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To require the Contractor to undertake a Detailed Design Review (DDR) as a Mandated System Review.
<u>Policy:</u>	See Section 4.1

**Guidance:** The DDR is conducted to ensure that specifications, drawings and software development documentation have been appropriately defined; that building block end product designs satisfy parent requirements; and that the building blocks are either ready for further development, adequately defined for procurement, or adequately defined for fabrication.

As for the PDR, when the engineering design is relatively simple and the level of risk is correspondingly low, the DDR should not be required. As the design and risk levels increase and the time required to carry out the design work becomes more significant, the DDR will be needed to provide oversight of the development work.

**Drafter's action:** Clause 4.3.2 should be included in the RFT without alteration.

**Related clauses:** Clause 4.1.4 of the draft SOW addresses the conduct of System Reviews.

Clause 6.1.3 of the SEMP DID addresses the requirements for System Reviews and Audits

**Further Reading:** See also – *System Review Guide for Australian Defence Contract (Strategic Materiel), Version 1.0, September 2003*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – System Reviews*

See also – *EIA-632, Processes for Engineering a System*

See also – *ASDEFCON (Strategic Materiel) Checklist – Detailed Design Review*

### System Implementation

<u>Reference:</u>	Clause 4.4
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core with optional clauses.
<u>Purpose:</u>	To require that the Contractor conforms to specific requirements during the implementation and integration of their design solution. These requirements relate to software and hardware development and project-specific activities such as the interaction with the Commonwealth during integration or the use of GFE.
<u>Policy:</u>	See Section 4.1.
<u>Guidance:</u>	See guidance on subclauses.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

#### 4.4.1 - GENERAL

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core.
<u>Purpose:</u>	To require the Contractor to address any Contract-specific requirements relating to system implementation and integration.

Policy: See Section 4.1.

Guidance: Many major projects involve the integration of a new or modified mission system with an existing or modified support system. This support system may include Commonwealth or other party controlled facilities such as military bases, airfields, test ranges, equipment and personnel. This situation makes the Contractor highly dependent on the Commonwealth and, hence, places the Project Office in a difficult situation as these facilities, equipment and personnel are rarely under the control of the Project Office. Examples include systems being installed and set to work at military bases where often the records and details of access, power conditioning, physical and electrical interfaces, noise etc. are not always what they need to be or as reflected in available documentation.

The situation can also arise where multiple requirements are placed on facilities and equipment such as when an integration facility is also required as a training facility. Both needs are legitimate and careful consideration needs to be given as to how to manage such an arrangement with the Contractor particularly when the need arises to increase integration and test access to resolve problems and to test corrections while maintaining progress. Careful planning and a close working relationship with the Contractor and other stakeholders is required to quickly resolve issues such as these with a minimum of potential for adverse claims or excusable delay.

This clause may need to address the relationship of site activities and access to the sites or parts of the sites, the relationship of access and test phases, the need for associated planning documents and the ability for the Commonwealth to interact with the site activities, e.g. to maximise operational capability during an intrusive installation period. The broad terms of the interaction, the "ground rules" should be defined in this clause. Given the likely time duration until installation though, there needs to be a way of capturing the detailed interactions that will develop in conjunction with the Contractor's design.

One way of capturing interactions is to add a new plan to the CDRL, a "Site Installation Plan" or equivalent that could address these issues and provide a vehicle for Commonwealth-Contractor agreement later in the program when the specifics of installation may be better defined. For a contract with only minor interactions, this plan could be combined into the Facilities Plan (FACP, described



in clause 5.2 of the draft SOW). However the focus of the FACP is more on the static nature and specification for the facilities rather than the detailed interactions with the facilities during integration.

Integration of modified or newly developed software systems is at best very difficult and problems should be expected. The Project Office should consider gaining visibility into the nature of the problems encountered and how these problems are analysed and resolved.

**Drafter's action:** Drafters should consider the need for clauses relating to:

- a. the interaction of the Contractor with Commonwealth facilities and the need to carefully manage such interaction;
- b. the relationship of program phases, including V&V phases, and Contractor access to facilities; and
- c. the need for site-based installation plans.

**Related clauses:** Clause 5.2 of the draft SOW addresses the LSA Program, including those elements relating to facilities.

Clause 7 of the draft SOW addresses Verification and Validation.

**Further Reading:** Nil.

#### 4.4.2 - SOFTWARE DEVELOPMENT (OPTIONAL)

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**Sponsor:** Standardisation Branch

**Status:** Optional

**Purpose:** To impose a contractual obligation on the Contractor to plan and manage the acquisition, supply, development, operation and maintenance of software.

**Policy:** See Section 4.1.

**Guidance:** To define the minimum standards for the management of the software development program.

**Guidance:** Although software engineering has been maturing for the last four decades, software systems are still a major contributor to failures of complex materiel projects. Industry and acquisition agencies are both still coming to terms with the difficulties of software engineering and, in particular, software project management. The DMO has started to adopt a number of acquisition reforms within the Materiel Acquisition and Sustainment Framework (MASF) specifically targeted to improve the success rate in acquiring software-intensive systems. References are made below to those documents that will help the SOW drafter.

#### Background Documents Which Assist SOW Development

The degree of complexity, risk, and management of software is one of the main aspects of a project which defines whether one of the *ASDEFCON (Strategic Materiel)* templates or the *ASDEFCON (Complex Materiel)* template should be used. The Defence Procurement Policy Manual provides policy guidance on the selection of the appropriate template based on the characteristics of the acquisition project. Selection of the *ASDEFCON (Complex Materiel)* template will have been decided by the Project Office through its acquisition-planning processes.

Key software activities that will contribute to the template decision are the development of a Software Profile and a Software Acquisition Management Plan (SAMP) for the project. SOW drafters need to be aware of the content of these documents, and note that the Contractor's Software Management Plan (SMP) needs to be consistent with the SAMP (as translated into the Contract) and should reflect a consistent implementation of its software-acquisition management strategy. Development of the SAMP is described in SAMS.

An issue that may assist the SW drafter, for example, is high level tailoring of the ISO 12207 standard, which will be described in the SAMP. Also the software

profile, which is mandatory for all major capital projects, provides a means of understanding the extent and role of software in a project. System-level objectives derived from the DOR, Acquisition Business Case, and Acquisition Strategy will help in compiling the profile. Development of the software profile is described in SAMS.

Note also that the Software List (DID-ENG-SW-SWLIST) requires the Contractor to perform some software profiling and provides further detail for incorporation and consideration within the project's Software Profile. This detail will greatly assist the project's software acquisition management planning and serve as a tracking mechanism to detect when the original Contractor intentions or assumptions alter partway through a contract, potentially adding risk.

#### Development of Draft SOW (SOW)

SOW planning will centre on selection and tailoring of applicable software standards to form a consistent set of requirements that address the needs of various project stakeholders. Where more than one Technical Regulatory Authority (TRA) is involved, commonly agreed standards are essential to ensure that the Contractor is not presented with conflicting requirements.

Planning will also need to address the activities to be undertaken during contract negotiations to reduce risk prior to contract signature (e.g. risk workshops and safety workshops), and contract surveillance activities. These need to be addressed at this stage so they may be incorporated into the Solicitation Response Evaluation Plan (or Tender Evaluation Plan), Conditions of Tender, and the draft contract SOW.

The following list provides a summary of the activities to be planned, scheduled and resourced during development of the draft SOW:

- a. Determine the acquisition strategy and select a compatible strategy for the software based on the software risks and profile.
- b. Consider additional software standards in accordance with TRA requirements, such as RTCA/DO-178B (noting that ISO 12207 remains the overriding standard).
- c. Make initial tailoring decisions for the selected software standards with TRA concurrence for each software category in the software profile.
- d. Plan to perform detailed tailoring of the selected software standards with TRA concurrence ensuring that, where more than one standard is selected, the requirements from each have been rationalised and integrated to form a consistent contract requirement.
- e. Plan to select and tailor required work products based on contract surveillance and support needs for the software.
- f. Plan to select and tailor Data Item Descriptions for the deliverable work products.
- g. Plan to develop draft SOW clauses to reflect the tailoring decisions.
- h. Plan to address references from the standards back to the conditions of contract and SOW.
- i. Plan to reflect the data item delivery requirements in the Contract Data Requirements List (CDRL).
- j. Plan to determine the required tender deliverables and associated instructions.
- k. Plan to develop selection criteria for inclusion in the COT, such as experience, process capability, and achievability of cost and schedule estimates.
- l. Plan to validate the tendered software size, cost and schedule estimates.

- m. Plan the Contract surveillance activities for software, including:
- 1) the review of contract deliverables relating to software ensuring that sufficient resources, including any specialists such as TRAs, will be available to review them at the time;
  - 2) the conduct and attendance at system and software reviews ensuring sufficient resources are available to review data packs prior to the review meetings;
  - 3) the involvement of software experts in reviews, audits and appraisals such as quality audits, noting that software quality requirements will be addressed in a software quality plan (an annex to the quality plan).

When the level of software development is very low, the SEMP and a software list will cover software requirements. Otherwise, the Contractor must develop an SMP based on the draft SOW clauses derived from the above process. The SMP DID (DID-ENG-SW-SMP) is based on the industry-accepted DI-IPSC-81427A with a tailoring instruction designed to gain visibility into the management capability and intentions of the tenderer.

DI-IPSC-8147A is called "Software Development Plan", but includes the management of software whether or not it is being developed. This DID can be tailored for project-specific requirements through the use of additional tailoring instructions applied to DID-ENG-SW-SMP.

#### Preparation of the Final SOW

Some elements of DID-ENG-SW-SMP that have not been provided in response to the RFT need to be agreed before contract signature. This is so that the required level of insight provided through the detail of the plan is agreed prior to contract. The completed SMP should be agreed and ready for approval at ED+0 (check the CDRL) as the SOW relies on the SMP to elaborate the detailed work requirements to be adhered to by the Contractor. This should be confirmed through contract surveillance activities including audits and reviews.

Before the SOW is finalised, it is important to check other areas of the SOW for consistency with software requirements, measurements and milestones. Important areas are listed below.

When safety is critical it will have its own management plan (see the System Safety Program Plan). The Software Management Plan needs to address how safety critical software will be integrated into the wider system safety program. This aspect needs special attention during solicitation response evaluation and contract surveillance to ensure that a co-ordinated approach is being applied.

Software support planning needs to be co-ordinated with ILS planning. Consideration needs to be given to the environments and associated processes that will be required to support the software. An initial analysis within the Software Profile should assist in defining software support requirements for inclusion in the RFT (see ILS Planning and Engineering Support). Clause 5.2.8.9 of the draft SOW is an optional requirement for the Contractor to deliver a Software Support Plan to address software support for any software components of the Mission System and Support System,

Throughout the life-cycle of the project, it will be important to consider a technology insertion program for those parts of the software that might benefit from an upgrade. Provision should be made to take advantage of such situations in the SOW Growth Program (Clause 4.6.1).

Software development is likely to be the most difficult area in which the drafter must exercise judgement. Sponsor assistance and specialist advice from the Director of Software Engineering (DSwE) in MPS Branch will often be necessary before the drafter's courses of action are finalised.

For very limited software development all planning activities will be covered by the SEMP and SWLIST. If drafters are in doubt that this is the appropriate course of

action, they should consult software specialist staff in consultation with the sponsor.

Conversely, as software development becomes more complex, drafters may need to consult specialists to interpret the software profile and CMMI appraisal and determine appropriate measurement, management and validation techniques to ensure that the development is thoroughly checked at well-defined milestones.

**Drafter's action:** Clause 4.4.2 is to be included in the RFT without alteration if software development is likely to be a requirement under the Contract.

**Related clauses:** The **Draft Software Management Plan** clause of the **Management** Annex of the conditions of tender optionally requests each tenderer to provide a draft SMP.

The **Commonwealth Access** clause of the draft conditions of contract provides the provisions for Commonwealth access to Contractor and Subcontractor premises and to documentation in relation to the work under the Contract.

The **Subcontractor Management** clause of the draft SOW addresses risk management.

Clause 4.6.6 of the draft SOW addresses the system safety program.

Clause 5.2.8.9 of the draft SOW is an optional requirement for the Contractor to develop, deliver and update a Software Support Plan (SWSP).

Clause 6.2.5 of the SEMP DID addresses the requirements for software management when a separate SMP is not required.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Software Management*

#### 4.4.3 - HARDWARE DEVELOPMENT (OPTIONAL)

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**Sponsor:** Standardisation Branch

**Status:** Optional

**Purpose:** To require the Contractor to develop, update and implement hardware development processes and procedures and to document these in the SEMP.

**Policy:** See Section 4.1.

**Guidance:** Specifying hardware development techniques and standards should be avoided unless absolutely necessary as mandating process may require the Contractor to deviate from their own proven processes adding cost and risk. The preferred approach is to review, understand and align hardware requirements where possible with the Contractor's proven processes and practices. The Contractor's Systems Engineering Management Plan or where necessary a separate Hardware Engineering Plan or equivalent should be used to document the practices and standards to be applied. The template SOW clauses will need to be modified to reflect the adopted approach.

Hardware development plans, practices, and processes can be an invaluable element of the support system particularly where Original Equipment Manufacturer (OEM) independence is a desirable option for In-Service support contracts. The extent to which this data is required will depend on the support concept, the extent of hardware development, the domain of the project and the technologies involved. Consideration should be given to the capital investment of specialised equipment to support the required hardware development and the number of companies who have such a capability or would be interested in acquiring it when formulating the support strategy as it may not be an effective strategy to acquire the required data only to find that future hardware support will be limited to the OEM.

The level of visibility into processes and practices and the extent of deliverable hardware development data will relate directly to the support concept. Engineering drawing detail should also be considered and be consistent with the support system needs. The level of detail required needs to be tempered with the cost and

future usefulness of the data. A well considered support concept is essential to ensure appropriate data is acquired as the technical data pack required for OEM-independent maintenance can be very different to that required for OEM-independent manufacture of additional or replacement items which may be different again if significant future modification is anticipated.

**Drafter's action:** The drafter should rarely need to tailor these clauses. Most of the hardware-specific aspects should be addressed as constraints in the System Specification. Tailoring may be necessary if the Commonwealth specifically needs to meet some hardware-process requirements that are specific to the Contract (e.g. use of a common development tool or format). Unless this is required, clause 4.4.3 is to be included in the RFT without alteration if hardware development is likely to be a requirement under the Contract.

**Related clauses:** Clause 4.1.1 of the draft SOW defines the requirements relating to the use of the SEMP.

**Further Reading:** Nil.

### System Analysis, Design and Development

<u>Reference:</u>	Clause 4.5
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core with optional clauses.
<u>Purpose:</u>	To require the Contractor to establish a suitable technical infrastructure for their development program, with visibility to the Commonwealth. This includes establishment of a suitable design documentation strategy, design traceability, an engineering information system, and a system of engineering drawings.
<u>Policy:</u>	See Section 4.1.
<u>Guidance:</u>	Nil.
<u>Drafter's action:</u>	Nil.
<u>Related clauses:</u>	Nil.
<u>Further Reading:</u>	Nil.

#### 4.5.1 - TECHNICAL DOCUMENTATION TREE (OPTIONAL)

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional
<u>Purpose:</u>	To require the Contractor to develop, document and maintain a Technical Documentation Tree (TDT) defining the hierarchy of specifications and design documentation for the Contract, reflecting the hierarchy of System Design products, and identifying the documentation that will be delivered to the Commonwealth.
<u>Policy:</u>	See Section 4.1.
<u>Guidance:</u>	The TDT defines the structure and content of the Contractor's design documentation. This documentation: <ol style="list-style-type: none"> <li>a. provides assurance to the Commonwealth that the Contractor is undertaking the design process in a manner that will ensure the technical integrity of the design;</li> <li>b. should enable the system to be supported over its life of type; and</li> <li>c. provides a means of communication of the design within the Contractor's organisation and between the Contractor and the Commonwealth during the development of the system.</li> </ol>

The TDT shows the specification and design documentation produced at each level of the design hierarchy, the standards to which they will be produced, their schedule for production or amendment, and the Commonwealth visibility and approval rights. This tree will be used during the tender evaluation process as part of the assessment of the Tenderer's development capability.

The use of the TDT allows each Contractor to use their internal processes to define the design data for a system, whilst maintaining appropriate Commonwealth visibility and access. The resulting documentation should be cost effective to produce and is likely to minimise unnecessary paperwork.

The Contractor must maintain the TDT, revising it as the design solution is refined. For example, if the system components (e.g. subsystems) or lower level configuration items change, then the TDT should be modified to reflect the change to the product breakdown structure. In effect, the TDT allows the normally static CDRL, to cope with the natural changes that can occur during the design process.

As it defines a major interface with the Commonwealth and the quality of the documentation affects the system supportability, the Commonwealth must have approval rights over any updates to the TDT (although they do not necessarily have approval rights over the individual documents that the TDT defines).

The Contractor shall provide the documentation defined by the TDT in accordance with the TDT.

**Drafter's action:** Where design is very simple, a TDT may not be required, and clause 4.5.1 may be marked "Not Used". For higher complexity developmental programs, clause 4.5.1 is to be included in the RFT without alteration.

**Related clauses:** The **Draft Technical Documentation Tree** clause of Annex F of the conditions of tender optionally requests each tenderer to provide a draft TDT.

The **Intellectual Property** clause of the draft conditions of contract addresses the overarching provisions relating to Intellectual Property (IP).

The **Intellectual Property Management** clause of the draft SOW addresses the work-related requirements associated with IP.

Clause 4.5.4 of the draft SOW addresses the requirements for engineering drawings.

Clause 5.2.8 of the draft SOW addresses the synthesis of the Technical Data requirements.

Clause 5.3.3 of the draft SOW addresses the implementation of the Technical Data requirements.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Design Documentation*

#### 4.5.2 - DESIGN TRACEABILITY (OPTIONAL)

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**Sponsor:** Standardisation Branch

**Status:** Optional

**Purpose:** To require the Contractor to develop, document and maintain a Requirements Traceability Matrix (RTM) that captures traceability of all specifications in the Technical Documentation Tree (TDT).

**Policy:** See Section 4.1.

**Guidance:** To provide a mechanism that allows the Commonwealth visibility of the Contractor's design traceability and to ensure that the design is traceable to the end-user requirements.

Design traceability is normally captured through the use of an appropriate requirements management tool (e.g. DOORS™ and RDT™ are two examples in use within DMO). Ideally the traceability should be provided through on-line access or delivery of regular snapshots of the native database.

It is possible to view the traceability through static reports; however, such a format does not allow the use of powerful filtering and display tools available in the commercially available tools and significantly reduces the ability of the Commonwealth to review the traceability.

Of particular concern to the Commonwealth is the traceability associated with the key requirement documents (i.e. the DOR and SS as discussed in SOW 4.2.2.3). It is essential that the Commonwealth is able to carefully review this traceability and assess its integrity and associated justification for any deviations before accepting the SS as the basis for the remaining work under the contract.

**Drafter's action:** When design is very simple, a Requirements Traceability Matrix may not be required, and clause 4.5.2 may be marked "Not used". Full design traceability will not then be available; however, the Verification Cross Reference Matrix (VCRM) will still permit tracking between specified requirements and Acceptance of the product.

If requirements traceability is deemed necessary, the drafter needs to address the particular requirements of the project. Ideally this clause should be made more project-specific (i.e. specify the tool, method of data exchange, frequency of

access, etc). If these issues are not relevant, clause 4.5.2 is to be included in the RFT without alteration.

**Related clauses:** Clause 4.5.2 of the draft SOW addresses the requirements for design traceability.  
 Clause 4.2.2.3 of the draft SOW addresses traceability between the DOR and the SS.  
 Clause 7.1.3 of the draft SOW addresses the requirements for a VCRM  
 The **Acceptance Verification** clause of the draft SOW addresses the requirements for Acceptance Verification

**Further Reading:** Nil.

#### 4.5.3 - NOT USED

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#### 4.5.4 - ENGINEERING DRAWINGS

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To require the Contractor to develop, deliver and keep updated a complete set of Engineering Drawings at the appropriate level of detail.

**Policy:** *DI(G) TECH 05-1 Management of Technical Data Packages*

**Guidance:** This clause defines the expected scope and standards for engineering drawings to be delivered under the Contract.

For most acquisition projects, *DEF(AUST) 5085B* will be a mandatory requirement. This standard prescribes the requirements for the acquisition of drawings and associated lists, henceforth referred to as drawings, to support Department of Defence materiel. The requirements are applicable to drawings regardless of their method of preparation.

*DEF(AUST) 5085B* defines 3 levels of drawing:

- a. Level 1, Conceptual and Developmental. Design drawings at Level 1 disclose information sufficient to enable the feasibility of a conceptual design to be evaluated as meeting stated military requirements. These drawings may provide information sufficient to manufacture hardware for experimental testing and analytical evaluation of the design to attain the required performance. Drawings shall be legible and include those types most amenable to the mode of presentation.
- b. Level 2, Production Prototype and Limited Production. Drawings at Level 2 disclose a design that approaches the final form, employs standard parts (or non-standard parts approved by the authority concerned) and, takes into account full military requirements with respect to performance. These drawings shall support the manufacture of prototype and limited production models in final form suitable for field test; and may not require production tools, jigs, fixtures or production methods to produce the end item. Drawings include, as applicable, parts lists, detail and assembly drawings, interface control data, diagrams, performance characteristics, critical manufacturing limits and details of new materials and processes. Special inspection and test requirements for the item are defined on the drawings or referenced to a document acceptable to the Commonwealth.
- c. Level 3, Production. Drawings at Level 3 provide engineering definition sufficiently complete to enable a competent manufacturer to produce and maintain quality control of items to the degree that physical and performance characteristics interchangeable with those of the original design are obtained without resorting to additional product design effort, additional design data, or recourse to the original design authority. These drawings reflect the end product, provide the engineering data for the



support of quantity production; and, in conjunction with other related re-procurement data, provide the necessary data to permit competitive procurement of items substantially identical to the original items.

Levels 1, 2 and 3 provide for natural progression of design from its inception to production. Combinations of levels may be specified in the contract.

Drawings form part of the Technical Data addressed under SOW 5.2.8.5.

The requirements for this clause need to be consistent with the support concepts defined in the DOR. Issues, such as whether or not the ADO will be involved in support and the level of this support, may impact upon the need for engineering drawings to be delivered to the Commonwealth.

Drafter's action: This clause may mandate or recommend particular standards as guidance, such as *DEF(AUST) 5085B*. The requirements need to address both the level (e.g. Level 2) and the scope (e.g. installation, wiring and rack layout) of engineering drawings.

The SOW is required to identify the level(s) of drawings to be acquired for each item or group of items for which a requirement varies, and include all tailoring requirements. Refer to *DEF(AUST) 5085B* for additional information that may need consideration and single-Service instructions as required.

Related clauses: Nil.

Further Reading: See also – *DEF(AUST) 5085B Engineering Drawing - Acquisition and Preparation for Defence Equipments*

4.5.5 - NOT USED

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### Specialty Engineering

<u>Reference:</u>	Clause 4.6
<u>Sponsor:</u>	Refer to Sponsor for each clause within clause 4.6 where applicable
<u>Status:</u>	Core with optional clauses.
<u>Purpose:</u>	To require the Contractor to plan and implement a range of Specialty Engineering activities and programs, as appropriate to particular subclauses, for Growth, Evolution and Obsolescence; Integrated Reliability, Maintainability and Testability; Logistics Engineering; Human Engineering; Electromagnetic Environmental Effects and Access to the Radio Frequency Spectrum; Safety; System Security; and where applicable Aircraft Type Certification.
<u>Policy:</u>	See Section 4.1.
<u>Guidance:</u>	See guidance on subclauses.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

#### 4.6.1 - GROWTH, EVOLUTION AND OBSOLESCENCE PROGRAM

<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To require the Contractor to undertake a growth, evolution and obsolescence program to ensure that: <ul style="list-style-type: none"> <li>a. technology evolution and obsolescence issues are appropriately considered in the design of the Mission System and Support System;</li> <li>b. the Contractor's design, development and production programs will not deliver equipment that has obsolescence problems at the time of delivery; and</li> <li>c. the Contractor's solutions for the Mission System and Support System minimise LCC when technology evolution, standardisation, and obsolescence issues are taken into consideration.</li> </ul>
<u>Policy:</u>	See Section 4.1.
<u>Guidance:</u>	<p>Defence's ability to take advantage of commercial product development cycles in dynamic industries has been hindered by cumbersome, time-consuming acquisition processes. For instance, the commercial computer and electronics sectors now introduce "next generation" products every few years. By contrast, Defence typically takes five to ten years to develop and upgrade new systems. As a result, military technology in fielded systems has grown increasingly expensive and distant from the commercial leading edge in many areas.</p> <p>Recognising the rapid commercial development cycles, Technology Insertion (TI) is the ability to replace COTS system components, both hardware and software, in a Defence system as that commercial component product is updated.</p> <p>It is important in that, over the system Life-of-Type (LOT), it:</p> <ul style="list-style-type: none"> <li>a. allows for system growth, especially as new threats are identified; and</li> <li>b. minimises wasted or obsolescent parts.</li> </ul> <p>Designing for TI encompasses a number of concepts such as commonality and standardisation of parts, the use of fewer parts, modularity, flexibility, adaptability, and open architecture. Since a significant percentage of a product's LCC is established during initial systems-engineering design, Defence will need to perform early, integrated assessments of the "cradle to grave" LCC, thereby enabling TI to occur in the most cost-effective manner.</p>

The SOW requires a Growth Program Report (GPR) to be developed progressively and its results to be presented to the Commonwealth at progress meetings and reviews to ensure that recommended changes, which require approval and possible CCP action, can be incorporated. The final report will be required at the Test Readiness Review prior to Acceptance of the Mission System.

Under the Growth Program, the Contractor is required to analyse and evaluate standardisation opportunities to provide improved supportability of the Mission System. This activity will occur during the design process and is described in the SEMP and (possibly) the ISP. There may be little value in this analysis when the design mainly involves Commercial or Military Off-The-Shelf components, but the value will increase as the design becomes more unique. Design decisions for supportability are closely related to those for the exploitation of technological opportunities, or the improvement of reliability, maintainability and testability. Trade-offs, therefore, may be involved with these other elements of the Growth and Integrated Reliability, Maintainability and Testability Programs.

**Drafter's action:** Clause 4.6.1 is to be included in the RFT without alteration.

**Related clauses:** Clause 4.6.2 of the draft SOW addresses the requirements for reliability, maintainability and testability.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Technology Insertion*

#### 4.6.2 - INTEGRATED RELIABILITY, MAINTAINABILITY AND TESTABILITY ENGINEERING PROGRAM (OPTIONAL)

**Sponsor:** Standardisation Branch

**Status:** Optional

**Purpose:** To require the Contractor to implement an Integrated Reliability, Maintainability and Testability Program.

**Policy:** *DI(G) LOG 08-6, Defence Policy on Reliability, Availability and Maintainability*

**Guidance:** The Reliability, Maintainability & Testability (RMT) Engineering Program objectives are to:

- a. maximise the operational readiness and mission success of the Mission System;
- b. minimise the demand for maintenance personnel and logistic support;
- c. provide essential management information; and
- d. minimise the impacts of the IRMT engineering program on overall program cost and schedule.

This program may not be required if the equipment is mainly off-the-shelf and has existing and adequate RMT data.

Some programs will have overriding requirements for the RMT program not adequately covered by the generic RMT Program objectives listed in the SOW. In these instances, the sub-clauses should be amended to suit the project's specific RMT Program objectives.

Following the approach of the ASDEFCON (Complex Materiel) SOW not to prescribe process to the Contractor but to seek the outcomes, the actual RMT Program to be followed will be defined in the Contractor's SEMP. This encourages tenderers to propose their own best practice methods for achieving the required results, with the outcomes being reported progressively at progress meetings and reviews in the IRMT Report defined by DID-ENG-MGT-IRMT-PR. The final report will be required at the Test Readiness Review prior to Acceptance of the Mission System.

The approach to RMT requirements in the SOW is to focus on a number of key high-value areas (e.g. management of the program, design reviews, and

acceptance testing) and to solicit the Contractor's approach to these, together with the detailed work requirements for the design and development of the system. This information will be provided in the SEMP, and should detail such things as the relevant standards, internal Contractor procedures, and tools to be used in the Contractor efforts.

Improved RMT characteristics may also be derived from the Growth Program described earlier. Reliability is often improved through changes in materials or advanced components, and Maintainability and Testability are often improved through advances in diagnostics, health and usage monitoring systems, computer-aided system management, and provision of on-board maintenance support. Technological Opportunities may enable changes to support concepts resulting in substantial cost savings. These savings can come from reducing the skill level required by maintenance personnel or downsizing the maintenance effort by replacing maintenance-intensive spares with lower cost, throw-away items.

Drafters should seek specialist opinion when it is considered that existing RMT data will suffice for project requirements and no program may be required.

**Drafter's action:** Drafters firstly need to determine whether or not the clause is required. If an IRMT program is required, clause 4.6.2 is to be included in the RFT with the following potential alterations:

- a. Clause 4.6.2.1 may need to be amended to incorporate project-specific objectives.
- b. Clause 4.6.2.2 is to be incorporated into the RFT without alteration.
- c. Clause 4.6.2.3 is to be drafted in conjunction with the relevant RAM Centre Of Expertise (COE).

**Related clauses:** Clause 4.6.1 of the draft SOW addresses the requirements for a Growth Program.

The **Logistics Support Analysis Program** clause of the draft SOW provides the LSA Program clauses for the Support System.

Clause 7.1.6 of the draft SOW addresses the requirement for Failure Reporting and Analysis.

**Further Reading:** See also – *ADO RAM Manual*

#### 4.6.3 - LOGISTICS ENGINEERING (OPTIONAL)

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**Sponsor:** Standardisation Branch

**Status:** Optional

**Purpose:** To require the Contractor to update the Logistics Support Analysis Record (LSAR) with supportability-related data for the Mission System when an LSAR is required under the Contract.

**Policy:** Nil.

**Guidance:** The full scope of the Logistics Engineering clauses from the ASDEFCON (Strategic Materiel) templates have not been incorporated into this template because the requirements are not considered necessary at this level, and the major supportability issues for the Mission System are addressed under the Growth and IRMT clauses.

#### Logistics Support Analysis Record (Optional)

The requirement for an LSAR is addressed under clause 5 of the draft SOW. The LSAR (if developed) will still need to be updated to identify any supportability-related design factors that are developed for the Mission System.

**Drafters Action:** Clause 4.6.3.4 of the draft SOW is to be included in the RFT without alteration when an LSAR is required under the Contract, consistent with the ILS clause requirements.

**Related clauses:** Clause 5.3.3.7 of the draft SOW addresses the requirements for an LSAR.

**Further Reading:** See also – *DEF(AUST) 5692, Logistic Support Analysis Record Requirements for the Australian Defence Organisation*

#### 4.6.4 - HUMAN ENGINEERING (OPTIONAL)

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**Sponsor:** Standardisation Branch

**Status:** Optional

**Purpose:** To ensure that the Contractor appropriately addresses the interfaces between human and system during the design process and to ensure that the Commonwealth has appropriate mechanisms to allow the end-system user community to influence the design.

**Policy:** See Section 4.1.

**Guidance:** This clause may not be required if the equipment is mainly off-the-shelf and there is little or no requirement for human engineering.

This clause may mandate or recommend particular Human Engineering (HE) standards as guidance, such as *MIL-HDBK-46855A* and *MIL-STD-1472F*. Consideration should be given to:

- a. aligning the choice of these standards with the Contractor's work practices; and
- b. establishing an HE Working Group to develop the relevant system aspects in a joint Commonwealth-Contractor environment as the design progresses. Where a working group is used, the timing, frequency and roles and authority (with respect to the design) of Commonwealth participants need to be considered.

In the case of aircraft projects, *AAP7001.054* provides relevant guidance.

At this template level, the comprehensive workload involved with Human Computer Interface and Human Workload Analyses is not warranted and the SOW does not explicitly require the Contractor to carry out this work. Also a Human Engineering Program Plan is not called up, but progressive Human Engineering Program Reports are required at progress meetings and reviews. The final report will be required at the Test Readiness Review prior to Acceptance of the Mission System.

**Drafter's action:** Drafters firstly need to determine whether or not the clause is required. If required, drafters may wish to amend clause 4.6.4 to provide the Commonwealth with visibility of intermediate stages of developing HE solutions to enable wider end-user review and feedback. Otherwise, clause 4.6.4 is to be included in the RFT without alteration

**Related clauses:** Clause 4.6.2 of the draft SOW addresses the requirement to address Maintainability.

**Further Reading:** Nil.

#### 4.6.5 - ELECTROMAGNETIC ENVIRONMENTAL EFFECTS (OPTIONAL)

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**Sponsor:** Directorate of Spectrum and Communications Regulation, Director General Technical Airworthiness – Australian Defence Force

**Status:** Optional

**Purpose:** To ensure that the Contractor appropriately addresses the system impact on the Electromagnetic Environment (E2) and effect of the E2 on the system.

**Policy:** *DI (G) ADMIN 05-9, Projects Involving the Provision/Utilisation of Communications-Electronics Equipment – Approval Process*

*DI (G) OPS 07-14, Management of the Defence Use of the Radiofrequency Spectrum*

*DI (G) OPS 07-16, Coordination of Use of the Radiofrequency Spectrum Shared by Defence Telemetry and Other Equipment and Deep Space Tracking Stations in the Radiofrequency Band 2200-2300 MHz.*

*DI (G) OPS 16-2, The Management of Electromagnetic Environmental Effects*

*DI (G) OPS 16-3, Electromagnetic Compatibility Compliance*

*DI (G) OPS 16-4, Management of Electromagnetic Environmental Effects in Airborne Systems*

**Guidance:** Personnel health, electrical and electronic equipment, explosive ordnance and flammable atmospheres may be adversely affected by Electromagnetic (EM) radiation. These effects are known collectively as Electromagnetic Environmental Effects (E3). The results of these effects can be significant, and may result in adverse health effects to exposed personnel, malfunction of equipment, compromising emanations, or unintentional detonation. Expertise in specific aspects of E3 is distributed throughout the Defence. DI (G) OPS 16-3 states Defence policy for adherence to the ACA EMC compliance framework. Further advice in these areas should be sought from the Directorate of Spectrum and Communications Regulation.

*DI (G) OPS 16-4 addresses E3 in Airborne Systems.* Further advice in this area should be sought from DGTA-ADF.

Note that this clause should not call up specific equipment requirements related to E2, these should be captured in the specification in the DOR. This clause should be concerned with the Contractor's process and work activities related to E2 and the Contractor's interaction with the Commonwealth in these areas.

**Drafter's action:** Drafters firstly need to determine whether or not the clause is required. If required, drafters should seek guidance from the relevant SMEs to determine if any project-specific requirements are necessary. If not, clause 4.6.5 is to be included in the RFT without alteration.

**Related clauses:** Clause 4.6.9 of the draft SOW addresses the requirements for access to the RF spectrum.

**Further Reading:** Nil.

4.6.6 - SAFETY

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To ensure that the Contractor conducts an adequate safety program.

**Policy:** *Defence Safety Manual (SAFETYMAN)*

*DI(G) LOG 08-15, Regulation of Technical Integrity of Australian Defence Force Materiel*

**Guidance:** DMO policy is that all projects are considered safety critical until proven otherwise. Therefore, all projects shall at least have a minimal safety program. The scope of the safety program will depend on the size of the project and the potential for accidents. This potential is determined through the conduct of a Safety Assessment that needs to be performed early in the project's life cycle to ensure adequate funding is available for the conduct of an adequate a safety program. Specialist support may be required to perform this activity and the project needs to consider the legal ramifications of all of its safety related decisions.

It is critically important to identify and engage early in the lifecycle the applicable Technical Regulatory Authority (TRA) who will perform the safety certification role for the system or a safety critical component of the system. This TRA needs to review the preliminary Safety Assessment and confirm the findings that will determine the scope of the project's safety program. Part of this scope definition will involve the identification of the safety-related standards to be applied by the

project. Care needs to be taken when multiple TRAs are involved in a project as to clearly resolving the jurisdiction of each and which TRA will be the lead TRA for the project (see Hooks for TRAs in the Philosophy section of the ASDEFCON (Strategic Materiel) Handbook). The TRA(s) will form part of the project's Safety Management Group (SMG). This group will monitor the project's safety program and endorse the Acquirer and System Safety Program Plans as well as review and approve the project's Safety Case.

The Safety Case may be developed immediately after the initial Safety Assessment if the system is deemed to not be safety critical. The SMG/TRA will review and endorse this assessment. In this case, the safety program will be limited to TRA review of on-going safety assessments made as part of Mandated System Reviews (see applicable DMO Checklists) but if during these activities the degree of safety criticality changes, the safety program will require expanding with associated budget and schedule implications.

Clearly responsibility for safety management does not rest solely with the Contractor. While the Contractor is required to deliver a safe system, the Project Office is also required to ensure that a safe system is specified and delivered. In order to meet this responsibility, it is necessary to establish an Acquirer Safety Program with appropriate planning and staffing. At the very least, the Acquirer Safety Program Plan will be contained in the Acquisition Project Management Plan and reflect the continued safety assessment performed as part of system reviews throughout the acquisition. For safety critical systems, the Acquirer Safety Program Plan will most likely be a separate document subordinate to the Acquisition Project Management Plan. If there is more than one Contractor, or the Commonwealth acts as a systems integrator, then there are additional responsibilities on the Project Office to ensure that safety is addressed at the system level, and to co-ordinate subordinate safety programs. To ensure that the Project Office has the necessary contractual tools to properly monitor and ensure compliance of the Contractor's safety program, an Acquirer Safety Program should be established as early as possible in the project lifecycle. At the very latest, the safety program should be established in time for safety planning outputs to be included in the solicitation package (i.e. SOW, CDRL and DIDs).

Where a project cannot prove that it is not safety critical at the outset, an assessment of the safety criticality of a tendered solution is required. Safety workshops are an effective mechanism to discuss, define and agree a tenderer's safety program and to obtain a mutual understanding of expectations. For this reason, Safety Workshops should be held with each competitive tenderer or as a minimum with the preferred tenderer prior to Contract signature to ensure the safety program is included in the Contract scope. The understandings and agreements reached during a Safety Workshop are documented in the Tenderer's System Safety Program Plan (DID-ENG-MGT-SSPP), which is agreed after SMG/TRA endorsement (preferably prior to Contract signature) and then becomes part of the contract scope via the SOW. Contact the Director of Software Engineering in ESD for assistance in scoping and performing Safety Workshops.

An SSPP is optional in this template, consistent with the policy of reducing management overheads where possible and sensible. However, the requirement for a plan can only be deleted when the initial safety assessment deems that the project is not safety critical. The safety program remains as a mandatory feature, and its assumptions, decisions, and outcomes are covered in the Safety Case Report, which is a contractual requirement. During the Contract, the Contractor should develop a Safety Case documented in the Safety Case Report (see DID-ENG-SOL-SCR), which summarises and pulls together all of the assumptions, actions (undertaken and planned), results and analysis used to argue that the system is acceptably safe. It will be developed to record the initial Safety Assessment results and updated throughout the life of the system. The Safety Management Group will use the Safety Case to determine that the system is acceptably safe prior to commencement of Verification or operation of the system prior to system Acceptance. The Safety Case documents and demonstrates how

the system satisfies its safety requirements and how the hazards identified for the system have been reduced to an acceptable level. The SMG/TRA must endorse the Safety Case as it develops throughout the project and endorse the final Safety Case Report prior to system acceptance.

**Drafter's action:** The drafter is to select either option A or B at SOW clause 4.6.6. The decision must agree with the outcome of the Safety Management Group's assessment on whether or not the system is safety critical.

If required, clause 4.6.6 is also to be amended to insert the mandated or recommended safety standards into the RFT. Prior to Contract signature, consideration should be given to aligning the safety standards with the Contractor's work practices and, if acceptable to the Commonwealth, clause 4.6.6 should be amended accordingly.

**Related clauses:** Nil.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Safety*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Safety Engineering*

See also – *SAMS System Safety Guide, Edition 1, November 2003*

4.6.7 - SYSTEM SECURITY (OPTIONAL)

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**Sponsor:** Defence Security Branch

**Status:** Optional

**Purpose:** To ensure that the Contractor has adequate processes in place to address the security requirements of the technical design. Note that issues associated with the Contractor's facility and personnel clearance are addressed separately in SOW clause 3.16.

**Policy:** *DI(G) ADMIN 20-29, Defence Security Manual*

*DI(G) OPS 41-2, Projects Involving the Provision / Utilisation of High-Grade Cryptographic Equipment Encryption Devices*

**Guidance:** This clause is intended to address the design of appropriate security features of the Mission and Support Systems. If security for these systems is likely to be applicable, this clause should include a security program in accordance with the Defence Security Manual or equivalent, as well as development of a security architecture plan, an accreditation plan, issues of timing and Commonwealth involvement.

**Drafter's action:** Refer to DSB / DSD for advice in drafting clauses in this domain that are suitable for the specifics of the project.

**Related clauses:** The **Facility Clearance Requirement** clause of Annex F of the conditions of tender requires each tenderer to provide details of the type and level of facility clearances held by the tenderer and proposed Subcontractors.

The **Defence Security** clause of the draft conditions of contract details the security requirements of the Contract and the security classification of work to be performed under the Contract.

The **Defence Security Compliance** clause of the draft SOWSOW details the work requirements associated with compliance with the security requirements of the Contract.

**Further Reading:** See also – *Defence Security Manual*

4.6.8 - AIRCRAFT TYPE CERTIFICATION (OPTIONAL)

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**Sponsor:** DGTA-SCI

**Status:** Optional (Core if Aircraft Type Certification is required)



<u>Purpose:</u>	To ensure that the airworthiness regulatory requirements are met.
<u>Policy:</u>	<i>DI (G) OPS 02-02 Australian Defence Force Airworthiness Management</i>
<u>Guidance:</u>	<p>This clause needs to address the contents of the Type Certification Program and associated plan. The Type Certification Plan must present a comprehensive proposal for the aircraft Certification Basis Description (CBD) that allows certification risk to be assessed. This CBD must be prepared in accordance with <i>AAP7001.054</i>.</p> <p>In the case of aircraft projects, DGTA-SCI must be consulted to establish airworthiness certification requirements. <i>AAP7001.054</i> provides relevant guidance.</p> <p>The following areas must be considered:</p> <ol style="list-style-type: none"> <li>a. Aircraft Structural Integrity;</li> <li>b. Engine Structural Integrity;</li> <li>c. Aircraft Electrical Loads Analysis;</li> <li>d. Stores Clearance; and</li> <li>e. Environmental Control Systems Analysis.</li> </ol>
<u>Drafter's action:</u>	Drafters are to consult with DGTA-SCI for developing subordinate clauses under this clause.
<u>Related clauses:</u>	Clause 4.1.3 of the draft SOW addresses the requirements for being an Authorised Engineering Organisation (AEO).
<u>Further Reading:</u>	<p>See also - <i>ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Airworthiness Regulatory Requirements</i></p> <p><u>4.6.9 - ACCESS TO THE RADIO FREQUENCY SPECTRUM (OPTIONAL)</u></p>
<u>Sponsor:</u>	Directorate of Spectrum and Communications Regulation
<u>Status:</u>	Optional.
<u>Purpose:</u>	To ensure that equipment, systems, sub-systems, Configuration Items (CIs), or end products are compliant with the <i>Radiocommunications Act 1992</i> and their in-service spectrum use can be managed to meet intended operational capability.
<u>Policy:</u>	<p><i>DI(G) ADMIN 05-9, Projects Involving the Provision/Utilisation of Communications-Electronics Equipment – Approval Process.</i> (under review)</p> <p><i>DI(G) OPS 07-14, Management of the Defence Use of the Radiofrequency Spectrum.</i></p> <p><i>DI(G) OPS 07-16, Coordination of Use of the Radiofrequency Spectrum Shared by Defence Telemetry and Other Equipment and Deep Space Tracking Stations in the Radiofrequency Band 2200-2300 MHz.</i></p>
<u>Guidance:</u>	<p>This clause provides for the management of Defence use of the Radiofrequency Spectrum to ensure that all who require access to this spectrum can do so without harmful interference. The clause provides for the submission of an Equipment Certification to Access Radiofrequency Spectrum (ECARS), which is evaluated by the Directorate of Spectrum and Communications Regulation (DCSR) to ensure that, when delivered, systems and equipment will:</p> <ol style="list-style-type: none"> <li>a. be compliant with Australian regulatory and Defence-specific requirements; and</li> <li>b. meet operational requirements.</li> </ol> <p>An initial delivery of the ECARS should be included in the conditions of tender to enable evaluation of RF spectrum issues during the tender phase and for any identified issues to be discussed with the preferred tenderer(s) pre-Contract. Of note, the CDRL specifies multiple deliveries of the ECARS under the Contract to</p>

align with the developmental status of the systems and equipment. Discussion of RF spectrum issues should also occur at each of the Mandated System Reviews to ensure that these issues are addressed at the earliest possible time in the Contractor's developmental processes.

DSCR must be advised when projects, systems or equipment require access to the radio frequency spectrum. This advice is submitted using the form AA763 as specified in the ADFP 561.

This includes advice on:

- a. compliance with current 'Australian Radiofrequency Spectrum Plan';
- b. compliance with any relevant band and channel plans;
- c. compliance with future planned regulatory changes;
- d. operational restrictions that may apply due to equipment using an inappropriate frequency band;
- e. cost implications (in accordance with DIMPI 9/99) of equipment not operating in defence bands;
- f. interoperability issues with other In-Service defence systems; and
- g. compliance with Australian or International radio frequency bands to either establish or maintain interoperability with allied systems.

DSCR should be contacted where any doubt exists as to the inclusion of these requirements.

For the ECARS processes to be effective, RF spectrum requirements must be included in the documentation that defines the requirements for the Mission System and Support System, including:

- a. the specification (DOR Part A) must include the specification requirements for access to the RF spectrum, including interoperability requirements;
- b. the Verification Cross Reference Matrix (VCRM) that accompanies the DOR Part A, if applicable, must include the Verification requirements associated with access to the RF spectrum;
- c. the operational and support concepts (DOR Part B) must capture the operational (and support) concepts and scenarios associated with access to the RF spectrum, including the identification of those other systems and equipment with which the new systems and equipment must be able to interoperate (e.g. work together and/or not interfere with);
- d. the Test Concept Document (TCD) must include the Verification requirements, where these requirements are likely to be significant cost and schedule drivers.

Guidance should be sought from DCSR for generic clauses and requirements that can assist with the development of project-specific requirements associated with access to the RF spectrum.

The acquisition planning processes must also address the requirements associated with addressing issues associated with access to the RF spectrum. For example, the Test and Evaluation Master Plan (TEMP) and the Project Design Acceptance Strategy (PDAS) should explicitly address these issues when they are relevant to the specific acquisition.

Additional work requirements, such as the requirements for RF site surveys by the Contractor, should be included in the SOW where Radiofrequency Spectrum issues are likely to be significant.

All actions under this clause must be consistent with the related requirements of clause 4.6.5 on Electromagnetic Environmental Effects.

**Drafters Actions:** Drafters should confirm that the DOR contains the required information, consistent with the guidance above.

Drafters should consider including requirements for site surveys and associated survey reports in the SOW.

The requirement for submission of the ECARS is to be reflected in the CDRL.

**Related clauses:** Clause 4.2.1 of the draft SOW addresses the requirements for the DOR.

Clause 4.6.5 of the draft SOW addresses the requirements associated with electromagnetic environmental effects.

The **Acceptance Verification** clause of the draft SOW addresses the requirements for Acceptance Verification.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Defence Radiocommunications*



## INTEGRATED LOGISTICS SUPPORT

**Warning: Clause 5 should never be deleted in total. In those situations where total contractor support is envisaged, most of clause 5 will still be required for a number of reasons, including the following:**

- a. The ILS clauses include the design of those elements of the Support System that will be provided by the In-Service Support contractors and subcontractors. As such, clause 5 is required to provide insight into whether or not a valid Support System, which meets the Commonwealth's preparedness objectives at a minimised Life Cycle Cost (LCC), will be provided.
  - b. Even when the Commonwealth will not be undertaking maintenance, the operators of the Mission System will still require training, publications, and (possibly) equipment and facilities. These aspects are covered under the Support System Constituent Capabilities of Operating Support and Training Support.
  - c. The Technical Data clauses are inextricably linked with the Intellectual Property (IP) clauses under the Contract. As such, the Technical Data clauses will always be required to ensure that the Commonwealth's IP objectives and rights under the Contract are realised.
- Guidance should be sought from the appropriate Subject Matter Experts (SMEs) before tailoring of clause 5 is commenced.**

### Integrated Logistics Support Program

<u>Reference:</u>	Clause 5.1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To require the Contractor to undertake Integrated Logistics Support (ILS) practices and supporting processes in undertaking the Supportability-related elements of the work under the Contract.
<u>Policy:</u>	<i>DI(G) LOG 03-6 Integrated Logistic Support</i>
<u>Guidance:</u>	See guidance on subclauses.
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	For a complete overview of the ILS aspects of the SOW, including the philosophy and concepts underpinning the ILS aspects, users of the ASDEFCON (Complex Materiel) Volume 2 Template are advised to read the Philosophy volume of the ASDEFCON (Strategic Materiel) Handbook, particularly the ILS chapter of that volume.

#### 5.1.1 - ILS PROGRAM OBJECTIVES

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To convey to the Contractor the ILS objectives that have led to the tailoring of the SOW and the focus of the individual project's requirements for the ILS Program.
<u>Policy:</u>	<i>DI(G) LOG 03-6 Integrated Logistic Support</i>
<u>Guidance:</u>	The ILS Program Objectives provide the high-level outcomes required as a result of implementing ILS as part of the acquisition program, and as the basis behind the ILS requirements in this SOW. The ILS Program Objectives listed are generic and are related to achieving an optimal balance between preparedness, support and Life Cycle Cost (LCC). The default terminal objectives for the application of ILS are:

- a. A Mission System designed for supportability. This first objective is to deliver to the Commonwealth a Mission System, which is designed in a way that enables a high level of availability with a minimal support burden. This objective should be interpreted appropriate to the level of design activity. For example, if off-the-shelf subsystems are being integrated into a Mission System, then subsystems that exhibit high reliability and minimise the need for special-to-type S&TE or unique trade skills would be preferable over other subsystems that are less supportable.
- b. A Support System designed for Mission System support requirements, while minimising LCC to the Commonwealth. The second objective is to deliver a Support System solution that:
  - 1) from the combination of delivered and available In-Service support components, is most effective in providing support to the Mission System in all its roles,
  - 2) minimises the LCC incurred by the Commonwealth,
  - 3) enables the required level of availability, and
  - 4) complies with any other program requirements and constraints.
- c. Implementation of the Support System. The third objective, in following the achievement of the previous two, is to realise the implementation of the Support System. Implementation requires:
  - 1) the timely identification of the appropriate range and quantities of all Support Resources, including those physical products delivered by the Contractor;
  - 2) the timely identification of all necessary information and skills transfer, required by the Commonwealth to enable transition into service; and
  - 3) the implementation of all of the elements required by the Contractors and Subcontractors that will be providing In-Service support (i.e. Contractors(LS) and Subcontractors(LS)).

Additionally, some programs will have overriding requirements for the ILS program not adequately covered by the generic ILS Program Objectives listed. Examples include: a requirement to reduce Defence personnel numbers to a predetermined level, or to be constrained within a defined maximum LCC or annual cost. Additional, overriding program objectives, such as these, will need to be added to clause 5.1.1.

Acknowledgement and understanding, by the Contractor, of the ILS Program Objectives, is intended to ensure that the Contractor's ILS and LSA programs will be planned and undertaken in a manner to achieve these objectives. The objectives should be apparent in, and influence, the Contractor's Integrated Support Plan (ISP) and subordinate ILS plans. In one respect, these objectives provide the "purpose" underpinning the Contractor's ILS program and, therefore, provide the frame of reference within which the "fitness for purpose" of the program can be assessed by the Commonwealth Representative.

Drafter's action: Clause 5.1.1 may need to be tailored to specify the high-level objectives for the ILS Program (including LSA) and any key constraints within which these objectives must be achieved. If there are no additional objectives, or the objectives and constraints are adequately specified in the DOR and/or Use Study Report, drafters should not amend the default objectives. Guidance should be sought from DLSE in amending the default objectives for the ILS Program.

Related clauses: All other clauses within clause 5 of the draft SOW.

The **Specialty Engineering** clause of the draft SOW details the requirements for the Contractor to undertake a range of Specialty Engineering activities, many of which directly relate to the Supportability characteristics of the Mission System.

Further Reading: See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – ILS/LSA Management*

### 5.1.2 - ILS PROGRAM MANAGEMENT

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Sponsor: Standardisation Branch

Status: Core

Purpose: To ensure the ILS Program is managed in an integrated manner to deliver an integrated and effective Supportability solution. To ensure that the various organisational structures, processes, and procedures (identified in the various plans) that the Contractor adopts are consistent with the achievement of the required ILS Program outcomes.

Policy: *DI(G) LOG 03-6 Integrated Logistic Support*

Guidance: Planning

Following the approach of the *ASDEFCON (Complex Materiel) Volume 2 SOW*, not to prescribe process to the Contractor but to seek the outcomes, the actual process followed will be defined in the Contractor's planning documents. This encourages tenderers to propose their own best practice methods for achieving the required results. Plans that are delivered as tender deliverables should be closely evaluated to provide the Commonwealth with the confidence that a potential Contractor has in place well-structured and effective processes to achieve the required outcomes. More details on this subject are discussed under the clauses related to each plan.

As the "Note to drafters" states, if the Technical data Plan (TDP) is not required as a stand-alone document, due to the limited size of the effort in that particular area, the ISP is required to address the Technical Data issues that would otherwise be addressed in the TDP, albeit at a lesser level of detail.

The default set of ILS plans comprises an ISP and a TDP. Whilst the TDP may be tailored out, with Technical Data planning being addressed in the ISP, this should not be done if the optional CALS clause 5.3.3.4 is used.

Drafters should note that the set of ILS management plans in *ASDEFCON (Complex Materiel) Volume 2* represents a complete set for a project, and additional ILS management plans should not be required.

For a mapping and discussion of the relationships between the ten ILS elements and the process/product approach underpinning *ASDEFCON (Complex Materiel) Volume 2*, drafters are referred to Section 11 of the *ASDEFCON (Strategic Materiel) Handbook Philosophy Volume*.

In the ILS plans, the Commonwealth does not specify the processes to be followed, but requires them to be defined in the Contractor's plans. As such, the Commonwealth ILSM must approve the Contractor's plans before they can be implemented. The Contractor must then conduct the program in accordance with those plans

Scheduling is an important part of planning the ILS Program. For consistency across the entire program, *ASDEFCON (Complex Materiel) Volume 2* requires all subordinate schedules, including the ILS schedule, to be incorporated into the Contract Master Schedule (CMS). Any scheduling described within the above plans should be derived from, and described in terms of the milestones from, the CMS.

#### Mandated System Reviews

The Commonwealth requires Mandated System Reviews to provide oversight of the progress and management of the Contractor's activities under the Contract, which includes the ILS program. The reviews are a combination of System Reviews, detailed in the Systems Engineering clause; configuration audits, addressed through the CM clauses; test readiness reviews, addressed under the

V&V clauses; and specific reviews of the ILS Program. Conduct of the ILS-related Mandated System Reviews is covered under clause 4.1.4 and 5.1.2.2 of the draft SOW and by the Contractor's Integrated Support Plan (ISP) (DID-ILS-MGT-ISP-2 refers).

The list of applicable reviews may need to be amended to suit the requirements of the individual program.

ILS involvement in those Mandated System Reviews that are detailed in the Systems Engineering clause ensures coordination between the ILS and SE Programs. Supportability characteristics of the Mission System design are addressed in these reviews, and the impact of the Mission System design on the Support System can be evaluated under whole-of-capability terms.

Clause 4.1.5 describes the general requirements for the conduct of System Reviews, and the clause for each review defines the review objectives to help ensure that both parties have a clear understanding of review requirements. Where the entry and exit criteria and objectives for more than one review can be met at the same time, the reviews may be conducted simultaneously.

The ISP is required to detail the conduct of each ILS-related System Review, based on the SOW clauses for System Reviews under the ILS and SE clauses and the Contractor's internal processes as tailored by the Contractor, including entry, exit and checklist items.

Each Mandated System Review should be considered as a Payment Milestone candidate in accordance with the provisions of clause 7.2 of the conditions of contract.

#### System Requirements Review (SRR) and System Definition Review (SDR)

Clause 5.1.2.2.1 highlights that there will be a System Requirements Review (SRR) and a System Definition Review (SDR) for the Mission System, which will address supportability requirements that are likely to affect Support Resource requirements. The clauses relating to these reviews are contained at clauses 4.2.3 and 4.2.4 of the draft SOW, respectively.

#### Preliminary Design Review (PDR) and Detailed Design Review (DDR) (Optional)

Clause 5.1.2.2.1 highlights that there could be a Preliminary Design Review (PDR) and a Detailed Design Review (DDR) for the Mission System, which will address supportability requirements that are likely to affect Support Resource requirements. The clauses relating to these reviews are contained at clauses 4.3.1 and 4.3.2 of the draft SOW, respectively. ILS staff should expect to be involved in the PDR and DDR for the Mission System because there are numerous issues addressed at these reviews that have significant implications for the Support System (e.g. reliability and maintainability of the Mission System, and, if specified through an appropriate DID, delivery of updates to the LSAR). Additionally, ILS staff should ensure that ILS is included in the agenda for both PDR and DDR to enable status updates of these programs to be addressed. Finally, these reviews provide an ideal opportunity for ILS staff from both the Contractor and the Commonwealth to discuss issues relating to the ILS program.

#### Provisioning Preparedness Review (PPR)

The purpose of the Provisioning Preparedness Review (PPR) is to review the Recommended Provisioning List (RPL) to enable the Commonwealth to approve the recommended spares, Support and Test Equipment (S&TE) and training equipment lists and proceed with procurement. If any of these Resources are not required, or if the range and quantity of any of these have been determined pre-Contract, and included in the Contract as deliverables, then this clause must be edited accordingly.

The use of existing (common) spares, support and test equipment and training equipment from other Capabilities or other sources of supply should also be identified. Considerations of standardisation and offsetting with existing items



already in service would also be a subject of discussion at the PPR. In preparing the RPL, the requirement for and utilisation levels of existing resources should have been identified.

The scheduling of the PPR for an individual program can be dependant upon whether resources can be procured off-the-shelf or if development is required.

Spares should be included in the PPR even when the Contractor is providing spares for the initial support period. This ensures there will be adequate numbers of spares for the initial support period and indicates the likely increase required for hand over from initial to longer term In-Service support. In this instance, a second PPR would be scheduled at a later time, in preparation for the hand over.

#### Training Readiness Review (TNGRR) (Optional)

If the Contractor will not provide any training under this Contract and is not involved in the set-up of the Commonwealth training program, then this clause should be deleted and the heading replaced with "Not used". The objective of the Training Readiness Review (TNGRR) is to enable the Commonwealth and the Contractor to review the state of training syllabi, materials, equipment, classrooms, etc, to confirm that all necessary elements are ready to enable Training to commence. Accordingly, the Commonwealth must be given the opportunity to review all training syllabi and course materials prior to the review, and to confirm delivery to the training facility (even if temporarily at the Contractor's facility) and set up of training equipment. Review of training materials includes paper-based training, video-based training and CBT products, as applicable. The TNGRR must be a coordinated part of the Verification and Validation (V&V) program for the Acceptance of the Training Support elements from the Contractor.

The TNGRR provides the Commonwealth and the Contractor with the opportunity to review the status of the Training Support Constituent Capability and to determine whether it is ready for the commencement of training, as required under the Contract. The TNGRR also assists the Commonwealth with ensuring that all necessary measures for the future support, development and upkeep of training courses have been appropriately planned for (e.g. through in-house support arrangements or via appropriate support contracts)..

The TNGRR is one of the steps leading to Acceptance of the Training Support requirements of the Contract. In general, the determination as to whether or not Training and Training Support are fit for purpose will not be able to occur until the delivered training courses are assessed through other V&V activities. The TNGRR, therefore, provides an initial check that the delivery of the training courses is ready to proceed, with the Acceptance of the Training Support elements occurring after the training has been validated.

#### Facilities Readiness Review (FACRR) (Optional)

If the Contractor is not involved in implementing facilities requirements, then this clause should be deleted and the heading replaced with "Not used". The objective of the Facilities Readiness Review (FACRR) is to review the state of facilities that are new, refurbished, fitted-out, or otherwise modified by the Contractor to confirm that the facilities are complete and ready for the Commonwealth or other agencies (including the Contractor), as applicable, to occupy. The FACRR must be a coordinated part of the Verification and Validation (V&V) program, leading to the Acceptance of facilities from the Contractor.

The FACRR provides the Commonwealth and the Contractor with the opportunity to review the implementation of new, refurbished, fitted-out, or otherwise modified facilities as required under the Contract. The FACRR also assists the Commonwealth with ensuring that all necessary measures for the future support and upkeep of facilities have been appropriately planned for (e.g. through in-house support arrangements or via support contracts).

The FACRR is one of the steps leading to the Acceptance of facilities by the Commonwealth. In general, the determination as to whether or not a facility is fit

for purpose will not be able to occur until the facility is occupied and the actual activities to be undertaken within that facility are performed. The FACRR, therefore, provides an initial check that facilities are ready for occupation, with the Acceptance of those facilities occurring after the facilities have been validated.

In preparation for the FACRR, the Commonwealth should have previously been provided with the Facilities Requirements Analysis Report (DID-ILS-FAC-FRAR-2) and copies of the relevant building specifications, environmental reports, plans, approvals and certificates.

**Drafter's action:** Clause 5.1.2 may need to be tailored, in the context of an individual project's requirements, to determine which plans will be required to describe how the Contractor will implement a program that is likely to achieve all requirements, including the need for visibility to satisfy Defence's Corporate Governance obligations. The drafter must determine if plans listed are suitable, should they be amalgamated or further broken down, and the need for any additional plans. DIDs for each applicable plan should be reviewed and scheduled in the CDRL, as applicable.

Cognisant of the plans selected and the project's requirements, the drafter must then also select the applicable review requirements and tailor the selection from the standard clauses, or add additional reviews if essential.

Drafters are to identify whether or not the ILS Mandated System Reviews should be identified as Payment Milestones in accordance with clause 7.2 of the conditions of contract.

Depending upon whether or not the Commonwealth Representative intends to obtain Contract-ready ILS plans prior to Contract, through contract negotiations, the CDRL delivery times for ILS plans will need to be adjusted.

**Related clauses:** The **Draft Integrated Support Plan** clause of Annex F of the conditions of tender optionally requests each tenderer to provide a draft ISP.

Clause 4.1.1 of the draft SOW addresses the SEMP, which is the major SE plan to be coordinated with the ILS plans.

Clause 4.1.4 of the draft SOW addresses the conduct of System Reviews.

Clause 4.2.3 of the draft SOW addresses the System Requirements Review.

Clause 4.2.4 of the draft SOW addresses the System Definition Review.

The **Configuration Audits** clause of the draft SOW addresses Configuration Audits, which include FCA/PCA for the Support System and for Support System Components.

Clause 7.1.4 of the draft SOW addresses Test Readiness Reviews, which include Supportability and Support System testing.

The **Acceptance Verification** clause of the draft conditions of contract provide the provisions relating to Milestone Payments.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – ILS/LSA Management*

See also – *System Review Guide for Australian Defence Contract (Strategic Materiel), Version 1.0, September 2003*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – System Reviews*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Supply Support*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Technical Data*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Training and Training Support*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Facilities*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Support and Test Equipment (S&TE)*

See also – *ASDEFCON (Strategic Materiel) Checklist – Spares Provisioning Preparedness Review*

See also – *ASDEFCON (Strategic Materiel) Checklist – S&TE Provisioning Preparedness Review*

See also – *ASDEFCON (Strategic Materiel) Checklist – Training Equipment Provisioning Preparedness Review*

See also – *ASDEFCON (Strategic Materiel) Checklist – Long Lead Time Items Review*

See also – *ASDEFCON (Strategic Materiel) Checklist – Training Readiness Review*

See also – *ASDEFCON (Strategic Materiel) Checklist – Facilities Readiness Review*

### Logistics Support Analysis (LSA) Program

- Reference:** Clause 5.2
- Sponsor:** Standardisation Branch
- Purpose:** To impose an obligation on the Contractor to define Support Resource requirements that will enable the Mission System and Support System to be effectively and economically supported, including those Support Resources that are to be provided by the Contractor and those that must be provided by the Commonwealth.
- To require the Contractor to identify the outcomes necessary to implement the Support System.
- Policy:** DMO policy requires Logistic Support Analysis (LSA) to be undertaken during requirements definition, system development and design of Support Systems. This requirement is underpinned in the Capability Systems Life Cycle Management (CSLCM) Manual 2002. Specific policy for LSA is outlined in relevant Process Reference Pages of the DMO's Standard Acquisition Management System (SAMS) and can be accessed through the DMO Quality and Environmental Management System (QEMS). In the ensuing sub-sections, where no specific policy is identified, this overarching policy is relevant.
- Guidance:** LSA is a discipline based on the conduct of analysis to achieve Supportability and other ILS goals. Details of the processes involved in LSA can be found in:
- a. *DEF(AUST) 5691;*
  - b. *AAP 5102.003 or MIL-STD-1388-1A;*
  - c. *DEF STAN 00-60;* and
  - d. *ADO LSA Manual.*
- LSA has been developed from Systems Engineering analysis processes, adapted to address Mission System supportability and supportability achieved through the design of an effective Support System. Additional activities are associated with the analysis and development of ILS products that are, or define, physical resource requirements for the Support System. ILS Products include provisioning lists, workforce and personnel plans, technical manuals, and training materials. Physical resources, for which requirements are defined, include all Support Resources (i.e. Mission System and Support System spares, Support and Test Equipment (S&TE), packaging, facilities, training equipment, etc).
- LSA, as defined by the available standards, is not applied exclusively in this clause 5.2. Mission System supportability aspects are covered under the Growth Program and the IRMT Program within the Specialty Engineering clause of Systems Engineering, while Supportability Test and Evaluation is included in the Verification and Validation clause of the draft SOW.
- The **Support System Implementation** clause following the **Logistics Support Analysis Program** clause should produce cost-effective and consistent results based on the integrated approach to analysis required by this clause of the draft SOW.
- For further guidance, refer to Guidance for each clause within the **Logistics Support Analysis Program** clause of the draft SOW.
- Drafter's action:** Nil
- Related clauses:** Nil
- Further Reading:** See also – *ADO LSA Manual*
- See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – ILS/LSA Management*

### 5.2.1 - LSA PROGRAM MANAGEMENT

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- Sponsor:** Standardisation Branch
- Status:** Core
- Purpose:** To impose an obligation on the Contractor to conduct the LSA Program in accordance with the Approved Integrated Support Plan (ISP).
- Policy:** See Section 5.2.
- Guidance:** LSA is an analysis discipline supporting ILS but, due to the interrelated nature of the Mission System and Support System, LSA must also be managed in the context of certain SE and V&V activities. Management of the LSA program, therefore, should be undertaken through the ILS program in pursuit of ILS goals and in the context of broader program requirements. In practice, management of the LSA program is documented and controlled through ILS management plans and ILS management/review meetings.
- The *ASDEFCON (Complex Materiel)* Volume 2 SOW is outcome based; hence, the application of LSA processes in accordance with either *DEF(AUST) 5691*, *MIL-STD-1388-1A*, *AAP 5102.003* or other LSA standard, is not mandatory and the inclusion of these standards is discouraged.
- The ISP (DID-ILS-MGT-ISP-2) is the principal management plan for directing and controlling LSA as part of the ILS Program. The clause on "Standards" in this DID (i.e. clause 6.2.3.2) is used to define which activities are to be conducted in accordance with recognised or other agreed standards. This clause requires the Contractor to define why activities were selected or not selected, modifications to processes, expected outcomes, responsibilities, required information, tools, etc. The response to this clause in the ISP DID, therefore, should include references to *MIL-STD-1388-1A*, *DEF(AUST) 5691*, *IEEE1220*, and any other standards being applied to the ILS/LSA Program, and how, if applicable, the processes are modified to suit the project. A sound ISP is critical to the success of the ILS and LSA Programs, and every effort should be made to ensure that agreement on this plan is reached prior to Contract award.
- The ISP also defines the conduct of ILS Management reviews and subordinate LSA reviews, and the involvement of LSA (and ILS) in the Mandated System Reviews. This forms the second element in managing the LSA Program. The use of on-going ILS reviews, LSA reviews, and one or more LSA Guidance Conferences may be required. In the Project Management Plan (PMP), meetings are covered generically in the clause titled "Meetings" and also "Project Communications Management". In the ISP, the process for conducting suitable reviews should be covered in the response to the "Standards" clause where this refers to an LSA standard, such as *DEF(AUST) 5691*, which includes ILS Reviews, LSA Reviews, and LSA Guidance Conferences. Scheduling of reviews should be included in the "ILS Program Schedule" clause of the ISP.
- Drafter's action:** Clause 5.2.1 is to be included in the RFT without alteration.
- After having completed the tailoring and any amendments to the rest of the **Logistics Support Analysis** clause and the **Support System Implementation** clause of the draft SOW, drafters should review the DIDs for the ISP and subordinate plans to ensure that these plans comprehensively address the LSA requirements for the project.
- Drafters are to review the delivery times and review periods in the CDRL to ensure that these elements reflect the requirements of the project, including the project Milestones (and associated entry/exit criteria).
- Related clauses:** Clause 5.1.2 of the draft SOW addresses the requirement for an ISP and related plans.
- Further Reading:** See also – *ASDEFCON (Strategic Materiel) Philosophy Annex A, Lifecycle Thread – ILS/LSA Management*

### 5.2.2 - SUPPORT SYSTEM DEFINITION

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<b><u>Sponsor:</u></b>	Standardisation Branch
<b><u>Status:</u></b>	Core
<b><u>Purpose:</u></b>	To impose an obligation on the Contractor to ensure that the operational and support concepts in the DOR remain consistent with the ILS outcomes as the ILS Program progresses.
<b><u>Policy:</u></b>	See Section 5.2.
<b><u>Guidance:</u></b>	Clause 5.2.2.1 establishes the obligation for the Contractor to propose amendments to the DOR part B to address any inconsistencies in the DOR which are revealed by conduct of the ILS program.
<b><u>Drafter's action:</u></b>	Drafters are to ensure that the DOR adequately captures the baseline logistic support concepts and requirements, and adequately addresses Supportability, ADO infrastructure, and logistic support constraints.
<b><u>Related clauses:</u></b>	Clause 4.1 of the draft SOW details the requirement for Systems Engineering management.

Clause 4.6 of the draft SOW addresses the Specialty Engineering requirements, which will have interfaces with, and implications for, the LSA Program requirements.

<b><u>Further Reading:</u></b>	See also – <i>ADO LSA Manual</i> See also – <i>EIA-632, Processes for Engineering a System</i> See also – <i>IEEE Std 1220-1998, IEEE Standard for Application and Management of the Systems Engineering Process</i>
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### 5.2.3 - NOT USED

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### 5.2.4 - NOT USED

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### 5.2.5 - NOT USED

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### 5.2.6 - NOT USED

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### 5.2.7 - NOT USED

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### 5.2.8 - SUPPORT SYSTEM SYNTHESIS

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<b><u>Sponsor:</u></b>	Standardisation Branch
<b><u>Status:</u></b>	Core
<b><u>Purpose:</u></b>	To impose an obligation on the Contractor to synthesise, from analysis of the stated support requirements conducted in accordance with the Approved ISP, completed listings of the required range and quantity of Support Resources for the new Capability. These listings include provisioning lists and the requirements for resources from the ADO, such as personnel.
<b><u>Policy:</u></b>	See Section 5.2. <i>DI(G) LOG 06-4, 'Australian Defence Force Reserve Stockholding Policy'</i> <i>DI(G) LOG 03-2, 'Defence Policy on Computer-aided Acquisition and Logistic Support'</i>
<b><u>Guidance:</u></b>	<b><u>General</u></b> Support System Synthesis involves determining Support Resources that will allow the Mission System and Support System to be effectively and economically supported in accordance with the operational and support concepts and

requirements defined in the DOR. The Support Resources considered under this clause of the draft SOW include:

- a. Spares;
- b. Packaging;
- c. Training, Training Equipment and Training Materials;
- d. Technical Data;
- e. Support and Test Equipment (S&TE);
- f. Facilities; and
- g. Personnel.

If the Contractor is not required to determine particular Support Resource requirements, then the SOW clauses relating to those Support Resources are to be replaced with "Not Used", or amended, as appropriate.

The concept is illustrated on the following page in Figure 5.0.

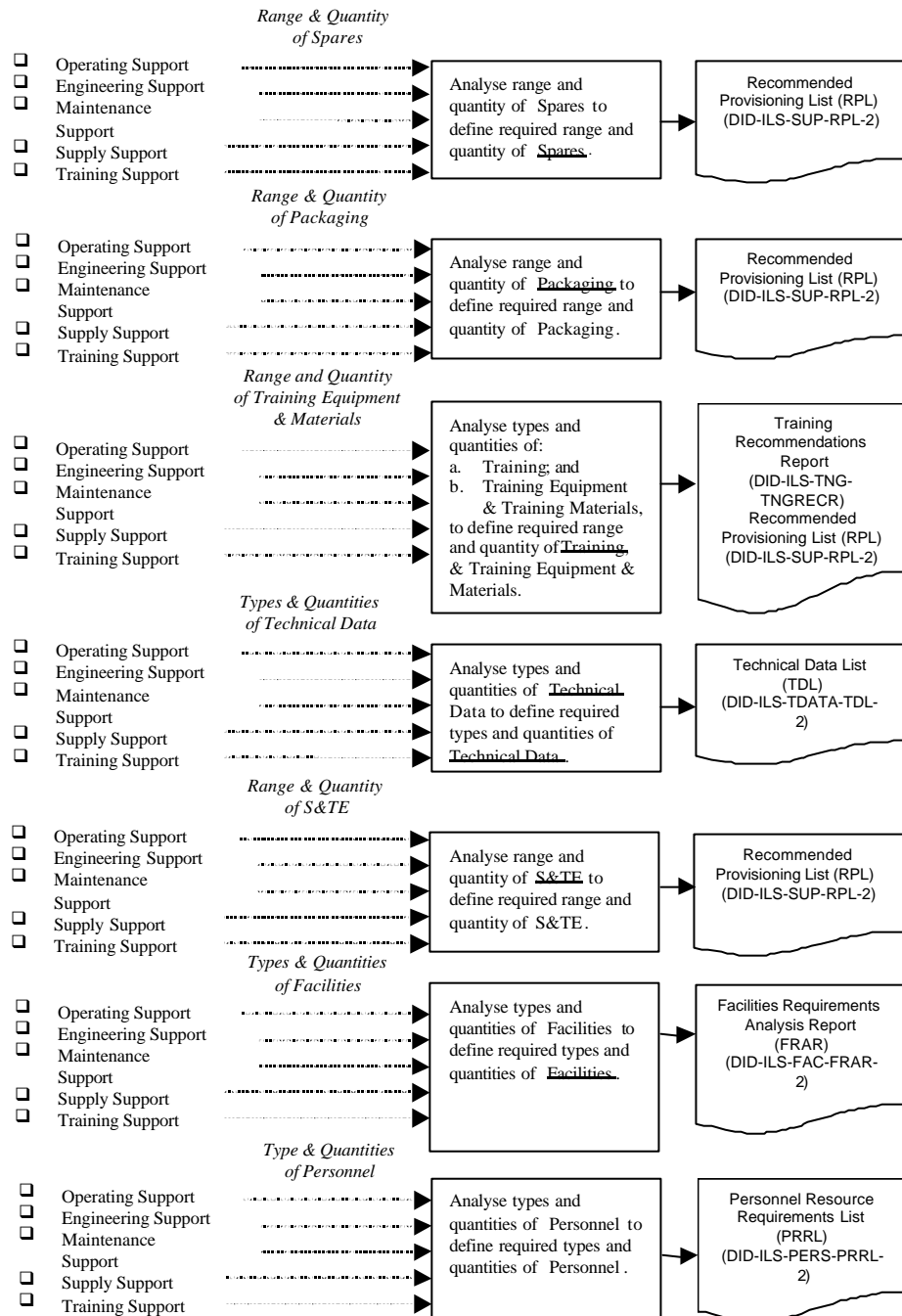


Figure 5.0 Support System Synthesis Concept

Spares, Packaging, Training Equipment and Materials, and Support and Test Equipment

Spares

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required range and quantity of spares for each of the Support System Constituent Capabilities.

While the standard Spares Optimisation Model used within Defence is based on the spares-optimisation software package OPUS 10, which is a multi-indenture, multi-echelon model, this template does not require the use of a particular process or tool. Instead, the Contractor defines its approach in the ISP. Tenderers are likely to have their own spares-modelling tools, and advice should be sought from the relevant SME on the acceptability of these tools. For more complex projects, spreadsheet-based spares models and other models based on simple algorithms



should be avoided because they neither adequately model the support concepts nor provide optimisation functionality. However, the need for these complex tools may not be required for the types of projects covered by this template.

As highlighted in the DID for the Recommended Provisioning List (RPL), the spares-model developed by the Contractor must accord with the build of the Mission System, and the operational and support environment and Rate of Effort (ROE). Furthermore, the model must be consistent with other models developed by the Contractor (e.g. the LORA model). The outcome of the spares-synthesis process is the list of recommended spares in the RPL; hence, the Commonwealth Representative needs to be convinced that the spares model is valid before it can Approve the RPL. In all likelihood, specialist support will be required to enable this assessment to be made.

The RPL provides all of the information required for provisioning purposes; however, prior to any procurement action being initiated, the Contractor is required (under clause 5.1.2.6 of the draft SOW) to hold a Provisioning Preparedness Review (PPR) to enable a joint review of the RPL and the spares-model to be conducted. Following approval of the RPL, the Contractor is required (under clause 5.3.2 of the Support System Implementation clauses) to provide the Spares identified in the Approved RPL. Drafters should note that, under ASDEFCON (Complex Materiel) Volume 2, the price for Spares is not included in the Contract price, and is subject to a separate Not-To-Exceed (NTE) price (refer to Annex C-2 and Annex G2 of the conditions of tender). After Approval of the RPL and agreement on the price to be paid for the Spares, the Contractor will be required to generate a CCP to modify the Contract to incorporate the list of Spares and the associated price into the Contract. Commonwealth Representative staff should also be aware that this final list will be subject to adjustment if there has been an initial purchase of any Spares that were identified as Long Lead-Time Items (LLTIs).

### Packaging

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required range and quantity of packaging for each of the Support System Constituent Capabilities. The main focus here is placed on any special-to-type or other high-cost packaging that will be the focus when reviewing the Recommended Provisioning List (RPL). Standard packaging and packaging materials are likely to be procured through existing Defence procurement channels from local sources.

There are no Defence-endorsed, packaging-models or tools for this purpose. However, packaging requirements are directly related to the transportation outcomes of LORA, the design of the Supply Support Constituent Capability, movement of stores/munitions, and any requirements/policy for packaging of stored items. Hence, as part of the synthesis process, the Contractor would be expected to describe, in accordance with the DID for the ISP, how the required range and quantity of packaging requirements would be determined. The DID for the RPL requires the Contractor to justify the set of packaging that the Contractor is recommending should be provisioned.

The RPL provides all of the information required for provisioning purposes. Following approval of this list, the Contractor is required (under clause 5.3.2 of the Support System Implementation clauses) to provide the packaging identified in the Approved RPL. Drafters should note that the price for this packaging is included in the Contract price.

Specialist advice should be sought from the SME to assess the appropriateness of any model(s)/tool(s) used. Advice on specialist packaging and pallets can be obtained from the Packaging Development Cell, LEA, Defence Plaza Melbourne, 661 Bourke St, Melbourne, Victoria.

### Training Equipment and Materials

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required range and quantity of Training Equipment and Training Materials for each of the Support System Constituent Capabilities.

There are no Defence-endorsed Training Equipment and Training Materials models or tools for this purpose. Specialist advice should be sought from the SME to assess the appropriateness of the model(s) / tool(s) / process(es) used.

The Contractor is required to document the recommended types and quantities of Training Equipment and Training Materials in the Recommended Provisioning List (RPL). The DID for the RPL requires the Contractor to justify the range and extent of Training Equipment that the Contractor is recommending should be provisioned, including undertaking standardisation and offsetting of identified Training Equipment with Training Equipment that is already in service with the Commonwealth.

The RPL provides all of the information required for provisioning purposes; however, prior to any procurement action being initiated, the Contractor is required (under clause 5.1.2.6 of the draft SOW) to hold a Provisioning Preparedness Review (PPR) to enable a joint review of the RPL to be conducted. Following approval of the RPL, the Contractor is required (under clause 5.3.2 of the Support System Implementation clauses) to provide the Training Equipment and Materials identified in the Approved RPL. Drafters should note that, under ASDEFCON (Complex Materiel) Volume 2, the price for Training Equipment is not included in the Contract price, and is subject to a separate Not-To-Exceed (NTE) price (refer to Annex C-2 and Annex G-2 of the conditions of tender). After Approval of the RPL and agreement on the price to be paid for the Training Equipment, the Contractor will be required to generate a CCP to modify the Contract to incorporate the list of Training Equipment and the associated price into the Contract. Commonwealth Representative staff should also be aware that this final list will be subject to adjustment if there has been an initial purchase of any Training Equipment that was identified as a Long Lead-Time Item (LLTI). Drafters should also note that the price for Training Materials is included in the Contract price.

### Support and Test Equipment

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required range and quantity of Support & Test Equipment (S&TE) for each of the Support System Constituent Capabilities. S&TE includes such equipment as forklifts and mobile handling equipment, which are used inside warehouses (and, therefore, form a part of the Supply Support Constituent Capability).

There are no Defence-endorsed S&TE-models or tools for this purpose. However, the Commonwealth Representative should be aware that, in determining the optimum location for maintenance tasks to be conducted, S&TE for maintenance will need to be located where those tasks are performed. LORA models will also consider the collocation of maintenance tasks that utilise the same S&TE as part of the economic optimisation process performed by the model. S&TE utilisation by maintenance level can be extracted from the LSAR, following LORA, thus identifying quantities at each maintenance location. However, different LORA models have applicability to different projects and will have varying capability, and, while the models optimise maintenance S&TE, they do not optimise operational, handling or other Supply Support equipment. Hence, the Contractor would be expected to describe, in accordance with the DID for the ISP, the process by which the required range and quantity of S&TE requirements would be determined, including undertaking standardisation and offsetting of identified S&TE with S&TE that is already in service with the Commonwealth. For specialist advice on this issue, guidance should be sought from the appropriate SME. Of note, any analysis of S&TE requirements must include any S&TE required to support other S&TE (e.g. calibration equipment).

The Contractor is required to document the recommended range and quantity of S&TE in the Recommended Provisioning List (RPL). The DID for the RPL requires the Contractor to justify the range and quantity of S&TE that the Contractor is recommending should be provisioned.

The RPL provides all of the information required for provisioning purposes; however, prior to any procurement action being initiated, the Contractor is required (under clause 5.1.2.6 of the draft SOW) to hold a Provisioning Preparedness Review (PPR) to enable a joint review of the recommended S&TE to be conducted. Following approval of the RPL, the Contractor is required (under clause 5.3.2 of the Support System Implementation clauses) to provide the S&TE identified in the Approved RPL. Drafters should note that, under ASDEFCON (Complex Materiel) Volume 2, the price for S&TE is not included in the Contract price, and is subject to a separate Not-To-Exceed (NTE) price (refer to Annex C-2 and Annex G-2 of the conditions of tender). After Approval of the RPL and agreement on the price to be paid for the S&TE, the Contractor will be required to generate a CCP to modify the Contract to incorporate the list of S&TE and the associated price into the Contract. Commonwealth Representative staff should also be aware that this final list will be subject to adjustment if there has been an initial purchase of any S&TE that was identified as a Long Lead-Time Item (LLTI).

### Training

This clause requires the Contractor to conduct the Training program in accordance with the requirements of a single-service or other joint standard for training design and development identified by the Commonwealth Representative and referenced by the drafter in clause 5.2.8.4.1, and the Approved Training Recommendations Report (TNGRECR).

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required range and quantity of Training for each of the Support System Constituent Capabilities.

There are no Defence-endorsed, training- models or tools for this purpose. Hence, as part of the synthesis process, the Contractor would be expected to describe, in accordance with the DID for the ISP, the process by which the required range and quantity of Training would be determined in the development of the Training Recommendations Report. Specialist advice should be sought from the SME to assess the appropriateness of the model(s) / tool(s) / process(es) used.

In accordance with clause 5.2.8.4.3, the Contractor is required to document the recommended types and quantities of Training in a Training Recommendations Report submitted in accordance with DID-ILS-TNG-TNGRECR.

### Technical Data

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required range and quantity of Technical Data for each of the Support System Constituent Capabilities.

There are no Defence-endorsed Technical Data models or tools for this purpose. Hence, as part of the synthesis process, the Contractor would be expected to describe, in accordance with the DID for the Technical Data Plan (TDP) (or ISP), the process by which the required range and quantity of Technical Data would be determined. Specialist advice should be sought from the appropriate SME to assess the appropriateness of any model(s)/tool(s) used.

In accordance with clause 5.2.8.5.2, the Contractor is required to document the recommended types and quantities of Technical Data in the Technical Data List (TDL) (DID-ILS-TDATA-TDL-2). The DID for the TDL includes the Technical Data that the Contractor will be providing to the Commonwealth. It should be expected that the TDL will have multiple deliveries (as specified in the CDRL) as the developmental status of the Mission System and Support System matures, and the scope of Technical Data becomes clearer.

### Facilities (Optional)

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required range and quantity of Facilities for each of the Support System Constituent Capabilities.

Of note, if the Facilities elements of a project are being acquired separately from the major capital elements (which is the norm for most projects), details of the Facilities elements must be provided to the Contractor so that the Contractor's design processes for the Mission System and Support System can take into consideration the constraints imposed by the extant Facilities designs.

There are no Defence-endorsed, facilities-models or tools for this purpose. However, the results from LORA and the LSAR can be used to determine tasks performed at different facilities and, therefore, the related facility-utilisation rates, requirements for utilities (power, water, air, etc) and, if populated, storage space requirements; however, this is only part of the total requirement. Hence, the Contractor would be expected to describe the process by which the required range and quantity of facilities were determined. For specialist advice on this issue, guidance should be sought from the appropriate SME (e.g. CSIG).

In accordance with clause 5.2.8.7.2, the Contractor is required to document the recommended range and quantity of Facilities in the Facilities Requirements Analysis Report (FRAR) (DID-ILS-FAC-FRAR). The DID for the FRAR requires the Contractor to provide detailed information with respect to the requirements and proposed scheduling for any new or modified Facilities.

The FRAR provides all of the information required to enable the FRAR to be translated into construction bid packages that will be compatible with the Mission System and Support System Components. Following approval of the FRAR, the Contractor is required (under clause 5.3.6 of the Support System Implementation clauses) to provide the Facilities identified in the Approved FRAR.

#### Personnel

The aim of this clause of the draft SOW is to require the Contractor to go through a *deliberate* process of analysing the required types and quantities of Personnel for each of the Support System Constituent Capabilities.

Personnel comprises all staff involved in the operation and support of the Mission System and Support System, including Commonwealth, Contractor(LS), and Subcontractors(LS). Personnel includes staff who perform managerial and supervisory functions, and not just those who are directly involved in the operation and support of the two systems.

There are no Defence-endorsed, personnel-models or tools for this purpose. Hence, as part of this process, the Contractor would be expected to describe the process by which the required types and quantities of personnel were determined. For specialist advice on this issue, guidance should be sought from the appropriate SME.

In accordance with clause 5.2.8.8.2, the Contractor is required to document the recommended range and quantity of Personnel in the Personnel Resource Requirements List (PRRL) (DID-ILS-PERS-PRRL). The DID for the PRRL requires the Contractor to justify the types and quantities of Personnel that the Contractor is recommending are required at each of the levels of operation, maintenance and support of the Mission System and Support System. Furthermore, the Personnel listed in the PRRL are required to be grouped into two categories: Commonwealth and Contractor(LS).

#### Software Support Requirements (Optional)

Clause 5.2.8.9 is an optional requirement, which establishes the obligation for the Contractor to develop, deliver, and update a Software Support Plan (SWSP). Software support for a Mission System (or for key elements of the Support System) is a significant issue that must be coordinated with the SE and software-development programs to ensure supportability. Furthermore, software support may be an expensive undertaking and a risk analysis needs to be performed in the

early phases of a project (i.e. prior to Contract) to determine the strategy for software support. This risk analysis may be conducted as part of software profiling, which addresses issues of software supportability and associated considerations. The concept for software support, particularly any in country support, should be documented in the DOR Part B, with any performance requirements documented in the DOR Part A.

There is a range of factors that might affect software supportability, including the attributes of the software item itself, the associated development process, or the environment within which the software is operated or supported. The factors are not all unique to software, and in some cases will be linked to system-level considerations. Some of the key factors are:

- a. change traffic,
- b. safety integrity,
- c. expansion capability,
- d. fleet size and disposition,
- e. modularity,
- f. size,
- g. security,
- h. skills,
- i. standardisation,
- j. technology,
- k. tools and methods,
- l. documentation, and
- m. platform independence.

For additional information, refer to DEF(AUST)5691 or DEF-STAN 60, which discuss these issues. Note that this list of factors is not all-inclusive and specialist advice needs to be sought from an appropriate SME.

#### Disposal Requirements

Clause 5.2.8.10 establishes the obligation for the Contractor to develop, deliver, and update a Disposal Plan (DISP). Disposal requirements must consider both Mission and Support System elements. This is further broken down into two areas. Firstly, there are disposals required during the operation and support of the Mission System and Support System (e.g. the disposal of non-repairable maintenance items). Secondly, there is the eventual retirement and withdrawal of Mission System and Support System items at the end of their service lives. The Contractor is to document all disposal requirements in accordance with DID-ILS-SUP-DISP. Disposal requirements in the plan should address all delivered items, even where those items are disposed of through the performance of deeper level maintenance and support functions by the Contractor(LS) and Subcontractors(LS).

The DISP should consider pre-planned modifications and upgrade paths, whereby certain Mission System and Support System items will reach the end of their service life earlier than the life-of-type of the whole Capability. Disposal Analysis (as per DEF(AUST)5691) can provide input to the development of the plan.

The Disposal Plan should also consider disposals resulting from operating and support activities that can begin during the Acquisition Phase, particularly for Acceptance Verification. In these circumstances, the CDRL may be altered so that initial delivery of a Disposal Plan may be scheduled early to address hazardous materials or other special disposal requirements, with the complete Disposal Plan delivered later. The relevant safety management and regulatory authorities should

be consulted at the outset of a project about the requirements for disposal of hazardous materiel.

**Drafter's action:** Drafters are to consider which Support Resource requirements are to be determined by the Contractor. If the Contractor is not required to determine particular Support Resource requirements, then the clauses relating to those Support Resources are to be replaced with "Not used", or amended, as appropriate.

Drafters are to include the appropriate Training standard into clause 5.2.8.4 prior to release of the RFT.

Drafters are to review the delivery times and review periods in the CDRL to ensure that these elements reflect the requirements of the project, including the project Milestones (and associated entry/exit criteria).

**Related clauses:** Clause 5.1.2 of the draft SOW identifies:

- a. the plans under which the Support Resources are to be realised; and
- b. the Mandated System Reviews that apply to these Support Resources.

The **Support System Implementation** clause of the draft SOW requires the Contractor to implement the recommended, and Approved, set of Support Resources.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Life Cycle Cost (LCC)*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Supply Support*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Technical Data*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Personnel*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Training and Training Support*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Facilities*

See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Support and Test Equipment (S&TE)*

### Support System Implementation

- Reference:** Clause 5.3
- Sponsor:** Standardisation Branch
- Purpose:** To impose an obligation on the Contractor to implement those elements of the Support System that are of interest to the Commonwealth.
- Policy:** Chief Executive Instructions (CEIs) define the management and recording requirements for goods that will be owned by the Commonwealth and that will be defined as assets under the CEIs.
- Guidance:** The **Logistics Support Analysis Program** of the draft SOW resulted in the finalisation of the requirements of the Support System and the identification of all of the Support Resources and services (e.g. training) required to implement the Support System (remembering that the Support System includes the Commonwealth and the In-Service Support Contractors and Subcontractors). As stated in the Note to drafters, the **Support System Implementation** of the draft SOW concentrates on the implementation of:
- a. those Support Resources that will be delivered to the Commonwealth as Supplies under the Contract, including Training;
  - b. all of the Technical Data associated with the Contract; and
  - c. those major Support Resources that will be implemented by the Contractor (or Subcontractors) but not delivered to the Commonwealth as Supplies under the Contract; however, the resources are considered to be of such significance to the Commonwealth that visibility into their development and implementation is required.
- Drafter's action:** If the Contractor is not required to implement particular Support Resource requirements, then the SOW clauses relating to those Support Resources are to be replaced with "Not Used", or amended, as appropriate.
- The Commonwealth may choose to include in the Contract's initial **Price and Delivery Schedule** Attachment to the conditions of contract, the range and quantity and delivery requirements of particular Support Resource/s to be delivered to the Commonwealth. If so, the clauses relating to implementation of those Support Resources are to be replaced with "Not used", or amended, as appropriate.
- Related clauses:** Nil
- Further Reading:** Nil

#### 5.3.1 - GENERAL

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- Sponsor:** Standardisation Branch
- Status:** Core
- Purpose:** To ensure that the Contractor understands their responsibility for timely delivery of Support Resources and Training to Personnel.
- Policy:** See Section 5.3.0
- Guidance:** Clause 5.3.1.1 requires the Contractor to acknowledge that there is a lead-time associated with the Commonwealth's ability to receipt, distribute, and integrate (as applicable) particular Support Resources and Training into the Commonwealth's existing logistics-support infrastructure. For example, the uploading of Codification Data onto the Standard Defence Supply System (SDSS) can be a lengthy process if the scale of Codification Data is large. This clause acts to create an overarching intent beneath which the Contractor provides the deliverable Support Resources. The Contractor provides the schedule for the delivery of Support Resources in each of the Data Items that document the plans for these deliverables (e.g. Technical Data in DID-ILS-TDATA-TDP, spares in DID-ILS-MGT-ISP, etc). For Technical Data, the delivery schedule is documented against each item of

Technical Data in the Technical Data List (DID-ILS-TDATA-TDL-2). The Commonwealth Representative should negotiate each of these delivery schedules to ensure that sufficient lead-time is established to enable the Commonwealth to undertake its Support System integration activities. Nevertheless, this clause advises the Contractor that it needs to allow a certain period of time after delivery for the Commonwealth to undertake these integration activities. Attention is also drawn to clause 3.2.3.5c of the draft SOW, which relates to the Contract Master Schedule (CMS).

The Note to tenderers highlights that Verification and Validation of all Support Resources other than publications is covered under the V&V clauses in the SOW (as part of V&V of Support System Components). At this point, it is worth highlighting that the respective plans require the Contractor to detail the systems and processes that will be utilised for the design and development or the procurement (as applicable) of Support Resources, as well as for the V&V of Support Resources.

**Drafter's action:** Clause 5.3.1 is to be included in the RFT without amendment.

**Related clauses:** The **Logistics Support Analysis Program** clause of the draft SOW addresses the design of the Support System and the identification of the requisite Support Resources.

The **Acceptance Verification** clause of the draft SOW addresses Acceptance Verification.

**Further Reading:** Nil

**5.3.2 - IMPLEMENTATION OF SPARES, PACKAGING, TRAINING EQUIPMENT AND MATERIALS, AND SUPPORT AND TEST EQUIPMENT REQUIREMENTS**

**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To establish the obligation for the Contractor to design and develop or acquire, as applicable, and deliver the Spares, Packaging, Training Equipment and Materials, and S&TE identified for delivery to the Commonwealth in the RPL.

**Policy:** See Section 5.3.

*DI(G) LOG 06-4, 'Australian Defence Force Reserve Stockholding Policy'*

**Guidance:** Clause 5.3.2 establishes the obligation for the Contractor to deliver the Spares, Packaging, Training Equipment and Materials, and S&TE that are identified for delivery to the Commonwealth in the Approved Recommended Provisioning List (DID-ILS-SUP-RPL-2). Clause 5.3.2.4 highlights that the procurement of Spares and S&TE under ASDEFCON (Complex Materiel) Volume 2 is based on Not To Exceed (NTE) prices for the Spares and S&TE, which should be established at Contract award. This NTE price should be sought from each tenderer in its tender response in Annex C-2 and Annex G-2 of the conditions of tender. If a different approach is adopted, then this clause will require amendment.

Of particular note, clause 5.3.2 only applies to Packaging that, in itself, is delivered as a Supply under the Contract, and does not apply to packaging that is used to package other Supplies for delivery. Should the support concept and/or the requirements for the Support System (as documented in the DOR) establish that certain Supplies (e.g. Spares, S&TE, etc) need to be transported to locations other than the main point of delivery or other than the home base or port, then these Supplies might require specific packaging to meet these requirements. Under this scenario, this packaging would also be considered to be a Supply and would fall under this clause (and the other Packaging clauses in the ILS clause of the draft SOW), even if the packaging were also utilised to deliver the Spares, S&TE, etc to the main point of delivery (or to the home base or port) in the first instance.

Clause 5.3.2.3 establishes the obligation for the Contractor to install any Training Equipment or S&TE that needs to be installed in Commonwealth facilities. An



additional clause may need to be added to this clause (similar to clause 5.3.6.3 under Facilities) if the Commonwealth were interested in obtaining visibility into the Contractor's and Subcontractors' activities relating to the installation of training equipment or S&TE in their own premises. A clause of this nature would be relevant when these activities are considered to represent a reasonable risk to the successful implementation of the Support System.

After all of the Support Resources for the Training Support Constituent Capability have been delivered, installed and commissioned, as applicable, the Contractor is required, under clause 5.1.2.9 of the draft SOW, to conduct a Training Readiness Review (TNGRR). This review confirms that all of the training elements are in place and functional and that Training can now proceed effectively.

**Drafter's action:** Drafters are to review the delivery times and review periods in the CDRL to ensure that these elements reflect the requirements of the project, including the project Milestones (and associated entry/exit criteria).

**Related clauses:** Clause 5.1.2 of the draft SOW identifies the requirement for:

- a. ILS plans;
- b. a Provisioning Preparedness Review (PPR); and
- c. a TNGRR.

Clause 5.2.8 of the draft SOW provides the mechanism by which the Spares, Packaging, Training Equipment and Materials, and S&TE requirements are determined.

The **Configuration Audits** clause of the draft SOW specifies the requirement for Functional and Physical Configuration Audits (FCA/PCA) for Mission System products and Support System Components.

The **Acceptance Verification** clause of the draft SOW specifies the requirements associated with Acceptance Verification.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Supply Support*

### 5.3.3 - IMPLEMENTATION OF TECHNICAL DATA REQUIREMENTS

**Sponsor:** Standardisation Branch

**Status:** Core (with Optional clauses)

**Purpose:** To establish the obligation for the Contractor to design and develop or acquire, as applicable, and deliver the Technical Data identified for delivery to the Commonwealth in the Approved Technical Data List (TDL).

**Policy:** See Section 5.3.

*DPPM – Section 3, Chapter 3.6*

*Developing and Sustaining Defence Capability – Defence Intellectual Property Policy, 2003*

*DI(G) LOG 03-2, 'Defence Policy on Computer-aided Acquisition and Logistic Support'*

**Guidance:** Under *ASDEFCON (Complex Materiel) Volume 2*, the logistics concept of Technical Data has been integrated with the Intellectual Property (IP) concept of Technical Information, with a unified definition, which embraces both concepts, being utilised (refer to the definition of Technical Data at Clause 1.1 of the conditions of contract). As an outcome of this integration, a number of the clauses in this clause of the draft SOW are linked to the IP clauses in the conditions of contract (with the genesis of these clauses coming from IP clauses utilised in previous Defence Contracting models). Annex C to the Philosophy Volume of the *ASDEFCON (Strategic Materiel) Handbook* provides an overview of Technical

Data as the concept evolves throughout the Capability Development and Acquisition Phases.

### General

Clause 5.3.3.1 establishes the obligation for the Contractor to deliver the Technical Data identified for delivery to the Commonwealth in the Approved Technical Data List (DID-ILS-TDATA-TDL-2). The TDL provides a list of all of the Technical Data associated with the Contract, including any Technical Data required by Contractors (Support) and Subcontractors (Support) (and not just the Technical Data that will be delivered to the Commonwealth). Given the linkages to the IP provisions of the Contract, drafters should ensure that a draft TDL is obtained as part of the initial tender response.

In addition, this clause identifies where the Contractor shall deliver the items of Technical Data. This clause recognises that there is a specific delivery regime for Technical Data identified in the TDL and requires the Contractor to comply with it. Since there is a delivery regime for CDRL items, this clause ensures that for those items specified in the TDL, the TDL delivery process is the one followed. Clause 5.3.3.1.2 also provides a default delivery location in those circumstances where the TDL has not done so.

### Continuous Acquisition and Life Cycle Support (CALs) (Optional)

Clause 5.3.3.3 is an optional clause, which places an obligation on the Contractor to deliver certain items of Technical Data under the Contract in a CALs format in accordance with the Approved Technical Data Plan (TDP) (DID-ILS-TDATA-TDP). The list of items of Technical Data that would be provided in CALs format is contained in the TDL, while the TDP details how the information will be generated, integrated and delivered.

The current Defence CALs policy states that projects are to require the production of technical and support documentation to the CALs standards, unless it can be demonstrated that the likely cost of compliance with the CALs requirements will outweigh the life cycle benefits. This decision can only be made in the light of information provided by tenderers. As such, clause 5.3.3.3 is to be included in all RFTs, with prospective tenderers being asked to provide costing for Technical Data with and without CALs formats.

Following receipt of tenders, more information will be known about the costs associated with the CALs requirements and an informed decision can be made during Contract negotiations, whether to exclude clause 5.3.3.3 from the final Contract where the cost of the CALs requirements outweigh the life cycle benefits. Of note, if this clause 5.3.3.3 is omitted from the Contract, then the DID for the TDP will also need to be amended (however, none of the other Technical Data DIDs will need to be amended). The decision to adopt CALs standards is rarely a black-and-white decision, with a typical outcome being that certain types of data will be acquired in CALs formats while certain other types (e.g. off-the-shelf manuals) will not be acquired in CALs formats.

Annex A to the TDP contains a list of current Commonwealth CALs standards. This list may require amendment to incorporate the latest approved CALs standards, and guidance on this issue should be sought from the CALs SME in DLSE-MPS. Drafters should note that, in addressing CALs issues, recent Configuration Management (CM) standards, such as EIA-836 (Consensus Standards for Configuration Management Data Exchange), implement a CALs approach for the exchange of CM data.

For this clause 5.3.3.3 to have meaning, the Specification at Annex A needs to clearly indicate which types of information are to be supplied by the Contractor in CALs format (e.g. all engineering drawings, all new maintenance publications, etc).

The **Items for Which Specific Prices are Required** clause of the **Financial Annex** of the conditions of tender requests tenderers to provide the specific price payable for delivery of the specified Technical Data in CALs format.

### Publications

Clause 5.3.3.4.1 establishes the obligation for the Contractor to develop and deliver the publications, addenda, and amendments which are identified in the Publications Tree in the Approved TDL, in accordance with the DID for Publications Packages (DID-ILS-TDATA-PUBPACK). The TDP describes the systems and processes for identifying, developing, delivering and validating Technical Data. The DID for Publications Packages is a specification for those publications that will be delivered to the Commonwealth. The DID for Publications Packages requires tailoring to address the Service-specific requirements relating to publications (e.g. for RAAF – AAP 5030.001). Additional guidance on this issue should be sought from the CALS/Technical Data SME in DLSA-MPS. Of note, DEF(AUST) 5629A is the base standard contained in this DID, which should be enhanced by the inclusion of the Service-specific requirements. DEF(AUST) 5629A should not be removed from this DID as part of any tailoring activity.

Clause 5.3.3.4.2 requires the Contractor to Verify and Validate that all publications are accurate, grammatically correct, technically correct, and suitable for use. While this clause may appear to be an overlap with the V&V clauses in the SOW, it has been explicitly included in this area because of the differing definitions of verification and validation included in DEF(AUST) 5629A.

### Codification Data (Core)

Clause 5.3.3.6 is a core clause, which places an obligation on the Contractor to provide Codification Data. This clause explains that the Codification Data will be used by the Commonwealth to establish codification for each item of Supplies (other than data, services or IP) of the essential characteristics that give each item of Supplies its unique character and differentiate it from any other item.

While the codification clauses may be optional, the Note to tenderers highlights that the clauses are mandatory for any Item of Supply that is repetitively procured, owned, stored or repaired by Defence. Under the CEIs, these items need to be registered on the Standard Defence Supply System (SDSS) for asset management and financial reporting purposes.

The Note to tenderers also highlights that the codification clauses, including the associated DID (i.e. DID-ILS-TDATA-CDATA), are based on DI(G) LOG 08-16 Defence Policy on Codification and a standardisation agreement to which Defence is a signatory (i.e. Appendix 1 to NATO Standardisation Agreement (STANAG) 4177) and, if included in the SOW, should not be changed without the agreement of the National Codification Bureau within the DMO.

The **Items for Which Specific Prices are Required** clause of Annex C of the conditions of tender requests tenderers to provide the specific price payable for delivery of Codification Data.

### Logistics Support Analysis Record (LSAR) (Optional)

Clause 5.3.3.7 is an optional clause, which, if selected, places an obligation on the Contractor to provide a Logistics Support Analysis Record (LSAR) in accordance with the option selected by the drafter. This clause addresses the approach to the collection of LSA data as well as the usage of the collected data within the program. An LSA objective, and a generic principle in the development of any system, is the use of a common and consistent information by all parties concerned; to a large extent, the LSAR is a data source intended to meet this purpose.

An LSAR may be either compliant with a Defence-approved standard (e.g. *MIL-STD-1388-2B*, *AAP5102.003*, or *DEF(AUST)5692*) or another custom or proprietary data management system Approved by the Commonwealth Representative. The optional clauses allow for:

- a. a fully compliant LSAR;

- b. a non-compliant LSAR, which produces a compliant transfer file for delivery to the Commonwealth; and
- c. a non-compliant data repository, where delivery to the Commonwealth is not required to be in a compliant format.

By default, a compliant LSAR would be sought by the RFT, with the acceptable use of non-compliant alternatives being determined during Contract negotiations, if a compliant solution proves infeasible. In those instances where a non-compliant solution is being included in the Contract, DID-ILS-TDATA-LSAR would need to be re-drafted to suit the unique requirements of the non-compliant solution. Optional clauses not required under this broader clause should be replaced with the words "Not Used".

Commonwealth Representative staff are advised that, while not explicitly highlighted in this clause 5.3.3.7, the DID for the ISP (DID-ILS-MGT-ISP-2) (specifically clause 6.2.4.2) requires the Contractor to define certain managerial aspects associated with the use of an LSAR.

In the ADO, compliant LSAR systems have been developed to support both the Acquisition Phase and the In-Service Phase. Where data collected is to be used in service, then one of the first two options will be necessary to avoid the ADO having to build a compliant LSAR at a later time. Alternatively, the Commonwealth Representative may consider a non-compliant system for use in service; however, this would incur its own additional burden for the support of a unique database system.

Delivery of LSAR data should support the analysis and review activity of both Contractor and Commonwealth organisations; hence, data should be delivered progressively during the acquisition period in accordance with DID-ILS-TDATA-LSAR. If a non-compliant system is used, then equivalent information should be provided to support the analysis and review process.

Quick feedback between the analysts entering LSAR data, and the Contractor and Commonwealth organisations using that data for further analysis, improves the quality of the data and resulting analysis outcomes, and therefore, on-line access to the LSAR is a significant advantage. This is one of the purposes behind clause 5.3.3.7.4, as well as providing the Commonwealth team with an insight mechanism into the Contractor's developmental activities and progress under the Contract. A teaming arrangement, whereby Commonwealth personnel work with the Contractor analysts in undertaking analysis and population of the LSAR, is another option not considered in the standard SOW for which on-line access to the LSAR would be required. If this approach were to be taken, then clause 5.3.3.7.4 would be likely to require modification.

Delivery of LSAR data is progressive, in accordance with the CDRL, and delivery should be consistent with the requirements and outputs of analysis regardless of whether a compliant or non-compliant LSAR solution is used. The ISP should detail how the LSAR data will be delivered in accordance with DID-ILS-TDATA-LSAR (either as standard or modified for non-compliant solutions). The ISP should also document how existing data, for off-the-shelf subsystems/items, will be reviewed for suitability and will be incorporated into the LSAR, while minimising any duplication of analysis.

DID-ILS-TDATA-LSAR provides considerable guidance on the scheduling of LSAR data to support Commonwealth review through key milestones of the *ASDEFCON (Complex Materiel) Volume 2* acquisition process. This DID should be reviewed, and edited if necessary, to meet any individual project requirements. Final delivery of the completed LSAR is normally required at System Acceptance; however, this may be extended into an initial support period to update the LSAR with live data from the In-Service Phase (or, perhaps, during the Support System Endurance Demonstration, where required by the Contract). This approach, which would be subject to individual transition and support arrangements, enables reliability and

maintainability data to be updated so that resource requirements can be recalculated in support of a final provisioning activity.

Drafters must fill in the Data Selection Sheet in DID-ILS-TDATA-LSAR, usually with input from SE and specialty stakeholders and disciplines, such as RAM. The Data Selection Sheet and focussing of data requirements will usually be a subject of a LSA Guidance Conference during Contract negotiations.

**Drafter's action:** Drafters are to review the optional clauses to determine their applicability to the project. Certain of these clauses (e.g. CALS LSAR) may not be able to be determined as optional until after the tender responses have been received and evaluated. Drafters are to retain these clauses in the RFT and subsequently remove the clauses that are no longer applicable prior to Contract signature.

Drafters are to ensure that the optional clauses throughout the draft SOW that relate to the LSAR are coordinated with clause 5.3.3.

Drafters are to coordinate any CALS requirements with any CM standards that are based upon CALS requirements (e.g. EIA-836).

Drafters are to review the delivery times and review periods in the CDRL to ensure that these elements reflect the requirements of the project, including the project Milestones (and associated entry/exit criteria).

Drafters are to determine whether there will be any requirement for data to be placed in escrow. The provisions for escrow arrangements have not been included in the *ASDEFCON (Complex Materiel)* template however, if required, include the Escrow Agreement deed from Part 4 to Attachment L to the draft conditions of contract from *ASDEFCON (Strategic Materiel)* in the RFT. Drafters should seek guidance from Contracting Policy & Operations Branch before including escrow in a RFT based on *ASDEFCON (Complex Materiel)*.

**Related clauses:** The **Intellectual Property** clause of the conditions of contract contains the IP clauses for the Contract. In particular, the **Intellectual Property Licence** clause details the Intellectual Property licences that must be provided by the Contractor to the Commonwealth and the **Provision of Technical Data** clause details the Technical Data to be provided under the Contract.

The **Intellectual Property Management** clause of the draft SOW identifies the work-related IP provisions for the Contract.

Clause 5.1.2 of the draft SOW identifies the requirement for a Technical Data Plan (TDP).

Clause 5.2.8 of the draft SOW provides the mechanism by which the Technical Data requirements are determined.

The Note to drafters under clause 6.1 of the draft SOW states that the tenderer is expected to identify the standard(s) that will be used to define its CM practices for the project.

The **Configuration Audits** clause of the draft SOW specifies the requirement for Functional and Physical Configuration Audits (FCA/PCA) for Mission System products and Support System Components.

The **Acceptance Verification** clause of the draft SOW specifies the requirements associated with Acceptance Verification.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Technical Data*

See also – *ADO LSA Manual, Part 5, Chapter 1 – LSAR Tools*

#### 5.3.4 - IMPLEMENTATION OF TRAINING DELIVERY REQUIREMENTS

**Sponsor:** Standardisation Branch

**Status:** Core

- Purpose:** To establish the obligation for the Contractor to conduct all Contractor-provided Training at the locations specified in clause 5.3.4.1.
- Policy:** See Section 5.3.
- Guidance:** The Note to drafters above clause 5.3.4.1 highlights that drafters must specify the locations for Contractor-provided Training. The cost-effectiveness of particular locations is a matter that could be addressed during Contract negotiations. If this cannot be determined pre-Contract, the relevant training course details may be added to the ISP, requiring modification to this clause. The Approved ISP would then control the conduct of initial training.
- Drafter's action:** Drafters are to insert locations for Contractor-provided training at clause 5.3.4.1. If different types of training are required at different locations, then this clause will require further expansion.
- Related clauses:** Clause 5.1.2 of the draft SOW identifies the requirement for ILS plans.
- Clause 5.2.8 of the draft SOW provides the mechanism by which the Training requirements are determined.
- Clause 6.7 of the draft SOW specifies the requirement for Functional and Physical Configuration Audits (FCA/PCA) for Mission System products and Support System Components.
- Clause 7.2 of the draft SOW specifies the requirements associated with Acceptance Verification.
- Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Training and Training Support*
- 5.3.5 -- NOT USED
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#### 5.3.6 - IMPLEMENTATION OF FACILITIES REQUIREMENTS (OPTIONAL)

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- Sponsor:** Standardisation Branch
- Status:** Optional
- Purpose:** To place an obligation on the Contractor to design, develop, construct, fit-out, and commission those facilities identified for delivery to the Commonwealth in the Approved Facilities Requirements Analysis Report (FRAR) (DID-ILS-FAC-FRAR).
- Policy:** See Section 5.3.
- Guidance:** The Facilities Requirements Analysis Report (FRAR) (DID-ILS-FAC-FRAR) describes the detailed requirements for all of the facilities required in the life-cycle of the Mission System and the Support System to enable the Commonwealth to:
- a. understand the full scope of the facilities requirements under the Contract; and
  - b. translate the FRAR into construction bid packages that will result in facilities that are compatible with the Mission System and other components of the Support System.
- The FRAR is divided into two main sections: Commonwealth facilities, and Contractor and Subcontractor facilities. The FACP describes the Contractor's systems, processes and procedures for designing, developing, constructing, fitting-out, and commissioning all facilities.
- Clause 5.3.6.1 should be included in an RFT if it makes sense for the Contractor to provide facilities under the Contract (e.g. for reasons of risk). This matter should be discussed with the applicable agencies, including the Corporate Services Infrastructure Group (CSIG) who would normally be responsible for the provision of facilities.
- Clause 5.3.6.2 establishes an obligation for the Contractor to support the Commonwealth in its facilities-related developmental activities. This clause helps

to ensure that the facilities elements are compatible with the Mission System and the Support Resources. This clause should be included for those projects where there are facilities issues and the Contractor is not responsible for addressing these issues. Depending upon project-specific requirements, this clause may be tailored to more accurately define the scope of the obligation.

Clause 5.3.6.3 establishes the obligation for the Contractor to design, develop, construct, fit-out, and commission those facilities required by the Contractor and Subcontractors, which do not form Supplies under the Contract. In part, this clause provides the Commonwealth with a level of visibility into the Contractor's and Subcontractors' facilities-related activities, and is relevant when these activities are considered to represent a reasonable risk to the successful implementation of the Support System (refer Note to drafters under clause 5.3 of the draft SOW). Even if the Contractor is not required to deliver facilities, or facilities works, to the Commonwealth, it may be worthwhile retaining this clause 5.3.5.3 in any Contract to ensure that the obligation contained in the clause is placed on the Contract.

After the Facilities have been constructed, fitted-out, and commissioned, as required, the Contractor is required, under clause 5.1.2.10 of the draft SOW, to conduct a Facilities Readiness Review (FACRR). This review confirms that all of the Facilities, and/or facilities works, elements are in place and functional and can now be handed over to the Commonwealth.

**Drafter's action:** Drafters are to review the delivery times and review periods in the CDRL to ensure that these elements reflect the requirements of the project, including the project Milestones (and associated entry/exit criteria).

**Related clauses:** Clause 5.1.2 of the draft SOW identifies the requirement for a FACRR.

Clause 5.2.8 of the draft SOW provides the mechanism by which the Facilities requirements are determined.

The **Configuration Audits** clause of the draft SOW specifies the requirement for Functional and Physical Configuration Audits (FCA/PCA) for Mission System products and Support System Components.

The **Acceptance Verification** clause of the draft SOW specifies the requirements associated with Acceptance Verification.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Facilities*

5.3.7 - NOT USED

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## CONFIGURATION MANAGEMENT

### Configuration Management Planning

<u>Reference:</u>	Clause 6.1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To impose a contractual obligation on the Contractor to submit a Configuration Management Plan (CMP), if required, for Approval by the Commonwealth Representative and to manage the configuration-management aspects of the project in accordance with the Approved governing plan. To require the Contractor to integrate Subcontractors into the Contractor's CM activities.
<u>Policy:</u>	<i>DI(G) LOG 08-4, Defence Policy on Configuration Management</i>
<u>Guidance:</u>	<p>Current Defence Configuration Management(CM) policy states, "All projects for acquisition of ADF materiel shall include a requirement for precise definition and verification of the configuration at the point of acceptance". Furthermore, the current policy recognises that CM has implications for:</p> <ol style="list-style-type: none"> <li>technical integrity,</li> <li>operational effectiveness,</li> <li>the cost-effectiveness of logistic support, and</li> <li>safety.</li> </ol>

In this light, it is imperative that sound and cost-effective CM practices be implemented by the Contractor.

Where the CM elements are unlikely to be significant (e.g. for a relatively off-the-shelf acquisition), ASDEFCON (Complex Materiel) Volume 2 provides the option for the CM elements of the Contract to be addressed through the System Engineering Management Plan (SEMP).

One of the key issues in the CMP (or SEMP) is for the Contractor to identify the standard(s) that will be used to define the CM practices for the project. In keeping with the ASDEFCON principle of utilising the Contractor's own processes where applicable, the RFT does not specify a particular CM standard (although acceptable standards could be highlighted). Any proposed standard should be one that the ADO has recognised in terms of providing guidance. DI(G) LOG 08-4 provides a list of CM standards and a brief description of their application, while the respective Technical Regulatory Authorities (TRAs) provide further direction through the technical regulatory frameworks. Advice on the applicability of CM standards should be sought from the relevant TRAs.

The agreed CM standard(s) needs to be reflected in the final Contract, either through direct specification in the SOW or through Approval of the Contractor's CMP or SEMP. Depending upon the program, the Contractor may wish to mix aspects of different standards for various reasons, and while such flexibility should be allowed, Commonwealth project staff should ensure they have a clear understanding on which parts from which standards are being used and, more importantly, that the combination of all elements of the CM system are harmonised.

Drafters should note that tenderers are not required to deliver a draft CMP as part of their tender responses for the following reasons:

- tendered CMPs are rarely discriminators in the tender-evaluation process because the tenderers have usually undertaken previous Defence work, have relatively sound CM practices, and the tendered CMPs are typically "boiler-plate" documents;
- in light of the preceding point, the removal of the requirement for a draft CMP helps to reduce the cost of tendering; and

- c. alternative means exist to evaluate each tenderer's CM practices, such as through the capability maturity evaluations.

Nevertheless, if the likely tenderers have not previously undertaken work for the ADO or might not have sound CM practices, drafters should consider the inclusion of a CMP as a tender deliverable. For the aforementioned reasons, however, this approach should only be considered in extreme circumstances.

In keeping with the *ASDEFCON (Complex Materiel)* principle of having agreed processes and process-evaluation criteria on Contract, drafters should consider including the finalisation of the CMP during contract negotiations. Drafters should also be aware that the TRAs are likely to require a draft CMP, as a minimum, at the time of Contract award. Further advice in this regard should be sought from the relevant TRAs.

Clause 6.1.4 of the draft SOW requires Contractors to integrate Subcontractors into its CM activities, and for the Subcontractors to comply with the requirements of the Contractor's CMP (or SEMP). This requirement has been imposed to ensure that a coherent approach to CM is adopted across the entire project. Drafters should note that the clause requires the Contractor to flow down into its Subcontracts the requirements of the Contractor's CMP (or SEMP). Drafters should also note that the definition of Subcontractors in the Glossary (at Attachment R to the Contract) is recursive, and that clause 6.1.4 does not only apply to first tier Subcontractors.

Clause 6.1.4 does not require the Contractor and the Subcontractors to have the same CM practices; however, these practices must integrate to ensure that the precise definition of the configuration can be achieved and maintained cost-effectively, as required by current CM policy. The mechanisms for achieving the requisite integration should be documented in the CMP (or SEMP), which should explain how, at the Contract level, a coherent approach to CM will be obtained across the project, including for:

- a. configuration identification, to ensure that all parties will be using consistent terminology for all relevant items of equipment and documentation;
- b. configuration control, to ensure that appropriate configuration baselines are implemented and documented, and that changes to those configuration baselines are appropriately managed (noting that the baselines at the Contract level will generally not be the same baselines at the Subcontract level (e.g. a subset of the Contractor's Allocated Baseline is likely to be a Subcontractor's Functional Baseline));
- c. configuration status accounting, to ensure that the complete status of the system configuration can be determined at any time, including the state of any changes (e.g. pending, approved, being actioned, etc) enabling project-wide visibility of inconsistencies and areas of risk; and
- d. configuration audits, in conjunction with the V&V program, to provide assurance that the progressive integration of the system is delivering the expected functionality and corresponds to the documented system design.

Drafters and users of *ASDEFCON (Complex Materiel) Volume 2* should recognise that certain, recent CM standards, such as *EIA-836* (Consensus Standards for Configuration Management Data Exchange), implement a CALS approach for the exchange of CM data. As such, drafters should ensure that the linkages between the CM clauses and the CALS requirements (under the Technical Data clauses) are coherently addressed.

**Drafter's action:** Clause 6.1.1 should be included in the RFT if the CM aspects of the project are expected to be significant or a stand alone CMP is dictated by the TRAs. Drafters should then choose the 'CMP' option in clauses 6.1.3 and 6.1.4.

Alternatively, the SEMP may be used to cover CM planning aspects, if CM is not anticipated to be a significant or critical aspect of the acquisition. In this case, clause 6.1.1 should be deleted and replaced with 'Not Used', and 'SEMP' should be selected in clauses 6.1.3 and 6.1.4.

The Contractor is expected to identify the standard(s) that will be used to define the CM practices for the project. These standards will be reflected in the final Contract. The Commonwealth would consider *MIL-STD-973* as an acceptable standard or, for projects subject to the Technical Regulation of Army Materiel Manual (TRAMM), *EIA-649* tailored with guidance from the TRAMM. Consideration should be given to aligning the choice of these standards with the Contractor's work practices.

Prior to Contract signature, drafters are to ensure that the agreed CM standards are reflected in the Contract, either through direct specification in the SOW or through Approval of the Contractor's CMP.

Drafters may need to tailor the DID for the CMP to reflect the requirements of the particular program and the policy requirements for standardisation of ADF CMPs, as promulgated in *DI(G) LOG 8-4*.

**Related clauses:** All other clauses within clause 6 of the draft SOW.

The SEMP, required under clause 4.1.1 of the draft SOW, should also address CM issues at a high level. (Note that the SEMP may cover all planning issues if the engineering is minimal and if CM is not anticipated to be a significant or critical aspect of the acquisition.)

Clause 5.3.3 of the draft SOW addresses CALS requirements.

**Further Reading:** See also - *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread - Configuration Management*

See also – *EIA-649, National Consensus Standard for Configuration Management*

See also – *MIL-STD-973, Configuration Management*

**Not Used**

Reference:

Clause 6.2

### Configuration Identification

<u>Reference:</u>	Clause 6.3
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that the Contractor clearly identifies all of the Configuration Items (CIs) that constitute the Mission System and Support System.
<u>Policy:</u>	<i>DI(G) LOG 08-4, Defence Policy on Configuration Management</i>
<u>Guidance:</u>	<p>The purpose of configuration identification is to incrementally establish and maintain a definitive basis for control and status accounting for a Configuration Item (CI) throughout its life cycle. The configuration identification process includes:</p> <ol style="list-style-type: none"> <li>selection of CIs (noting that the list of CIs should be documented in the CMP and, therefore, be subject to review and Approval by the Commonwealth);</li> <li>defining the configuration baselines for the CIs and the configuration documentation required for each CI (noting that clause 6.3 requires both the system components (6.3.1) as well as the documentation for those components (6.3.2) to be uniquely identified);</li> <li>assigning identifiers to CIs and their component parts and associated configuration documentation, and ensuring that the marking or labelling of items and documentation with their applicable identifiers enables correlation between the item, configuration documentation, and other associated data; and</li> <li>establishing a release system for configuration documentation.</li> </ol> <p>The purpose of this clause in the SOW is to ensure that the contractor establishes a process for configuration identification, as this is the first essential step in the CM process.</p> <p>The <b>Configuration Identification</b> clause provides the minimum set of requirements for configuration identification. Drafters should be aware that additional clauses may be required if the Commonwealth requires the Contractor to conform to an existing Commonwealth system of configuration identification. This situation is likely to occur for those projects that are providing modifications to existing platforms where the practices for configuration identification are already defined.</p>
<u>Drafter's action:</u>	If existing practices for configuration identification exist and these practices need to be mandated on the Contractor, The <b>Configuration Identification</b> clause is to be amended accordingly to reference these practices. If this situation does not exist, the <b>Configuration Identification</b> clause is to be included in the RFT without alteration.
<u>Related clauses:</u>	<p>All other clauses within the <b>Configuration Management</b> clause of the draft SOW.</p> <p>Clause 4.5.1 of the draft SOW (Technical Documentation Tree) should identify the documents of clause 6.3.2.</p> <p>Clauses 5.2.8.5 and 5.3.3 address the overarching requirements for Technical Data under the Contract.</p>
<u>Further Reading:</u>	Nil

## Configuration Baselines

<u>Reference:</u>	Clause 6.4
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that the Contractor clearly identifies the minimum required set of Configuration Baselines that define the design of the Mission System and Developmental Support System Components.
<u>Policy:</u>	<i>DI(G) LOG 08-4, Defence Policy on Configuration Management</i>
<u>Guidance:</u>	<p>From <i>EIA-649</i>, “A baseline identifies an agreed-to description of the attributes of a product at a point in time and provides a known configuration to which changes are addressed”. CM normally employs three types of configuration baselines – the functional baseline (FBL), the allocated baseline (ABL), and product baseline (PBL) – to provide for the progressive definition and documentation of the requirements and design information describing the various configuration items (CIs) designated for a system (both Mission System and Support System).</p> <p>The FBL, which specifies the functional requirements for an item, is defined by the approved functional configuration documentation (FCD). The FCD required for the FBL, typically takes the form of system specifications, plus other applicable documentation (for example, Interface Requirements Specifications and Interface Control Documents for the systems). The Contractor is responsible for generating the FCD required for the FBL for both the Mission System and Developmental Support System Components.</p> <p>The ABL, which specifies the “design to” requirements for an item, is defined by the approved allocated configuration documentation (ACD). The ACD typically includes documentation describing a CI’s functional, performance, interoperability, and interface requirements that are allocated from those of a system or higher level configuration item; interface requirements with interfacing configuration items; and the verifications required to confirm the achievement of those specified requirements. The Contractor is responsible for generating the ACD required for the FBL for both the Mission System and Developmental Support System Components.</p> <p>The PBL, which describes the “as built” system, is defined by the approved product configuration documentation (PCD). The product baseline of a configuration item may include the actual equipment and software. The PCD typically includes the combined performance/design documentation utilised for the production or procurement of the CI. The PCD incorporates the ACD describing a CI’s functional, performance, interoperability and interface requirements and the verifications required to confirm the achievement of those specified requirements. The PCD also includes such additional design documentation, ranging from form and fit information about the proven design to a complete design disclosure package, as is deemed necessary for the acquisition program. The Contractor is responsible for generating the PCD required for the FBL for both the Mission System and Developmental Support System Components.</p> <p>The Contractor should recommend to the Commonwealth the types of specifications and associated documentation to a level of detail commensurate with logistic support requirements and procurement strategies that should be used to define each CI; however, the actual specifications provided should be those ultimately ordered in the Contract.</p> <p>The Contractor should generate the configuration documentation required for the configuration baselines being established by the Commonwealth. The FCD, ACD, and PCD defining the configuration baselines need to be mutually consistent and compatible. Each succeeding level of configuration documentation from FCD to ACD to PCD should be traceable to, and be a detailed extension of, its predecessor(s).</p>

Note that the FBL, ABL and PBL are typically constructed following Contract award. Other baselines may be struck prior to, and at, Contract award, such as the Capability Baseline and the Acquisition Baseline (refer to the Standard Acquisition Management System (SAMS) for further information on these baselines).

The Contractor's Configuration Status Accounting (CSA) system needs to be able to track the documentation set comprising each baseline, at all levels at which baselines are to be established, together with the revision status and history of that baseline documentation.

In keeping with the ASDEFCON principle of Clear Accountability In Design (CAID), the Commonwealth is primarily interested in maintaining control over:

- a. the FBL because this baseline represents the requirements against which Verification will be conducted; and
- b. the PBL because this baseline has significant implications for the support and Life Cycle Cost (LCC) of the system (both Mission System and Support System).

Although the Commonwealth is primarily interested in the control of the FBL and PBL for the Mission System and Developmental Support System Components, the ABL of developmental items is also of interest because the ABL defines the point where system requirements are converted into specific physical design requirements. A review of the ACD constituting the ABL will provide the Commonwealth with an appreciation of the Contractor's detailed approach to the design and assure the Commonwealth that requirements specified are being addressed in the physical design. Nevertheless, the Commonwealth does not generally maintain control over the ABL because this approach would act to transfer risk to the Commonwealth.

The FCD for the FBL and the PCD for the PBL are critical as they provide the basis for Functional Configuration Audits (FCAs) and Product Configuration Audits (PCAs) conducted during the Acceptance Verification of a system at the end of an acquisition program.

**Drafter's action:** Clause 6.4.1 may need to be modified to address project-specific strategies such as delivery of functionality in multiple increments, where baselines would need to be established for each increment. Other baselines per-platform or for a production first article may also be necessary.

**Related clauses:** All other clauses within clause 6 of the draft SOW.

The FBL is referenced in the following clauses in the draft SOW: 4.2.2, 6.5.2, 6.5.3, 7.1.3, and 7.2.2.

The PBL is referenced in the following clauses in the draft SOW: 6.5.2, 6.5.4, 6.5.5, 6.5.6, 6.5.7, and 6.7.4.

'Developmental Support System Component' is defined in the Glossary at Attachment R to the draft conditions of contract.

**Further Reading:** See also – *MIL-STD-973, Configuration Management*

## Configuration Control

<u>Reference:</u>	Clause 6.5
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that all formal baselines are managed and controlled and that the Commonwealth has the appropriate input into any significant changes.
<u>Policy:</u>	<i>DI(G) LOG 08-4, Defence Policy on Configuration Management</i>
<u>Guidance:</u>	<p>Configuration control is the systematic proposal, justification, evaluation, coordination, approval or disapproval of proposed changes, and the implementation of all approved changes, in the configuration of a Configuration Item (CI) after establishment of the configuration baseline(s) for the CI.</p> <p>The configuration control program established by the Contractor should:</p> <ol style="list-style-type: none"> <li>ensure effective control of all CIs and their approved configuration documentation (e.g. release of only approved configuration changes into CIs and their related configuration documentation);</li> <li>establish effective change procedures for use during the design, development and production of the item design, including, as a minimum, procedures for Engineering Change Proposals (ECPs) and Request for Deviations (RFDs); and</li> <li>ensure implementation and verification of approved changes.</li> </ol> <p>The procedures used for configuration control should be described in the CMP or SEMP, which is subject to review and Approval by the Commonwealth.</p> <p>A clear understanding should be displayed by the Contractor as to when and why Commonwealth involvement is required as part of the configuration control process (e.g. in the case of a major modification program to an existing system, the configuration control process should clearly articulate the relationship between configuration control activities conducted as part of the design under the Contract and those Commonwealth-related configuration control processes for the system being modified).</p>
<u>Drafter's action:</u>	<p>Configuration control practices may, depending upon the support concept, migrate into an In-Service phase. In this case, the In-Service configuration control requirements may need to flow back and influence these Contract clauses, since the strategies for configuration control adopted in the acquisition Contract should allow clean migration to the configuration management on the support phase.</p> <p>Drafters are to select either CMP or SEMP in clause 6.5.2, depending upon the requirements for a governing plan under clause 6.1.</p>
<u>Related clauses:</u>	All other clauses within the <b>Configuration Management</b> clause of the draft SOW.
<u>Further Reading:</u>	Nil



### Configuration Status Accounting

<u>Reference:</u>	Clause 6.6
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To ensure that the Contractor records and reports information on Mission System and Support System designated Configuration Items (CIs) in an effective and efficient manner.
<u>Policy:</u>	<i>DI(G) LOG 08-4, Defence Policy on Configuration Management</i> <i>DI(G) LOG 03-2, Defence Policy on Computer-aided Acquisition and Logistic Support</i>
<u>Guidance:</u>	<p>The Configuration Status Accounting (CSA) system established by the Contractor should:</p> <ol style="list-style-type: none"> <li>identify the current approved configuration documentation and identification number associated with each CI;</li> <li>record and report the status of proposed engineering changes from initiation to final approval/contractual implementation;</li> <li>record and report the results of configuration audits to include the status and final disposition of identified discrepancies;</li> <li>record and report the status of all critical and major requests for deviations that affect the configuration of a CI;</li> <li>record and report implementation status of authorised changes;</li> <li>provide the traceability of all changes from the original baselined configuration documentation of each CI; and</li> <li>report the effectivity and installation status of configuration changes to all CIs at all locations.</li> </ol> <p>There is no single CSA process or CSA Database (CSAD) used throughout Defence. In fact, even within Air Force alone, AAP 7001.047 recognises that there are many "Configuration Status Accounts distributed across corporate information systems forming a distributed or virtual repository of configuration information".</p> <p>With the advent of improved electronic transaction systems for business, the electronic transfer of configuration data is currently an area of worldwide attention. At the current time though, Defence is not adequately equipped to work in such an environment and electronic transactions for CM need to be addressed on a case-by-case basis.</p>
<u>Drafter's action:</u>	<p>Depending on the logistics-support concept, the configuration status accounting system as a whole, rather than just CSA reports, may need to be considered as a deliverable. The drafter should also consider the applicability of standards for interchange of CM data, such as MIL-STD-2549 and the evolving commercial standard EIA-836. If either of these considerations is applicable, clause 6.6 will require amendment to incorporate these requirements.</p> <p>Drafters are to select either CMP or SEMP in clause 6.6.1, depending upon the requirements for a governing plan under clause 6.1.</p>
<u>Related clauses:</u>	All other clauses within the <b>Configuration Management</b> clause of the draft SOW.
<u>Further Reading:</u>	Nil

## Configuration Audits

<u>Reference:</u>	Clause 6.7
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional
<u>Purpose:</u>	To ensure that the Contractor conducts both Functional Configuration Audits (FCAs) and Physical Configuration Audits (PCAs) on each Mission System product and Support System Component prior to Acceptance (and Final Acceptance).
<u>Policy:</u>	<i>DI(G) LOG 08-4, Defence Policy on Configuration Management</i>
<u>Guidance:</u>	Configuration audits are performed before establishing a product baseline (PBL) for an item and consist of Functional Configuration Audits (FCAs) and Physical Configuration Audits (PCAs).

A Functional Configuration Audit (FCA) is the formal examination of functional characteristics of a Configuration Item (CI) (functional characteristics are quantitative performance parameters and design constraints, including operational and logistic parameters and their respective tolerances), prior to Acceptance, to verify that the item has achieved the requirements specified in its FCD and ACD. The FCA will also involve examination of test results from any testing conducted as part of the Acceptance Verification process.

A Physical Configuration Audit (PCA) is the formal examination of the "as-built" configuration, or physical characteristics of a CI (physical characteristics are quantitative and qualitative expressions of material features, such as composition, dimensions, finishes, form, fit, and their respective tolerances), against its technical documentation to establish or verify the configuration item's PBL.

The Commonwealth's intent with respect to configuration audits is for an FCA and PCA to be conducted by, or on behalf of the Commonwealth, on each Mission System product or Support System Component (i.e. if the system is delivered as a single element, then the FCA and PCA will only be on that element) prior to Acceptance.

Drafters and users of *ASDEFCON (Complex Materiel) Volume 2* should be aware that FCAs and PCAs are Mandated System Reviews and are conducted in accordance with the clauses 4.1.5 and 6.7 of the SOW, and the relevant governing plan (i.e. CMP or SEMP). Clause 6.7 identifies the objectives for FCA and PCA, while the governing plan is required to identify the entry and exit criteria.

At the lower level of complexity under *ASDEFCON (Complex Materiel) Volume 2*, when CM is not a significant issue and no separate CMP is produced, the FCA and PCA are optional. When they are not used, the Verification Cross Reference Matrix (VCRM) should suffice to ensure tracking from the specified requirements to Acceptance of the product.

Drafter's action: Drafters are to determine, in consultation with sponsors, whether or not the FCA and PCA are required, and take the alternative action outlined above when appropriate.

If configuration audits are required, drafters are to select either CMP or SEMP in clauses 6.7.1 and 6.7.3, depending upon the requirements for a governing plan under clause 6.1.

Related clauses: All other clauses within the **Configuration Management** clause of the draft SOW.

- SOW Clause 4.1.4 (Conduct of System Reviews.)
- SOW Clause 4.4.2 (Design Traceability)
- SOW Clause 7.1 (Final Acceptance and VCRM)
- SOW Clause 7.2 (Acceptance Verification)

Further Reading: See also – *System Review Guide for Australian Defence Contract (Strategic Materiel), Version 1.0, September 2003*  
See also – *ASDEFCON (Strategic Materiel) Checklist – Functional Configuration Audit*  
See also – *ASDEFCON (Strategic Materiel) Checklist – Physical Configuration Audit*

**Not Used**

Reference: Clause 6.8

**VERIFICATION AND VALIDATION (V&V)****V&V Management**

<u>Reference:</u>	Clause 7.1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To require the Contractor to implement appropriate practices for the management of the Verification and Validation (V&V) program.
<u>Policy:</u>	<i>DI(G) OPS 43-1, "Defence Test and Evaluation Policy"</i> (Although this policy does not address V&V specifically, it does define the policy requirements for test and evaluation, which is but one portion of the overall V&V framework.)
<u>Guidance:</u>	This template only provides for Verification to be conducted. However, for document standardisation purposes, the terminology 'Verification and Validation' is used in headings and titles.

The template uses the similar V&V clauses as used in ASDEFCON (Strategic Materiel), except for the additional clause 7.1.2.3 addressing previously conducted V&V results. However, the DIDs called up provide for processes scaled to the lower levels of complexity and risk associated with use of this template.

**General**

The template allows for the potential acceptance by the Commonwealth of the results of verification previously conducted by the Contractor. This is also intended to reduce the V&V effort and, therefore, the cost to both the Contractor and the Commonwealth.

A more detailed insight into the philosophy underpinning V&V is provided in Section 13 of the ASDEFCON (Strategic Materiel) Handbook - Philosophy Volume.

A Risk Assessment of the project will guide the scope and depth of V&V activities that need to be conducted - this will depend on the risks associated with the design being undertaken. The V&V approach from the TCD and TEMP (if these documents exist) will also provide guidance on the approach.

<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	See also – <i>ABR 6205 Naval Test Evaluation and Acceptance Manual</i> See also – <i>Technical Regulation of Army Materiel Manual</i> See also – <i>DI (AF) LOG 2-7, Test and Evaluation of Technical Equipment</i> See also – <i>DEF (AUST) 5691, Logistics Support Analysis Defence Standard (Chapter 6 Supportability Assessment)</i>

**7.1.1 - GENERAL**

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To establish the overall objectives within which the V&V program will be undertaken.
<u>Policy:</u>	Refer Section 7.1.
<u>Guidance:</u>	The intent of the V&V program is to demonstrate that the Supplies offered for Acceptance comply with the requirements of the Contract.  The Contractor should acknowledge these objectives in their Verification and Validation Plan (V&VP) or optionally in the SEMP, which is subject to review and Approval by the Commonwealth – this will provide objective evidence that the Contractor has acknowledged these objectives.

**Drafter's action:** Clause 7.1.1 is to be included in the RFT without amendment.

**Related clauses:** All other clauses within clause 7 of the draft SOW.

**Further Reading:** See also – ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, *Lifecycle Thread – Verification and Validation*

### 7.1.2 - VERIFICATION AND VALIDATION PLANNING

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To impose a contractual obligation on the Contractor to submit a V&V Plan (V&VP), if required, for Approval by the Commonwealth Representative and to manage the V&V elements of the project in accordance with the Approved governing plan.

**Policy:** See Section 7.1.

**Guidance:** The V&VP, including or supplemented by subordinate plans, is used by the Contractor to provide direction and guidance to the Contractor's team responsible for conducting the V&V program. The V&VP is also used by the Commonwealth Representative to gain visibility of the Contractor's V&V planning and to provide input into Commonwealth Representative planning.

Where the scope of V&V activities is unlikely to be significant (e.g. for lower-complexity acquisitions), ASDEFCON (Complex Materiel) Volume 2 provides the option for the V&V elements of the Contract to be addressed through the System Engineering Management Plan (SEMP).

The V&VP (or SEMP) describes the complete effort required for V&V activities as part of the Contract. Care should be taken when discussing activities that perform a V&V function that are encompassed as part of another program (e.g. FCAs and PCAs can technically be considered both a V&V activity as well as a CM activity but are detailed as part of the CM program). In such a circumstance, the V&VP (or SEMP) should identify the activities and describe the role of these activities in each of the programs but refer out to the lead document/plan for further details.

The Contractor is permitted to seek Commonwealth approval to substitute results of previously conducted V&V to reduce the V&V effort required for the current Contract. This approach can produce considerable cost savings to the Commonwealth. However, care and judgement must be exercised to ensure applicability of these previous results.

Previous V&V results can only be used when Mission System elements and/or Support System elements delivered are of the same configuration and used in the same environment as those that previously underwent V&V. The Contractor must prove to the satisfaction of the Commonwealth that these conditions are met before previous V&V results can be used in-lieu of dedicated V&V for this Contract.

DID-V&V-MGT-V&VP-2 provides for the Contractor to describe any previous V&V results that will be offered, and clause 7.1.2.3 requires the Contractor to provide a detailed Previous V&V Results Package (DID-V&V-TST-PV&VPR) to the Commonwealth Representative for Approval. This clause also requires the Contractor to cross-reference to this package from within the Verification Cross Reference Matrix (VCRM).

**Drafter's action:** Clause 7.1.2.1 should be included in the RFT if the V&V aspects of the project are expected to be significant or a standalone V&VP is dictated by the TRA. Drafters should then choose the 'V&VP' option in clauses 7.1.2.3 and 7.1.2.4.

Alternatively, the SEMP may be used to cover V&V planning aspects, if the scope of V&V is not anticipated to be significant. In this case, clause 7.1.2.1 should be deleted and replaced with 'Not Used', and 'SEMP' should be selected in clauses 7.1.2.3 and 7.1.2.4.

Depending upon whether or not the Commonwealth Representative intends to obtain a Contract-ready V&VP prior to Contract (i.e. through contract negotiations), the CDRL delivery times for the V&VP may need to be adjusted.

**Related clauses:** The **Draft Verification and Validation Plan** clause of Annex F of the conditions of tender optionally requests tenderers to provide a draft V&VP.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Verification and Validation*

### 7.1.3 - VERIFICATION CROSS REFERENCE MATRIX

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**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To impose a contractual obligation on the Contractor to define the methods by which specified requirements (at multiple levels in the design) are to be verified.

**Policy:** See Section 7.1.

**Guidance:** The Verification Cross Reference Matrix (VCRM) is a generic term used for a table that cross-references specified requirements to the methods by which those requirements will be verified. A VCRM may be associated with a specification at any level in a specification hierarchy, so care should be taken to ensure that the context of application within that hierarchy is clearly enunciated.

The clauses are specifically targeted at those specifications that define the Functional Baselines for:

- a. the Mission System;
- b. those parts of the DOR that define the Support System Component requirements; and
- c. Developmental Support System Components and non-developmental Support System Components.

One potential problem when a VCRM is aligned against lower-level specifications (e.g. subsystem by subsystem) is the loss of the high-level view that ensures all component systems of the Mission System operate effectively together (e.g. communication systems don't adversely interfere with navigation systems, etc). To avoid this problem, the Commonwealth Representative should ensure the VCRM that accompanies the specification in the DOR (if one exists) contains high-level, whole-of-system Verification requirements and that this is carried through into the Contractor's VCRMs.

Section 13 of the *ASDEFCON (Strategic Materiel) Handbook Philosophy Volume* provides an explanation of the relationships between, and the responsibilities of the Commonwealth Representative with respect to, the various VCRMs that are likely to exist under the Contract.

**Drafter's action:** Clause 7.1.3 is to be included in the RFT without alteration.

**Related clauses:** 'Developmental Support System Component' is defined in the Glossary at Attachment R to the draft conditions of contract.

Clause 4.2.2 of the draft SOW specifies the processes for the development and Approval of the Mission System Functional Baseline.

Clause 4.5.2 of the draft SOW specifies the requirements relating to design traceability, which are linked to the VCRM requirements.

The **Configuration Baselines** clause of the draft SOW specifies the configuration baselines that the Contractor is required to develop and maintain for the Mission System and Support System Components.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook Philosophy, Section 13 – Verification and Validation*

#### 7.1.4 - TEST READINESS REVIEWS (OPTIONAL)

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- Sponsor:** Standardisation Branch
- Status:** Optional
- Purpose:** To require formal reviews to be conducted prior to commencing any type of formal Acceptance V&V activity to ensure that all parties are prepared and that it is appropriate to proceed with such activities.
- Policy:** See Section 7.1.
- Guidance:** Drafters may optionally include a TRR, to precede all Commonwealth formal Acceptance V&V activities if the complexity of the testing process is anticipated to warrant this, which would generally be the case. Drafters should assess whether this activity will be required, or whether other project management activities, including the review for Approval of documentation associated each stage of the V&V will be likely to suffice in lieu of a formally scheduled TRR. Drafters should note that, if later deemed to be required, a TRR could effectively be conducted as an Extraordinary Meeting.
- If a TRR is considered as required, drafters should note that the requirements for conduct of the review are to be addressed by the Contractor in the appropriate governing plan (i.e. V&VP or SEMP).
- Depending on the particular program, specific TRRs may also need to be considered. For example, Ground Test Readiness Reviews (GTRRs) and Flight Test Readiness Reviews (FTRRs) may need to be conducted for acquisitions involving aircraft. Alternatively, TRRs for Factory Acceptance Test (FAT) and Site Acceptance Test (SAT) activities might also be deemed appropriate. Notwithstanding, the range of specific TRRs should align with the planned scope of Acceptance Verification activities under clause 7.2 of the draft SOW.
- Drafter's action:** If selected, drafters are to include clause 7.1.4 in the RFT without alteration, with the exception of selecting the appropriate governing plan in clause 7.1.4.1.
- If not selected, drafters will need to specify alternative delivery timings in the CDRL for items that are keyed to the TRR (e.g. ATP&Ps).
- Related clauses:** Clause 4.1.4 of the draft SOW addresses the conduct of System Reviews.
- The **Acceptance Verification** clause of the draft SOW addresses the requirements for Acceptance Verification.
- Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – System Reviews*
- See also – *System Review Guide for Australian Defence Contract (Strategic Materiel), Version 1.0, September 2003*
- See also – *ASDEFCON (Strategic Materiel) Checklist – Test Readiness Review*

#### 7.1.5 - COMMONWEALTH INVOLVEMENT IN AV&V

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- Sponsor:** Standardisation Branch
- Status:** Core
- Purpose:** To ensure that Commonwealth oversight of any AV&V activities is catered for as part of the Contract.
- Policy:** See Section 7.1.
- Guidance:** Although the Contractor may perform the detailed V&V activities, the Commonwealth Representative needs to observe V&V to be assured that the systems satisfy their specified requirements. The onus in any V&V is on the Contractor to prove to the Commonwealth that the delivered systems meet the specified requirements, not the other way around - requiring the Commonwealth to perform this activity may transfer the burden of proof away from the Contractor and is not a recommended practice.



In some cases, however, there may be a need to have Commonwealth personnel as participants (e.g. where military personnel are required to operate and/or support the systems being tested). If this is the case, then clear boundaries should be established at the outset as to specific Commonwealth involvement and any conditions whereby failures identified during testing are not attributable to the system but due to the manner in which Commonwealth personnel operated the system. Clarity of responsibility is important here, as training of Commonwealth personnel by the Contractor can also be validated in such tests.

The Commonwealth may also need to provide other substantial resources for the AV&V of the Mission System and Support System Components. These may include ranges and test facilities, In-Service mission systems to be used in joint system operations, deployment and/or transportation. Again, clear boundaries must be established.

These conditions will need to be documented in any V&V plans and procedures developed to conduct such testing.

**Drafter's action:** Clause 7.1.5 is to be included in the RFT without alteration. Prior to Contract signature, drafters should consider the possible locations for V&V and, if required, a change to the notification period in clause 7.1.5.4 should be addressed with the successful tenderer.

**Related clauses:** The **Acceptance Verification** clause of the draft SOW addresses the requirements for Acceptance Verification.

**Further Reading:** Nil

#### 7.1.6 - FAILURE REPORTING AND ANALYSIS

**Sponsor:** Standardisation Branch

**Status:** Core

**Purpose:** To require that all failures identified as part of AV&V are reported and analysed by the Contractor.

**Policy:** See Section 7.1.

**Guidance:** Failure Reporting and Analysis is an essential part of any testing. All failures need to be recorded, analysed as to the root cause of that failure, and then a corrective action should be proposed. Note that it is not sufficient just to record an occurrence of a failure and assume that most apparent cause is correct because the apparent mode in which a system failed may be misleading - a root cause analysis of the failure should be conducted to identify the true cause of the apparent failure. Care should be taken as part of any failure investigation as to the conditions under which the failure occurred because overstress test conditions beyond the use conditions specified may actually invalidate any test results. The failure should also carefully record the configuration of the system or system component under test at the time of failure so that appropriate regression testing can be identified following a design change.

This activity should be integrated with any Failure Reporting Analysis and Corrective Action System (FRACAS) implemented as part of the Reliability Engineering program.

**Drafter's action:** Clause 7.1.6 is to be included in the RFT without alteration.

**Related clauses:** Clause 4.6.2 of the draft SOW addresses the requirements for reliability engineering.

The **Verification Acceptance** clause of the draft SOW addresses the requirements for Acceptance Verification.

**Further Reading:** Nil

#### 7.1.7 - REGRESSION TESTING

**Sponsor:** Standardisation Branch

- Status: Core
- Purpose: To require that any corrective actions implemented by the Contractor, due to failures reported and analysed as part of AV&V, are verified to ensure the effectiveness of the corrective action that was implemented.
- Policy: See Section 7.1.
- Guidance: Any subsequent changes to the design due to rectify identified failures need to be re-tested to prove that the design change was effective - this is the objective of Regression Testing. Care needs to be taken when determining the scope of regression testing to be undertaken to also ensure that the testing encompasses any systems that have a dependency on the area rectified by the design change. Note that the management of the configuration of the items under test during failure and through consequent design changes and testing is a key factor in ensuring the effectiveness and integrity of any regression testing.
- Drafter's action: Clause 7.1.7 is to be included in the RFT without alteration.
- Related clauses: The **Verification Acceptance** clause of the draft SOW addresses the requirements for Acceptance Verification.
- Further Reading: Nil

### Acceptance Verification

<u>Reference:</u>	Clause 7.2
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To specify the program of Acceptance Verification activities to ensure that the Mission System and Support System developed by the Contractor are fit for purpose.
<u>Policy:</u>	<i>DI(G) OPS 43-1, "Defence Test and Evaluation Policy"</i> (Although this policy does not address V&V specifically, it does define the policy requirements for test and evaluation, which is but one portion of the overall V&V framework.)
<u>Guidance:</u>	<p>Under the <b>Acceptance</b> and <b>Final Acceptance</b> clauses of the draft conditions of contract, Acceptance of Supplies is divided into two parts: Acceptance and Final Acceptance. Acceptance relates to individual Supplies, whereas Final Acceptance relates to the Supplies functioning and integrating as required by the Contract. Final Acceptance occurs after Acceptance of all Supplies. The Acceptance Verification activities documented under clause 7.2 of the draft SOW have been drafted to accord with these two sets of Acceptance provisions for both the Mission System and Support System, and any amendments to the <b>Payment</b> clause must continue to be aligned with the Acceptance provisions.</p> <p>Acceptance Test and Evaluation (AT&amp;E) is but one process by which Acceptance Verification may be conducted. Other processes may involve design reviews and audits, analysis of modelling and simulation results, etc.</p> <p>The <b>Payment</b> clause should also address any mandated test phases for the program. These may consist of a factory (or office environment) test phase, one or more site-based test phases, and one or more operationally focussed test phases. In addition to these phases, others that could be considered are First Article Test (where multiple identical units will be procured), Ground and Flight Tests for equipment integrated into aircraft, and specialty tests such as those associated with EMI/EMC testing.</p>
<u>Drafter's action:</u>	Nil
<u>Related clauses:</u>	Nil
<u>Further Reading:</u>	Nil

#### 7.2.1 - GENERAL

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<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To define those conditions under which Acceptance Verification of the Mission System and Support System Components are to occur. To impose a contractual obligation for the Contractor to Validate the test environment and the test equipment used for Acceptance Verification.
<u>Policy:</u>	See Section 7.2.
<u>Guidance:</u>	<p>Logically, the intention of the Commonwealth is to ensure that the Acceptance Verification activities are conducted on the same system that will be delivered to the Commonwealth. This is an important objective, especially given the complexity that can be built into systems through software. With only minor changes to configuration, such systems may exhibit quite different behaviour.</p> <p>Ideally the "identical system" concept could be mandated, but instead the SOW identifies this as a goal. Because of the complexity of some systems that are being addressed, ASDEFCON (Complex Materiel) coupled with the significant time and effort required to conduct a comprehensive Verification program, the likelihood of completing a Acceptance Verification program without need for rework is low. It would not be cost-effective for the Commonwealth to demand a complete retest for</p>

any rework. The alternative is, where a design or configuration change is made during the Acceptance Verification program, to conduct regression testing based on the knowledge of the implementation and the risk to the Commonwealth.

It is important that all test environments and equipment used during the Acceptance Verification phases are controlled and Validated to confirm that they will meet their objectives as used in the program. This includes the more straightforward elements, such as the calibration of test equipment, as well as the need to validate more elaborate models used in the Acceptance Verification program (e.g. underwater propagation models used as part of the Acceptance Verification program for a sonar system). In the latter case, if the models were well established and known to be valid, then they might be Validated by reference to subject matter experts. If the models were relatively new or developed specifically for the project, however, then they might need further scrutiny and potential supplementation by real world trials.

Drafter's action: Clause 7.2.1 is to be included in the RFT without alteration.

Related clauses: Clause 7.2.2 of the draft SOW addresses Acceptance Verification.

Further Reading: Nil

#### 7.2.2 - ACCEPTANCE VERIFICATION

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Sponsor: Standardisation Branch

Status: Core

Purpose: To impose a contractual obligation on the Contractor to Verify that the "as built" Mission System and Support System Components satisfy their specified requirements as defined by their respective FBLs.

Policy: See Section 7.2.

Guidance: Although these clauses should be adequate in most cases, specific clauses may need to be drafted to ensure that the scope of Acceptance Verification, consistent with the Test Concepts Document (TCD) and the Test and Evaluation Master Plan (TEMP) (where these documents exist), is captured in the Contract.

Verification of the Mission System involves verifying that each of the requirements specified for the Mission System Functional Baseline have been satisfied.

Verification of the Support System Components involves verifying that these components satisfy their relevant specifications and the requirements defined in the DOR.

Drafter's action: Clause 7.2.2 may be included unchanged, or may be tailored to address the required scope of Acceptance Verification activities for both the Mission System and Support System Components, including the need for test phases.

Related clauses: The **Verification and Validation Management** clause of the draft SOW addresses V&V management.

Further Reading: Nil

**QUALITY MANAGEMENT PROGRAM**

<u>Reference:</u>	Clause 8.0
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core, with Optional clauses.
<u>Purpose:</u>	To notify the Contractor of the quality system standard or processes that must be maintained and applied by the Contractor during the Contract.
<u>Policy:</u>	<i>DPPM - Section 3, Chapter 3.5</i> <i>DI(G) LOG 02-1, "Defence Policy on Quality Assurance"</i> <i>AS/NZS ISO 9001:2000, "Quality Management Systems – Requirements"</i> <i>AS/NZS ISO 9001:2000, "Vocabulary"</i>
<u>Guidance:</u>	The template allows for Quality to be assured by: <ol style="list-style-type: none"> <li>a. controlling the processes during production (including design and development) using a Quality Management System (QMS) that has third party accreditation to a recognised standard, with or without a project-specific Quality Plan;</li> <li>b. Acceptance Verification of the completed product; or</li> <li>c. a combination of these means.</li> </ol>

The optional requirement for the application of a formal and documented Quality Management System (QMS) to work performed under the Contract would assist the Contractor in maintaining quality and give the Commonwealth a high measure of assurance that adequate quality-management practices are in place. Without such QMSs, management of quality can be unstructured and quality issues can sometimes be sacrificed in the interests of cost and schedule with no visibility to the Commonwealth. In higher risk projects, this would be unacceptable.

The optional requirement for a Contract-specific Quality Plan will require the Contractor to tailor its QMS to the requirements of the Contract. This will provide the Commonwealth detailed visibility of the application of the QMS to the Contract, and the ability to influence this. In higher risk projects, this will either be desirable or essential.

The optional provision for the Commonwealth to audit any required QMS (including its processes and products) and to require correction of non-conformances is a powerful mechanism for the Commonwealth to gain assurance of the quality of work performed under the Contract. This option should always be selected if the option for a QMS is selected. It involves no Commonwealth commitment or obligation, but provides valuable rights should any concern be held at Contractor performance.

However, application of a formal QMS may not be appropriate for a range of Contracts with low risk or for low criticality Supplies, such as for items that are in production in an established environment and where the normal, possibly commercial production quality standard is assessed as being suitable. The option to assure quality through only Verification of the Supplies might be quite suitable in such cases. Its selection would avoid the costs of a formal QMS, and would permit the Contract to be let to suppliers that do not have, and see little value for them in attaining, a formal Quality accreditation.

The method of assuring Quality that is selected will depend on the value in or essentiality of ensuring that a formal QMS either was, or will be, applied during production of the Supplies, and whether the Commonwealth requires to Approve, and have direct visibility of, and involvement in, any such QMS. Drafters should be aware of the potentially high cost to a Contractor of attaining Quality System accreditation, and of introducing Contract-specific documentation and procedures.

#### Quality System Standards:

The ISO 9000 series QMS standards used in Defence contracts are commercial standards. The risk-based approach to the application of these standards is consistent with Commonwealth procurement policy for Quality Assurance.

#### Prior Manufacture:

If the Supplies have potential to have been manufactured before the Effective Date, clause 8.1.7 facilitates acquisition of supplies previously manufactured under an accredited QMS, where a QMS is required by the Contract.

#### Maintenance of Quality Records:

When Option A of the **Contractor Quality Management Responsibilities** clause is selected, ensure that, where required, the Commonwealth can obtain access to records relating to the Contractor's QMS and the quality of the Supplies. Clause 8.1.7 places a contractual obligation on the Contractor to maintain records relating to the planning and Verification of the quality of the Supplies for a minimum period of seven years after the completion of the Contract.

#### TRA Requirements:

Unless otherwise approved by the relevant Technical Regulatory Authority (TRA), contracts for the production of items affecting the Technical Integrity of ADF Materiel are to be placed only with suppliers that have a QMS that has been certified to an internationally accepted standard (equivalent to AS/NZS ISO 9001:2000).

#### Selection of the Method of Assuring Quality:

The template provides three choices for Quality Management. These choices, the reasons why each may be selected, and the method to select clauses to apply each follows:

- a. The Contractor has an accredited QMS; the Contractor provides a Contract-specific Quality Plan which the Commonwealth Representative is to Approve and the Commonwealth has the right to audit the implementation of the Contractor's QMS on the Contract, and to undertake process and product surveillance and audits. This choice is appropriate for complex or critical production (including design and development) processes, where Quality will be vital to performance of the Supplies, and the Commonwealth requires visibility of, and influence on, certain Quality management processes and decisions. This choice is implemented by selecting Option A of the **Contractor Quality Management Responsibilities** clause and the optional **Quality Plan** and **Quality Systems, Processes and Product Non-Conformances** clauses. The **Commonwealth Representative Approval of Non-Conforming Supplies** clause is always retained.
- b. The Contractor has an accredited QMS; there is no Contract-specific Quality Plan; the Commonwealth has the right to audit the implementation of the Contractor's QMS on the Contract, and to undertake process and product surveillance and audits. This choice is appropriate where Quality management in the production (including design and development) processes is critical to performance of the Supplies, but it is assessed that Commonwealth requirements can be, or should have been, met by the Contractor's existing QMS and plan. This choice is implemented by selecting Option A of the **Contractor Quality Management Responsibilities** clause and the optional **Quality Systems, Processes and Product Non-Conformances** clause, and deleting the optional **Quality Plan** clause. The **Commonwealth Representative Approval of Non-Conforming Supplies** clause is always retained.

- c. There is no requirement for the Contractor to have an accredited QMS; the Commonwealth has no rights for production system or product audit or surveillance activities; the Quality of the Supplies will be assured solely through their V&V. This choice is appropriate where an accredited QMS is not assessed as necessary or appropriate due to the nature of the Supplies, their production environment, or their application, and Acceptance Verification is assessed as suitable to provide adequate Quality Assurance. This choice is implemented by selecting Option B of the **Contractor Quality Management Responsibilities** clause, and deleting the optional **Quality Plan** clause and **Quality Systems, Processes and Product Non-Conformances** clause. The **Commonwealth Representative Approval of Non-Conforming Supplies** clause is always retained.

Drafter's action: Nil

Related clauses: Nil

Further Reading: See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Quality Assurance*

### Contractor Quality Management Responsibilities

<u>Reference:</u>	Clause 8.1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core, with Optional clauses.
<u>Purpose:</u>	To increase confidence that the Supplies will meet the Contract requirement through effective management of quality by the Contractor. To notify the Contractor of the quality system standard or processes that must be maintained and applied by the Contractor during the Contract.
<u>Policy:</u>	<p><i>DPPM - Section 3, Chapter 3.5</i></p> <p><i>DI(G) LOG 02-1, "Defence Policy on Quality Assurance"</i></p> <p><i>AS/NZS ISO 9001:2000, "Quality Management Systems – Requirements"</i></p> <p><i>AS/NZS ISO 9001:2000, "Vocabulary"</i></p>
<u>Guidance:</u>	<p>See guidance at clause 8.</p> <p>Option A of the <b>Contractor Quality Management Responsibilities</b> clause of the draft SOW should not be changed or tailored without appropriate policy advice and assistance from SB-QA. Changes could result in the application of inappropriate standards or a reduction in the Commonwealth's rights.</p> <p>SB-QA staff can be contacted through the MASF Help line.</p>
<u>Drafter's action:</u>	<p>The drafter must select Option A or B, as appropriate to the acquisition, in consultation with SB-QA staff.</p> <p>Once this selection has been made, the relevant clauses should be incorporated into the Draft RFT without alteration unless amendments are agreed by SB-QA.</p>
<u>Related clauses:</u>	<p>The <b>Quality Statement</b> clause of the <b>Management</b> Annex to the conditions of tender requests tenderers to provide information relating to the tenderer's QMS and notifies tenderers of the quality system standard required for the Contract.</p> <p>'Effective Date' is defined in the <b>Glossary</b> Attachment to the Contract.</p> <p>The <b>Quality Plan</b> clause of the draft SOW optionally specifies the requirements for a Contract-specific Quality Plan.</p> <p>The <b>Quality Systems, Processes and Product Non-Conformances</b> clause of the draft SOW specifies the mechanism for establishing corrective actions on quality system, process and product non-conformances identified by the Commonwealth.</p> <p>The <b>Commonwealth Representative Approval of Non-Conforming Supplies</b> clause of the draft SOW specifies the mechanism for seeking Commonwealth Representative approval of non-conforming Supplies, materials or work.</p>
<u>Further Reading:</u>	See also – <i>ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Quality Assurance</i>



### Quality Plan

<u>Reference:</u>	Clause 8.2
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Optional
<u>Purpose:</u>	To require the Contractor to submit a Quality Plan and maintain and apply the agreed Quality Plan to the work performed under the Contract. To set out the procedure for agreement of the Quality Plan and any subsequent amendments to the Quality Plan.
<u>Policy:</u>	<i>DPPM - Section 3, Chapter 3.5</i> <i>DI(G) LOG 02-1, "Defence Policy on Quality Assurance"</i> <i>AS/NZS ISO 9001:2000, "Quality Management Systems – Requirements"</i> <i>AS/NZS ISO 9001:2000, "Vocabulary"</i>
<u>Guidance:</u>	See guidance under clause 8.

The Quality Plan describes how the Contractor's certified QMS is applied specifically to the Contract. From the Contractor's perspective, the Quality Plan is the means by which the detailed application of the Contractor's QMS is documented and all activities needed to fulfil the quality requirements of the Contract are addressed. From the Commonwealth's perspective, the Quality Plan provides evidence that all quality planning activities have been adequately addressed and provides a baseline against which the Quality Assurance Representatives' (QARs') auditing and surveillance activities can be scheduled.

#### Quality Plan Delivery and Approval

Drafters should note that the conditions of tender only require tenderers to submit a Quality Statement as part of their tender responses and not an outline Quality Plan. To obtain an agreed Quality Plan under the Contract, therefore, drafters may require a Quality Plan to be developed:

- a. as part of Contract negotiations; or
- b. shortly after Contract award.

Currently, the draft Contract Data Requirements List (CDRL) specifies that the Quality Plan will be Approved at the Effective Date, which would be the case if the Quality Plan were included as an activity under the first option specified above. If the second option were to be selected, however, drafters would need to specify, in the CDRL, the initial delivery requirements for the Quality Plan and the time allowed for the agreement and amendment of the submitted Quality Plan. Careful consideration should be given to the selection of the time periods, particularly where it is likely that critical or significant Contract work (e.g. design, development or integration) will be undertaken prior to, or immediately after, Contract signature. Drafters should contact SB-QA staff to assist in the determination of these periods.

Drafters are advised that the preferred approach for the development of the Quality Plan is to include this activity as part of Contract negotiations. The two principal benefits with this approach are that:

- a. the Quality Plan will be specifically tailored for the Contract before Contract signature; and
- b. the risks associated with having uncontrolled or ineffective processes being applied in the early stages of critical or significant Contract work is mitigated.

In negotiating the Quality Plan, any issues raised during tender evaluation should be considered for mitigation in the Quality Plan (and the Risk Register). SB-QA staff can assist in the determination of risk-mitigation strategies for inclusion in the Quality Plan (e.g. specific controls to be applied to the activity in question).

### Amendments to Clause 8.2 of the Draft SOW

The **Quality Plan** clause of the draft SOW should not be changed or tailored without appropriate policy advice and assistance from SB-QA. Changes could result in the application of inappropriate standards or a reduction in the Commonwealth's rights.

SB-QA staff can be contacted through the MASF Helpline.

**Drafter's action:** Drafters need to determine whether a Contract-specific Quality Plan is required on the basis of the guidance at clause 8 and at this clause, and advice from SB-QA. If required, the **Quality Plan** clause should be incorporated into the RFT without alteration, unless amendments are agreed by SB-QA. If a Contract Specific Quality Plan is not required, the **Quality Plan** clause should be deleted.

If the development of the Quality Plan is to be included as an activity during contract negotiations, the drafters should not alter the CDRL delivery requirement of ED. If, however, the Quality Plan is to be developed under the Contract, then drafters must insert in the CDRL the period within which the Contractor is to submit the Quality Plan to the Commonwealth Representative for agreement. Time periods for the agreement and amendment of the submitted Quality Plan must also be inserted in the CDRL. In this latter case, advice should be sought from SB-QA. Furthermore, in all cases, advice should be sought from SB-QA for specific additions or deletions associated with the DID requirements.

**Related clauses:** The **Quality Statement** clause at the **Management** Annex to the conditions of tender requests tenderers to provide information relating to the tenderer's quality management system and notifies tenderers of the quality system standard required for the Contract.

'Effective Date' is defined in the Glossary at Attachment R to the Contract.

The **Contractor Quality Management Responsibilities** clause of the draft SOW notifies the Contractor of the quality system standard that must be maintained and applied by the Contractor during the Contract.

The **Quality Systems, Processes and Product Non-Conformances** clause of the draft SOW specifies the mechanism for establishing corrective actions on quality system, process and product non-conformances identified by the Commonwealth.

The **Commonwealth Representative Approval of Non-Conforming Supplies** clause of the draft SOW specifies the mechanism for seeking Commonwealth Representative approval of non-conforming Supplies, materials or work.

**Further Reading:** See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Quality Assurance*

### Quality Systems, Process and Product Non-Conformances

- Reference:** Clause 8.3
- Sponsor:** Standardisation Branch
- Status:** Optional; required if clause 8.1 Option A is selected.
- Purpose:** To set out as contractual obligations the mechanism for establishing corrective actions on quality system, process and product non-conformances identified by the Commonwealth.
- Policy:** Requirements for the control of quality system, process and product non-conformances should always be included in Contracts in order to increase the probability that Supplies received conform to quality requirements.
- DPPM - Section 3, Chapter 3.5*
- DI(G) LOG 02-1, "Defence Policy on Quality Assurance"*
- AS/NZS ISO 9001:2000, "Quality Management Systems – Requirements"*
- AS/NZS ISO 9001:2000, "Vocabulary"*
- Guidance:** See Guidance under clause 8.
- This clause provides the mechanism for establishing Commonwealth control of corrective actions on quality system, process and product non-conformances.
- Correction of Non-Conformances**
- The **Quality Systems, Processes and Product Non-Conformances** clause entitles the Commonwealth Representative to require the Contractor by written notice to correct quality system, process and product non-conformances within the period specified in the notice. In selecting the period in which the non-conformance must be corrected, consideration should be given to the nature of the non-conformance, the time required to rectify the non-conformance and the criticality of the non-conformance. Clause 8.3.2 entitles the Commonwealth Representative to undertake an Audit to verify that the non-conformance has been corrected.
- Where the Contractor fails to remedy a quality system, process or product non-conformance within the time period specified in the notice, the Contractor will be in breach of Contract and the Commonwealth will be entitled to claim damages where it has suffered loss as a result of the breach. In addition to damages, the Commonwealth may be entitled to terminate the Contract for default through the process provided for under clause 12.2.1.1 of the conditions of contract (i.e. issue of a notice to 'make good' the default), or at common law if it can be established that the Contractor's failure to correct the non-conformance was a fundamental breach of the Contract or was otherwise a default for which the common law gives a right to terminate. Advice should be sought from CPO branch prior to any action being taken to claim damages or terminate the Contract for default.
- Amendments to Clause 8.3 of the Draft SOW**
- The **Quality Systems, Processes and Product Non-Conformances** clause of the draft SOW should not be changed or tailored without appropriate policy advice and assistance from SB-QA. Changes could result in the application of inappropriate standards or a reduction in the Commonwealth's rights.
- SB-QA staff can be contacted through the MASF Helpline.
- Drafter's action:** If the **Contractor Quality Management Responsibilities** clause is selected, drafters should include the **Quality Systems, Processes and Product Non-Conformances** clause in the RFT without alteration, unless changes are endorsed by SB-QA.

Related clauses: The Quality Statement at Annex F-6 to the conditions of tender requests tenderers to provide information relating to the tenderer's QMS and notifies tenderers of the quality system standard required for the Contract.

The **Contractor Quality Management Responsibilities** clause of the draft SOW notifies the Contractor of the quality system standard that must be maintained and applied by the Contractor during the Contract and details the Commonwealth's right to perform Quality Audits and surveillance activities.

The **Quality Plan** clause of the draft SOW sets out the procedure for agreement of the Quality Plan and any subsequent amendments to the Quality Plan.

The **Commonwealth Representative Approval of Non-Conforming Supplies** clause of the draft SOW specifies the mechanism for seeking Commonwealth Representative approval of non-conforming Supplies, materials or work.

Further Reading: See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Quality Assurance*

### **Commonwealth Representative Approval of Non-Conforming Supplies**

<u>Reference:</u>	Clause 8.4
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To set out as contractual obligations the mechanism for seeking Commonwealth Representative approval of non-conforming Supplies, materials or work.
<u>Policy:</u>	<p>Requirements for the control of non-conforming Supplies should always be included in Contracts in order to increase the probability that Supplies received conform to quality requirements, and are free of reworked or repaired components that do not have Commonwealth Representative approval.</p> <p><i>DPPM - Section 3, Chapter 3.5</i></p> <p><i>DI(G) LOG 02-1, "Defence Policy on Quality Assurance"</i></p> <p><i>AS/NZS ISO 9001:2000, "Quality Management Systems – Requirements"</i></p> <p><i>AS/NZS ISO 9001:2000, "Vocabulary"</i></p> <p>Form SG2 – Application for Deviations</p>
<u>Guidance:</u>	<p>See guidance at clause 8.</p> <p>This clause provides the mechanism by which the Contractor may apply for Commonwealth Representative approval of non-conforming Supplies.</p> <p><u>Use of Non-Conforming Materials or Work</u></p> <p>The Contractor must obtain the Commonwealth Representative's written approval to use non-conforming work or materials in the production of the Supplies. The Defence mechanism for processing these applications and providing written approval is through the use of Form SG 2 "Application for Deviations" (which may also be known as Production Permits and Concessions).</p> <p>A Defence internal procedure for managing applications for Deviations is published as a Departmental Quality Assurance Instruction. This Instruction is available through the DEFWEB.</p> <p>Form SG 2 can be obtained from the Defence Intranet web forms system.</p> <p><u>Approval of Non-Conforming Materials or Work</u></p> <p>The Commonwealth Representative is under no obligation to approve use of non-conforming work or materials in the production of the Supplies. If the Commonwealth Representative does approve the use of non-conforming work or materials, the Commonwealth will be bound by the approval and may be prevented from claiming against the Contractor in the event that the Supplies are defective. The Commonwealth Representative's approval of the use of non-conforming work and materials may also affect the Commonwealth Representative's ability to reject Supplies under clause 6 of the conditions of contract. It is important to note, however, that clause 8.4.2 limits the extent to which the Contractor's obligations under the Contract are affected to the extent specifically set out in the approved application.</p> <p>The <b>Commonwealth Representative Approval of Non-Conforming Supplies</b> clause of the draft SOW should not be changed or tailored without appropriate policy advice and assistance from SB-QA. Changes could result in the application of inappropriate standards or a reduction in the Commonwealth's rights.</p> <p>SB-QA staff can be contacted through the MASF Helpline.</p>
<u>Drafter's action:</u>	The <b>Commonwealth Representative Approval of Non-Conforming Supplies</b> clause is to be included in the RFT without alteration.

Related clauses: The **Quality Statement** clause of Annex F to the conditions of tender requests tenderers to provide information relating to the tenderer's QMS and notifies tenderers of the quality system standard required for the Contract.

The **Contractor Quality Management Responsibilities** clause of Option A (if used) of the draft SOW notifies the Contractor of the quality system standard that must be maintained and applied by the Contractor during the Contract and details any Commonwealth's right to perform Quality Audits and surveillance activities.

The **Quality Plan** clause (if used) of the draft SOW sets out the procedure for agreement of the Quality Plan and any subsequent amendments to the Quality Plan.

The **Quality Systems, Processes and Product Non-Conformances** clause (if used) of the draft SOW specifies the mechanism for establishing corrective actions on quality system, process and product non-conformances identified by the Commonwealth.

Further Reading: See also – *ASDEFCON (Strategic Materiel) Handbook - Philosophy Annex A, Lifecycle Thread – Quality Assurance*

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**ANNEX A****DESCRIPTION OF REQUIREMENT (DOR)**

<u>Reference:</u>	Annex A
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To specify the technical requirements and Defence operational and support concepts for the Supplies to be provided under the Contract.
<u>Policy:</u>	To be determined.
<u>Guidance:</u>	<p>It is essential that the Commonwealth Representative, tenderers and the Contractor have as precise an understanding as possible of the full scope of work to be performed. This depends in part on the Description of Requirement (DOR).</p> <p>The DOR will be included as Annex A to the Draft SOW in the RFT, and will, after any modifications resulting from source selection and Contract negotiation, become Annex A to the SOW at Attachment A to the conditions of contract.</p> <p>The DOR includes the Commonwealth's:</p> <ol style="list-style-type: none"> <li>a. Specification, which defines the technical requirements for the Supplies sought under the Contract, including ILS products and training, at Part A; and</li> <li>b. the operational and support concepts for employment and support of the Supplies, at Part B.</li> </ol>

**PART A - SPECIFICATION**

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The Specification should be included as Part A of the DOR.

Depending on the level of development anticipated, the nature of the Specification may either tend towards item-level product specifications if the Supplies will be largely off-the-shelf or towards a system-level function and performance specification if some level of development is expected.

The Specification may be realised through a number of alternative approaches, including one or more of:

- a. a plain English description of the required Supplies, comprising a statement of the functions and performance of the item(s);
- b. a list of hardware and software required;
- c. one or more specifications, potentially defining mandatory and desirable requirements for the Supplies;
- d. one or more recognised Standards, with which the Supplies are required to comply;
- e. reference to relevant drawings, specifications and samples (including nominating a known product); and
- f. a functional and performance specification..

Additionally, the Specification needs to include specification requirements (as opposed to work requirements, which are contained in the SOW) for the support-related elements of the Supplies, including:

- a. details of any facilities constraints applicable to the equipment elements of the Supplies;
- b. specification of storage, transportation, and/or inspection requirements;
- c. statements of requirements for any specific types of Support System Components, including specification requirements for:
  - 1) packaging;
  - 2) training equipment and materials;

**ANNEX A**

- 3) publications;
  - 4) engineering drawings;
  - 5) other Technical Data not covered by (3) and (4);
  - 6) Support and Test Equipment (S&TE); and
  - 7) facilities works required; and
- d. statements of requirements for initial training (which is a service and not a product), including:
- 1) types of training (e.g. operator, maintainer, train-the-trainer);
  - 2) types of ADO personnel to be trained; and
  - 3) other technical requirements pertaining to the training.

Note that other support services (e.g. maintenance) should not be included in the DOR because ASDEFCON (Complex Materiel) Volume 2 is not designed to accommodate these ongoing types of support services.

Specifications for items of equipment may already exist (i.e. DEF(AUST)s, Defence Purchase Descriptions (DPDs), manufacturer's specifications, etc), which may not fully meet the requirements for this annex, particularly with respect to the Support System Components. In these circumstances, drafters should reference the existing standard and include the remaining requirements in this annex. Examples of the remaining requirements include:

- a. for packaging, *DEF(AUST) 1000C, "ADF Packaging"*;
- b. for training materials, refer to the single Service training manuals (eg, *AAP 2002.001 (Air Force), Manual of Land Warfare 3.4.2 (Army), and RAN Training System Manual Volume 1 (Navy)*);
- c. for publications, refer to *DEF(AUST) 5647B, "Technical Manuals Acquisition Guidelines Handbook"*; and
- d. for engineering drawings, *DEF(AUST) 5085B, "Engineering Drawing – Acquisition and Preparation For Defence Equipments"*.

Extant specifications may also contain mandatory process and product requirements. When referencing these extant specifications from within the Specification, drafters should review their full implications, and where they include inappropriate, excessive or irrelevant requirements, these should be excluded by specific qualifying statements within the Specification.

Guidance on the development of specifications that accord with the preceding requirements can be found in:

- a. *ASD QMS Procedure 3-3-1-1, "Specification Development"*;
- b. *LSD SOP-ENG-10, "Specifications and Defence Purchase Descriptions"*; and
- c. *MIL-STD-961D, "Defense Specifications"*, Appendix A (based on the content for an Item Specification (IS)).

**PART B – OPERATIONAL AND SUPPORT CONCEPTS**

The Capability Definition Documents (CDD) Guide states that DMO projects require an Operational Concept Document (OCD) to achieve Second Pass Approval. The Approved OCD to support this acquisition should be included here as Part B of the Description of Requirement (DOR). If the relevant DMO Division Head approves that an OCD is not available or required for this acquisition, a statement of operational and support concepts should be sought from the project Sponsor, or drafted for Sponsor approval, and be included as Part B of the DOR.

**ANNEX A**

The statement of operational and support concepts should:

- a. describe the characteristics of the Mission System and Support System from an operational perspective;
- b. facilitate an understanding of the overall system goals for both the Mission System and Support System;
- c. detail missions and scenarios associated with operations and support of both of the Mission System and Support System;
- d. detail the support concepts, including:
  - 1) key Mission System performance characteristics, including availability, operating tempo, operating cycles, and operating hours, to enable the operational and preparedness needs to be met,
  - 2) key policies and standards associated with the Support System,
  - 3) any constraints imposed by the existing support infrastructure,
  - 4) any constraints imposed by the ADF operating and support environments, and
  - 5) the concepts for operational support, engineering support, maintenance support, supply support and training support, and
- e. identify any constraints or limitations in how the Mission System and Support System satisfy the operational need.

Part B of the DOR provides a reference for determining 'fitness for purpose'.

The Contractor and the Commonwealth rely on Part B of the DOR as the basis for common understandings by all stakeholders, including war fighters (end-users) and system developers. It can be viewed as a translation vehicle between the various specialty domains of the stakeholders.

Drafters preparing a statement of operational and support concepts for inclusion at Part B of the DOR should be guided by the following documents:

- a. *ADO LSA Manual*, Part 3, Chapter 3, Annex A, 'Use Study Report Outline';
- b. *Capability Definition Documents (CDD) Guide*;
- c. Defence Architecture Framework:  
<http://www.defence.gov.au/dhq/cko/archmain.htm>,  
<http://defweb.cbr.defence.gov.au/adhq/ose/VCDF/Staff/KnowledgeStaff/C4/DIEAO/Arch%20Web%20Site/archindex.html>; and
- d. Capability Systems Life Cycle Management (CSLCM) Manual 2002.

Drafters should limit the nature and scope of the statement of operational and support concepts to the minimum level appropriate to the nature of the acquisition. In low complexity acquisitions, a quite simple statement of operational and support concepts may well be adequate. From this perspective, the first of the above references is likely to be the most appropriate for the complexity of acquisitions covered by this template (noting that the Use Study Report in the ADO LSA Manual includes both operational and support concepts).

**PART C**

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The System Specification is to be included here when submitted by the Contractor as a CCP, and the CCP is Approved by the Commonwealth Representative. Any changes to the System Specification are to be incorporated here only after they have been submitted as a CCP, and the CCP Approved.

**ANNEX A**General

It may be appropriate to incorporate tendered information in the DOR during contract negotiations (e.g. through incorporation of the tenderer's product specification(s)), if this will enhance the quality of the description to support Contract management or execution.

Drafters' action:

RFT: Drafters must prepare the DOR to be included as Annex A to the Draft SOW to meet the requirements outlined above.

Contract: Drafters must refine the DOR either before or during contract negotiation, in liaison with the preferred tenderer as required, to ensure that the document included in the Contract provides as precise a description of requirements as practicable, and that it is adequate to support Contract management and execution.

Related clauses/documents:

The **Description of Proposed Solution** Annex of the conditions of tender is used to require tenderers to describe their proposed solution, including recommendations for the ranges and quantities of Support System Components and for training.

The **Price and Delivery Schedule** Attachment to the Contract includes the prices, quantities and delivery details for all items, including the individual Support System Components and training, to be acquired under the Contract.

Optional SOW Clauses:

Nil

**NOT USED**



**ANNEX C****CONTRACT DATA REQUIREMENTS LIST (CDRL)****Purpose**

<u>Reference:</u>	Annex C, clause 1
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Purpose:</u>	To summarise the data deliverables under the Contract and to define their parameters, including required delivery times; Commonwealth Review, Approval and Acceptance rights; and required standards. To set out the processes and procedures for preparation, delivery, management and maintenance of data items by the Contractor.
<u>Policy:</u>	Nil
<u>Guidance:</u>	The purpose of this annex to the SOW is to summarise the data deliverables under the Contract and to define their parameters, including required delivery times; Commonwealth Review, Approval and Acceptance rights; and required standards. The Annex also sets out the processes and procedures for preparation, delivery, management and maintenance of data items by the Contractor.

**CDRL vs DID**

A common misconception is that a CDRL item and the Data Item Description (DID) represent the same thing. The CDRL line number (column 'a' in section 6) refers to a particular line number that is referenced in the SOW and is required to be delivered under the contract. A DID is called out for each CDRL line number (column 'i' in section 6) and specifies the purpose and minimum requirements for the document. There is no 1:1 relationship between them because a given DID may be called out for any number of CDRL line numbers, and ideally the same DID should be referenced across multiple contracts. DMO maintains a library of common DIDs that can be used across all projects and may be modified if necessary.

**Basis for the CDRL**

The Contract data items, defined by the CDRL as individual CDRL line numbers, act as the prime vehicle for information transfer between the Contractor and the Commonwealth. As such, the CDRL needs to consider the processes that the Contractor will adopt, the consequent outputs and hence data items that may be provided and their content.

Best practice suggests that both the Contractor and Commonwealth should establish a working relationship with continuous interaction, better feedback and the avoidance of "big bang reviews". In particular the reviews should avoid overloading both parties so the focus of the review is lost – the consequence of which is that both the end product and the working relationship will suffer.

Reviews are held periodically after contract award to:

- a. enhance communications between disciplines and organisations;
- b. contribute to Commonwealth confidence that the evolving design will meet contractual requirements;
- c. provide technical familiarity with the evolving design;
- d. highlight important, high risk, or controversial alternatives in the design approach which require customer input; and
- e. ensure that interpretation of requirements is in accordance with customer expectations.

Where possible, the Commonwealth should progressively review the Contractor process products throughout the design phases and in between major reviews. The CDRL would still specify the required products for each major review but

## ANNEX C

intermediate steps and products, defined by Contractor's processes, would be used for progressive review. It is expected these would be captured in the Engineering Information System (EIS) and made available to resident Commonwealth staff or via remote on-line access.

Given progressive review of intermediate products, the major design reviews (Mandated System Reviews) would then serve to consolidate and baseline the previous work. If the previous activities have been comprehensive, little new material would be need to be presented at the design review. The review would then take a minimum time with lower likelihood of significant follow-up actions.

### Principles of CDRL Selection and Approval

This is intended to provide the philosophy applied develop the contract CDRL.

### Project Processes

The Commonwealth is responsible for ensuring the adequacy of the development processes for the development of the System as well as the adequacy of the System product. This is, in part, because no amount of end-testing can assure quality that is not built-in along the development path and also since the Commonwealth, as an informed buyer, needs to understand the risks during the development processes. The Commonwealth specifies the framework for the project processes (e.g. EIA-632) in the SOW and the Contractor, using its expertise, tailors these mandated processes in the appropriate plans and provides the detailed processes to undertake the job.

### What Data Items?

#### *Process Definition vs Process Work Products*

The required data items must be considered in the context of the relevant project processes. The data items that need to be specified by the CDRL can be divided into two basic types:

- a. process definition data items, such as the PMP and SEMP; and
- b. process work product data items, such as a Project Status Report (PSR) or System Specification.

Process-definition data items should be relatively static documents, and only change when the project processes are changed or inadequately defined. This includes the situation in which the process definition data item needs to be updated to address future phases of the project not covered in the existing data item. Process work product data items may be either static or dynamic depending upon whether they are reporting on the process or defining the system products and its design. As an example, the Risk Management Plan (RMP) should define the risk management strategy and processes, which should not change over time. However, the risk register (part of the PSR), which captures the individual risks at any point in time, will change throughout the life of the project.

The work-products data items are required for one or more of the following:

- a. to monitor project progress (e.g. project status report, issue based metrics);
- b. to verify that the processes are being followed (e.g. design review package);
- c. to define design goals (e.g. system specification, internal interface documents);
- d. to allow the Commonwealth to provide early feedback to contractor as to suitability of design and to avoid nugatory work on the part of the contractor (e.g. design documents, human factors design output, design review package);
- e. to verify system against design goals (test plans, reports);



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- f. form part of the operational system that consists of equipment people and processes (training, operational manuals); and
- g. permit the ongoing support and development of the system (maintenance manuals, configuration information, and design data).

**Timing for Data Item Deliveries**

Data items that define processes should be delivered before those processes are implemented within the project and, in general, are required at the start of the project. Ideally, these should be delivered as a set rather than in a piecemeal fashion, to ensure that the processes form a complete set and are harmonised.

Data items that are the work products of the process should be delivered as they are produced. Of course, these data items must also pass through the Contractor's internal review and approval. For iterative processes such as HMI development, draft data items may be required to reflect the current status.

For those data items in which the format and content need to be Approved (or agreed) by the Commonwealth Representative, an outline data item is required before the execution of the process.

**Endorsement of Data Items**

Depending on the significance of the deliverable, the Commonwealth Representative will require differing levels of endorsement. These are, in order of most to least significance:

- a. CCP approval;
- b. Accept;
- c. Approve; or
- d. Review.

The processes associated with these differing levels of endorsement are specified in clause 2.3 of the draft SOW.

All data items should be internally reviewed and, if necessary, approved by the Contractor before presentation to the Commonwealth Representative.

Data items that define project processes must be Approved by the Commonwealth Representative.

Data items that form part of the operational system (e.g. operational manuals) should be Accepted by the Commonwealth Representative.

Data items that become attachments to the Contract (e.g. SS and SSSPEC) should be subject to CCP approval by the Commonwealth Representative.

Data items that permit the ongoing support and development of the system are divided into two cases. Where the Contractor provides the whole-of-life support for the system, these data items should be Reviewed. Where the Contractor may not support the system over its entire life, these data items should be Approved.

Data items that define the output from key design stages (e.g. design review minutes) should be Approved by the Commonwealth Representative.

Data items that monitor progress (e.g. PSR) and verify that the processes are being followed should be reviewed by the Commonwealth Representative. As the series of PSRs represents the history of the project, the comments by the Commonwealth Representative are needed to ensure accuracy. Note that in the case of the progress reports, some items may still need Approval for contractual reasons (e.g. the Cost Performance Reports).

Data items that provide visibility of activities (e.g. EIS databases) or provide early feedback on the design (e.g. design documents) should be supplied to the Commonwealth Representative as review items.

**ANNEX C**Update Schedule for Data Items

Process-description data items must be updated when they no longer accurately reflect the actual processes to be used or the project is entering a different phase that has not been addressed in the current data item. These data items should be updated and Approved before the process is implemented. The process changes within any phase are expected to be rare.

Process work-products data items need to be updated:

- a. if they form part of a configuration baseline that is subject to formal change control (i.e. ECP);
- b. if they are found to be inadequate for their intended purpose;
- c. if they contain inconsistencies or errors of fact; or
- d. if, during a project process and before incorporation into a formal baseline, the data item is required to disseminate information, but does not accurately reflect the current situation.

**Management of Data Items**

<u>Reference:</u>	Annex C, clause 2
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Policy:</u>	Nil
<u>Guidance:</u>	No tailoring is expected in this section.

**ANNEX C****Explanation of the CDRL**

<b><u>Reference:</u></b>	Annex C, clause 3
<b><u>Sponsor:</u></b>	Standardisation Branch
<b><u>Status:</u></b>	Core
<b><u>Policy:</u></b>	Nil
<b><u>Guidance:</u></b>	<p>The drafter must ensure that each line item in the CDRL has been referenced from the SOW and that each line item has been given a unique identifier, name and cross reference that are consistent with the SOW.</p> <p>Delivery schedules should consider the expected maturity of the document, the ability of the Commonwealth to adequately review it in the specified time, and the risk to the program.</p> <p>At least one hard copy should be requested when the line item is for Commonwealth Approval or Acceptance, ensuring that the appropriate Contractor signatures are retained. Wherever possible, the use of softcopy is encouraged, though the ability of the Commonwealth to interpret and review the relevant file format needs to be addressed in the wording of the CDRL and SOW.</p> <p>DIDs need to be carefully chosen and uniquely identified as discussed in section 6.</p> <p>The drafter needs to consider the actual period required to review each data item before inserting periods in the CDRL. Factors to be considered include:</p> <ol style="list-style-type: none"><li>a. the size and complexity of the document;</li><li>b. whether a preliminary or draft version would already have been reviewed;</li><li>c. the need to involve external agencies or Approval authorities; and</li><li>d. conflicting requirements (e.g. the need to review more than one data item concurrently).</li></ol>

**ANNEX C****Delivery Addresses**

<u>Reference:</u>	Annex C, clause 4
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Policy:</u>	Nil
<u>Guidance:</u>	The drafter must ensure that each line item in the CDRL has been referenced from Drafters should think carefully about the distribution of data items listed in the CDRL before the RFT is released. Wherever possible, arrange via the Contract for the Contractor to send the appropriate quantities of data items to all Commonwealth locations that require the data item. Add to the distribution list in the CDRL and expand as required below.

**ANNEX C****General Requirements for the Data Items**

<u>Reference:</u>	Annex C, clause 5
<u>Sponsor:</u>	Standardisation Branch
<u>Status:</u>	Core
<u>Policy:</u>	Nil
<u>Guidance:</u>	

**5.1 - DATA ITEM MEDIA**

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If on-line access or on-line delivery of information is specified in the SOW, then this section needs to be modified appropriately.

Drafters should note that USA-based contractors will base their normal business practices on letter size paper. Requiring the use of A4 type paper will increase the cost above that for letter format paper.

Drafters should carefully consider the preferred electronic format. The ILS section of the SOW specifies the Continuous Acquisition and Lifecycle Support (CALs) requirements for all Technical Data and the requirements specified here should be consistent with the requirements in the SOW.

**5.2 - FORMAT INSTRUCTIONS**

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The requirements in this area may be expanded or contracted as assessed by each project on a risk basis. For example, Commonwealth Representative staff may need to control the document reference number and format to integrate with an existing suite of documentation.

**5.3 - CONTENT INSTRUCTIONS**

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The requirement for submitted data items (eg manuals) to satisfy a certain reading grade level (e.g. RGL 9) could be included as necessary. This is to ensure that the data item is written focussed at an acceptable level of reading difficulty.

**5.4 - USE OF EXISTING DATA**

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No tailoring expected.

## ANNEX C

**Contract Data Requirements List**

<b><u>Reference:</u></b>	Annex C, clause 6
<b><u>Sponsor:</u></b>	Standardisation Branch
<b><u>Status:</u></b>	Core
<b><u>Policy:</u></b>	Nil
<b><u>Guidance:</u></b>	The Data Item Descriptions (DID) can be accessed from the "DMO Assets" folder located within the <i>ASDEFCON (Strategic Materiel)</i> website at:

<http://stagedao.cbr.defence.gov.au/magd/CPO/publications/ASDEFCONSM/ASDEFCONSM.html>

Drafters should download the most recent DID version from the website, and specify the version in place of the 'x' under the Data Item Description Reference column. For example, Version H of the Project Management Plan DID will be referenced as DID-PM-MGT-PMP-VH.

If project-specific data items are required (e.g. to meet regulatory requirements), drafters should generate these additional DIDs using the standard format and approach utilised for the Standard Asset DIDs. The short title for the DID should then be incorporated into the CDRL, along with the other information required. To the extent practicable, drafters should avoid using project-specific DIDs unless no other option is available. Drafters also need to ensure that access to all DIDs is provided to tenderers, which may be achieved through:

- a. attachment to the draft Contract (e.g. as another annex to the SOW);
- b. provision of the DIDs in soft format (e.g. CDROM) to the respective tenderers; or
- c. access to the DIDs through a project-specific web site.

**Drafter's Action:** The CDRL is to be amended, both prior to release of the RFT and prior to Contract signature, to:

- a. ensure that all (and only) those data items called up in the draft SOW (including though other DIDs (e.g. Risk Log)) are invoked;
- b. ensure that the latest versions of the data items are referenced;
- c. ensure that the appropriate level of endorsement (i.e. Review, Approval, Acceptance, and CCP approval) for each data item or versions of data items is included, consistent with the guidance provided herein and the principle of Clear Accountability In Design (CAID);
- d. ensure that the scheduling of the delivery times for data items reflects the requirements of the project, the interactions between data items, and the interrelationships with the developmental cycle for the Mission System and elements of the Support System;
- e. ensure that the Commonwealth review times for data items reflect the factors discussed in the guidance;
- f. reflect the method of delivery (e.g. hard copy, electronic or via a Contractor Integrated Technical Information Service (CITIS));
- g. reflect the required distribution of data items;
- h. reflect those data items for which prior Approval has been provided, such as through contract negotiations.

Drafters are to ensure that access to the draft DIDs is provided to each tenderer.

**Related Clauses:** Clause 2.3 of the draft SOW requires the Contractor to produce, update and deliver the data items referenced in the CDRL. The clause also details the Contractor's obligations and the Commonwealth's rights with respect to processing the data items.

**ANNEX C**

Further Reading: Refer to the Philosophy Volume of the ASDEFCON (Strategic Materiel) Handbook for a discussion of the Guiding Principles and the CAID philosophy.



**NOT USED**

