APPROVED SUBCONTRACTOR DEED (RFT CORE)

This Deed is made on **[INSERT DATE]**

BETWEEN

The Commonwealth of Australia as represented by the Department of Defence ABN 68 706 814 312 (‘**the Commonwealth**’)

AND

**[INSERT NAME OF COMPANY]** **[INSERT ACN/ARBN AND ABN AS APPLICABLE]** a company duly incorporated under the laws of **[INSERT JURISDICTION]** and having its registered office at **[INSERT DETAILS]** (‘**the Approved Subcontractor**’).

RECITALS

1. The Commonwealth has entered into a Contract **(INSERT CONTRACT NUMBER)** dated **(INSERT DATE)** (‘**the Contract**’) with **(INSERT NAME OF CONTRACTOR AND ACN/ARBN AND ABN AS APPLICABLE)** ('**the Contractor**') for the supply of **(INSERT BRIEF DESCRIPTION)**.
2. The Contractor has entered into a contract **(INSERT CONTRACT NUMBER)** dated **(INSERT DATE)** (‘**the Approved Subcontract**’) with the Approved Subcontractor for the supply of **(INSERT BRIEF DESCRIPTION)**.
3. The Approved Subcontractor has agreed to provide the commitments set out in this Deed in favour of the Commonwealth in relation to the Approved Subcontract.

AGREED TERMS

1. INTERPRETATION

Note to drafters: The definitions at clause 1.1 below should be reviewed for currency and relevancy prior to both the RFT release and the Effective Date of this deed.

* 1. Definitions (Core)
     1. In the interpretation of this Deed, unless the contrary intention appears:

“ACE Measurement Points” has the meaning given in the Approved Subcontract.

“ACE Measurement Rules” means method for calculating Australian Contract Expenditure and Imported Contract Expenditure as prescribed by the *ACE Measurement Rules*, August 2021.

“AIC Obligations” means the obligations of the Approved Subcontractor under the Approved Subcontract relating to AIC and for the avoidance of doubt includes the obligation to comply with the Subcontractor AIC Plan.

“Approved Subcontract” means the Approved Subcontract identified in the recitals and includes any amendments to the Approved Subcontract.

“Approved Subcontract Material” means information, other than Technical Data (TD) or Software, reduced to a material form (whether stored electronically or otherwise) that is delivered or required to be delivered to the Commonwealth under or in connection with the Approved Subcontract.

“Approved Subcontractor Personnel” means the officers, employees and agents of the Approved Subcontractor and includes employees, officers or agents of a subcontractor to the Approved Subcontractor.

“Audit” means a systematic, independent and documented process for obtaining audit evidence and evaluating it objectively to determine the extent to which audit criteria are fulfilled.

“Australian Contract Expenditure” has the meaning given in the ACE Measurement Rules.

“Australian Entity” means:

* + - 1. a company registered under the *Corporations Act 2001* (Cth) or a company registered under the *Companies Act 1993* (New Zealand);
      2. a body corporate, partnership, joint venture or association formed or incorporated in Australia or New Zealand; or
      3. a foreign-owned company in Australia or New Zealand, and which has a registered body number (ie, ARBN or NZRBN),

carrying on business through a permanent establishment in Australia or New Zealand, including as evidenced though employment and the conduct of business operations in Australia or New Zealand.

“Australian Industry” means Australian Entities that perform work in Australia or New Zealand.

“Circuit Layout” means a circuit layout that is protected under the *Circuit Layouts Act 1989* (Cth) or the corresponding laws of any other jurisdiction.

"Claim" means a claim, demand, suit or proceeding of any kind, including by way of court proceedings, proceedings in the nature of arbitration, mediation or other methods of dispute resolution and administrative claims and proceedings (whether or not before a tribunal or court).

"Commercial Item" means an item that is:

* + - 1. available to the general public or in the market for defence goods and services for supply on standard commercial terms; and
      2. able to be used for its intended purpose under the Approved Subcontract without development or modification (except for any minor modification or reconfiguration that is necessary and commonly required to install the item).

"Commercial Software" means Software that is:

* + - 1. a Commercial Item; or
      2. supplied, without further development or modification, as a part of, or in conjunction with a Commercial Item under the standard commercial terms applicable to that item; or
      3. Free and Open Source Software.

"Commercial TD" means TD that is:

* + - 1. a Commercial Item; or
      2. supplied, without further development or modification, as a part of, or in conjunction with a Commercial Item or Commercial Software under the standard commercial terms applicable to that item or Software.

“Commercialise” means, in respect of the Commonwealth or any of its sublicensees, to exploit the Intellectual Property (IP) in TD, Approved Subcontract Material or Software in return for payment of a Royalty or a commercial return to the Commonwealth or the sublicensee.

"Commonwealth Contractor" means a person (other than the Contractor, the Approved Subcontractor or a subcontractor of either of them) engaged by the Commonwealth to provide goods or services to the Commonwealth.

“Commonwealth EVPR” means the Commonwealth Earned Value Performance Report (EVPR) to be provided by the Approved Subcontractor to the Commonwealth, which is substantially in the form of the Contractor EVPR with financial data at the cost level, not at the price level (ie, all costs are those incurred by the Approved Subcontractor, not those incurred by the Contractor).

“Commonwealth Officer” means any of the following:

* + - 1. a Minister of State for the Commonwealth;
      2. a person employed or engaged under the *Public Service Act 1999* (Cth) or the *Members of Parliament (Staff) Act 1984* (Cth);
      3. a person who is included in Defence Personnel; and
      4. a member of the Australian Federal Police.

“Commonwealth Property” means property of any kind (including government furnished material) owned or leased by, or in the possession of, the Commonwealth.

"Commonwealth Personnel" means Commonwealth Officers, Defence Personnel, and any other agents of the Commonwealth.

"Commonwealth Service Provider" means a person (including an officer or employee of the person) engaged to perform a function, or discharge a duty, of the Commonwealth, including a person engaged to provide:

* + - 1. professional, administrative, contract management or project management services to Defence; or
      2. technical management or assurance services, including verification and validation, safety, certification, security or capability development,

but does not include Excluded Parties.

"Commonwealth Software" means:

* + - 1. any Software of the type described in Annex C to the TDSR Schedule in respect of an item of Supplies specified in that annex; and
      2. any developments, modifications or improvements to that Software.

“Commonwealth TD” means:

* + - 1. any TD of the type described in Annex C to the TDSR Schedule in respect of an item of Supplies specified in that annex; and
      2. any developments, modifications or improvements to that TD.

"Confidential Information" means:

* + - 1. any information provided by the Approved Subcontractor that is identified in Schedule 3; and
      2. any other information:
         1. that is commercially sensitive (not generally known or ascertainable);
         2. the disclosure of which would cause unreasonable detriment to the owner of the information or another party; and
         3. that was provided with an express or implied understanding that it would remain confidential,

but does not include information that:

* + - 1. is or becomes public knowledge other than by breach of this Deed;
      2. is in the possession of a party without restriction in relation to disclosure before the date of receipt; or
      3. has been independently developed or acquired by the receiving party.

“Contractor EVPR” means the EVPR t required to be provided by the Approved Subcontractor to the Contractor in accordance with the Approved Subcontract.

“Contractor Managed Commonwealth Assets” or “CMCA” means any item of Commonwealth Property subject to inventory and stock control that is in the care, custody or control of the Approved Subcontractor or Approved Subcontractor Personnel for the purposes of the Approved Subcontract.

"Contractor Personnel" means the officers, employees and agents of the Contractor.

"Copyright" means any existing or future copyright as defined under the *Copyright Act 1968* (Cth) or the corresponding laws of any other jurisdiction in any original literary and artistic works, computer programs and Software, sound recordings and any other works or subject matter whether stored electronically or otherwise in which copyright subsists and may subsist in the future.

“Defect” means:

a defect, fault (including a fault which results in a Failure), damage, malfunction or omission in the Supplies, including in relation to:

* + - 1. operation, performance or functionality of the Supplies; or
      2. design manufacture, workmanship or materials,

and ‘Defective’ has a corresponding meaning.

Without limiting the above, Supplies are defective if they do not conform to the requirements of the Approved Subcontract. A defect, fault, damage, malfunction or omission is not a Defect to the extent that it results from fair wear and tear.

"Defence" means the Department of Defence and/or the Australian Defence Force.

"Defence Personnel" means an employee of the Department of Defence or a member of the Australian Defence Force (whether of the Permanent Forces or Reserves as defined in the *Defence Act 1903* (Cth)) and the equivalents from other organisations on exchange to Defence.

"Defence Purpose" means a purpose related to any of the following:

* + - 1. the defence and defence interests of Australia;
      2. the national security of Australia;
      3. the provision of aid or assistance in respect of an emergency or disaster (whether natural or otherwise); and
      4. peacekeeping or peace enforcement activities.

"Effective Date" means the date on which this Deed is signed by the parties, or if signed on separate days, the date of the last signature.

“Environment” in the context of environmental management, means any of the following:

* + - 1. ecosystems and their constituent parts;
      2. natural and physical resources;
      3. the qualities and characteristics of locations, places and areas;
      4. noise; and
      5. the social, economic, aesthetic and cultural aspects of a thing mentioned in paragraphs a, b or c.

“Excluded Party” means a party identified as such in Annex D to the TDSR Schedule.

“Failure” means the inability of a system or component to perform its required functions within specified performance requirements. The fault tolerance discipline distinguishes between a human action (a mistake), its manifestation (a hardware or software fault), the result of the fault (a failure), and the amount by which the result is incorrect (the error).

“Free and Open Source Software” means Software that:

* + - 1. is distributed on a free to use basis without a requirement to pay a Royalty or other fee; and
      2. may be used, modified, developed or adapted by any person subject to specified conditions,

and includes open source Software, public domain Software, shareware, community source Software and freeware.

“Imported Contract Expenditure” has the meaning given in the ACE Measurement Rules.

“Industry Capability” means the ability, resulting from the employment of business, commercial and industry resources, to provide particular goods and/or services. An industry capability is one that is not only able to provide the goods and services when needed, but it is also sustainable over the period that the industry capability may be required, and ‘Industry Capabilities’ has a corresponding meaning.

"Intellectual Property" or "IP" means all present and future rights conferred by law in or in relation to any of the following:

* + - 1. Copyright;
      2. rights in relation to a Circuit Layout, Patent, Registrable Design or Trade Mark (including service marks); and
      3. any other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields recognised in domestic law anywhere in the world whether registered or unregistered.

"Key Commercial Item" means a Commercial Item listed (or required to be listed) in Annex B to the TDSR Schedule.

“Latent Defect” means a Defect that:

* + - 1. was not discoverable by reasonable care or inspection before Acceptance of the Supplies (or if the Contract does not provide for Acceptance of the Supplies, Final Acceptance), as the case may be; and
      2. other than in relation to Software, falls outside the incidence of random Failures to be expected of Supplies of the relevant kind.

"Licence" means a non-exclusive licence of IP in respect of TD, Software, or Approved Subcontract Material, being a licence that:

* + - 1. is fully paid-up and does not require any additional payment by the licensee, including by way of Royalty or any other fee;
      2. cannot be revoked or terminated by the owner for any reason except upon expiration of a statutory protection term;
      3. operates in perpetuity without any action required on the part of the licensee to renew or extend the licence;
      4. operates on a world-wide basis; and
      5. binds each successor in title to the owner of the IP in respect of the TD, Software or Approved Subcontract Material.

“Loss” means any liability, loss (including economic loss), damage, compensation, costs and expenses.

"Moral Rights" means any of the following:

* + - 1. a right of attribution of authorship;
      2. a right not to have authorship falsely attributed; or
      3. a right of integrity of authorship.

"Patent" means the rights and interests in any registered, pending, or restored standard or innovation patent under the *Patents Act 1990* (Cth) or the corresponding laws of any other jurisdiction, including all provisional applications, substitutions, continuations, continuations-in-part, continued prosecution applications including requests for continued examination, divisions, additions and renewals, all letters patent granted, and all reissues, re-examinations and extensions, term restorations, confirmations, registrations, revalidations, revisions and supplemental protection certificates.

“Quality” means the degree to which a set of inherent characteristics fulfils requirements.

"Registrable Design" means a design able to be protected under the *Designs Act 2003* (Cth) or the corresponding laws of any other jurisdiction.

"Request" means a request for tender, proposal, quotation or information or similar request for the provision of goods or services to the Commonwealth.

"Royalty" means a payment or credit made by a licensee in consideration for the exercise of a particular right or privilege by the licensor in favour of the licensee for the use of, or the right to use any IP, however calculated.

"Software" means a collection of computer code comprising a set of instructions or statements used directly or indirectly by a computer to bring about a certain result (including using a computer programming language to control a computer or its peripheral devices), and includes computer programs, firmware and applications, but excludes Source Code.

"Source Code" means the expression of Software in human readable form which is necessary to understand, maintain, modify, correct and enhance that Software.

“Subcontractor AIC Plan” means the Approved Subcontractor’s AIC Plan developed, delivered and updated by the Approved Subcontractor and approved by the Contractor in accordance with the Approved Subcontract.

"Sublicence" means, in respect of a Licence of IP granted to the Commonwealth under clause 2.2.2, a sublicence of that IP on terms that comply with the requirements of clause 2.3 of this Deed.

"Supplies" means goods and services required to be supplied under or in connection with the Approved Subcontract and includes items acquired in order to be incorporated in the Supplies. A reference to Supplies is also a reference to:

* + - 1. each item of Supplies;
      2. a component of a system or subsystem comprised of Supplies; and
      3. such a system or subsystem itself.

“Surveillance” means continual monitoring and Verification of the status of an entity and analysis of records to ensure that specified requirements are being fulfilled (the entity could be a system, process, product, project, contract, etc).

"TDSR Schedule" means Schedule 1 of this Deed.

"Technical Data" or "TD" means technical or scientific data, know-how or information, reduced to a material form (whether stored electronically or otherwise) in relation to the Supplies, and includes calculations, data, databases, designs, design documentation, drawings, guides, handbooks, instructions, manuals, models, notes, plans, reports, simulations, sketches, specifications, standards, Training Materials, test results and writings, and includes Source Code.

"Trade Mark" means a trade mark protected under the *Trade Marks Act 1995* (Cth) or corresponding laws of any other jurisdiction.

"Use" means, in relation to a licence of any TD, Software or Approved Subcontract Material granted to a licensee, to:

* + - 1. use, reproduce, adapt and modify the TD, Software or Approved Subcontract Material in accordance with the licence; and
      2. disclose, transmit and communicate the TD, Software or Approved Subcontract Material:
         1. to the licensee's employees, officers and agents; and
         2. to a sublicensee under a sublicence granted in accordance with the licence.

“Verification” means confirmation by examination and provision of objective evidence that specified requirements to which a product or service, or aggregation of products and services, is built, coded, assembled and provided have been fulfilled; and “Verify” and “Verified” have corresponding meanings.

"Working Day", in relation to the doing of an action in a place, means any day in that place other than:

* + - 1. a Saturday, Sunday or public holiday; and
      2. any day within the two-week period that starts on:
         1. the Saturday before Christmas Day; or
         2. if Christmas Day falls on a Saturday, Christmas Day.
  1. Interpretation (Core)
     1. In this Deed, unless the contrary intention appears:
        1. headings are for the purpose of convenient reference only and do not form part of the Deed;
        2. the singular includes the plural and vice versa;
        3. a reference to one gender includes any other;
        4. a reference to a person includes a body politic, body corporate or a partnership;
        5. 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;
        6. 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;
        7. a reference to a clause includes a reference to a subclause of that clause;
        8. a reference to a ”dollar”, ”$”, ”$A” or ”$AUD” means the Australian dollar;
        9. 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, or alternatively, a reference to another version of the document if agreed in writing between the parties;
        10. the word ”includes” in any form is not a word of limitation; and
        11. 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 Deed.
  2. Precedence (Core)
     1. Unless expressly provided for, the terms of this Deed prevail over the provisions of any Schedule to this Deed to the extent of any inconsistency.
  3. Survival (Core)
     1. The rights and obligations created under or in connection with this Deed survive the termination or expiry of the Contract or the Approved Subcontract.

1. TECHNICAL DATA and SOFTWARE (OPTIONAL)

Note to drafters: If the Approved Subcontractor is not providing significant IP in items of TD or Software (ie, clause 11.9.3.c (and possibly 11.9.3d(i)) of the COC does not apply to the Approved Subcontractor but other parts of clause 11.9.3 of the COC do apply), then clause 2 will not be necessary and may be deleted and marked ‘Not Used’. If the Approved Subcontractor is providing significant IP in items of TD or Software (ie, clause 11.9.3c and possibly 11.9.3d.(i) of the COC do apply to the Approved Subcontractor), then all of clause 2 is a requirement of this deed.

* 1. Ownership of Intellectual Property
     1. Nothing in this Deed affects the ownership of IP, except as expressly contemplated in this clause 2.1.
     2. The parties agree that all IP created under or in connection with the Approved Subcontract in respect of Commonwealth TD and Commonwealth Software that is delivered or required to be delivered as part of the Supplies, is assigned to the Commonwealth (or its nominee) immediately upon its creation.
  2. TD and Software
     1. This clause 2.2applies to all TD and Software delivered or required to be delivered to the Contractor or any other person under the Approved Subcontract, other than:
        1. Commonwealth TD and Commonwealth Software to the extent that clause 2.4 applies; and
        2. Commercial TD or Commercial Software to which clause 2.3 applies.
     2. The Approved Subcontractor 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 2.2 applies, to:
        1. Use the TD or Software for any Defence Purpose; and
        2. grant a Sublicence in accordance with clauses 2.2.3 and 2.4 to Use the TD or Software.
     3. The Commonwealth may grant a Sublicence in respect of all TD and all Software to which this clause 2.1.2 applies, to:
        1. 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;
        2. any person to Use the TD or Software to do any of the following:
           1. installing or configuring the Supplies;
           2. physically integrating the Supplies with other systems;
           3. operating or maintaining the Supplies;
           4. rectifying any Defect in the Supplies;
           5. undertaking training in relation to the Supplies;
           6. removing or uninstalling the Supplies;
           7. decommissioning or destroying the Supplies;
           8. for the person to respond to a Request to be engaged for any of the above purposes; and
           9. for any other purpose (including to modify and upgrade the Supplies) but subject to the restrictions specified in Annex A to the TDSR Schedule; and
        3. any person for a purpose referred to in clause 3.1.3.
     4. If, when exercising rights under clause 2.2.2, the Commonwealth discloses TD or Software that contains Confidential Information to a third party, the Commonwealth shall ensure that the disclosure of that information is in accordance with clause 3.1.
     5. A Licence granted under clause 2.2.2 shall be on terms no less favourable than the terms agreed to with the Contractor for the benefit of the Commonwealth under the Contract.
  3. Commercial TD and Commercial Software
     1. This clause 2.3 applies to all Commercial TD and Commercial Software referred to in clause 2.3.2 that is delivered or required to be delivered to the Contractor or any other person under the Approved Subcontract.
     2. The Approved Subcontractor shall ensure that each Commercial Item (and related Commercial TD or Commercial Software) delivered or required to be delivered under the Approved Subcontract is specified as a Key Commercial Item in Annex B to the TDSR Schedule, if the IP in the related Commercial TD or Commercial Software is owned by the Approved Subcontractor, unless otherwise agreed by the Commonwealth in writing.
     3. The Approved Subcontractor grants to the Commonwealth a licence in respect of all Commercial TD and all Commercial Software to which this clause 2.3 applies to Use the Commercial TD or Commercial Software, or to grant a sublicence to any person to Use the Commercial TD or Commercial Software, for any of the purposes set out in clauses 2.2.3b(i) to 2.2.3b(viii), and for any other purpose, subject to any restrictions specified in Annex B to the TDSR Schedule for that item.
     4. The Approved Subcontractor shall ensure that any licence granted to the Commonwealth in respect of Commercial TD and Commercial Software under this clause 2.3 does not require the Commonwealth to pay a Royalty or other fee (not otherwise included in the Approved Subcontract price) unless the Commonwealth has agreed in writing to the payment.
     5. A licence granted under clause 2.3.3 shall be on terms no less favourable than the terms agreed to with the Contractor for the benefit of the Commonwealth under the Contract.
  4. Commonwealth Sublicences
     1. The Commonwealth's right to grant a Sublicence to a person (“**Sublicensee**”) in accordance with clause 2.2.2 is subject to the following conditions:
        1. the Sublicence shall only be granted for a Defence Purpose;
        2. the Sublicence shall include (as a minimum) the same restrictions on Use and sublicensing as are applicable to the Commonwealth;
        3. the rights granted under the Sublicence shall be limited to the rights that are reasonably necessary to enable the Sublicensee to Use the TD and Software (as applicable) to efficiently perform its obligations, functions or duties to the Commonwealth or a Commonwealth Contractor;
        4. the rights granted under the Sublicence shall expire when no longer required for the purposes referred to in clause 2.4.1a; and
        5. any right of the Sublicensee to grant a further sublicence shall be subject to the same conditions as set out in this clause 2.4.
     2. The Approved Subcontractor shall ensure that any IP in Commonwealth TD or Commonwealth Software not assigned to the Commonwealth under clause 2.1.2 is specified in Annex C of the TDSR Schedule.
  5. Approved Subcontractor to deliver TD and Software
     1. The Commonwealth may by notice to the Approved Subcontractor require the delivery to the Commonwealth (or its nominee) of all TD and Software included as part of the Supplies.
     2. The Approved Subcontractor shall comply with a notice given under clause 2.5.1**.** unless compliance with the notice would be inconsistent with any restricted delivery requirements specified in respect of the relevant TD of Software in Annex A of the TDSR Schedule.
     3. The Commonwealth shall act reasonably when issuing a notice under clause 2.5.1**.**, including in relation to specifying a time for delivery of the item of TD or Software.
  6. Patents, Registrable Designs and Circuit Layouts
     1. The Approved Subcontractor warrants and shall ensure that a licence is granted or obtained under this Deed for the Commonwealth to exercise any Patent, Registrable Design or Circuit Layout that is necessary to use or support the Supplies.
     2. The Approved Subcontractor warrants and shall ensure that any restriction on a right referred to in clause 2.6.1**.** is specified in Annex E to the TDSR Schedule.
  7. No Commercialisation
     1. A Licence or Sublicence granted in accordance with this clause 2 does not permit the Commonwealth or its sublicensee to Commercialise any IP in the TD or Software.
     2. For the avoidance of doubt, clause 2.7 does not prevent the Commonwealth from granting a Sublicence, in accordance with a right granted in this clause 2, to a person for the purpose other than providing goods or services to the Commonwealth for a Defence Purpose.

1. Confidential Information (CORE)
   1. Confidential Information (Core)

Note to drafters: If clause 2 above is not used, delete subclause 3.1.1a and clause 3.1.2, and mark clause 3.1.2 as ‘Not Used’.

* + 1. Each party shall ensure that Confidential Information provided by the other party under or in connection with the Deed or identified in Schedule 2 is not disclosed, except to the extent that:
       1. the disclosure is permitted under clause 3.1.3;
       2. the Confidential Information is in TD or Software and the disclosure is in connection with the exercise of the rights provided for in clause 2; or
       3. the other party provides its prior written consent to the disclosure (and such consent may be subject to conditions).
    2. Each party shall ensure that, before disclosing Confidential Information under clause 3.1.1b, the recipient:
       1. executes a confidentiality deed poll substantially in the form of Schedule 2; or
       2. is otherwise subject to an obligation not to disclose the Confidential Information to any other person, which is on terms substantially equivalent to those in Schedule 2.
    3. The restriction in clause 3.1.1 does not apply to a disclosure of Confidential Information to the extent that the disclosure is for any of the following purposes:
       1. as required or authorised by law;
       2. as necessary for the conduct of any legal proceedings arising in connection with the Deed, the Contract or the Approved Subcontract;
       3. 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
       4. is to any of the following:
          1. a legal adviser, insurer, financier, auditor or accountant of a party, to the extent required to enable them to perform those roles;
          2. a Related Body Corporate for internal management purposes;
          3. any Commonwealth Personnel that need to know the information to undertake their duties or functions;
          4. Contractor Personnel or Approved Subcontractor Personnel that need to know the information to enable the Contractor or Approved Subcontractor to perform their obligations under the Contract or Approved Subcontract; or
          5. a Commonwealth Service Provider who needs to know the information to undertake their duties or functions.
    4. The Approved Subcontractor shall not, in marking information supplied to the Commonwealth, misuse the term "Confidential Information" or equivalent terms.
    5. Subject to clause 3.1.6, the Approved Subcontractor agrees to 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:
       1. the date specified in a notice given by the Commonwealth (acting reasonably); and
       2. the time the documents and other material are no longer required for the purposes of the Approved Subcontract or this Deed.
    6. The Approved Subcontractor 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:
       1. retained in order to comply with any legal, professional or insurance obligations; or
       2. stored in electronic backups or records that are produced in the normal course of business where it is not reasonably practicable to destroy such backups or records.
    7. If the Commonwealth gives a notice under clause 3.1.5a and the Approved Subcontractor has placed or is aware that documents containing the Confidential Information are beyond its possession or control, the Approved Subcontractor 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.
    8. Subject to clause 3.1.6 the Approved Subcontractor, 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.
    9. Return or destruction of the documents referred to in this clause 3.1 does not release the Approved Subcontractor from its obligations under the Approved Subcontract or this Deed.

1. Indemnities and Warranties (OpTIONAL)

Note to drafters: If the Approved Subcontractor is not providing significant IP in items of TD or Software (ie, clause 11.9.3c (and possibly 11.9.3d.(i)) of the COC does not apply to the Approved Subcontractor but other parts of clause 11.9.3 of the COC do apply), then clause 4 is not necessary and may be deleted and marked ‘Not Used’. If the Approved Subcontractor is providing significant IP in items of TD or Software (ie, clause 11.9.3c and possibly 11.9.3d.(i) of the COC do apply to the Approved Subcontractor), then all of clause 4 is a core requirement of this deed.

* 1. Intellectual Property and Confidentiality Indemnity
     1. The Approved Subcontractor shall indemnify the Commonwealth and Commonwealth Personnel in respect of any Loss in connection with a Claim by a third party in respect of the following:
        1. an infringement or alleged infringement of the third party’s IP rights (including Moral Rights) arising out of or as a consequence of:
           1. an activity permitted or purportedly permitted by or under a licence or assignment of IP rights under or referred to in this Deed; and
           2. a failure by the Approved Subcontractor to grant (or ensure the grant of) a licence or assign (or ensure the assignment of) IP rights under or referred to in this Deed; and
        2. a 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 Approved Subcontractor or Approved Subcontractor Personnel.
     2. The liability of the Approved Subcontractor under clause 4.1.1 shall be reduced to the extent that the Approved Subcontractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth default.
     3. In this clause 4.1:

“infringement” of a right includes an act or omission that would, but for the operation of section 163 of the *Patents Act 1990* (Cth), section 96 and 96A of the *Designs Act 2003* (Cth), section 183 of the *Copyright Act 1968* (Cth), or section 25 of the *Circuit Layouts Act 1989* (Cth), constitute an infringement of the right.

* 1. Intellectual Property Warranties
     1. The Approved Subcontractor warrants and shall ensure that, in respect of any IP in the TD or Software delivered or required to be delivered as part of the Supplies or under or in connection with this Deed, and as at the time of the delivery to the Contractor or, if delivered directly to the Commonwealth, the Commonwealth, of the relevant TD or Software and after making diligent inquiries:
        1. the IP is licenced to, or owned by, the Commonwealth as required by this Deed;
        2. the Approved Subcontractor 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;
        3. the Approved Subcontractor is not engaged in litigation, arbitration or other proceedings in relation to any of the IP; and
        4. there are no proceedings threatened by or against the Approved Subcontractor in relation to any of the IP, and there is nothing that is likely to give rise to any such proceedings.
     2. The warranty under clause 4.2 does 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 restriction specified in the TDSR Schedule.

1. Australian industry capability (OPTIONAL)

Note to drafters: Clause 5, including all subclauses, must be included in the deed when the Approved Subcontractor is an AIC Subcontractor. If clause 5 is included, all subclauses are core and required as part of the deed.

* 1. Subcontractor AIC Plan
     1. The Approved Subcontractor acknowledges that the Australian Industry Capability (AIC) objectives for the Contract are to:
        1. within the context of the Commonwealth obtaining value for money, identify and pursue opportunities to maximise the participation of Australian Entities in the performance of the Contract;
        2. 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
        3. 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 materiel system.
     2. The Approved Subcontractor’s approach and obligations for giving effect to the objectives described in clause 5.1 shall be set out in the Subcontractor AIC Plan, which shall detail the specific activities and other commitments that the Approved Subcontractor will undertake in connection with the performance of the Approved Subcontract.
     3. The Approved Subcontractor shall undertake the required activities to comply with the AIC Obligations in accordance with the Approved Subcontract. Without limiting those AIC Obligations, and with the aim of achieving the AIC objectives referred to in clause 5.1, the Approved Subcontractor shall continually:
        1. identify and promote opportunities for enhancing the quality of Australian Industry participation in the performance of the Approved Subcontract, particularly in relation to developing, enhancing and maintaining Industrial Capabilities;
        2. monitor and explore opportunities for the increased involvement of Australian Industry in the performance of the Approved Subcontract; and
        3. liaise with the Contractor in relation to AIC in the performance of the Approved Subcontract and reporting on its performance of the AIC Obligations in accordance with the Approved Subcontract.
     4. The Approved Subcontractor shall comply with the Subcontractor AIC Plan.
  2. Independent AIC Audit Program
     1. Without limiting the Commonwealth’s rights under clause 6, the Approved Subcontractor acknowledges and agrees that the Approved Subcontractor’s compliance with the AIC Obligations may be audited as part of the Commonwealth’s Independent AIC Audit Program.
     2. Each person conducting the Commonwealth’s Independent AIC Audit Program is a person authorised by the Commonwealth for the purposes of clause 6.
  3. Reporting
     1. Within 30 Working Days of the Effective Date, or otherwise on request by the Commonwealth in relation to a proposed Contract Change Proposal to the Contract the Approved Subcontractor shall provide the Commonwealth with a report which provides a breakdown of the Approved Subcontract price to level 4 of the contract work breakdown structure for the Approved Subcontract in respect of each of the following categories, separating amounts in respect of each category into budgeted Australian Contract Expenditure (ACE) and budgeted Imported Contract Expenditure (ICE) (and where reference to a ‘**Subcontract’** means a subcontract to the Approved Subcontract):
        1. labour costs (excluding labour provided through a Subcontract);
        2. materials costs (excluding materials provided through a Subcontract);
        3. other direct costs[[1]](#footnote-1), including travel and accommodation costs;
        4. Subcontract costs (inclusive of all subcontractors to the Approved Subcontractor, with the breakdown of the subcontract price into ACE and ICE amounts to be provided for as many subcontractors as necessary, up to a maximum of 5 or to provide visibility of 80% of the total stated subcontract ACE value (whichever results in the smaller number of subcontractors), with all other subcontractors amalgamated and provided as a separate entry, showing consolidated amounts for ACE and ICE;
        5. indirect costs (including overheads and general administrative costs); and
        6. all remaining price elements, including management reserve, profit and incentives, as applicable to the Approved Subcontractor’s work scope and in relation to subcontracts.
     2. Within 30 Working Days after the occurrence of an ACE Measurement Point, or otherwise on request by the Commonwealth in relation to a proposed Contract Change Proposal to the Contract, the Approved Subcontractor shall provide the Commonwealth with a report which provides a breakdown of the actual costs incurred in performing the Approved Subcontract up until and including the ACE Measurement Point or the date specified in the Commonwealth’s request (as applicable), with this breakdown to be provided to level 4 of the contract work breakdown structure for the subcontract in respect of each of the following categories, separating amounts in respect of each category into ACE and ICE (and where reference to a ‘S**ubcontract’** means a subcontract to the Approved Subcontract):
        1. labour costs (excluding labour provided through a Subcontract);
        2. materials costs (excluding materials provided through a Subcontract);
        3. other direct costs, including travel and accommodation costs;
        4. Subcontract costs (inclusive of all subcontractors to the Approved Subcontractor, with the breakdown of the subcontract price into ACE and ICE amounts to be provided for as many subcontractors as necessary, up to a maximum of 5 or to provide visibility of 80% of the total stated subcontract ACE value (whichever results in the smaller number of Subcontractors), with all other subcontractors amalgamated and provided as a separate entry, showing consolidated amounts for ACE and ICE; and
        5. indirect costs (including overheads and general and administrative costs).

1. Commonwealth Access (CORE)
   * 1. During the performance of the Approved Subcontract, the Approved Subcontractor shall, subject to the Commonwealth giving five Working Days' prior notice to the Approved Subcontractor, provide the Commonwealth and any person authorised by the Commonwealth, access to Approved Subcontractors’ premises, and to records and accounts in connection with the performance of work under the Approved 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 Approved Subcontractor 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.
     2. Without limiting clauses 6.1.1 and 6.1.3, the Approved Subcontractor acknowledges and agrees that:
        1. the Auditor-General has the power under the *Auditor Act 1997* (Cth) to conduct audits (including performance audits) of the Approved Subcontractor in relation to the Approved Subcontract;
        2. the Auditor-General may give a copy of, or an extract from, a report on an audit in relation to the Approved Subcontract 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
        3. the Commonwealth may authorise the Auditor-General, or member of the staff of the Australian National Audit Office, to access premises, records and accounts under clause 6.1.1.
     3. Without limiting the generality of clause 6.1.1, the purposes for which the Commonwealth or any person authorised by the Commonwealth may require access include:
        1. inspecting CMCA, attending, conducting or checking stocktakes of CMCA, including viewing and assessing the Approved Subcontractor’s inventory control and stocktaking systems, and removing CMCA that is no longer required for the performance of the Approved Subcontract;
        2. performing audit and Surveillance activities in relation to Quality;

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| Option: Include cthis subclause when the Approved Subcontractor is an AIC Subcontractor.   * + - 1. auditing the Approved Subcontractor’s compliance with the AIC Obligations including validating progress in meeting the Subcontractor AIC Plan; |

* + - 1. investigating the reasonableness of proposed prices or costs in any CCP submitted to the Contractor under the Approved Subcontract;
      2. investigating:
         1. postponement costs claimed;
         2. schedule recovery costs claimed;
         3. cost reimbursement payments;
         4. Defect rectification costs claimed; and
         5. any other claims made by the Approved Subcontractor under the Approved Subcontract;
      3. determining whether and to what extent steps should be taken to register or otherwise protect Commonwealth IP;

|  |
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| Option: Include this subclause if clause 2 is included in the deed.   * + - 1. validating the Contractor's compliance with clause 2 and the TDSR Schedule; |

* + - 1. auditing raw data, Software, and Source Code for the purpose of validating the Approved Subcontractor’s performance under this Deed and the Approved Subcontract;

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| Option: Include clause 6.1.3i if clause 7 is included in the deed.   * + - 1. performing reviews of the Earned Value Management System; |

* + - 1. without being under any obligation to do so, monitoring the Approved Subcontractor’s compliance with any applicable laws or Approved plans in connection with the protection of Work Health and Safety (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 Approved Subcontract;
      2. assessing the financial viability of the Approved Subcontractor to perform and complete the Subcontract;
      3. validating progress against the requirements of any approved remediation plan provided by the Contractor under the Contract; and
      4. such other matters specified in the Approved Subcontract.
    1. The Commonwealth shall comply with, and shall require any delegate or person authorised by the Commonwealth to comply with, any reasonable Approved Subcontractor safety and security requirements or codes of behaviour for the premises.

1. Earned Value Management (OPTIONAL)

Note to drafters: Clause 7 must be included when the Approved Subcontractor is required to have an earned value management system (to provide reports on earned value) in accordance with the Approved Subcontract.

* + 1. The Approved Subcontractor shall provide the Commonwealth EVPRs to the Commonwealth at the same time as it provides the Contractor EVPRs to the Contractor (or when otherwise required by the Commonwealth where the Approved Subcontract does not specify timing for the provision of a Contractor EVPR).
    2. The Approved Subcontractor and the Commonwealth acknowledge and agree that, where analysis of the Commonwealth EVPRs identifies a variance, which may not have been evident to the Contractor in the Contractor EVPRs, the Commonwealth may discuss this variance with the Contractor, but the Commonwealth will do so in a manner that does not result in the sharing any of the underlying financial data with the Contractor.

1. LAW
   1. Goods and Services Tax (Core)
      1. In this clause, ‘GST’ means a Commonwealth goods and services tax imposed by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and the expressions ‘adjustment event’, ‘taxable supply’ and ‘tax invoice’ have the meaning as in that Act.
      2. If a party to this Deed (the “Supplier”) makes a taxable supply under this Deed or in connection with any matter or thing occurring under this Deed to another party to this Deed (the “Recipient”) and the consideration otherwise payable for the taxable supply does not include GST, the Supplier will be entitled, in addition to any other consideration recoverable in respect of the taxable supply, to recover from the Recipient the amount of any GST on the taxable supply.
      3. If the amount paid by the Recipient to the Supplier in respect of GST differs from the GST on the taxable supply (taking into account any adjustment events that occur in relation to the taxable supply), an adjustment shall be made. If the amount paid by the Recipient exceeds the GST on the taxable supply, the Supplier shall refund the excess to the Recipient. If the amount paid by the Recipient is less than the GST on the taxable supply, the Recipient shall pay the deficiency to the Supplier.
      4. A party will not be obliged to pay any amount in respect of GST to the other party unless a valid tax invoice has been issued in respect of that GST.
   2. No Exclusion of Law or Equity (Core)
      1. Subject to its terms, this Deed shall not be construed to exclude the operation of any principle of law or equity intended to protect and preserve the confidentiality of the Confidential Information.
   3. Waiver (Core)
      1. Failure by either party to enforce a provision of this Deed shall not be construed as in any way affecting the enforceability of that provision or the Deed as a whole.
   4. Remedies (Core)
      1. The rights and remedies provided under this Deed are cumulative and not exclusive of any rights or remedies provided by law or any other such right or remedy.
      2. Subject to the terms of this Deed, the rights and obligations of the parties under this Deed are in addition to and not in derogation of any other right or obligation between the parties under any other deed or agreement to which they are parties.
   5. Variation (Core)
      1. This Deed may only be varied by written agreement of the parties.
   6. Applicable Law (Core)
      1. The laws of the **[INSERT RELEVANT STATE OR TERRITORY]** apply to this Deed, and the courts of that State or Territory have non-exclusive jurisdiction to decide any matter relating to this Deed.
   7. Notices (Core)
      1. Unless the contrary intention appears, any notice or communication under this Deed shall be effective if it is in writing and sent from and delivered to the relevant party, at the following address:

**[INSERT COMMONWEALTH ADDRESS, FAX NUMBER AND EMAIL]**

**(INSERT APPROVED SUBCONTRACTOR ADDRESS, FAX NUMBER AND EMAIL)**

* + 1. A notice or communication is deemed to be delivered:
       1. if sent by pre-paid post, when received at the address;
       2. if hand delivered, when received at the address, or by the addressee if sooner;
       3. if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the total number of pages of the notice, unless within one Working Day after that transmission, the recipient informs the sender that it has not received the entire notice; or
       4. if sent as an email, when the email enters the addressee'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 addressee,

but if the receipt, transmission 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.

SIGNED AS A DEED

SIGNED for and on behalf of

THE COMMONWEALTH OF AUSTRALIA:

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

In the presence of:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  |  |  |  |  |
| (signature) |  | (print name) |  | (date) |

SIGNED SEALED AND DELIVERED for and on behalf of

THE APPROVED SUBCONTRACTOR:

Note for Deed 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/%7B836F0CF2-84F0-43C2-8A34-6D34BD246B0D%7D/Item/%7BEBDAF9B0-2B07-45D4-BC51-67963BAA2394%7D>

This guidance is developed for Commonwealth Personnel and should be used to assess the Approved Subcontractor’s execution of the Deed. The Approved Subcontractor should seek its own independent legal advice on its execution of the Deed.

**(INSERT APPROPRIATE APPROVED SUBCONTRACTOR’S EXECUTION CLAUSE)**

SCHEDULE 1

TD & SOFTWARE RIGHTS (TDSR) SCHEDULE (OPTIONAL)

Note to drafters: This schedule including all of its annexes should be included, and tables populated accordingly, when clause 2 is included in the Approved Subcontractor Deed.

The TDSR Schedule used in this Deed should reflect the restrictions on TD and Software supplied by the Approved Subcontractor and included in the TDSR Schedule to the Contract. If the Approved Subcontractor is engaged before the TDSR Schedule under the Contract is updated to take into account that engagement, a CCP under clause 11.1 of the Contract should be raised to update the TDSR Schedule in the Contract in conjunction with the execution of this Deed.

* 1. This Schedule consists of the following Annexes:
     1. Annex A – Delivery and Licence Restrictions on Use of TD and Software;
     2. Annex B – Key Commercial Items;
     3. Annex C – Commonwealth TD and Commonwealth Software;
     4. Annex D – Excluded Parties; and
     5. Annex E – Patents, Registrable Designs and Circuit Layouts.

SCHEDULE 1

ANNEX A – DELIVERY AND LICENCE RESTRICTIONS ON USE OF TD AND SOFTWARE (CORE)

Note to Tenderers: This table should reflect Annex A in the TDSR Schedule for the Contract, in respect of TD and Software provided by the Approved Subcontractor.

| **Unique Line Item Description** | **Owner or Licensor** | **System/ Subsystem/  Component/ CI Name** | **Description of TD or Software subject to Restriction**  **(refer Unique Line Item Description from Annex C if appropriate)** | **Restricted Delivery Arrangements?  (Yes/No)**  **If yes, specify identity of recipient(s) or nature of the restrictions in column (g)** | **Restrictions on Commonwealth rights to Use or Sublicense the TD or Software** | **Justification for Restriction (s)** |
| --- | --- | --- | --- | --- | --- | --- |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) |
|  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |

SCHEDULE 1

ANNEX b– KEY COMMERCIAL ITEMS (CORE)

Note to tenderers: This table should reflect Annex B in the TDSR Schedule for the Contract, in respect of Commercial Items required to be delivered by the Approved Subcontractor and for which the Approved Subcontractor owns the IP in the related Commercial TD or Commercial Software (which should also be listed). The terms applicable to the licence proposed to be granted for the item are also to be specified. The tenderer may complete column (d) by reference to other documents from which those terms are ascertainable.

|  |  |  |  |
| --- | --- | --- | --- |
| Unique Line Item Description | Description of Key Commercial Item System/ Subsystem/ Component/CI Name | Description of related Commercial TD or Commercial Software (including version number and use) | Licence Terms |
| 1. (a) | 1. (b) | 1. (c) | 1. (d) |
|  |  |  |  |
|  |  |  |  |

ANNEX C – COMMONWEALTH TD AND COMMONWEALTH SOFTWARE (CORE)

Note to Tenderers: This table should reflect Annex C in the TDSR Schedule for the Contract, in respect of Commonwealth TD and Commonwealth Software that will be created by the Approved Subcontractor.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Unique Line Item Description | Item References within SSTDL / Software List | Equipment System/ Subsystem/ Component/CI Name | Category of TD or Software | Name of Assignee | Restrictions on non-Commonwealth owned IP  (refer Unique Line Item Description from Annex A if required) | Restrictions on licences granted by the Commonwealth to Commonwealth TD or Commonwealth Software |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) |
|  |  |  |  |  |  |  |
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SCHEDULE 1

ANNEX D – EXCLUDED PARTIES (CORE)

Note to Tenderers: This table should reflect Annex D in the TDSR Schedule for the Contract, to the extent that Excluded Parties have been identified by the Approved Subcontractor.

| **Unique Line Item Description** | **Excluded Party**  **(party must be capable of being clearly identified by the Commonwealth)** | **Period of Restriction**  **(must not be perpetual)** | **Justification for Non-Disclosure Restriction** |
| --- | --- | --- | --- |
| (a) | (b) | (c) | (d) |
|  |  |  |  |

ANNEX E – PATENTS, REGISTRABLE DESIGNS AND CIRCUIT LAYOUTS (CORE)

Note to Tenderers: This table should reflect the equivalent table under Annex E of the TDSR Schedule for the Contract, in respect of restrictions on a Patent, Registrable Design or Circuit Layout provided by the Approved Subcontractor.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Unique Line Item Description | Supplies containing a Patent, Registrable Design or Circuit Layout  (pending or registered) | Type of IP  (Patent, Registrable Design or Circuit Layout) | Owner / IP Applicant | Application / Registration No  (if applicable) | Countries or regions of permitted use | Restrictions |
| 1. (a) | 1. (b) | 1. (c) | 1. (d) | 1. (e) | 1. (f) | 1. (g) |
|  |  |  |  |  |  |  |
|  |  |  |  |  |  |  |

SCHEDULE 1

SCHEDULE 2

CONFIDENTIALITY DEED POLL

(INSERT NEGOTIATED FORM OF CONFIDENTIALITY DEED POLL)

SCHEDULE 3

CONFIDENTIAL INFORMATION

**(INSERT EXTRACT OF NEGOTIATED ATTACHMENT N TO THE CONDITIONS OF CONTRACT)**

1. Refer to the CASG Cost Principles regarding the scope of direct costs / direct expenses. [↑](#footnote-ref-1)