TECHNICAL DATA AND SOFTWARE RIGHTS (TDSR) SCHEDULE (CORE)

Note to drafters: Prior to RFT release drafters are to:

1. identify in TDR C-4 or as a note to tenderers in the TDSR Schedule, for items or equipment (at a product, system, subsystem or component level) likely to be included in the Services, where potential restrictions on the Commonwealth's Use or Sublicensing of the related TD and Software will not be acceptable; and
2. determine and specify if the Commonwealth requires ownership of IP in any new TD and Software that will be created under the Contract (i.e. Commonwealth TD and Commonwealth Software).

The examples in each annex are to be removed prior to RFT release and system-specific information must be inserted where necessary. The Commonwealth should have conducted a Technical Data Requirements Analysis (TDRA) for the acquisition of the Materiel System – this may be updated when preparing a draft Support Contract. Information regarding the conduct of a Commonwealth TDRA can be found in CASG Handbook (E&T) 12-2-003.

Further information on clause 5 of the draft COC and the TDSR Schedule can be found in the ASDEFCON TD / IP Commercial Handbook at:

* <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/intellectual-property-framework>.

Note to tenderers: Attachment G and its annexes define any restrictions on the TD and Software rights granted under the Contract and provide additional information for the purposes of the TD and Software provisions in the Contract. Attachment G does not define restrictions on GFM or Products Being Supported.

Attachment G and its annexes will consist of an amalgamation of information contained in this draft Attachment G, the successful tenderer's response to TDR C-4 and any negotiated adjustments.

* 1. Attachment G consists of the following Annexes:

1. Highly Sensitive TD and Highly Sensitive Software (Core);
2. Delivery and Licence Restrictions on Use of TD and Software (Core);
3. Key Commercial Items (Core);
4. Commonwealth TD and Commonwealth Software (Core);
5. Excluded Parties (Core); and
6. Patents, Registrable Designs and Circuit Layouts (Core).

HIGHLY SENSITIVE TD AND HIGHLY SENSITIVE SOFTWARE (CORE)

Note to drafters: Highly Sensitive TD and Highly Sensitive Software are described in the note to tenderers below. Highly Sensitive TD and Highly Sensitive Software may:

1. exist as at the Effective Date (e.g. the tenderer is licenced by an OEM for TD or Software that was not delivered to the Commonwealth during the acquisition); or
2. be introduced during the course of the Contract (e.g. when a modification under an S&Q Order introduces new equipment).

By permitting the inclusion of TD or Software in this Annex A, the Commonwealth's Use of or ability to Sublicense IP may be severely restricted, as described in clause 5.2 of the draft COCs. The Commonwealth must carefully consider the remaining Life of Type for the Capability or Products Being Supported (including any impacts on related and future contracts) before agreeing to any restrictions in this Annex A.

Note to tenderers: Highly Sensitive TD and Highly Sensitive Software listed in Annex A should only include TD or Software that the tenderer would bring to the Contract (eg, not already licenced to the Commonwealth), where disclosure would have a major adverse effect on the business of the tenderer (or proposed Approved Subcontractor) and its commercial advantage.

Highly Sensitive TD and Highly Sensitive Software should be clearly identified at its lowest Configuration Item (to which the restriction is able to be distinguished) and linked to the tendered draft TDL, as appropriate. Highly Sensitive TD and Highly Sensitive Software will generally already exist as at the Effective Date and will not include TD or Software created under the Contract or a Subcontract. This Annex A is to:

1. list and describe all items of Highly Sensitive TD and Highly Sensitive Software (columns d and e);
2. identify any restrictions on the Commonwealth’s rights to Use and Sublicense the listed TD or Software, as contemplated by clause 5.2 of the draft COC (column f); and
3. specify the reasons in support of categorising the TD or Software as Highly Sensitive TD or Highly Sensitive Software and the restrictions being proposed (column g).

Restrictions on the Commonwealth's right to grant a Sublicence in respect of TD or Software should not be included in this Annex A if the restriction only limits the grant of a Sublicence for "other Defence Purposes". These restrictions should be included in Annex B only.

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| --- | --- | --- | --- | --- | --- | --- |
| Unique Line Item Description | Item Reference within TDL | Owner or Licensor | System/ Subsystem/ Component/CI Name | Description of TD or Software | Restrictions on Commonwealth's rights to Use or Sublicence the TD or Software  (COC, clause 5.2) | Justification for Restriction(s) |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) |
| 1. *Example:  G-A-1* | 1. *ABC #1295* | 1. *Contractor* | 1. *Fuel tank* | 1. *Process for emptying and cleaning Wing fuel tanks and maintaining fuel tank pumps* | 1. *The Commonwealth's rights to Use the TD is limited to performance assessment and cost review purposes only.* 2. *The Commonwealth is not entitled to grant a Sublicence in respect of the TD other than to a Commonwealth Service Provider not included as an Excluded Party.* | 1. *This data is highly sensitive data that underpins the Contractor's business. The disclosure of this data to a competitor of the Contractor would cause very significant damage to the Contractor's business.* 2. *This data is only required for performance assessments and cost review purposes and is not required to enable the Commonwealth (or its Contractors) to use or support or maintain the Products Being Supported as envisaged under the Contract.* |
| 1. *Example:  G-A-2* | 1. *ABC #1258* | 1. *EWS Ltd (Approved Subcontractor)* | 1. *Combat Management System* | 1. *Electronic Warfare Maintenance and Configuration Tool (including Source Code)* | 1. *The Commonwealth must not grant a Sublicence of the TD to XRY Pty Ltd or its Related Bodies Corporate for any reason.* | 1. *Disclosure of the Maintenance and Configuration Tool (including Source Code) to the listed companies (or their Related Bodies Corporates) would cause very significant damage to the business of EWS Ltd and result in the Contractor being unable to exercise the maintenance licence granted directly by EWS Ltd to the Contractor for this Contract and many similar US Air Force EW system support contracts.* |

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

Note to drafters: The Commonwealth's rights to Use and Sublicense TD and Software under clause 5.3.3b(ix) of the draft COC and the Commonwealth's rights to have TD and Software delivered, may be subject to restrictions as set out in this Annex B. The Commonwealth must carefully consider any restrictions proposed by a tenderer before agreeing to include them in this Annex B.

Restrictions may apply for TD and Software that the tenderer proposed to provide at the Effective Date (e.g. is licenced by an OEM for TD or Software that was not delivered to the Commonwealth as part of the acquisition of the Capability or Products Being Supported) or that will be introduced during any resultant Contract (e.g. when a modification under an S&Q Order introduces new equipment).

Drafters should, after considering Materiel System requirements from a Life of Type perspective (particularly the implications for any related and future support contracts), and after conducting or updating a TDRA if applicable, draw each tenderer's attention to any restrictions that the Commonwealth considers would not be acceptable. This information should be included as a note to tenderers or in TDR C-4.

Note to tenderers: In addition to the information provided in this Annex B, tenderers should note any guidance provided in TDR C-4 and this Annex B in relation to specific restrictions that are considered to be unacceptable to the Commonwealth. In responding, tenderers are to identify any proposed restrictions on:

1. the Commonwealth's Sublicensing rights in respect of TD and Software under clause 5.3.3b(ix) of the draft COC (columns (f) and (g)); and
2. the Commonwealth's rights to require delivery of TD for the purposes of clause 5.13 of the draft COC (columns (e) and (g)). Restrictions will only be included in column (e) where tenderers have justified the basis for the restricted delivery requirements for the relevant TD or Software. These restrictions will only be agreed if the Commonwealth considers that delivery of the item to the Commonwealth is not required.

If TD or Software currently exists that will be incorporated into Commonwealth TD or Commonwealth Software, tenderers are to list the TD or Software in this Annex B and include a reference to the relevant Unique Line Item Description of the Commonwealth TD or Commonwealth Software from Annex D and insert in column (d).

For any item of TD or Software that is subject to restrictions on delivery to the Commonwealth, the recipient of the TD or Software is the person identified in the Approved TDL.

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| --- | --- | --- | --- | --- | --- | --- |
| Unique Line Item Description | Owner or Licensor | System/ Subsystem/ Component/CI Name | Description of TD or Software  (and refer to Unique Line Item Description from Annex D, if appropriate) | Restrictions on Commonwealth's rights to the delivery of the TD or Software  (Yes / No)  (COC, clause 5.13)  If yes, specify identity of recipient(s) or nature of the restrictions in column (g) | Restrictions on Commonwealth's rights to Use or Sublicence the TD or Software  (COC, clause 5.3.3b(ix)) | Justification for Restriction(s) |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) |
| 1. *Example: G-B-1* | 1. *Contractor* | 1. *Aircraft Landing System* | 1. *Aircraft structural loads and certification data* | 1. *No* | 1. *Licences do not include right to grant sublicences for the purpose of a third party modifying the Capability.* | 1. *This is competitively sensitive data as it reveals unique characteristics of the Aircraft Landing System.* |
| 1. *Example: G-B-2* | 1. *Contractor* | 1. *Combat Management System* | 1. *Mission Planning Software* | 1. *No* | 1. *Licences do not include right to grant sublicences for the purpose of modifying, developing or upgrading the Software without the prior written consent of XYZ Pty Ltd.* | 1. *This is competitively sensitive data.* |
| 1. *Example: G-B-3* | 1. *Contractor* | 1. *Fuelling System* | 1. *Business Process Manual* | 1. *Yes* | 1. *N/A* | 1. *Contains competitively sensitive data that are trade secrets and not required to utilise the Product Being Supported.* 2. *Contractor will directly provide to a recipient where necessary.* |

KEY COMMERCIAL ITEMS (CORE)

Note to tenderers: Tenderers are to list all items of Commercial TD or Commercial Software related to a Key Commercial Item procured (or to be procured) as part of the Services in accordance with clause 5.4 of the draft COC, and specify the terms applicable to the licence proposed to be granted for the item. The tenderer may complete column (f) by reference to other documents from which those terms are ascertainable.

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| --- | --- | --- | --- | --- | --- |
| Unique Line Item Description | Description of Key Commercial Item System/ Subsystem/ Component/CI Name | Description of related TD or Software (including version number and use) | Details of Approved Subcontractor or relevant Related Body Corporate | Owner or Licensor | Licence Terms |
| (a) | (b) | (c) | (d) | (e) | (f) |
| 1. *Example: G-C-1* | 1. *Environmental Management System* | 1. *XYZ Software V8.5 used in Support System* | 1. *Easy Breathe Pty Ltd.* | 1. *Easy Breathe Pty Ltd.* | 1. *Same terms as per clause 5.4 except no permission to sublicense to Good Air Pty Ltd.* |
| 1. *Example: G-C-2* | 1. *Aircraft Tank Cleaning System* | 1. *Maintenance Manual for Aircraft Cleaning System* | 1. *Clean Landing Pty Ltd.* | 1. *Clear Landing US Inc.* | 1. *Terms and conditions are as detailed at* [*www.cleanlanding.com/manuals/HCS/terms*](http://www.cleanlanding.com/manuals/HCS/terms) *and conditions.aspx as at 1 July 2018.* 2. *The Commonwealth must pay to Clean Landing US Inc. an annual licence fee of $2,000.00 for each year the system is retained and used by a different support contractor after Contract expiry.* |

COMMONWEALTH TD AND COMMONWEALTH SOFTWARE (CORE)

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, the Commonwealth can require ownership of IP in specific items of TD or Software.

In the Support context, the Commonwealth may elect to own records created by the Contractor, such as supply records which may include maintenance logs, defect reports and demands for spares. However, if the licence under clause 5.3 of the COC is adequate for the Commonwealth's purposes, the Commonwealth should not require ownership of those records.

For any TD or Software that is listed in this Annex D, any new IP in that TD or Software ownership is assigned to the Commonwealth or its nominee under clause 5.1.3 of the draft COC. Column (d) should describe the class or type in sufficient detail as to enable the identification of TD or Software that comes within the relevant class. Column (b) is to include a cross reference to the Approved TDL or other Contract document or Deliverable, where the relevant TD or Software is to be listed in greater detail.

Note to tenderers: Tenderers are to describe in column (d) of this Annex D, the classes or types of TD or Software (if not already specified by the Commonwealth) that will be created as part of the Services being provided in relation to the Products Being Supported shown below in column (c). For each item of TD or Software that falls within the class or type listed in column (d), the ownership of IP relating to that item will be assigned to the Commonwealth. The relevant TD or Software is referred to as Commonwealth TD or Commonwealth Software (as applicable).

If any Commonwealth TD or Commonwealth Software contains IP owned by the Tenderer or a proposed subcontractor (being IP in existence prior to the Effective Date or created outside the Contract and Subcontracts), the Contractor is to grant a licence to the Commonwealth of that IP under clause 5.3 of the draft COC (subject to any proposed restrictions listed in Annex B). Tenderers should note that such restrictions should not prevent the use of the Commonwealth TD or Commonwealth Software as provided for in the Contract (see clause 5.16.2b of the draft COC).

This Annex D does not deal with licences for GFM and Products Being Supported that are provided by the Commonwealth to the Contractor (see clause 5.6 of the draft COC and Attachment E).

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| --- | --- | --- | --- | --- | --- | --- |
| Unique Line Item Description | Item Reference with TDL | Equipment/ System/ Subsystem/ Component/CI Name | Description of TD or Software | Name of Assignee | Restrictions on non-Commonwealth owned IP  (refer Unique Line Item Description from Annex B if required) | Restrictions on licences granted by the Commonwealth under clause 5.5.2 of the COC |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) |
| 1. *Example: G-D-1* | 1. *ABC #1299* | 1. *Flight System* | 1. *Wing refuelling station design* | 1. *Commonwealth* | 1. *Contractor owns IP in Wing refuelling clasp included in design.* | 1. *The Contractor may use solely for the purpose of maintaining the Aircraft and must not sublicense any of the IP in the Technical Data.* |
| 1. *Example: G-D-2* | 1. *ABC #1976* | 1. *Radar System* | 1. *XYZ software configuration manual.* | 1. *Commonwealth* | 1. *Nil* | 1. *The Contractor may use solely for the purpose of installation of updates to the XYZ subsystem and must not sublicense any of the IP in the manual.* |
| 1. *Example: G-D-3* | 1. *ABC #1982* | 1. *Combat Management System* | 1. *Operation and maintenance manuals for XYZ combat management system.* | 1. *ABC Pty Ltd (via the Commonwealth).* | 1. *Nil* | 1. *The Contractor may use solely for the purpose of undertaking repairs and updates on XYZ subsystem and must not sublicense any of the IP in the Technical Data.* |

EXCLUDED PARTIES (CORE)

Note to drafters: Listing parties as Excluded Parties means they cannot be engaged by the Commonwealth as Commonwealth Service Providers for the purposes of the Contract. The effect of this is that the Commonwealth is not entitled to grant these parties the broad Sublicences at clauses 5.3.3a and 5.7.1b(i) of the draft COC. However, Excluded Parties may still be granted Sublicences under clauses 5.3.3b, 5.3.3c, 5.7.1b(ii) or 5.7.1b(iii). The Commonwealth’s preference is that there are no Excluded Parties. In most cases, there will be no need for Excluded Parties because the TDSR Schedule enables the tenderer to protect specific TD or Software that it considers sensitive. For further guidance on the impact of listing parties as Excluded Parties, see Chapter 5 of the ASDEFCON Technical Data / Intellectual Property Commercial Handbook, available from the ASDEFCON intranet page and the internet link below.

Note to tenderers: The Commonwealth has broad rights to grant a sublicence in respect of TD, Software and Contract Material to a Commonwealth Service Provider at clauses 5.3.3a and 5.7.1b(i) of the draft COC. The listing of Excluded Parties will only be agreed to by the Commonwealth in exceptional circumstances, due to the administrative and operational constraints for the Commonwealth arising from listing a party in this annex. Specifying that a party is an Excluded Party does not mean that the Commonwealth cannot sublicense to that person if they are engaged in another capacity (for example, to provide maintenance or upgrade services to the Commonwealth) and such sublicensing is not restricted in Annex A or B. For further guidance, see Chapter 5 of the ASDEFCON Technical Data / Intellectual Property Commercial Handbook at:

<https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/intellectual-property-framework><https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/intellectual-property-framework>.

* 1. The following parties are excluded from being Commonwealth Service Providers for the purposes of clause 5 of the Contract:

| Unique Line Item Description | Excluded Party  (a party must be capable of being clearly identified by the Commonwealth) | Period of Restriction  (must not be perpetual) | Justification for Non-Disclosure Restriction |
| --- | --- | --- | --- |
| (a) | (b) | (c) | (d) |
| *Example: G-E-1* | *XYZ Pty Ltd* | *5 years from Effective Date* | *XYZ Pty Ltd is a direct competitor of the Contractor in relation to the maintenance of Fuel Pumps. If XYZ Pty Ltd were to be engaged as a Commonwealth Service Provider, it would be granted a licence for access to the Contractor's documented method and processes for increasing mean time between maintenance cycles for fuel pumps, and that licence would not be subject to the restrictions on the use or disclosure of the TD that apply to subcontractors (because Commonwealth Service Providers are granted broader licences than other subcontractors). This would significantly harm the Contractor's competitive advantage as well as the Contractor's ability to generate revenue from other customers in relation to the maintenance of the fuel pumps included in the Products Being Supported.* |

PATENTS, REGISTRABLE DESIGNS AND CIRCUIT LAYOUTS (CORE)

Note to tenderers: Tenderers are to identify any restrictions that limit the licences granted to the Commonwealth in relation to a Patent, Registrable Design or Circuit Layout (in accordance with clause 5.18 of the draft COC). A full description of the relevant Products, TD or Software that contains the Patent, Registrable Design or Circuit Layout protection must be included.

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| --- | --- | --- | --- | --- | --- | --- |
| Unique Line Item Description | Services containing a Patent, Registrable Design or Circuit Layout  (pending or registered) | Type of IP  (Patent, Registrable Design or Circuit Layout) | Owner / IP Applicant | Application / Registration No  (if applicable) | Countries or regions of permitted use | Restriction |
| (a) | (b) | (c) | (d) | (e) | (f) | (g) |
| 1. *Example: G-F-1* | 1. *Signal Integrator Manual (Method of Signal Capture)* | 1. *Patent* | 1. *XYZ Pty Ltd* | 1. *AU 01 233 323232* | 1. *Australia only* | 1. *The Commonwealth may not make an integrated circuit from the plans contained in the manual for a period of 3 years.* |
| 1. *Example: G-F-2* | 1. *Signal Integrator Device* | 1. *Circuit Layout* | 1. *XYZ Pty Ltd* | 1. *N/A* | 1. *Australia and United States only* | 1. *The Commonwealth may not disclose the device to a third party for a period of 5 years from the Operative Date.* |