



Australian Government
Department of Defence

[INSERT NAME OF CAPABILITY/SYSTEM] SUPPORT CONTRACT

CONTRACT NO: (INSERT NUMBER)

DETAILS SCHEDULE

PARTIES

COMMONWEALTH OF AUSTRALIA represented by the Department of Defence

ABN 68 706 814 312 (Commonwealth)

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

(Insert full name of Contractor) ABN (Insert Contractor's ABN) (Contractor)

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

INFORMATION TABLE

Item	Information		
Item 1 (clause 1.4)	Effective Date: (Core)	(INSERT DATE)	
Item 2 (clause 1.5)	Planned Operative Date: (Core)	(INSERT DATE)	
Item 3 (clause 1.9)	Term: (Core)	Note to drafters: Select either Option A, B or C corresponding to the Term option selected at clause 1.9 and delete all other options.	
		Option A: For where an Award Term model is selected	
		Initial Term	[INSERT PERIOD - E.G. 'five years'] after the Operative Date
		Maximum Term	[INSERT MAXIMUM TERM OF CONTRACT] after the Operative Date
		Option B: For where a Fixed Term is selected	
		Fixed Term	[INSERT PERIOD - E.G. 'five years'] after the Operative Date
		Option C: For where a Renewal Term model is selected	

Item	Information		
		Initial Term	[INSERT PERIOD - E.G. 'five years'] after the Operative Date
		Renewal Term	[INSERT PERIOD OF RENEWAL TERM]
		Maximum Term	[INSERT MAXIMUM TERM OF CONTRACT] after the Operative Date
Item 4	Base Date: (Core)	[INSERT DATE] Note to drafters: The Base Date is ordinarily one month before the Closing Time.	
Item 5 (clause 3.14.4)	Task-Priced Services Limit: (Optional)	[INSERT ANNUAL AMOUNT OR OTHER RELEVANT AMOUNT]	
Item 6 (clause 3.16.2)	Pre-Authorised Ad Hoc Services Limit: (Optional)	<p>[INSERT AMOUNT] for a single Ad Hoc Service in relation to clause 3.16.2;</p> <p>[INSERT AMOUNT] for the cumulative value of claims made by the Contractor for Ad Hoc Services made over the period specified in clause 3.16.2e; and</p> <p>[INSERT NUMBER OF CLAIMS] for Ad Hoc Services over the period specified in clause 3.16.2e.</p>	
Item 7 (clause 7.5)	Bank Guarantee for Mobilisation Payment: (RFT Core)	Mobilisation Security Amount:	(INSERT \$ AMOUNT BEING 50% OF THE MOBILISATION PAYMENT)
		Mobilisation Security Date:	[INSERT DATE]
Item 8 (clause 7.5.5b)	Bank Guarantee for Performance: (RFT Core)	Performance Security Amount:	\$(INSERT AMOUNT)
		Performance Security Date:	[INSERT DATE AFTER THE EFFECTIVE DATE BUT NO LATER THAN THE OPERATIVE DATE]
		Release Event:	[INSERT EVENT THAT WILL LEAD TO RELEASE OF PERFORMANCE SECURITY BY THE COMMONWEALTH]
Item 9 (clause 7.8)	Deed Guarantee of Indemnity: (RFT Core)	<input type="checkbox"/> Yes / <input type="checkbox"/> No Guarantor: (INSERT NAME)	
Item 10 (clause 7.13)	GST Agent: (RFT Core)	Address:	(INSERT ADDRESS) ABN: (INSERT ABN)
		Email:	(INSERT EMAIL ADDRESS)
Item 11 (clause 8.1.1)	Defect Notification Period: (Core)	From the Operative Date until [INSERT PERIOD] after expiry or earlier termination of the Contract.	
Item 12 (clause 8.2.1)	Defect Rectification Period:	If the Defect is a Latent Defect:	

Item	Information		
	(Core)	<p>in the case of Deliverables which are Accepted, from Acceptance of the Deliverable until [INSERT PERIOD] after Acceptance of the Deliverable; and</p> <p>in all other cases, from satisfactory completion of performance of the relevant Service until [INSERT PERIOD] after such completion.</p> <p>If the Defect is not a Latent Defect:</p> <p>in the case of Deliverables which are Accepted, from Acceptance of the Deliverable until [INSERT PERIOD] after Acceptance of the Deliverable; and</p> <p>in all other cases, from satisfactory completion of performance of the relevant Service until [INSERT PERIOD] after such completion.</p>	
<p>Item 13 (clause 9.1)</p> <p>Note to drafters: Delete insurance policies if they do not apply.</p>	<p>Approved Contractor Insurance Program Status: (Core)</p> <p>Limits of indemnity required insurances: (Core)</p>	<p><input type="checkbox"/> Yes / <input type="checkbox"/> No</p> <p>Public liability: (clause 9.1.4a)</p> <p>Products liability: (clause 9.1.4b)</p> <p>Public and products liability tangible property sublimit: (clause 9.1.4e)</p> <p>Professional indemnity: (clause 9.1.5)</p> <p>Industrial special risks business interruption period: (clause 9.1.6)</p> <p>Motor vehicle insurance: (clause 9.1.8b)</p> <p>Aviation liability: (clause 9.1.10a)</p> <p>Aviation products liability: (clause 9.1.10b)</p> <p>Aviation liability tangible property sublimit: (clause 9.1.10e)</p> <p>Hangarkeepers: (clause 9.1.11)</p>	<p>AMOUNT]</p> <p>million</p> <p>AMOUNT]</p> <p>million</p> <p>AMOUNT]</p> <p>million</p> <p>AMOUNT]</p> <p>million</p> <p>[INSERT NUMBER] weeks</p> <p>AMOUNT]</p> <p>million</p> <p>AMOUNT]</p> <p>million</p> <p>AMOUNT]</p> <p>million</p> <p>AMOUNT]</p> <p>million</p>

Item	Information		
		Marine liability: (clause 9.1.13)	[\$[INSERT AMOUNT] million]
		Marine liability tangible property sublimit: (clause 9.1.13c)	[\$[INSERT AMOUNT] million]
		Ship repairers liability: (clause 9.1.14)	[\$[INSERT AMOUNT] million]
		Ship repairers liability tangible property sublimit: (clause 9.1.14c)	[\$[INSERT AMOUNT] million]
		Cyber: (clause 9.1.15)	[\$[INSERT AMOUNT] million]
		Contract works advanced consequential loss period: (clause 9.1.16b)	[INSERT NUMBER] weeks
		Loss of or damage to Defence property (other than Deliverables or Products Being Supported): (clause 10.10.1a)	[\$[INSERT AMOUNT] million]
Item 14 (clause 10.10.1)	Limitation Amount: (Core)	Loss of or damage to Defence property: (clause 10.10.1a)	[\$[INSERT AMOUNT] million]
		Liquidated Damages (clause 10.10.1b)	[\$[INSERT AMOUNT] million]
		Loss of or damage to Deliverables or Products Being Supported (including loss of use of Deliverables or Products Being Supported), and Losses other than those referred to in clauses 10.10.1a and 10.10.1a: (clause 10.10.1c)	[\$[INSERT AMOUNT] million]
Item 15 (clause 10.10.3)	Overall Limitation Amount: (Optional)	Loss of any kind:	[\$[INSERT AMOUNT] million]
Item 16 (clause 10.11)	Renegotiation Threshold: (Core)	[\$[INSERT AMOUNT] million]	
Item 17 (clause 11.9.3a)	Approved Subcontractor Threshold: (Core)	[\$[INSERT \$A AMOUNT] million per annum.	
Item 18 (clause 11.10)	Defence Security: (Core)	Security classification of information, assets and work to be performed under the Contract: (clause 11.10.3)	[INSERT CLASSIFICATION]

Item	Information		
		Personnel security clearance: (clause 11.10.3b)	[INSERT CLASSIFICATION]
		DISP membership required: (clause 11.10.4 and 11.10.5) Note to Drafters: Delete DISP Governance Level, DISP Personnel Security Level, DISP Physical Security Level and DISP Information / Cyber Security Level if DISP membership is not required.	<input type="checkbox"/> Yes / <input type="checkbox"/> No
		DISP Governance Level: Note to Drafters: In accordance with Control 16.1 of the DSPF, the DISP membership level required for the Governance element must equal the highest DISP membership level required for the other elements.	[INSERT LEVEL] [INSERT SPECIFIC DETAILS IF REQUIRED]
		DISP Personnel Security Level:	[INSERT LEVEL] [INSERT SPECIFIC DETAILS IF REQUIRED]
		DISP Physical Security Level:	[INSERT LEVEL] [INSERT SPECIFIC DETAILS IF REQUIRED]
		DISP Information / Cyber Security Level:	[INSERT LEVEL] [INSERT SPECIFIC DETAILS IF REQUIRED]
		Security Classification and Categorisation Guide included: (clause 11.10.7)	<input type="checkbox"/> Yes / <input type="checkbox"/> No
		COMSEC material: (clause 11.10.9 and 11.10.10) <input type="checkbox"/> Yes / <input type="checkbox"/> No	<input type="checkbox"/> transmitted in Australia <input type="checkbox"/> transmitted overseas
Item 19 (clause 12.1)	Governing law: (Core)	[INSERT RELEVANT STATE OR TERRITORY]	
Item 21 (clause 13.1)	Management Representatives (position): (Core)	Commonwealth:	(INSERT DETAILS)
		Contractor:	(INSERT DETAILS)
Item 22		Commonwealth:	(INSERT DETAILS)

Item	Information		
(clause 13.1)	Senior Representatives (position): (Core)	Contractor:	(INSERT DETAILS)

PART 2 – DRAFT CONDITIONS OF CONTRACT

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1 CONTRACT FRAMEWORK

1.1 Definitions (Core)

1.1.1 In the Contract, unless the contrary intention appears, words, abbreviations and acronyms have the meanings given to them in the Details Schedule, or by the Glossary at Attachment M. The Glossary also contains definitions of WBS elements, a list of documents referred to in the Contract and details of the version that is applicable to the Contract.

1.2 Interpretation (Core)

1.2.1 In the Contract, unless the contrary intention appears:

- a. headings are for the purpose of convenient reference only and do not form part of the Contract;
- b. the singular includes the plural and vice-versa;
- c. a reference to one gender includes any other;
- d. a reference to a person includes a body politic, body corporate or a partnership;
- e. if the last day of any period prescribed for the doing of an action falls on a day which is not a Working Day, the action shall be done no later than the end of the next Working Day;
- f. a reference to an Act is a reference to an Act of the Commonwealth, State or Territory of Australia, as amended from time to time, and includes a reference to any subordinate legislation made under the Act;
- g. a reference to a clause includes a reference to a subclause of that clause;
- h. a reference to a 'dollar', '\$', '\$A' or 'AUD' means the Australian dollar;
- i. a reference to a specification, publication, Commonwealth policy or other document is a reference to that specification, publication, Commonwealth policy or document, in effect on the Effective Date specified in the Details Schedule, or alternatively, a reference to another version of the document if agreed in writing between the parties;
- j. the word 'includes' in any form is not a word of limitation;
- k. a reference to a party includes that party's administrators, successors, and permitted assigns, including any person to whom that party novates any part of the Contract; and
- l. a provision stating that a party 'may' agree or consent to something, approve or reject something, or take or decline to take an action, means that the party may exercise its discretion in deciding whether or not to do so, and may impose conditions on any such agreement, consent or approval.

1.3 Objectives (Core)

1.3.1 The objectives of the parties in entering into the Contract are:

- a. to ensure that, for the payments provided for under the Contract, the Contractor provides the Services on time, on budget and to the required level of performance, safety, quality and capability, including the Outcomes and otherwise in accordance with the Contract;
- b. to provide materiel elements and associated services, Intellectual Property (IP) rights, Technical Data (TD), know-how and know-why, which enable an effective Capability that:
 - (i) achieves the ADF's operational requirements for the Capability, including the Outcomes set out in the Contract;
 - (ii) achieves Defence's Sovereignty needs, including providing the Commonwealth with the capability to have enduring sovereign control over the operation and sustainment of the Capability to which the Products Being Supported relate;

- (iii) ensures Materiel Safety, achieves Environmental Outcomes, and complies with, and enables the Commonwealth to comply with, all applicable environmental and safety laws and related regulatory requirements; and

Note to drafters: Insert any additional procurement-specific ADF Capability Objectives, such as:

- a. minimises the Total Cost of Ownership; or**
- b. is able to be evolved to address technology evolution, Supportability concerns, and changes to operational needs, threats, and external systems and interfaces.**

- (iv) **[INSERT PROCUREMENT SPECIFIC OBJECTIVES IF ANY];**

(collectively, the 'ADF Capability Objectives');

- c. to:

- (i) within the context of clause 1.3.1d, identify and pursue opportunities to maximise the participation of Australian Entities in the performance of the Contract;
- (ii) facilitate the creation, enhancement and/or maintenance of Industrial Capabilities within Australia and New Zealand to satisfy the Contract requirements, achieve the ADF Capability Objectives, and support government's and Defence's goals for Australian Industry, as set out in Defence industry policy; and
- (iii) ensure that Australian Industry has the necessary technology, IP rights, TD, know-how and know-why to participate in future development and sustainment work in relation to the Capability to which the Products Being Supported relate,

(collectively, the 'Australian Industry Capability (AIC) Objectives');

- d. to obtain value for money for the Commonwealth on a whole-of-life basis in relation to the provision of the Services in accordance with the Commonwealth Procurement Rules (CPRs), including through minimising the Total Cost of Ownership as required by the Contract;
- e. to obtain for the Contractor as a commercial entity a reasonable return on its investment when it performs the Contract efficiently and successfully, being a return that appropriately reflects the properly managed risks assumed by the Contractor in the performance of the Contract;
- f. for each party to perform their respective obligations under the Contract with full commitment to fostering trust, cooperation and collaboration, including by:
 - (i) communicating openly and honestly and in a timely manner;
 - (ii) sharing information to support effective decision making and using information shared for positive outcomes;
 - (iii) working together respectfully, productively and in a timely manner to achieve best for Capability outcomes;
 - (iv) taking accountability and delivering on commitments;
 - (v) assigning personnel with the requisite capability and capacity for collaborative working;
 - (vi) providing proactive, cooperative and flexible support when challenges arise; and
 - (vii) accepting and respecting decisions once made; and
- g. **[INSERT PROCUREMENT SPECIFIC OBJECTIVES IF ANY].**

1.3.2 Without in any way affecting or overriding the other terms of the Contract, each party agrees to perform its obligations and enforce its rights under the Contract having regard to, and with the aim of, achieving the objectives described in clause 1.3.1.

1.4 Effective Date (Core)

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

1.5 Operative Date (Core)

- 1.5.1 The Commonwealth has no obligations under the Contract before the Operative Date other than:
- a. complying with the Commonwealth's obligations under the Contract Data Requirements List at Annex C to the SOW in respect of those data items to be delivered to the Commonwealth prior to the Operative Date;
 - b. those obligations in the Approved Phase In Plan which are to be performed by the Commonwealth prior to the Operative Date;
 - c. to the extent provided in this clause 1.5.1;
 - d. the obligations under clause 6.4, where a delay to the Contractor's performance of its obligations under the Contract is caused by a Commonwealth failure to perform its obligations under clause 1.5.3b;
 - e. the obligations under clause 11.3.2b in relation to the protection of Confidential Information;
 - f. the obligation to pay the Milestone Payments in respect of those Milestones identified for achievement prior to the Planned Operative Date specified in the Details Schedule, upon achievement of the relevant Milestone in accordance with the Contract; and

Note to drafters: Include in clause 1.5.1g any Commonwealth obligations that will apply prior to the Operative Date such as specific sections of the COC and the SOW that set out Commonwealth obligations during Phase In.

Obtain expert advice before making any payment obligations operative prior to the Operative Date.

- g. **[INSERT ANY OTHER SPECIFIC CLAUSES THAT WILL APPLY TO THE COMMONWEALTH PRIOR TO OPERATIVE DATE].**
- 1.5.2 Clause 1.5.1 does not limit or affect the Commonwealth's rights under the Contract, including rights in relation to the Contractor's obligations under this clause 1.5.

Note to drafters: The events listed in clause 1.5.3 are examples of events which may need to be completed prior to the Operative Date. This clause should be tailored by the drafter to suit the circumstances of the Contract, by adding to and amending the subclauses below.

- 1.5.3 On or before the Planned Operative Date:
- a. the Contractor shall:
 - (i) achieve **[INSERT 'Engineering / Maintenance Organisation approval / accreditation' AS REQUIRED]**;
 - (ii) have the necessary Support Resources available, including all required Facilities and arrangements established for sourcing Stock Items, to be able to provide the Services;
 - (iii) establish and achieve Acceptance of any Defence-Required Australian Industrial Capabilities (DRAICs) required to be Accepted by the Operative Date;
 - (iv) establish the capabilities, including Support Resources and any applicable Subcontracts, necessary to implement those Australian Industry Activities (AIAs) (other than DRAICs) required for Services commencing from the Operative Date;
 - (v) introduce the DMS into operational use in accordance with clause 2.3 of the SOW;
 - (vi) complete all Phase In activities required under the Approved Phase In Plan and the SOW to be completed on or before the Planned Operative Date;
 - (vii) if Products are to be supplied by the Contractor under another contract, achieve Acceptance for the applicable Products as defined in that contract;
 - (viii) deliver to the Commonwealth the data items required by the CDRL to be delivered on or before the Planned Operative Date and, if required under the CDRL, achieve Approval or Acceptance of those data items;

- (ix) provide the financial securities required under clauses 7.5 and 7.5.5b;
- (x) obtain all personnel security clearances for Contractor Personnel that are necessary for the performance of the Services from OD in accordance with clause 11.10;
- (xi) hold and provide to the Commonwealth Representative copies of all of the necessary facility licences and approvals for the nature of the work to be performed in each of the Facilities to be used by the Contractor for the purposes of the Contract;

Note to drafters: If clause 9.1.29 is included in the draft contract, then include the text in square brackets below, otherwise delete.

- (xii) **[subject to clause 9.1.28]** provide the Commonwealth Representative with evidence of the insurance required to be effected and maintained under clause 9.1;
- (xiii) obtain all relevant Authorisations and provide copies of those Authorisations to the Commonwealth Representative;
- (xiv) **[INSERT OTHER ITEMS AS REQUIRED]**; and
- (xv) **[INSERT LAST ITEM OF LIST]**; and

Note to drafters: Include in clause 1.5.3b Commonwealth obligations to 'dovetail' with the list in clause 1.5.3a.

- b. the Commonwealth shall:
 - (i) deliver, or provide the Contractor with access to, the GFM required by Annex A to Attachment E to be delivered or provided before the Planned Operative Date;
 - (ii) complete those Phase In activities required by the Approved Phase In Plan and the SOW to be completed by the Commonwealth before the Planned Operative Date;
 - (iii) following delivery by the Contractor, action in accordance with the CDRL the data items required to be delivered by the Contractor before the Planned Operative Date;
 - (iv) **[INSERT OTHER ITEMS AS REQUIRED]**; and
 - (v) **[INSERT LAST ITEM OF LIST]**.
- 1.5.4 Subject to clause 1.5.5, if the Commonwealth is satisfied that all the obligations under clause 1.5.3 have been fully performed in accordance with the Contract, the Commonwealth Representative shall issue a notice to the Contractor specifying the date on which the last of those obligations was fully performed and specifying the '**Operative Date**' for the purposes of the Contract. Unless agreed otherwise in writing, the Operative Date shall be the later of:
- a. the date the Commonwealth Representative specifies as the date on which the last of the obligations under clause 1.5.3 have been fully performed in accordance with the Contract; and
 - b. the Planned Operative Date.
- 1.5.5 If, for any reason, the Contractor has not performed an obligation under clause 1.5.3a by the Planned Operative Date, the Commonwealth may, by notice to the Contractor, do any one or more of the following:
- a. specify a new date as the Planned Operative Date;
 - b. waive the requirement for the Contractor to perform the obligation by the Planned Operative Date (subject to conditions, if any, specified in the notice, which may include conditions as to when the obligation is to be performed) and specify a date as the Operative Date;
 - c. recover liquidated damages that may be payable in accordance with clause 10.6 due to a failure of the Contractor to perform an obligation under clause 1.5.3a;

- d. specify a date, no less than 20 Working Days from the date of the notice, on which the Contract will terminate with immediate effect if the obligation has not been fully performed in accordance with the Contract by that date; and
 - e. terminate the Contract with immediate effect from the date of the notice or a later date specified in the notice.
- 1.5.6 The Contractor shall comply with any condition of the notice issued under clause 1.5.5b.
- 1.5.7 Without limiting clause 1.5.4, once the Commonwealth has specified a date as the Operative Date in accordance with clauses 1.5.4 or 1.5.5, the parties agree to amend the Glossary to specify the date that is the Operative Date in accordance with clause 11.1.
- 1.5.8 If the Commonwealth issues a waiver in accordance with clause 1.5.5b, which includes a condition that the obligations in the waiver shall be performed by a specified date, the Commonwealth may (without limiting the Commonwealth's other rights under the Contract or at law or in equity and despite any other provision of the Contract):
- a. suspend an amount from any Milestone Payment or any other amount payable to the Contractor under the Contract prior to, and including, the Operative Date, being in total the amounts that the Commonwealth Representative determines, acting reasonably, to be commensurate with the diminution in value to the Commonwealth as a result of the Contractor's failure to comply with its obligations under clause 1.5.3a by the Planned Operative Date; and
 - b. deduct from the payment of the Recurring Services Fee such amount that reflects the reduction in value of the Services as determined by the Commonwealth Representative, acting reasonably, as a result of the Contractor's failure to comply with its obligations under clause 1.5.3a.
- 1.5.9 The Commonwealth's right to withhold or deduct an amount under clause 1.5.7 shall continue until such time as the Contractor complies with its obligations under clause 1.5.3a.

Note to drafters: Expert advice must be obtained before tailoring clause 1.5.10.

- 1.5.10 If the Commonwealth terminates the Contract pursuant to clause 1.5.5:
- a. the Commonwealth shall be entitled to recover from the Contractor the applicable LD Amount as liquidated damages and not as a penalty; and
 - b. the Contractor shall repay any Milestone Payments paid by the Commonwealth to the Contractor prior to the date of termination under clause 1.5.5.
- 1.5.11 The parties acknowledge and agree that:
- a. the Loss the Commonwealth will suffer as a result of termination pursuant to clause 1.5.5 will, having regard to the governmental and non-commercial nature of the Services and their significance to the defence of Australia, be impossible, complex or expensive to quantify accurately in financial terms;
 - b. the applicable LD Amount is:
 - (i) a genuine pre-estimate of the Loss that would be suffered by the Commonwealth in the circumstances to which clause 1.5.10a applies; and
 - (ii) an appropriate protection of the Commonwealth's legitimate interests in relation to the performance of the Contract; and
 - c. subject to clause 1.5.10b, the amount which the Commonwealth is entitled to recover in accordance with clause 1.5.10a shall be the Commonwealth's only entitlement to recover compensation or damages for Loss suffered if the Commonwealth terminates the Contract pursuant to clause 1.5.5.
- 1.5.12 The parties acknowledge and agree that:
- a. the fact that the Commonwealth has elected (or may have elected) to do any of the things referred to in clause 1.5.5 in respect of any breach shall not, to the extent permitted by law:

- (i) constitute a waiver or election of any of the Commonwealth's rights under the Contract or otherwise at law or in equity in respect of that breach or in respect of any other breach; or
 - (ii) limit or affect the ability of the Commonwealth to terminate the Contract in respect of any breach, notwithstanding that the Commonwealth may have exercised its rights under clause 1.5.5 in respect of any prior breach; and
- b. the Contractor releases the Commonwealth from any claim that it otherwise may have been able to make or bring against the Commonwealth arising out of or in connection with any exercise by the Commonwealth of any of its rights under clause 1.5.5 (including as the exercise of those rights is contemplated in this clause 1.5.12).

1.6 Entire Agreement (Core)

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

1.7 Precedence of Documents (Core)

- 1.7.1 If there is any inconsistency between parts of the Contract, a descending order of precedence shall be accorded to:
- a. the COC (including the Details Schedule) and the Glossary (other than the referenced documents in the Glossary);
 - b. in relation to an S&Q Service, the S&Q Order for the S&Q Service;
 - c. the SOW and its annexes;
 - d. the attachments other than the SOW and the Glossary; and
 - e. any document incorporated by express reference or otherwise referenced as part of the Contract,
- so that the provision in the higher ranked document, to the extent of the inconsistency, shall prevail.

1.8 Contracted Requirement (Core)

- 1.8.1 The Contractor shall, for the payments provided under the Contract, provide the Services and comply with all of its other obligations under the Contract.
- 1.8.2 The Contractor acknowledges and agrees that:
- a. the obligation to provide the Services includes an obligation to do everything necessary and incidental to ensuring the Services are provided, including functions and responsibilities that are reasonably related or required for the proper provision of the Services, even if they are not otherwise expressly mentioned in the Contract;
 - b. the only circumstances in which the Contractor shall be entitled to Performance Relief or Postponement are those in which all of the criteria in clause 6.4 have been satisfied; and
 - c. except where the Contract expressly authorises the Contractor to make a claim to the Commonwealth for a cost incurred by the Contractor, the Contractor is not entitled to claim that cost from the Commonwealth under the Contract.

1.9 Term (Core)

Note to drafters: Select either:

- **Option A (Award Term Contract extensions);**
- **Option B (Fixed-Term contracts); or**
- **Option C (Renewal Term Contract extensions).**

The approach to be taken should be as determined in the Procurement Strategy. Refer to the PPBC Guide for ASDEFCON (Support) for guidance.

Option A: For when an Award Term incentive will apply (preferred option). There are two Award Term models: 'standard Award Terms' and 'rolling-wave Award Terms' that may be included in the draft Contract. This option includes several sub-options and drafters must select those optional clauses that apply to the model being implemented. Options marked A-1A, A-2A etc apply to the standard Award Term and options marked A-1B, A-2B etc apply to the rolling-wave Award Term. If notes to drafters do not indicate one model or the other, then the sub-option applies to both. Refer to the PPBC Guide for ASDEFCON (Support) for further guidance.

- 1.9.1 The Contract expires at the end of the Initial Term specified in the Details Schedule unless it is:
- a. terminated earlier in accordance with the Contract or otherwise; or
 - b. extended by an Award Term in accordance with this clause 1.9.
- 1.9.2 Despite any other provision of the Contract, the Contract may be extended by one or more Award Terms but cannot be extended beyond the Maximum Term specified in the Details Schedule.

Note to drafters: If a rolling-wave Award Term model is used then delete the words 'subject to clause 1.9.16 from clause 1.9.3.'

- 1.9.3 The Contractor acknowledges and agrees that:
- a. **[subject to clause 1.9.16,]** an Award Term shall only be offered where the Commonwealth rates the Contractor's performance as **'satisfactory'** in accordance with clause 1.9.10b for the relevant Award Assessment Period; and
 - b. an extension to the Term by an Award Term offered under clause 1.9.3 shall only be granted if a CCP to extend the Term by the Award Term is Approved by the Commonwealth and executed by both parties.
- 1.9.4 The Commonwealth may, despite the Contractor's performance being assessed as satisfactory for the relevant Award Assessment Period, notify the Contractor that an Award Term shall not be offered:
- a. due to strategic or national interest reasons or other direction from Government; or
 - b. because the Products forming the basis of the Capability will be entirely withdrawn from service at the end of the current Term.
- 1.9.5 The Contractor shall not have any claim against the Commonwealth where the Commonwealth does not offer an Award Term in accordance with this clause 1.9.

Note to drafters: Select the following Option A-1A for standard Award Terms or Option A-1B for rolling-wave Award Terms.

Option A-1A: If a standard Award Term model is selected include this clause.

- 1.9.6 The Commonwealth shall, at least 100 Working Days before the Off Ramp Date for the current Term, determine in accordance with this clause 1.9 if an Award Term will be offered.
- 1.9.7 The date on which the Commonwealth makes its determination under clause 1.9.6 shall be the **'Award Term Determination Date'**.

Option A-1B: If a rolling-wave Award Term model is selected include this clause and insert the Milestone from when Contractor performance will be measured and assessed in accordance with Attachment P.

- 1.9.8 The Commonwealth shall within 20 Working Days following each anniversary of the **[INSERT EITHER, "Operative Date" OR "end of the PIP" OR "end of stage [X] of the PIP"]** determine in accordance with this clause 1.9 if an Award Term will be offered, but only if the Off Ramp Date is more than 120 Working Days from the date of that anniversary. If the Off Ramp Date is less than 120 Working Days from the date of that anniversary, no Award Term shall be offered.
- 1.9.9 The date on which the Commonwealth makes its determination under clause 1.9.8 shall be the **'Award Term Determination Date'**.

Note to drafters: Insert the applicable Milestone which defines the period.

- 1.9.10 The Commonwealth shall, in accordance with clauses b and 1.9.12, assess the Contractor's performance under the Contract for the following period (as applicable) (each an Award Assessment Period):
- a. in respect of the first Award Term, the period from the **[INSERT EITHER "Operative Date" OR "end of the PIP" OR "end of stage [X] of the PIP" WHICH DEFINES THE PERIOD]** until the end of the Review Period immediately prior to the first Award Term Determination Date; and
 - b. in respect of each subsequent Award Term, the period that commences on the day following the end of the previous Award Assessment Period until the end of the Review Period immediately prior to the relevant Award Term Determination Date.
- 1.9.11 The Commonwealth shall rate the Contractor's performance under the Contract for an Award Assessment Period as satisfactory if:
- a. the Contractor has performed its obligations in a manner which satisfies the objectives of the Contract specified in clause 1.3.1;
 - b. the Contractor's performance for each KPI in every Review Period during the Award Assessment Period was assessed as being in Performance Band A or B;
 - c. the Contractor's performance against any Other Performance Measures specified as being relevant to an Award Term decision, is acceptable to the Commonwealth;

Note to drafters: Include clause 1.9.11d if Periodic Cost Reviews have been included at clause 1.11.

- d. the outcome of a Periodic Cost Review (where applicable) conducted in accordance with clause 1.11 is acceptable to the Commonwealth;

Note to drafters: The selection of two unsatisfactory ratings should only be considered where the Award Assessment Period spans a relatively high number of Review Periods (eg, eight Review Periods of three months each).

- e. the Contractor has received no more than **[INSERT EITHER, "one rating" OR "two ratings"]** of **'unsatisfactory'** in respect of the CIE Program at the Performance Assessment Reviews, undertaken in accordance with SOW clause 3.4.5, during the Award Assessment Period; and
- f. the Contractor has not been required to develop and deliver a Remediation Plan or, where the Contractor has been required to develop and deliver a Remediation Plan in accordance with clause 6.12.1 (whether before or during the Award Assessment Period), the Commonwealth has not been entitled to suspend payment under clause 6.12.6a in respect of that Remediation Plan during the Award Assessment Period.

Note to drafters: If a standard Award Term is not selected, delete the words 'Subject to clause 1.9.16' from the following clause 1.9.12.

- 1.9.12 The Commonwealth shall rate the Contractor's performance under the Contract for an Award Assessment Period as unsatisfactory if the Commonwealth's assessment is that during the Award Assessment Period any of the requirements of clause 1.9.10b have not

been met. **[Subject to clause 1.9.16,]** if the Contractor's performance is rated as unsatisfactory by the Commonwealth, the Contractor shall not be offered an Award Term.

Option A-2A: If a standard Award Term model is selected include this clause.

1.9.13 Subject to clause 1.9.15, if the Contractor's performance is rated as satisfactory following an assessment by the Commonwealth, the Commonwealth Representative shall, no later than five Working Days after the Award Term Determination Date, give a notice to the Contractor ('Extension Notice') specifying the period by which the Contract is proposed to be extended ('Award Term'), which shall not be shorter than **[INSERT MINIMUM EXTENSION (EG, two years)]** or longer than **[INSERT MAXIMUM EXTENSION (EG, four years)]**. In determining the duration of the Award Term, the Commonwealth may have regard to the Commonwealth's assessment of the Contractor's performance during the current and any previous Award Assessment Periods.

Option A-2B: If the rolling wave Award Term model is selected include this clause.

1.9.14 Subject to clause 1.9.15, if the Contractor's performance is rated as satisfactory following an assessment by the Commonwealth, the Commonwealth Representative shall, no later than five Working Days after the Award Term Determination Date, give a notice to the Contractor ('Extension Notice') that the Contract is proposed to be extended by one year ('Award Term').

1.9.15 Where an Award Term would extend the Contract to within **[INSERT NUMBER]** years of the Maximum Term, the Commonwealth may, subject to clause 14.4, increase the period of the proposed Award Term specified in the Extension Notice to align with the Maximum Term.

Note to drafters: Clause 1.9.16 gives the Commonwealth the discretion to extend the Term despite an unsatisfactory rating, with this extension to be treated as an Award Term that is subject to a separate Award Assessment process under clauses 1.9.10 to 1.9.12. This extension allows the Contractor to demonstrate that any performance shortfalls have been overcome. Accordingly, the maximum extension under this clause should be no longer than the minimum Award Term extension that can be granted under clause 1.9.13 (ie, when the Contractor receives a satisfactory performance rating). Refer to the PPBC Guide for ASDEFCON (Support) for further guidance.

Option A-3: If a standard Award Term model is selected include this clause

1.9.16 If the Contractor's performance is rated as unsatisfactory following an assessment by the Commonwealth, the Commonwealth Representative may, no later than five Working Days after the Award Term Determination Date, give an Extension Notice proposing an Award Term. The Award Term shall not be longer than **[INSERT MAXIMUM DCRETIONARY EXTENSION, BEING LESS THAN THE MINIMUM 'SATISFACTORY' AWARD TERM (EG, one year)]**.

Note to drafters: Ensure that the clause references in the following clause are updated to the selected option. For standard Award Term the clause references will be 'clause 1.9.13 or clause 1.9.16' and for a rolling wave Award Term the clause reference will be 'clause 1.9.14'.

1.9.17 If the Commonwealth Representative gives an Extension Notice under **[INSERT EITHER "clauses 1.9.13 or 1.9.16" OR "clause 1.9.14"]**, the Commonwealth shall in the Extension Notice:

- a. state whether the Commonwealth has determined that there is to be a reduction in the scope of the Contract for the proposed Award Term in accordance with clause 1.10; and
- b. provide details of any other proposed changes to the scope of the Services:
 - (i) during the current Term, with the proposed changes commencing no earlier than the current Off Ramp Date; or
 - (ii) for the proposed Award Term.

- 1.9.18 The Contractor shall within 30 Working Days after receipt of an Extension Notice, or such other period as agreed between the parties, submit a CCP in accordance with clause 11.1 to reflect:
- a. the proposed extension to the Term by the proposed Award Term;
 - b. any reduction in the scope of the Contract for the proposed Award Term in accordance with clause 1.10;
 - c. the pricing and payment arrangements (and related financial matters) to apply during the proposed Award Term in accordance with clause 1.9.19, including a detailed breakdown of the pricing, cost components and margins for each line item in the annexes to Attachment B; and
 - d. any other changes to the scope of the Services proposed by the Commonwealth in accordance with clause 1.9.17b.
- 1.9.19 The pricing and payment arrangements to apply during the proposed Award Term shall be the pricing and payment arrangements applicable to the final year of the current Term, adjusted only to reflect:
- a. cost savings arising from the implementation of Approved Innovations / Efficiencies to reduce TCO, which depend upon or that are inter-related with the extension of the Term by the proposed Award Term and cost savings identified in accordance with clause 3.4.5.9b of the SOW;

Note to drafters: Include clause 1.9.19b if Periodic Cost Reviews have been included at clause 1.11.

- b. the outcome of a Periodic Cost Review (where applicable) conducted in accordance with clause 1.11;
 - c. the outcome of any Contract Performance Review conducted in accordance with clause 3.4.4 of the SOW;
 - d. any reduction in the scope of the Contract for the proposed Award Term in accordance with clause 1.10; and;
 - e. any other changes to the scope of the Services proposed by the Commonwealth for the proposed Award Term in accordance with clause 1.9.17b.
- 1.9.20 The Commonwealth may reject a CCP submitted by the Contractor under clause 1.9.18, if:
- a. the CCP has not been prepared in accordance with the Extension Notice, clause 1.9.18 or such other changes agreed by the Commonwealth; or
 - b. the Commonwealth determines, acting reasonably, that the pricing set out in the CCP taken as a whole does not represent value for money for the Commonwealth.

Option A-4: If a rolling-wave Award Term model is selected include this clause.

- 1.9.21 If the Commonwealth has not Approved the CCP referred to in clause 1.9.18 within 95 Working Days of the date of the Extension Notice, the Award Term shall not be granted.

- 1.9.22 If the Off Ramp Date occurs the Contract will not be extended and:
- a. the Phase Out provisions in clause 13.8.2 will apply on and from the Off Ramp Date; and
 - b. the Contract will expire at the end of the Term.

Option B: For when the Contract is to be for a Fixed Term (ie, no Contract extension).

- 1.9.23 Unless terminated earlier in accordance with the Contract or otherwise, the Contract expires at the end of the Fixed Term specified in the Details Schedule.
- 1.9.24 The Commonwealth may give a notice to the Contractor at any time prior to the end of the Fixed Term that some or all of the Phase Out provisions in clause 14 will apply from a date specified in the notice, provided that such date is after the date being **[INSERT PERIOD, EG, one year]** prior to the end of the Fixed Term.

Option C: For when Renewal Term Contract extensions will apply. Renewal Terms are only to be used in a direct-sourcing or similar non-competitive contracting environment and where Award Terms are not feasible. The inclusion of Renewal Terms must be endorsed within the Project Execution Strategy or Support Procurement Strategy, as applicable. Refer to the PPBC Guide for ASDEFCON (Support) for further guidance.

- 1.9.25 The Contract expires at the end of the Initial Term specified in the Details Schedule unless it is:
- a. terminated earlier in accordance with the Contract or otherwise; or
 - b. extended by a Renewal Term specified in the Details Schedule in accordance with this clause 1.9.
- 1.9.26 Despite any other provision of the Contract, the Contract may be extended by one or more Renewal Terms but cannot be extended beyond the Maximum Term specified in the Details Schedule.
- 1.9.27 The Commonwealth may extend the Contract by the Renewal Term, by giving the Contractor a notice ('**Extension Notice**') at least 100 Working Days before the Off Ramp Date. The Commonwealth shall, in the Extension Notice:
- a. state whether the Commonwealth has determined that there is to be a reduction in the scope of the Contract for the Renewal Term in accordance with clause 1.10; and
 - b. provide details of any other proposed changes to the scope of the Services commencing during the balance of the current Term or the proposed Renewal Term.
- 1.9.28 The Contractor shall, within 30 Working Days after a notice under clause 1.9.27 or such other period as agreed by the Commonwealth in writing, submit a CCP in accordance with clause 11.1 to give effect to the Extension Notice.
- 1.9.29 The pricing and payment arrangements to apply during the proposed Renewal Term shall be the pricing and payment arrangements applicable to the final year of the current Term, adjusted only to reflect:
- a. cost savings arising from the implementation of Approved Innovations / Efficiencies to reduce TCO, which depend upon or that are inter-related with the extension of the Term by the proposed Renewal Term and cost savings identified in accordance with clause 3.4.5.9b of the SOW;

Note to drafters: Include paragraph b if Periodic Cost Reviews have been included at clause 1.11.

- b. the outcome of any Periodic Cost Review (where applicable) in accordance with clause 1.11;
 - c. the outcome of any Contract Performance Review conducted in accordance with clause 3.4.4 of the SOW;
 - d. any reduction in the scope of the Contract for the proposed Renewal Term in accordance with clause 1.10; and
 - e. any other changes to the scope of the Services proposed by the Commonwealth in accordance with clause 1.9.27b.
- 1.9.30 If the Commonwealth has not Approved the CCP referred to in clause 1.9.28 before the Off Ramp Date, the Contract will not be extended and:

- a. the Phase Out provisions in clause 14 will apply on and from the Off Ramp Date; and
- b. the Contract will expire at the end of the Term.

1.10 Reduction in Scope for a Contract Extension (Optional)

Note to drafters: Include this clause if Option A - Award Terms or Option C - Renewal Terms was selected at clause 1.9 and the Commonwealth requires the ability to reduce the scope of the Services for a Contract extension. A reduction may occur if a more effective solution becomes available or pre-planned because a component of the Services has been identified for later reallocation to the Commonwealth or as part of a separate contracting activity. Otherwise, the following subclauses should be replaced with a single 'Not used'. When this clause is included, drafters must select either Option A or Option B, for Award Term or Renewal Term Contract extensions, as selected for clause 1.9.

Option A: If Award Terms - Option A was selected at clause 1.9 include this clause. At clause 1.10.3 amend clause in square brackets cross-reference accordingly.

- 1.10.1 The Commonwealth may, in an Extension Notice, reduce the scope of the Contract for an Award Term by removing part of the Services if the Commonwealth has determined that:
- a. the provision of the relevant Services by the Contractor does not represent value for money for the Commonwealth;
 - b. it is necessary for strategic or national interest reasons, or because of a change in the location of the relevant Products, that the relevant Services be provided by a person other than the Contractor (which may include the Commonwealth itself);
 - c. the relevant Services will be provided by the Commonwealth;
 - d. the Commonwealth Representative has formed the view that the Contractor has repeatedly breached a requirement of the Contract in relation to the relevant Services; or
 - e. the relevant Services will not be required because the Commonwealth has determined that one or more of the Products that form the basis of the Capability will be withdrawn from service.

Option B: If Renewal Terms - Option C was selected at clause 1.9 include this clause. At clause 1.10.3 amend clause in square brackets cross-reference accordingly.

- 1.10.2 The Commonwealth may, in an Extension Notice, reduce the scope of the Contract for a Renewal Term specified in the Details Schedule by removing part of the Services.
- 1.10.3 If the Commonwealth gives a notice under clause **[INSERT EITHER 1.10.1 or 1.10.2]**:
- a. the Commonwealth shall not be liable for any Loss suffered or incurred by the Contractor as a result of the reduction in scope;
 - b. the Commonwealth shall only be liable for payments under the payment terms of the Contract as amended in accordance with clause 13.5.7; and
 - c. the Contractor shall comply with clause 13.5.7.
- 1.10.4 This clause 1.10 does not affect the operation of any other rights of the Commonwealth under the Contract or otherwise, including under clauses 13.4 and 13.5.7.

1.11 Periodic Cost Reviews (Optional)

Note to drafters: Periodic Cost Reviews should be considered core for all contracts except for those that are for a 'shorter' fixed term (eg, less than 7 years).

Periodic Cost Reviews should be included in longer-term support contracts (eg, greater than 7 years) to enable the pricing and payment arrangements to be rebaselined at particular times. Typically, this should only need to occur after every 5-7 years. The rebaselining of the pricing

and payment arrangements recognises that, in longer term contracts, prices and price bases will not always change in line with the relevant indices.

1.11.1 Periodic Cost Reviews shall be conducted in accordance with this clause 1.11 and clause 3.4.6 of the SOW.

Option A: If standard Award Terms – Option A-1A was selected at clause 1.9 include this clause.

1.11.2 Periodic Cost Reviews shall be conducted at least three months prior to the end of the Award Assessment Period for **[INSERT TIMEFRAME (eg, "every second" or "every fourth")]** Award Term in order to inform the price and payment arrangements under clause 1.9.19.

Option B: If Renewal Terms - Option C was selected at clause 1.9 include this clause.

1.11.3 Periodic Cost Reviews shall be conducted nine months prior to the Off Ramp Date in preparation for **[INSERT TIMEFRAME (eg, "each" or "every second")]** Renewal Term specified in the Details Schedule in order to inform the price and payment arrangements under clause 1.9.28.

1.11.4 In this clause 1.11, 'Commonwealth' includes its relevant advisers and other persons acting for or on behalf of the Commonwealth.

1.11.5 The Contractor shall:

- a. cooperate with the Commonwealth in respect of each Periodic Cost Review; and
- b. do anything that the Commonwealth reasonably requires for the purpose of each Periodic Cost Review, including providing information and attending meetings, as the Commonwealth requires.

1.11.6 The Contractor shall provide the following information in support of the Periodic Cost Review, at least 20 Working Days prior to the date for the review (as notified by the Commonwealth):

- a. for Recurring Services, an analysis in relation to each line item or element of the Services and prices specified in Annex B to Attachment B, in order to determine the ongoing validity and appropriateness of those Services and prices for the Recurring Services that are intended to be provided under the Contract;
- b. for Task-Priced Services, an analysis of each of the Services and associated prices specified in Annex D to Attachment B, in order to determine the ongoing validity and appropriateness of those Services and prices; and
- c. for S&Q Services, an analysis of the labour and mark-up rates set out in Annex E to Attachment B, including, when adjustment to the rates is considered necessary, a proposal to adjust the rates, including suitable justification for each labour category for which the rate is proposed to be changed (eg, by providing a comparison with current industry norms).

1.11.7 The information to be provided by the Contractor under clause 1.11.6 shall include the following details in relation to Recurring Services and, where a CWBS is required under the Contract, the following details in relation to each CWBS element:

- a. a breakdown of Contractor labour engaged to provide the Recurring Services, by labour category and the period for which engaged (including periods of leave or absence from duty);
- b. Contractor labour rate and number of hours expended on Recurring Services in relation to each location;
- c. materials used in the performance of the Services, including costs, financing charges, interest, overheads on materials, stock, facilities, plant and equipment utilised in relation to the Services;
- d. any other expenses associated with providing the Recurring Services;
- e. details of all margins applied;

- f. prices for Approved Subcontractors, detailing the breakdown of labour and material prices (where applicable);
 - g. prices for any other Subcontractors detailing total labour and material prices (where applicable) per Subcontractor; and
 - h. any other information reasonably required by the Commonwealth Representative to enable the objectives of the review to be achieved.
- 1.11.8 When the Contractor wishes to propose one or more adjustments to the pricing and/or payments through the Periodic Cost Review, it shall include the proposed adjustments together with a justification for the adjustments as part of the information provided under clause 1.11.6.
- 1.11.9 Any adjustments to pricing or payments proposed by the Contractor under clause 1.11.8 shall be:
- a. calculated subject to the overriding consideration that the Commonwealth receives value for money and the revised prices are fair and reasonable and are calculated in a manner that is transparent and avoids any double counting;
 - b. based on the pricing and payment arrangements applicable to the final year of the current Term (or the last full year of the Contract if the Periodic Cost Review is not being conducted for the purposes of extending the Contract), but adjusted having regard to:
 - (i) any incremental costs which will be incurred by the Contractor in performing the Services during the proposed **[INSERT EITHER Award Term OR Renewal Term]**, or during the balance of the Term, if the Periodic Cost Review is not being conducted for the purposes of extending the Contract, except to the extent that those costs:
 - 1) are reflected in the adjustments which have occurred or will occur in accordance with Annex G to Attachment B;
 - 2) arise directly or indirectly as a result of the Contractor not complying with its obligations under the Contract ;
 - 3) could have been reasonably contemplated and allowed for by the Contractor before entering into the Contract and
 - 4) could have been mitigated by the Contractor;
 - (ii) any reduction in costs or other savings, including those which will or are expected to arise as a result of implementing any Approved Innovations / Efficiencies or from any efficiencies implemented by the Contractor other than in accordance with clause 13 of the SOW;
 - (iii) cost savings arising from any amounts previously paid to the Contractor in respect of costs which have not been actually incurred by the Contractor; and
 - c. calculated on the basis that the percentage of price which represents profit will not increase as a result of any change to the prices for the proposed **[INSERT EITHER Award Term OR Renewal Term]** or during the balance of the Term if the Periodic Cost Review is not being conducted for the purposes of extending the Contract; and
 - d. expressed in Base Date (specified in the Details Schedule) amounts.
- 1.11.10 Without limiting clause 11.7 or any other provision of the Contract, the Contractor shall and shall ensure that Approved Subcontractors shall:
- a. provide all information referred to in this clause 1.11 on an Open Book Basis;
 - b. promptly provide the Commonwealth with full access to internal cost estimation, programming, contingency and risk information used by the Contractor and the Approved Subcontractors (as applicable) for their own purposes in calculating the adjustments to the pricing and payments and, to the extent the Commonwealth reasonably considers the information relevant to its assessment of the adjustments;

- c. allow the Commonwealth to review and undertake audits on reasonable notice at reasonable times so as to minimise disruption to the Contractor, the Approved Subcontractors (as applicable), or the Services, to enable the Commonwealth to:
 - (i) assess the reasonableness of the adjustments to the pricing and payments;
 - (ii) understand the basis on which those adjustments to the pricing and payments have been calculated; and
 - (iii) verify compliance with this clause 1.11;
- d. if requested by the Commonwealth:
 - (i) meet with the Commonwealth, or attend any meetings proposed by the Commonwealth; and
 - (ii) provide further details and access to appropriately qualified personnel, to enable the Commonwealth to:
 - (iii) discuss any potential adjustments to the pricing and payments referred to in this clause 1.11 to be contained in any CCP that may be necessary to adjust the pricing and payments set out in the Contract; and
 - (iv) assess the reasonableness of the adjustments to the pricing and payments, to understand the basis on which those adjustments have been calculated, and to verify compliance with this clause 1.11.

1.12 Phase In (Optional)

Note to drafters: Include this clause, if Phase In is included at clause 2.6 of the SOW

1.12.1 The Contractor shall comply with clause 2.6 of the SOW.

Option A: Include these clauses if the Contract follows a Contract (Support).

- 1.12.2 The Contractor acknowledges that it is replacing **[INSERT EITHER "an outgoing contractor" OR "the Commonwealth"]** and that retention of highly skilled and trained Personnel is of paramount importance for satisfactory provision of the Services.
- 1.12.3 The Contractor agrees to take all reasonable steps to facilitate the transfer of the personnel who wish to transfer from an outgoing contractor to the Contractor and who are accepted for engagement by the Contractor.

Option B: Include this clause if the Contract follows a Contract (Acquisition).

- 1.12.4 Notwithstanding anything in the SOW, the Contractor shall, when implementing the Approved Phase In Plan:
 - a. except to the extent agreed in writing by the Commonwealth Representative, ensure there is no interruption to the Capability due to an act or omission of the Contractor;
 - b. cooperate as reasonably necessary with Commonwealth organisations involved in the establishment of related elements of support for the Materiel Systems;
 - c. cooperate as reasonably necessary with any other contractors to the Commonwealth that are establishing or configuring their support capabilities for the Materiel Systems; and
 - d. ensure that the achievement of the Phase In of support capability enables, to the maximum extent practicable, the Commonwealth's validation activities for the acceptance into operational service of the Materiel System.

1.13 Ramp Up (Optional)

Note to drafters: Include this clause, if Ramp Up is included at clause 2.7 of the SOW to manage the increase of Services subsequent to the Operative Date.

1.13.1 The Contractor shall comply with clause 2.7 of the SOW.

Option A: Include this clause if the Contract follows a Contract (Support).

1.13.2 Notwithstanding anything in the SOW, the Contractor shall, when implementing the Approved Ramp Up Management Plan, except to the extent agreed in writing by the Commonwealth Representative, ensure there is no interruption to the **[INSERT EITHER 'planned ramp up of the Capability' OR 'Capability']** due to an act or omission of the Contractor.

Option B: Include this clause if the Contract follows a Contract (Acquisition).

1.13.3 Notwithstanding anything in the SOW, the Contractor shall, when implementing the Approved Ramp Up Management Plan:

- a. except to the extent agreed in writing by the Commonwealth Representative, ensure there is no interruption to the **[INSERT EITHER "planned ramp up of the Capability" OR "Capability"]** due to an act or omission of the Contractor;
- b. cooperate as reasonably necessary with any Commonwealth organisations involved in the establishment of related elements of support for the Materiel Systems;
- c. cooperate as reasonably necessary with any other contractors to the Commonwealth that are establishing or configuring their support capabilities for the Materiel Systems; and
- d. ensure that the achievement of Ramp Up of support capability enables, to the maximum extent practicable, the Commonwealth's validation activities for the acceptance into operational service of the Materiel System.

2 CONTRACT GOVERNANCE**2.1 Representatives (Core)**

- 2.1.1 The Commonwealth Representative is responsible for managing the Contract on behalf of the Commonwealth.
- 2.1.2 The Contractor shall comply with the reasonable directions of the Commonwealth Representative made within the scope of the Contract.
- 2.1.3 The parties may discuss the effect of a direction on the Contractor, including through the Contract Governance Framework set out in Attachment T. If the parties agree that the direction is not consistent with clause 2.1.2, the Contractor may submit a CCP to give effect to the direction.
- 2.1.4 If given orally a direction shall be confirmed in writing by the Commonwealth Representative within 10 Working Days. Unless otherwise specified in the Contract, the Commonwealth Representative has no authority to waive any provision of, or release the Contractor from, its obligations under the Contract except in accordance with clause 11.1 or clause 11.4 of the SOW.
- 2.1.5 The Contractor Representative has the authority to represent the Contractor for the purposes of the Contract.
- 2.1.6 The Commonwealth Representative or the Contractor Representative:
- a. shall advise of a change in representative; and
 - b. may delegate their functions under the Contract, or authorise another person on their behalf to carry out their functions under the Contract,
- by giving a notice to the other party (including updated Notice Details specified in the Details Schedule, and the scope of the delegation or authorisation, as applicable).
- 2.1.7 Unless authorised by the Contract, any work performed or cost incurred by the Contractor in response to a communication from the Commonwealth Representative is at the Contractor's sole risk.

2.2 Notices (Core)

- 2.2.1 Unless the contrary intention appears, any notice under the Contract shall be effective if it is in writing and sent from and delivered to the Commonwealth Representative or Contractor Representative, as the case may be, in accordance with the Notice Details specified in the Details Schedule.
- 2.2.2 A notice given in accordance with this clause 2.2 is deemed to be delivered:
- a. if hand delivered, when received at the address;
 - b. if sent by pre-paid post, in three Working Days when sent within Australia and in eight Working Days when sent by air mail from one country to another; or
 - c. if sent as an email, when the email enters the recipient's information system, unless the sender's information system receives a message within one Working Day that the email has not been delivered to the recipient,
- but if the receipt or entry into the information system is not on a Working Day or is after 5.00pm (recipient's local time) on a Working Day, the notice is taken to be received at 9.00am (recipient's local time) on the next Working Day.

2.3 Governance Framework (Core)

- 2.3.1 The Commonwealth and the Contractor shall manage their Contract relationship, and oversee and manage their respective performance of the Contract, in accordance with the Contract Governance Framework set out in Attachment T.

3 PROVISION OF SERVICES

3.1 Language and Measurement (Core)

- 3.1.1 All information provided as part of the Services under the Contract shall be written in English. If such documentation is a translation into the English language, the translation shall be accurate and free from ambiguity.
- 3.1.2 Measurements of physical quantity shall be in Australian legal units as prescribed under the *National Measurement Act 1960* (Cth), or, if Services are imported, units of measurement as agreed in writing by the Commonwealth Representative.

3.2 Standards of Work and Conformity (Core)

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

3.3 Fitness for Purpose (Core)

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

3.4 Authorisations (Core)

- 3.4.1 The Contractor shall, and shall ensure that its Subcontractors:

- a. obtain and maintain in full force all Authorisations (other than Export Approvals);
 - b. without limiting clause 1.5.3a(xi), take all reasonable steps to obtain and maintain in full force all Export Approvals;
 - c. provide a copy of any Authorisations to the Commonwealth within five Working Days after request by the Commonwealth; and
 - d. ensure that all work under the Contract is performed and the Services are provided in accordance with all Authorisations.
- 3.4.2 The Contractor shall notify the Commonwealth Representative within five Working Days after receiving notification that an Authorisation is refused, revoked or qualified.
- 3.4.3 The Contractor shall notify the Commonwealth Representative within five Working Days after:
- a. the application for an Export Approval; or
 - b. the grant of, or a new requirement for, an Export Approval.
- 3.4.4 The Commonwealth Representative shall, on request by the Contractor, give the Contractor all assistance reasonably required to facilitate the provision of an Export Approval, including the provision of a certificate by the Commonwealth as to the end use of the Services.
- 3.4.5 The Commonwealth shall take all reasonable steps to ensure that the provision and use of GFM under the Contract is permitted under all applicable Export Approvals.
- 3.4.6 The Contractor shall, on request by the Commonwealth, give the Commonwealth all assistance reasonably required to ensure that the provision and use of GFM under the Contract is permitted under all applicable Export Approvals.
- 3.4.7 If a party becomes aware of a breach of an Export Approval, it shall promptly notify the other party and co-operate with any investigation or disclosure to the relevant government authorities in relation to the breach.

3.5 Imports and Customs Entry (RFT Core)

- 3.5.1 The Contractor shall arrange customs entry and the payment of any customs duty applicable to any aspect of the provision of the Services at no additional cost to the Commonwealth, except as provided in this clause 3.5.
- 3.5.2 The Contractor shall give the Commonwealth Representative a notice, including supporting evidence, of any variation to the rate of customs duty applicable to the Services between the Base Date specified in the Details Schedule and the relevant date of entry and:
- a. in the case of an increase, the Contractor may claim reimbursement of an amount equivalent to the extra customs duty payable as a consequence of the increase; or
 - b. in the case of a decrease, the Commonwealth may elect to recover from the Contractor under clause 13.7 an amount equivalent to the reduction in the customs duty payable as a consequence of the decrease. No amount shall be owing to the Commonwealth under this clause 3.5.2 until the Commonwealth elects to recover the amount.
- 3.5.3 The Commonwealth shall not be liable to reimburse the Contractor for any fine or penalty incurred by the Contractor under any Australian customs, excise or duty legislation applicable to the importation of the Services.

3.6 GFM – Provision and Management (Core)

- 3.6.1 The Commonwealth shall deliver or provide access to, and the Contractor shall manage, GFM in accordance with the Contract.
- 3.6.2 The Commonwealth shall notify the Contractor of any known damage, defect or deficiency in the GFM.
- 3.6.3 The Contractor acknowledges and agrees that:
- a. the Commonwealth's obligations to provide GFM on the dates or at the times described in Attachment E or the GFM section of an S&Q Order are subject to the Contractor performing the Services in accordance with clause 6.1.1; and

- b. any delay of the Contractor in meeting its obligations under the Contract may result in the Commonwealth not being able to provide GFM to the Contractor, or access to Products, at the time the Contractor requires delivery of or access to the GFM or Products (as applicable).
- 3.6.4 Subject to the Commonwealth's rights under clause 6.5.6, if at any time the Contractor requires a change to the timing of delivery of or access to GFM or Products, the Commonwealth shall use reasonable endeavours to accommodate such change.
- 3.6.5 To avoid doubt, clause 3.6.4 does not require the Commonwealth to remove GFM or Products from operational requirements, amend any other contracts, incur any additional costs or provide the Contractor with GFM or Products allocated to or available for other contracts.
- 3.6.6 The Contractor shall not be entitled to Performance Relief or Postponement of a date for the provision of Services or a Milestone Date, or to postponement costs, on the basis of any failure by the Commonwealth to deliver or provide access to GFM or Products in accordance with any changed requirement under clause 3.6.4, except to the extent that the requirement for the change resulted from an event or circumstance in respect of which the Contractor was entitled to Performance Relief or Postponement in accordance with clause 6.4.
- 3.6.7 The Contractor shall ensure that the use of GFM does not adversely impact on the provision of the Services or Products.

Option: For when GFI is to be provided.

- 3.6.8 The parties acknowledge that the GFI is not furnished to the Contractor for the purpose of either directing or guiding the Contractor's task under the Contract. The Commonwealth does not warrant the suitability of such GFI for any particular use or application, nor does the Commonwealth warrant the accuracy or precision of the GFI.
- 3.6.9 Except as otherwise provided in this clause 3.5.3, the Contractor shall be responsible for the application or use of the GFI and any conclusions, assumptions or interpretations made by the Contractor on the basis of the GFI, or its application or use of them.

Option: For when the Contract includes GFD or Commonwealth Mandated GFM.

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

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

3.7 Government Furnished Facilities (Optional)

Note to drafters: Use clause 3.7 if there is to be a licence of GFF to the Contractor. If there is not to be a licence of GFF, mark clause 3.7 'Not Used'.

All necessary approvals under the Lands Acquisition Act 1989 (Cth) (LAA) to grant a licence of GFF must be obtained before the Contract is signed. Failure to obtain the necessary LAA approvals before then will breach the LAA.

Drafters must engage with Directorate of Licensing and Leasing (DELL), Infrastructure Division, Security and Estate Group (SEG) when entering into a Contract that will licence GFF to the Contractor.

- 3.7.1 The Commonwealth grants to the Contractor a non-exclusive licence to occupy and use the GFF on the terms set out in Attachment O.
- 3.7.2 Each party shall comply with its obligations under Attachment O and the SOW.

3.8 Commonwealth Property (Core)

- 3.8.1 The Contractor acknowledges that GFM and any other Commonwealth Property provided to or used by the Contractor or a Subcontractor for the purposes of the Contract, remains the property of the Commonwealth.
- 3.8.2 The Commonwealth retains the right to identify Commonwealth Property as its property and the Contractor shall preserve any means of identification.
- 3.8.3 The Contractor shall only use Commonwealth Property:
- a. for the purposes of the Contract;
 - b. in a manner consistent with any applicable requirements for the Commonwealth Property, including as set out in the SOW; and
 - c. for the purposes for which the Commonwealth Property was designed, manufactured or constructed, or otherwise as expressly permitted or required by any prior written Approval of the Commonwealth Representative.
- 3.8.4 The Contractor shall not, without the prior written approval of the Commonwealth Representative, do any of the following:
- a. modify Commonwealth Property;
 - b. move Commonwealth Property from the location to which it was delivered (except to return the property to the Commonwealth); and
 - c. transfer possession or control of Commonwealth Property to any other person,
- except to the extent reasonably necessary to enable the Contractor to satisfy an express requirement of the Contract.
- 3.8.5 The Contractor shall not, without the prior written approval of the Commonwealth Representative, create or allow to be created any Security Interest over any Commonwealth Property.
- 3.8.6 The Contractor shall return all items of Commonwealth Property (including GFM) that are required to be returned to the Commonwealth in accordance with the SOW, Attachment O or as otherwise directed by the Commonwealth Representative.
- 3.8.7 The Contractor acknowledges that it may be provided with the ability to access Commonwealth-held information in connection with its performance of the Contract, including through access to Commonwealth information technology systems. The Contractor shall not access or use Commonwealth-held information except to the extent strictly required for the performance of the Contractor's obligations under the Contract.
- 3.8.8 Without limiting the Contractor's obligations with respect to Commonwealth Property as set out in the SOW and Attachment O, the Contractor shall notify the Commonwealth Representative within five Working Days after becoming aware of any material loss or damage to, or any material defect in, any Commonwealth Property provided to, or used by, the Contractor or a Subcontractor for the purposes of the Contract.

3.9 Government Furnished Services (RFT Core)

- 3.9.1 The Commonwealth shall provide the GFS, and the Contractor shall coordinate the provision of GFS, in accordance with the Contract.
- 3.9.2 If the Commonwealth fails to provide the GFS on the dates set out in Attachment E or the GFS section of an S&Q Order, the Contractor may make a claim for relief and relief costs in relation to the affected Services, except to the extent that the failure to provide the GFS was caused by a Contractor Default. The process for submission and consideration of the claim shall be undertaken, and any rights of the Contractor determined, in accordance with clauses 6.2 and 6.4.

Option: For when the Commonwealth mandates GFS.

- 3.9.3 The Commonwealth shall ensure that the Commonwealth Mandated GFS is fit for its intended purpose (being the purpose specified in respect of the GFS in Attachment E or the GFS section of an S&Q Order) except to the extent that the failure of GFS to be fit for the relevant purpose results from:
- a. any deficiency or other non-compliance in the GFS when it was provided to the Commonwealth, by the Contractor or a Related Body Corporate of the Contractor (whether under the Contract or another contract); or
 - b. a Contractor Default.
- 3.9.4 If the Contractor becomes aware of a deficiency or other issue that may result in the GFS not being fit for its intended purpose, the Contractor shall, as soon as reasonably practicable, notify the Commonwealth of the deficiency or issue.

3.10 Members Required in Uniform (Optional)

- 3.10.1 The Commonwealth may make MRU available for utilisation by the Contractor in accordance with this clause 3.10 and Attachment R. Where the Commonwealth does not make MRU available in accordance with the Contract, the Contractor shall not be entitled to make any claim against the Commonwealth or Commonwealth Personnel and shall not be entitled to claim relief under clause 6.4 or relief from performing its obligations under the Contract.
- 3.10.2 The Contractor shall utilise MRU made available in accordance with Attachment R.
- 3.10.3 If any MRU Credit Rate is specified in Attachment R, the Contractor shall:
- a. credit the Commonwealth with the MRU Credit Rate multiplied by each hour the MRU are available to the Contractor for utilisation in the provision of the Services ('**MRU credit**'); and
 - b. offset against the claims made by the Contractor under clause 7.3 any MRU credit outstanding when a claim is made.
- 3.10.4 MRU remain members of the ADF. However, subject to any limitations in Attachment R, MRU operate under the direction and supervision of the Contractor, and the Contractor shall:
- a. bear the risk of all work performed by the MRU;
 - b. not be entitled to make any claim against the Commonwealth or Commonwealth Personnel arising out of or in connection with the work performed by the MRU; and
 - c. not be entitled to claim relief under clause 6.4 or relief from performing its obligations under the Contract,
- except arising out of or as a consequence of a wilfully wrongful act or omission on the part of the MRU.

3.11 Excess Capacity (Optional)

- 3.11.1 The Contractor shall not make use of Excess Capacity except in accordance with a written agreement between the Commonwealth and the Contractor that contains terms:
- a. specifying the extent and manner of the use of Excess Capacity;
 - b. detailing the savings or returns to the Commonwealth, including any fees (calculated by reference, so far as reasonably practicable, to the market rate of return for the utilised Excess Capacity);
 - c. specifying any limitations on the use of the Excess Capacity;
 - d. specifying the persons to whom the benefit of the Excess Capacity may be applied;
 - e. giving the Commonwealth a right to terminate the agreement, in whole or in part, by notice in writing;
 - f. limiting the Contractor's entire rights and remedies on termination of the agreement to the recovery from the Commonwealth of the actual costs to the Contractor of work performed but incomplete or non-saleable as a result of the termination; and

- g. specifying how the Contractor shall manage risks relating to WHS and the Environment.
- 3.11.2 If the Contractor wishes to use Excess Capacity, the Contractor shall submit a proposal to the Commonwealth Representative that includes the terms required by clause 3.11.1.
- 3.11.3 The Commonwealth Representative shall evaluate a proposal submitted under clauses 3.11.2 or 3.11.4 and within 20 Working Days after receipt, or within such other period as may be agreed, shall either:
 - a. agree to the proposal; or
 - b. reject the proposal giving reasons for such rejection.
- 3.11.4 If the Commonwealth rejects a proposal under clause 3.11.3b, the Contractor may submit a revised proposal which shall be subject to evaluation by the Commonwealth in accordance with clause 3.11.3.
- 3.11.5 Subject to clause 3.11.1e, the Contractor releases the Commonwealth from any claim that it otherwise may have been able to make or bring against the Commonwealth arising out of or in connection with any use of the Excess Capacity by the Contractor.

3.12 Key Persons and Personnel (Core)

Note to drafters: Key Persons are those individuals named in the Approved SSMP for the corresponding Key Staff Position in accordance with clause 9.1.2 of the SOW.

- 3.12.1 The Contractor shall ensure that each person named in the Approved SSMP is appointed to the Key Staff Position nominated for the person, and that each vacancy is filled as soon as practicable by a person accepted under this clause 3.12.
- 3.12.2 If the Contractor becomes aware that a Key Person will or may become unavailable to fill the relevant Key Staff Position for a period of four consecutive weeks or more, the Contractor shall:
 - a. promptly notify the Commonwealth of the impending unavailability; and
 - b. as soon as practicable, nominate a replacement with appropriate experience, skills and expertise.
- 3.12.3 The Commonwealth may give a notice, including reasons, directing the Contractor to remove specified Contractor Personnel from work in respect of the Services, if in the Commonwealth Representative's reasonable opinion that the person specified in the notice is:
 - a. a Key Person who is unable to perform the work required of them under the Contract for reasons of incapacity or incompetence; or
 - b. acting inappropriately to undertake the work required of them under the Contract for reasons relating to WHS, security, equity and diversity, workplace gender equality, probity, or the relationship between the Commonwealth and the Contractor.
- 3.12.4 If the Commonwealth gives the Contractor a notice under clause 3.12.3 the Contractor shall (or shall ensure that the relevant Subcontractor shall):
 - a. within the period specified in the notice, remove the Key Person from the relevant Key Staff Position; and
 - b. as soon as practicable, nominate a replacement with appropriate experience, skills and expertise.
- 3.12.5 For any person nominated as a Key Person or to replace a Key Person, the Contractor shall give the Commonwealth the documentation required by clause 9.1.2.2 of the SOW.
- 3.12.6 The Commonwealth shall notify the Contractor within 10 Working Days after receiving the documentation referred to in clause 3.12.5 whether or not a nomination has been accepted (including reasons if the nomination is rejected). The Commonwealth shall act reasonably in determining whether to accept or reject the nomination. If the Commonwealth notifies the Contractor that a nomination is rejected, the Contractor shall promptly nominate another person to replace the person.
- 3.12.7 The Contractor shall not be entitled to Performance Relief or Postponement of a date for provision of Services or a Milestone Date under clause 6.4 as a result of:

- a. any obligation of the Contractor to remove or replace a person under this clause 3.12 or any failure by the Contractor to provide a replacement person; or
 - b. the exercise by the Commonwealth of any right under this clause 3.12.
- 3.12.8 If the Contractor is required to replace any Key Person under this clause and a replacement person satisfactory to the Commonwealth is not accepted within three months after the Commonwealth first receives or provides notice under clause 3.12.2 or 3.12.3, the Commonwealth may give the Contractor a Default Notice in accordance with clause 13.3.

3.13 Ad Hoc Services (Core)

Note to drafters: Drafters are to amend Clause 3.13.1 to reflect which of clauses 3.14 to 3.16 are included in the Contract. If any of the following clauses are not required, the clauses can be deleted and the heading annotated with 'Not used'.

- 3.13.1 Except as provided in clauses 3.14, 3.15 and 3.16, the Commonwealth has no obligation to pay the Contractor for Ad Hoc Services.

3.14 Task-Priced Services (Optional)

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

- 3.14.1 The Commonwealth Representative may by notice authorise the Contractor to provide a Task-Priced Service described in the notice.
- 3.14.2 If the Commonwealth Representative gives the Contractor a notice under clause 3.14.1, the Contractor shall:
- a. commence the Task-Priced Service within two Working Days of the notice (or within a longer period (if any) specified in the Contract or by the Commonwealth in the notice);
 - b. provide the Task-Priced Service in accordance with the Contract; and
 - c. complete the Task-Priced Service (and achieve Acceptance of any relevant Deliverables) within the period specified for that Task-Priced Service in the Contract (or within the longer period (if any) specified by the Commonwealth in the notice).
- 3.14.3 If the Contractor becomes aware that:
- a. circumstances have arisen in which, in the Contractor's reasonable opinion, the capability of the **[INSERT EITHER "Products Being Supported" OR "Mission System and/or Support System"]** may not be maintained unless a Task-Priced Service is performed; and
 - b. the Commonwealth Representative may not be aware of those circumstances,
- the Contractor shall notify the Commonwealth Representative of the circumstances as soon as is practicable.
- 3.14.4 Despite any other provisions of this Contract:
- a. the Commonwealth shall not be liable to pay to the Contractor more than the Task-Priced Services Limit specified in the Details Schedule in aggregate for Task-Priced Services provided during the Term; and
 - b. if the aggregate amount paid or payable in respect of Task-Priced Services provided during the Term reaches the Task-Priced Services Limit:
 - (i) the Contractor shall immediately notify the Commonwealth;
 - (ii) the Commonwealth may, but is not obliged, to increase the Task-Priced Services Limit by notice to the Contractor; and
 - (iii) the Contractor shall not perform any Task-Priced Services unless the Commonwealth elects to increase the Task-Priced Services Limit.

3.15 Survey & Quote Services (Core)

- 3.15.1 The Commonwealth Representative may request the Contractor to provide a quote for the provision of an S&Q Service described in the request. The request shall be in the form of Part 1 of Annex A to DID-SSM-S&Q.
- 3.15.2 The Contractor shall, before the due date specified by the Commonwealth in the request, conduct a survey of the S&Q Service and submit a quote for the S&Q Service ('**S&Q Quote**') in the form of Part 2 of Annex A to DID-SSM-S&Q. The S&Q Quote shall include:
- a. a price for the provision of the requested S&Q Service;
 - (i) prepared on the price basis specified by the Commonwealth in the request; and
 - (ii) calculated in accordance with Annex E to Attachment B; and
 - b. where applicable or requested by the Commonwealth, a draft of each of the plans and other items referred to in clause 3.3 of the SOW tailored to reflect the specific S&Q Services requested.
- 3.15.3 An S&Q Quote shall take effect when an S&Q Order in the form of Part 3 of Annex A to DID-SSM-S&Q is executed by the Commonwealth in respect of the S&Q Service. The Commonwealth may at any time before executing an S&Q Order cancel a request under clause 3.15.1 by notice to the Contractor. Upon receipt of such a notice, the Contractor shall cease its activities in relation to the request.
- 3.15.4 If the Commonwealth executes a S&Q Order in respect of an S&Q Service:
- a. subject to clause 3.15.5 and 3.15.6, the Contractor shall provide the S&Q Service in accordance with the Contract and the S&Q Order; and
 - b. complete the S&Q Service within the periods specified in the S&Q Order.
- 3.15.5 The S&Q Services shall be provided in accordance with the terms of the Contract, except to the extent that the S&Q Order states that, a provision of the SOW or another attachment identified in the S&Q Order:
- a. does not apply to the provision of the S&Q Service; or
 - b. is amended for the purposes of providing the S&Q Service.
- 3.15.6 Notwithstanding the terms of an S&Q Order, the S&Q Order shall not amend the COC and the COC shall apply to the extent of any inconsistency with the S&Q Order.
- 3.15.7 If the Contractor determines that the outcome of the S&Q Service may require a change to the Contract (other than to the COC), the Contractor shall promptly raise the issue with the Commonwealth Representative and seek a direction as to whether the Contractor is to submit a CCP in accordance with clause 11.1 to give effect to the required change.
- 3.15.8 If the Contractor becomes aware that:
- a. circumstances have arisen in which, in the Contractor's reasonable opinion, the capability of the **[INSERT EITHER "Products Being Supported" OR "Mission System and/or Support System"]** may not be maintained unless a S&Q Service is performed; and
 - b. the Commonwealth Representative may not be aware of those circumstances,
- the Contractor shall notify the Commonwealth Representative of the circumstances as soon as is practicable.

3.16 Pre-Authorised Ad Hoc Services (Optional)

- 3.16.1 Subject to clause 3.16.2, the Contractor may provide a Pre-Authorised Ad Hoc Service without the Commonwealth Representative having authorised the performance of the Service as a Task-Priced Service under clause 3.14 or executed an S&Q Order for the Service under clause 3.15 if the costs to the Commonwealth (whether in monetary or capability terms) for the Commonwealth Representative to authorise a Task-Priced Service or execute an S&Q Order for the provision of the Service would be disproportionate to the value of the Service.

- 3.16.2 Notwithstanding clause 3.16.1, the Contractor shall not provide a Pre-Authorised Ad Hoc Service without the Commonwealth Representative having authorised the performance of the Service as a Task-Priced Service under clause 3.14 or executed an S&Q Order for the Service under clause 3.15 if:
- a. the value of the Ad Hoc Service would exceed the Pre-Authorised Ad Hoc Services Limit specified in the Details Schedule when calculated on the basis of the prices set out in Attachment B;
 - b. the Ad Hoc Service relates to or affects **[INSERT SUBJECT/AREA]** or other subject areas as notified by the Commonwealth from time to time;
 - c. the Ad Hoc Service relates to the performance of an obligation which the Contractor is otherwise required to perform under the Contract;
 - d. the Ad Hoc Service is of a kind that the Commonwealth Representative has specified in a notice to the Contractor;

Note to drafters: For clauses 3.16.2e and 3.16.2e, drafters should amend the period if circumstances require.

- e. the cumulative value of claims made by the Contractor for Ad Hoc Services authorised under this clause 3.16 in the previous three months exceeds the Pre-Authorised Ad Hoc Services Limit; or
 - f. the number of claims made by the Contractor for Ad Hoc Services authorised under this clause 3.16 in the previous three months exceeds the Pre-Authorised Ad Hoc Services Limit.
- 3.16.3 The provisions of the Contract apply to the performance of a Pre-Authorised Ad Hoc Service, being a Service to be provided under the Contract.

3.17 Coordination and Cooperation with other Commonwealth Contractors (Core)

- 3.17.1 The Contractor shall coordinate and cooperate with Associated Parties in accordance with its obligations under clause 3.6 of the SOW at no additional cost to the Commonwealth.

3.18 Use of Contractor Resources (Core)

- 3.18.1 The Contractor:
- a. shall not charge the Commonwealth for any resources of the Contractor or a Subcontractor to the extent that the cost of such resources is included in the price for any other Services under the Contract (**'Commonwealth Funded Resources'**); and
 - b. shall ensure that it first seeks to use the spare capacity of any Commonwealth Funded Resources to satisfy any request by the Commonwealth for additional services (to the extent that such spare capacity is relevant to the request for additional Services), and that any CCP or quote submitted to the Commonwealth in response to such a request does not include the cost of the Commonwealth Funded Resources.

3.19 Capability Innovations and Efficiencies (Core)

- 3.19.1 The Contractor shall identify, analyse and implement Innovations / Efficiencies in accordance with clause 13 of the SOW.

3.20 Non-exclusivity (Core)

- 3.20.1 The Contractor agrees that nothing in this Contract prevents the Commonwealth from undertaking itself, or entering into an arrangement with a person other than the Contractor for the person to undertake, any work relating to the Products that is not included in the scope of:
- a. Recurring Services;
 - b. S&Q Services the subject of an S&Q Order under clause 3.15;
 - c. Task-Priced Services authorised by the Commonwealth Representative under clause 3.14; or
 - d. Pre-Authorised Ad Hoc Services complying with clause 3.16,
- including any work that has been removed from the Services in accordance with this Contract.

4 AUSTRALIAN INDUSTRY CAPABILITY

4.1 General AIC Requirements (Core)

- 4.1.1 The Contractor shall:
- a. comply with the AIC Obligations;
 - b. comply with the Approved AIC Plan; and
 - c. ensure that the AIC Subcontractors comply with their respective AIC Subcontractor Obligations.
- 4.1.2 The Contractor acknowledges and agrees that it is of critical importance to the Commonwealth that the Contractor complies with its AIC Obligations and that the Contractor ensures the involvement of Australian Industry in the provision of the Services as required by the Contract.
- 4.1.3 The Contractor shall undertake the required activities to comply with the AIC Obligations. Without limiting the AIC Obligations, and with the aim of achieving the AIC Objectives the Contractor shall continually:
- a. identify and promote opportunities for enhancing the quality of Australian Industry participation in the performance of the Contract, particularly in relation to developing, enhancing and maintaining Industrial Capabilities;
 - b. monitor and explore opportunities for the increased involvement of Australian Industry in the performance of the Contract; and
 - c. liaise with the Commonwealth in relation to AIC in the performance of the Contract and report on its performance of the AIC Obligations in accordance with the SOW.
- 4.1.4 Where the Contractor fails to comply with any AIC Obligation, or anticipates that it is likely to fail to comply with any AIC Obligation, it shall notify the Commonwealth Representative in writing as soon as reasonably practicable.
- 4.1.5 The Contractor acknowledges and agrees that:
- a. compliance with the AIC Obligations shall not relieve the Contractor from its liabilities or other obligations under the Contract;
 - b. Acceptance of any Deliverables or provision of the Services shall not relieve the Contractor from complying with its AIC Obligations; and
 - c. the public AIC Plan section of the Approved AIC Plan will be made publicly available on a Commonwealth internet website.

4.2 Essential AIC Obligations (Core)

Note to drafters: If the Recurring Services Fee for the Contract is expected to exceed A\$20 million per annum then the Contract will include Prescribed ACE Percentages at Attachment F, and achievement of the Prescribed ACE Percentages will be an Essential AIC Obligation under clause 4.2.1b below. If the Contract will not include Prescribed ACE Percentages, delete clauses 4.2.1a and 4.2.1b, and amend clause 4.2.1 to read 'The Contractor shall comply with the obligations under the Contract (including in Attachment F and clause 10 of the SOW) in relation to the Australian Industry Activities.'

- 4.2.1 The Contractor shall:
- a. comply with the obligations under the Contract (including in Attachment F and clause 10 of the SOW) in relation to the Australian Industry Activities; and

Option: For when the Contract will include Prescribed ACE Percentages.

- b. in respect of each ACE Measurement Point, ensure that the Achieved ACE Percentage is equal to or greater than the Prescribed ACE Percentage for that ACE Measurement Point.

4.3 Independent AIC Audit Program (Core)

- 4.3.1 Without limiting the Commonwealth's rights under clause 11.7, the Contractor acknowledges and agrees that the Contractor's compliance with its AIC Obligations and an AIC

Subcontractor's compliance with its AIC Subcontractor Obligations may be audited as part of the Independent AIC Audit Program.

- 4.3.2 Each person conducting an audit under the Independent AIC Audit Program is a person authorised by the Commonwealth Representative for the purposes of clause 11.7 of the Contract.

4.4 AIC Remedies (Core)

Note to drafters: If an Award Term is not included at clause 1.9, then delete clause c. below, which refers to an Award Term.

- 4.4.1 The Contractor acknowledges and agrees that:
- a. the Commonwealth may suffer loss or damage if the Contractor fails to comply with any AIC Obligation, an AIC Subcontractor fails to comply with any AIC Subcontractor Obligation, or the Contractor fails to comply with an Approved Remediation Plan in relation to compliance with any AIC Obligation;
 - b. damages may not be an adequate remedy for a failure of:
 - (i) the Contractor to comply with any AIC Obligation;
 - (ii) an AIC Subcontractor to comply with any AIC Subcontractor Obligation; or
 - (iii) the Contractor to comply with an Approved Remediation Plan,
 and that remedies such as specific performance or injunctive relief may be sought by the Commonwealth;
 - c. clause 1.9.11f, regarding a satisfactory rating for an Award Term, applies in relation to any Remediation Plan required in order to address a non-compliance with an AIC Obligation;
 - d. the Essential AIC Obligations are each essential and fundamental terms of the Contract; and
 - e. the rights of the Commonwealth under this clause 4.4 are in addition to, and do not limit or affect, any other rights or remedies under the Contract or at law.
- 4.4.2 The Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1e if the Contractor commits a breach of an Essential AIC Obligation that, in the Commonwealth's opinion, is not capable of being remedied.

5 TECHNICAL DATA, SOFTWARE AND CONTRACT MATERIAL

Note to drafters: Drafters should refer to the ASDEFCON Technical Data & Intellectual Property Commercial Handbook to assist with tailoring this clause 5 and the TDSR Schedule. These clauses have been drafted following Defence industry consultation and reflect an endorsed Defence position. Changes to the clauses may result in additional risk to the Commonwealth or a reduction in the Commonwealth's capacity to Use TD, Software and Contract Material required to operate and support the Products Being Supported.

5.1 Ownership of Intellectual Property (Core)

Note to tenderers: The Commonwealth's default position reflected in this clause 5.1 is that the Contractor (or its nominee) will own all IP created under the Contract. However, under clause 5.1.3 an exception exists to enable the Commonwealth to own newly created IP in specific items of TD and Software that are identified in Annex D to the TDSR Schedule (ie Commonwealth TD and Commonwealth Software). The Commonwealth may require ownership of this TD and Software for reasons relating to national security and/or strategic interests associated with the program or a Capability's whole of life requirements, or where required to satisfy obligations owed under other contracts (eg acquisition contract relating to the Products Being Supported).

Clause 5.1.3 states that the Commonwealth will own any new IP created under the Contract in relation to GFM or the Products Being Supported (including new IP in updates or amendments to GFM or the Products Being Supported). However, under clause 5.1.4, the Contractor (or its nominee) will own this IP if it already owns the existing IP in the GFM or the Products Being Supported or this is specified in Attachment E (for GFM) or Attachment S (for Products Being

Supported). The Commonwealth's default position is that ownership of newly created IP created under a subcontract will be determined by the terms of the relevant Subcontract between the Contractor and Subcontractor. However, clause 5.1.3 states that the Contractor is obliged to ensure that the Commonwealth is assigned any IP created under a Subcontract in Commonwealth TD, Commonwealth Software and GFM, whether the IP is owned by the Subcontractor or the Contractor.

- 5.1.1 Nothing in the Contract affects the ownership of IP, except as expressly provided for in this clause 5.
- 5.1.2 Subject to the other provisions of this clause 5.1, the parties agree that all IP created under the Contract in respect of TD, Software or Contract Material is assigned to the Contractor (or its nominee) immediately upon its creation.
- 5.1.3 that all IP created under the Contract or a Subcontract in respect of:
- a. Commonwealth TD or Commonwealth Software; and
 - b. GFM or a Product Being Supported (except as provided for in clause 5.1.4),
- that is delivered or required to be delivered to the Commonwealth or any other person under the Contract is assigned to the Commonwealth (or its nominee) immediately upon its creation.
- 5.1.4 The parties agree that IP created under the Contract or a Subcontract in respect of GFM or a Product Being Supported is not required to be assigned to the Commonwealth under clause 5.1.3 if:
- a. the Contractor or a Subcontractor owns all of the IP in the GFM or the Product Being Supported;
 - b. for GFM, Attachment E or the GFM section of an S&Q Order specifies that the Contractor (or its nominee) is to own IP created under the Contract or a Subcontract in respect of the GFM; or
 - c. for a Product Being Supported, Attachment S specifies that the Contractor (or its nominee) is to own IP created under the Contract or a Subcontract in respect of the Product Being Supported.

5.2 Highly Sensitive TD and Highly Sensitive Software (Core)

Note to drafters: For combined Acquisition and Support procurements where the Complex Materiel Vol. 2 template is used as the Acquisition contract, the category of Highly Sensitive TD and Highly Sensitive Software should not be used in the Support template (as that category is not used in the Complex Materiel Vol. 2 template) and other contract documents amended accordingly (i.e. TDSR Schedule, Approved Subcontractor Deed etc).

- 5.2.1 This clause 5.2 applies to all Highly Sensitive TD or Highly Sensitive Software delivered or required to be delivered to the Commonwealth or any other person under the Contract.
- 5.2.2 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all TD and all Software to which this clause 5.2 applies, to:
- a. Use the TD or Software for any Defence Purpose; and
 - b. grant a Sublicence in accordance with clause 5.9 to Use the TD or Software, or to grant a further sublicence to Use the TD or Software,
- subject to the restrictions specified in Annex A to the TDSR Schedule.

5.3 TD and Software (Core)

- 5.3.1 This clause 5.3 applies to all TD and Software delivered or required to be delivered to the Commonwealth or any other person under the Contract, other than:
- a. Highly Sensitive TD or Highly Sensitive Software to which clause 5.2 applies;
 - b. Commercial TD or Commercial Software to which clause 5.3.3c applies;
 - c. Commonwealth TD or Commonwealth Software to the extent that clause 5.5 applies to that TD or Software; and

- d. TD or Software provided as, or as a part of, GFM or Products Being Supported where clause 5.6 applies to that GFM or those Products Being Supported.
- 5.3.2 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all TD and all Software to which this clause 5.3 applies, to:
- a. Use the TD or Software for any Defence Purpose; and
 - b. grant a Sublicence in accordance with clause 5.3.3 and clause 5.9 to Use the TD or Software.
- 5.3.3 The Commonwealth may grant a Sublicence in respect of all TD and all Software to which this clause 5.3 applies, to:
- a. a Commonwealth Service Provider to Use the TD or Software to enable the Commonwealth Service Provider to perform its obligations, functions or duties to the Commonwealth;
 - b. any person to Use the TD or Software, or to grant a further sublicence to Use the TD or Software, to do any of the following:
 - (i) installing or configuring the Deliverables or the Products Being Supported;
 - (ii) physically integrating the Deliverables with the Products Being Supported or other systems;
 - (iii) operating or maintaining the Deliverables or the Products Being Supported;
 - (iv) rectifying any Defect in the Deliverables or the Products Being Supported where the Contractor has failed to comply with its obligations under clause 8.1.3c in relation to the Defect;
 - (v) undertaking training in relation to the Deliverables or the Products Being Supported;
 - (vi) removing or uninstalling the Deliverables or the Products Being Supported;
 - (vii) decommissioning or destroying the Deliverables or the Products Being Supported;
 - (viii) for the person to respond to a Request to be engaged for any of the above purposes; and
 - (ix) for any other purpose (including to modify and upgrade the Deliverables or the Products Being Supported) but subject to any restrictions specified in Annex B to the TDSR Schedule or an S&Q Order for the relevant TD or Software; and
 - c. any person for a purpose referred to in clause 11.4.3.

5.4 Commercial TD and Commercial Software (Core)

- 5.4.1 This clause 5.4 applies to all Commercial TD and Commercial Software delivered or required to be delivered to the Commonwealth or any other person under the Contract.
- 5.4.2 The Contractor shall ensure that each Commercial Item (and related Commercial TD or Commercial Software) delivered or required to be delivered under the Contract is specified as a Key Commercial Item in Annex C to the TDSR Schedule or an S&Q Order, if the IP in the related Commercial TD or Commercial Software is owned by:
- a. the Contractor;
 - b. an Approved Subcontractor; or
 - c. a Related Body Corporate of the Contractor,
- unless otherwise agreed by the Commonwealth in writing.
- 5.4.3 The Contractor shall ensure that the Commonwealth is granted a licence in respect of all Commercial TD and all Commercial Software to which this clause 5.4 applies, on the following terms:

- a. for TD and Software relating to a Key Commercial Item, a licence to Use the TD or Software, or to grant a sublicense to any person to Use the TD or Software, to do any of the following:
- (i) installing or configuring the Deliverables or the Products Being Supported;
 - (ii) physically integrating the Deliverables with the Products Being Supported or other systems;
 - (iii) operating or maintaining the Deliverables or the Products Being Supported;
 - (iv) rectifying any Defect in the Deliverables or the Products Being Supported where the Contractor has failed to comply with its obligations under clause 8.1.3c in relation to the Defect;
 - (v) undertaking training in relation to the Deliverables or the Products Being Supported;
 - (vi) removing or uninstalling the Deliverables or the Products Being Supported;
 - (vii) decommissioning or destroying the Deliverables or the Products Being Supported;
 - (viii) for the person to respond to a Request to be engaged for any of the above purposes,
- subject to any restrictions specified in Annex C to the TDSR Schedule or an S&Q Order for that Key Commercial Item; and
- b. for all other TD and Software, on the best commercial terms available to the Contractor.

5.4.4 The Contractor shall ensure that any licence granted to the Commonwealth in respect of Commercial TD and Commercial Software under this clause 5.4 does not require the Commonwealth to pay a Royalty or other fee (not otherwise included in the payments under the Contract) unless the Commonwealth has agreed in writing to the payment.

5.5 Commonwealth TD and Commonwealth Software (Core)

Note to tenderers: This clause covers IP relating to Commonwealth TD and Commonwealth Software that is assigned to the Commonwealth under clause 5.1.3a. If, in respect of any Commonwealth TD or Commonwealth Software, there also exists IP owned by the Contractor (or a Subcontractor), the Commonwealth's rights with respect to the Use and Sublicensing of that IP are covered under clause 5.3.

- 5.5.1 This clause 5.5 applies to all Commonwealth TD and Commonwealth Software delivered or required to be delivered to the Commonwealth or any other person under the Contract, to the extent that the IP in that TD or Software is assigned to the Commonwealth under clause 5.1.3a.
- 5.5.2 The Commonwealth grants to the Contractor a non-exclusive, Royalty-free licence in respect of the Commonwealth TD and Commonwealth Software to the extent that this clause 5.5 applies to:
- a. Use the TD and Software for the purpose of enabling the Contractor to perform its obligations under the Contract;
 - b. grant a sublicense to a Subcontractor to Use the TD and Software for the purpose of enabling the Subcontractor to perform its obligations under the Subcontract; and
 - c. grant a sublicense to a person for a purpose referred to in clause 11.4.3,
- subject to any restrictions specified in Annex D to the TDSR Schedule or an S&Q Order in respect of that TD or Software, or as otherwise notified by the Commonwealth.
- 5.5.3 The Contractor shall ensure that any IP in Commonwealth TD or Commonwealth Software not assigned to the Commonwealth under clause 5.1.2 is specified in Annex D to the TDSR Schedule or the relevant S&Q Order and capable of being clearly distinguished from the IP assigned to the Commonwealth.

5.6 GFM and Products Being Supported (Core)

- 5.6.1 This clause 5.6 applies to all TD or Software that is:

- a. provided as, or as a part of, GFM or the Products Being Supported; or
- b. created under the Contract or a Subcontract in respect of GFM or the Products Being Supported,

except to the extent that IP in the TD or Software is owned by the Contractor or a Subcontractor.

5.6.2 The Commonwealth grants to the Contractor (or shall ensure the Contractor is granted), a non-exclusive, Royalty-free licence in respect of the TD or Software to the extent that this clause 5.6 applies to:

- a. Use the TD or Software for the purpose of enabling the Contractor to perform its obligations under the Contract;
- b. grant a sublicense to a Subcontractor to Use the TD or Software for the purpose of enabling the Subcontractor to perform its obligations under the Subcontract; and
- c. grant a sublicense to a person for a purpose referred to in clause 11.4.3,

subject to any restrictions specified in Attachment E or the GFM section of an S&Q Order (for GFM), Attachment S (for Products Being Supported) or as otherwise notified by the Commonwealth.

5.6.3 Without limiting any restrictions specified in Attachment E or the GFM section of an S&Q Order (for GFM), Attachment S (for Products Being Supported) or as notified by the Commonwealth under clause 5.6.2, the Contractor's right to grant a sublicense under clause 5.6.2b is subject to the following conditions:

- a. the sublicense shall include (as a minimum) the same restrictions on Use and sublicensing as are applicable to the Contractor;
- b. the rights granted under the sublicense shall be limited to the rights that are reasonably necessary to enable the sublicensee to Use the TD or Software to efficiently perform its obligations, functions or duties to the Contractor;
- c. the rights granted under the sublicense shall expire when no longer required for the purposes referred to in clause 5.6.2a; and
- d. any right of the sublicensee to grant a further sublicense shall be subject to the same conditions as set out in this clause 5.6.3.

5.6.4 The licence under clause 5.6.2a (and any sublicense granted under clause 5.6.2b) expires upon the expiry or termination (whichever is the earlier) of the Contract or the relevant Subcontract (if any).

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

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

5.7 Contract Material (Core)

5.7.1 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all Contract Material to:

- a. Use the Contract Material for any Defence Purpose;
- b. grant a Sublicense in accordance with clause 5.9 to:
 - (i) a Commonwealth Service Provider to Use the Contract Material to perform its obligations, functions or duties to the Commonwealth;
 - (ii) any person to Use the Contract Material, or to grant a further sublicense to the Contract Material, provided that any related disclosure of Confidential Information in the Contract Material complies with clause 11.4.1d; and

- (iii) any person for a purpose referred to in clause 11.4.3.

5.8 Contractor Sublicences (Core)

- 5.8.1 Without limiting any restrictions specified in Annex D to the TDSR Schedule, Attachment E, an S&Q Order or notified by the Commonwealth under clauses 5.5.2 or 5.6.2, the Contractor's rights to grant a sublicense under clauses 5.5.2b and 5.6.2b are subject to the following conditions:
- a. the sublicense shall include (as a minimum) the same restrictions on Use and sublicensing as are applicable to the Contractor;
 - b. the rights granted under the sublicense shall be limited to the rights that are reasonably necessary to enable the sublicensee to Use the TD or Software to efficiently perform its obligations, functions or duties to the Contractor;
 - c. the rights granted under the sublicense shall expire when no longer required for the purposes referred to in clause 5.8.1b; and
 - d. any right of the sublicensee to grant a further sublicense shall be subject to the same conditions as set out in this clause 5.8.

5.9 Commonwealth Sublicences (Core)

- 5.9.1 The Commonwealth's right to grant a Sublicence to a person ('Sublicensee') in accordance with clause 5.2, 5.3 or 5.7 is subject to the following conditions:
- a. the Sublicence shall include (as a minimum) the same restrictions on Use and sublicensing as are applicable to the Commonwealth;
 - b. the rights granted under the Sublicence shall be limited to the rights that are reasonably necessary to enable the Sublicensee to Use the TD, Software and Contract Material (as applicable) to efficiently perform its obligations, functions or duties to the Commonwealth or a Commonwealth Contractor;
 - c. the rights granted under the Sublicence shall expire when no longer required for the purposes referred to in clause 5.9.1b; and
 - d. any right of the Sublicensee to grant a further sublicense shall be subject to the same conditions as set out in this clause 5.9.

5.10 No Commercialisation (Core)

- 5.10.1 A Licence or Sublicence granted in accordance with this clause 5 does not permit the Commonwealth or its sublicensee to Commercialise any IP in the TD, Software or Contract Material.
- 5.10.2 For the avoidance of doubt, clause 5.10.1 does not prevent the Commonwealth from granting a sublicense in accordance with the rights granted in this clause 5 to a person for the purpose of the person providing goods or services to the Commonwealth for a Defence Purpose.

5.11 Failure to obtain IP rights (Core)

- 5.11.1 The Contractor shall promptly notify the Commonwealth if the Contractor considers it will be unable to comply with any of its obligations under this clause 5 in respect of IP (in this clause 5.11, an "IP Issue"), including if the Contractor is not able to ensure that the Commonwealth is:
- a. assigned any IP as required under clause 5.1.3;
 - b. granted rights to TD, Software or Contract Material as required by this clause 5; or
 - c. provided with an Approved Subcontractor Deed as required under clause 11.9.13.
- 5.11.2 The Contractor shall ensure that a notice under clause 5.11.1 includes details of:
- a. the relevant IP Issue, including the steps taken by the Contractor to ensure compliance with this clause 5 or to mitigate the effects of the IP Issue;
 - b. the Deliverable (and related TD, Software or Contract Material) to which the IP Issue relates;

- c. the rights that the Contractor is able to ensure are granted to the Commonwealth in respect of the relevant TD, Software or Contract Material; and
 - d. options available to remedy, or mitigate the effects of, the IP Issue.
- 5.11.3 If the Contractor gives a notice of an IP Issue, or the Commonwealth considers that an IP Issue has occurred, the Commonwealth may by notice to the Contractor, without limiting any of its other rights under the Contract, do any one or more of the following:
- a. require that the Contractor:
 - (i) use alternative goods or services, or obtain the goods or services from another supplier, to ensure that the Contractor complies with the requirements of this clause 5; or
 - (ii) modify the Deliverable or Services to the extent necessary to ensure that the Contractor complies with the requirements of this clause 5;
 - b. agree to waive a requirement of this clause 5 on such conditions as the Commonwealth may determine;
 - c. reduce the scope of the Contract to exclude the Deliverable or Services to which the IP Issue relates; or
 - d. require the Contractor to submit a CCP to amend the Contract to implement any of the actions required under this clause 5.11.2d or any other option to remedy the IP Issue or mitigate the effects of the IP Issue.
- 5.11.4 The Contractor shall comply with a notice issued by the Commonwealth under clause 5.11.2d.
- 5.11.5 The Contractor acknowledges and agrees that:
- a. a notice issued by the Commonwealth under clause 5.11.2d is not an event or circumstance beyond the reasonable control of the Contractor for the purposes of clause 6.4; and

Option: Include clause 5.11.5b if clause 6.7 (Schedule Recovery Costs) is included.

- b. the Contractor is not entitled to schedule recovery costs under clause 6.7 in respect of complying with the Commonwealth's notice.

5.12 TDSR Schedule (Core)

- 5.12.1 The Contractor shall take all reasonable steps (including by submitting a CCP in accordance with clause 11.1) to ensure the TDSR Schedule is up to date and contains an accurate description of all restrictions applicable to the Commonwealth's rights in respect of TD, Software and Contract Material delivered, or required to be delivered, under the Contract, including an S&Q Order.
- 5.12.2 The Commonwealth's rights in respect of TD, Software and Contract Material under this clause 5 are not subject to any restrictions, unless such restrictions are permitted under these Conditions of Contract and expressly set out in the TDSR Schedule.

5.13 TD and Software required to be delivered (Core)

- 5.13.1 The Contractor shall deliver all TD and Software required to be delivered under the Contract to the recipients at the times and locations, and in the manner, specified in the Contract or as otherwise required to enable the provision of the Services.
- 5.13.2 Without limiting the Contractor's obligation under clause 5.13.1 (and subject to clause 5.13.2), if the Commonwealth is not specified as a recipient of any item of TD or Software required to be delivered under the Contract, the Commonwealth may by notice to the Contractor require the delivery of the item to the Commonwealth.
- 5.13.3 The Contractor shall comply with a notice given under clause 5.13.1 unless compliance with the notice would be inconsistent with any restrictions specified in Annex A or B to the TDSR Schedule or the equivalent attachment to an S&Q Order.

- 5.13.4 If the time, location or manner of delivery of any item of TD or Software required to be delivered under the Contract is not specified in the Contract, the Contractor shall deliver the relevant item in accordance with a notice given by the Commonwealth.
- 5.13.5 The Commonwealth shall act reasonably when giving a notice under clause 5.13.1 or clause 5.13.4, including in relation to specifying a time for delivery of the item of TD or Software.
- 5.13.6 If the Contract is terminated (except under clause 13.4), the Contractor shall, within the period set out in the notice of termination (which shall be a reasonable period), deliver to the Commonwealth all TD and Software required to be delivered under the Contract, each in its then current state of development.
- 5.13.7 An obligation under this clause 5.13 or any other provision of the Contract that requires the Contractor to deliver TD or Software (other than under clause 5.13.5), includes an obligation to create, develop or acquire the TD or Software to enable the TD or Software to be delivered at the times and in the manner required under the Contract.
- 5.13.8 The Approved TDL does not operate to restrict the rights of the Commonwealth in respect of IP in any TD under this clause 5 or otherwise under the Contract.
- 5.13.9 For the purposes of this clause 5, an item of TD, Software or Contract Material is not taken to have been delivered under the Contract if, at the time it is provided:
- a. the Contractor identifies that the item is provided for the information of the Commonwealth only; and
 - b. the item is not otherwise required to be delivered under the Contract.

5.14 Electronic Delivery of TD, Software and Contract Material (Core)

- 5.14.1 If an item of TD, Software or Contract Material is permitted by the Contract to be delivered in electronic form to the Commonwealth, the item is deemed to have been delivered:
- a. if the item is to be delivered by access to an information system of the Contractor – when all of the following requirements are met:
 - (i) the item is present in the information system;
 - (ii) the Commonwealth has been notified that the item is present in the information system; and
 - (iii) the item is accessible for use by the Commonwealth in accordance with the SOW; or
 - b. if the item is to be delivered by an electronic communication, or by transfer into an information system nominated by the Commonwealth, when the electronic communication or transferred item enters the information system, unless the Contractor receives notification within one Working Day that the electronic communication or transfer has not been successful.

5.15 Markings (Core)

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

5.16 TD and Software Warranties (Core)

Note to drafters: If a support contract involves a significant acquisition (for example, of Software in relation to major engineering change), the TD and Software warranties in this clause may be inadequate for this purpose. If this is the case, consider utilising the TD and Software warranties as set out in the Strategic Materiel (for more complex) or Complex Materiel Vol. 2 (for less complex) acquisitions.

- 5.16.1 The Contractor warrants that:

- a. the rights granted to the Commonwealth in accordance with this clause 5 (including in relation to Commercial TD and Commercial Software), will not prevent the Products Being Supported from being used and supported by or on behalf of the Commonwealth as contemplated under the Contract;
- b. the rights granted to the Commonwealth in accordance with clause 5.4.3a in relation to a Key Commercial Item shall be on terms that are no less favourable than the best commercial terms available to the Contractor;
- c. the Approved TDL lists all of the TD used or required to be delivered under the Contract; and
- d. all of the TD and Software delivered under clause 5.13.1 is complete and accurate.

5.16.2 The Contractor warrants and shall ensure that:

- a. all Software delivered or required to be delivered to the Commonwealth under the Contract or a Subcontract is free from Malware, at the time of delivery to the Commonwealth; and
- b. no Malware will be installed on the Products Being Supported or any other Commonwealth system as a result of an act or omission of any of the Contractor Personnel.

5.17 Intellectual Property Warranties (Core)

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

- a. the relevant assignor or licensor (as applicable) has the right, title or authority to assign or license, and has been made aware of, the rights granted in respect of IP under this clause 5 or under an Approved Subcontractor Deed;
- b. ownership of the IP referred to in clause 5.1.3 has vested in the Commonwealth (or its nominee) immediately upon its creation; and
- c. the Contractor shall notify the Commonwealth if the Contractor becomes aware of any challenge, claim or proceeding referred to in clause 5.17.2e arising in respect of any IP after the relevant TD, Software or Contract Material is delivered to the Commonwealth.

5.17.2 If the Commonwealth, Commonwealth Personnel or a sublicensee of the Commonwealth infringes the IP or any Moral Rights of any third party in an item of TD, Software or Contract Material as a consequence of:

- a. an activity permitted or purportedly permitted by or under a licence or assignment of IP rights under or referred to in the Contract (including in this clause 5); or
- b. a failure by the Contractor to grant (or ensure the grant) of a licence or assign (or ensure the assignment) of IP rights under or referred to in the Contract (including in this clause 5),

the Contractor shall, without limiting the Contractor's obligations under this clause 5, use its best endeavours to:

- c. modify the item in order to avoid continuing infringement and so that the Deliverable meet the requirements of the Contract with the modified item;
- d. procure at its own cost the rights or additional rights necessary to ensure that the Commonwealth, Commonwealth Personnel and sublicensees are entitled to exercise the rights under this clause 5 or an Approved Subcontractor Deed in respect of the item; or
- e. remove the item from the Deliverable and modify the Deliverable or the Services to the extent necessary to ensure that the Deliverable or Services meet the requirements of the Contract without the item.

5.17.3 The Contractor warrants and shall ensure that, in respect of any IP in any TD, Software or Contract Material delivered or required to be delivered under the Contract, and as at the time of delivery to the Commonwealth of the relevant TD, Software or Contract Material and after making diligent inquiries:

- a. the IP is licenced to, or owned by, the Commonwealth as required by this clause 5;
- b. the Contractor has no notice of any challenge to the validity or enforceability of any of the IP and has no knowledge of any actual or threatened claim or proceeding in relation to any of the IP;
- c. neither the Contractor, nor any Approved Subcontractor is engaged in litigation, arbitration or other proceedings in relation to any of the IP; and
- d. there are no proceedings threatened by or against the Contractor, or any Approved Subcontractor in relation to any of the IP, and there is nothing that is likely to give rise to any such proceedings.

5.17.4 The warranty under clause 5.17.1 and the obligations under clause 5.17.2 do not apply to the extent that the infringement arises from a failure by the Commonwealth, Commonwealth Personnel or a sublicensee of the Commonwealth to comply with a relevant restriction specified in the TDSR Schedule.

5.18 Patents, Registrable Designs and Circuit Layouts (Core)

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

5.18.2 The Contractor warrants and shall ensure that any restriction on a right referred to in clause 5.18.1 is specified in Annex F to the TDSR Schedule or an S&Q Order (for Deliverables provided under an S&Q Order).

5.19 Export Approvals (Core)

5.19.1 Nothing in this clause 5 affects the obligations of either party to comply with the terms of any Export Approval that is binding on it.

5.20 Existing IP Licences (Core)

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

6 PERFORMANCE, ACCEPTANCE AND OWNERSHIP

6.1 Performance (Core)

- 6.1.1 The Contractor shall provide the Services in accordance with the Contract, including:
- a. providing Deliverables by the relevant dates (if applicable) and in the manner required;
 - b. achieving Acceptance of any Deliverables by the relevant dates (if applicable) and in the manner required;
 - c. achieving Milestones by the relevant Milestone Dates;
 - d. achieving, or exceeding, the Required Performance Level for each KPI and for each Review Period; and
 - e. in relation to those Services to which no KPI relates, achieving a level of performance that a competent contractor would achieve when providing services of the same type as those Services.
- 6.1.2 The Contractor's performance against the KPIs shall be measured and reported in accordance with Attachment P and the SOW.
- 6.1.3 The Contractor's entitlement to Performance Payments under Annex C to Attachment B is subject to its performance against the KPIs.
- 6.1.4 Without limiting the Commonwealth's other rights and remedies under the Contract or at law, if the Contractor does not comply with its obligations under clause 6.1.1, the Commonwealth may be entitled to:
- a. issue a direction under clause 6.3;

Option: For when Schedule Recovery (clause 6.5.6) is included.

- b. issue a direction under clause 6.5.6;
 - c. exercise its rights to substitute performance under clause 6.10.5;
 - d. require the Contractor to prepare and comply with a Remediation Plan in accordance with clause 6.12;
 - e. suspend payment under clause 7.9;
 - f. recover liquidated damages or accept compensation under clause 10.6; or
 - g. terminate the Contract under clause 13.2.
- 6.1.5 Without limiting the Contractor's obligations under clause 6.1.1, the Contractor shall ensure that the Commonwealth is placed in a position where the Commonwealth can perform the tasks it is required to perform under the Contract in sufficient time to enable the Contractor to:
- a. achieve each Milestone by the relevant Milestone Date; and
 - b. achieve or exceed the Required Performance Level for each KPI for each Review Period,
- in accordance with the requirements of the Contract.

6.2 Delay (Core)

- 6.2.1 Without affecting the Contractor's obligations under clause 6.1.1, the Contractor shall take all reasonable steps to prevent and minimise delay and to mitigate both parties' Losses due to delay.
- 6.2.2 If the Contractor becomes aware that the provision of the Services or the achievement of a Milestone will or may be delayed for any reason, the Contractor shall notify the Commonwealth Representative of the following matters, to the extent that the Contractor is aware of them:
- a. the cause and nature of the delay;
 - b. the steps that the Contractor and its Subcontractors are taking and will take to minimise the delay and mitigate the effects of the delay;
 - c. the anticipated duration of the delay; and
 - d. whether the Contractor will be claiming Performance Relief or Postponement of the date for the provision of the Services or the Milestone Date under clause 6.4, or seeks any other change to the Contract, on the basis of the delay.
- 6.2.3 A notice under clause 6.2.1 shall be given as soon as practicable after the Contractor becomes aware of the delay or potential delay, but no later than 30 days after the Contractor becomes so aware.
- 6.2.4 The Contractor shall notify the Commonwealth as soon as practicable after the Contractor becomes aware of a material change to information notified under clause 6.2.1.
- 6.2.5 The Contractor shall comply with any request by the Commonwealth Representative for information concerning a delay or potential delay in the provision of the Services or the achievement of a Milestone.

6.3 Performance Shortfalls (Core)

- 6.3.1 If the Contractor's performance for a KPI is in Performance Band C or Performance Band D for a Review Period:
- a. the Contractor shall immediately take all reasonable steps to minimise the adverse effects of the Contractor's performance, including mitigating any losses of the parties arising as a result; and
 - b. the Commonwealth may direct the Contractor to take any measures the Commonwealth Representative considers reasonably necessary to remedy the Contractor's performance and the Contractor shall comply with the direction at no additional cost to the Commonwealth.

- 6.3.2 The Contractor shall, within five Working Days after becoming aware that its performance for a KPI for a Review Period will be, or is likely to be, in Performance Band C or D for any reason, notify the Commonwealth Representative in writing of the matter and provide details of:
- a. the Contractor's actual or anticipated performance against the KPI during the Review Period;
 - b. the events or circumstances which affected or are likely to affect the Contractor's performance during the Review Period; and
 - c. the effects of the Contractor's performance during the Review Period on the provision of the Services or the capability of the Products.
- 6.3.3 The Contractor shall, within five Working Days after a notification under clause 6.3.2, notify the Commonwealth Representative in writing:
- a. of the steps it has taken and will take to minimise the adverse effects of the Contractor's performance;
 - b. of the period during which the Contractor expects that its performance for the relevant KPI will or is likely to be in Performance Band C or D; and
 - c. whether it will be claiming relief under clause 6.4 in respect of performance against the relevant KPI.
- 6.3.4 The Contractor shall undertake the steps specified in a notification provided under clause 6.3.3.

6.4 Performance Relief and Postponement (Core)

Note to drafters: If clause 6.5.6 is included in the draft Contract, then include the text in square brackets below, otherwise delete.

- 6.4.1 Subject to clauses 6.4.3 to 6.4.8 [and 6.5.6], the Contractor shall be entitled to Performance Relief to the extent that a Performance Event:
- a. is beyond the reasonable control of the Contractor and its Subcontractors and could not have been reasonably contemplated and allowed for by the Contractor or its Subcontractors before entering into the Contract; or
 - b. resulted from:
 - (i) a Commonwealth Default;
 - (ii) an Excepted Risk; or

Option: For when GFF is included in the draft Contract.

(iii) a GFF Delay Event.

- 6.4.2 Subject to clauses 6.4.3 to 6.4.8 [and 6.5.6], the Contractor shall be entitled to Postponement to the extent that a Postponement Event:
- a. is beyond the reasonable control of the Contractor and its Subcontractors and could not have been reasonably contemplated and allowed for by the Contractor or its Subcontractors before entering the Contract; or
 - b. resulted from:
 - (i) a Commonwealth Default;
 - (ii) an Excepted Risk; or

Option: For when GFF is included in the draft Contract.

(iii) a GFF Delay Event.

- 6.4.3 The Contractor shall only be entitled to Performance Relief under clause 6.4.1 or Postponement under clause 6.4.2, as applicable, if:
- a. the Contractor notified the Commonwealth of the relevant event or circumstance as required by clause 6.2 or 6.3, as applicable;

- b. the work under the Contract cannot be performed in such a way as to meet the performance requirements at clause 6.1, as is reasonable having regard to any other relevant circumstances;
 - c. the Contractor has made and continues to make all reasonable endeavours to minimise or prevent:
 - (i) its failure to perform; or
 - (ii) delay,
- and the Contractor mitigates both parties' Losses;
- d. the Contractor submits a claim for Performance Relief in accordance with clause 6.4.6 or Postponement in accordance with clause 6.4.7, as applicable; and
 - e. the Contractor has complied with clause 6.4.8, as applicable.
- 6.4.4 The Contractor shall not be entitled to Performance Relief or Postponement to the extent that the relevant Performance Event or Postponement Event resulted from:
- a. a Contractor Default;
 - b. compliance with a direction under clause 12.4.10; or
 - c. a cessation of work under clause 11.3.3 of the SOW or the Commonwealth's inability to action a data item within the timeframes described in the CDRL in the circumstances described in clause 2.4.8.2 of the SOW.
- 6.4.5 The Contractor shall not be entitled to Performance Relief or Postponement for a period longer than the duration of the relevant Performance Event or Postponement Event.
- 6.4.6 The Contractor may claim Performance Relief by submitting to the Commonwealth the Performance Measurement Report which includes :
- a. details of the Performance Event and its claim for Performance Relief; and
 - b. documentation demonstrating the Contractor's entitlement to Performance Relief.
- 6.4.7 The Contractor may claim Postponement by submitting to the Commonwealth:
- a. a notice setting out the details of the Postponement Event and its claim for Postponement; and
 - b. documentation demonstrating the Contractor's entitlement to Postponement.
- 6.4.8 If the Contractor has notified the Commonwealth that it proposes to claim Postponement, or to seek some other change to the Contract on the basis of a failure to perform or delay, the Contractor shall make the claim, or seek the change:
- a. as soon as it is practicable to do so after that notification; or
 - b. if the Commonwealth directs the Contractor to do so, in accordance with the Commonwealth direction.
- 6.4.9 To avoid doubt, unless and until a claim for Performance Relief or Postponement is Approved under this clause 6.4, the Contractor shall be fully responsible for:
- a. complying with its obligations under this Contract;
 - b. any potential or actual Performance Event or Postponement Event; and
 - c. any Loss arising from such failure or delay.
- 6.4.10 Whether or not the Contractor has sought or is entitled to seek Performance Relief or Postponement under this clause 6.4 and without affecting any other rights of the Commonwealth, the Commonwealth may, at any time, by notice to the Contractor:
- a. increase the Adjusted Performance Score (which may result in a change to the Performance Band) for a KPI for a Review Period;
 - b. in accordance with Annex C to Attachment B, suspend the requirement to measure the Contractor's performance against a KPI for a Review Period or part thereof; or

- c. postpone a Milestone Date or the delivery date for provision of the Services to the date specified in the notice to reflect the expected date on which the relevant Milestone will be achieved or the Services will be provided.

6.4.11 The parties acknowledge that:

- a. a notice under clause 6.4.10 does not affect any rights the Contractor may have to claim Postponement to a date that is later than the date specified in the notice;
- b. the Commonwealth Representative is not required to give a notice under clause 6.4.10; and
- c. giving, or failing to give, a notice under clause 6.4.10 is not capable of being the subject of a dispute for the purposes of clause 13.1 or otherwise subject to review.

6.4.12 If the Commonwealth Representative issues a notice under clause 6.4.10 to postpone a Milestone Date or the delivery date for provision of the Services, and that postponement requires a change to the Contract, the Contractor shall submit a CCP to give effect to the notice in accordance with clause 11.1.3.

6.5 Postponement Costs (Optional)

6.5.1 Subject to clause 6.5.4 and except to the extent that another provision of the Contract provides to the contrary, the Contractor shall only be entitled to costs in respect of Postponement when all of the following are satisfied:

Note to drafters: If GFF is included in the draft Contract include the text in square brackets below, otherwise delete.

- a. the relevant Postponement Event resulted from a Commonwealth Default [or GFF Delay Event];
- b. the Contractor claims the costs by notifying the Commonwealth Representative of the amount of the Postponement costs as soon as practicable after the determination of the costs by the Contractor but no later than six months after the notification under clause 6.4.10 was given; and
- c. the Contractor provides substantiating evidence to the satisfaction of the Commonwealth Representative of the costs and steps taken to mitigate the Contractor's Loss and Commonwealth's Loss in connection with the Postponement Event.

6.5.2 The Commonwealth Representative shall within 30 days after receiving a claim under clause 6.5.1:

- a. Approve the claim if it satisfies the requirements of clause 6.5.1, and notify the Contractor of the amount of the Postponement costs to be paid; or
- b. reject the claim if it does not satisfy the requirements of clause 6.5.1, and notify the Contractor of the reason for rejection.

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

Note to tenderers: The selection of 5 or 20 days below will depend on whether the PEPPOL framework has been agreed by the Commonwealth and the Contractor. This will be determined based on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.

6.5.3 On notification that the Commonwealth Representative Approves the claim under clause 6.5.1, the Contractor shall submit to the Commonwealth Representative a claim for payment for the amount of postponement costs that has been Approved by the Commonwealth. The Commonwealth shall pay the claim for postponement costs within [INSERT 5 or 20] days after receipt of the claim for payment.

Note to drafters: If GFF is included in the draft Contract include the text in square brackets below, otherwise delete.

- 6.5.4 The Contractor shall only be entitled to Postponement costs equal to the unavoidable additional costs incurred by the Contractor as a direct consequence of the Commonwealth Default **[or GFF Delay Event]** referred to in clause 6.5.1a.
- 6.5.5 The Contractor shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify all Postponement costs claimed to have been incurred by the Contractor.
- 6.5.6 The Contractor's rights under this clause shall be its sole remedy for any Loss suffered by the Contractor in connection with a Postponement Event caused by an act or omission of the Commonwealth.

6.6 Schedule Recovery (Optional)

Note to drafters: This clause 6.5.6 and clause 6.7 (Schedule Recovery Costs) may not be appropriate if the Contract is predominantly for Core Services which have KPIs as the measure of performance. In assessing whether or not to include this clause, drafters should also consider the likelihood that large scale S&Q Services will be required (such as modification programs), which are largely schedule driven and would benefit from the inclusion of such a clause.

- 6.6.1 The Commonwealth Representative may direct the Contractor to take any measures the Commonwealth Representative considers reasonably necessary to ensure provision of the Services within the timeframes (including Milestone Dates) specified in the Contract, if:
- a. the Commonwealth Representative receives a notification requesting Postponement under 6.4.7 and the requirements of clauses 6.4.2 to 6.4.8 have not been met;
 - b. the Contractor notifies the Commonwealth under clause 6.2.1 or 6.3.2 that the achievement of a Milestone or the provision of the Services will or may be delayed;
 - c. the Contractor fails to achieve a Milestone or other requirement of the Contract by the relevant Milestone Date or other due date for performance under the Contract; or
 - d. the Commonwealth Representative receives a notification under clause 6.4.7 and the requirements of clauses 6.4.2 to 6.4.8 have been met and the parties have negotiated, in accordance with clause 6.6.4b, the contents of a direction to expedite the Contractor's progress under this clause 6.6.1.
- 6.6.2 A direction made under clause 6.6.1a:
- a. shall not be inconsistent with the Contract; and
 - b. does not limit or affect the Contractor's obligation to comply with the Contract.
- 6.6.3 Before issuing a direction under clause 6.6.1a, 6.6.1a or 6.6.1b, the Commonwealth Representative may request from the Contractor information on any matter which may materially affect the Contractor's ability to comply with a direction issued under clause 6.6.1. The Contractor shall provide such information within the timeframes and in the manner specified by the Commonwealth Representative at the time of request.
- 6.6.4 In addition to the Commonwealth's right in clause 6.6.2b, the Commonwealth shall consult with the Contractor before issuing a direction under clause 6.6.1, to ensure that:
- a. the Commonwealth is as well informed as is reasonably possible about the implications of a proposed direction for the Contract or any other contract between the Contractor and the Commonwealth; and
 - b. the Contractor has a reasonable opportunity to propose options for alternative ways of meeting the Commonwealth's timing requirements.
- 6.6.5 Before issuing a direction under clause 6.6.1, the Commonwealth shall ensure the direction takes into account:
- a. the Commonwealth's ability to reschedule the provision of or access to GFM, GFS or Products;
 - b. the extent to which timing is affected by an event that is beyond the reasonable control of the Contractor; and

Note to drafters: If GFF is included in the draft Contract include the text in square brackets below, otherwise delete.

- c. any relevant Excepted Risk, Commonwealth Default **[or GFF Delay Event]**.
- 6.6.6 If the Commonwealth receives a notification referred to in clause 6.6.1, the Contractor shall, at the request of the Commonwealth negotiate in good faith the feasibility and contents of a direction proposed by the Commonwealth Representative under clause 6.6.1, including schedule recovery costs in accordance with clause 6.7.4, and the matters referred to in clause 6.6.4. The Contractor shall be available to meet with the Commonwealth within the timeframes and in the manner specified by the Commonwealth Representative. If agreement cannot be reached or a direction under clause 6.6.1 is either not feasible or not used by the Commonwealth Representative, then, without limiting the Commonwealth's rights, the Commonwealth shall consider the notification in accordance with the provisions of clause 6.4.
- 6.6.7 The Contractor shall comply with a direction under clause 6.6.1 within the timeframes and in the manner specified by the Commonwealth Representative.
- 6.6.8 If the Commonwealth Representative gives a direction under clause 6.6.1 in connection with a delay, any entitlement of the Contractor to Postponement under clause 6.6.1 for such delay shall be reduced to reflect the reduction in the delay that would reasonably be expected to result from compliance with the direction.
- 6.6.9 Subject to clause 6.7, the Contractor is not entitled to any additional payment for complying with a direction under clause 6.6.1, including any payment under clause 6.5.
- 6.6.10 To avoid doubt and despite anything else in the Contract:
- a. the Contractor shall, if any changes to the Contract are discussed or proposed by the parties in the context of this clause 6.5.6, and if required by the Commonwealth, submit a CCP to give effect to the changes;
 - b. the Commonwealth's rights under this clause are in addition to any other rights or remedies the Commonwealth may have; and
 - c. by issuing a direction under clause 6.6.1, the Commonwealth will not be taken to have waived any right it may have to terminate the Contract.
- 6.6.11 If the Contractor fails to comply with a direction under clause 6.6.1, the Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1e.

6.7 Schedule Recovery Costs (Optional)

Note to drafters: This clause 6.7 and clause 6.5.6 (Schedule Recovery) may not be appropriate if the Contract is predominantly for Core Services which have KPIs as the measure of performance. In assessing whether or not to include this clause, drafters should also consider the likelihood that large scale S&Q Services will be required (such as modification programs), which are largely schedule driven and would benefit from the inclusion of such a clause.

- 6.7.1 Subject to clause 6.7.2, the Contractor shall be entitled to schedule recovery costs if:
- a. the Commonwealth Representative has issued a direction under clause 6.6.1a, and the delay notified was caused by an act or omission of the Commonwealth in relation to the Contract; or
 - b. the Commonwealth Representative has issued a direction under clause 6.6.1d after negotiation with the Contractor in accordance with clause 6.6.4b,
- and all of the following are satisfied:
- c. the Contractor has complied with the requirements of the direction issued under clause 6.6.1a or clause 6.6.1d;
 - d. subject to clause 6.7.4, the Contractor notifies the Commonwealth Representative of the quantum of the schedule recovery costs it claims as soon as practicable after the incurring and determination of the costs by the Contractor but no later than six months after complying with the direction under clauses 6.6.1a or 6.6.1d; and
 - e. the Contractor provides substantiating evidence to the satisfaction of the Commonwealth Representative of the costs reasonably incurred by the Contractor.

- 6.7.2 The Commonwealth Representative shall, within 30 days after receiving a claim under clause 6.7.1:
- a. Approve the claim, if it satisfies the requirements of clause 6.7.1, and notify the Contractor of the amount of schedule recovery costs to be paid; or
 - b. reject the claim, if it does not satisfy the requirements of clause 6.7.1, and notify the Contractor of the reason for rejection.

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

Note to tenderers: The selection of 5 or 20 days below will depend on whether the PEPPOL framework has been agreed by the Commonwealth and the Contractor. This will be determined based on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.

- 6.7.3 On notification that the Commonwealth Representative Approves the claim under clause 6.7.1, the Contractor shall submit to the Commonwealth Representative a claim for payment for the amount of schedule recovery costs that has been Approved by the Commonwealth. The Commonwealth shall pay the claim for schedule recovery costs within **[INSERT 5 or 20]** days after receipt of the claim for payment.
- 6.7.4 Subject to clause 6.7.4, the Contractor shall only be entitled to schedule recovery costs equal to the unavoidable additional costs incurred by the Contractor as a direct consequence of complying with a direction under clause 6.6.1, such costs to be determined consistent with Attachment B. Schedule recovery costs shall not include Postponement costs.
- 6.7.5 If the Commonwealth issues a direction under clause 6.1.1c subsequent to negotiation in accordance with clause 6.6.4b, the Contractor shall be entitled to schedule recovery costs equal to all reasonable costs, including loss of profit, if any, incurred by the Contractor as a direct consequence of complying with the direction, such costs to be determined by the Commonwealth in a manner which is consistent with Attachment B to the Contract and agreed in writing at the time of negotiation under clause 6.6.4b.
- 6.7.6 The Contractor shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify any schedule recovery costs claimed to have been incurred by the Contractor.

6.8 Acceptance (Core)

- 6.8.1 The Contractor shall, at the delivery points and within the timeframes specified in the Contract (where applicable, and including in accordance with Attachment C), offer to the Commonwealth Representative for Acceptance any Deliverables which:
- a. are Products;
 - b. will be incorporated into a Product; or
 - c. the Contract otherwise requires to be Accepted by the Commonwealth,
- that conform with the requirements of the Contract except for minor Defects (if any).
- 6.8.2 The Contractor shall, when offering Deliverables for Acceptance:
- a. complete and present a signed SAC certifying that the Deliverables listed on the SAC conform with the requirements of the Contract, except for the minor Defects (if any) detailed on the SAC or on an attachment to the SAC;
 - b. provide any other supporting evidence reasonably required by the Commonwealth Representative, including confirmation of successful completion of any V&V activities or Acceptance testing required by the Contract; and
 - c. in respect of Deliverables for which Certification is required by a certifying authority (eg, in accordance with ADF Regulatory / Assurance Framework requirements), provide a copy of the completed Certification documentation.

- 6.8.3 The Commonwealth Representative shall, within 15 Working Days (or such other period as is specified in the Contract) after an offer of Deliverables for Acceptance:
- a. Accept the Deliverables by signing the SAC;
 - b. if there are minor Defects in the Deliverables:
 - (i) Accept the Deliverables by signing the SAC on the basis that the Contractor shall, within 10 Working Days after signature of the SAC by the Commonwealth Representative, or within such further period as the Commonwealth Representative may allow, rectify the Defects; or
 - (ii) notify the Contractor that the Commonwealth Representative proposes to Accept the Deliverables on the basis that an Application for a Deviation is Approved in accordance with clause 11.4 of the SOW; or
 - c. reject the Deliverables, in which case the Commonwealth Representative shall notify the Contractor of the reasons for the rejection.
- 6.8.4 If clause 6.8.3b(i) applies but the Contractor fails to rectify a Defect in accordance with that clause, the Commonwealth may:
- a. without limiting the Contractor's obligations, rectify the Defect itself or procure a third party to rectify the Defect under clause 6.10.5; and
 - b. elect to recover from the Contractor under clause 13.7 the costs incurred by the Commonwealth in rectifying the Defect. No amount shall be owing to the Commonwealth under this clause 6.8.3c until the Commonwealth elects to recover the amount.
- 6.8.5 If clause 6.8.3b(ii) applies, but the Application for a Deviation is not Approved within 10 Working Days after the Commonwealth's notification (or another period agreed in writing by the Commonwealth) the Commonwealth Representative shall reject the Deliverables.
- 6.8.6 If the Commonwealth Representative rejects Deliverables in accordance with clause 6.8.3b(ii), the Contractor shall, within 10 Working Days (or otherwise specified under the Contract) after receipt of the notification of rejection, provide full written details of its proposed remedy to the Commonwealth Representative.
- 6.8.7 The Commonwealth Representative shall, within 10 Working Days after receipt of the Contractor's proposed remedy as referred to in clause 6.8.5:
- a. direct the Contractor to complete, within a specified period, any course of action proposed by the Contractor; or
 - b. reject the Contractor's proposal and direct the Contractor to submit an alternative proposal within 10 Working Days (or another period agreed between the parties).
- 6.8.8 The Contractor acknowledges and agrees that:
- a. the specification of the requirements for the Services in the Contract is the result of resource-intensive Commonwealth definition, approval and procurement processes;
 - b. the Commonwealth has relied on the Contractor's representations about time (including as reflected in the Milestone Dates or other dates for provision of the Services in the Contract);
 - c. the Commonwealth has determined that the Contract is value for money is, in part, on the basis that full Acceptance of those Deliverables that are subject to Acceptance is achieved with no delay; and
 - d. it is reasonable that the Commonwealth at all times during the period of the Contract has current knowledge of:
 - (i) progress under the Contract;
 - (ii) risks to achievement of Acceptance or other Milestones including potential minor Defects;
 - (iii) any other potential or actual non-compliance with the Contract;
 - (iv) risk management by the Contractor including of emerging risks; and

- (v) any potential delay in meeting any timing obligation in the Contract, for any reason, and whether or not the delay risk was foreseeable or has been previously identified.

6.8.9 The Contractor shall:

- a. proactively ensure that the Commonwealth is kept informed of matters relevant to the issues in clause 6.8.8, using the communication channels and reporting processes in the Contract; and
- b. comply with any directions by the Commonwealth or the exercise of any other Commonwealth powers under or in relation to the Contract in dealing with such matters.

6.8.10 If an offer of Deliverables for Acceptance is rejected, the Commonwealth Representative may by notice require the Contractor to retake possession of the Deliverables within five Working Days after the date of the notice.

6.8.11 The cost of replacing or rectifying rejected Deliverables, and of complying with the reasonable directions of the Commonwealth, shall be borne by the Contractor in accordance with clause 8.1.3c.

6.8.12 Any action of the Contractor in rectifying Defects in the Deliverables and in complying with the directions of the Commonwealth Representative under this clause 6.7.6 shall not entitle the Contractor to claim Performance Relief or Postponement under clause 6.4, or relieve the Contractor from performing its obligations under the Contract.

6.9 Approval and Acceptance Not to Affect Commonwealth's Other Rights (Core)

6.9.1 Approval or Acceptance of Deliverables does not affect the Commonwealth's continuing rights, or the Contractor's continuing obligations, in relation to Services, including under clauses 8 and 10.

6.10 Ownership (Core)

6.10.1 Subject to clauses 5 and 13.5.3 and Attachment C, ownership of Deliverables, including Deliverables incorporated into Products Being Supported, shall pass to the Commonwealth at the following times:

- a. for those Deliverables being provided as part of Ad Hoc Services, on payment of the claim for the applicable Services;
- b. for those Deliverables being provided as part of Recurring Services, on payment of the claim for the period within which work on the Deliverables was undertaken; or
- c. for any other Deliverables:
 - (i) if the Deliverables are to be Accepted, upon payment of a claim for the Milestone relating to the Acceptance of the Deliverables or, if no Milestone applies, upon Acceptance of the Deliverables; or
 - (ii) if the Deliverables are not subject to Acceptance, upon:
 - 1) delivery of the Deliverables to the Commonwealth (or its nominee as directed by the Commonwealth) under or in accordance with the Contract; or
 - 2) their fitment to Commonwealth Property;

whichever occurs first.

6.10.2 The Contractor warrants and shall ensure that, at the time ownership of any Item or Deliverable passes to the Commonwealth under clause 6.10.1:

- a. the Contractor has full power and authority to transfer full legal and beneficial ownership in those Deliverables to the Commonwealth; and
- b. the Commonwealth will obtain good title to those Deliverables, free from any Security Interest.

6.10.3 To the extent that clause 6.10.1 does not apply to an Item, if an Item (that is not otherwise a Deliverable) is installed on, or becomes part of, a Product owned by the Commonwealth in

connection with the performance of the Services, the Item passes to the Commonwealth on the earlier of:

- a. Acceptance of the Item or the work in respect of the Item, (including Acceptance of the Product on which the Item has been installed or become a part of); or
- b. payment of the claim for the applicable Services for the period within which work was undertaken on or in relation to the Item.

6.10.4 Commonwealth ownership of any property, including the Products, GFM or Stock Items, or a component of any of them, is not transferred or affected in any way by the Contract, including:

- a. a transfer of care, custody or control of the item or component to the Contractor or a Subcontractor;
- b. the installation of the item or component on a Product or other property;
- c. the removal of the item or component from a Product, except where disposal is expressly permitted in accordance with the Contract and the item is disposed of in accordance with the Contract; and
- d. the repair, replacement or refurbishment of the item or component.

6.10.5 The Contractor acknowledges that any Deliverables which become owned by the Commonwealth under the Contract, or any of the Products or Stock Items, are not GFM unless specifically described as GFM.

6.11 Substituted Performance (Core)

6.11.1 If:

- a. the Contractor fails to provide any of the Services or rectify any Defects in accordance with the Contract;
- b. the Commonwealth has issued the Contractor a notice requiring the Contractor to rectify the failure or Defect within a period specified in the notice; and
- c. the Contractor has not rectified the failure or Defect within the specified period,

the Commonwealth may perform or procure the performance of the Services and any other work which in the Commonwealth's opinion is necessary to rectify the failure or Defect ('**Remedial Work**') and the Commonwealth may elect to recover from the Contractor under clause 13.7 any expense that it incurs in doing so. No amount shall be owing to the Commonwealth under this clause 6.11.1 until the Commonwealth elects to recover the amount.

6.11.2 Despite the other provisions of the Contract:

- a. the Remedial Work shall not form part of the Services to be provided by the Contractor, or the Contract;
- b. the Contractor shall have no right to any IP in TD, Software or Contract Material created under or in connection with the performance of the Remedial Work (including any right in any licence to that TD, Software or Contract Material);
- c. the Defect rectification obligations at clause 8.1.3c shall not apply:
 - (i) to the Remedial Work; or
 - (ii) to the extent that the Defect is caused by the Remedial Work; and
- d. the Commonwealth is not entitled to reject Deliverables offered for Acceptance under the Contract to the extent that a Defect in a Deliverable is caused by the Remedial Work.

6.11.3 In addition to the Commonwealth's rights under clause 11.7, the Contractor shall fully cooperate with the Commonwealth, or any person nominated by the Commonwealth, to ensure that the Commonwealth is able to exercise its rights under clause 6.11.1 effectively and expeditiously including by:

- a. providing the Commonwealth or its nominee with full access:

- (i) to the Contractor's Facilities, plant and equipment, records, Contractor Personnel and all other information and materials of relevance to the Contract;
 - (ii) to the Products (if in the care, custody or control of the Contractor or a Subcontractor) and any Commonwealth Property, as applicable; and
- b. providing the Commonwealth or its nominee with any TD, Software or other information required by the Commonwealth for the purposes of performing or procuring the performance of the Remedial Work, and the Contractor shall ensure that the Commonwealth and its nominee have all licences to the TD, Software or other information to perform the Remedial Work;
 - c. complying with the directions or recommendations of the Commonwealth Representative or its nominee; and
 - d. issuing such directions to Contractor Personnel as are necessary to ensure that they will follow directions made by the Commonwealth or its nominee.
- 6.11.4 The exercise by the Commonwealth of its rights, or any action required of the Contractor, under this clause 6.10.5 shall not entitle the Contractor to claim Performance Relief or Postponement under clause 6.4 or relieve the Contractor from performing any of its obligations under the Contract.

6.12 Remediation of Performance Problems (Core)

- 6.12.1 If at any time the Commonwealth Representative considers on reasonable grounds (including in relation to clauses 6.12.1d and 6.12.1e, or having regard to the outcomes of any audit including an audit under the Independent AIC Audit Program) that:
- a. there has been, is, or will be, any problem with or failure to provide any of the Services or to otherwise perform the Contract;
 - b. notwithstanding clause 3.2.5.3.5 of the SOW, the Contractor performance for a KPI is likely to be in Performance Band C or Performance Band D for a Review Period (other than when this is allowed to occur during the Performance Implementation Period);
 - c. there has been a failure to achieve the minimum level of performance for an OPM where a required minimum level of Contractor performance has been specified;
 - d. the Contractor has failed to comply with, or is likely to fail to comply with, an AIC Obligation; or
 - e. an AIC Subcontractor has failed to comply with, or is likely to fail to comply with, an AIC Subcontractor Obligation,
- the Commonwealth Representative may, by notice to the Contractor require the Contractor to develop and deliver a Remediation Plan in accordance with CDRL Line Number MGT-400 ('**Remediation Plan**').
- 6.12.2 The Contractor shall ensure that the Approved Remediation Plan and the steps taken to implement an Approved Remediation Plan:
- a. do not limit or affect the Contractor's ability to perform its obligations under the Contract;
 - b. do not limit or affect the Contractor's ability to achieve the Required Performance Level for a KPI or to provide the Services in accordance with the Contract ; and
 - c. are not otherwise inconsistent with the Contract.
- 6.12.3 The date for submission of a Remediation Plan for Approval by the Commonwealth Representative shall be agreed between the parties, or, if the parties cannot agree within 15 Working Days of the Commonwealth Representative's notice under clause 6.12.1, a reasonable period determined by the Commonwealth Representative.
- 6.12.4 Following the Commonwealth's Approval of a Remediation Plan, the Contractor shall comply with the Approved Remediation Plan.
- 6.12.5 The Approved Remediation Plan does not limit or affect the Contractor's obligations under the Contract including the AIC Obligations.
- 6.12.6 The Commonwealth may:

- a. suspend payment in accordance with clause 7.9 if:
 - (i) the Contractor does not develop and deliver a Remediation Plan in accordance with clause 6.12.1 by the date being 15 Working Days after the date for submission determined in accordance with clause 6.12.3, for the period from that date until the Remediation Plan is Approved;
 - (ii) the Commonwealth Representative does not Approve the Remediation Plan developed and delivered by the Contractor under clause 6.12.1, for the period from the date being 15 Working Days after the date the Commonwealth Representative notifies the Contractor that the Remediation Plan is not Approved until the Remediation Plan is Approved; or
 - (iii) the Commonwealth Representative considers that the Contractor has not complied with the requirements of any Approved Remediation Plan, for the period from the date being 15 Working Days after the date the Commonwealth Representative notifies the Contractor of the non-compliance until the Commonwealth Representative is satisfied that the Contractor is complying with the requirements of the Approved Remediation Plan; or
- b. give the Contractor a notice of termination for default under clause 13.2.1e if:
 - (i) the Remediation Plan has not been Approved by the Commonwealth Representative within four months of the date for submission determined in accordance with clause 6.12.3; or
 - (ii) the Contractor has not complied with the requirements of an Approved Remediation Plan within three months of the Contractor being notified by the Commonwealth that the Contractor is not complying with the Approved Remediation Plan.

7 PRICE AND PAYMENT

7.1 Price (Core)

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

Option: For when a Mobilisation Payment is included in the Contract.

- a. for the Mobilisation Payment specified in the Details Schedule, in accordance with clause 7.5;
- b. for achievement of a Milestone, the relevant Milestone Payment in accordance with Annex A to Attachment B;
- c. for the provision of Core Services (not forming part of a Milestone):
 - (i) the Base Fee in accordance with Annex B to Attachment B; and
 - (ii) the Performance Payments in accordance with Annex C to Attachment B;
- d. for the provision of Excluded Services, the Excluded Services Fee in accordance with Annex B to Attachment B;
- e. for the provision of a Task-Priced Service, a payment in accordance with Annex D to Attachment B;
- f. for the provision of an S&Q Service, a payment in accordance with the S&Q Order; and
- g. for an Adjustment Payment following an Adjustment Date in accordance with clause 7.4.4a.

7.2 Conversion of Ad Hoc Services (Optional)

- 7.2.1 Where, in the reasonable opinion of the Commonwealth Representative tasks of the same or similar nature are being provided as Ad Hoc Services on a regular basis by the Contractor:

- a. where the relevant Services are being performed as Task-Priced Services, the Commonwealth Representative may request that the Contractor provide an estimate for such tasks to be provided as Recurring Services; or
 - b. where the relevant Services are being performed as S&Q Services, the Commonwealth Representative may request that the Contractor provide an estimate for such tasks to be provided as Recurring Services or as a Task-Priced Service.
- 7.2.2 Where the Commonwealth Representative makes a request in accordance with clause 7.2.1, the Contractor shall provide the Commonwealth Representative with a Notice containing a fixed price quote for the performance of the Service as either a Recurring Service or a Task-Priced Service (as the case may be), within 30 days after receipt of such request, having regard to:
- a. the nature of the task the subject of the request;
 - b. the prices for Recurring Services specified at Annex B to Attachment B; and
 - c. quotations provided by the Contractor and approved by the Commonwealth (in accordance with clause 3.15) for performance of that task as an Ad Hoc Service.
- 7.2.3 The Commonwealth Representative shall within 90 days after receiving a quote under clause 7.2.1b (or within the longer period (if any) specified by the Contractor in the quote), either:
- a. Approve the quote, and notify the Contractor who shall prepare a CCP in accordance with clause 11.1 to amend;
 - (i) Annex B to Attachment B to include the Services as part of the price for Recurring Services; or
 - (ii) Annex D to Attachment B to include the Service the subject of the quote as a Task-Priced Service,
 as the case may be; or
 - b. reject the quote and notify the Contractor of the reasons for rejection.
- 7.2.4 If the Commonwealth Representative gives no notice under clause 7.2.2c within the period determined in accordance with that clause, the Commonwealth will be taken to have rejected the quote.

7.3 Claims for Payment (Core)

- 7.3.1 If the Commonwealth is satisfied that:
- a. the Contractor is entitled to make a claim for payment under clause 7.1.1;
 - b. the Contractor's claim for payment meets the requirements of clause 7.3.5; and
 - c. the Contractor has complied with any other provisions of the Contract applicable to the payment,
- then the Commonwealth shall Approve the claim for payment.

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

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

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

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

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

The option selected below will depend on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.

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

- 7.3.2 The Commonwealth and the Contractor shall use electronic invoices through the Pan-European Public Procurement On-Line (PEPPOL) framework for the purposes of the delivery and receipt of payment claims under the Contract.
- 7.3.3 When a claim is Approved under clause 7.3.1, the Commonwealth shall make payment within 5 days after Approval of the claim.

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

- 7.3.4 When a claim is Approved under clause 7.3.1, the Commonwealth shall make payment within 20 days of Approval of the claim.

- 7.3.5 The Contractor shall ensure that each claim for payment made under the Contract:
- specifies the Commonwealth's reference number for the Contract;
 - is calculated in accordance with the Contract;
 - contains sufficient information to enable the Commonwealth to verify the claim;
 - is in the form of a valid Tax Invoice;
 - is accompanied by any substantiating documentation requested by the Commonwealth Representative; and
 - contains a statement by the Contractor that the information in the claim is complete and accurate.
- 7.3.6 If a claim for payment is not Approved, the Commonwealth Representative shall notify the Contractor within 10 Working Days after receipt of the claim providing reasons for rejection and any action to be taken by the Contractor for the claim to be rendered correct for payment. The resubmitted claim shall be subject to the same conditions as if it were the original claim.

7.4 Adjustments (Core)

- 7.4.1 Where specified in Attachment B in respect of a particular price or payment, the relevant formula in clause 7.2 of Attachment B shall be applied to:
- Milestone Payments, on each Adjustment Date that occurs on or before the relevant Milestone Date; and
 - prices for Services other than Services included in Milestones, on each Adjustment Date. However, unless stated otherwise in an S&Q Order, the formulae in clause 7.2 of Attachment B shall not be applied to an S&Q Order (including in relation to any unperformed S&Q Services).
- 7.4.2 Subject to clause 7.4.1, the adjusted price or payment amount shall apply on and after the applicable Adjustment Date.
- 7.4.3 No later than three months after the publication of the indices for an Adjustment Date, the Contractor shall submit a CCP in accordance with clause 11.1 to update Attachment B to reflect the adjustment to the price and payment amounts as determined in accordance with clause 7.4.1.
- 7.4.4 No later than three months after the publication of the indices for an Adjustment Date, the Contractor shall determine if, as a result of the adjustment under clause 7.4.1, an adjustment is required to any claim for payment that had been submitted in accordance with clause 7.1.1

after the Adjustment Date but prior to the date the CCP under clause 7.4.3 takes effect ('Adjustment Payment'). If such Adjustment Payment:

- a. is to the credit of the Contractor, the Contractor may claim that amount as a separate claim for payment in accordance with clause 7.1.1g; or
- b. is to the credit of the Commonwealth, the Contractor shall notify the Commonwealth of the amount of the credit.

7.4.5 The Commonwealth shall not be liable for any claims for payment under clause 7.4.4a submitted after the end of the three month period referred to in clause 7.4.4.

7.4.6 If an Adjustment Payment calculated in accordance with clause 7.4.4 is to the credit of the Commonwealth, the Commonwealth may elect to recover the amount from the Contractor under clause 13.7. No amount shall be owing to the Commonwealth under this clause 7.4.6 until the Commonwealth elects to recover the amount.

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

7.5 Bank Guarantee for Mobilisation Payment (RFT Core)

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

7.5.1 The Contractor shall provide a bank guarantee equal to the Mobilisation Security Amount specified in the Details Schedule to the Commonwealth no later than the Mobilisation Security Date specified in the Details Schedule. The bank guarantee shall be unconditional and shall be from a bank or financial institution acceptable to the Commonwealth Representative, and in the form of the Bank Guarantee Deed set out at Annex D to Attachment I.

7.5.2 The Commonwealth shall not be obligated to pay the Mobilisation Payment identified in Annex A to Attachment B until it has received the bank guarantee in accordance with clause 7.5.1.

7.5.3 The Mobilisation Payment shall be offset against amounts payable by the Commonwealth to the Contractor under the Contract. The Commonwealth shall be deemed to have paid those claims for payment Approved in accordance with clauses 7.3 and 7.3.6, until the sum of the Approved claims for payment equals the amount of the Mobilisation Payment.

7.5.4 The Commonwealth shall release the bank guarantee provided under clause 7.5.1 within 10 Working Days after the date on which the sum of the amounts deemed to have been paid under clause 7.5.3 equals or is greater than the amount of the Mobilisation Payment.

7.5.5 The Commonwealth's rights under the bank guarantee provided under clause 7.5.1 shall be exercisable by the Commonwealth for either or both of the following:

- a. to obtain repayment of an amount equal to the value of any part of the Mobilisation Payment that has not been offset against amounts payable by the Commonwealth to the Contractor under the Contract in the event of termination of the Contract in accordance with clause 13.2; and
- b. to recover any debts owing by the Contractor to the Commonwealth in relation to the Contract.

7.6 Bank Guarantee for Performance (RFT Core)

Note to drafters: Drafters must include both clause 7.5.5b Bank Guarantee for Performance and clause 7.8 Deed of Guarantee and Indemnity in the RFT. Although it is unlikely that both forms of security will be required, it may not be possible to determine the form of any required security until the preferred tenderer has been identified and the risk associated with the preferred tenderer has been fully assessed.

Note to tenderers: Whether the Commonwealth requires both a bank guarantee in respect of the Contractor's performance and a Deed of Guarantee and Indemnity (clause 7.7) will be determined

during negotiations with the preferred tenderer, considering risks associated with the provision of the Services.

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

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

- 7.6.1 The Contractor shall provide a bank guarantee equal to the Performance Security Amount specified in the Details Schedule to the Commonwealth no later than the Performance Security Date specified in the Details Schedule. The bank guarantee shall be unconditional and shall be from a bank or financial institution acceptable to the Commonwealth Representative, and in the form of the Bank Guarantee Deed set out in Annex D to Attachment I.
- 7.6.2 The Commonwealth shall release the bank guarantee provided under clause 7.6.1 within 10 Working Days after the Release Event specified in the Details Schedule occurs.
- 7.6.3 The Commonwealth's rights under the bank guarantee provided under clause 7.6.1 shall be exercisable by the Commonwealth for either or both of the following:
- a. to obtain compensation for Loss suffered in the event that the Contractor fails to perform the Contract, including upon termination of the Contract in accordance with clause 13.2; and
 - b. to recover any debts owing by the Contractor to the Commonwealth in relation to the Contract.

7.7 Exercise of Securities (RFT Core)

- 7.7.1 If the Commonwealth exercises any or all of its rights under the securities provided under clauses 7.5 or 7.5.5b, the Commonwealth shall not be liable for, and the Contractor shall release the Commonwealth from liability for, any resultant Loss suffered by the Contractor.
- 7.7.2 The rights of the Commonwealth to recover from the Contractor the balance, after draw down or exercise of either or both securities provided under clauses 7.5 or 7.5.5b, of Loss suffered by the Commonwealth shall not be limited by the Commonwealth's exercise of those securities.

7.8 Deed of Guarantee and Indemnity (RFT Core)

Note to tenderers: If the tenderer has a Master Guarantee and Indemnity Deed with Defence that it wishes to apply to any resultant Contract, and this includes pre-agreed amendments to the template Bank Guarantee, the tenderer is to indicate which alterations it is seeking to apply within the 'Statement of Non-Compliance' tendered in accordance with TDR A-3. Information on the Master Guarantee Program is available at:

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

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

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

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

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

7.9 Suspending Payments (Core)

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

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

- a. the Contractor fails to achieve a Stop Payment Milestone by the relevant Milestone Date (and the Commonwealth may continue to suspend payments until the relevant Stop Payment Milestone has been achieved);
- b. the Contractor's performance for any KPI is in Performance Band D for any Review Period (and the Commonwealth may continue to suspend payments until the Contractor has completed a Review Period with no KPI with the Contractor's performance in Performance Band D);
- c. the Contractor's performance for the same KPI is in Performance Band C for two or more consecutive Review Periods (and the Commonwealth may continue to suspend payments until the Contractor has completed a Review Period during which the Contractor's performance for the relevant KPIs was in Performance Band B (or higher));
- d. the Contractor's performance for any three KPIs are in Performance Band C for any Review Period (and the Commonwealth may continue to suspend payments until the Contractor has completed a Review Period during which the Contractor's performance had no more than two KPIs in Performance Band C);
- e. the Contractor fails to submit or obtain Approval for a Remediation Plan, or comply with an Approved Remediation Plan, in accordance with clause 6.12 (and the Commonwealth may continue to suspend payments for the period(s) set out in clause 6.12.6); or
- f. an event referred to in clause 6.12.6 occurs (and the Commonwealth may continue to suspend payments for the periods set out in clause 6.12.6).

7.9.2 The exercise by the Commonwealth of its rights under this clause 7.9 shall not:

- a. entitle the Contractor to claim Performance Relief or Postponement under clause 6.4;
- b. relieve the Contractor from performing any of its obligations under the Contract; or
- c. in the case of a suspended payment which is subsequently made, entitle the Contractor to claim interest in accordance with clause 7.9.3c for the period that the Commonwealth suspended the payment in accordance with clause 7.9.1.

7.9.3 The Commonwealth's rights under this clause 7.9 do not affect the Commonwealth's rights in respect of any Default of the Contractor, including to:

- a. give the Contractor a Default Notice under clause 13.3;
- b. recover compensation or damages; or
- c. terminate the Contract for Contractor Default.

7.10 Early and Late Payment (Core)

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

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

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

- 7.10.1 If payment of an amount due to the Contractor under the Contract is made early, interest shall be payable by the Contractor to the Commonwealth in accordance with the formula at clause 7.10.3.
- 7.10.2 If payment of an amount due to the Contractor under the Contract is made late, interest shall be payable by the Commonwealth to the Contractor in accordance with the formula at clause 7.10.3. Any payment not made within 60 days after the date it is to be made under the Contract shall be in breach of the Contract.
- 7.10.3 Interest payments shall be calculated in accordance with the following formula:

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

where:

- 'I%' for early payments means the Reserve Bank of Australia cash rate target current at the date of payment expressed as a percentage;
- 'I%' for late payments means the ATO sourced General Interest Charge rate current at the due date of payment expressed as a percentage;
- P means the amount of the early or late payment; and
- n means the number of days before or after the due date for payment that the payment is made.

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

Note to tenderers: The selection of 5 or 20 days below will depend on whether the PEPPOL framework has been agreed by the Commonwealth and the Contractor. This will be determined based on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.

- 7.10.4 If the interest payment is not offset or paid as part of the subject claim, the Commonwealth Representative shall adjust the next Approved payment under the Contract. If there are no further payments, the relevant party shall pay the interest payment within **[INSERT 5 or 20]** days after being provided with notice.

7.11 Restrictions on Certain Payments (Optional)

Note to drafters: Include clause 7.11 if Performance Incentives have been included in Annex C to Attachment B.

- 7.11.1 Without limiting clause 7.9 or any other rights of the Commonwealth under the Contract or otherwise, the Contractor shall not be entitled to Performance Incentives for a KPI if during the relevant Review Period:
- the Contractor did not achieve a Milestone due to be achieved;
 - the Commonwealth was entitled to claim liquidated damages in accordance with clause 10.6; or
 - the Commonwealth was entitled to terminate the Contract for default under clause 13.2.

7.12 Taxes and Duties (Core)

- 7.12.1 All Taxes imposed or levied in Australia or overseas in connection with the Contract shall be met by the Contractor and the Contractor agrees that they are included within the payments under the Contract.

- 7.12.2 The amounts set out in or determined in accordance with Attachment B include GST for Services to be delivered under the Contract which are taxable supplies within the meaning of the GST Act.
- 7.12.3 Each Tax Invoice provided under clause 7.3.2 shall include the amount and method of calculation of any GST payable by the Contractor in relation to that claim for payment as a separate item.
- 7.12.4 If the Contractor incorrectly states the amount of GST payable, or paid, by the Commonwealth on an otherwise valid Tax Invoice, the Contractor shall issue to the Commonwealth a valid adjustment note in accordance with the GST Act.
- 7.12.5 If the Commonwealth makes, or is assessed by the ATO as having made, a taxable supply to the Contractor under or in connection with the Contract, the Commonwealth shall be entitled to recover from the Contractor upon presentation of a valid tax invoice, the amount of GST paid or payable by the Commonwealth to the ATO.
- 7.12.6 The Commonwealth may elect to recover from the Contractor under clause 13.7 any amount of GST to be paid by the Contractor under clause 7.12.5. No amount shall be owing to the Commonwealth under this clause 7.12.6 until the Commonwealth elects to recover the amount.
- 7.12.7 If the Contractor has a claim for an amount under the Contract, the claim is for the amount less any input tax credit to which the Contractor is entitled in respect of the claim. The Commonwealth may treat the Contractor as entitled to full input tax credits for GST included in an amount unless the Contractor satisfies the Commonwealth otherwise.

7.13 GST Agent (RFT Core)

Note to tenderers: This clause will only be included if the Contractor appoints a resident agent. Tenderers should make their own inquiries regarding the suitability of proposing an agent to act for them for the purposes of Division 57 of the GST Act. Tenderers should indicate, within the 'Statement of Non-Compliance' tendered in accordance with TDR A-4, the requirement for this clause in any resultant Contract and, if so, their ability to comply with it.

- 7.13.1 The Contractor has appointed the GST Agent specified in the Details Schedule as its resident agent for the purposes of Division 57 of the GST Act.
- 7.13.2 The Contractor, by appointing a resident agent, shall not be relieved of its liabilities or obligations under the Contract and shall at all times be responsible for ensuring that the resident agent complies with the requirements of this clause 7.13.
- 7.13.3 Without limiting clause 7.13.2, the Contractor shall ensure that its resident agent:
- a. provides all necessary documentation required by the Commonwealth for a claim for payment to be considered under clause 7.3; and
 - b. complies with Division 57 of the GST Act.
- 7.13.4 The Commonwealth shall make all payments otherwise due to the Contractor under clause 7.3 to the resident agent. The Contractor agrees that such payments to the resident agent shall discharge, to the extent of the payment, the Commonwealth's liability to the Contractor for those Services.
- 7.13.5 If the Contractor appoints an alternative resident agent, the Contractor shall notify the Commonwealth Representative within 10 Working Days after the change, and provide the information required in the Details Schedule.
- 7.13.6 The Contractor, if requested by the Commonwealth Representative, shall provide the Commonwealth Representative with a copy of the resident agency agreement, which copy need not contain prices.

7.14 Cost Principles (Core)

- 7.14.1 Without in any way affecting or overriding the other provisions of the Contract, the Contractor shall apply the Defence Cost Principles when preparing any:
- a. claim for Performance Relief or Postponement costs under clause 6.5;

Option: For when the Schedule Recovery Costs clause 6.7 is included.

- b. claim for schedule recovery costs under clause 6.7;

Option: For use when Defence Cost Principles are applied

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

- c. price for any CCP under clause 11.1; or S&Q Order under clause 3.15; or

- d. claim for costs if the Contract is terminated.

7.15 ACE Measurement Rules (Core)

- 7.15.1 Where the Contractor is required to calculate ACE and ICE under the Contract, ACE and ICE shall be calculated in accordance with the ACE Measurement Rules, and any alternate and/or additional deeming rates that are detailed in Attachment B.
- 7.15.2 The Contractor shall, and shall ensure that AIC Subcontractors, maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify the calculation of ACE and ICE in accordance with the ACE Measurement Rules.

7.16 Performance Management Framework Adjustments (Optional)

- 7.16.1 The Contractor shall meet with the Commonwealth Representative, as part of the Contract Performance Reviews conducted under clause 3.4.4 of the SOW and at any other time reasonably required by the Commonwealth Representative, to discuss whether the performance management framework should be adjusted having regard to:

Note to drafters: Amend the following list as applicable to the Contract.

- a. the need to achieve the Outcomes and objectives, including those specified in clause 1.3;
- b. the need to adjust a KPI in response to a change to the Rate of Effort in accordance with clause 2.2 of the SOW;
- c. the need to motivate the Contractor to achieve continuous improvement in the provision of the Services;
- d. any desire by the Commonwealth to refocus the weightings (ie, the proportion of the total At-Risk Amount), applicable to particular KPIs, including to reflect changes in the relative importance of the Services measured by KPIs;
- e. the suitability of a KPI as a means of assessing the Contractor's performance;
- f. both parties' desire for measurement efficiency; and
- g. any Innovation / Efficiency that has been Approved and which will have an impact on a KPI.
- 7.16.2 Following each meeting referred to in clause 7.16.1, the Commonwealth Representative may, by notice to the Contractor, propose adjustments to one or more of the following:
- a. the basis of measurement of KPIs;
- b. any Contractor reporting obligations; or

Note to drafters: If a Performance Implementation Period (PIP) will not be included in the Contract, then amend the following subclause to remove the text in square brackets referring to the PIP.

- c. the weightings for the KPIs, the Required Performance Level, the Performance Bands and formulae for calculating the APS for the KPIs, subject to the restrictions set out in Table 1 below[, in addition to the adjustments specified in Annex B to Attachment P for the Performance Implementation Period].

Note to drafters: Amend the following table for the KPIs in Attachment P. Depending on the KPIs, it may only be necessary to identify limits on increases in weightings because weightings are to be no less than 0% and the total of all weightings must be equal to 100%.

As a suggested format, Table 1 below describes adjustments and limiting criteria for KPI weightings first and then describes the adjustments and criteria related to the Performance Bands of each KPI. Drafters should refer to the PPBC Guide for ASDEFCON (Support) for guidance and an example.

Table 1: KPI adjustment limits

Proposed adjustment	Criteria for proposed adjustments
Note to drafters: The first two rows are standard requirements for all contracts.	each weighting must not be less than 0%
decrease the weighting of any KPI	
adjust the weightings of any KPIs not adjusted by any criteria in the following rows, so that the sum of the weightings = 100%	the total of all KPI weightings must add up to 100%
increase in the weighting of KPI-01, [INSERT KPI NAME]	no more than 10% (eg, from 25% to 35%) the weighting must not exceed 50%
increase in the weighting of KPI-02, [INSERT KPI NAME] or of KPI-03, [INSERT KPI NAME]	no more than 5% (eg, from 10% to 15%) the weighting of each KPI must not exceed 30%
increase in the weighting of both KPI-02 and KPI-03	the sum of the weightings for KPI-02 and KPI-03 does not exceed 40%
increase in the weighting of KPI-04, [INSERT KPI NAME]	no more than 5% (eg, from 10% to 15%) the weighting must not exceed 20%
Note to drafters: The following three rows may be repeated for each KPI, in order to adjust formulae in Performance Bands.	Note to drafters: Criteria below is typically defined for each adjustment and a maximum allowed after multiple adjustments.
increase in the KPI-01 Required Performance Level	no more than 1% (eg, from 84% to 85%) does not exceed 86%
increase in the KPI-01 Performance Band B-C boundary	no more than 4% (eg, 62% to 66%) does not exceed 68%
increase in the KPI-01 Performance Band C-D boundary	no more than 2% (eg, 40% to 42%) does not exceed 45%

7.16.3 Within 20 Working Days after receiving the notice given under clause 7.16.2 (or within such longer period as the Commonwealth Representative may agree in writing) the Contractor shall review and assess the likely impact of the proposed adjustment and notify the Commonwealth Representative:

- a. of the results of the assessment of the proposed adjustment; and
- b. whether or not the Contractor agrees with the proposed adjustment.

7.16.4 If the Contractor fails to notify the Commonwealth Representative that the Contractor does not agree with the proposed adjustment within the time period determined in accordance with clause 7.16.3, the Contractor shall be taken to have agreed with the proposed adjustment.

7.16.5 If the Contractor gives notice under clause 7.16.3 that it does not agree with the proposed adjustment within the time period determined in accordance with clause 7.16.3:

- a. the Contractor shall, in its notice under clause 7.16.3, set out the reasons why the Contractor does not agree with the proposed adjustments;
- b. the parties shall negotiate the proposed adjustments in good faith;

- c. if the parties are unable to reach agreement within 10 Working days after the Contractor's notice under clause 7.16.3 (or longer period as the Commonwealth Representative may agree in writing), the Management Representatives specified in the Details Schedule shall meet and negotiate the proposed adjustments in good faith; and
 - d. if the Management Representatives are unable to reach agreement within 20 Working Days after the Contractor's notice under clause 7.16.3 (or longer period as the Commonwealth Representative may agree in writing), the Commonwealth Representative shall make a final determination of the adjustments to be made to the performance management framework and notify the Contractor in writing of those adjustments.
- 7.16.6 The Commonwealth may, or may require the Contractor to, provide a CCP to reflect the adjustments within 20 Working Days following (as applicable):
- a. the Contractor's agreement under clause 7.16.3 or clause 7.16.3b;
 - b. agreement in accordance with clause 7.16.5b; or
 - c. the Commonwealth Representative's notice under clause 7.16.5d (as applicable).
- 7.16.7 To avoid doubt:
- a. notwithstanding clause 11.1:
 - (i) the Contractor's agreement of the adjustments to the performance management framework under clauses 7.16.3, b or 7.16.4; or
 - (ii) the Commonwealth Representative's determination of the adjustments to the performance management framework under clause 7.16.5d,

shall be final and legally binding on the parties from the date that the Contractor is taken to have agreed to the Commonwealth's adjustments to the performance management framework under clause b or the date specified in the Commonwealth Representative's notice under clause 7.16.5d (or if no date is specified, from the start of the next Review Period applicable to any adjusted KPI after the date of the notice under clause 7.16.5d), notwithstanding that a CCP is not signed by the parties in accordance with clause 7.16.6. The Contractor shall not be entitled to make or bring any claim against the Commonwealth arising out of or in connection with any such agreement or determination; and
 - b. although the Commonwealth Representative's authority to determine adjustments includes the authority to reallocate proportions of the At-Risk Amount and Performance Incentive, if applicable, between KPIs (within the limits of the criteria defined in Table 1), it does not include the authority to increase the proportion of the Recurring Services Fee that represents the At-Risk Amount unless the Contractor agrees to that increase.

8 DEFECT NOTIFICATION AND RECTIFICATION

8.1 Notification of Defects (Core)

- 8.1.1 If during the Defect Notification Period specified in the Details Schedule, the Contractor becomes aware of any Defect in the Services which adversely affects, or is likely to adversely affect:
- a. the safety of a Product or a Deliverable or the safety of persons, the Contractor shall notify the Commonwealth Representative of the Defect within one Working Day; or
 - b. the operation or capability of a Product or a Deliverable, the Contractor shall notify the Commonwealth Representative of the Defect within five Working Days.
- 8.1.2 The Contractor shall, within 30 days after a notification under clause 8.1.1, provide the Commonwealth with a report, including supporting evidence on:
- a. the nature of the Defect;
 - b. its cause;
 - c. its effects; and
 - d. proposed rectification action.

- 8.1.3 For the purposes of clause 8.1.2b, the Contractor will be taken to have caused the Defect unless the Contractor can demonstrate, to the satisfaction of the Commonwealth Representative, that the Defect arose from an act or omission of:
- a. the Commonwealth;
 - b. an Unrelated Party under another contract; or
 - c. the Contractor under another contract.

8.2 Defect Rectification and Assistance Obligations (Core)

- 8.2.1 Subject to clause 8.2.3, if the Commonwealth Representative notifies the Contractor of a Defect in the Services, or the Contractor notifies the Commonwealth under clause 8.1 (or otherwise), during the relevant Defect Rectification Period (specified in the Details Schedule), the Contractor shall, within **[INSERT PERIOD]** after the notification, or a longer period agreed in writing by the Commonwealth, by repair, replacement or modification:
- a. rectify the Defect and Defects of a similar nature; and
 - b. rectify any damage or other adverse effect to the extent caused by the Defect or the rectification of the Defect on other Products or Deliverables,
- whether or not the Defect arises out of or as a consequence of a Contractor Default.
- 8.2.2 Unless otherwise specified in the Contract, the Contractor shall be entitled to claim for an additional amount (calculated in accordance with Attachment B as an S&Q Service) for any rectification work performed under clause 8.2.1 but only to the extent that the Defect arose out of or as a consequence of any of the following:
- a. a Commonwealth Default;
 - b. subject to clause 8.2.3, an act or omission of a Commonwealth Contractor under a previous acquisition, support or other contract with the Commonwealth;
 - c. the Commonwealth wilfully damaging a Product Being Supported or Deliverable; or
 - d. if the Defect comprises damage to a Product Being Supported or Deliverable, or the damage arose out of or as a consequence of the following:
 - (i) the Product Being Supported or Deliverable being stored, installed, configured, used, maintained or modified by the Commonwealth or an Associated Party in a way that deviates from any authorised specifications, instructions or manuals, unless such deviation is necessary to enable the Product or Deliverable to function and be fit for its intended purpose;
 - (ii) an Excepted Risk occurring; and
 - (iii) a breach of a general law duty or an applicable law by an Unrelated Party, except to the extent that the Contractor is liable for such damage under clause 10.8.2.
- 8.2.3 To the extent that any identified Defect is determined to be a consequence of work performed or deliverables provided under a contract referred to in 8.2.2b, and the Commonwealth or Contractor determines that rectification of the Defect is covered by that other contract (for example, within that contract's defect notification period), then:
- a. the Contractor shall assist the Commonwealth in the gathering of evidence to support a claim under that other contract; and
 - b. the Commonwealth shall determine if the Contractor is to proceed to rectify the Defect.
- 8.2.4 The Contractor's obligations under clause 8.2.1 do not require the Contractor to rectify a Defect in GFM incorporated into Deliverables except to the extent that the Defect:
- a. arose out of or as a consequence of a Contractor Default; or
 - b. was present in the item when it was provided to the Commonwealth by or through the Contractor or a Related Body Corporate of the Contractor (whether under the Contract or another contract).
- 8.2.5 Subject to clauses 8.2.2 and 8.2.9, the Contractor shall bear all costs of, and incidental to any rectification work performed under clause 8.2.1, including the costs of any removal,

disassembly, packing, freight relevant testing, re-assembly and reinstallation, except to the extent that the Commonwealth Representative otherwise reasonably agrees.

- 8.2.6 If the Contractor fails to rectify a Defect within the period specified in clause 8.2.1, the Commonwealth may itself or by a third party ensure that the rectification is performed. The Commonwealth may elect to recover from the Contractor under clause 13.7 the amount of the Commonwealth's costs of rectifying the Defect. No amount shall be owing to the Commonwealth under this clause 8.2.6 until the Commonwealth elects to recover the amount.
- 8.2.7 If a Defect (other than a Latent Defect) in any Services is rectified in accordance with clause 8.2.1, the Defect Rectification Period for the affected Services shall expire on the later of:
- a. the end of the original Defect Rectification Period; or
 - b. the date that is half the original Defect Rectification Period after the rectified Products or Deliverables are returned to the Commonwealth.
- 8.2.8 If the Contractor has performed rectification work as required by this clause 8.1.3c and the Commonwealth is not satisfied that the Defect has been rectified, the Contractor shall perform any additional tests that are required by the Commonwealth to determine whether the Defect has been rectified.
- 8.2.9 If tests conducted under clause 8.2.8 show that the Defect has been rectified, the cost of the tests shall be borne by the Commonwealth. If the tests show that the Defect has not been rectified:
- a. the Contractor shall rectify the Defect as soon as practicable; and
 - b. the costs of the rectification work and the tests shall be borne by the Contractor.
- 8.2.10 Nothing under this clause 8.1.3c limits or affects:
- a. the obligations of the Contractor under clause 3.2, 3.3, 10.7 or 10.8; or
 - b. any other right of the Commonwealth under the Contract or otherwise arising out of or as a consequence of a Defect.

8.3 Manufacturer and Other Warranties (Optional)

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

- 8.3.1 The Contractor shall ensure that the Commonwealth obtains the benefit of any manufacturer, supplier or other third party warranty applicable to the Services (including after the expiry of the Defect Rectification Period for the relevant Services), including by taking all reasonable action to enforce such a warranty, until the expiry of the warranty or clause 8.3.2 applies.
- 8.3.2 Following the termination or expiry of the Contract, the Contractor shall:
- a. assign the benefit of any remaining third party warranties for those Services to the Commonwealth; or
 - b. if the Contractor is not permitted to assign those third party warranties, otherwise ensure that the Commonwealth obtains the benefit of any remaining third party warranties for those Services, including by taking all reasonable action to enforce such a third party warranty until the expiry of the warranty.

9 INSURANCE

9.1 Insurance (Core)

Note to drafters: Drafters are to tailor this clause by selecting only those insurance policies actually required for the draft Contract and by inserting the required limit of indemnity for the relevant insurances in the Details Schedule. (Note: the LRA provides the basis for determining the insurance requirements). As a guide, insurance policy indemnity limits should be based on the Maximum Probable Loss (MPL) determined by the LRA. The MPL represents the financial

consequence of a risk event occurring after taking into account any risk treatments that mitigate consequence – it is NOT to be discounted by multiplying consequence x likelihood.

The ACIP Initiative applies to CASG procurements in accordance with Functional Policy (Procurement) – Mandatory Procurement Policy Requirements for the Approved Contractor Insurance Program Initiative. Drafters should refer to the ASDEFCON Insurance Handbook for guidance to assist with understanding and tailoring this clause. In accordance with paragraphs 28 to 31 of Functional Policy (Procurement) – Mandatory Procurement Policy Requirements for the Approved Contractor Insurance Program Initiative, material changes to this clause must be approved by the ACIP Management Team at ACIP.ManagementTeam@defence.gov.au.

Information on the ACIP Initiative is available at:

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

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

Drafters using this clause for non-CASG procurements (unless otherwise approved by the ACIP Management Team) or for CASG procurements in which no tenderer with ACIP status will participate, must delete the Note to tenderers below and also delete clause 9.1.29 and its associated Note to tenderers.

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

As per clause 9.1.29, for Contractors with ACIP status, the Contractor will be deemed compliant with relevant requirements of this clause where the policy is within the scope of the Contractor's ACIP. Information on the ACIP Initiative and the list of companies with current ACIP status is at:

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

9.1.1 The Contractor shall effect and maintain the insurances (which, for the purposes of this clause 9.1 will be satisfied where the Contractor causes such insurances to be effected and maintained or where the Contractor is insured under such insurances) for the times and in the manner specified in this clause 9.1, without requiring insurance to be effected to the extent that a particular risk:

- is insured against under other insurance effected in compliance with this clause 9.1; or
- has been expressly retained by the Commonwealth, except to the extent that such retention by the Commonwealth is dependent on the Contractor being liable only to the extent that it is insured for the liability.

For the avoidance of doubt, the terms of this clause 9.1 do not alter the allocation of risk or liability between the parties as provided for under any other clause of the Contract.

9.1.2 The Contractor shall use its reasonable endeavours to ensure that Subcontractors and their employees, officers and agents are insured as required by this clause 9.1, as is appropriate (including with respect to the amount of insurance, types of insurance and period of insurance) given the nature of services or work to be performed by them, as if they were the Contractor.

Option: For use if workers compensation insurance is required.

9.1.3 **(workers compensation)** The Contractor shall effect and maintain workers compensation insurance or registrations as required by law, in respect of the Contractor's liability to its employees engaged in the performance of any obligation or the exercise of any right under the Contract. Where permitted under the relevant statutory workers compensation or accident compensation scheme, the insurance or registrations shall extend to cover the vicarious liability of the Commonwealth for the acts or omissions of the Contractor. However, the requirements of this clause 9.1.3 (workers compensation) do not apply to the extent and for such time as the Contractor is a licensed self-insurer or exempt employer in the relevant jurisdiction.

Note to tenderers: Alternative clause 9.1.3 to be used where some workers engaged by the Contractor will be performing work outside of Australia. If this alternative clause is used, prior to Contract signature the clause number and cross-references in this clause 9.1.3 will need to be automated and automatic cross-references elsewhere in clause 9.1 to this clause will need to be reinserted.

9.1.3 **(workers compensation)** The Contractor shall effect and maintain:

- a. workers compensation insurance or registrations as required by law, in respect of the Contractor's liability to its employees engaged in the performance of any obligation or the exercise of any right under the Contract. Where permitted under the relevant statutory workers compensation or accident compensation scheme, the insurance or registrations shall extend to cover the vicarious liability of the Commonwealth for the acts or omissions of the Contractor. However, the requirements of this clause 9.1.3a do not apply to the extent and for such time as the Contractor is a licensed self-insurer or exempt employer in the relevant jurisdiction; and
- b. in each jurisdiction where common law claims can be brought outside of the statutory workers compensation or accident compensation scheme referred to in clause 9.1.3a, employer's liability insurance with a limit of indemnity of not less than the amount customarily effected by prudent insureds for this risk in each relevant jurisdiction, covering any work-related injury, damage, expense, loss or liability suffered or incurred by any person engaged by the Contractor in the work under the Contract (or their dependants). Such insurance shall extend to cover the vicarious liability of the Commonwealth for the acts or omissions of the Contractor.

Option: For use if public and products liability insurance is required.

9.1.4 **(public and products liability)** The Contractor shall effect and maintain public and products liability insurance written on an occurrence basis with a limit of indemnity of not less than:

- a. the amount specified in the Details Schedule each and every occurrence for public liability claims; and
- b. the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period for products liability claims,

which covers:

- c. the Contractor, its employees, officers and agents (including for liability to each other); and
- d. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents,

for their respective liabilities for any:

- e. loss of, damage to, or loss of use of, any tangible property (including GFF, GFE and any other Commonwealth Property in the care, custody or control of the Contractor or its Subcontractors) for a sublimit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and damage under the insurance referred to in clause 9.1.6 ([property or Industrial Special Risks]); and
- f. the bodily injury, disease, illness or death of any person,

Note to drafters: At the end of clause 9.1.4 below, select the appropriate territorial limit:

- a. ***If works under the Contract will occur only in Australia and the acquired items will not be used outside of Australia, then include the second last sentence "This insurance shall have a territorial limit which includes Australia"; and***
- b. ***If works under the Contract will occur in whole or in part outside of Australian or the acquired items may be used outside of Australia, then include the last sentence "This insurance shall have a worldwide territorial limit".***

caused by, arising out of, or in connection with the negligent performance of any obligation or the exercise of any right under the Contract or under any GFF Licence entered into for the purposes of this Contract by the Contractor or Contractor Personnel, including in respect of the manufacture, processing, alteration, repair, installation, supply, distribution or sale of any product. **[INSERT EITHER 'This insurance shall have a territorial limit which includes Australia.' OR 'This insurance shall have a worldwide territorial limit']**.

Option: For use if professional indemnity insurance is required.

9.1.5 **(professional indemnity)** The Contractor shall effect and maintain professional indemnity insurance with a limit of indemnity of not less than the amount specified in the Details Schedule for any one claim and in the aggregate for all claims in any 12 month policy period, and including a right of reinstatement, which covers the liability of the Contractor at general law arising from a negligent breach of duty owed in a professional capacity, by reason of any act or omission of the Contractor or Contractor Personnel. Such insurance shall:

- a. have a definition of professional services broad enough to include all professional services, activities and duties to be provided or performed by the Contractor and Contractor Personnel under the Contract;

Note to drafters: Paragraphs b, c, d and f are optional depending on the services and risks. Where b or c is selected, f should also be included.

- b. extend to cover claims related to software and IT risks;
- c. extend to cover claims for unintentional breaches of IP rights;

- d. extend to cover claims for unintentional breaches of trade practices laws;
- e. have a retroactive date of no later than the earlier of the commencement of the work under the Contract or any preparatory work by the Contractor and Contractor Personnel; and
- f. have worldwide territorial and jurisdictional limits.

Option: For use if property or Industrial Special Risks insurance is required.

- 9.1.6 **(property)** The Contractor shall effect and maintain all risks property insurance covering:
- a. the tangible Services, unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability);
 - b. GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability);
 - c. all other property, plant and equipment in the care, custody or control of the Contractor or its agents, material to the Contractor's ability to perform its obligations under the Contract; and

Note to drafters: The last sentence of clause 9.1.6 below highlighted in grey is optional and should only be used where GFF constitutes a part of a building or facility.

- d. against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris. The insurance shall insure the respective interests of the Contractor and the Commonwealth in the property insured. Where the GFF constitutes only a part of a building or facility, the requirement for insurance for GFF under this clause 9.1.6 only applies in respect of the Licensed Fittings (as defined in the GFF Licence).

Note to drafters: The following alternative clause 9.1.6 is to be used where business interruption insurance is required. If this alternative clause is used, the clause number and cross-references in this clause 9.1.6 will need to be automated and automatic cross-references elsewhere in clause 9.1 to this clause will need to be reinserted.

- 9.1.6 **(Industrial Special Risks)** The Contractor shall effect and maintain:
- a. all risks property insurance covering:
 - (i) the tangible Services, unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability);
 - (ii) GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability); and
 - (iii) all other property, plant and equipment in the care, custody or control of the Contractor or its agents, material to the Contractor's ability to perform its obligations under the Contract,

Note to drafters: The last sentence in subclause b below highlighted in grey is optional and should only be used where GFF constitutes a part of a building or facility.

- b. against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris. The insurance shall insure the respective interests of the Contractor and the Commonwealth in the property insured. Where the GFF constitutes only a part of a building or facility, the requirement for insurance for GFF under this clause 9.1.6 only applies in respect of the Licensed Fittings (as defined in the GFF Licence); and
- c. business interruption insurance for a period of not less than the period specified in the Details Schedule with a limit sufficient to cover the loss of profit and increased

costs of working due to the interruption of the Contractor's operations or activities caused by damage to insured property by a peril required to be insured against under clause 9.1.6a.

Option: For use if transit insurance is required.

9.1.7 **(transit)** The Contractor shall effect and maintain insurance covering any tangible property referred to in clause 9.1.6, against the risks of loss, damage or destruction caused by all commercially insurable risks for an amount not less than their full replacement value plus freight and insurance on an indemnity basis during transits of such property by land, sea or air and during loading or unloading and storage during transit, where such transits are at the risk of the Contractor. The insurance shall insure the respective interests of the Contractor and the Commonwealth in the property insured.

Option: For use if motor vehicle insurance is required.

9.1.8 **(motor vehicle)** The Contractor shall effect and maintain:

- a. compulsory third party insurance as required by law in respect of all registered plant and motor vehicles used by the Contractor, its employees, officers and agents in connection with the work under the Contract; and
- b. motor vehicle liability insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence covering:
 - (i) third party property loss or damage arising out of the use by the Contractor, its employees, officers and agents of any registered or unregistered plant or vehicles; and
 - (ii) third party bodily injury, disease, illness or death arising out of the use by the Contractor, its employees, officers and agents of any unregistered plant or vehicles and, any registered vehicles not required to be insured under compulsory third party insurance in a foreign jurisdiction,

in connection with the work under the Contract or on or around any GFF by the Contractor or Contractor Personnel.

Option: For use if aircraft hull insurance is required.

9.1.9 **(aircraft hull)** The Contractor shall effect and maintain aircraft hull insurance for the full replacement value (or, where it is the practice for such property to be insured for its market or agreed value by prudent insureds in accordance with insurance market practice for this type of risk, then for such market or agreed value) of each aircraft to be used in the performance of the work under the Contract against the risks of loss, damage or destruction by all commercially insurable risks (including hull war cover as provided by LSW555D and spares all risks cover) whilst each aircraft is at the risk of the Contractor and which insures the respective interests of the Contractor and the Commonwealth in the property insured.

Option: For use if aviation liability insurance is required.

- 9.1.10 **(aviation liability)** The Contractor shall effect and maintain aviation and aviation products liability insurance written on an occurrence basis with a limit of indemnity of not less than:
- a. the amount specified in the Details Schedule each and every occurrence for aviation liability claims; and
 - b. the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period for aviation products liability claims, which covers:
 - c. the Contractor, its employees, officers and agents (including for liability to each other); and
 - d. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents, for their respective liabilities for any:
 - e. loss of, damage to, or loss of use of, any tangible property (including GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors for a sublimit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and damage under the insurance referred to in clause 9.1.6 (**INSERT EITHER 'property' OR 'Industrial Special Risks' IN ACCORDANCE WITH THE SELECTION MADE AT CLAUSE 9.1.6]**) or 9.1.9 (aircraft hull)); and
 - f. bodily injury, disease, illness or death of any person, caused by, arising out of, or in connection with, the manufacture, processing, alteration, supply, distribution, sale, use, operation, repair, maintenance or ownership of any aircraft or aviation products in the performance of the Contract by the Contractor or Contractor Personnel. Such insurance shall:
 - g. cover all aviation activities and services to be provided by the Contractor, its employees, officers and agents under the Contract;
 - h. not exclude claims related to the effects of noise or wind produced as a result of the use, operation or ownership of any aircraft;
 - i. not exclude claims arising from an alleged breach of duty owed in a professional capacity;
 - j. cover war risks as provided by AVN52E;
 - k. cover third party passenger liability;
 - l. cover claims by pilots and operational crew as provided by AVN73; and
 - m. include confirmation that the insurance is compliant with requirements of the *Civil Aviation (Carriers Liability) Act 1959* (Cth) as provided by AVN57A.

Option: For use if hangarkeepers insurance is required.

- 9.1.11 **(hangarkeepers)** The Contractor shall effect and maintain hangarkeepers liability insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence which covers the liability (including premises liability and airside liability) of:
- a. the Contractor, its employees, officers and agents (including for liability to each other); and
 - b. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents,
- caused by, arising out of, or in connection with, the occupation, use or ownership of any hangar, runways or related infrastructure and facilities used in the performance of the work under the Contract by the Contractor or Contractor Personnel.

Option: For use if marine hull insurance is required.

- 9.1.12 **(marine hull)** The Contractor shall effect and maintain marine hull insurance for the full replacement value (or, where it is the practice for such property to be insured for its market or agreed value by prudent insureds in accordance with insurance market practice for this type of risk, then for such market or agreed value) of each vessel to be used in the performance of the work under the Contract against the risks of loss, damage or destruction by all commercially insurable risks (including war risks) whilst each vessel is at the risk of the Contractor and which insures the respective interests of the Contractor and the Commonwealth in the property insured.

Option: For use if marine liability insurance is required.

- 9.1.13 **(marine liability)** The Contractor shall effect and maintain marine liability (or protection and indemnity) insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence which covers:
- a. the Contractor, its employees, officers and agents (including for liability to each other); and
 - b. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents,
- for their respective liabilities for any:
- c. loss of, damage to, or loss of use of, any tangible property (including GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors for a sublimit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and damage under the insurance referred to in clause 9.1.6 (**[INSERT EITHER 'property' OR 'Industrial Special Risks' IN ACCORDANCE WITH THE SELECTION MADE AT CLAUSE 9.1.6]**) or 9.1.12 (marine hull)); and
 - d. bodily injury, disease, illness or death of any person,
- caused by, arising out of, or in connection with, the use, operation or ownership of any vessel by the Contractor or Contractor Personnel in the performance of the Contract, including cover for war risks.

Option: For use if ship repairers liability insurance is required.

- 9.1.14 **(ship repairers liability)** The Contractor shall effect and maintain ship repairers liability insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence which covers:
- a. the Contractor, its employees, officers and agents (including for liability to each other); and
 - b. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents,
- for their respective liabilities for any:
- c. loss of or damage to any tangible property (including GFF, GFE and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors for a sub-limit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and damage under the insurance referred to in clause 9.1.6 ([INSERT EITHER 'property' OR 'Industrial Special Risks' IN ACCORDANCE WITH THE SELECTION MADE AT CLAUSE 9.1.6])); and
 - d. the bodily injury, disease, illness or death of any person, caused by, arising out of, or in connection with the negligent performance of ship repair or maintenance work under the Contract by the Contractor or Contractor Personnel. Such insurance shall include cover for:
 - e. war risks, strikes and malicious acts;
 - f. wet risks;
 - g. docking and undocking, launching and piloting;
 - h. hot work;
 - i. accidental pollution (including clean-up costs);
 - j. worker to worker liability; and
 - k. warranty and maintenance guarantee obligations.

Option: For use if Cyber insurance is required.

9.1.15 **(cyber)** The Contractor shall effect and maintain cyber insurance which covers the Contractor for:

- a. liability arising from the alleged or actual theft or unauthorised dissemination, or unauthorised use of, or unauthorised access to personal, confidential, security classified or proprietary information;
- b. "network security liability" being a liability arising from unauthorised access to, unauthorised use of, or unauthorised modification of computer systems or applications (other than the Defence Protected Network), including hacker attacks, the inability of an authorised party to access, use or modify the systems or applications including because of "denial of service" attacks, except to the extent caused by a mechanical or electrical failure not in the direct operational control of the insured;
- c. liability arising from Malware included in the Services, or introduced into equipment, networks or existing applications or systems (other than the Defence Protected Network), or data relating thereto, belonging to or used by the Commonwealth, the Contractor, a Subcontractor, a Commonwealth Contractor or a third party;
- d. costs and expenses of government investigations into events of the kind described in clauses 9.1.15a to 9.1.15c;
- e. fines and penalties imposed in relation to events of the kind described in clauses 9.1.15a to 9.1.15c;
- f. mitigation (including web clean-up) costs, crisis management costs and investigation (including forensic) costs in relation to events of the kind described in clauses 9.1.15a to 9.1.15c;
- g. cyber ransom and extortion; and
- h. data recovery costs incurred in relation to events of the kind described in clauses 9.1.15a to 9.1.15c;

Option: For use where business interruption insurance is required.

Note to drafters: Use clause 9.1.15i a non-physical business interruption resulting from a cyber event will materially affect the Contractor's ability to complete the Contract or unacceptably extend the Contract.

- i. non-physical business interruption;

written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule any one occurrence and in the aggregate for all occurrences in any 12 month policy period. Such insurance shall:

- j. cover the liability of the Contractor by reason of any act or omission of the Contractor, its employees, officers, Subcontractors and agents;
- k. cover the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor;
- l. have a retroactive date of no later than 36 months before the commencement of the work under the Contract; and
- m. have worldwide territorial and jurisdictional limits.

Option: For use if contract works insurance is required.

Note to drafters: 'Construction works', 'site' and 'defects correction period' are in square brackets in case there is a more appropriate defined or undefined term.

9.1.16 **(contract works)** The Contractor shall effect and maintain all risks insurance covering the whole of the [construction works] (including any temporary works), plant and equipment and any other property on [site] (including while in storage off [site] and while in transit to or from the [site]) for use in performing or incorporation into the [construction works] against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris and insuring the respective interests of the Contractor, its employees, officers and agents and the Commonwealth in the property insured.

Note to drafters: Alternative clause 9.1.15 is to be used where advanced consequential loss insurance is required. If this alternative clause is used, the clause number and cross-references in this clause 9.1.15 will need to be automated and automatic cross-references elsewhere in clause 9.1 to this clause will need to be reinserted.

9.1.16 **(contract works)** The Contractor shall effect and maintain:

- a. all risks insurance covering the whole of the [construction works] (including any temporary works), plant and equipment and any other property on [site] (including while in storage off [site] and while in transit to or from the [site]) for use in performing or incorporation into the [construction works] against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris and insuring the respective interests of the Contractor, its employees, officers and agents and the Commonwealth in the property insured; and
- b. advanced consequential loss insurance for a period of not less than the period specified in the Details Schedule with a limit sufficient to cover the increased costs of working and other costs and expenses incurred by the Contractor due to a delay in the progression of the [construction works] due to the occurrence of a peril required to be insured against under clause 9.1.15a.

9.1.17 The insurances and registrations referred to in:

Note to drafters: 'Defects correction period' is in square brackets in case there is a more appropriate defined or undefined term.

In clause 9.1.17a below, include the words highlighted in grey only if contract works insurance has been selected.

- a. the following clauses shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed (and all applicable [defects correction periods] in respect of any works have expired):
 - (i) clause 9.1.3 (workers compensation);
 - (ii) clause 9.1.6 (**[INSERT EITHER 'property' OR 'Industrial Special Risks' IN ACCORDANCE WITH THE SELECTION MADE AT CLAUSE 9.1.6]**);
 - (iii) clause 9.1.9 (aircraft hull);
 - (iv) clause 9.1.11 (hangarkeepers liability);
 - (v) clause 9.1.12 (marine hull);
 - (vi) clause 9.1.13 (marine liability);
 - (vii) clause 9.1.14 (ship repairers liability); and

(viii) clause 9.1.15 (cyber)

Note to drafters: If the products supplied have a life which exceeds the Contract Term, then:

- include the whole sentence at clause 9.1.17b below, and
- insert a period sufficient to cover the life of the product. If that period is commercially too long, insert a reasonable period, eg. 7 or 10 years.

If the products supplied have a life which does not exceed the Contract Term, then at clause 9.1.17b below, delete the words at the end of the clause highlighted in grey.

- b. clause 9.1.4 (public and products liability) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed and, in respect of products liability for [INSERT PERIOD] years following completion of the work under the Contract;

Note to drafters: If the aviation products supplied have a life which exceeds the Contract Term, then:

- include the whole sentence at clause 9.1.17c below, and
- insert a period sufficient to cover the life of the product. If that period is commercially too long, insert a reasonable period, eg. 7 or 10 years.

If the aviation products supplied have a life which does not exceed the Contract Term, then at clause 9.1.17c below, delete the words at the end of the clause highlighted in grey.

- c. clause 9.1.10 (aviation liability) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed and, in respect of products liability for [INSERT PERIOD] years following completion of the work under the Contract;
- d. clause 9.1.5 (professional indemnity) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until the earlier of:
- (i) [7/10] years following completion of the work under the Contract; or
 - (ii) [7/10] years following an earlier termination of the Contract;
- e. clause 9.1.7 (transit) shall be effected on or before the start of each conveyance and maintained until the end of each conveyance by delivery at the [site];
- f. clauses 9.1.8 (motor vehicle) shall be effected on or before the date the plant or vehicle is used in connection with the work under the Contract or on or around the GFF (whichever is the earlier) and maintained until such plant or vehicle ceases to be so used; and
- g. clause 9.1.16 (contract works) shall be effected on or before the [construction works] commence and maintained until the expiry of any [defects correction period] in relation to the [construction works] to which the insurance relates.

9.1.18 To the extent that the Contractor's insurances and registrations required by clause 9.1 of this Contract are in fact written on a claims made basis (notwithstanding any requirements of this Contract for such insurances to be written on an occurrence basis) then the Contractor shall maintain those insurances and registrations until the earlier of:

- a. [7/10] years following completion of the work under the Contract; or
- b. [7/10] years following an earlier termination of the Contract.

Option: For use if there will be Members Required in Uniform.

Note to drafters: Delete insurances from the following list if it is beyond doubt that the MRU will not perform certain works (eg, will not do anything aviation related where aviation insurance is required).

9.1.19 The Contractor shall ensure that insurances referred to in:

- a. clause 9.1.4 (public and products liability);
- b. clause 9.1.5 (professional indemnity);

- c. clause 9.1.8 (motor vehicle);
- d. clause 9.1.10 (aviation liability);
- e. clause 9.1.11 (hangarkeepers liability);
- f. clause 9.1.13 (marine liability);
- g. clause 9.1.14 (ship repairers liability); and
- h. clause 9.1.15 (cyber),

provide cover to the MRU and the Contractor for their respective liabilities for the acts and omissions of the MRU, while the MRU are made available to the Contractor for the purposes of this Contract.

- 9.1.20 With the exception of statutory insurances, the insurances referred to in this clause 9.1 shall:
- a. be effected with an insurer with a financial security rating of 'A-' or better by Standard & Poor's (or the equivalent rating with another recognised rating agency), or an insurer approved by the Commonwealth, acting reasonably; and
 - b. provide that the insurer agrees:
 - (i) to provide at least 30 days written notice of cancellation to the policyholder;
 - (ii) that the policy operates (with the exception of limits of indemnity) as if there was a separate policy of insurance covering each party comprising the insured;
 - (iii) that a failure by any insured to observe and fulfil the terms of the policy or to comply with the pre-contractual duty of disclosure does not prejudice the insurance of any other insured;
 - (iv) that the state of mind and knowledge of one insured will not be imputed to any other insured for the purposes of determining the availability of cover under the policy;
 - (v) to waive all rights of salvage in respect of property of the Commonwealth which the Commonwealth notifies to the Contractor at or before the time of loss is of a sensitive nature from a national security perspective. Where the Commonwealth obtains proceeds from the salvage sale from any such property of the Commonwealth insured under the Contractor's insurance, the insurer may deduct the actual payment of such salvage sale proceeds obtained by the Commonwealth from the amount of claim payment. Where the Commonwealth does not sell but instead reuses such property, the insurer may deduct a reasonable amount from the amount of the claim payment to reflect the value the Commonwealth has obtained from the reuse of the property. However this clause 9.1.20b(v) only applies to the insurances referred to in the following clauses:
 - 1) clause 9.1.4 (public and products liability);
 - 2) clause 9.1.6 (**[INSERT EITHER 'property' OR 'Industrial Special Risks' IN ACCORDANCE WITH THE SELECTION MADE AT CLAUSE 9.1.6]**);
 - 3) clause 9.1.7 (transit);
 - 4) clause 9.1.9 (aircraft hull);
 - 5) clause 9.1.11 (hangarkeepers liability);
 - 6) clause 9.1.12 (marine hull); and
 - 7) clause 9.1.14 (ship repairers liability);
 - (vi) that a notice of a claim by any insured will be accepted as notice by all insureds; and
 - (vii) that in respect of liability insurances required by this clause 9.1 (except statutory insurances), the policies will cover the Contractor for liabilities assumed by it under the provisions of clause 10.12.

- 9.1.21 The Contractor shall, on request, produce evidence satisfactory to the Commonwealth Representative of the currency and terms of the insurances referred to in this clause 9.1, including:
- a. certificates of currency issued by the insurer or by the Contractor's insurance broker which contains sufficient detail to enable the Commonwealth to ascertain whether the insurances are in compliance with this clause 9.1;
 - b. copies of all policies (except for statutory insurances and provided that, in relation to commercially sensitive policies only, for the purpose of complying with this clause 9.1.21b, such policies may be made available for inspection by the Commonwealth or the Commonwealth's advisers, at a place and time reasonably convenient to the Commonwealth or the Commonwealth's advisers); and
 - c. other evidence of the insurances which the Commonwealth reasonably requires.
- 9.1.22 If the Contractor fails to comply with clause 9.1.21, the Commonwealth may, but is not obliged to, effect and maintain the relevant insurances and may:
- a. elect to recover from the Contractor under clause 13.7 the cost of effecting and maintaining the insurance; or
 - b. deduct the premiums payable for the relevant insurances from amounts payable to the Contractor under the Contract.
- No amount shall be owing to the Commonwealth under this clause 9.1.22 until the Commonwealth elects to recover the amount.
- 9.1.23 In the event the Commonwealth elects to exercise its rights under clause 9.1.22, the Contractor shall provide the Commonwealth with all reasonable assistance to allow the Commonwealth to exercise those rights, including by executing documents and providing insurance proposal information to the Commonwealth's insurance broker and proposed insurers.
- 9.1.24 In respect of each insurance referred to in this clause 9.1, the Contractor shall:
- a. pay (or cause to be paid) all premiums and deductibles as and when they are due;
 - b. not do anything or fail to do anything or (insofar as it is reasonably within its power) permit anything to occur which prejudices any insurance;
 - c. if necessary, rectify anything which might prejudice any insurance;
 - d. reinstate an insurance policy if it lapses;
 - e. not cancel, materially adversely vary or allow an insurance policy to lapse without the prior written consent of the Commonwealth;
 - f. promptly notify the Commonwealth of any event (including the issue of a notice of intention to cancel by the insurer to the policyholder) which may result in an insurance policy lapsing or being cancelled;
 - g. promptly inform the Commonwealth if it becomes aware of any actual, threatened or likely claims (with the exception of claims or potential claims by the Commonwealth against the Contractor) which could materially reduce the available limits of indemnity or which may involve the Commonwealth, and shall reinstate or replace any depleted aggregate limit of indemnity resulting from claims that are unrelated to the work under the Contract, if requested to do so in writing by the Commonwealth;
 - h. give full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any way prejudice or affect any policy or the payment of any claims under the insurance; and
 - i. do everything reasonably required by the Commonwealth in order to allow the Commonwealth or any other person for whose benefit the policy is effected to claim and to collect or recover monies due under any insurance policy.
- 9.1.25 The Contractor shall not do anything which has been notified to the Contractor by the Commonwealth that may invalidate or prejudice any insurance policy held by the Commonwealth or any indemnity to which the Commonwealth may be entitled.

Note to drafters: The following clauses 9.1.26, 9.1.27 and 9.1.28 are only appropriate to include where the term of the Contract exceeds 3 years.

- 9.1.26 The Commonwealth may increase or decrease the limits of indemnity required for the insurances referred to in, or change the types of insurances required by, this clause 9.1 at each renewal date of the relevant insurance by providing three months prior written notice to the Contractor. The Commonwealth shall only increase the limits of indemnity required for the insurances referred to in, or require additional insurances under, this clause 9.1 where it has obtained an opinion from a reputable insurance broker or otherwise appropriately qualified consultant that an increase is required in order to conform with current prudent insurance practice for a company with a risk profile comparable to the Contractor. The Contractor shall, within 30 days after receipt of a notice from the Commonwealth to increase or decrease the limits of indemnity required for the insurances referred to in, or change the types of insurances required by, this clause 9.1, submit a CCP to effect a change to the Contract.
- 9.1.27 If the Contractor becomes aware that a risk to be covered by an insurance policy referred to in this clause 9.1 has or is to become Uninsurable then:
- a. the Contractor shall promptly notify the Commonwealth together with all details available to the Contractor as to the reason why the risk is Uninsurable, steps taken by the Contractor to obtain insurance for the risk, the date on which the risk became or will become Uninsurable, and details as to what the Contractor suggests is appropriate to mitigate, manage or control the risk while it remains Uninsurable;
 - b. the parties shall meet as soon as reasonably practicable, but (unless otherwise agreed in writing between the parties) no later than five Working Days after the notification in clause 9.1.27a to discuss all practical means by which the risk shall be managed (including, if the risk is material, the option of the Commonwealth providing an indemnity to the Contractor covering substantially the risks which have become Uninsurable or varying the Contract);
 - c. if the parties cannot agree as to how an Uninsurable risk is to be managed then, if the Uninsurable risk is material, either party (provided that the party is adversely affected by the Uninsurable risk), acting reasonably and in good faith, may terminate the Contract by notice with the exception that the Contractor shall not terminate the Contract if the Commonwealth offers an indemnity in substitution for insurance for the Uninsurable risk and that indemnity is no less broad than the insurance held by the Contractor for that risk immediately before the risk became Uninsurable. For the avoidance of doubt, termination pursuant to this clause is not to be treated under any circumstances as the exercise of a termination right under any other provision of this Contract, even if such a right may otherwise exist;
 - d. the Contractor shall, in respect of any risk that has become Uninsurable:
 - (i) monitor the insurance industry on a regular basis (and not less than twice a year) and attempt to obtain insurance for the risk which is Uninsurable;
 - (ii) provide the Commonwealth with details of attempts made by the Contractor to obtain insurance for the Uninsurable risk; and
 - (iii) as soon as it is able to do so, obtain insurance for the Uninsurable risk;
 - e. the Contractor acknowledges that the Commonwealth may undertake its own enquiries as to the availability of insurance for Uninsurable risks and as to the terms and conditions, including price, on which it is available. If the Commonwealth's own enquiries show that the insurance for Uninsurable risks is available on terms and conditions that are commercially reasonable in all of the circumstances, the Contractor shall obtain that insurance without unreasonable delay; and
 - f. the Contractor is relieved of its obligations under clause 9.1 to effect insurance for any risk that is Uninsurable for the period that the risk remains Uninsurable.
- 9.1.28 For the purposes of clause 9.1.27, 'Uninsurable' means, in relation to a risk, either that:
- a. insurance required pursuant to this clause 9.1 is not available in the international insurance markets with insurers with a financial security rating of 'A-' or better by Standard & Poors (or the equivalent rating with another reputable rating agency); or

- b. the insurance premium for insuring that risk is at such a level or the terms and conditions are such that the risk is not generally being insured against in the international insurance market with reputable insurers by prudent corporates with a risk profile comparable to the Contractor.

Note to drafters: When using this clause for non-CASG procurements (unless otherwise approved by the ACIP Management Team) or for CASG procurements in which no tenderer with ACIP status will participate, delete clause 9.1.29 and its associated Note to tenderers.

Note to tenderers: Clause 9.1.29 will only be included if the Contractor has an ACIP and may require amendment to only apply to those insurances to be covered by the ACIP.

9.1.29 The Contractor shall be:

- a. deemed compliant with the requirements of the following clauses:
- (i) clause 9.1.1;
 - (ii) clause 9.1.3 (workers compensation);
 - (iii) clause 9.1.4 (public and products liability);
 - (iv) clause 9.1.5 (professional indemnity);
 - (v) clause 9.1.6 (**[INSERT EITHER 'property' OR 'Industrial Special Risks' IN ACCORDANCE WITH THE SELECTION MADE AT CLAUSE 9.1.6]**);
 - (vi) clause 9.1.7 (transit);
 - (vii) clause 9.1.8 (motor vehicle);
 - (viii) clause 9.1.9 (aircraft hull);
 - (ix) clause 9.1.10 (aviation liability);
 - (x) clause 9.1.11 (hangarkeepers liability);
 - (xi) clause 9.1.12 (marine hull);
 - (xii) clause 9.1.13 (marine liability);
 - (xiii) clause 9.1.14 (ship repairers liability);
 - (xiv) clause 9.1.15 (cyber);
 - (xv) clause 9.1.16 (contract works); and
 - (xvi) clauses 9.1.17, 9.1.18, 9.1.19 and 9.1.20; and
- b. relieved of its obligations under clauses 9.1.21 and 9.1.24,

in respect of a particular insurance listed in clause 9.1.29a for any period during which the Contractor's insurance program holds Approved Contractor Insurance Program (ACIP) status under CASG's centralised process for monitoring the compliance of contractors with contractual insurance requirements, subject to any limitations on or conditions of that approval (including whether the Contractor's ACIP status extends to that type of insurance). The Contractor shall advise the Commonwealth Representative within five Working Days if its ACIP status is withdrawn or suspended by the Commonwealth.

10 INDEMNITIES, DAMAGES, RISK AND LIABILITY

10.1 Contractor's Employees and Officers (Core)

- 10.1.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with the death, personal injury, disease or illness of any employee or officer of the Contractor in relation to the Contract.
- 10.1.2 The liability of the Contractor under clause 10.1.1 shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.

- 10.1.3 The Contractor shall release the Commonwealth and Commonwealth Officers in respect of any liability for Loss referred to in clause 10.1.1, except to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.

10.2 Intellectual Property and Confidentiality (Core)

- 10.2.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with a Claim by a third party in respect of the following:
- a. an infringement or alleged infringement of the third party's IP rights (including Moral Rights) arising out of or as a consequence of:
 - (i) an activity permitted or purportedly permitted by or under a licence or assignment of IP rights under or referred to in the Contract (including in clause 5); and
 - (ii) a failure by the Contractor to grant (or ensure the grant of) a licence or assign (or ensure the assignment of) IP rights under or referred to in the Contract (including in clause 5); and
 - b. breach or alleged breach of any obligation of confidentiality owed to that third party arising out of or as a consequence of any act or omission of the Contractor or Contractor Personnel.

- 10.2.2 The liability of the Contractor under clause 10.2.1 shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.

- 10.2.3 In this clause 10.2:

'infringement' of a right includes an act or omission that would, but for the operation of section 163 of the *Patents Act 1990*, section 100 of the *Designs Act 2003*, section 183 of the *Copyright Act 1968*, or section 25 of the *Circuit Layouts Act 1989*, constitute an infringement of the right.

10.3 Other Third Party Claims (Core)

- 10.3.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with a Claim by a third party arising out of or as a consequence of a Contractor Default, including a Claim in respect of:
- a. the death, personal injury, disease or illness of any person; or
 - b. loss of or damage to any third party property.
- 10.3.2 The liability of the Contractor under clause 10.3.1 shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of:
- a. a Commonwealth Default;
 - b. an Excepted Risk; or
 - c. a breach of a general law duty or an applicable law by an Unrelated Party.

10.4 Proceedings Relating to Indemnities (Core)

- 10.4.1 If:
- a. a Claim is brought or threatened against the Commonwealth; and
 - b. the Claim is one that is or may be the subject of an indemnity given by the Contractor under the Contract,
- the Commonwealth shall give the Contractor notice of the Claim, which shall include particulars of the Claim so far as known to the Commonwealth Representative.
- 10.4.2 The Commonwealth shall, for any proceedings relating to a Claim of the type referred to in clause 10.4.1:
- a. keep the Contractor informed of all developments in relation to the proceedings;
 - b. conduct the proceedings in accordance with any reasonable directions of the Contractor, subject to the *Legal Services Directions 2017* and other relevant Commonwealth policies; and

- c. not agree to a settlement in relation to the Claim without the prior consent of the Contractor, unless a failure to agree the settlement would be contrary to the *Legal Services Directions 2017* and other relevant Commonwealth policies.
- 10.4.3 The Commonwealth may, following a request from the Contractor, agree to apply for leave to withdraw from proceedings relating to a Claim. If the Commonwealth is granted leave to withdraw from the proceedings:
- a. the Commonwealth shall withdraw from the proceedings;
 - b. the Contractor shall comply with any conditions imposed by the court in relation to the grant of such leave; and
 - c. the Contractor shall, in its own name and at its own expense, conduct the proceedings.

10.5 Other Provisions Relating to Indemnities (Core)

- 10.5.1 The Commonwealth holds the benefit of each indemnity given in favour of a Commonwealth Officer (each a 'protected person') under clauses 10.1, 10.2 or 10.3 on trust for the protected person.
- 10.5.2 The Commonwealth may recover from the Contractor an amount under an indemnity given by the Contractor under the Contract before the Commonwealth makes a payment in respect of such amount.

10.6 Liquidated Damages and Other Compensation (Core)

Note to drafters: Care should be taken if this clause is to be used in conjunction with the performance payment regime.

- 10.6.1 The parties acknowledge that, if the Contractor does not achieve a Key Requirement in accordance with Attachment D:
- a. the Commonwealth will suffer loss and damage; and
 - b. such loss and damage will, having regard to the governmental and non-commercial nature of the Services and their significance to the defence of Australia, be impossible, complex or expensive to quantify accurately in financial terms,
 - c. and therefore, the parties agree that the applicable LD Amount is:
 - (i) a genuine pre-estimate of the Loss that would be suffered by the Commonwealth resulting from a Contractor delay in achievement of the Key Requirement; and
 - (ii) an appropriate protection of the Commonwealth's legitimate interests in relation to the performance of the Contract.
- 10.6.2 If a Key Requirement is not achieved in accordance with Attachment D, the Commonwealth shall be entitled to recover from the Contractor, as liquidated damages and not as a penalty, the LD Amount for the Key Requirement.
- 10.6.3 No amount shall be owing to the Commonwealth under this clause 10.6 until the Commonwealth elects, in accordance with this clause 10.6, to recover the amount.
- 10.6.4 The Commonwealth may elect:
- a. to recover an LD Amount in one amount;
 - b. to recover an LD Amount in two or more amounts;
 - c. to accept compensation (instead of the LD Amount) as agreed in writing between the parties; or
 - d. to accept compensation as agreed between the parties and to recover part of the LD Amount as agreed in writing between the parties in one or more amounts.
- 10.6.5 If the Commonwealth makes an election under clause 10.6.4b or 10.6.4d in respect of a failure to achieve a Key Requirement, the Commonwealth may make one or more further elections in relation to the failure (up to any applicable cap on the LD Amount).

- 10.6.6 An election by the Commonwealth under this clause 10.6 in respect of a failure to achieve a Key Requirement shall, unless otherwise agreed in writing between the parties, be made and notified to the Contractor no later than:
- a. if an applicable cap on the LD Amount is reached before the Key Requirement is achieved, the end of four months after the Commonwealth receives notice from the Contractor that the cap has been reached; or
 - b. if the Key Requirement is achieved before the Commonwealth receives a notice under clause 10.6.6a, the end of four months after the Key Requirement is achieved.
- 10.6.7 If the Commonwealth does not elect before the end of the period determined in accordance with clause 10.6.6 in respect of all or some of the LD Amount for a Key Requirement listed in Attachment D, the Commonwealth will be taken to have elected and notified the Contractor at that time to recover the whole or the balance of the LD Amount (as relevant).
- 10.6.8 Unless the Commonwealth expressly agrees otherwise, a change to a Key Requirement effected by a CCP does not affect the Commonwealth's entitlement to liquidated damages already accrued in respect of that Key Requirement up to the date when the CCP takes effect to change the Key Requirement.
- 10.6.9 If the Commonwealth elects to accept compensation instead of liquidated damages (whether in the form of further supplies or services or otherwise), the Contractor shall prepare a CCP to effect a change to the Contract and any other contract between the Commonwealth and the Contractor that may be affected.
- 10.6.10 The Commonwealth's rights under this clause 10.6 in respect of a delay in the achievement of a Key Requirement are the Commonwealth's only entitlement to recover compensation or damages in respect of Loss of the Commonwealth resulting from that delay. To avoid doubt, no Commonwealth rights other than to compensation or damages in respect of that delay (for example, termination rights or rights in respect of a misrepresentation) are affected.

10.7 Loss of or Damage to the Deliverables and Products Being Supported (Core)

- 10.7.1 Risk in relation to any loss of, or damage to, Deliverables and Products Being Supported which are not yet owned by the Commonwealth resides with the Contractor:
- a. until the Deliverables and Products Being Supported are delivered or returned to the Commonwealth in accordance with the Contract; and
 - b. at any time after delivery or return (but prior to Acceptance of the Deliverables and Products Being Supported) where the Contractor retakes possession of the Deliverables and Products Being Supported in accordance with the Contract.
- 10.7.2 The Contractor shall replace or reinstate any Deliverables and Products Being Supported that are lost and repair any Deliverables and Products Being Supported that are damaged while the risk resides with the Contractor under clause 10.7.1, except to the extent that the loss or damage to the Deliverables or Products Being Supported arose out of or as a consequence of a Commonwealth Default.
- 10.7.3 The Commonwealth shall take reasonable care to prevent loss of or damage to Deliverables and Products Being Supported that have been delivered or returned to it in accordance with the Contract but which have not yet been Accepted.
- 10.7.4 Nothing in this clause 10.7 limits or affects the Contractor's obligations under clause 3.2, 3.3, 8.1.3c or 10.8.

10.8 Loss of or Damage to Commonwealth Property (Core)

- 10.8.1 The Contractor shall (and shall ensure that all Contractor Personnel) take reasonable care, to prevent loss of, or damage to, Commonwealth Property in connection with:
- a. the work under the Contract; and

Option: Insert clause 10.8.1b if GFF is included in the draft Contract.

- b. the use or occupation of any GFF.

- 10.8.2 The Contractor shall be liable for any Loss incurred by the Commonwealth in connection with any loss of, or damage to:
- a. any Commonwealth Property (other than GFF) while it is:
 - (i) on any Contractor Premises; or
 - (ii) being stored or transported by or on behalf of the Contractor, a Related Body Corporate of the Contractor, or a Subcontractor;

Option: Insert clause 10.8.2b if GFF is included in the draft Contract and include 'or' at the end of 10.8.2a(ii) above.

- b. any GFF (other than fair wear and tear) in respect of which the Contractor or the Subcontractor is responsible for controlling physical access,

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

- 10.8.3 The liability of the Contractor under clause 10.8.2 shall be reduced to the extent that the Contractor demonstrates that the loss or damage arose out of or as a consequence of:
- a. a Commonwealth Default; or
 - b. an Excepted Risk,
- except to the extent that the loss or damage could have been prevented or mitigated by reasonable care on the part of the Contractor or Contractor Personnel.
- 10.8.4 Without limiting clause 10.8.2, the Contractor shall be liable for any Loss incurred by the Commonwealth in connection with any loss of, or damage to, Commonwealth Property arising out of or as a consequence of a Contractor Default.
- 10.8.5 The liability of the Contractor under clause 10.8.4 shall be reduced to the extent that the Contractor demonstrates that the loss or damage arose out of or as a consequence of:
- a. a Commonwealth Default;
 - b. an Excepted Risk, except to the extent that the loss or damage could have been prevented or mitigated by reasonable care on the part of the Contractor or Contractor Personnel; or
 - c. a breach of a general law duty or an applicable law by an Unrelated Party.
- 10.8.6 Nothing in this clause 10.8 limits or affects the Contractor's obligations under clauses 3.2, 3.3, 8.1.3c or 10.7.

10.9 Exclusions of Certain Losses (Core)

- 10.9.1 Subject to clause 10.10.4, the Contractor is not liable to:
- a. pay compensation or damages under or in relation to this Contract; and
 - b. make a payment under an indemnity in this Contract,
- for Loss incurred by the Commonwealth resulting from:
- c. damage to reputation or exemplary or punitive damages incurred by the Commonwealth; or
 - d. diminished revenue, profits or business opportunity suffered by the Commonwealth.
- 10.9.2 The Commonwealth is not liable to pay compensation or damages under or in relation to this Contract for Loss resulting from damage to reputation or for exemplary or punitive damages incurred by the Contractor.

Option: Insert clause 10.9.3 if a GFF Licence is included in the draft Contract.

10.9.3 The Commonwealth has no liability to the Contractor for any Loss resulting from loss of revenue or profits or loss of business opportunity suffered or incurred by the Contractor in connection with any occupation or use of the GFF by the Contractor for a purpose that is not related to the performance of the Contract.

10.10 Liability Caps (Core)

Note to drafters: A liability risk assessment is to be undertaken by the Commonwealth in accordance with the Defence Liability Principles and the standard Defence methodology described in the Liability Risk Assessment template, both of which can be accessed via the link included in the following note to tenderers. The liability risk assessment provides the basis for determining the liability caps in this clause 10.10 and the insurance requirements in clause 9.

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

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

10.10.1 The liability of the Contractor to the Commonwealth in connection with the Contract (including at general law, in negligence or in equity) in respect of the following is limited (in each case) in aggregate to the relevant Limitation Amount specified in the Details Schedule:

- loss of or damage to Defence Property (other than Products Being Supported or Deliverables);
- liquidated damages (including the value of any agreed compensation provided by the Contractor instead of an LD Amount that would otherwise be payable);
- loss of or damage to Deliverables or Products Being Supported (including loss of use of Deliverables or Products Being Supported), and Losses other than those referred to in clauses 10.10.1a and 10.10.1a.

10.10.2 Each of the liability caps referred to in clause 10.10.1 is mutually exclusive and is to be applied separately.

Option: For use if an overall liability cap, as well as the individual caps in clause 10.10.1, are used.

10.10.3 In addition to clause 10.10.1, the maximum amount that the Contractor is liable to pay as compensation or damages under the Contract (including at general law, in negligence or in equity) in respect of Loss suffered by the Commonwealth of any kind, is limited in aggregate to the Overall Limitation Amount specified in the Details Schedule.

10.10.4 The liability caps in this clause 10.10 and exclusions of liability under clause 10.9 do not apply to a liability of the Contractor under or arising out of the Contract in relation to:

- (third party claims)** a Claim by a third party in respect of:
 - the death, personal injury, disease or illness of any person; or
 - loss of or damage to property of a third party;
- (IP)** an infringement of an intellectual property right (including a Moral Right) of any person;
- (confidentiality)** a breach of an obligation of confidence;
- (death of or personal injury to Commonwealth Officers)** the death, personal injury, disease or illness of a Commonwealth Officer;
- (non-Defence Commonwealth Property)** the loss of, or damage to, Commonwealth Property (other than Defence Property);

- f. **(Defence security)** a breach of the Contractor's obligations in relation to Defence security;
- g. **(privacy)** a breach of a written law with respect to privacy;
- h. **(criminal offences)** an act or omission of the Contractor or Contractor Personnel, where the person concerned has been convicted or found guilty of an offence comprised in the act or omission;
- i. **(Wilful Default)** a Wilful Default of the Contractor or Contractor Personnel;
- j. **(repudiation)** a repudiation of the Contract by the Contractor where the Contractor has intentionally abandoned the Contract; or
- k. **(restitution)** restitution of amounts paid under a mistake of fact or law in relation to the Contract.

10.10.5 Each paragraph of clause 10.10.4 is independent of, and its application is not affected by, any of the other paragraphs.

Note to drafters: Choose either 'clause 10.10.1' or 'clauses 10.10.1 and 10.10.3' depending on whether or not the optional clause 10.10.3 is selected.

10.10.6 The amount of a liability cap in [INSERT EITHER 'clause 10.10.1' OR 'clauses 10.10.1 and 10.10.3'] shall be adjusted in accordance with the formula:

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

where:

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

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

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

10.11 Renegotiation of Liquidated Damage and Liability Cap Amounts (Core)

10.11.1 If:

- a. a party proposes a change to the Contract by a CCP; and
- b. that change, together with other changes to the Contract since this clause 10.11 was last applied, increases or decreases the Contractor's payment entitlements (other than for S&Q Services) by more than the Renegotiation Threshold specified in the Details Schedule,

the parties shall negotiate in good faith, taking into account any increased risk relating to the Contract, to make amendments to the liability caps; and to the LD Amounts.

Note to drafters: If clause 10.6 is not included, drafters are to remove the words 'Liquidated Damage and' from the clause heading and remove 'and to the LD Amounts' from the end of this clause.

10.12 Proportionate Liability Laws (Core)

10.12.1 The parties agree that, to the extent permitted by law, the provisions of the Contract:

- a. are express provisions for their rights, obligations and liabilities with respect to matters to which a Proportionate Liability Law applies; and
- b. exclude, modify and restrict the provisions of a Proportionate Liability Law to the extent of their inconsistency with the Proportionate Liability Law.

11 CONTRACT MANAGEMENT**11.1 Change to the Contract (Core)**

- 11.1.1 Except as expressly permitted in the Contract, the Contract shall only be changed by CCP in accordance with this clause 11.1. The parties shall not be liable to each other for any additional work undertaken or expenditure incurred unless the change has been Approved under clause 11.1.5 and taken effect in accordance with clause 11.1.5.
- 11.1.2 Either party may propose a change to the Contract. CCPs shall be in the format set out at Annex C to Attachment I.
- 11.1.3 If the Commonwealth Representative proposes a change to the Contract it shall:
- a. notify the Contractor and the Contractor shall submit a CCP to the Commonwealth Representative within a period of 30 days after receipt of such notice or such other period as agreed in writing; or
 - b. provide a CCP to the Contractor and the Contractor shall, within 30 days after receipt, notify the Commonwealth Representative of any changes it requires to the CCP.
- 11.1.4 The Contractor shall calculate the effect of a CCP on the Contractor's payment entitlements:
- a. by reference to Attachment B (including any rates it contains or any other basis agreed by the parties in writing); and
 - b. taking into account the Contractor's obligations under clause 3.18.
- 11.1.5 Prior to the Contractor preparing a CCP, the Commonwealth may require the Contractor to provide a NTE quote for the preparation of a CCP. If the Commonwealth requests an NTE quote under this clause, the amount payable under clause 11.1.8 shall not exceed the NTE quote provided.
- 11.1.6 Unless otherwise agreed in writing, the Commonwealth Representative shall:
- a. within such period as specified in clause 2.4 of the SOW; or
 - b. if no such period is specified, within 30 days after receipt,
- either Approve the CCP or reject the CCP giving reasons for such rejection. A CCP that has been Approved takes effect when executed by both parties unless otherwise set out in the CCP.

Note to drafters: The list included in clause 11.1.7 needs to be validated against the COC and the SOW to ensure that it is both accurate and complete.

- 11.1.7 The cost of preparing the following CCPs shall be borne by the Contractor, including where the CCP is required by the Commonwealth for:
- a. a CCP under clauses 1.9, 1.11, 3.6.4, 6.4.7, 6.4.11c, 6.6.10, 7.4.3, 10.6.9, 11.9.6, 13.6.1 or 14.4;
 - b. a CCP under clauses 2.2.2, 2.4.6.1, 3.12.2, 3.14.4, 9.2.2.4 or 13.3.8 of the SOW;
 - c. any CCP under SOW Annex A or SOW Annex C;
 - d. a CCP under clause 6.2.2 of DSD-SUP-SERV; and
 - e. any other CCP which is proposed or required to address any non-performance of the Contractor under the Contract.
- 11.1.8 Subject to clauses 11.1.5 and 11.1.7, for a CCP required by the Commonwealth the Commonwealth shall meet the reasonable cost of preparation of the CCP whether or not the CCP is agreed by the Contractor.
- 11.1.9 The Commonwealth Representative may issue an amendment to the Contract to incorporate CCPs that have taken effect. The amendment does not affect the legal status of the CCP as determined under clause 11.1.5.

11.2 Conflicts of Interest and Other Disclosures by the Contractor (Core)

- 11.2.1 The Contractor warrants that, to the best of its knowledge after making diligent inquiries, as at the Effective Date specified in the Details Schedule no conflict of interest exists or is likely to

arise in connection with the performance of its obligations under the Contract by the Contractor, an Approved Subcontractor or the employees and officers of either of them.

- 11.2.2 The Contractor shall promptly notify and fully disclose to the Commonwealth, any event or occurrence actual or threatened during the Term which may materially adversely affect the Contractor's ability to perform any of its obligations under the Contract.
- 11.2.3 Without limiting clause 11.2.2, the Contractor shall promptly notify the Commonwealth if a conflict of interest referred to in clause 11.2.1 arises or appears likely to arise.
- 11.2.4 Within five Working Days after giving notice under clauses 11.2.2 or 11.2.3, the Contractor shall notify the Commonwealth of the steps the Contractor will take to resolve the issue. If the Commonwealth considers those steps are inadequate, it may direct the Contractor to resolve the issue in a manner proposed by the Commonwealth.
- 11.2.5 If the Contractor fails to notify the Commonwealth in accordance with clauses 11.2.2, 11.2.3 or 11.2.3 or fails to resolve the issue in the required manner, the Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1e.
- 11.2.6 The Contractor shall include rights of the Commonwealth equivalent to those contained in this clause 11.2 in all Approved Subcontracts.

11.3 Waiver (Core)

- 11.3.1 Failure by either party to enforce a condition of the Contract shall not be construed as in any way affecting the enforceability of that condition or the Contract as a whole.
- 11.3.2 The exercise of the Commonwealth's rights under the Contract does not affect any other rights of the Commonwealth under the Contract or otherwise, and does not constitute:
- a. an election to exercise those rights instead of other rights; or
 - b. a representation that the Commonwealth will not exercise other rights.

11.4 Confidential Information (Core)

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

- 11.4.1 Each party shall ensure that Confidential Information provided by the other party under or in connection with the Contract or identified in Attachment N is not disclosed, except to the extent that:
- a. the disclosure is permitted under clause 11.4.3;
 - b. the Confidential Information is in TD or Software and the disclosure is in connection with the exercise of the rights provided for in clause 5;
 - c. the Confidential Information is in Contract Material and the disclosure is to a Commonwealth Service Provider in connection with the exercise of the rights provided for in clause 5.7.1a; or
 - d. the other party provides its prior written consent to the disclosure (and such consent may be subject to conditions).
- 11.4.2 Each party shall ensure that, before disclosing Confidential Information under clause 11.4.1b or 11.4.1c, the recipient:
- a. executes a confidentiality deed poll substantially in the form of Annex B of Attachment I; or
 - b. is otherwise subject to an obligation not to disclose the Confidential Information to any other person on terms substantially equivalent to those in Annex B of Attachment I.
- 11.4.3 Clause 11.4.1 does not apply to a disclosure of Confidential Information to the extent that the disclosure is for any of the following purposes:
- a. as required or authorised by law;

- b. as necessary for the conduct of any legal proceedings arising in connection with the Contract;
 - c. is made by the Commonwealth, a Minister or Parliament in accordance with statutory or portfolio duties or functions, or for public accountability reasons, including following a request by Parliament, a parliamentary committee or a Minister; or
 - d. is to any of the following persons:
 - (i) a legal adviser, insurer, financier, auditor or accountant of a party, to the extent required to enable them to perform those roles;
 - (ii) a Related Body Corporate for internal management purposes;
 - (iii) any Commonwealth Personnel who needs to know the information in order to undertake their duties or functions; and
 - (iv) an employee, officer or agent of the Contractor who needs to know the information to enable the Contractor to perform its obligations under the Contract.
- 11.4.4 The Contractor shall not, in marking information supplied to the Commonwealth, misuse the term 'Confidential Information' or equivalent terms.
- 11.4.5 Subject to clause 11.4.6, the Contractor shall deliver to the Commonwealth, as required by the Commonwealth, all documents in its possession, power or control which contain or relate to any information that is Confidential Information of the Commonwealth on the earlier of:
- a. the date specified in a notice given by the Commonwealth (acting reasonably); and
 - b. the time the documents and other material are no longer required for the purposes of the Contract.
- 11.4.6 The Contractor may retain, and will not be required to return or destroy, any documents containing or relating to Confidential Information of the Commonwealth, where such documents are:
- a. retained in order to comply with any legal, professional or insurance obligations; or
 - b. stored in electronic backups or records that are produced in the normal course where it is not reasonably practicable to destroy such backups or records.
- 11.4.7 If the Commonwealth gives a notice under clause 11.4.5a, and the Contractor has placed or is aware that documents containing the Confidential Information of the Commonwealth are beyond its possession or control, the Contractor shall provide full particulars of the whereabouts of the documents containing the Confidential Information, and the identity of the person in whose custody or control they lie.
- 11.4.8 Subject to clause 11.4.6 the Contractor, when directed by the Commonwealth in writing, agrees to destroy any document in its possession, power or control, which contain or relate to any Confidential Information of the Commonwealth.
- 11.4.9 Return or destruction of the documents referred to in this clause 11.3.2b does not release the Contractor from its obligations under the Contract.

11.5 Assignment and Novation (Core)

- 11.5.1 Neither party may, without the written consent of the other, assign its rights under the Contract or novate its rights or obligations under the Contract.
- 11.5.2 If the Contractor proposes to enter into any arrangement which will require the novation of the Contract, it shall notify and seek the consent of the Commonwealth Representative within a reasonable period prior to the proposed novation.
- 11.5.3 The Commonwealth may refuse to consent to an arrangement proposed by the Contractor under clause 11.5.2.

11.6 Negation of Employment and Agency (Core)

- 11.6.1 The Contractor shall not represent itself, and shall ensure that Contractor Personnel do not represent themselves, as being employees, partners or agents of the Commonwealth.

11.6.2 None of the Contractor or Contractor Personnel shall, by virtue of the Contract, be, or for any purpose be taken to be, an employee, partner or agent of the Commonwealth.

11.7 Commonwealth Access (Core)

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

11.7.2 The Contractor shall ensure that Approved Subcontracts require Approved Subcontractors to give the Commonwealth Representative and any person authorised by the Commonwealth Representative, access to Approved Subcontractors' premises, and to records and accounts in connection with the performance of work under the Subcontract, including the right to copy. However, in the event of an emergency, an accident or incident investigation, a threat to WHS or the Environment, the Commonwealth may require, and the Contractor shall ensure that the Approved Subcontractor provides, immediate access to the premises, records or accounts for any purpose related to such emergency, investigation or threat. The Contractor shall ensure that the Commonwealth may copy any records or accounts for such purposes.

11.7.3 Without limiting clauses 11.7.1, 11.7.2 and 11.7.4, the Contractor acknowledges and agrees that:

- a. the Auditor-General has the power under the *Auditor-General Act 1997* (Cth) to conduct audits (including performance audits) of the Contractor and Subcontractors in relation to the Contract;
- b. the Auditor-General may give a copy of, or an extract from, a report on an audit in relation to the Contract to any person (including a Minister) who, in the Auditor-General's opinion, has a special interest in the report or the content of the extract; and
- c. the Commonwealth Representative may authorise the Auditor-General, or member of the staff of the Australian National Audit Office, to access premises, records and accounts under clauses 11.7.1 and 11.7.2.

11.7.4 Without limiting the generality of clauses 11.7.1 and 11.7.2, the purposes for which the Commonwealth Representative or any person authorised by the Commonwealth Representative may require access include:

- a. inspecting CMCA, attending, conducting or checking stocktakes of CMCA, including viewing and assessing the Contractor's inventory control and stocktaking systems, and removing CMCA that is no longer required for the performance of the Contract;
- b. performing Audit and Surveillance activities in relation to Quality in accordance with clause 11 of the SOW;
- c. auditing the Contractor's compliance with the AIC Obligations and each AIC Subcontractor's compliance with the respective AIC Subcontractor Obligations, including validating progress in meeting the Approved AIC Plan or Subcontractor AIC Plans (as applicable);
- d. investigating the reasonableness of proposed prices or costs in any CCP submitted in accordance with clause 11.1, and of prices quoted or claimed for Ad Hoc Services in accordance with clauses 3.12.8 to 0;
- e. investigating any costs claims made by the Contractor under the Contract, including any claims for:
 - (i) Postponement costs submitted under clause 6.5;
 - (ii) schedule recovery costs submitted under clause 6.7;
 - (iii) Defect rectification costs submitted under clause 8.2.2;

- f. determining whether and to what extent steps should be taken to register or otherwise protect Commonwealth TD or Commonwealth Software;
- g. validating the Contractor's compliance with clause 5 and the TDSR Schedule;
- h. auditing raw data, Software and Source Code for the purpose of validating the Contractor's performance under the Contract;

Note to drafters: Insert paragraph if clause 13.5 has been included in the SOW.

- i. for the purposes contemplated by clause 13.5 of the SOW;
- j. without being under any obligation to do so, monitoring the Contractor's compliance with any applicable laws or Approved plans in connection with the protection of WHS or the Environment, including the development and implementation of any systems, policies or procedures related to WHS and environmental compliance as required under the Contract;
- k. assessing the performance of the Contractor, including against the KPIs and OPMs and including accessing and inspecting relevant information technology systems to analyse and interrogate data supporting the Contractor's assessment of its performance against the KPIs and OPMs;
- l. assessing how and if the Contractor has achieved the Innovations / Efficiencies referred to in clause 3.18.1b;

Note to drafters: Insert paragraph m if Periodic Cost Reviews have been included at clause 1.11.

- m. conducting a Periodic Cost Review in accordance with clause 1.11;
- n. validating the Contractor's progress against the requirements of any Approved Remediation Plan;
- o. assessing the financial viability of the Contractor to perform and complete the Contract;
- p. monitoring and assessing compliance with the Commonwealth Supplier Code of Conduct in accordance with clause 12.11.1.

Note to drafters: When significant software management activities may be performed by Approved Subcontractors, the procurement team should consider including a tripartite deed (ideally in the RFT or otherwise in the draft Contract for negotiation) to capture the obligations in clauses 11.7.4h and 11.7.2 (as an annex to Attachment I to the Contract) within the context of a direct relationship between the Contractor, Approved Subcontractor and the Commonwealth. An additional clause would need to be included in clause 11.7 requiring the Contractor to obtain and provide to the Commonwealth an executed deed substantially in accordance with the relevant annex to Attachment I from all Approved Subcontractors performing software management activities.

11.7.5 The Contractor shall permit the Commonwealth to, and shall facilitate the Commonwealth being able to, exercise its rights in this clause 11.7 to access Related Bodies' Corporate records (including subsidiary and parent company records) relating to transfer pricing, cross-subsidisation with Related Bodies Corporate and the allocation of overheads between the Contractor and the Related Bodies Corporate in connection with any investigation, audit or review referred to in clause 11.7.4.

11.7.6 The Commonwealth shall comply with, and shall require any delegate or person authorised by the Commonwealth Representative to comply with, any reasonable Contractor or Approved Subcontractor safety and security requirements or codes of behaviour for the premises.

11.8 Contractor Access (Core)

11.8.1 The Commonwealth shall, during the Term, provide access to any Commonwealth Premises for persons Approved under this clause 11.8 as necessary for the Contractor's performance of the Contract.

11.8.2 Subject to clause 3.7 and unless otherwise agreed in writing, the Contractor shall seek written permission from the Commonwealth Representative, at least five Working Days prior to entry being required, for each person the Contractor wishes to have access to Commonwealth Premises.

- 11.8.3 The Commonwealth Representative may grant or refuse to grant a person access to the Commonwealth Premises. If access to any person specified by the Contractor is refused, the Contractor may request access for another person if necessary for the performance of the Contract.
- 11.8.4 The Commonwealth Representative may by notice to the Contractor withdraw access rights to any Commonwealth Premises at any time for any period.
- 11.8.5 The Contractor shall comply with, and require persons afforded access under this clause 11.8 to comply with, any relevant Commonwealth safety and security requirements, regulations, standing orders, or codes of behaviour for the Commonwealth Premises.
- 11.8.6 The Commonwealth Representative may notify the Contractor of, and the Contractor shall comply with, any special security or access provisions that apply to a particular Commonwealth Premises relevant to the Contract.

Option: For when the Contractor is to be given a GFF Licence.

- 11.8.7 This clause 11.8 does not apply in relation to the GFF.

11.9 Subcontracts (Core)

- 11.9.1 The Contractor shall not Subcontract the whole of the work under the Contract.
- 11.9.2 The Contractor may, but shall not be required to, Subcontract with one or more of the Approved Subcontractors.

Note to drafters: Exceptions identified in accordance with clause 11.9.3 may be defined in terms of specific Subcontractors, classes of Subcontractors, or levels in the WBS, etc. For instance, SMEs who become relevant only because they perform installation services might be exempted from requirements that are not in any way relevant to their Subcontract, such as measurement activities pertaining to software management.

- 11.9.3 The Contractor shall not Subcontract work under the Contract to a Subcontractor and shall ensure that an Approved Subcontractor does not Subcontract work under an Approved Subcontract if:
- a. the total value of all work with the Subcontractor is expected to exceed the Approved Subcontractor Threshold specified in the Details Schedule;
 - b. the work involves:
 - (i) design and development activities;
 - (ii) modification of systems or equipment, such as Deviations;
 - (iii) systems installation or integration; or
 - (iv) **[INSERT OTHER SPECIFIC TYPE OF WORK OR TASK(S) TO BE PERFORMED]**;
 - c. the work involves bringing or creating IP in significant items of TD or Software;
 - d. the Subcontractor will be located, on an on-going basis, on Commonwealth Premises;
 - e. the Subcontractor will host, on an on-going basis, Commonwealth Personnel on their premises; or
 - f. the work involves establishing, enhancing or maintaining an Industrial Capability within an Australian Entity that is, or forms part of, an Australian Industry Activity (AIA) Industrial, including:
 - (i) transfer of technology, TD, IP rights, knowhow and/or know-why to an Australian Entity for the purposes of creating or enhancing a Defence-Required Australian Industry Capability (DRAIC) or other ANZ Industrial Capability;
 - (ii) providing work to an Australian Entity that materially supports the maintenance of a DRAIC or other ANZ Industrial Capability; and/or
 - (iii) where the Approved Subcontractor is establishing, enhancing or maintaining an Industrial Capability within itself,

unless that Subcontractor is an Approved Subcontractor or unless otherwise Approved by the Commonwealth in writing pursuant to clause 11.9.5.

Note to drafters: Clause 11.9.3f relates to the development of Industrial Capability as a reason for identifying AIC Subcontractors. Clause 11.9.4c (below) is for contributions to the Australian economy and drafters need to insert a threshold ACE percentage that, in the context of the Approved Subcontractor Threshold, provide scope to pursue the AIC Objectives. Refer to the AIC Guide for ASDEFCON for further guidance on this issue.

- 11.9.4 If:
- a. an Approved Subcontractor performs work referred to in clause 11.9.3f;
 - b. an Approved Subcontractor is responsible for the establishment, development and/or maintenance of supply chains involving Australian Entities, which are required to support achieving Sovereignty for the Capability or capabilities to which the Products Being Supported relate; or
 - c. the total value of all work with an Approved Subcontractor is expected to exceed the Approved Subcontractor Threshold and for which the percentage of ACE is expected to be equal to or greater than [... **INSERT EG, 30%** ...] of the Approved Subcontract price,
- that Approved Subcontractor shall also be an AIC Subcontractor.
- 11.9.5 Where clause 11.9.3 or clause 11.9.4 applies in respect of a Subcontractor, the Contractor may seek the Commonwealth's Approval by written request to the Commonwealth Representative (such request to include a detailed justification) for the relevant Subcontractor not to be treated as an:
- a. Approved Subcontractor for the purposes of the Contract;
 - b. AIC Subcontractor for the purposes of the Contract; and/or
 - c. Approved Subcontractor or an AIC Subcontractor for the purposes of the application of specific provisions of the Contract.
- 11.9.6 The Contractor may request the inclusion of additional Approved Subcontractors in Attachment H by submitting a CCP in accordance with clause 11.1. The CCP shall include full particulars of the work to be Subcontracted, the name and address of each proposed Subcontractor and any other information about the Subcontractor required by the Commonwealth Representative.
- 11.9.7 The Commonwealth Representative shall Approve or reject the CCP in accordance with clause 11.1.6. The Commonwealth Representative's Approval shall not be unreasonably withheld.
- 11.9.8 None of the following reduce or limit the Contractor's obligations or liabilities under or in relation to the Contract:
- a. the Contractor's subcontracting any part of the work under the Contract;
 - b. the Commonwealth's Approval of a Subcontractor or a Subcontract; or
 - c. an act or omission of Contractor Personnel,
- and the Contractor shall be responsible for all Subcontractors.
- 11.9.9 The Contractor shall not enter into a Subcontract if the terms of the Subcontract will result in the Contractor not complying with a requirement in clause 5, unless the Contractor has obtained a waiver of the requirement in accordance with clause 5.11.3b.
- 11.9.10 If a Subcontract is terminated, repudiated or rescinded, whether in relation to its terms or as a result of any legislation relating to bankruptcy, liquidation or official management, the Contractor shall promptly notify the Commonwealth Representative and shall complete the work under the Contract either itself or by engaging another Subcontractor.
- 11.9.11 The Contractor acknowledges and shall inform its Subcontractors that the Commonwealth may be required to publicly disclose the Subcontractor's participation in the performance of the Contract. If requested by the Commonwealth Representative, the Contractor shall provide the Commonwealth Representative with names of Subcontractors and copies of Subcontracts (which need not contain prices) for this purpose.

- 11.9.12 The Contractor shall not enter into a Subcontract with a Subcontractor named by the Workplace Gender Equality Agency as an employer currently not complying with the *Workplace Gender Equality Act 2012* (Cth).
- 11.9.13 The Contractor shall obtain and provide to the Commonwealth an Approved Subcontractor Deed duly executed by a relevant Approved Subcontractor before any goods or services are provided by that Approved Subcontractor and no later than 20 Working Days after executing the relevant Subcontract.
- 11.9.14 For the purposes of clause 11.9.13, "a relevant Approved Subcontractor" means:
- a. an Approved Subcontractor who performs work referred to in clause 11.9.3c;
 - b. an AIC Subcontractor; and
 - c. an Approved Subcontractor identified in Attachment H as being required to provide an Approved Subcontractor Deed to the Commonwealth.

Note to drafters: These clauses 11.9.15 to 11.9.18b must be included in the draft RFT in accordance with the Payment Times Procurement Connected Policy (PT PCP) if the procurement will be valued at over \$4 million (inc GST). If the value of the procurement is not known, it should be assumed for the purposes of the PT PCP, that the procurement is valued above \$4 million (inc GST), unless it is reasonable to assume otherwise.

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

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

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

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

The following clauses will be included in the Contract if:

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

- 11.9.15 The Contractor shall comply with the Payment Times Procurement Connected Policy (PT PCP), including the obligation to provide and comply with a PT PCP Remediation Plan (as defined in the PT PCP) when required to do so by the PT PCP Policy Team.
- 11.9.16 If the Contractor enters into a PT PCP Subcontract, the Contractor shall include in that subcontract:
- a. a requirement for the Contractor to pay the PT PCP Subcontractor:
 - (i) within 20 days after the acknowledgement of the satisfactory delivery of the goods or services and receipt of a Correctly Rendered Invoice, provided that this does not affect any other obligation to comply with applicable legislation that provides for a shorter payment period; and
 - (ii) subject to clause 11.9.17b(ii), for payments made by the Contractor after the payment is due, the unpaid amount plus interest on the unpaid amount calculated in accordance with the formula for late payments at clause 7.10;
 - b. a statement that the PT PCP applies to that subcontract;
 - c. a statement that the subcontractor may make a complaint to the PT PCP Policy Team in accordance with the PT PCP if there has been non-compliance with the requirements of this clause 11.9.16;
 - d. a statement that the Contractor must respond to any complaint of non-compliance made by the subcontractor under clause 11.9.16b;

- e. a statement that, if requested by the PT PCP Policy Team, the Contractor must complete a questionnaire in the form of Appendix C to the PT PCP.
- 11.9.17 If the Contractor enters into a Reporting Entity Subcontract, the Contractor shall use reasonable endeavours to include in that subcontract:
- a. obligations equivalent to those in clause 11.9.16; and
- b. a requirement that if the Reporting Entity Subcontractor in turn enters into a Reporting Entity Subcontract, then that subcontract shall include:
- (i) obligations equivalent to those in clause 11.9.16; and
- (ii) obligations equivalent to this clause 11.9.17a (such that the obligations in this clause 11.9.17a are to continue to be flowed down the supply chain to all Reporting Entity Subcontractors).
- 11.9.18 The Contractor is not required to pay interest in accordance with clause 11.9.16a(ii) if either:
- a. the Commonwealth has failed to pay the Contractor in accordance with the timeframes and requirements under this Contract; or
- b. the amount of the interest that would otherwise be payable is less than \$100 (inc GST).
- 11.9.19 If the Contractor agrees that if it is the subject of a complaint in relation to its compliance with clauses 11.9.15 to 11.9.18b, or the associated payment provisions of a PT PCP Subcontract, the Contractor shall:
- a. not take any prejudicial action against the complainant due to the complaint or any investigation or inquiry in relation to the complaint; and
- b. cooperate in good faith with the PT PCP Policy Team in connection with any investigation or inquiry and any attempt to resolve the complaint.

11.10 Defence Security (Core)

Note to drafters: Where the procurement involves weapons or explosive ordnance, drafters must obtain the DSVS's approval for the security-related aspects of the request documentation prior to release.

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

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

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

or contact the relevant Regional DSVS Office.

Where the procurement involves complex security arrangements or a range of personnel security clearances, details should be set out in the Security Classification and Categorisation

Guide at Attachment J. In this event, reference to that attachment should be made in the relevant section of the Details Schedule.

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

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

- 11.10.3 The security classification of the information and assets accessible to the Contractor and work to be performed under the Contract will be up to and including the level specified in the Details Schedule. The Contractor shall:
- a. comply with the classification and protection of official information requirements of Principle 10 of the DSPF; and
 - b. ensure that all required personnel (if any) possess a personnel security clearance at the level specified in the Details Schedule, and comply with the requirements and procedures of Principle 40 of the DSPF.

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

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

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

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

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

Option 1: If the Contractor will require DISP membership in accordance with Control 16.1 of the DSPF.

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

Option 2: If the Contractor will not require DISP membership in accordance with Control 16.1 of the DSPF.

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

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

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

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

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

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

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

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

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

- a. ensure that no security classified information furnished or generated under the Contract shall be released to a third party, including a representative of another country, without prior written approval of the originator through the Commonwealth Representative;
- b. promptly report to the Commonwealth Representative any security incident, as defined by the DSPF, including instances in which it is known or suspected that security classified information furnished or generated under the Contract has been lost or disclosed to unauthorised parties, including a representative of another country; and
- c. ensure that all security classified information transmitted between the parties or a party and a Subcontractor, in Australia, whether generated in Australia or overseas, shall be subject to the terms of Principle 71 of the DSPF.

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

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

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

- a. without limiting clause 11.10.8b, all COMSEC material transmitted between the parties or a party and a Subcontractor in Australia shall be subject to the special security provisions of Principle 13 of the DSPF; and
- b. all security classified information transmitted between the parties or a party and a Subcontractor located overseas whether generated in Australia or by another country shall be subject to the laws of the overseas country regarding the custody and protection of security classified information and to any bilateral security instrument between Australia and the overseas country.

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

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

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

- a. all COMSEC material transmitted between the parties or a party and a Subcontractor located overseas shall be subject to approval in the first instance by the Director ASD in respect of Australian COMSEC material and by the respective COMSEC authorities in other countries in respect of COMSEC material originating from those countries; and
- b. once approved for release, the material shall be subject to the laws of the overseas country regarding the custody and protection of COMSEC material as determined by the Director ASD and to any bilateral security instrument between Australia and the overseas country.

11.10.11 If there has been a breach by the Contractor or Contractor Personnel of this clause 11.10, the Commonwealth Representative may give the Contractor a notice of termination for default under clause 13.2.1e.

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

11.11 Post Defence Separation Employment (Core)

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

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

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

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

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

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

- e. the policy requirements set out in DI Administration and Governance Provision 5-Conflicts of interest and declarations of interest AG5 and the *Integrity Policy Manual*, as applicable.

11.11.4 The Contractor shall include rights of the Commonwealth equivalent to those contained in clause 11.11 in all Approved Subcontracts.

11.12 Change of Control of the Contractor or the Guarantor (Core)

11.12.1 Subject to clause 11.12.2, the Contractor shall seek the Commonwealth Representative's prior written consent to any proposed Change of Control by providing notice to the Commonwealth at least 15 Working Days before the proposed Change of Control is to occur.

11.12.2 If a Change of Control occurs as a result of a transfer of shares or other interests listed on a recognised stock exchange and the consent of the Commonwealth Representative could not have been obtained in accordance with clause 11.12, the Contractor shall seek that consent by providing notice to the Commonwealth within 5 Working Days after the Change of Control.

11.12.3 In any notice given to the Commonwealth seeking consent to a Change of Control, the Contractor shall include the following details:

- a. the ownership and management arrangements of the Contractor or the Guarantor that were in place immediately before the change or, if the change has yet to occur, that were in place at the time the Contractor became aware of the prospective change;
- b. the ownership and management arrangements of the Contractor or the Guarantor that have been or will be put in place as a consequence of the change or, if the change has yet to occur, that the Contractor reasonably expects to be put in place if the change occurs;
- c. the impact (if any) that the change has had on the Contractor's or the Guarantor's ability to meet its obligations under the Contract or, if the change has yet to occur, that the Contractor reasonably expects the change to have on that ability; and
- d. the steps the Contractor has taken or proposes to take to minimise the impact of the change or prospective change.

11.12.4 If there is a Change of Control and the Commonwealth Representative does not consent to the Change of Control, then the Commonwealth may:

- a. give the Contractor a notice of termination under clause 13.2.1e; or
- b. agree not to give the Contractor a notice of termination under clause 13.2.1e, subject to the Contractor providing further information, giving specified undertakings, or executing further agreements (including a CCP), as may be required by the Commonwealth.

11.12.5 Nothing in this clause 11.12 requires the Contractor or the Guarantor to act in a manner inconsistent with its obligations under the *Corporations Act 2001* (Cth) or equivalent laws and regulations in a foreign jurisdiction.

12 POLICY AND LAW

12.1 Governing Law (Core)

12.1.1 The laws of the State or Territory specified in the Details Schedule shall apply to the Contract. The courts of that State or Territory shall have non-exclusive jurisdiction to decide any matter arising out of the Contract.

12.1.2 The United Nations Convention on Contracts for the International Sale of Goods shall not apply to the Contract.

12.2 Compliance with Laws (Core)

12.2.1 The Contractor shall, in the performance of the Contract, comply with and ensure that Contractor Personnel comply with, the laws from time to time in force in the State, Territory, or other jurisdictions (including overseas) in which any part of the Contract is to be carried out.

12.2.2 The Contractor shall provide to the Commonwealth Representative within 10 Working Days after a request by the Commonwealth written confirmation that, to the best of the Contractor's knowledge and based on reasonable enquiries undertaken by the Contractor, the Contractor

and Contractor Personnel are compliant with all laws (including foreign anti-corruption legislation) regarding the offering of unlawful inducements whether in Australia or otherwise in connection with the performance of the Contract and the Subcontracts.

12.2.3 The Contractor:

- a. shall take all reasonable measures to prevent, detect and investigate any fraud that may occur, is occurring or has occurred under the Contract or any Subcontract; and
- b. acknowledges and agrees that its obligation in clause 12.2.3a extends to taking all reasonable measures to prevent, detect and investigate any fraud which has or may be committed by Contractor Personnel.

12.2.4 If the Contractor knows that any fraud is occurring or has occurred, it shall, as soon as practicable, provide written details to the Commonwealth, and provide such further information and assistance as the Commonwealth, or any person authorised by the Commonwealth, reasonably requires in relation to the fraud.

12.3 Policy Requirements (Core)

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

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

12.3.1 Subject to clause 12.3.2 the Contractor shall comply with, and ensure that Contractor Personnel comply with, the following Commonwealth policies of general application relevant or applicable to the Contract:

- a. DI, and in particular:
 - (i) Administration and Governance Provision 4 AG4 – Incident reporting and management and the Incident Reporting and Management Manual;
 - (ii) Administration and Governance Provision 5, AG5 – Conflicts of interest and declarations of interest and the Integrity Policy Manual; and
 - (iii) People Provision 7, PPL 7 – Required behaviours in Defence and Chapter 3 of the Complaints and Alternative Resolutions Manual;
- b. Financial Policy Gifts and Benefits;
- c. Financial Policy Sponsorship;
- d. Australian Defence Force alcohol policy as detailed MILPERSMAN Part 4 Chapter 1;
- e. Public Interest Disclosure policy as detailed at:

<https://www.ombudsman.gov.au/Our-responsibilities/making-a-disclosure>; and
- f. **[DRAFTERS TO INSERT ANY OTHER RELEVANT COMMONWEALTH AND DEFENCE POLICIES THAT REGULATE PERFORMANCE OF THE SERVICES]**

12.3.2 Notwithstanding clause 1.7, if the SOW is inconsistent with a policy referred to in clause 12.3.1, the Contractor shall comply with the SOW to the extent of the inconsistency and provided that compliance with the SOW does not result in a breach of any laws.

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

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

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

- 12.3.3 The Contractor shall comply with its obligations under the *Workplace Gender Equality Act 2012* (Cth) (WGE Act).
- 12.3.4 If the Contractor becomes non-compliant with the WGE Act during the Term, the Contractor shall notify the Commonwealth Representative.

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

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

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

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

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

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

If the proposed Subcontractor to enter into the Subcontract is:	STRs required:
(a)	(b)
a. a body corporate or natural person;	a satisfactory and valid STR in respect of that body corporate or person;
b. a partner acting for and on behalf of a partnership;	a satisfactory and valid STR: <ul style="list-style-type: none"> (i) on behalf of the partnership; and (ii) in respect of each partner in the partnership that will be directly involved in the delivery of the Subcontract;
c. a trustee acting in its capacity as trustee of a trust;	a satisfactory and valid STR in respect of the: <ul style="list-style-type: none"> (i) trustee; and (ii) the trust;
d. a joint venture participant;	a satisfactory and valid STR in respect of: <ul style="list-style-type: none"> (i) each participant in the joint venture; and (ii) if the operator of the joint venture is not a participant in the joint venture, the joint venture operator;
e. a member of a Consolidated Group;	a satisfactory and valid STR in respect of: <ul style="list-style-type: none"> (i) the relevant member of the Consolidated Group; and (ii) the head company in the Consolidated Group;
f. a member of a GST Group;	a satisfactory and valid STR in respect of the:

		(i) the GST Group member; and (ii) the GST Group representative.
12.3.6	The Contractor shall obtain and hold additional STRs in the following circumstances within 10 Working Days of the Contractor becoming aware of the circumstances arising:	
	If the Contractor or Subcontractor is:	Additional STRs required:
	(a)	(b)
	a. a partner acting for and on behalf of a partnership;	a satisfactory and valid STR in respect of any additional partner that becomes directly involved in the delivery of the Contract or Subcontract (as applicable);
	b. a trustee acting in its capacity as trustee of a trust;	a satisfactory and valid STR in respect of any new trustee appointed to the trust;
	c. a joint venture participant;	a satisfactory and valid STR in respect of: (i) any new participant in the joint venture; and (ii) any new joint venture operator if the new operator is not already a participant in the joint venture;
	d. a member of a Consolidated Group;	a satisfactory and valid STR in respect of any new head company of the Consolidated Group; and
	e. a member of a GST Group;	a satisfactory and valid STR in respect of any new representative for the GST Group.
12.3.7	The Contractor shall provide the Commonwealth with copies of the STRs referred to in clause 12.3.5 or 12.3.6 within 5 Working Days after a written request by the Commonwealth.	
12.3.8	For the purposes of the Contract, an STR is taken to be:	
	a.	satisfactory if the STR states that the entity has met the conditions, as set out in the ShadowEconomy Procurement Connected Policy, of having a satisfactory engagement with the Australian tax system; and
	b.	valid if the STR has not expired as at the date on which the STR is required to be held.

12.4 Work Health and Safety (Core)

12.4.1 The Commonwealth and the Contractor:

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

in connection with the Services.

12.4.2 Without limiting the application of the WHS Legislation, the Contractor acknowledges that to the extent that any Commonwealth Personnel:

- a. are located on the Contractor Premises in relation to the Contract; and
- b. whose activities in carrying out work in relation to the Contract are influenced or directed by the Contractor,

such Commonwealth Personnel will be taken to be workers for the purposes of the applicable WHS Legislation.

12.4.3 The Contractor represents and warrants that:

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

12.4.4 The Contractor shall:

- a. provide the Services in such a way that the Commonwealth and Commonwealth Personnel are able to undertake any roles or obligations in connection with the Services (such as in relation to testing or auditing); and
- b. ensure that the Commonwealth and Commonwealth Personnel are able to make full use of the Services for the purposes referred to in clause 3.3.1, and to maintain, support and develop the Services and Products,

without the Commonwealth or Commonwealth Personnel contravening any legislation relating to WHS including the WHS Legislation, any applicable standards relating to WHS or any policy relating to WHS identified in the Contract.

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

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

to the Commonwealth Representative:

- c. within 10 Working Days (or another period agreed in writing by the Commonwealth) of a request by the Commonwealth Representative any information or copies of documentation requested by the Commonwealth Representative and held by the Contractor or Subcontractor (as the case may be) to enable the Commonwealth to comply with its obligations under the WHS Legislation;
- d. in respect of:
 - (i) the Contractor or an Approved Subcontractor, within 10 Working Days after receipt or submission of the notice, written communication or written undertaking by the Contractor or Approved Subcontractor (as the case may be); or
 - (ii) any other Subcontractor engaged in any Prescribed Activities, within 10 Working Days of a request by the Commonwealth,

copies of:

- (iii) all formal notices and written communications issued by a regulator or agent of the regulator under or in compliance with the applicable WHS Legislation to the Contractor or Subcontractor (as the case may be) relating to WHS matters;
- (iv) all formal notices issued by a health and safety representative of the Contractor or Subcontractor (as the case may be) under or in compliance with the applicable WHS Legislation; and

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

and that the Contractor or Subcontractor (as the case may be) has made reasonable enquiries before providing the written assurances.
- 12.4.6 Subject to clause 11.10 and any relevant foreign government restrictions, the Commonwealth shall provide to the Contractor in a timely manner any information or copies of documentation reasonably requested by the Contractor and held by the Commonwealth to enable the Contractor to comply with its obligations under the applicable WHS Legislation in relation to the Contract.
- 12.4.7 The Contractor shall ensure that if the WHS Legislation requires that:
- a. a person (including a Subcontractor):
 - (i) be authorised or licensed (in accordance with the WHS Legislation) to carry out any works at the workplace, that person is so authorised or licensed and complies with any conditions of such Authorisation; and/or
 - (ii) has prescribed qualifications or experience, or if not, is to be supervised by a person who has prescribed qualifications or experience (as defined in the WHS Legislation), that person has the required qualifications or experience or is so supervised; or
 - b. a workplace, plant or substance (or design), or work (or class of work) be authorised or licensed, that workplace, plant or substance (or design), or work (or class of work) is so authorised or licensed.
- 12.4.8 If the Contractor becomes aware of any intention on the part of a regulatory authority to cancel, revoke, suspend or amend an Authorisation relating to WHS, it shall immediately notify the Commonwealth giving full particulars (so far as they are known to it).
- 12.4.9 Without limiting clause 11.7, the Contractor shall give and shall ensure that an Approved Subcontractor gives, the Commonwealth Representative and any person authorised by the Commonwealth Representative access to:
- a. premises to conduct site inspections for the purpose of monitoring the Contractor's or the Approved Subcontractor's (as the case may be) compliance with any applicable laws, Authorisations or Approved plans in connection with WHS in relation to the Contract; and
 - b. all internal and third party audit results in relation to WHS in relation to the Services or work performed under the Contract.
- 12.4.10 To the extent not inconsistent with the express requirements of the Contract, the Commonwealth Representative may direct the Contractor to take specified measures that the Commonwealth Representative considers reasonably necessary to comply with applicable legislation relating to WHS including the WHS Legislation in relation to the provision of the Services. The Contractor shall comply with the direction unless the Contractor demonstrates to the reasonable satisfaction of the Commonwealth Representative that it is already complying with the WHS Legislation in relation to the matter to which the direction relates or the direction goes beyond what is reasonably necessary to achieve compliance with the WHS Legislation.

- 12.4.11 The Contractor shall comply with clause 12 of the SOW.
- 12.4.12 The Contractor shall not use ACM in providing the Services and shall not take any ACM onto Commonwealth Premises in connection with providing the Services.
- 12.4.13 Subject to clause 12.4.13b and without limiting the Contractor's obligations under the Contract:

Note to drafters: Where the optional clause 12.4.14 below is selected, insert the additional words in square brackets in clause 12.4.13a below.

- a. the Contractor shall ensure that all Approved Subcontracts contain equivalent provisions to those set out in this clause 12.4 [(other than clause 12.4.14)]; and
- b. where in relation to an Approved Subcontract:
 - (i) the WHS Legislation does not apply in respect of any work performed under that Approved Subcontract; and
 - (ii) the Commonwealth does not have any duties or obligations under the WHS Legislation in respect of the workers engaged or caused to be engaged by the relevant Approved Subcontractor,

the Contractor shall only be required to ensure that an Approved Subcontract contains equivalent provisions to those set out in clauses 12.4.3, 12.4.4, and 12.4.12 in respect of that Approved Subcontract.

Option: The following clause must be included except where following receipt of advice from Defence Legal it is determined that the Commonwealth should be the principal contractor (refer to DPPI NO 4/2012 Engagement of Principal Contractors under the WHS Legislation).

- 12.4.14 To the extent that work to be performed by the Contractor under the Contract is construction work for the purposes of the:
- a. WHS Legislation, in accordance with regulation 293 of the *Work Health and Safety Regulations 2011* (Cth) (in respect of the Commonwealth and the harmonised WHS Legislation of each of the States or Territories in which the construction work is carried out), the Contractor is engaged as the principal contractor for the construction work the subject of the Contract and is authorised to have management or control of the workplace and discharge the duties imposed on a principal contractor for the purpose of the WHS Legislation;
 - b. *Occupational Health and Safety Regulations 2007* (Vic), in accordance with regulation 5.1.14 of the *Occupational Health and Safety Regulations 2007* (Vic), the Contractor is appointed as the principal contractor for the construction work the subject of the Contract and is authorised to have management or control of the workplace and discharge the duties imposed on a principal contractor for the purpose of the *Occupational Health and Safety Regulations 2007* (Vic); and
 - c. *Occupational Safety and Health Regulations 1996* (WA), in accordance with regulation 1.3 of the *Occupational Safety and Health Regulations 1996* (WA), the Contractor is the main contractor for the construction work the subject of the Contract and is taken to have control of the site and the workplace and is required to discharge the duties imposed on a main contractor for the purpose of the *Occupational Safety and Health Regulations 1996* (WA).

12.5 Environmental Obligations (Core)

- 12.5.1 The Contractor shall perform its obligations under the Contract in such a way that:
- a. the Commonwealth is not placed in breach of; and
 - b. the Commonwealth is able to support and to make full use of the Services for the purposes for which they are intended without being in breach of,
- any applicable environmental legislation including the Environment Protection and Biodiversity Conservation Act 1999 (Cth).
- 12.5.2 The Contractor shall ensure and warrants that:

- a. it has given careful, prudent and professional consideration to the environmental implications of the work to be performed by it under the Contract; and
 - b. as at the Effective Date specified in the Details Schedule, the proposed method of performance of that work complies with all applicable environmental legislation.
- 12.5.3 If the Contractor becomes aware of any intention on the part of a regulatory authority to cancel, revoke or amend an Authorisation relating to the Environment that the Contractor requires to carry out the work under the Contract, it shall notify the Commonwealth without delay, giving full particulars (so far as they are known to it).
- 12.5.4 Without limiting clause 11.7, the Contractor shall give the Commonwealth Representative and any person authorised by the Commonwealth Representative access to:
- a. premises for the purpose of monitoring the Contractor's compliance with any applicable laws or Approved plans in connection with the protection of the Environment; and
 - b. all internal and third party audit results in relation to the Environment.

12.6 Severability (Core)

- 12.6.1 If any part of the Contract is or becomes illegal, invalid or unenforceable, the legality, validity or enforceability of the remainder of the Contract shall not be affected and shall be read as if that part had been severed.

12.7 Privacy (Core)

- 12.7.1 The Contractor shall:
- a. if it obtains Personal Information in the course of performing the Contract, use or disclose that Personal Information only for the purposes of the Contract subject to any applicable exceptions in the *Privacy Act 1988* (Cth);
 - b. comply with its obligations under the *Privacy Act 1988* (Cth); and
 - c. as a contracted service provider, not do any act or engage in any practice which, if done or engaged in by the Commonwealth, would be a breach of the Australian Privacy Principles.
- 12.7.2 The Contractor shall notify the Commonwealth as soon as reasonably practicable if:
- a. it becomes aware of a breach or possible breach of any of the obligations contained, or referred to, in this clause 12.7, whether by the Contractor, Contractor Personnel or any other person to whom the Personal Information has been disclosed for the purposes of the Contract; or
 - b. in relation to Personal Information obtained in the course of performing the Contract:
 - (i) it becomes aware that a disclosure of such Personal Information may be required by law; or
 - (ii) it is approached by the Privacy Commissioner.
- 12.7.3 The Contractor shall ensure that Contractor Personnel who deal with Personal Information for the purposes of the Contract are aware of, and comply with, this clause 12.7.
- 12.7.4 The Contractor shall ensure that any Subcontract entered into for the purposes of fulfilling its obligations under the Contract, contains provisions that are functionally equivalent to clauses 12.7.1, 12.7.2a and 12.7.3.

12.8 Child Safety (Optional)

Option: For when the Commonwealth Child Safe Framework applies.

Note to drafters: The Department of Prime Minister and Cabinet) has developed the <https://www.childsafety.gov.au/what-we-do/lead-commonwealth-child-safe-framework> to protect children and young people who may have contact with Commonwealth entities. The CCSF sets out the minimum standards for Commonwealth entities to protect children.

Defence and all Defence officials have an obligation under the [Child Protection legislation](#) and the Work Health Safety Act 2011 (Cth) to ensure the health and safety of youth when they engage or interact with Defence. This obligation also extends to Defence contractors. Youth special care provisions also extend to over 18 year olds participating in a Defence Youth Program.

Defence policy relating to Child Safety is contained in YOUTHPOLMAN which can be found here:

<https://www.defenceyouth.gov.au/defence-youth-policy/>.

Defence has developed relevant clauses, for use with ASDEFCON based approaches to market, which address the requirements of the CCSF and YOUTHPOLMAN. These clauses are adapted from model clauses included in Department of Finance's ClauseBank and must be inserted into Defence procurements using the [ASDEFCON Suite of Tendering and Contracting Templates](#), where the Contractor will engage with or interact with youth in performing its obligations under the Contract

The clauses can be found here:

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

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

procurement.asdefcon@defence.gov.au.

For information in relation to CCSF and policy related questions please email:

procurement.policy@defence.gov.au.

For further assistance and guidance in relation to the application of the CCSF please refer to the Child Safety Framework Factsheet here:

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

12.9 Modern Slavery (Optional)

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

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

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

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

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

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

procurement.asdefcon@defence.gov.au.

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

- <http://ibss/PublishedWebsite/LatestFinal/%7B836F0CF2-84F0-43C2-8A34-6D34BD246B0D%7D/Item/EBDAF9B0-2B07-45D4-BC51-67963BAA2394>.

12.10 Indigenous Procurement (Optional)

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

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

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

12.11 Commonwealth Supplier Code of Conduct (Core)

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

Drafters must consider the interaction and alignment of this clause with clauses 3.4, 3.12, 11.2, 11.4, 11.7, 12.2, 12.3, 12.4, 13.2 prior to RFT release and prior to any resultant Contract.

- 12.11.1 The Contractor shall (and shall ensure that all Contractor Personnel) comply with the Commonwealth Supplier Code of Conduct in the performance of the Contract.
- 12.11.2 The Contractor shall notify the Commonwealth Representative immediately after becoming aware of any potential or actual non-compliance with the Commonwealth Supplier Code of Conduct, including:
- a description of the non-compliance,
 - the date that the non-compliance occurred, and
 - whether any Contractor Personnel engaged in the performance of the Contract were or may have been involved in the non-compliance.
- 12.11.3 If the Commonwealth considers that a potential or actual non-compliance with the Commonwealth Supplier Code of Conduct has occurred, the Commonwealth may by notice to

the Contractor, without limiting any of its other rights under the Contract, require that the Contractor:

- a. provide a response to the Commonwealth Representative within 3 Working Days on whether a potential or actual non-compliance has occurred; and
- b. comply with its obligations under clause 12.11.

12.11.4 The Commonwealth Representative may request, and the Contractor shall provide, further information on any matter relating to:

- a. the policies, frameworks, or systems the Contractor has established to monitor and assess compliance with the Commonwealth Supplier Code of Conduct;
- b. the Contractor's compliance with the Commonwealth Supplier Code of Conduct; or
- c. an actual or potential non-compliance with the Commonwealth Supplier Code of Conduct, including its obligations under clauses 12.11.1 or 12.11.3a.

The Contractor shall provide such information within the timeframes and in the manner specified by the Commonwealth Representative at the time of request.

12.11.5 The Contractor acknowledges and agrees that compliance with the Commonwealth Supplier Code of Conduct and the obligations under clause 12.11 shall not relieve the Contractor from its liabilities or other obligations under the Contract or at law.

12.11.6 The Contractor's performance of its obligations under this clause will be at no additional cost to the Commonwealth.

12.11.7 If the Contractor fails to comply with the Commonwealth Supplier Code of Conduct in accordance with clause 12.11.1, the Commonwealth may give the Contractor a notice of termination for default under clause 13.2.

12.12 Environmentally Sustainable Procurement Policy (Optional)

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

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

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

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

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

procurement.asdefcon@defence.gov.au.

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

procurement.policy@defence.gov.au.

Or the Commonwealth Sustainable Procurement Advocacy and Resource Centre at:

sustainable.procurement@dcceew.gov.au.

12.13 Australian Skills Guarantee (Optional)

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

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

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

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

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

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

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

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

procurement.asdefcon@defence.gov.au.

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

procurement.policy@defence.gov.au.

Or DEWR at:

ASG@dewr.gov.au.

13 DISPUTES AND TERMINATION

13.1 Resolution of Disputes (Core)

- 13.1.1 A party shall not commence court proceedings relating to any Dispute unless that party has complied with the procedure for resolving Disputes set out in this clause 13.1.
- 13.1.2 The parties acknowledge and agree that the intent of:
- a. this clause 13.1 is that the parties will seek to resolve Disputes in a non-adversarial manner, and at the lowest reasonably practicable level within their respective organisations; and
 - b. the Contract Governance Framework set out in Attachment T includes facilitating problem solving and the resolution of Disputes.
- 13.1.3 The parties shall negotiate in good faith and use all reasonable efforts to resolve Disputes, and matters that may give rise to a Dispute, as quickly as practicable.
- 13.1.4 If the parties are unable to resolve a Dispute through the reasonable efforts of the Commonwealth Representative and the Contractor Representative, either party may give a notice ('**Dispute Notice**') to the other party setting out the nature of the Dispute and the Dispute shall then be referred to the Management Representatives specified in the Details Schedule.

Note to drafters: For clauses 13.1.5 and 13.1.5 drafters should amend the period if circumstances require.

- 13.1.5 If, despite using all reasonable efforts, the Management Representatives are unable to resolve the Dispute within 30 days (or such longer period agreed by the parties in writing) after the referral under clause 13.1.4, the parties may refer the Dispute to the Senior Representatives specified in the Details Schedule.

- 13.1.6 If, despite using all reasonable efforts, the Senior Representatives are unable to resolve the Dispute within 30 days (or such longer period agreed by the parties in writing) after the referral under clause 13.1.5, and are unable to agree on an alternative dispute resolution process during that period, either party may commence legal proceedings in respect of the Dispute.

Option: For use if access to arbitration is required.

Note to drafters: The following optional clause may be used if access to alternative dispute resolution under the Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules is to be sought. Further information on the Arbitration Rules is available from:

- <https://acica.org.au/>.

Because accessing arbitration can have significant cost implications, drafters should carefully consider the requirements of their procurement before including the clause. If the clause is included, drafters should delete clause 13.1.5 above and replace it with the following:

- 13.1.7 If, despite using all reasonable efforts, the Senior Representatives are unable to resolve the Dispute within 30 days (or such longer period agreed by the parties in writing) after the referral under clause 13.1.5, the parties shall resolve the Dispute by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be **[INSERT CITY eg, Sydney, Australia]**. The language of the arbitration shall be English. The number of arbitrators shall be **[INSERT NUMBER OR DELETE THIS SENTENCE AND RELY ON ARTICLE 8 OF THE ACICA ARBITRATION RULES, WHICH AUTHORISES ACICA TO DETERMINE THE NUMBER OF ARBITRATORS]**.

- 13.1.8 The parties shall, despite any Dispute occurring, continue to perform their respective obligations under the Contract.
- 13.1.9 Nothing in this clause 13.1, or the Contract Governance Framework set out in Attachment T, prevents either party from seeking urgent interlocutory relief in relation to a Dispute.

13.2 Termination Without Notice for Contractor Default (Core)

- 13.2.1 The Commonwealth may terminate the Contract by notice to the Contractor if any of the following occurs:
- an Insolvency Event occurs in relation to the Contractor, except to the extent the exercise of a right under this clause 13.2.1a is prevented by law;
 - an Insolvency Event occurs in relation to the Guarantor and the Commonwealth does not receive a replacement Deed of Guarantee and Indemnity from another guarantor acceptable to the Commonwealth within 10 Working Days (or another period agreed in writing by the Commonwealth), except to the extent the exercise of a right under this clause 13.2.1b is prevented by law;
 - the Contractor has failed to remedy a Default specified in a Default Notice within the period specified in the Default Notice;
 - the Contractor commits a breach of the Contract that, in the Commonwealth's opinion, is not capable of being remedied;
 - an event occurs in respect of which the Contract provides that a notice of termination may be given under this clause 13.2.1e;
 - the Contractor's performance for any two KPIs are in Performance Band D for the same Review Period (other than when this situation is allowed to occur during the Performance Implementation Period, as set out in Attachment P);
 - the Contractor's performance for the same KPI is in Performance Band C for three or more consecutive Review Periods (other than when this situation is allowed to occur during the Performance Implementation Period, as set out in Attachment P);
 - the Contractor assigns its rights under the Contract otherwise than in accordance with the requirements of the Contract; and

- i. the Contractor would have, except for the operation of any limitation of liability under clause 10.10, been liable to the Commonwealth for Loss in aggregate for an amount greater than the relevant Limitation Amount.

13.2.2 To avoid doubt, the Commonwealth is not required to provide prior notice of an exercise of its rights under clause 13.2.1.

13.3 Default Notices (Core)

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

13.3.2 If the Commonwealth gives the Contractor a Default Notice, the Contractor shall:

- a. remedy the Default within the period specified in the Default Notice;
- b. comply with any directions given to the Contractor by the Commonwealth in relation to the Default; and
- c. mitigate all loss, costs (including the costs of its compliance with any directions) and expenses in connection with the Default, including those arising from affected Subcontracts.

13.4 Termination or Reduction for Convenience (Core)

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

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

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

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

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

13.4.4 The Contractor, in each Approved Subcontract, shall secure a right of termination and reduction and provisions for compensation functionally equivalent to this clause 13.4.

13.5 General Termination Provisions (Core)

13.5.1 The Commonwealth may, in a notice of termination or subsequently, direct that the Phase Out provisions in clause 14 apply from the date specified in the notice.

13.5.2 If the Contract is terminated under clause 13.2 or otherwise:

- a. the termination takes effect on:
 - (i) the date of the notice of termination; or
 - (ii) if the notice of termination specifies a later date, the later date;
- b. the Contractor shall:
 - (i) stop work in accordance with the notice of termination;
 - (ii) comply with any directions given to the Contractor by the Commonwealth; and
 - (iii) mitigate all loss, costs (including the costs of its compliance with any directions) and expenses in connection with the termination, including those arising from affected Subcontracts;

- c. the Contractor shall provide to the Commonwealth, as required by the Commonwealth, all documents in its possession, power or control or in the possession, power or control of Contractor Personnel that contain or relate to any Commonwealth or third party Confidential Information or which are security classified;
 - d. the Contractor shall repay the Mobilisation Payment or any portion of the Mobilisation Payment that has not been offset in accordance with clause 7.5;
 - e. subject to clause 13.8, the parties shall be relieved from future performance, without prejudice to:
 - (i) any right, or cause of action, that has accrued at the date of termination; or
 - (ii) any amount owing under or in connection with the Contract as at the date of termination;
 - f. subject to clauses 10.9, 10.10 and 13.4, the right to recover damages, including full contractual damages, shall not be affected;
 - g. the Contractor shall, within 30 days after receipt of the notice of termination, or other period agreed in writing by the parties, deliver the Technical Data (in its then current state of development) for Services produced prior to the date of termination; and
 - h. the Contractor shall deliver to the Commonwealth all Commonwealth Property that the Contractor or Contractor Personnel have in their possession in connection with the Contract.
- 13.5.3 To avoid doubt, and despite anything else in the Contract, if the Contractor delays in meeting a Milestone, delivering Services or complying with any other obligation in accordance with the Contract, each day of delay is a new breach of the Contract for which the Commonwealth may exercise its rights under clause 13.2 or at law, despite any conduct by the Commonwealth or any election not to terminate the Contract for a previous breach of the Contract.
- 13.5.4 Upon termination of the Contract:
- a. subject to clause 13.5.5, the Commonwealth shall retain ownership of any Deliverables in respect of which title has passed to the Commonwealth under clause 6.10;
 - b. all Deliverables that have been Accepted by the Commonwealth shall be deemed to be owned by the Commonwealth (whether or not ownership has passed under clause 6.10); and
 - c. the Contractor shall be entitled to payment for the Deliverables referred to in clause 13.5.4b in accordance with the payment terms of the Contract, having regard to the amounts already paid or payable in respect of the Deliverables and the condition of the Deliverables at that time.
- 13.5.5 The Commonwealth may, in a termination notice under clause 13.2 or 13.4, require Deliverables not owned by the Commonwealth in the possession of the Contractor or a Subcontractor (whether completed or not) to be delivered to the Commonwealth and:
- a. the Contractor shall deliver the Deliverables (in their current state of development) in accordance with the notice;
 - b. ownership in the Deliverables shall pass to the Commonwealth upon delivery, free of any Security Interest; and
 - c. the Contractor shall be entitled to payment for the Deliverables in accordance with the payment terms of the Contract, having regard to the amounts already paid or payable in respect of the Deliverables and the condition of the Deliverables at that time.
- 13.5.6 The Commonwealth may, in a termination notice under clause 13.2, require the Contractor to retake possession of Deliverables previously delivered to the Commonwealth under the Contract and:
- a. the Contractor shall retake possession of the Deliverables in accordance with the notice;
 - b. ownership in the Deliverables shall pass to the Contractor upon delivery, free of any Security Interest; and

- c. the Commonwealth shall be entitled to repayment for the Deliverables in accordance with the payment terms of the Contract, having regard to the amounts already paid or payable in respect of the Deliverables.

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

13.6 General Provisions for Reductions in Scope (Core)

13.6.1 If the Commonwealth gives a notice under clause [INSERT CLAUSE “1.9.17” OR “1.9.27” IF APPLICABLE], 1.10, 13.4 or 14.1 to reduce the scope of the Contract, the Contractor shall, in respect of the Services being removed from the scope of the Contract (‘Removed Services’):

- a. comply with some or all of the Phase Out provisions in clause 14 as directed by the Commonwealth and from the date specified to the Contractor by the Commonwealth;
- b. cease performing the Removed Services on and from the date(s) specified in the notice;
- c. provide to the Commonwealth, as required by the Commonwealth:
 - (i) all documents and data in the possession, power or control of the Contractor or Contractor Personnel, which:
 - 1) relate to the Removed Services and are not otherwise required to perform the remainder of the Contract; and
 - 2) contain or relate to any Commonwealth Confidential Information or which are security classified;
 - (ii) all existing Technical Data relating to the Removed Services; and
 - (iii) all Commonwealth Property in the possession, power or control of the Contractor or Contractor Personnel, except to the extent (if any) that the Contractor is obliged or authorised to retain the property under a contract or contracts, other than the Contract, with the Commonwealth,

within 20 Working Days after receipt of the notice, or as required by the Commonwealth;
- d. within 30 Working Days after receipt of the notice, submit a CCP in accordance with clause 11.1 to give effect to the notice, including to:
 - (i) remove the Removed Services from the SOW and other parts of the Contract;
 - (ii) reduce the amounts payable to the Contractor under this Contract to reflect the removal of the Removed Services; and
 - (iii) make such other amendments as necessary or convenient to be made to give effect to the notice; and
- e. without limiting clause 11.7, the Contractor shall provide, upon request to the Commonwealth, accurate financial data to allow the Commonwealth to determine the appropriate reduced payment amount.

13.7 Right of Commonwealth to Recover Money (Core)

13.7.1 Without limiting the Commonwealth’s other rights or remedies under the Contract, if the Commonwealth elects, in accordance with the Contract, to recover an amount from the Contractor or the Contractor otherwise owes any debt to the Commonwealth in relation to the Contract, the Commonwealth may:

- a. deduct the amount from payment of any claim; or
- b. give the Contractor a notice of the existence of a debt recoverable which shall be paid by the Contractor within 30 days after receipt of notice.

13.7.2 The Commonwealth may exercise any or all of its rights in respect of any security provided in accordance with clauses 7.5 or 7.5.5b to recover any debt owing by the Contractor, except to the extent otherwise recovered by the Commonwealth under clause 13.7.1.

13.7.3 If the Commonwealth deducts the amount of a debt from any payment or security, it shall notify the Contractor that it has done so.

- 13.7.4 If any sum of money owed to the Commonwealth is not received by its due date for payment, the Contractor shall pay to the Commonwealth interest at the ATO sourced General Interest Charge rate current at the date the payment was due for each day the payment is late.

13.8 Survivorship (Core)

- 13.8.1 Any provision of the Contract which expressly or by implication from its nature is intended to survive the termination or expiration of the Contract, and any rights arising on termination or expiration shall survive the termination or expiration of the Contract on its terms.
- 13.8.2 Without limiting clause 13.8.1, any provision dealing with Confidential Information, IP, Defence Security, Privacy, Spare Parts and Support and any warranties, guarantees, licences (other than the licence given under clause 3.7), performance of the Contractor's obligations under clause 13.8.2, indemnities, liability caps, rights to recover money or financial and performance securities given under the Contract shall survive the termination or expiration of the Contract on its terms.

14 PHASE OUT

14.1 Application of Phase Out Provisions (Core)

Note to drafters: Select Option A below when Award Terms or Renewal Terms are selected for Contract extensions under clause 1.9, and update subclause b where indicated. Select Option B when a fixed Term is selected under clause 1.9.

- 14.1.1 This clause 14 applies and Phase Out commences:

Option A: If there is an Off Ramp Date

- a. if the Off Ramp Date occurs, in respect of all Services from the Off Ramp Date or as otherwise advised to the Contractor by the Commonwealth;
- b. if the Commonwealth gives an Extension Notice that includes a reduction in the scope of the Contract for the **[INSERT EITHER "Award Term" OR "Renewal Term"]** pursuant to clause 1.10, in respect of the Services removed from the date specified in the Extension Notice or as subsequently advised to the Contractor by the Commonwealth, but such date shall not be prior to the Off Ramp Date applicable as the date of the Extension Notice;

Option B: If there is no Off Ramp Date (ie, a Fixed Term contract with no Contract extension)

- c. if the Commonwealth gives notice in accordance with clause 1.9.23, in respect of all Services from the date and to the extent specified in the notice or as subsequently advised to the Contractor by the Commonwealth;
 - d. if the Commonwealth gives a notice terminating the Contract under clauses 13.2 or 13.4, in respect of all Services from the date and to the extent specified in the notice or as subsequently advised to the Contractor by the Commonwealth;
 - e. if the Commonwealth gives a notice reducing the scope of the Contract under clause 13.4, in respect of the Services being removed from the scope of the Contract from the date and to the extent specified in the notice or as subsequently advised to the Contractor by the Commonwealth; or
 - f. if there is a termination of the Contract or a reduction in scope of the Contract for any other reason (including by CCP), in respect of the Services being terminated or removed from the scope of the Contract from the date and to the extent specified in the notice or as subsequently advised to the Contractor by the Commonwealth or as agreed between the parties,
- and the Services within the scope of clause 14.1.1a to 14.1.1e, as applicable, are referred to as the **'Services being Phased Out'**.

14.2 Objective of Phase Out (Core)

- 14.2.1 The parties acknowledge that the objective of Phase Out is to prepare for and undertake the activities, including Phase Out activities, necessary to enable, as applicable:

- a. the orderly transition of the Services being Phased Out to the Commonwealth or another contractor appointed by the Commonwealth; or
 - b. the orderly cessation of the Services being Phased Out if one or more of the Products that form the basis of the Capability are being withdrawn from service.
- 14.2.2 During Phase Out, the Contractor shall provide the Services being Phased Out in accordance with the Contract, as modified by clause 14.4.2.
- 14.2.3 The Contractor acknowledges that, except to the extent that one or more Products are being withdrawn from service:
- a. it is essential for the continuing operation of the ADF that there is no interruption to the provision to the Commonwealth of the Services being Phased Out as a result of the transition from the Contractor to the Commonwealth or an incoming contractor;
 - b. the transfer of highly skilled and trained Personnel from the Contractor to the Commonwealth or the incoming contractor may be of paramount importance for the satisfactory performance of services the same as or similar to the Services being Phased Out; and
 - c. the transfer of any Industrial Capabilities, which are resident in Subcontractors and identified as AIAs in Attachment F, to the incoming contractor (for example, through novation of the relevant Subcontract) may be of paramount importance for the satisfactory performance of services the same as or similar to the Services being Phased Out.

14.3 Completion of Phase Out (Core)

- 14.3.1 The Contractor's obligations under this clause 14 and the Approved Phase Out Plan shall survive termination or expiry of the Contract.
- 14.3.2 In the event of termination or expiry of the Contract:
- a. where the Commonwealth reasonably considers that the Contractor has failed to fully comply with its obligations under this clause 14 or the Approved Phase Out Plan; or
 - b. the Approved Phase Out Plan requires the Contractor to perform obligations after termination or expiry of the Contract,
- then the terms of the Contract, modified if applicable by the terms of the Approved Phase Out Plan, shall continue to apply until the Commonwealth gives notice to the Contractor that the Contractor has complied with its obligations under this clause 14 and the Approved Phase Out Plan, or the parties otherwise agree.

14.4 General Provisions for Phase Out (Core)

- 14.4.1 The Contractor shall in respect of the Services being Phased Out:
- a. co-operate with the Commonwealth to implement the applicable Approved Phase Out Plan and comply with its obligations under that plan; and
 - b. comply with clause 2.8 of the SOW and this clause 14.
- 14.4.2 In respect of the Services being Phased Out, the Commonwealth may direct the Phase Out of:
- a. the types of the Services being Phased Out;
 - b. the number of Products Being Supported; and
 - c. the frequency, scheduling or sequencing of the Services being Phased Out,
- to occur:
- d. in accordance with the Approved Phase Out Plan;
 - e. as directed by the Commonwealth, including on a gradual basis, or stepped basis at a particular time or times or for a particular period; or
 - f. as otherwise agreed.

- 14.4.3 To implement the Phase Out in accordance with clause 14.4.2, the Commonwealth may direct the Contractor to submit one or more of the following:
- a. an update of the existing Approved Phase Out Plan for Approval; and
 - b. an additional Phase Out Plan for Approval in respect of the Services being Phased Out (where the existing Approved Phase Out Plan is not suitable).
- 14.4.4 If the Commonwealth gives a direction in accordance with clause 14.4.2, the Contractor shall, within 20 Working Days after receipt of the notice, provide to the Commonwealth:
- a. details of the reductions proposed in the amounts payable by the Commonwealth to the Contractor to reflect the reduction in cost to the Contractor of no longer providing the Services being Phased Out; and
 - b. detailed financial data and supporting information to allow the Commonwealth to determine the reduction in cost to the Contractor of no longer providing the Services being Phased Out and the appropriate reduced payment amount and any additional amounts payable.
- 14.4.5 Upon receipt of the information required by clause 14.4.4, the Commonwealth may, in respect of the proposed amounts payable:
- a. accept the proposed amounts payable and direct the Contractor to promptly submit a CCP in accordance with clause 11.1 to reflect the Phase Out of the Services being Phased Out and reduction in the scope of the Services, including the amounts payable; or
 - b. reject the proposed amounts payable, giving reasons.
- 14.4.6 If the parties are unable to agree on the amounts payable within 20 Working Days, the parties shall seek Dispute resolution in accordance with clauses 13.1 in respect of the amounts payable, having regard to the information provided pursuant to clause 14.4.4b and any other relevant information.
- 14.4.7 The Commonwealth is not obliged to make any payment to the Contractor during Phase Out except as expressly provided for in the Contract.
- 14.4.8 The Commonwealth may require the Contractor to submit a quote for the provision of S&Q Services pursuant to clause 3.15 for the provision of additional services (not otherwise provided under the existing Approved Phase Out Plan or the Contract), which are required to facilitate the transition of the Services being Phased Out to the Commonwealth or to an incoming contractor, or for the cessation of Services being Phased Out. The additional Services may include the provision of:
- a. training to an incoming contractor and/or Commonwealth Personnel; and
 - b. Services in relation to the disposal of Products.

14.5 Transition to a New Contractor (Optional)

- 14.5.1 As part of Phase Out, the Contractor shall (unless the Commonwealth has determined that the Products will be withdrawn from service):
- a. provide to the Commonwealth (or any person nominated by the Commonwealth and subject to the person having agreed to be bound by appropriate obligations of confidentiality), within five Working Days after receipt of a request by the Commonwealth Representative, information and documents relating to the Contractor's provision of the Services being Phased Out. The information and documents which may be required may include:
 - (i) answers to questions in relation to the methods and processes used for provision of the Services being Phased Out;
 - (ii) a full set of Standard Operating Procedures in relation to the operation and Maintenance of the Products Being Supported that are able to be accessed and used by the Commonwealth or its nominee;
 - (iii) Technical Data relevant to the provision of the Services being Phased Out; and

- (iv) Maintenance records or logs, any relevant asset details (including condition reports and expected life spans), arising rates and consumable usage rates, Maintenance efforts for Corrective Maintenance and Preventive Maintenance, historical measurements of KPIs and similar information for the period requested by the Commonwealth;
- b. fully co-operate with the Commonwealth and any incoming contractor and do all tasks and things as may be reasonably necessary to ensure the smooth transition of the Services being Phased Out from the Contractor to the incoming contractor or the Commonwealth (as the case may be) in a manner which ensures no interruption of the Services being Phased Out;
- c. use all reasonable endeavours to resolve any issues arising with the transition from the Contractor to the incoming contractor or the Commonwealth (as the case may be);
- d. comply with all reasonable directions from the Commonwealth Representative, having regard to the requirements of the Commonwealth or the incoming contractor;
- e. other than in respect of documents, property or information required for the provision of the Services (other than the Services being Phased Out), upon request from the Commonwealth or otherwise prior to the Contractor ceasing to provide a Service being Phased Out:
 - (i) provide to the Commonwealth all documents in its possession, power or control, or in the possession, power or control of Contractor Personnel, which contain or relate to any Commonwealth or third party Confidential Information or which are security classified;
 - (ii) deliver to the Commonwealth all existing Technical Data; and
 - (iii) return to the Commonwealth (or such other person as directed by the Commonwealth Representative) all Commonwealth Property, Commonwealth data and any other property or information provided by the Commonwealth to the Contractor,
in connection with or arising from the Services being Phased Out, in the condition required by the Contract and to the satisfaction of the Commonwealth Representative;
- f. engage in briefings as required by the Commonwealth Representative and the incoming contractor with a view to ensuring that the Commonwealth or incoming contractor have sufficient information to provide the Services being Phased Out or goods or services of a similar nature to the Services being Phased Out;
- g. take all reasonable steps to facilitate the transfer of the Personnel who wish to transfer to the incoming contractor or the Commonwealth and who are accepted for engagement by the incoming contractor or the Commonwealth. If such Personnel do not wish to transfer, the Contractor shall make reasonable efforts to provide the services of such Personnel to the incoming contractor or the Commonwealth, by way of subcontract, at reasonable rates for a reasonable period agreed with the incoming contractor or the Commonwealth;

Option: For use if Subcontracts are to be novated, including in relation to AIAs, and Contractor equipment is to be transferred to the incoming contractor or the Commonwealth.

- h. subject to clause 14.5.1b, novate to the Commonwealth, or to any person nominated by the Commonwealth, any Subcontract as required by the Commonwealth Representative on the terms of a novation deed that are reasonably satisfactory to the Commonwealth Representative;
- i. if any Subcontract is not specific to the Contract, use its reasonable endeavours to procure the Subcontractor to enter into a contract with the Commonwealth, or any person nominated by the Commonwealth, as required by the Commonwealth Representative on terms reasonably satisfactory to the Commonwealth Representative; and
- j. if required by the Commonwealth Representative, use its reasonable endeavours to arrange for the transfer to the Commonwealth, or a person nominated by the Commonwealth Representative, of any of the following, if and to the extent that the following arrangements and items are used by the Contractor solely in the performance of the Contract:
 - (i) leases or service agreements; and
 - (ii) hardware, software, parts, components, consumables or equipment used by the Contractor to provide, or provided as part of, the Services being Phased Out at the Contractor's then depreciated book value of those items or a fair market value (whichever is the lesser amount).

14.5.2 The Commonwealth may use the information referred to in clause 14.5.1a to prepare for and undertake a procurement process associated with the Capability or the subject matter of the Services being Phased Out, including for the preparation of procurement documents, and recipients of the documents may use the information to undertake due diligence activities and prepare tender responses. Nothing in clause 5 restricts or otherwise affects the Commonwealth's rights under this clause 14.5.2, and nothing in this clause 14.5.2 restricts or otherwise affects the Commonwealth's rights under clause 5.

14.6 Contractor's Obligations on Withdrawal of Products from Service (Optional)

- 14.6.1 If the Commonwealth gives a notice to the Contractor that one or more of the Products that form the basis of the Capability will be withdrawn from service and the Services associated with those Products are Services being Phased Out, the Contractor shall in accordance with the Approved Phase Out Plan and this clause 14.6.1:
- a. subject to the rights and obligations set out in clause 5, within five Working Days after receipt of a request by the Commonwealth Representative, provide to the Commonwealth information and documents relating to the Contractor's provision of the Services being Phased Out which may be required by the Commonwealth to facilitate the withdrawal of the Products from service. The information required may include:
 - (i) Technical Data relevant to the provision of the Services being Phased Out; and
 - (ii) Maintenance records or logs, any relevant asset details (including condition reports and expected life spans), arising rates and consumable usage rates, maintenance efforts for Corrective Maintenance and Preventive Maintenance, historical measurements of KPIs and similar information for the period requested by the Commonwealth;
 - b. fully co-operate with the Commonwealth and any Associated Party and do all tasks and things as may be reasonably necessary to facilitate the withdrawal of the Products from service;
 - c. comply with all reasonable directions from the Commonwealth Representative; and
 - d. upon request from the Commonwealth or otherwise prior to the Contractor ceasing to provide a Service being Phased Out, return to the Commonwealth (or such other person as directed by the Commonwealth Representative) all Commonwealth Property, Commonwealth data and any other property or information that relate to the Products to be withdrawn from service (other than such property or information required for the

provision of the Services (other than the Services being Phased Out)) and that were provided by the Commonwealth to the Contractor under or in connection with the Contract, in the condition required by the Contract and to the satisfaction of the Commonwealth Representative.

SIGNED AS AN AGREEMENT

SIGNED for and on behalf of
THE COMMONWEALTH OF AUSTRALIA:

(signature) (print name and position) (date)

In the presence of:

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

SIGNED for and on behalf of
THE CONTRACTOR:

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

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

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

(INSERT APPROPRIATE CONTRACTOR'S EXECUTION CLAUSE)