



## Australian Government

### Defence

**[INSERT NAME OF PROCUREMENT/SERVICES] COMPLEX SERVICES 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:	<b>(INSERT DETAILS)</b>	
Notice Details:	Address:	<b>(INSERT ADDRESS)</b>
	Email:	<b>(INSERT EMAIL ADDRESS)</b>

**(INSERT FULL NAME OF CONTRACTOR) ABN (INSERT CONTRACTOR'S ABN) (Contractor)**

Contractor Representative:	<b>(INSERT DETAILS)</b>	
Notice Details:	Address:	<b>(INSERT ADDRESS)</b>
	Email:	<b>(INSERT EMAIL ADDRESS)</b>

#### INFORMATION TABLE

Item	Information		
<b>Item</b> (clause 1.4)	<b>1</b> Effective Date (Core)	<b>[INSERT DATE]</b>	
<b>Item</b> (clause 1.5)	<b>2</b> Planned Operative Date (Optional)	<b>[INSERT DATE]</b>	
<b>Item</b> (clause 1.9)	<b>3</b> Initial Term (Core)	Effective Date:	<b>(INSERT DATE)</b>
		Expiry Date:	<b>(INSERT DATE)</b>
Item 4 (clause 1.10)	Options to Extend (Optional)	Number of Options	<b>[INSERT NUMBER]</b>
		Option Period:	<b>[INSERT PERIOD OF EACH OPTION]</b>
		Maximum Term	<b>[INSERT MAXIMUM TERM OF CONTRACT] after the Effective Date</b>

Item	Information		
Item 5	Base Date: (Core)	<p><b>[INSERT DATE]</b></p> <p><b>Note to drafters: Base Date should be the date one month prior to the date on which tenders close.</b></p>	
Item 6 (clause 3.12.4)	Task-Priced Services Limit: (Optional)	<b>[INSERT ANNUAL AMOUNT OR OTHER RELEVANT AMOUNT ]</b>	
Item 7 (clause 11.9)	Approved Subcontractor Threshold: (Optional)	<b>[INSERT \$A AMOUNT PER ANNUM]</b> per annum.	
Item 8 (clause 7.5)	Bank Guarantee for Mobilisation Payment: (Optional)	Mobilisation Payment:	<b>(INSERT AMOUNT)</b>
		Mobilisation Security Amount:	<b>(INSERT AMOUNT)</b>
		Mobilisation Security Date:	<b>(INSERT DATE)</b>
Item 9 (clause 7.6)	Bank Guarantee for Performance: (RFT Core)	Performance Security Amount:	<b>[INSERT AMOUNT]</b>
		Performance Security Date:	<b>[INSERT DATE]</b>
		Release Event:	<b>[INSERT RELEASE EVENT]</b>
Item 10 (clause 7.8)	Deed of Guarantee and Indemnity (RFT Core)	<input type="checkbox"/> Yes / <input type="checkbox"/> No  Guarantor: <b>(INSERT NAME)</b>	
Item 11 (clause 8.1.1)	Defect Notification Period (Core)	From the Effective Date until <b>[INSERT PERIOD]</b> after expiry or earlier termination of the Contract.	
Item 12 (clause 8.2.1)	Defect Rectification Period (Core)	If the Defect is a Latent Defect, <b>[INSERT PERIOD]</b> after the date of Acceptance of the Deliverable or, for any Service that is not subject to Acceptance, after completion of the relevant Service in accordance with the Contract.  If the Defect is not a Latent Defect, <b>[INSERT PERIOD]</b> after the date of Acceptance of the Deliverable or, for any Service that is not subject to Acceptance, after completion of the relevant Service in accordance with the Contract.	
Item 13 (clause 9)  Note to drafters: Delete insurance policies if they do not apply.	Approved Contractor Insurance Program Status (Core)	<input type="checkbox"/> Yes / <input type="checkbox"/> No	
	Limits of indemnity for required insurances: (Core)	Public liability (Clause 9.1.1b)	<b>[\$[INSERT AMOUNT] million each and every occurrence</b>
	Products liability (Clause 9.1.1b)	<b>[\$[INSERT AMOUNT] million each occurrence and in the annual aggregate for all occurrences</b>	

Item	Information		
		Professional indemnity (Clause 9.1.1c)	\$[INSERT AMOUNT] million each claim and in the annual aggregate for all claims
		Motor vehicle liability (Clause 9.1.1g)	\$[INSERT AMOUNT] million each and every occurrence.
		Cyber insurance (Clause 9.1.1h)	\$[INSERT AMOUNT] million each claim and in the annual aggregate for all claims
<b>Item 14</b> (clause 10.7)	Limitation Amount: (Core)	[INSERT AMOUNT]	
<b>Item 15</b> (clause 10.8)	Renegotiation Threshold (Core)	[INSERT AMOUNT]	
<b>Item 16</b> (clause 13.1)	Management Representatives: (position) (Core)	Commonwealth:	(INSERT)
		Contractor:	(INSERT)
<b>Item 17</b> (clause 13.1)	Senior Representatives: (position) (Core)	Commonwealth:	(INSERT)
		Contractor:	(INSERT)
<b>Item 18</b> (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]
		Personnel security clearance:  (clause 11.10.3b)	[INSERT CLASSIFICATION]
		DISP membership required:  (clause 11.10.4)	<input type="checkbox"/> Yes / <input type="checkbox"/> No
		<b>Note to Drafters:</b> Delete DISP Governance Level, DISP Personnel Security Level, DISP Physical Security Level and DISP Information / Cyber Security Level if DISP membership is not required.	

Item	Information		
	DISP Governance Level: <b>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.</b>	[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) <input type="checkbox"/> Yes / <input type="checkbox"/> No	<input type="checkbox"/> transmitted in Australia	<input type="checkbox"/> transmitted overseas
<b>Item 19</b> (clause 12.1)	Governing law: (Core)	[INSERT RELEVANT STATE OR TERRITORY]	

## DRAFT CONDITIONS OF CONTRACT

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## **1 CONTRACT FRAMEWORK**

### **1.1 Definitions (Core)**

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1.1.1 In the Contract, unless the contrary intention appears, words, abbreviations and acronyms have the meaning given to them in the Details Schedule or the Glossary at Attachment C.

### **1.2 Interpretation (Core)**

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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 that 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)**

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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 and Deliverables on time, on budget and to the required level of performance, safety and quality in accordance with the Contract;



**Note to drafters: Insert additional procurement-specific Objectives based on the business case underlying the procurement, such as:**

- a. **improvement to Defence processes;**
- b. **to improve knowledge/training materials or capture lessons learnt; or**
- c. **to update Defence documentation to address technology evolution, supportability concerns, and changes to operational needs, threats, and external systems and interfaces.**

b. [INSERT PROCUREMENT SPECIFIC OBJECTIVES]; and

c. to achieve these objectives through a culture of mutual respect and co-operation, and in an environment that fosters innovation, continuous improvement, cost efficiency and transparency (collectively, the 'Objectives').

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 (Optional)**

**Note to drafters: An Operative Date allows for the provision of Recurring Services to commence after the Effective Date, following a period of Phase In. If Services commence immediately from the Effective Date, then the following clauses may be replaced with a single 'Not used'. If an Operative Date is required, drafters need to define the date or an event that establishes the Operative Date, and review the scope of the obligations placed on both parties prior to the Operative Date (which will be performed during Phase In). For more extensive Operative Date clauses refer to the ASDEFCON (Support) COC template.**

1.5.1 The Commonwealth has no obligations under the Contract before the Operative Date other than:

- a. to the extent provided for in this clause 1.5;
- b. those obligations in the Approved Phase In Plan which are to be performed by the Commonwealth prior to the Operative Date;
- c. the obligations under clause 6.4, where a delay is caused by a Commonwealth failure to perform its obligations under clause 1.5.3b;
- d. the obligations under clause 11.4, for the protection of Confidential Information;
- e. payments for Services that are specified in the Contract or by notice from the Commonwealth Representative, to be provided before the Operative Date (eg, repair of faulty GFM, before the Operative Date, if requested by the Commonwealth);

#### **Option: Include when Milestone Payments are used**

- 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

g. [...INSERT ANY OTHER APPLICABLE COMMONWEALTH OBLIGATIONS...].

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.

1.5.3 On or before the Planned Operative Date:

- a. the Contractor shall:
  - (i) receive deliveries of, or collect, and inspect or functionally check (as applicable) GFM, in accordance with Attachment G (if used);
  - (ii) obtain the resources necessary to be able to provide the Services;
  - (iii) provide any financial securities required under clause 7.4;

- (iv) undertake Phase In activities in accordance with clause 1.11;

**Note to drafters: Additional requirements may include obtaining export approvals, etc.**

- (v) [...INSERT REQUIRED LIST ITEM...]; and
- b. the Commonwealth shall:
- (i) in accordance with clause 2.3 of the SOW, action any data items that are required to be delivered and actioned by the Commonwealth before the Operative Date;
- (ii) deliver to, or provide the Contractor with access to, GFM in accordance with Attachment G (if used); and

**Note to drafters: Additional requirements may include training Contractor staff in the use of Defence information systems, etc.**

- (iii) [...INSERT REQUIRED LIST ITEM...].

- 1.5.4 Subject to clause 1.5.5, if the Commonwealth is satisfied that all obligations under clause 1.5.3 have been met, the Commonwealth Representative shall issue a notice to the Contractor specifying the 'Operative Date' for the Contract, which shall be either:
- a. the Planned Operative Date; or
- b. the date that the Commonwealth Representative acknowledges, in the notice, that the obligations under clause 1.5.3 were fully performed,
- 1.5.5 If, for any reason, an obligation under clause 1.5.3 has not been performed by the Planned Operative Date, or a requirement under clause 1.5.3 otherwise cannot be met, the Commonwealth may, by notice to the Contractor, elect to:
- a. specify a new date as the Planned Operative Date; or
- 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 issue a notice under clause 1.5.4; or
- c. if the Commonwealth Representative considers that an obligation under clause 1.5.3a is unlikely to be met within an acceptable period, terminate the Contract in accordance with clause 13.2.1.
- 1.5.6 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):

**Option: Include when Milestone Payments are used**

- 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.
- 1.5.7 The Commonwealth's right to withhold or deduct an amount under clause 1.5.6 shall continue until such time as the Contractor complies with its obligations under clause 1.5.3a.

**Option: Include if Milestone Payments will be made prior to the Operative Date.**

- 1.5.8 If the Commonwealth terminates the Contract pursuant to clause 1.5.5, 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.

## **1.6 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 S&Q Services, the S&Q Order for the S&Q Services;
  - c. the SOW and its annexes;
  - d. the Attachments other than the SOW and the Glossary; and
  - e. any document expressly incorporated 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 required 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)**

- 1.9.1 The Contract expires at the end of the Initial Term specified in the Details Schedule unless it is:

**Option: Include when clause 1.10 below is used.**

- a. extended in accordance with clause 1.10; or
- b. terminated in accordance with the Contract or otherwise.

## **1.10 Options to Extend (Optional)**

**Note to drafters: This optional clause gives the Commonwealth the discretion to extend the Term of the Contract. This offers flexibility but it is not a reliable reward for performance. If drafters require a solution whereby the Contractor has certainty of being offered an extension**

**that is based on performance, refer to the 'standard' Award Term option within the Term clause of the ASDEFCON (Support) COC.**

**The suggested period of 100 Working Days below allows for a CCP to be prepared, evaluated, negotiated, and agreed before the Off Ramp Date. The period between the Off Ramp Date and the Expiry Date (eg, 24 months) must be sufficient to allow the Commonwealth to establish a replacement contract (ie, allowing for tender preparation, responses, evaluations and negotiation, as applicable). Insert an appropriate durations for the draft Contract.**

- 1.10.1 The Commonwealth may extend the Contract for one or more Option Periods specified in the Details Schedule on the terms and conditions then in effect, by issuing an Extension Notice to the Contractor not less than [...INSERT NUMBER EG, 100...] Working Days before the Off Ramp Date.
- 1.10.2 If the Commonwealth issues an Extension Notice, the Commonwealth shall, in the Extension Notice:
- a. specify the Option Period(s) by which the Contract is proposed to be extended; and
  - b. provide details of any change to the scope of the Services (eg, an increase or reduction) for the period of the proposed extension.
- 1.10.3 Despite any other provision of the Contract, the Contract cannot be extended beyond the Maximum Term specified in the Details Schedule.

**Option: Include this optional clause if the Commonwealth wishes to inform the Contractor that KPIs, objectives and/or other factors will be considered before offering a Contract extension.**

- 1.10.4 The Contractor acknowledges that, when considering an extension to the Term of the Contract, the Commonwealth may, but is not obliged to, have regard to the Commonwealth's assessment of:
- a. the Contractor's performance of its obligations in a manner which satisfies the Objectives of the Contract specified in clause 1.3.1;

**Note to drafters: If the Contract will not include KPIs or other Performance Measures, then the clauses (b and c) below should be deleted as applicable. When included, an Adjusted Performance Score of 80% will usually represent a level that, below which, represents significant under-performance. Any other Performance Measure that will be considered for an extension should include, in its specification, the applicable criteria that will be assessed.**

- b. if a Key Performance Indicator (KPI) is included in the Contract, the Contractor's performance for each KPI in every Review Period within the previous two years including whether the Adjusted Performance Score for a KPI has been assessed as being above 80%;
- c. if the Contractor's performance is measured using any other Performance Measures, whether that performance is acceptable to the Commonwealth;

**Note to drafters: If other factors will be considered for the purposes of an extension, and the Commonwealth wishes to identify these, describe these factors below.**

- d. [...INSERT OTHER CRITERIA...]; and
- e. if the Contractor has been required to deliver a Remediation Plan within the previous 2 years (in accordance with clause 6.9), whether as a result of a Remediation Plan the Commonwealth has been or is entitled to suspend payment under clause 6.9.5.

- 1.10.5 An extension to the Contract, in accordance with the Extension Notice, is subject to the Approval of a CCP in accordance with clause 11.1.
- 1.10.6 If, prior to the Off Ramp Date, the parties are unable to agree to the CCP required by clause 1.10.5 then the Contract shall expire on the Expiry Date unless earlier terminated in accordance with the Contract or otherwise.

## **1.11 Phase In (Optional)**

**Note to drafters: Phase In activities are performed between the Effective Date and the Operative Date to establish the ability and capacity to commence the delivery of Recurring Services. This**

**clause and clause 1.5, Operative Date, should be included together or both designated as 'Not used'.**

- 1.11.1 The Contractor shall comply with the Approved Phase In Plan and clause 2.4 of the SOW.
- 1.11.2 The Contractor acknowledges that it may be replacing an outgoing contractor and that retention of highly skilled and trained personnel is of paramount importance for satisfactory provision of the Services.
- 1.11.3 The Contractor agrees to take all reasonable steps to facilitate the transfer of any personnel who wish to transfer from an outgoing contractor to the Contractor and who are accepted for engagement by the Contractor.

## **2 CONTRACT GOVERNANCE**

### **2.1 Representatives (Core)**

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- 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 L. 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 10.4 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)**

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- 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 clause 2.2.1 is deemed to be delivered:
  - a. if hand delivered, when received at the address;
  - b. if sent by pre-paid post, in 3 Working Days when sent within Australia and in 8 Working Days when sent by air mail from one country to another;
  - 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 1 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)**

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- 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 L.

**3 PROVISION OF SERVICES****3.1 Language and Measurement (Core)**

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- 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 as agreed in writing by the Commonwealth Representative.

**3.2 Standards of Work and Conformity (Core)**

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- 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 Services are compatible with and do not restrict the performance of, or adversely affect, any existing services that are referred to in the Contract or that the Contractor may reasonably be expected to be aware of.
- 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)**

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- 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)**

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- 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. 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 5 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 5 Working Days after receiving notification that an Authorisation is refused, revoked or qualified.
- 3.4.3 The Contractor shall notify the Commonwealth Representative within 5 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.

**Option: For when clause 3.6 below is used.**

- 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.

**Note to drafters: Include the below clause where there will be imported components (ie goods from overseas) as part of the Services.**

**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 13.6 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 (Optional)**

**Note to drafters: This clause 3.6, SOW clause 3.10 and Attachment G are optional but interdependent and must be inserted or omitted as a package. If no GFM is to be provided, then the clauses under clause 3.6 may be replaced with a single “Not used” (and Attachment G would also be “Not used”).**

- 3.6.1 The Commonwealth shall deliver or provide access to, and the Contractor shall manage, the 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 that:
- a. the Commonwealth’s obligations to deliver or provide access to GFM on the dates described in the Contract or the GFM section of an S&Q Order may be 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 deliver or provide the Contractor with access to GFM.
- 3.6.4 The Contractor shall ensure that the use of GFM does not adversely affect the provision of the Services or any other services provided by Associated Parties that relate to or interact with the Services.

**Option: For when GFI is to be provided.**

- 3.6.5 The parties acknowledge that the GFI is not furnished to the Contractor for the purpose of 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.
- 3.6.6 Except as otherwise provided in this clause 3.6 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 and/or Commonwealth Mandated GFM.**

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

- 3.6.7 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 G 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 if a GFF Licence is used. Failure to obtain the necessary LAA approvals before then will breach the LAA.**

**Drafters must engage with Directorate of Property Leasing, Property Services Branch, Infrastructure Division, Estate and Infrastructure Group 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 K.
- 3.7.2 Each party shall comply with its obligations under Attachment K 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); or
  - 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 G or as otherwise directed by the Commonwealth Representative.

**Option: For when clause 3.10, GFS Information & Communications Technology is not used.**

- 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, the Contractor shall notify the Commonwealth Representative within 5 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 (Optional)**

- 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 G or the GFS section of an S&Q Order, the Contractor may be entitled to Performance Relief or Postponement as determined in accordance with clause 6.4.

**Option: For when the Commonwealth mandates GFS. If clause 3.10 is not used, the words in brackets can be removed.**

- 3.9.3 [Subject to clause 3.10,] 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 G 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 GFS Information & Communications Technology (ICT) (Optional)**

- 3.10.1 If the Contractor is provided with access to or the use of any GFS (ICT) for the purposes of providing the Services, the Contractor shall (and shall ensure that all Contractor Personnel):
- a. hold an appropriate Defence security clearance when accessing or using the GFS (ICT);
  - b. comply with any relevant policies and processes, including Defence security requirements, applicable to the access or use of the GFS (ICT);
  - c. not access, use or obtain information available from the GFS (ICT) except to the extent strictly required for the performance of the Contractor's obligations under the Contract; and

- d. store any TD, Software or Contract Material delivered to the Commonwealth on the GFS (ICT) in an approved document management system, such as Objective.
- 3.10.2 The Contractor acknowledges and agrees that:
- a. the GFS (ICT) shall be provided to the Contractor on the same basis, configuration and availability as provided generally to Commonwealth users; and
  - b. no modifications or additions to the functionality of the GFS (ICT) shall be made by the Commonwealth to provide the Contractor any particular access, Software or service level not otherwise provided in accordance with clause 3.10.2a, unless agreed to by the Commonwealth Representative in writing.
- 3.10.3 The Contractor shall take all reasonable steps to ensure that any use of GFS (ICT) does not damage, interfere with or otherwise compromise the GFS (ICT), any information contained within it or any other Defence information system.
- 3.10.4 The Contractor shall not establish any interface between the GFS (ICT) and any information system owned or controlled by the Contractor, or by a third party, unless agreed to by the Commonwealth Representative in writing.
- 3.10.5 If the Commonwealth fails to provide the GFS (ICT) to the Contractor in accordance with clause 3.10.2a, the Contractor may be entitled to Performance Relief or Postponement as determined in accordance with clause 6.4.

### 3.11 Contractor Personnel (Core)

**Note to drafters: Key Persons are those individuals named in the Approved SMP for the corresponding Key Staff Position. If Key Persons are not required, amend the title of this clause to 'Contractor Personnel', and use Option B below.**

- 3.11.1 The Contractor shall ensure that the Services are performed by Contractor Personnel who:
- a. are suitably qualified, with appropriate experience, skills and expertise; and
  - b. hold appropriate current Authorisation in accordance with clause 3.4.1 as is necessary to provide the Services.

**Option A: For use when the Contract identifies Key Persons.**

- 3.11.2 The Contractor shall ensure that each person named in the Approved SMP 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 3.11.
- 3.11.3 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.
- 3.11.4 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 opinion, 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, including for reasons relating to WHS, security, equity and diversity, workplace gender equality, probity, or the relationship between the Commonwealth and the Contractor.
- 3.11.5 If the Commonwealth gives the Contractor a notice under clause 3.11.4 the Contractor shall (or shall ensure that the relevant Subcontractor shall):

- a. within the period specified in the notice, remove the person from the work in respect of the Services; and
  - b. as soon as practicable, nominate a replacement with appropriate experience, skills and expertise.
- 3.11.6 For any person nominated as a Key Person or to replace a Key Person, the Contractor shall give the Commonwealth supporting documentation that:
- a. demonstrates how the nominated person satisfies the requirements for the relevant Key Staff Position;
  - b. demonstrates how any capability shortfalls of the nominated person will be addressed; and
  - c. includes an update to position/person specifications for affected Key Staff Positions to reflect any changes in duties and responsibilities that result from the replacement of a Key Person.
- 3.11.7 The Commonwealth shall notify the Contractor within 10 Working Days after receiving the documentation referred to in clause 3.11.6 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.
- 3.11.8 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 3.11 or any failure by the Contractor to provide a replacement person; or
  - b. the exercise by the Commonwealth of any right under this clause 3.11.
- 3.11.9 If the Contractor is required to replace any Key Person under this clause 3.11, and a replacement person satisfactory to the Commonwealth is not accepted within three months after the Commonwealth first receives or provides notice under clause 3.11.3 or 3.11.4, the Commonwealth may give the Contractor a Default Notice in accordance with clause 13.3.

**Option B: For use when the Contract does not identify Key Persons.**

- 3.11.10 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 opinion, the person specified in the notice is 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 or for reasons of incapacity or incompetence.
- 3.11.11 If the Commonwealth gives the Contractor a notice under clause 3.11.10 the Contractor shall (or shall ensure that the relevant Subcontractor shall):
- a. within the period specified in the notice, remove the person from the work in respect of the Services; and
  - b. as soon as practicable, nominate a replacement with appropriate experience, skills and expertise.

**3.12 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).**

- 3.12.1 The Commonwealth Representative may by notice authorise the Contractor to provide a Task-Priced Service described in the notice.
- 3.12.2 If the Commonwealth Representative gives the Contractor a notice under clause 3.12.1, the Contractor shall:
- a. commence the Task-Priced Service within 2 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).
- 3.12.3 If the Contractor becomes aware that:
- d. circumstances have arisen in which, in the Contractor's reasonable opinion, the delivery of the Services may be adversely affected unless a Task-Priced Service is performed; and
  - e. the Commonwealth Representative may not be aware of those circumstances,
- the Contractor shall notify the Commonwealth Representative of such circumstances as soon as is practicable.
- 3.12.4 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.

**3.13 Survey and Quote Services (Core)**

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- 3.13.1 The Commonwealth Representative may request the Contractor to provide a quote for the provision of the S&Q Services described in the request. The request shall be in the form of Part 1 of Annex A to DID-SSM-S&Q.
- 3.13.2 The Contractor shall, before the due date specified by the Commonwealth in the request, conduct a survey of the S&Q Services and submit a quote for the S&Q Services (**S&Q Quote**) by completing 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 Services;
    - (i) prepared on the price basis specified by the Commonwealth in the request; and
    - (ii) calculated in accordance with 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.
- 3.13.3 The obligation to provide the S&Q Services in accordance with the 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 (**S&Q Order**).
- 3.13.4 The Contractor shall:
- a. provide the S&Q Services in accordance with the Contract and the S&Q Order; and
  - b. complete the S&Q Services within the periods specified in the S&Q Order.
- 3.13.5 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 Services; or
  - b. is amended for the purposes of providing the S&Q Services.
- 3.13.6 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.
- 3.13.7 If the Contractor determines that the outcome of the S&Q Services 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.
- 3.13.8 If the Contractor becomes aware that:
- a. circumstances have arisen in which, in the Contractor's reasonable opinion, the delivery of the Services may be adversely affected unless one or more S&Q Services is performed; and
  - b. the Commonwealth Representative may not be aware of those circumstances,

the Contractor shall notify the Commonwealth Representative of such circumstances as soon as is practicable.

**3.14 Coordination and Cooperation with other Commonwealth Contractors (Core)**

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- 3.14.1 The Contractor shall coordinate and cooperate with Associated Parties in accordance with clause 3.8 of the SOW at no additional cost to the Commonwealth.

**3.15 Use of Contractor Resources (Core)**

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- 3.15.1 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.

### 3.16 Non-exclusivity (Core)

3.16.1 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 Services that is not included in the scope of:

- a. Recurring Services;
- b. S&Q Services the subject of an S&Q Order under clause 3.13; or

**Option: Include this clause when Task-Priced Services are used.**

- c. Task-Priced Services authorised by the Commonwealth Representative under clause 3.12,

including any work that has been removed from the Services in accordance with this Contract.

## 4 DEFENCE INDUSTRY PARTICIPATION (CORE)

**Note to drafters: If the expected value of any resultant Contract is at or above \$4 million and less than \$20 million for the Initial Term (including GST) include this clause 4.**

**If the expected value of any resultant Contract is less than \$4 million (including GST), or an exemption from the 2019 Defence Policy for Industry Participation applies, then Defence Industry Participation (DIP) is not required.**

**If DIP is not required, the heading should be retained and '(Not used)' added at the end of the heading. Delete all clauses below the heading. This will preserve the clause numbering and cross references throughout the Contract.**

**If the expected value of any resultant Contract is at or above \$20 million for the Initial Term (including GST), then more extensive DIP requirements, including a DIP Plan, will be required and drafters will need to seek assistance in developing the appropriate requirements.**

**If your procurement activity is a materiel procurement, DIP will not apply and the enhanced Australian Industry Capability (AIC) framework may apply. If AIC applies drafters need to transfer and tailor appropriate provisions from the ASDEFCON (Support Short) or ASDEFCON (Support) templates dependant on the expected value of any resultant contract.**

**Drafters should contact their contracting officer for guidance on how to incorporate these requirements.**

**Additionally, drafters can consult with:**

**CASG AIC Division at: [aic.delivery@defence.gov.au](mailto:aic.delivery@defence.gov.au) for AIC guidance.**

**Or visit:**

- <http://drnet/strategy/DIPD/Australian-Industry-Capability/Pages/AIC.aspx>.

### 4.1 General Defence Industry Participation Requirements (Core)

**Note to Tenderers: Tenderers should refer to Annex G (TDR G) to Attachment A to the Conditions of Tender for more details on including DIP requirements.**

4.1.1 The Contractor acknowledges the importance to the Commonwealth of Defence Industry Participation (DIP), as set out in government and Defence policies, and the contribution made by the Contractor towards achieving the objectives for DIP, to:

- a. deliver Services to Defence, from Australian Industry, through solutions that provide value for money for the Commonwealth; and
- b. maximise opportunities for competitive Australian Industry to participate in Defence procurements.

4.1.2 The Contractor acknowledges that the DIP Schedule in the form of Attachment J to the Conditions of Contract sets out the DIP activities that it intends will be carried out by Australian Industry (whether by the Contractor or identified Subcontractors) in Australia or New Zealand in performing the Contract.

- 4.1.3 The Contractor shall:
- a. ensure that the DIP activities specified in the DIP Schedule are performed in Australia or New Zealand by the Contractor or, subject to clause 4.2.2, the relevant Subcontractors identified in the DIP Schedule; and
  - b. achieve the overall Contract expenditure in Australia or New Zealand in respect to each DIP Activity Value specified in the DIP Schedule.

#### **4.2 DIP Obligations (Core)**

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- 4.2.1 The Contractor shall maintain the accuracy, completeness and currency of the DIP Schedule.
- 4.2.2 If the Contractor or a Subcontractor can no longer perform a DIP Activity specified in the DIP Schedule, the Contractor shall:
- a. propose an alternative entity to perform the DIP Activity, ensuring that opportunities are maximised for Australian Industry to perform that DIP Activity in Australia or New Zealand; and
  - b. submit a CCP in accordance with clause 11.1, as soon as practicable or as otherwise agreed by the Commonwealth Representative.
- 4.2.3 The Contractor acknowledges and agrees that:
- a. compliance with this clause 4 shall not relieve the Contractor from any other liabilities or other obligations under the Contract; and
  - b. the provision of Services and the Acceptance of the Deliverables shall not relieve the Contractor from complying with its obligations under this clause 4 and its other obligations relating to DIP.
- 4.2.4 Where the Contractor fails to comply, or anticipates that it is likely to fail to comply, with this clause 4 or the DIP Schedule, it shall notify the Commonwealth Representative in writing as soon as reasonably practicable.

#### **4.3 DIP Remedies (Core)**

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- 4.3.1 The Contractor acknowledges and agrees that:
- a. the Commonwealth may suffer loss or damage if:
    - (i) the Contractor fails to comply with any DIP Obligation; or
    - (ii) the Contractor fails to comply with an Approved Remediation Plan in relation to compliance with any DIP Obligation;
  - b. damages may not be an adequate remedy for a failure by the Contractor to comply with:
    - (i) any DIP Obligation; or
    - (ii) an Approved Remediation Plan in relation to compliance with any DIP Obligation,
    - (iii) and that remedies, such as specific performance or injunctive relief may be sought by the Commonwealth; and
  - c. the rights of the Commonwealth under this clause 4.3 are in addition to, and do not limit or affect, any other rights or remedies under the Contract or at law.
- 4.3.2 The Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1f if the Contractor commits a breach of this clause 4 that, in the Commonwealth's opinion, is not capable of being remedied.

## 5 TECHNICAL DATA, SOFTWARE AND CONTRACT MATERIAL

### 5.1 Ownership of Intellectual Property (Core)

**Note to drafters: If Commonwealth ownership of Intellectual Property (IP) (in addition to the rights provided by this clause 5) or broader IP rights for Defence Purposes are required (eg, for security reasons), appropriate clauses from ASDEFCON (Support) should be included.**

**Note to tenderers: The Commonwealth's default position is that the Contractor (or its nominee) will own all Intellectual Property (IP) created under the Contract. This position is reflected in clause 5.1.**

**The Commonwealth will generally own any new IP created under the Contract in relation to GFM (including new IP in updates or amendments to the GFM). However, under clause 5.1.4, the Contractor (or its nominee) will own this IP if it already owns all of the existing IP in the GFM. This clause also provides that the Commonwealth will own IP in Commonwealth Material (being material other than TD and Software that is to be produced under the contract and owned by the Commonwealth). 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 5.2.2 states that the Contractor is obliged to ensure that the Commonwealth is assigned any IP created under a Subcontract in Commonwealth Material and/or 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, 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.

**Option: Include if GFM is to be provided to the Contractor or if there will be Commonwealth Material. If there will be GFM or Commonwealth Material but not both, tailor accordingly.**

- 5.1.3 Subject to clause 5.1.4, IP created under the Contract in respect of GFM and Commonwealth Material 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 is not required to be assigned to the Commonwealth under clause 5.1.3 if the Contractor or the Subcontractor owns all of the IP in the GFM to be provided to it under the Contract.

### 5.2 TD and Software (Core)

- 5.2.1 This clause 5.2 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. Commercial TD or Commercial Software to which clause 5.3 applies; and

**Option: Include if GFM is to be provided to the Contractor or Commonwealth Material delivered by the Contractor (as appropriate).**

- b. TD or Software in GFM where clause 5.4 applies to that GFM; and
- c. Commonwealth Material to the extent that clause 5.6 applies to that TD or Software.

- 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 Use the TD for any Defence Purpose and to grant a sublicense to:
- a. a Commonwealth Service Provider to Use the TD or Software to enable it to perform its obligations, functions or duties to the Commonwealth;
  - b. any person to Use the TD or Software and to grant a further sublicense to Use the TD or Software, for:
    - (i) installing, applying, configuring, operating, maintaining, removing, uninstalling or disposing of the Deliverables;
    - (ii) integrating the Deliverables with the Services, other systems or other services;



- (iii) rectifying any Defect in the Deliverables where the Contractor has failed to comply with its obligations under clause 8.2 in relation to the Defect;
  - (iv) undertaking Training in relation to the Deliverables or Services; or
  - (v) any other Defence Purpose, but subject to any restrictions specified in 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.

### **5.3 Commercial TD or Commercial Software (Core)**

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- 5.3.1 The Contractor shall ensure that the Commonwealth is granted a licence, in respect of all Commercial TD and all Commercial Software delivered or required to be delivered to the Commonwealth or any other person under the Contract, on the best commercial terms available to the Contractor.
- 5.3.2 The Contractor shall ensure that any licence granted to the Commonwealth in respect of Commercial TD and Commercial Software under this clause 5.3 does not require the Commonwealth to pay a royalty or other fee (not otherwise included in the price under clause 7.1.1) unless the Commonwealth has agreed in writing to the payment.

### **5.4 GFM Licence (Optional)**

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**Note to drafters: Include clause 5.4 if GFM is to be provided to the Contractor.**

- 5.4.1 The Commonwealth grants to the Contractor (or shall ensure the Contractor is granted), a non-exclusive, Royalty-free licence in respect of TD or Software in GFM (except TD or Software to which clause 5.1.4 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 11.4.1,
- subject to any restrictions specified in Attachment G (if used) or as otherwise notified by the Commonwealth.
- 5.4.2 Without limiting any restrictions referred to in clause 5.4.1, the Contractor's right to grant a sublicense under clause 5.4.1b 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 5.4.1b; 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 5.4.2.
- 5.4.3 The licence under clause 5.4.1a (and any sublicense granted under clause 5.4.1b) expires upon the expiry or termination (whichever is the earlier) of the Contract or the relevant Subcontract.

### **5.5 Contract Material (Core)**

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- 5.5.1 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all Contract Material to Use the Contract Material for any Defence Purpose and to grant a sublicense to:
- a. a Commonwealth Service Provider to Use the Contract Material to enable it to perform its obligations, functions or duties to the Commonwealth;
  - b. any person to Use the Contract Material, or to grant a further sublicense to Use the Contract Material, for a Defence Purpose; or
  - c. any person for a purpose referred to in clause 11.4.1.

## 5.6 Commonwealth Material (Optional)

**Note to drafters: The Commonwealth's default position is to not own IP created under the Contract or a Subcontract. However, in limited cases for national security and/or strategic interest reasons (where the Commonwealth wishes to prevent the Contractor from using and/or sharing Commonwealth Material with a third party), the Commonwealth can require ownership of IP in specific items of TD or Software.**

**For example, in the Complex Services context, the Commonwealth may elect to own training material that describes a Defence capability and how it is used by the Commonwealth.**

**Note to tenderers: This clause covers IP relating to Commonwealth Material that is assigned to the Commonwealth under clause 5.1.3. If, in respect of any Commonwealth Material, 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 5.2.**

- 5.6.1 This clause 5.6 applies to all Commonwealth Material delivered or required to be delivered to the Commonwealth or any other person under the Contract.
- 5.6.2 The Commonwealth grants to the Contractor a non-exclusive, Royalty-free licence in respect of the Commonwealth Material to:
- a. Use the Commonwealth Material for the purpose of enabling the Contractor to perform its obligations under the Contract;
  - b. grant a sublicense to a Subcontractor to Use the Commonwealth Material 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 11.4.1,
- 5.6.3 subject to any restrictions specified in the TDSR or an S&Q Order in respect of the Commonwealth Material, or as otherwise notified by the Commonwealth.
- 5.6.4 The Contractor shall ensure that any IP in Commonwealth Material not assigned to the Commonwealth under clause 5.1.3 is capable of being clearly distinguished from the IP assigned to the Commonwealth and is licensed to the Commonwealth for Defence Purposes including a right to grant a sublicense for Defence Purposes.

## 5.7 No Commercialisation (Core)

- 5.7.1 A Licence or sublicense 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.
- 5.7.2 For the avoidance of doubt, clause 5 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.

## 5.8 TDSR Schedule (Core)

- 5.8.1 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 or Software delivered or required to be delivered under the Contract, including an S&Q Order.
- 5.8.2 Despite clause 11.4.1, the Commonwealth may disclose a restriction included in the TDSR Schedule to a person for the purposes of the Commonwealth exercising a right or complying with a restriction under this clause 5 or the TDSR Schedule.

## 5.9 TD and Software required to be delivered (Core)

- 5.9.1 The Contractor shall deliver all TD and Software and Commonwealth Material 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.
- 5.9.2 If the time, location or manner of delivery of any item of TD or Software or Commonwealth Material 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 (acting reasonably).

**5.10 Markings (Core)**

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- 5.10.1 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.

**5.11 TD and Software Warranties (Core)**

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- 5.11.1 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 Commonwealth from obtaining the benefit of the Services as contemplated under the Contract; and
  - b. all of the TD and Software delivered under clause 5.9.1 is complete and accurate.
- 5.11.2 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 included in any Software Deliverables or installed on any Commonwealth system as a result of an act or omission of any of the Contractor Personnel.

**5.12 Intellectual Property Warranties (Core)**

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- 5.12.1 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; and
  - b. as at the time of delivery and after making diligent enquiries, the Contractor has no notice of any challenge, claim or proceeding in respect of such IP.
- 5.12.2 The Contractor shall notify the Commonwealth if the Contractor becomes aware of any challenge, claim or proceeding referred to in clause 5.12.1b arising in respect of any IP after the TD, Software or Contract Material is delivered to the Commonwealth.

**5.13 Patents, Registrable Designs and Circuit Layouts (Core)**

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- 5.13.1 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.

**5.14 Existing IP Licences (Core)**

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- 5.14.1 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)**

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- 6.1.1 The Contractor shall provide the Services in accordance with the Contract, including:
- a. providing the Services by the relevant times or dates (if applicable) and in the manner required;
  - b. achieving Approval or Acceptance of any Deliverables subject to Approval or Acceptance by the relevant times or dates (if applicable) and in the manner required;

**Option: Include when Milestones are used**

- c. achieving Milestones by the relevant Milestone Dates;
- d. providing the Services in accordance with, and to the standards, specifications, certifications and other requirements set out or referred to in the Contract (including the SOW and the Data Item Descriptions listed in Annex C to the SOW); and
- e. ensuring that the Services are provided to the standards of work set out in clause 3.2.

**Note to drafters: Include the following clause 6.1.2 if the Contract will be implemented as a performance-based contract and performance payments are included.**

**Option: Include the following clause if the Contract will be implemented as a performance-based contract.**

- 6.1.2 If the performance of Services is measured using a Key Performance Indicator (KPI), the Contractor's performance of those Services shall be measured and reported, and any Performance Payments shall be calculated, in accordance with Annex E to Attachment B.

**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.

**Note to drafters: The wording in square brackets should be included if Milestones have been included in the Contract.**

- 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

**Note to drafters: The wording in square brackets should be included if Milestones have been included in the Contract.**

- 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 6.2.2 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 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 (Optional)**

**Note to drafters: Include this clause for performance-based contracts. Otherwise, replace the following clause with 'Not used'.**

- 6.3.1 If the Adjusted Performance Score for any KPI for a Review Period is, or is likely to be, less than 80%, the Contractor shall:
- a. investigate the event or circumstance that caused of the shortfall in performance;
  - b. take all reasonable steps to minimise the adverse effects of the shortfall; and
  - c. within 5 Working Days of becoming aware of the shortfall, notify the Commonwealth and provide details of:
    - (i) the shortfall and the events or circumstances that caused the shortfall;

- (ii) the steps taken, or to be taken, to minimise any adverse effect of the shortfall; and
- (iii) whether the Contractor intends to make a claim under clause 6.4.

#### **6.4 Performance Relief and Postponement (Core)**

6.4.1 Subject to clauses 6.4.3 to 6.4.8, 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, 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 12.4.9; or
- c. 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:

***Option: Include this clause if the contract will include KPIs.***

- a. increase the Adjusted Performance Score for a KPI for a Review Period;
  - b. in accordance with Annex E 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 notifies the Commonwealth Representative of the quantum of the Postponement costs it claims as soon as practicable after the determination of the costs by the Contractor but no later than six months after the notification under clause 6.2.2 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 the notification and substantiating evidence 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 2.8 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 6.5.2a, 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 Acceptance (Core)**

- 6.6.1 The Contractor shall offer for Acceptance any Deliverables including any items delivered as part of the Services or otherwise required to be delivered under the Contract, at the delivery points and within the time frames specified in the Contract (where applicable).
- 6.6.2 The parties acknowledge that any Deliverable that is subject to Approval is not also required to be offered for Acceptance, unless otherwise specified in the Statement of Work (eg, a version of a Deliverable is subject to Approval, and a later version is subject to Acceptance).
- 6.6.3 The Contractor shall, when seeking Acceptance of Deliverables in accordance with 6.6.1:
- a. complete and present a signed Supplies Acceptance Certificate certifying that the Deliverables conform with the requirements of the Contract, except for any minor omissions or Defects, or any non-conforming materials or work detailed in the Supplies Acceptance Certificate; and

- b. provide any other supporting evidence required by the Commonwealth Representative including confirmation of successful completion of any testing or other Verification activities required by the Contract.
- 6.6.4 The Commonwealth Representative shall, within 15 Working Days (or other period specified in the Contract) after the offer of Deliverables for Acceptance:
- a. subject to clause 6.6.5, accept the Deliverables by signing the Supplies Acceptance Certificate where all requirements in clause 6.6.5 have been met; or
  - b. reject the Deliverables where the requirements in clause 6.6.3 have not all been met, in which case the Commonwealth Representative shall notify the Contractor in writing of the reasons for rejection and the extent of any non-conformance.
- 6.6.5 The Commonwealth Representative may Accept Deliverables despite the existence of minor omissions or Defects in the Deliverables or non-conforming materials or work as detailed in an Application for a Deviation submitted in accordance with clause 9.4.1 of the SOW. The Commonwealth Representative shall endorse such omissions or Defects or non-conforming materials or work on the Supplies Acceptance Certificate (or on an attachment to the certificate). The Contractor shall, within 10 Working Days after Acceptance (or such longer period as the Commonwealth Representative may agree in writing), make good the omissions or Defects or non-conforming materials or work to the satisfaction of the Commonwealth Representative.
- 6.6.6 If the Commonwealth rejects any Deliverables under clause 6.6.4b, the Contractor shall, within a period determined by the Commonwealth, offer Deliverables that conform to the requirements of the Contract.

## **6.7 Ownership (Core)**

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- 6.7.1 Subject to clause 5.1, ownership of Deliverables, including Deliverables incorporated into Commonwealth Property, shall pass to the Commonwealth on the earlier of:
- a. Acceptance of the Deliverable or the work that includes the Deliverable;
  - b. if the Deliverables are included in a Milestone, upon payment of a claim relating to achievement of the Milestone;
  - c. payment of the claim for the applicable Services for the period within which the work that includes the Deliverable was undertaken or the Deliverable was delivered under or in accordance with the Contract; and
  - d. payment for the Deliverable or the work.
- 6.7.2 The Contractor warrants and shall ensure that, at the time ownership of any item of Deliverables passes to the Commonwealth under clause 6.7.1:
- a. the Contractor has full power and authority to transfer full legal and beneficial ownership in the Deliverable to the Commonwealth; and
  - b. the Commonwealth will obtain good title to the Deliverable, free from any Security Interest.

## **6.8 Substituted Performance (Core)**

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- 6.8.1 If:
- a. the Contractor fails to provide any of the Services, fails to provide any of the Services to the required standard or fails to 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 (or any part 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 13.6 any expense that it incurs in doing so. No amount shall be owing to the Commonwealth under this clause 6.8.1 until the Commonwealth elects to recover the amount.
- 6.8.2 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 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.

6.8.3 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 6.8.1 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 any Deliverables and any Commonwealth Property, as applicable; and
- b. providing the Commonwealth or its nominee with any TD, Software or other information (including data related to or created in the performance of the Services) 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.

6.8.4 The exercise by the Commonwealth of its rights, or any action required of the Contractor, under this clause 6.8 shall not entitle the Contractor to claim Performance Relief under clause 6.4 or relieve the Contractor from performing any of its obligations under the Contract.

## 6.9 Remediation Plan (Core)

6.9.1 Without limiting clauses 13.2 or 13.3, the Commonwealth may require the Contractor to submit a Remediation Plan to the Commonwealth for Approval in accordance with clause 3.14 of the SOW if any one or more of the following occurs:

- a. a Contractor Default occurs, and in the opinion of the Commonwealth, the Contractor Default is capable of being remedied;
- b. there is, or is likely to be, any problem with or failure to provide any of the Services or to otherwise perform the Contract; and

***Option: Include the following clause if the Contract will be implemented as a performance-based contract.***

- c. the Adjusted Performance Score for any KPI for a Review Period is, or is likely to be, less than 80%.

6.9.2 The date for submission of a Remediation Plan for Approval by the Commonwealth Representative shall be within a reasonable period determined by the Commonwealth Representative.

6.9.3 If the Commonwealth Representative considers the Remediation Plan submitted by the Contractor to be unsatisfactory, the Contractor shall amend the Remediation Plan to rectify the issues raised by the Commonwealth Representative and shall resubmit the Remediation Plan within a period agreed or determined in accordance with clause 6.9.2.

- 6.9.4 If a Remediation Plan is Approved, the Contractor shall complete all of the steps and activities contained in the Approved Remediation Plan within the timeframe specified in the Approved Remediation Plan. The Contractor shall ensure that the steps the Contractor undertakes, as required by the Approved Remediation Plan, do not affect the performance of any other Services and are not inconsistent with the Contract.
- 6.9.5 If the Contractor has not complied with the Approved Remediation Plan within the period specified in the Approved Remediation Plan, the Commonwealth may do any one or more of the following:
- a. perform or procure the performance of the Services and any other work under clause 6.8 which in the Commonwealth's opinion is necessary to rectify the failure or Defect as Remedial Work;
  - b. suspend payment in accordance with clause 7.9.1g; or
  - c. terminate the Contract in accordance with clause 13.2.
- 6.9.6 The Contractor shall fully cooperate with, and assist, the Commonwealth, or any person nominated by the Commonwealth, to ensure that the Commonwealth is able to exercise its rights under clause 6.9.5a effectively and expeditiously, including by providing access to its premises, plant and equipment, Technical Data (as determined necessary by the Commonwealth to remedy the Contractor Default), Contractor Personnel, and any Commonwealth Property in the Contractor's possession.

## 7 PRICE AND PAYMENT

**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. The Commonwealth will only make payments in Australian currency when the foreign currency amounts are insignificant. A determination of whether the amounts are significant will be made by Defence following receipt of tenders.**

**If the Commonwealth determines that amounts under any resultant Contract will be payable in Australian dollars only, the Commonwealth will negotiate provisions with the successful tenderer enabling adjustment of the payments provided for under any resultant Contract for exchange rate fluctuations.**

### 7.1 Price (Core)

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

**Option: Include this clause when a Mobilisation Payment is included in the Contract.**

- a. for the Mobilisation Payment specified in the Details Schedule;

**Option: Include when Milestone Payments are used**

- b. Services included in a Milestone upon achieving the Milestone on or before the Milestone Date;

**Option: Include this clause when Performance Payments will not adjust the Recurring Services Fee (ie, not applying a performance based contract).**

- c. for the provision of Recurring Services, in accordance with Annex C to Attachment B;

**Option: Include this clause when Performance Payments will be used to adjust the Recurring Services Fee (ie, when applying a performance based contract).**

- d. for the provision of Recurring Services in accordance with Annex C to Attachment B, less any reduction in the Performance Payment amount determined in accordance with Annex G to Attachment B;

**Option: Include this clause when Task-Priced Services are used.**

- e. for the provision of Task-Priced Services, in accordance with Annex D to Attachment B;
- f. for the provision of S&Q Services in accordance with an S&Q Order; and
- g. for an Adjustment Payment following an Adjustment Date in accordance with clause 7.3.4a.
- 7.1.2 The Commonwealth is entitled, without derogating from any other rights it may have, to defer payment of a claim until the Contractor has completed, to the satisfaction of the Commonwealth Representative, that part of the Services to which the claim relates.
- 7.1.3 If the Commonwealth agrees to Accept the Deliverables despite any minor omissions or Defects or other non-compliance, or if the Services are not performed in accordance with the Contract, the Commonwealth may, after consultation with the Contractor:
- a. determine a revised price under clause 7.1.1 reflecting the reduction in value for money of the omission, Defect, non-compliance or non-performance (**Reduction Amount**); and
- b. exercise its rights under clause 13.6 in respect of the Reduction Amount.
- 7.1.4 The Commonwealth shall not determine a Reduction Amount that includes an amount representing a reduction in value for money for non-performance, if the Commonwealth has calculated a Performance Payment that takes into account that non-performance.

**7.2 Claims for Payment (Core)**

**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 either be:**

- **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**
- **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 2.8 of Annex A to Attachment A to the Conditions of Tender.**

- 7.2.1 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 7.2.5; and
- c. the Contractor has complied with any other provisions of the Contract applicable to the payment,
- d. then the Commonwealth shall Approve the claim for payment.

**Note to tenderers: The option selected below will depend on the tenderer's response to clause 2.8 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.**

- 7.2.2 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.
- 7.2.3 When a claim is Approved under clause 7.2.1, the Commonwealth shall make payment within 5 days of Approval of the claim.

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

- 7.2.4 When a claim is Approved under clause 7.2.1, the Commonwealth shall make payment within 20 days of Approval of the claim.

- 7.2.5 The Contractor shall ensure that each claim for payment under the Contract:
- a. specifies the Commonwealth's reference number for the Contract;
  - b. is calculated in accordance with the Contract;
  - c. contains sufficient information to enable the Commonwealth to verify the claim;
  - d. is in the form of a valid Tax Invoice;
  - e. does not include a claim for payment of an amount included in another claim, unless the other claim for payment of that amount has been withdrawn by the Contractor in writing or the Commonwealth has rejected it under clause 7.2.6;
  - f. is accompanied by any substantiating documentation requested by the Commonwealth Representative; and
  - g. contains a statement by the Contractor that the claim is complete and accurate.
- 7.2.6 If a claim for payment, or part of a claim for payment, is rejected by the Commonwealth, 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.

### **7.3 Adjustments (Core)**

- 7.3.1 Where specified in Attachment B in respect of a particular price or payment, the relevant formula in clause 6.2 of Attachment B shall be applied to:

**Option: Include when Milestone Payments are used**

- a. Milestone Payments on each Adjustment Date that occurs on or before the relevant Milestone Date; and
  - b. the price or payment, on each Adjustment Date. However, unless stated otherwise in an S&Q Order, the labour rates applicable to an S&Q Order executed before the relevant Adjustment Date shall not be adjusted.
- 7.3.2 Subject to clause 7.3.1, the adjusted price or payment amount shall apply on and after the applicable Adjustment Date.
- 7.3.3 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 7.3.1.
- 7.3.4 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 7.3.1, an adjustment is required to any claim for payment that had been submitted in accordance with clause 7.2

after the Adjustment Date but prior to the date the CCP under clause 7.3.3 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 7.1.1f; or
- b. is to the credit of the Commonwealth, the Contractor shall notify the Commonwealth of the amount of the credit.

7.3.5 The Commonwealth shall not be liable for any claims for payment under clause 7.3.4a submitted after the end of the three-month period referred to in clause 7.3.4.

7.3.6 If an Adjustment Payment calculated in accordance with clause 7.3.4 is to the credit of the Commonwealth, the Commonwealth may elect to recover the amount from the Contractor under clause 13.6. No amount shall be owing to the Commonwealth under this clause 7.3.6 until the Commonwealth elects to recover the amount.

#### **7.4 Mobilisation Payment (Optional)**

**Note to drafters: This clause must be included if clause 7.5 (Bank Guarantee for Mobilisation Payment) is included. If a Mobilisation Payment will not apply under the Contract, then clauses 7.1.1a, this clause 7.4 and clause 7.5 must be replaced with "Not used".**

7.4.1 Subject to the Contractor providing the financial security required by clause 7.5.1, the Commonwealth shall pay the Contractor the Mobilisation Payment specified in the Details Schedule.

#### **7.5 Bank Guarantee for Mobilisation Payment (Optional)**

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 Annex C to Attachment F.

7.5.2 The Commonwealth shall not be obligated to pay the Mobilisation Payment identified in the Details Schedule 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 clause 7.2 and 7.3, 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 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 7.6 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: Tenderers should note that whether the Commonwealth requires both a bank guarantee in respect of the Contractor's performance and a Deed of Guarantee and Indemnity will be determined during negotiations with the preferred tenderer and based on the risk profile associated with the preferred tenderer's provision of the Services. The Commonwealth expects**

**that it will only require both types of security where it is assessed as necessary in the circumstances.**

**Where the Commonwealth determines that it does not require a security, the amount nominated for a security will be deducted from the tendered price and 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 indicate which alterations it is seeking are pre-agreed.**

- 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 C to Attachment F.
- 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 any securities provided under clauses 7.5 or 7.6, 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 clause 7.5 or 7.6, 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, the tenderer can elect to have the Master Guarantee and Indemnity apply to any resultant Contract. Information on the Master Guarantee Program is available at:**

**<https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/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 D to Attachment F 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)**

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

- 7.9.1 The Commonwealth may suspend some or all payments under the Contract if one or more of the following events occurs:
- a. the Contractor fails to replace a Key Person in accordance with clause 3.11;

**Option: Include when Milestones are used**

- b. 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);
- c.
- d. the Contractor fails to obtain or maintain any Authorisation, except to the extent that the failure was outside of the Contractor's reasonable control;
- e. the Contractor fails to provide or maintain a financial security or deed in accordance with clauses 7.5 to 7.8;
- f. the Contractor fails to comply with clause 9.1 or 12.4;
- g. the Contractor fails to comply with its obligations under clause 5;
- h. the Contractor fails to submit or obtain Approval for a Remediation Plan, or comply with an Approved Remediation Plan, in accordance with clause 6.9, within the timeframe required by the Commonwealth; or
- i. the Contractor fails to remedy a Default within the period specified in the Default Notice

**Option: If the Contract will be established as a performance based contract, include (if applicable) and amend the following clause to identify when a KPI could trigger this remedy (note that KPIs should be the only Performance Measures to directly link to suspending payments, other Performance Measures would first require a Remediation Plan).**

- j. the Contractor's performance for any KPI is below [...INSERT THRESHOLD...] for any Review Period, and the Commonwealth may continue to suspend payments until the Contractor has completed a Review Period with no results for any KPI being below [...INSERT THRESHOLD...].

**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: In accordance with clause 7.2.1 and per the Commonwealth Pay On-Time Policy, 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 2.7 of Annex A to Attachment A to the Conditions of Tender.**

7.9.2 The Commonwealth shall pay any withheld amounts to the Contractor within **[INSERT 5 or 20]** days after the cessation of all events that entitled the Commonwealth to withhold payment under this clause 7.9.

**7.10 Late Payments (RFT Core)**

7.10.1 If payment of an amount due under the Contract is made late, the Commonwealth shall pay interest on the unpaid amount, whether or not the Contractor has submitted a separate invoice for the interest.

7.10.2 Interest payable by the Commonwealth under this clause 7.10 shall be calculated in accordance with the following formula:

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

where:

"I%" means the Australian Taxation Office (ATO) sourced General Interest Charge rate current at the due date of payment expressed as a percentage;

"P" means the amount of the late payment; and

"n" means the number of days that the payment was late up to and including the day that the payment is made.

- 7.10.3 Interest shall only be payable in accordance with this clause 7.10 if the interest amount exceeds A\$100.

### **7.11 Taxes and Duties (Core)**

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- 7.11.1 All taxes, duties and government charges 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.
- 7.11.2 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.
- 7.11.3 Each Tax Invoice provided under clause 7.2.5 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.
- 7.11.4 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.
- 7.11.5 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 is 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.
- 7.11.6 The Commonwealth may elect to recover from the Contractor under clause 13.6 any amount of GST to be paid by the Contractor under clause 7.11.5. No amount shall be owing to the Commonwealth under this clause 7.11.6 until the Commonwealth elects to recover the amount.

### **7.12 Cost Principles (Core)**

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- 7.12.1 The Contractor shall apply the Defence Cost Principles when preparing any:
- a. claim for Postponement costs under clause 6.5;

***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***

- b. price for any CCP under clause 11.1; or S&Q Order under clause 3.13; or
- c. claim for costs if the Contract is terminated.

## **8 DEFECT NOTIFICATION AND RECTIFICATION**

### **8.1 Notification of Defects (Core)**

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- 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 any of the following, then the Contractor shall notify the Commonwealth Representative within the time period indicated:
- a. the safety of any persons - 1 Working Day;
  - b. the security of any Deliverable or Commonwealth Property where the risk is assessed, in accordance with the Approved SMP, as:
    - (i) high (or higher) - 1 Working Day; or
    - (ii) medium (or lower) - 5 Working Days;
  - c. subject to clause 8.1.1b, the operation or capability of any Deliverable, Commonwealth Property, or any services provided by the Commonwealth or Commonwealth Contractors that relate to or interact with the Services - 5 Working Days; or
  - d. any other property - 5 Working Days.
- 8.1.2 If a Defect requires an investigation to determine its cause and contributing factors, the Contractor shall perform the investigation in accordance with the SOW, or if directed by the



Commonwealth, prepare and submit an S&Q Quote for the performance of the investigation. Unless the Contractor is entitled to claim an additional amount under clause 8.2.2, the investigation or S&Q Services shall be provided at no cost to the Commonwealth.

## **8.2 Defect Rectification and Assistance Obligations (Core)**

- 8.2.1 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), then 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 repairing, replacing, modifying or re-performing the Service:
- a. rectify the Defect; and
  - b. rectify any damage to or other adverse effect on the Services to the extent caused by the Defect or the rectification of the Defect,
- 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 S&Q Services) 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 services or other contract with the Commonwealth;
  - c. the Commonwealth wilfully damaging a Deliverable; or
  - d. if the Defect comprises damage to the Deliverable, the damage arose out of or as a consequence of the following:
    - (i) the Deliverable being stored, installed, configured, used, maintained or modified by the Commonwealth or a Commonwealth Contractor in a way that deviates from any authorised specifications, instructions or manuals, unless such deviation is necessary to enable the Deliverable to function and be fit for its intended purpose;
    - (ii) an Excepted Risk occurring; or
    - (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 10.4.
- 8.2.3 To the extent that any identified Defect is determined by the Commonwealth to have arisen out of or as an act or omission under a contract referred to in clause 8.2.2b, and the Commonwealth determines that rectification of the Defect is covered by that other contract (for example, within that contract's defect notification period), then the Contractor shall assist the Commonwealth in the gathering of evidence to support a claim under that other contract.
- 8.2.4 The Contractor's obligations under clause 8.2.1 do not require the Contractor to remedy a Defect in GFM incorporated into the Services, 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 clause 8.2.2, the Contractor shall, except to the extent that the Commonwealth Representative otherwise agrees, bear all costs of, and incidental to, rectifying Defects as required by the Contract.
- 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 13.6 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 date the Services are rectified.

8.2.8 If a Defect requires an investigation to determine its cause and contributing factors, the Contractor shall perform the investigation if directed by the Commonwealth to do so. Unless the Contractor is entitled to claim an additional amount under clause 8.2.2 in respect of the rectification of the Defect, the investigation shall be conducted at no cost to the Commonwealth.

### 8.3 Manufacturer and Other Warranties (Optional)

**Note to tenderers: This clause may be included if there is significant plant and equipment being provided as part of the Services and if there are any warranties available from the relevant manufacturer or supplier that will extend beyond the end of the relevant Defect Rectification Period which 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).

## 9 INSURANCE (CORE)

### 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](mailto:ACIP.ManagementTeam@defence.gov.au). Information on the ACIP Initiative is available at:**

- <http://ibss/PublishedWebsite/LatestFinal/%7B836F0CF2-84F0-43C2-8A34-6D34BD246B0D%7D/Item/%7B331E4CAE-EEBE-45A0-9DA6-9B2C24E1DE33%7D>.

**For non-CASG procurements, drafters may seek approval to apply the ACIP Initiative from the [ACIP.ManagementTeam@defence.gov.au](mailto: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 9.1.9 and its associated Note to tenderers.**

**Note to tenderers: The operation of clause 9 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 are within the Contractor's ACIP.**

**As per clause 9.1.9, 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/procurement-guidance/acip-initiative>.

- 9.1.1 The Contractor shall effect and maintain (or be insured under) the following insurances for the times and in the manner specified in this clause 9, except to the extent that a particular risk is insured against under other insurance effected in compliance with this clause 9:
- a. workers compensation insurance or registration 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;
  - b. public and products liability insurance, written on an occurrence basis with limits of indemnity not less than the relevant amounts specified in the Details Schedule, which covers the Contractor and Contractor Personnel for their respective liabilities caused by, arising out of, or in connection with the negligent performance of any obligation or the exercise of any right under the Contract by the Contractor or Contractor Personnel. **[Note: The following sentence is optional and should be used where the works under the contract will occur only in Australia and the acquired items will not be used outside of Australia.]** This insurance shall have a territorial limit which includes Australia. **[Note: The following sentence is optional and should be used where the works under the contract will occur in whole or part outside of Australia and the acquired items may be used outside of Australia.]** This insurance shall have a worldwide territorial limit;
  - c. professional indemnity insurance with a limit of indemnity of not less than the amount specified in the Details Schedule, 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. Such insurance shall have a retroactive date of no later than the earlier of the commencement of the work under the Contract or any earlier preparatory work by the Contractor. **[Note: The following sentence is optional depending on the services and risks]** Such insurance shall also:
    - (i) extend to cover claims related to Software and IT risks; and
    - (ii) extend to cover claims for unintentional breaches of intellectual property rights;
  - d. all risks property insurance covering:
    - (i) tangible Deliverables unless and to the extent that the Commonwealth has expressly retained the risk of such property;
    - (ii) GFE and any other property of the Commonwealth in the care, custody or control of the Contractor or Contractor Personnel unless and to the extent that the Commonwealth has expressly retained the risk of such property; and
    - (iii) all other property, plant and equipment in the care, custody or control of the Contractor material to the Contractor's ability to perform its obligations under the Contract,

against the risks of loss, damage or destruction by all commercially insurable risks, for the full replacement or reinstatement value of such insured property;
  - e. transit insurance covering any tangible property referred to in clause 9.1.1d, 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 transit and during loading or unloading and storage during transit where such transits are at the risk of the Contractor;
  - f. compulsory third party motor vehicle insurance as required by law; and

- g. 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 covering:
    - (iii) third party property loss or damage arising out of the use by the Contractor of any registered or unregistered plant or vehicles; and
    - (iv) third party bodily injury, illness or death arising out of the use by the Contractor 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 by the Contractor or Contractor Personnel.
  - h. cyber insurance which covers the Contractor for:
    - (v) liability incurred from alleged or actual theft, dissemination, use of, or unauthorised access to personal, confidential or other proprietary information;
    - (vi) network security liability arising from the unauthorised access to, use of, or tampering with computer systems, including hacker attacks or inability of an authorised third party to gain access to services, including denial of service, unless caused by a mechanical or electrical failure;
    - (vii) liability arising from the introduction of Malware or equipment into, or otherwise causing damage to, the Contractor's or a third person's computer, computer system, network, or similar computer related property and the data, Software, and programs thereon;
    - (viii) associated costs and expenses of government investigations resulting from the events described in clauses 9.1.1h(i) to (iii);
    - (ix) associated fines and penalties resulting from the events described in clauses 9.1.1h(i) to (iii);
    - (x) associated mitigation (including web clean up) costs, crisis management costs and investigation (including forensic) costs resulting from the events described in clauses 9.1.1h(i) to (iii);
    - (xi) cyber ransom and extortion; and
    - (xii) data recovery costs,
  - i. written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule for any one occurrence and in the aggregate for all occurrences in any 12 month policy period. The insurance shall:
    - (xiii) cover the liability of the Contractor by reason of any act or omission of the Contractor, its employees, officers and agents;
    - (xiv) cover the Commonwealth for its vicarious liability for the acts or omissions of the Contractor;
    - (xv) have a retroactive date of no later than 24 months before the commencement of the work; and
    - (xvi) have worldwide territorial and jurisdictional limits.
- 9.1.2 For the avoidance of doubt, the terms of this clause 9 do not alter the allocation of risk or liability between the parties as provided for under any other clause of the Contract.
- 9.1.3 The insurances and registrations referred to in:
- 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:
    - (xvii) clause 9.1.1a (workers compensation);
    - (xviii) clause 9.1.1d (property); and
    - (xix) clause 9.1.1h (cyber);
  - b. clause 9.1.1b (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 **[Note: Include the rest of this sentence only if the products supplied have a life which exceeds the contract period]** and, in respect of product liability for **[Note: Insert period sufficient to cover the life of the product if it extends beyond the Contract term or, where this is commercially too long, some reasonable period eg 7/10]** years following completion of the work under the Contract;

- c. clause 9.1.1c (professional indemnity) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until the earlier of:
    - (xx) **[...INSERT EG. 'seven' or 'ten'...]** years following completion of the work under the Contract; or
    - (xxi) **[...INSERT EG. 'seven' or 'ten'...]** years following an earlier termination of the Contract;
  - d. clause 9.1.1e (transit) shall be effected on or before the start of each conveyance and maintained until each conveyance ends by delivery; and
  - e. clauses 9.1.1f (compulsory third party) and 9.1.1g (motor vehicle liability) shall be effected on or before the date the plant or vehicle is used in connection with the work under the Contract and maintained until such plant or vehicle ceases to be so used.
- 9.1.4 To the extent that the Contractor's insurances and registrations required by clause 9 of this Contract are 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. **[...INSERT EG. 'seven' or 'ten'...]** years following completion of the work under the Contract; or
  - b. **[...INSERT EG. 'seven' or 'ten'...]** years following an earlier termination of the Contract.
- 9.1.5 With the exception of the workers compensation insurance or registrations (referred to in clause 9.1.1a) and the compulsory third party motor vehicle liability insurance (referred to in clause 9.1.1f), the insurances required by this clause 9 shall be effected with insurers with a financial security rating of "A-" or better by Standard & Poors (or the equivalent rating with another recognised rating agency), or an insurer approved by the Commonwealth, acting reasonably.
- 9.1.6 The Contractor shall, on request, produce evidence satisfactory to the Commonwealth Representative, acting reasonably, of the currency and terms of the insurances referred to in this clause 9.
- 9.1.7 The Contractor shall use its reasonable endeavours to ensure that its Subcontractors are insured as required by this clause 9, 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.
- 9.1.8 The Contractor shall, in respect of the insurances required by this clause 9:
- a. 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; and
  - b. do everything reasonably required by the Commonwealth to enable the Commonwealth to claim and to collect or recover monies due under any insurance policy.

**Note to tenderers: Clause 9.1.9 will only be included in a resultant Contract if the Contractor has ACIP status and the clause may require amendment to only apply to those insurances to be covered by the ACIP.**

- 9.1.9 The Contractor shall be:
- a. deemed compliant with the requirements of the following clauses:
    - (i) clause 9.1.1a (workers compensation);
    - (ii) clause 9.1.1b (public and products liability);

- (iii) clause 9.1.1c (professional indemnity);
- (iv) clause 9.1.1d (property);
- (v) clause 9.1.1e (transit);
- (vi) clause 9.1.1f (compulsory third party motor vehicle liability);
- (vii) clause 9.1.1g (motor vehicle liability);
- (viii) clause 9.1.1h (cyber); and
- (ix) clause 9.1.5; and

b. relieved of its obligations under clauses 9.1.6 and 9.1.8,

in respect of a particular insurance listed in clause 9.1.9a 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 5 Working Days if its ACIP status is withdrawn or suspended by the Commonwealth.

9.1.10 If the Contractor fails to effect and maintain the insurances in accordance with this clause 9.1.1 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 13.6 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 9.1.10 until the Commonwealth elects to recover the amount.

## **10 INDEMNITIES, DAMAGES, RISK AND LIABILITY**

### **10.1 Indemnity (Core)**

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10.1.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with:

- a. the death, personal injury, disease or illness of any employee or officer of the Contractor in relation to the Contract; and
- b. a Claim by a third party arising out of or as a consequence of a Contractor Default, including a Claim in respect of:
  - (i) the death, personal injury, disease or illness of any person; or
  - (ii) loss of or damage to any third party property.

10.1.2 The liability of the Contractor under clause 10.1.1a 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 liability of the Contractor under clause 10.1.1b 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.

10.1.4 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:
- a. an infringement or alleged infringement of the third party's IP rights (including Moral Rights) arising out of or as a consequence of 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
  - 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 sections 163 or 163A of the *Patents Act 1990*, sections 96 or 96A 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 Loss of or Damage to the Deliverables (Core)**

- 10.3.1 Risk in relation to any loss of, or damage to Deliverables resides with the Contractor:
- a. until the Deliverables 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) where the Contractor retakes possession of the Deliverables in accordance with the Contract.
- 10.3.2 The Contractor shall replace or reinstate any Deliverables that are lost and repair any Deliverables that are damaged while the risk resides with the Contractor under clause 10.3.1, except to the extent that the loss or damage to the arose out of or as a consequence of a Commonwealth Default.
- 10.3.3 Nothing in this clause 10.3 limits or affects the Contractor's obligations under clause 3.2, 3.3, 8.2 or 10.4.

**10.4 Loss of or Damage to Commonwealth Property (Core)**

- 10.4.1 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 10.4.1b if GFF is included in the draft Contract.**

- b. the use or occupation of any GFF.

- 10.4.2 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 10.4.2b if GFF is included in the draft Contract and include 'or' at the end of 10.4.2a(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;

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

- 10.4.3 The liability of the Contractor under clause 10.4.2 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.
- 10.4.4 Without limiting clause 10.4.2, 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.
- 10.4.5 The liability of the Contractor under clause 10.4.4 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; or
  - c. a breach of a general law duty or an applicable law by an Unrelated Party.
- 10.4.6 This clause 10.4 operates in addition to, and does not limit or affect, clause 10.3.

#### **10.5 Other Provisions Relating to Indemnities (Core)**

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- 10.5.1 The Commonwealth holds the benefit of each indemnity given in favour of a Commonwealth Officer (each a 'protected person') 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 Exclusions of Certain Losses (Core)**

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- 10.6.1 Subject to clause 10.7.2, the Contractor is not liable to pay compensation or damages under or in relation to this Contract, or liable to make a payment under an indemnity in this Contract, for Loss incurred by the Commonwealth resulting from:
- a. damage to reputation or exemplary or punitive damages incurred by the Commonwealth; or
  - b. the Commonwealth's diminished revenue, profits or business opportunities.
- 10.6.2 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 10.6.3 if a GFF Licence is included in the draft Contract.***

- 10.6.3 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.

#### **10.7 Liability Caps (Core)**

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***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 at:***

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

***The liability risk assessment provides the basis for determining the limitation of liability cap in this clause 10.7 and insurance requirements in clause 9.***

***Note to tenderers: The limitation of liability amounts 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/procurement-guidance/liability-risk-management>.
- 10.7.1 The liability of the Contractor to the Commonwealth in connection with the Contract (including at general law, in negligence or in equity) is limited in aggregate to the Limitation Amount specified in the Details Schedule.
- 10.7.2 The liability cap in clause 10.7.1 and the exclusions of liability under clause 10.6 do not apply to a liability of the Contractor under or arising out of the Contract in relation to:
- a. **(third party claims)** a Claim by a third party in respect of:
    - (i) the death, personal injury, disease or illness of any person; or
    - (ii) loss of or damage to property of a third party;
  - b. **(IP)** an infringement of an intellectual property right (including a Moral Right) of any person;
  - c. **(confidentiality)** a breach of an obligation of confidence;
  - d. **(death of or personal injury to Commonwealth Officers)** the death, personal injury, disease or illness of a Commonwealth Officer;
  - e. **(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.

10.7.3 Each paragraph of clause 10.7.2 is independent of, and its application is not affected by, any of the other paragraphs.

10.7.4 The amount of a liability cap in clause 10.7.1 shall be adjusted in accordance with the formula:

$$10.7.5 \quad \text{new amount} = \left( \frac{\text{most recent CPI}}{\text{Base Date CPI}} \right) \times \text{existing amount}$$

where:

'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

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

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

## 10.8 Renegotiation of Limitation Amount (Core)

10.8.1 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 10.8 was last applied, increases or decreases the Contractor's payment entitlements 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 an amendment to the Limitation Amount.

## **10.9 Proportionate Liability Laws (Core)**

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- 10.9.1 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)**

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- 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 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 A to Attachment F.
- 11.1.3 If the Commonwealth Representative proposes a change to the Contract it shall by notice to the Contractor, require the Contractor to prepare the CCP and the Contractor shall within 30 days of such notice, submit a CCP to the Commonwealth to give effect to the change.
- 11.1.4 The Contractor shall calculate the effect of a CCP on the Contractor's payment entitlements by reference to Attachment B (including any rates it contains), or any other basis agreed by the parties in writing taking into account the Contractor's obligations under clause 3.15.
- 11.1.5 The Commonwealth shall within 30 days after receipt (or such other period as agreed by the parties in writing) either Approve the CCP or reject the CCP giving reasons for such rejection. A CCP that has been Approved shall take effect when executed by both parties unless otherwise set out in the CCP.
- 11.1.6 Subject to clause 11.1.7, the Contractor shall not be entitled to any payment for the preparation of, or response to, a CCP.
- 11.1.7 Except where a CCP is proposed or required to address any non-performance of the Contractor under the Contract, the Commonwealth shall meet the reasonable costs of preparation of a CCP that is required by the Commonwealth (whether or not the CCP is Approved by the Commonwealth).
- 11.1.8 Prior to the Contractor preparing a CCP, the Commonwealth may require the Contractor to provide a Not to Exceed (NTE) quote for the preparation of a CCP and the amount payable under clause 11.1.7 shall not exceed the NTE quote provided.

### **11.2 Conflict of Interest (Core)**

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- 11.2.1 The Contractor warrants that, to the best of its knowledge after making diligent inquiries, no undisclosed conflict of interest exists as at the Effective Date, or is likely to arise in the performance of its obligations under the Contract by itself or by Contractor Personnel, any Approved Subcontractor or Approved Subcontractor Personnel.
- 11.2.2 If during the Term a conflict of interest arises, or appears likely to arise, the Contractor shall promptly notify the Commonwealth and take such steps as the Commonwealth may require to resolve the conflict.
- 11.2.3 If the Contractor fails to notify the Commonwealth in accordance with this clause 11.2, or is unable or unwilling to resolve the conflict of interest as required, or in the opinion of the Commonwealth the conflict cannot be satisfactorily resolved, the Commonwealth may exercise its rights to terminate the Contract under clause 13.2.

**11.3 Waiver (Core)**

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- 11.3.1 Failure by either party to enforce a term of the Contract shall not be construed as in any way affecting the enforceability of that term 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)**

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- 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 E is not disclosed by the party, except to the extent that:
- a. the disclosure is permitted under clause 11.4.3;
  - b. the Confidential Information is in TD, Software or Contract Material and the disclosure is in connection with the exercise of the rights provided for in clause 5;
  - c. the disclosure is to a Commonwealth Service Provider to enable it to perform its obligations, functions or duties to the Commonwealth; 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 executes (or has already executed) a written undertaking in the form of a deed of confidentiality or is subject to a contractual obligation that appropriately restricts the further disclosure of that information.
- 11.4.3 The restriction in clause 11.4.1 does not apply to a disclosure of Confidential Information to the extent that the disclosure is:
- a. required or authorised by law;
  - b. necessary for the conduct of any legal proceedings arising in connection with the Contract;
  - c. made by the Commonwealth, a Minister or the Parliament, in accordance with statutory or portfolio duties or functions or for public accountability reasons, including following a request by the Parliament, a parliamentary committee or a Minister; or
  - d. 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 need 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 return to the Commonwealth or destroy, all documents in its possession, power or control, or the possession, power or control of Contractor Personnel, which contain any Confidential Information of the Commonwealth if the Confidential Information is no longer required for the purposes of the Contract.
- 11.4.6 The Contractor may retain Confidential Information of the Commonwealth in its records, if retention is required to comply with any legal, professional or insurance obligations or where it is not reasonably practicable to destroy the records included in routine electronic backups.
- 11.4.7 Retention, return or destruction of the documents referred to in this clause 11.4 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)**

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- 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 Without limiting clause 11.6.1 and unless required otherwise by the Contract, the Contractor shall clearly identify itself, and shall ensure that Contractor Personnel clearly identify themselves, as a contractor to the Commonwealth when communicating through telephone, email or any other communication tool in the course of performing the Services.
- 11.6.3 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)**

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- 11.7.1 During the performance of the Contract, the Contractor shall, subject to the Commonwealth giving 5 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 or 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 and its nominees may copy any records or accounts relevant to the Services or the Contract and retain or use these records or accounts for the purposes of this clause.
- 11.7.2 The Contractor shall ensure that each Approved Subcontractor provides the Commonwealth Representative, and any person authorised by the Commonwealth Representative, with access to the Approved Subcontractor's premises, records and accounts for any purpose relevant to the Services or the Approved Subcontract, including the right to copy.
- 11.7.3 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.
- 11.7.4 Without limiting clauses 11.7.1 to 11.7.3, the Contractor acknowledges and agrees that:
- a. the Auditor-General has the power under the *Auditor-General Act 1997* 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 clause 11.7.1 or 11.7.2.
- 11.7.5 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 and attending, conducting or checking stocktakes of CMCA;

**Option: Include when clause 4 is included in the Contract.**

- b. validating the Contractor's compliance with the DIP Obligations;

- c. validating the Contractor's progress against the requirements of any Approved Remediation Plan;
- d. validating the Contractor's compliance with clause 5 and the TDSR Schedule;
- e. 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; and
- f. monitoring and assessing compliance with the Commonwealth Supplier Code of Conduct in accordance with clause 12.11.1.

### 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 Unless otherwise agreed in writing, the Contractor shall seek written permission from the Commonwealth Representative, at least 5 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 may 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.

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

**11.8.6** This clause 11.8 does not apply in relation to the GFF.

### 11.9 Subcontracts (Core)

**Note to drafters: If a proposed Subcontract will be an Approved Subcontract, the Subcontractor will need to be listed as an Approved Subcontractor in Attachment I. For Approved Subcontractors, the Contractor is subject to certain obligations, including the requirement to "flow-down" certain provisions of this Contract. Drafters should carefully consider the appropriate threshold for this purpose, having regard to the value and complexity of the Contract, the nature of the work likely to be subcontracted, and the number and identity of expected Subcontractors. It is not intended to capture minor or low risk Subcontractors.**

- 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.
- 11.9.3 None of the following reduce or limit the Contractor's obligations or liabilities under or in relation to the Contract:
  - a. the Contractor or a Subcontractor 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.

**Note to drafters: Exceptions identified in accordance with clause 11.9.4 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.**

- 11.9.4 The Contractor shall not Subcontract work under the Contract to a Subcontractor if:

- a. the total value of all work with the Subcontractor is expected to exceed the Approved Subcontractor Threshold specified in the Details Schedule; or
  - b. the work involves:
    - (i) a Prescribed Activity; or
    - (ii) [INSERT OTHER SPECIFIC TYPE OF WORK OR TASK(S) TO BE PERFORMED], or
  - 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; or
  - e. the Subcontractor will host, on an on-going basis, Commonwealth Personnel on their premises,
  - f. unless that Subcontractor is an Approved Subcontractor.
- 11.9.5 Clause 11.9.4 does not apply to a Subcontract that is a labour hire arrangement for the supply of labour to the Contractor to work as part of the Contractor's workforce, performing the same kind of work as the Contractor's employees and officers.
- 11.9.6 The Contractor may request the inclusion of additional Approved Subcontractors in Attachment I 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 11.1.5. The Commonwealth Representative's Approval shall not be unreasonably withheld.
- 11.9.8 Without limiting the Contractor's obligations under the Contract, the Contractor shall ensure that:
- a. the requirements of clauses 3.4.1, 3.11, 5.1.3 (if used), 5.4.2 (if used), 11.6, 12.1, 12.3, 12.6.1 and 12.6.2a are included in all Subcontracts;
  - b. each Subcontractor that requires access to any Commonwealth Premises or to security classified information is subject to the requirements of clause 11.10;
  - c. the requirements of clauses 11.2, 11.11 and 11.11 are included in all Approved Subcontracts;
  - d. the Subcontractor grants to the Contractor any rights in relation to TD, Software and Contract Material that are necessary to enable the Contractor to grant the licences under clause 5 and comply with its obligations under clause 5;
  - e. the Contractor obtains rights, in each Approved Subcontract, that are equivalent to the rights of the Commonwealth under clause 13.4 and includes obligations of the Approved Subcontractor equivalent to the Contractor's obligations under clause 13.5; and
  - f. all Approved Subcontracts contain equivalent provisions to those set out in clause 12.4, except 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,
  - g. in which case the Contractor shall ensure that the Approved Subcontract contains equivalent provisions to those set out in clauses 12.4.3, 12.4.4 and 12.4.11.
- 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.
- 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 Subcontractors' 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).

**Note to drafters: These clauses 11.9.13 to 11.9.17 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.**

- 11.9.13 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.
- 11.9.14 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 11.9.16, 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 11.9.14;
  - d. a statement that the Contractor must respond to any complaint of non-compliance made by the subcontractor under clause 11.9.14c;
  - 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.
- 11.9.15 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 11.9.14; 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 11.9.14; and
  - (ii) obligations equivalent to this clause 11.9.15b (such that the obligations in this clause 11.9.15b are to continue to be flowed down the supply chain to all Reporting Entity Subcontractors).

11.9.16 The Contractor is not required to pay interest in accordance with clause 11.9.14a(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).

11.9.17 If the Contractor agrees that if it is the subject of a complaint in relation to its compliance with clauses 11.9.13 to 11.9.17, 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)**

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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 Defence Security Principles Framework (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 and required accreditations, refer to the Australian Government's Protective Security Principles Framework at:**

- <https://www.protectivesecurity.gov.au/physical/physical-security-entity-resources/Pages/default.aspx>
- [or contact the relevant 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 H. 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 H (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/physical/physical-security-entity-resources/Pages/default.aspx>

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:

- comply with the classification and protection of official information requirements of Principle 10 of the DSPF; and
- 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 A: 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 B: 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 Note to tenderers should be deleted.**

**Note to tenderers: If the tenderer proposes to perform work at an overseas location and that work involved 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 equipment (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 in Attachment H 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 11.10.8c, all COMSEC material transmitted between the parties or a party and a Subcontractor in Australia shall in addition to the terms of clause 11.10.8c above 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 Australian Signals Directorate (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.

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)**

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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 or advise in relation to the performance of the Contract (or the 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 (or 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) including the manner in which the services are proposed to be performed;
- 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 clause 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 ADMINPOL Annex C AG5 and the *Integrity Policy Manual*, as applicable.

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

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11.12.1 Subject to clause 11.12.2, the Contractor shall notify the Commonwealth Representative prior to any proposed Change of Control by giving notice to the Commonwealth as soon as practicable after the Contractor becomes aware of the proposal, but no later than 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 Commonwealth could not have been notified in accordance with clause 11.12.1, the Contractor shall provide the notice to the Commonwealth within 5 Working Days after the Change of Control.

11.12.3 In any notice given to the Commonwealth under this clause 11.12, 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, then the Commonwealth, having taken into account any notice given under this clause 11.12, may at its sole and absolute discretion:
- a. give the Contractor a notice of termination under clause 13.2.1k; or
  - b. agree not to give the Contractor a notice of termination under clause 13.2.1k, 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)

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- 12.1.1 The laws of the State or Territory specified in the Details Schedule shall apply to the Contract and any Subcontracts. The courts of that State or Territory shall have non-exclusive jurisdiction to decide any matter arising out of the Contract or any Subcontracts.
- 12.1.2 The United Nations Convention on Contracts for the International Sale of Goods shall not apply to the Contract or any Subcontracts.

### 12.2 Compliance with Laws (Core)

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- 12.2.1 The Contractor shall, in the performance of the Contract, comply with and ensure 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 and modern slavery 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)

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**Note to drafters: Prior to any 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.**

**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 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 (Including Hospitality) – Receiving;
  - c. Financial Policy Gifts and Benefits (Including Hospitality) – Spending;
  - d. Financial Policy Sponsorship;
  - e. Australian Defence Force alcohol policy detailed in MILPERSMAN Part 4 Chapter 1;
  - f. Public Interest Disclosure policy detailed at:  
<https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing>;  
and
  - g. [DRAFTERS TO INSERT ANY OTHER RELEVANT COMMONWEALTH AND DEFENCE POLICIES THAT REGULATE DELIVERY OF THE SERVICES].

**Note to tenderers: It is Commonwealth policy to stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy. The Commonwealth Indigenous Procurement Policy is available at:**

- <https://www.niaa.gov.au/resource-centre/indigenous-affairs/commonwealth-indigenous-procurement-policy>.

12.3.2 The Contractor shall use its reasonable endeavours to increase its:

- a. purchasing from Indigenous enterprises; and
- b. employment of Indigenous Australians,
- c. in the performance of the Contract. For the purposes of this clause “Indigenous enterprise” means an organisation that is 50 per cent or more Indigenous owned that is operating a business. Supply Nation maintains a list of enterprises that meet the definition of “Indigenous enterprises” ([www.supplynation.org.au](http://www.supplynation.org.au)).

**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, the procurement will still be subject to the Workplace Gender Equality Procurement Principles and the following clauses must be used.**

**A list of Defence specific exemptions is found in the factsheet ‘Exemptions from Division 2 of the Commonwealth Procurement Rules’ which is available here:**

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

**Note to tenderers: These clauses 12.3.3 and 12.3.4 apply only to the extent that the tenderer has identified itself as 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 (even if Division 2 of the CPRs does not apply) 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 Statement of Tax Records (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 body corporate or natural person;	a satisfactory and valid STR in respect of that body corporate or person;
a partner acting for and on behalf of a partnership;	a satisfactory and valid STR: a. on behalf of the partnership; and b. in respect of each partner in the partnership that will be directly involved in the delivery of the Subcontract;
a trustee acting in its capacity as trustee of a trust;	a satisfactory and valid STR in respect of the: a. trustee; and b. the trust;
a joint venture participant;	a satisfactory and valid STR in respect of: a. each participant in the joint venture; and b. if the operator of the joint venture is not a participant in the joint venture, the joint venture operator;
a member of a Consolidated Group;	a satisfactory and valid STR in respect of: a. the relevant member of the Consolidated Group; and b. the head company in the Consolidated Group;
a member of a GST Group;	a satisfactory and valid STR in respect of the: a. the GST Group member; and b. 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 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);
	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;
	a joint venture participant;	a satisfactory and valid STR in respect of: <ul style="list-style-type: none"> <li>a. any new participant in the joint venture; and</li> <li>b. any new joint venture operator if the new operator is not already a participant in the joint venture;</li> </ul>
	a member of a Consolidated Group;	a satisfactory and valid STR in respect of any new head company of the Consolidated Group; and
	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 12.3.4 or 12.3.5 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: <ul style="list-style-type: none"> <li>a. <b>satisfactory</b> if the STR states that the entity has met the conditions, as set out in the Shadow Economy Procurement Connected Policy, of having a satisfactory engagement with the Australian tax system; and</li> <li>b. <b>valid</b> if the STR has not expired as at the date on which the STR is required to be held.</li> </ul>	

**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 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 applicable WHS Legislation.

12.4.3 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, for which they are intended, 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.

12.4.4 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; and
- b. 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) after 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 after 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.

12.4.5 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.

- 12.4.6 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.
- 12.4.7 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).
- 12.4.8 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.
- 12.4.9 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. The Contractor shall not be entitled to claim relief from the performance of its obligations under the Contract as a result of compliance with the direction.
- 12.4.10 The Contractor shall comply with clause 10 of the SOW.
- 12.4.11 The Contractor shall not use Asbestos Containing Material (ACM) in providing the Services and shall not take any ACM onto Commonwealth Premises in connection with providing the Services.

**Note to drafters: To the extent that any work under the Contract will involve construction work (eg, installation activities) over \$250,000, clause 12.4.14 of the conditions of contract in the ASDEFCON (Support) v5.0 template must be included (at clause 12.4.12) 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 Work Health and Safety Legislation).**

## **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).

## **12.6 Privacy (Core)**

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- 12.6.1 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.
- 12.6.2 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 12.6, 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.
- 12.6.3 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 12.6.

## **12.7 Severability (Core)**

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- 12.7.1 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.

**12.8 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 [Commonwealth Child Safe Framework \(CCSF\)](#) 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](mailto:procurement.asdefcon@defence.gov.au)

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

[procurement.policy@defence.gov.au](mailto: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://ibss/PublishedWebsite/LatestFinal/836F0CF2-84F0-43C2-8A34-6D34BD246B0D/Item/EBDAF9B0-2B07-45D4-BC51-67963BAA2394>

**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 Australian Border Force (ABF) 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 ABF'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](mailto: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/836F0CF2-84F0-43C2-8A34-6D34BD246B0D/Item/EBDAF9B0-2B07-45D4-BC51-67963BAA2394>

**12.10 Indigenous Procurement (Optional)**

**Note to drafters: This clause must be included when the procurement is subject to the Indigenous Procurement Policy (IPP) and Mandatory Minimum Requirements for Indigenous participation apply. Refer to clause 1.7 of the conditions of tender for further details.**

- 12.10.1 The Contractor shall comply with the Indigenous Participation Plan at Attachment M.
- 12.10.2 The Contractor shall use reasonable endeavours to increase the Mandatory Minimum Requirements specified in Attachment M by Subcontracting to Indigenous Enterprises and employing Indigenous Australians, in the delivery of the Services.
- 12.10.3 If at any time the Commonwealth reasonably believes that there is, or is likely to be, any failure to comply with the Indigenous Participation Plan, the Commonwealth may request the Contractor to develop and submit a Remediation Plan in accordance with clause 6.9 and the Commonwealth may exercise any of its rights under that clause in relation to that requirement.
- 12.10.4 Notwithstanding any other clause of this Contract, the Contractor acknowledges and agrees that the report submitted in accordance with clause 3.16.6 of the SOW:
- a. will be recorded in the Indigenous Procurement Policy Reporting Solution (IPPRS);
  - b. may be accessed by Commonwealth entities;
  - c. may be made publicly available;
  - d. is not Confidential Information; and
  - e. may be used by Commonwealth entities for any purpose.

**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, 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. a description of the non-compliance,
  - b. the date that the non-compliance occurred, and
  - c. 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](mailto: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](mailto:procurement.policy@defence.gov.au).

**Or the Commonwealth Sustainable Procurement Advocacy and Resource Centre at:**

[sustainable.procurement@dcceew.gov.au](mailto: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](mailto: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](mailto:procurement.policy@defence.gov.au).

**Or DEWR at:**

[ASG@dewr.gov.au](mailto: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:
- 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
  - the Contract Governance Framework set out in Attachment L 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 13.1.6 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:**

- <http://www.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 13.1.6 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 L, prevents either party from seeking urgent interlocutory relief in relation to a Dispute.

### **13.2 Termination for Contractor Default (Core)**

13.2.1 The Commonwealth may terminate or reduce the scope of the Contract by notice to the Contractor if any of the following occurs:

- a. 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;

**Option: Include this clause if the Contract will include a Deed of Guarantee and Indemnity.**

- b. 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 13.2.1 is prevented by law;

- c. the Contractor has failed to remedy a Default specified in a Default Notice within the period specified in the Default Notice;
- d. the Contractor fails to comply with an Approved Remediation Plan;
- e. the Contractor commits a Default that, in the Commonwealth's opinion, is not capable of being remedied;
- f. the Contractor commits a Default, or series of Defaults which, in the opinion of the Commonwealth has or will have, individually or in aggregate, a material adverse effect on the Commonwealth use of the Services;
- g. the Contractor would have, except for the operation of any limitation of liability under clause 10.7.1, been liable to the Commonwealth for Loss in aggregate for an amount greater than the Limitation Amount;

**Option: Include this clause if the contract will include a bank guarantee.**

- h. the Contractor fails to provide or maintain a bank guarantee in accordance with clauses 7.4 or 7.5;

- i. the Contractor breaches any of its obligations under clause 12.4;



**Option: Include this clause if the contract will include KPIs.**

j. the Contractor's Adjusted Performance Score for any two KPIs are below 80% for the same Review Period;

k. another clause of the Contract provides that the Commonwealth may terminate or reduce the scope of the Contract under this clause.

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, in the Commonwealth's opinion, 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 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 terms of the Contract for 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.

**13.5 General Termination Provisions (Core)**

13.5.1 If the Contract is terminated under clause 13.2 or otherwise, or the scope of the Contract is reduced under clause 13.4 or otherwise:

- a. the termination or reduction takes effect on the date of the notice of termination or reduction, or if the notice specifies a later date, the later date;
- b. the Contractor shall:
  - (i) stop or reduce work in accordance with the notice;
  - (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 a termination or reduction, including those arising from affected Subcontracts;
- c. the Contractor shall deliver 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;

**Option: For when clause 7.5 (Bank Guarantee for Mobilisation Payment) is included in the Contract.**

- 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 13.7 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 10.6, 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 reduction (as applicable), or other period agreed in writing by the parties, deliver all the Technical Data (in its then current state of development) for Services produced prior to the date of termination or reduction; 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 or, in the case of a reduction, is no longer required to perform the removed Services.
- 13.5.2 If the Commonwealth reduces the scope of the Contract under clause 13.2.1 or 13.4, the Contractor shall:
- 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. within 30 days after receipt of the notice, prepare and submit a CCP to give effect to the notice, including to:
    - (i) remove Services from the Contract;
    - (ii) reduce the amounts payable to the Contractor under the Contract to reflect the removal of Services; and
    - (iii) make such other amendments as necessary or convenient to be made to give effect to the notice.
- 13.5.3 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 Right of the Commonwealth to Recover Money (Core)**
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- 13.6.1 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.
- 13.6.2 The Commonwealth may exercise any or all of its rights in respect of any security provided in accordance with clauses 7.5 or 7.6 to recover any debt owing by the Contractor, except to the extent otherwise recovered by the Commonwealth under clause 13.6.1.
- 13.6.3 If the Commonwealth deducts the amount of a debt from any payment or security, it shall notify the Contractor that it has done so.
- 13.6.4 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.

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**13.7 Survivorship (Core)**

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- 13.7.1 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.
- 13.7.2 Without limiting clause 13.7.1, any provision dealing with Confidential Information, IP, Defence security, Privacy and any warranties, guarantees, licences, performance of the Contractor's obligations under clause 13.5, 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**

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**14.1 Application of Phase Out Provisions (Core)**

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- 14.1.1 This clause 14 applies and Phase Out commences:
- 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 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;
  - c. 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;
  - d. 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,
- 14.1.2 and such Services coming within the scope of this clause 14.1.1 are referred to as the **'Services being Phased Out'**.

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**14.2 Objective of Phase Out (Core)**

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- 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 activities that are included in the Services are no longer required by the Commonwealth.
- 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 activities that are included in the Services are no longer required by the Commonwealth:
- 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; and
  - 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.

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**14.3 Completion of Phase Out (Core)**

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- 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)**

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- 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 2.5 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. one or more of the of activities included in the Services; 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 Phase 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 Phase 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 clause 13.1 in respect of the amounts payable, having regard to the information provided pursuant to clause 14.4.5 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 3.13 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 cessation of particular activities included in the Services.

#### **14.5 Transition to a New Contractor (Optional)**

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- 14.5.1 As part of Phase Out, the Contractor shall:
- 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 5 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 performance of the Services that are able to be accessed and used by the Commonwealth or its nominee (which may be an incoming contractor);
    - (iii) Technical Data relevant to the provision of the Services being Phased Out;
  - 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. 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;
  - f. 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 Contractor equipment is to be transferred to the incoming contractor or the Commonwealth.**

- g. 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 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.

SIGNED AS AN AGREEMENT

SIGNED for and on behalf of

THE COMMONWEALTH OF AUSTRALIA:

----- (signature)	----- (print name and position)	----- (date)
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In the presence of:

----- (signature of witness)	----- (print name of witness)	----- (date)
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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]**