



Australian Government
Department of Defence

CONTRACT MANUAL
FOR
DESIGN SERVICES CONTRACT

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Disclaimer and Table of contents

This Manual has been prepared solely for the purpose of providing guidance in relation to the use and administration of the Capital Facilities and Infrastructure Branch (CFI) suite of construction and infrastructure contracts. The Manual is not intended to be relied upon as legal advice. No responsibility will be taken by the Commonwealth of Australia or its advisers assisting in the preparation of the Manual for any such reliance on the guidance provided in the Manual. Nothing in the Manual will alter or affect the respective rights, obligations and liabilities of the parties under any contract.

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Part 1 - Introduction

1.1 General

The Department of Defence CFI Design Services Manual (**Manual**) is a fully searchable online resource designed to provide guidance and collateral resources for Defence and industry personnel using and administering CFI's suite of contracts for construction and infrastructure works.

This manual covers the Design Services Contract suite of template documents, namely the DSC Invitation to Register Interest, the DSC Tender Documents and the Design Services Contract itself. There is a separate Manual for the suite of template documents relating to each of the Medium Works Contract, the Head Contract, the Managing Contractor Contract and the ECI Head Contract.

A copy of the Contract, Schedule of Collateral Documents and Proforma Notices can be found on the Defence website (**Defence Website**) at: www.defence.gov.au.

1.2 Structure of the Manual

The Manual comprises a single online resource which, for reference purposes, has been divided into 27 "Parts". In general terms, the various Parts of the Manual can be grouped as follows:

- (a) Part 1: This Introduction to the Manual;
- (b) Part 2: provides guidance for the release of the Invitation to Register Interest (**ITR**), including guidance as to completing the ITR;
- (c) Part 3: provides guidance for the release of the Tender Documents, including guidance as to completing the various documents at that stage of the procurement process such as the Disclaimer and Confidentiality Agreement;
- (d) Part 4: provides guidance for contract finalisation and contract execution; and
- (e) Part 5 to Part 27: clause by clause guidance on the Conditions of Contract and Special Conditions.

The Contract identifies defined terms (as set out in clause 1.1 of the Conditions of Contract) by using a capital letter – eg “Completion”, “Commonwealth Risks” etc. The Manual follows this convention.

1.3 No substitute for reading the Contract

The Manual does not attempt to discuss all aspects of market procurement and contract administration in detail, so it is no substitute for reading the applicable market procurement document and the Contract and – if necessary – obtaining policy, legal or other specialist guidance.

Further, the Manual does not provide detailed advice in relation to matters not expected to arise in the day-to-day administration of the Contract, such as termination of the Contract or dealing with disputes. The need to seek specialist advice in extraordinary circumstances such as these is flagged throughout the Manual. If such circumstances arise, Defence and the Contract Administrator will need to seek specialist advice. If in doubt, contact the Directorate of Program Assurance and/or Directorate of Quality and Compliance.

Part 2 – Guidance for release of Invitation to Register Interest

2.1 General

When undertaking a two-stage procurement process (i.e. where Defence seeks registrations of interest followed by a formal tender process), Defence will first issue the Invitation to Register Interest document. The purpose of this first stage is to seek an indication of initial interest from industry for the purposes of:

- (a) identifying those consultants who are interested in bidding (**Applicants**);
- (b) enabling Applicants to pre-qualify for the tender process; and
- (c) enabling Defence to compile a shortlist of Applicants from whom it wishes to request tenders.

Part 2 of this Manual provide guidance as to:

- (a) how either Defence personnel or a consultant to Defence, known as the “ITR Administrator”, is to complete the Invitation to Register Interest document before it is issued to Applicants;
- (b) details of the manner in which, and the conditions under which, an Applicant is to lodge its response (its **Registration of Interest**); and
- (c) the prerequisites to and basis for consideration and acceptance of a Registration of Interest by Defence.

2.2 Completing the ITR Notification on AusTender

In order for the AusTender notification to be effective, the ITR Administrator must carefully complete those parts of the document to be completed by Defence before the notification is published on AusTender.

These parts include guidance as to the required details and are identified in square brackets, bold and italics. Matters in **[SQUARE BRACKETS, BOLD AND ITALICS]** also contain general guidance notes and should be deleted before the notification is finalised.

It is important for the information in the notification to be consistent with the information in the Invitation to Register Interest.

2.3 Completing the ITR

This Part 2.3 provides guidance on completing the Invitation to Register Interest for a Design Services Contract delivery method.

In order for the Invitation to Register Interest document to be effective, the ITR Administrator must carefully complete those parts of the document to be completed by Defence before issue.

Please note the distinction between those parts of the Invitation to Register Interest to be completed by the ITR Administrator which are ***[THOSE MATTERS IDENTIFIED IN SQUARE BRACKETS, BOLD AND ITALICS]*** as opposed to those to be completed by the Applicant, which are **[THOSE MATTERS IDENTIFIED IN SQUARE BRACKETS AND BOLD]**. Matters in ***[SQUARE BRACKETS, BOLD AND ITALICS]*** may contain guidance notes and should be deleted before the Invitation to Register Interest document is issued.

The proforma wording of the Invitation to Register Interest is not to be amended without authorisation from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance, except as described below. To facilitate this approval, project teams are encouraged to seek advice in a timely manner.

The ITR Administrator must have particular regard to the following before issuing the Invitation to Register Interest:

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
Title page		
	Insert the ATM Number, Project Number, Project Name and description of works	

Invitation to Register Interest for Design Services Contract

Clause	Information to be inserted by ITR Administrator	Guidance
	<p>and services, as applicable.</p> <p>Delete:</p> <p>(a) "[LAST AMENDED ...]"; and</p> <p>(b) the bullet point reading "matters in [SQUARE BRACKETS AND ITALICS] are to be completed by the Commonwealth/ ITR Administrator before the Invitation to Register Interest is published on AusTender or otherwise issued to Applicants; and".</p>	
1. Information for Applicants		
<p>1.1 The Project, the Works and the Services</p>	<p>Insert a brief description of the project, the works and the Services.</p> <p>If there will be more than one package of services, also describe the other packages of services forming part of the project.</p>	<p>The ITR Administrator should refer to the Project Delivery Development Plan (PDDP) and any Tender Evaluation Plan (TEP) for the project.</p> <p>It is critical that the Invitation to Register Interest succinctly and clearly describes the likely scope of the project, the works and the services. The ITR Administrator should take into account that the Applicant may not have a full and complete understanding of the background of the project, the works or the</p>

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
	Also, complete relevant details in the document headers.	<p>services. The information provided must enable an Applicant to properly assess whether it wishes to respond to the Invitation to Register Interest, and (if it does) to maximise the likelihood that the Applicant's Registration of Interest will be directed to satisfying Defence's requirements.</p> <p>The description must also be consistent with the description in the notification on AusTender.</p> <p>The description must also indicate whether or not the works or the project are/is subject to any government and or parliamentary approvals.</p> <p>The description must also use consistent Defence terminology.</p>
1.2 Form of Contract	Nothing to insert.	
1.3 Timeframe	Insert an anticipated contract award date and completion date.	<p>The ITR Administrator should refer to the PDDP and TEP for the project.</p> <p>The description must also be consistent with the description in the notification on AusTender.</p>
1.4 Estimated Value of the Project, the Works and the Services	Insert the estimated value for the works and the services.	<p>The ITR Administrator should refer to the PDDP and TEP for the estimated value of the works and the services.</p> <p>The estimated values must also be consistent with the values in the notification on AusTender.</p>
1.5 ITR Administrator	Insert name of legal entity appointed as the ITR Administrator that will assist in	The ITR Administrator details must be consistent with the details in the notification on AusTender (if applicable) and include an email address.

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
	administering the Invitation to Register Interest and the registration of interest process. Also, insert the ITR Administrator's representative name and email address.	For example, ABC Pty Ltd attention John/Joan Smith (ITR Administrator) at john.smith@abcptyltd.com
1.6 AusTender, the Australian Government Tender System	Nothing to insert.	In participating in the registration of interest process, the Applicant must comply with the terms and conditions and any applicable instructions, processes, procedures and recommendations as advised on AusTender at https://www.tenders.gov.au/infolinks/terms_ofuse
2. Selection process and evaluation criteria		
	Insert the maximum number of Applicants which may be shortlisted. Delete guidance note under the heading.	
2(a)(i) – (iii) Evaluation Criteria	Insert the weighting for each evaluation criteria.	The Invitation to Register Interest has three evaluation criteria addressing proposed resources, previous performance, and information security. The evaluation criteria are closely aligned with the information to be lodged in a Registration of Interest and must be consistent with the evaluation criteria identified in the PDDP and any TEP. Applicants should seek to address the evaluation criteria listed in this clause by providing the information requested in each

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		<p>relevant Schedule. The Schedules themselves indicate the general nature and extent of the information which should be lodged.</p> <p>It should be noted that:</p> <ul style="list-style-type: none"> • all evaluation criteria must be disclosed; and • as applicable, the percentage weighting for evaluation criteria, or that the evaluation criteria will be evaluated on the basis of whether it is met should be disclosed. <p>If in doubt about evaluation criteria, advice should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p>
2(b)	Nothing to insert.	<p>The Commonwealth may (in its absolute discretion):</p> <ul style="list-style-type: none"> (a) obtain and take into account information from its own knowledge, enquiries and investigations, including from referees on prior or current projects (whether or not nominated by the Applicant in its Registration of Interest) and in connection with any other Commonwealth project; and (b) take into account information lodged by an Applicant in any other Commonwealth procurement process. <p>The Commonwealth may decide (in its absolute discretion) not to evaluate a Registration of Interest (or continue to evaluate a Registration of Interest) if:</p> <ul style="list-style-type: none"> (a) the Applicant does not have the necessary financial viability to perform the services and otherwise meet its

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		<p>obligations under the contract if it is the successful tenderer; or</p> <p>(b) the Applicant has failed to comply with any of its obligations in the Invitation to Register Interest or has otherwise acted inconsistently with the registration of interest process.</p> <p>The Commonwealth may also decide not to evaluate or continue to evaluate any material in excess of any page limit identified in a Schedule.</p>
2(c)	<p>Insert details which is anticipated to be used in the tender process - including minimum form and content requirements, conditions for participation and evaluation criteria.</p> <p>Include clause 2(c)(i)B and 2(c)(iii)I if the procurement is for a High Value Contract (as defined in the Indigenous Procurement Policy). See guidance provided in relation to clause 22 of the ITR, below.</p>	<p>This clause also needs to detail the anticipated conditions for participation (if any), minimum form and content requirements and evaluation criteria to be used in the second stage which is a requirement of the Commonwealth Procurement Rules. The ITR Administrator should check that the description and weighting of the proposed evaluation criteria are consistent with the evaluation criteria identified in the PDDP for the second stage of this procurement.</p>
3. Registration of Interest		
3.1 Conforming Registration of Interest,	<p>Insert the ATM Close Date.</p>	<p>The ITR Administrator must have regard to the minimum timeframes in the Commonwealth Procurement Rules and</p>

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
including ATM Close Date and ATM Close Time, Minimum Form and Content Requirements and Conditions for Participation		<p>Defence policy as to the closing date. For example, the Invitation to Register Interest period must be at least 25 days from the date and time the Commonwealth publishes the Invitation to Register Interest on AusTender and 30 days from the issue date if the Invitation to Register Interest documents are not published on AusTender (unless an exemption applies). Defence usually allows at least 30 calendar days.</p> <p>The Registration of Interest must be lodged electronically via AusTender at www.tenders.gov.au and received before the ATM Close Date and ATM Close Time.</p> <p>As a result of the Commonwealth Procurement Rules, clause 3.2 of the Invitation to Register Interest is of critical importance. This clause sets out the requirements which must be met for a Registration of Interest to be “conforming”, including minimum form and content requirements and conditions for participation (if any). The ITR Administrator and all Defence project staff are expected to understand the importance and potential impact of non-conformance and to brief prospective Applicants accordingly, as appropriate.</p> <p>An Applicant and /or its Registration of Interest must meet all of the requirements set out in clause 3.1 of the Invitation to Register Interest for its Registration of Interest to be “conforming”.</p> <p>The requirements in clause 3.1 can be summarised as:</p> <p>(a) the Registration of Interest must be lodged electronically via AusTender at www.tenders.gov.au by the ATM Close Date and ATM Close Time; and</p>

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		<p>(b) if clause 20 applies, the Registration of Interest must satisfy the minimum form and content requirement (being completion and lodgement of Schedule E – Statement of Tax Record, including by attaching all valid and satisfactory STRs required for its entity type).</p> <p>The ITR Administrator and Defence may specify conditions for participation in Schedule D. If the ITR Administrator considers that any conditions for participation are required, approval must be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p> <p>Essentially, the Commonwealth can only evaluate (or continue to evaluate) conforming Registrations of Interest. This principle is subject to the two narrow exceptions in clause 3.2 of the Invitation to Register Interest.</p> <p>Any industry briefing for the Invitation to Register Interest process should specifically draw prospective Applicants’ attention to the importance of clause 3.1 and the effect of clause 3.2.</p>
3.2 Non-Conforming Registration of Interest	Nothing to insert.	<p>The Commonwealth Procurement Rules provide significant restrictions to the evaluation (or continued evaluation) of non-conforming Registrations of Interest.</p> <p>As noted above, the Commonwealth can only evaluate (or continue to evaluate) conforming Registrations of Interest. This principle is subject to two narrow exceptions in this clause 3.2 of the Invitation to Register Interest.</p> <p>The first exception may apply if the Registration of Interest was not lodged in</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>accordance with clause 3.1(a) (i.e. it was late or it was not lodged electronically via AusTender). If the reason it was not lodged in accordance with the requirements of clause 3.1(a) was solely due to mishandling by the Commonwealth, then the Registration of Interest will be evaluated (or will continue to be evaluated).</p> <p>The Invitation to Register Interest makes it clear that the Applicant is responsible for lodging its Registration of Interest in accordance with the requirements of clause 3.1(a) and managing all surrounding risks, including those associated with the use of AusTender and all information technology risks. These risks will not be considered 'mishandling by the Commonwealth'.</p> <p>The cases in which a Registration of Interest is not lodged in accordance with clause 3.1(a) and the reason for this is solely due to Commonwealth mishandling are anticipated to be rare.</p> <p>The second exception may apply if the Registration of Interest does not satisfy a minimum form and content requirement specified in clause 3.1(b) (i.e. in circumstances where clause 20 of the Invitation to Register Interest applies and the Applicant has not completed and lodged Schedule E – Statement of Tax Record) and the Commonwealth considers (in its absolute discretion) that the failure was due to an unintentional error by the Applicant.</p> <p>In such circumstances, if the Commonwealth considers (in its absolute discretion) that the failure to satisfy a minimum form and content requirement may be due to an unintentional error by the Applicant, the ITR Administrator will notify</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>the Applicant that it requires the Applicant to provide a response to the ITR Administrator and the Commonwealth may (in its absolute discretion) review and accept any correction of an unintentional error provided in the Applicant’s response.</p> <p>This is often a question of fact in each case, and Defence personnel must seek assistance from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance in determining whether or not it is appropriate for Defence to exercise its discretion in all of the circumstances. Legal and/or Probity advice should also be sought as required.</p> <p>In addition, it is important to note that, to the extent that the correction of an unintentional error involves the provision of any valid and satisfactory STRs required for the Applicant’s entity type, such STRs must be provided by no later than 10 business days after the date of the ITR Administrator’s notice. If the Applicant fails to meet this timeframe, the Registration of Interest will be non-conforming.</p> <p>It should be noted that the Commonwealth does not have any discretion to evaluate or continue to evaluate a Registration of Interest that does not satisfy a condition for participation.</p>
<p>3.3 Administrative Arrangements</p>	<p>Insert the software type and version for one electronic copy in clause 3.3(a)(iii). Specify the file size (in megabytes) limit per upload in clause 3.3(a)(iii)B.</p>	<p>This clause sets out a number of “administrative arrangements” which are relevant to each Registration of Interest.</p> <p>Except for Schedule D – Conditions for Participation (if any) and Schedule E – Statement of Tax Record (which is expressly stated to be a minimum form and content requirement under clause 3.1(b)), the use of</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>the term “requested” in clause 3.3(a)(i) and 3.3(a)(ii)A to E of the Invitation to Register Interest means that these administrative arrangements are not specified as “minimum form and content requirements” so any failure to comply with these arrangements (e.g. a failure to lodge a Schedule (A, B or C) or lodge it in the form requested by the Commonwealth) will not of itself mean that the Registration of Interest is non-conforming.</p> <p>To assist the Commonwealth in identifying the Applicant, identifying its Registration of Interest and evaluating its Registration of Interest the Applicant is requested to:</p> <ul style="list-style-type: none"> (a) lodge in respect of the information in clause 3.3(a)(i) and 3.3(a)(ii) files which: <ul style="list-style-type: none"> • identify the project, the Applicant’s name and the relevant Registration of Interest Form and Schedule references; and • do not exceed the inserted file size; (b) lodge its Registration of Interest in accordance with the response lodgement procedures described in the Invitation to Register Interest and on AusTender; (c) unless otherwise specified, express measurements in Australian legal units of measurement; and (d) ensure that all contents are clear, legible and readable. <p>Unless otherwise specified, the Applicant is to provide its Registration of Interest in A4 and portrait format.</p> <p>The information requested in Schedules A to E and, where applicable Schedule G, will be</p>

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		<p>critical to evaluation.</p> <p>Under clause 3.3(b) the Applicant is to provide clarification or authentication of material included in the Registration of Interest where notified to do so by the ITR Administrator.</p>
4. Questions, communications amendments to Invitation to Register Interest and Information Documents		
4(a)	Nothing to insert.	<p>This clause provides for an Applicant to lodge any questions, concerns or enquiries regarding discrepancies, ambiguity, errors or omissions in the ITR to the ITR Administrator in writing by email no later than 7 days prior to the ATM Close Date and ATM Close Time. This is important to ensure that all Applicants are dealt with fairly and in accordance with general principles of probity. An Applicant that directs a question or enquiry by phone or by email or to any other person (including Defence project personnel) should be referred immediately to the ITR Administrator and the requirements of this clause.</p> <p>The ITR Administrator should promptly reply to any reasonable request for relevant information by an Applicant but must take particular care to avoid doing so in a manner which could lead to an Applicant, or several Applicants, gaining an unfair advantage. Subject to the Commonwealth Procurement Rules, the ITR Administrator is not obliged to respond to all such notices.</p>
4(b) and 4(e)	Nothing to insert.	<p>Under clause 4(b) the Commonwealth may (in its absolute discretion) amend the Invitation to Register Interest at any time prior to the ATM Close Date and ATM Close</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>Time. All amendments to the Invitation to Register Interest must be in the form of addenda.</p> <p>Under clause 4(d) the ITR Administrator and the Commonwealth may give any notice or undertake any written communication contemplated by the Invitation to Register Interest (including all addenda and information documents) by publication on AusTender, or otherwise by email, other electronic means, post or hand.</p> <p>Under clause 4(e), if there is a discrepancy between a communication by AusTender and a communication by any other means, the communication by AusTender will prevail.</p> <p>Care should be taken to ensure that information issued to Applicants during the registration of interest process is properly characterised as and described as either:</p> <ul style="list-style-type: none"> (a) “addenda”, in that the content amends the Invitation to Register Interest; or (b) “information document” in that the content merely provides background information or clarification but does not amend nor form part of the Invitation to Register Interest. Applicant questions and answers which do not amend the Invitation to Register Interest are typically categorised as “information documents”. If the answer given means that an amendment to the Invitation to Register Interest is needed, addenda will also be required. <p>Because addenda and information documents have a legal effect, the ITR Administrator must give careful consideration to drafting addenda and information documents, and should obtain</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>legal advice from the legal adviser, as well as probity advice, for the project on the content of the draft addenda or information document.</p> <p>In issuing addenda or information documents close to the ATM Close Date and ATM Close Time, Defence should give proper consideration to extending the registration of interest period to permit Applicants a reasonable opportunity to respond to such information. Further advice is available from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p>
4(d)	Nothing to insert.	<p>The ITR Administrator and the Commonwealth may give any notice or issue any written communication (including all addenda and information documents) contemplated by this Invitation to Register Interest by publication on AusTender, or otherwise by email, other electronic means, post or hand.</p>
5. Registration of interest process and other acknowledgements		
5	Nothing to insert.	<p>Clause 5 contains a list of acknowledgements by the Applicant intended to protect the Commonwealth including that the Commonwealth does not intend to create any contract or other relationship under which the Commonwealth is legally obliged to conduct the registration of interest process in any manner or at all.</p> <p>These Registration of Interest Process Acknowledgements have been inserted to align with the Tender Process Acknowledgements set out in the Tender Conditions, relating to:</p> <ul style="list-style-type: none"> • the manner in which the

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>Commonwealth conducts the Registration of Interest Process;</p> <ul style="list-style-type: none"> • information documents; and • the ability of the Commonwealth to vary, suspend or discontinue the Registration of Interest process.
6. Notification and debrief		
	Nothing to insert.	<p>The Commonwealth Procurement Rules require Applicants to be notified (in writing) of the outcome of a Registration of Interest process.</p> <p>This clause provides that:</p> <p>(a) where the Registration of Interest was non-conforming no debrief will be provided unless the Commonwealth considers that it would be appropriate in the particular circumstances to provide one;</p> <p>(b) within 14 days of notification that an Applicant's Registration of Interest is non-conforming, the Applicant may by email notify the ITR Administrator that it requests the Commonwealth to exercise its discretion and provide a debrief;</p> <p>(c) if the Applicant did lodge a conforming Registration of Interest, the Commonwealth will notify the Applicant if its Registration of Interest was successful or unsuccessful and the Applicant may then notify the ITR Administrator by email that a debrief is requested; and</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>(d) the Commonwealth will determine (in its absolute discretion) a suitable time, date and place for the debrief and the ITR Administrator will notify the Applicant of the time, date and place of the debrief.</p> <p>The ITR Administrator may assist the Commonwealth in preparing for the debrief and may also attend the debrief. A debrief will typically be given orally or, if required by Commonwealth policy, in writing.</p> <p>It is important that any debrief be provided promptly. However, the suitable time for the debrief is to be determined by the Commonwealth (in its absolute discretion).</p> <p>Although a 14 day notification period has been inserted to provide some certainty, if an Applicant seeks a debrief outside this period, Defence should still consider providing one. If in doubt, seek advice from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p> <p>It is important that what is stated in any debrief arises out of careful and detailed preparation and is based on clear and objective evidence. Essentially, the purpose of any debrief is to discuss the reasons why the Applicant's Registration of Interest was successful or unsuccessful. Comparisons with other Applicants or Registrations of Interest should be avoided. See further guidance on clause 9 of the Tender Conditions in respect of the type of information that should and should not be provided in a debrief.</p> <p>Further information on debriefing is provided in the Defence Procurement Policy Manual.</p> <p>If there is any doubt as to whether or not</p>

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		certain information should be included in a proposed briefing or debriefing, advice should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.
7. Costs and claims		
	Nothing to insert.	<p>This clause provides that the Commonwealth will not make any payment to the Applicant or any other person or entity for any costs, expenses, losses or damages incurred or suffered by the Applicant or arising out of or in connection with preparing a Registration of Interest, the registration of interest process (including an industry briefing or a debrief) or any failure to comply with the Invitation to Register Interest.</p> <p>This clause also provides that the Applicant releases the Commonwealth from any claim for costs, expenses, losses or damages in connection with the preparation of the Registration of Interest (including an industry briefing or a debrief) or any failure to comply with the Invitation to Register Interest.</p>
8. Joint Bids		
	Nothing to insert.	<p>The Commonwealth offers the Applicant the opportunity to lodge a Registration of Interest on a Joint Bid Basis.</p> <p>Joint Bid Basis means a Registration of Interest lodged:</p> <ul style="list-style-type: none"> (a) by an unincorporated joint venture; or (b) on any other basis involving more than one entity where the Commonwealth would be relying upon a representation that those parties will be jointly and

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		<p>severally responsible for performing the services and otherwise meeting the obligations under the contract if the parties are the successful tenderer.</p> <p>Under clause 8.2(c) where a Registration of Interest Form is lodged on a Joint Bid Basis the Applicant must complete and lodge a single Registration of Interest Form on behalf of all entities that are lodging a Registration of Interest on a Joint Bid Basis and ensure that the Registration of Interest form is executed by each such entity.</p> <p>If a Registration of Interest is not lodged on a Joint Bid Basis and the Applicant is invited to lodge a tender for the services, the Applicant cannot subsequently lodge a tender on a Joint Bid Basis.</p> <p>Ultimately, if an Applicant lodged its Registration of Interest on a Joint Bid Basis, was then short-listed by the Commonwealth and was then evaluated as the successful tenderer, the identity of the Consultant under the Design Services Contract will be described as both entities forming the Joint Bid and those entities will be jointly and severally liable to the Commonwealth under the Design Services Contract.</p>
9. Restriction on use of personnel in preparation of Registration of Interest		
9	Nothing to insert.	<p>Subject to clause 9(c), the Applicant must ensure that its Registration of Interest is not prepared by any officer, employee, agent or adviser of the Applicant who was an employee of Defence, or involved in any capacity in the planning or performance of the Services, the Works or the Project, at any time during the 12 months immediately preceding the date on which the Invitation to</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>Register Interest was issued to the Applicant or was involved in any capacity in the Commonwealth’s management of the registration of interest process or preparation of the Invitation to Register Interest at any time.</p> <p>Under clause 9(b) the Applicant may request permission from the Commonwealth in relation to the use of particular personnel in the preparation of the Registration of Interest by notifying the ITR Administrator no later than 14 days prior to the ATM Close Date and ATM Close Time and providing particular required details – see clause 9(b).</p> <p>Once this information is received by the ITR Administrator, the ITR Administrator should liaise with the Defence project team personnel regarding the information received. Prior approval from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance must be obtained before any action is taken in respect of or in reliance on this clause.</p>
10. Conflict of interest		
	Nothing to insert.	<p>The objective of this clause is to ensure that the Applicant is obliged to notify the ITR Administrator of any conflict and the steps which the Applicant has taken to mitigate or resolve the conflict.</p> <p>The ITR Administrator will notify the Applicant by email of any steps the Commonwealth requires the Applicant to take to prevent, end, avoid, mitigate, resolve or otherwise manage the conflict of interest.</p> <p>Prior approval from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance must be obtained</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		before any action is taken in respect of or in reliance on this clause.
11. Use of Registration of Interest documents		
	Nothing to insert.	The objective of this clause is to ensure that the Applicant's Registration of Interest and other related documents become the property of the Commonwealth which it can use, retain and copy for the purposes set out in clause 11(b)(i) to (iv).
12. Unlawful conduct		
	Nothing to insert.	<p>The objective of this clause is to provide that the Commonwealth may (in its absolute discretion) decide not to evaluate (or continue to evaluate) a Registration of Interest if it has been prepared in breach of or otherwise inconsistently with any statutory requirement (including Commonwealth policies), or with the utilisation of information unlawfully obtained from the Commonwealth.</p> <p>Prior approval from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance must be obtained before any action is taken in respect of or in reliance on this clause.</p>
13. Procurement Complaints		
13.1 General Procurement Complaints	Nothing to insert.	This section explains the process under which the Applicant may make a complaint in relation to the Registration of Interest process.

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Clause	Information to be inserted by ITR Administrator	Guidance
13.2 Complaints under the Government Procurement (Judicial Review) Act 2018	Insert in clause 13.2(e) whether or not a public interest certificate under the <i>Government Procurement (Judicial Review Act 2018)</i> in relation to the registration of interest has been issued for this procurement.	This section explains the process under which the Applicant may submit a complaint in relation to the Registration of Interest process in circumstances where the registration of interest process is a Covered Procurement for the purposes of the <i>Government Procurement (Judicial Review Act 2018)</i> .
13.3 Definitions	Nothing to insert.	This clause sets out the definitions that apply to clause 13.
14. Workplace gender equality		
	Nothing to insert.	The Workplace Gender Equality Procurement Principles impose obligations on the Commonwealth to obtain a letter of compliance from any tenderer who is a "Relevant Employer" as defined in the <i>Workplace Gender Equality Act 2012 (Cth) (WGE Act)</i> . The Australian Government has adopted a policy of not purchasing goods or services from suppliers who do not comply with their obligations, if any, under the WGE Act. As part of its tender, if applicable, the tenderer will be required to provide the letter of compliance referred to above.
15. Employee entitlements		
	Nothing to insert.	It is a requirement of the Commonwealth Procurement Rules that the Commonwealth must not enter into a contract with a

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		<p>tenderer who has a judicial decision (being a decision of any court, tribunal or other body with authority to make a decision or determination which is binding on the tenderer) against it (not including a decision under appeal) relating to employee entitlements and have not paid the claim.</p> <p>This means that at the award date of the contract, the successful tenderer must:</p> <ul style="list-style-type: none"> (a) not have a judicial decision against it (not including a decision under appeal) relating to employee entitlements; and (b) have satisfied any resulting order (e.g. where the entitlement remains unpaid). <p>Under clause 15(b), as part of its tender, if applicable, the tenderer will be required to provide a declaration confirming that the tenderer does not have any judicial decision against it relating to employee entitlements where the resulting order remains unsatisfied.</p>
16. Industry briefing		
	Nothing to insert.	<p>The Commonwealth may conduct one or more industry briefings (including any site visits) in relation to the Invitation to Register Interest, the registration of interest process, the services, the works and the project.</p> <p>If an industry briefing will be conducted and this clause 16 is to be triggered, the ITR Administrator will need to notify the Applicant of the details of the industry briefing. The notice needs to be carefully prepared and should set out each of the details contemplated in paragraphs (i) to (iv), including whether the industry briefing is to be in person and/or via videoconference.</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		<p>If the Applicant wishes to attend the industry briefing it must notify the ITR Administrator by email no later than the time and date specified in the ITR Administrator’s notice, providing details of the applicant, the full names and addresses of all applicant personnel proposed to attend and all other information required by the ITR Administrator in its notice.</p> <p>The industry briefing will be conducted for the purpose of providing background information only.</p> <p>The applicant is not to rely on the industry briefing (or any industry briefing materials provided to the Applicant) for the purpose of preparing its Registration of Interest, preparing its tender or entering into any contract with the Commonwealth.</p>
17. Information security		
17	Nothing to insert	<p>The Commonwealth has requirements in respect of Confidential Information including any Sensitive and Classified Information (each as defined in the Disclaimer and Confidentiality Agreement, Tender Conditions forming part of the tender documents and Conditions of Contract for the Design Services Contract).</p> <p>If the Applicant:</p> <p>(a) is invited to lodge a tender for the services, it will be required to comply with the requirements in the Disclaimer and Confidentiality Agreement and Tender Documents; and</p> <p>(b) is the successful tenderer, it will be required to comply with the requirements in the Design Services</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		Contract.
18. Financial viability		
18.1 Solvency Statement and Financial Information	Nothing to insert.	<p>At any time before the Award Date of the Contract, the ITR Administrator or an independent financial adviser engaged by the Commonwealth may notify the Applicant by email that it is required to provide any of the information or documents set out in clause 18.1(a) – (h).</p> <p>The Applicant acknowledges that, if the Registration of Interest is lodged on a Joint Bid Basis, the Applicant must provide the information or documents for each joint bid party (as applicable).</p> <p>Consideration should be made, on a case by case basis, as to whether the Commonwealth or the independent financial adviser requires the Applicant to provide any of the information or documents set out in clause 18.1(a) – (h).</p>
18.2 Independent Financial Advisor	Nothing to insert.	<p>The Commonwealth may (in its absolute discretion) engage an independent financial adviser to assess whether or not the Applicant has the necessary financial viability to perform the services and otherwise meet its obligations under the Contract (including an assessment of the information or documents provided by the Applicant under clause 18.1 or otherwise).</p> <p>The Applicant acknowledges that the independent financial adviser may contact the Applicant’s nominated financial representative.</p>
19. Strategic Notice Events		

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Clause	Information to be inserted by ITR Administrator	Guidance
<p>19.1 Applicant's Warranty</p> <p>19.2 Applicant to Give Notice</p>	<p>Nothing to insert.</p>	<p>The objective of clauses 19.1 and 19.2 is to ensure that the Applicant discloses details regarding any Strategic Notice Event, both at the time of lodging its Registration of Interest and after the lodgement its Registration of Interest.</p> <p>Under clause 19.1 the Applicant warrants that, at the time of lodging its Registration of Interest, it is not aware of any Strategic Notice Event.</p> <p>Under clause 19.2 if the Applicant after lodging its Registration of Interest becomes aware of any Strategic Notice Event it must, as soon as reasonably practicable, notify the ITR Administrator, by email providing details of the Strategic Notice Event and the steps which the Applicant has taken (or will take) to resolve or otherwise manage the risk of any adverse effect of the Strategic Notice Event on the interests of the Commonwealth.</p> <p>The Applicant must continue to comply with clause 19.2 following a notification from the Commonwealth that its Registration of Interest was successful.</p> <p>There are four separate elements forming the definition of "Strategic Notice Event", covering Material Change, Defence Strategic Interest Issue, Significant Event and Fraud/Corruption. Each of these terms is also separately defined in clause 19.6.</p>
<p>19.3 Commonwealth Rights upon Occurrence of Strategic Notice Event</p>	<p>Nothing to insert.</p>	<p>If the Applicant notifies the ITR Administrator under clause 19.2 or has given a false warranty in any respect under clause 19.1 or has failed to strictly comply with clause 19 or the Commonwealth considers (in its absolute discretion) that there exists (or is likely to exist) a Strategic Notice Event</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		the Commonwealth may exercise other powers under clause 19.3. These powers include that the Applicant be specifically excluded from participating in the Registration of Interest process and its Registration of Interest will not be evaluated (or continue to be evaluated) or is specifically excluded from participating in the tender process and its tender will not be evaluated (or continue to be evaluated).
19.4 Release	Nothing to insert.	The Applicant must bear and releases the Commonwealth in respect of, all costs, expenses, losses, damages or liabilities suffered or incurred by the Applicant or any other person or entity arising out of or in connection with the Strategic Notice Event or in respect of the exercise of the ITR Administrator's or the Commonwealth's absolute discretions under clause 19.
19.5 Applicant's compliance	Nothing to insert.	<p>Clause 19 does not require the Applicant to act in any manner or disclose any information which would have the consequences listed in clause 19.5(a)(i) – (iv).</p> <p>Despite the restrictions in clause 19.5(a), the Applicant must use reasonable endeavours to make any disclosures and take reasonable steps to ensure that the overarching intent of clause 19 is achieved.</p>
19.6 Definitions	Nothing to insert.	This clause sets out definitions that apply to clause 19.
20. Statement of Tax Record		
	Select whether or not	Clause 20 will apply when the procurement has an estimated value over \$4 million (GST

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Clause	Information to be inserted by ITR Administrator	Guidance
	<p>the clause applies.</p> <p>Delete guidance notes.</p>	<p>inclusive).</p> <p>The Applicant’s attention is drawn to the Shadow Economy Procurement Connected Policy (formerly known as the Black Economy Procurement Connected Policy). More information about the requirements arising under this policy is available at: https://treasury.gov.au/policy-topics/economy/shadow-economy/procurement-connected-policy.</p> <p>This clause provides that the Applicant must complete and lodge Schedule E – Statement of Tax Record, which includes providing all of the satisfactory and valid STRs required for the Applicant’s entity type under (and as set out in) Schedule E – Statement of Tax Record and making the declaration in the form set out in Schedule E – Statement of Tax Record.</p> <p>It should be noted that under clause 3.1(b) this is a minimum form and content requirement for the Applicant’s Registration of Interest.</p>
21. Payment Times Procurement Connected Policy		
	<p>Noting to insert</p>	<p>Clause 19 draws the Applicant’s attention to the Payment Times Procurement Connected Policy (PT PCP) (being the procurement connected policy available at https://treasury.gov.au/publication/p2021-183909).</p> <p>Where the PT PCP applies:</p> <p>(a) successful Applicants will be required to disclose at the time of tender whether they are a “Reporting Entity” (as defined in the <i>Payment Times Reporting Act 2020 (Cth)</i>); and</p>

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Clause	Information to be inserted by ITR Administrator	Guidance
		(b) to the extent the successful tenderer is a "Reporting Entity", specific additional contractual obligations relating to the PT PCP will apply. In this regard, see clause 22 of the Conditions of Contract to the Design Services Contract which includes (among other things) specific timeframes by which the Consultant must pay certain of its subcontractors
22. Indigenous Procurement Policy		
22	<p>Select in clause 22 whether or not the procurement involves a High Value Contract.</p> <p>Delete the inapplicable text, depending on whether or not the procurement involves a High Value Contract.</p> <p>If the procurement does involve a High Value Contract, select in clause 22(a) whether or not the procurement also involves a Remote Area Contract.</p> <p>Delete the guidance notes.</p>	<p>Specific requirements apply where the procurement involves a High Value Contract and a Remote Area.</p> <p>A procurement will involve:</p> <p>(a) a "High Value Contract" if the contract is valued at \$7.5 million (GST inclusive) or more; and</p> <p>(b) a "Remote Area", if the area is identified in the map on the Indigenous Procurement website, as updated from time to time.</p> <p>For further guidance on the Indigenous Procurement Policy more generally, see Part 20.1.2 of this Manual regarding clauses 16.2 and 16.3 of the Conditions of Contract.</p>
23. Environmentally Sustainable Procurement Policy		

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Clause	Information to be inserted by ITR Administrator	Guidance
23	Nothing to insert	<p>Clause 23 draws the Applicant’s attention to the Environmentally Sustainable Procurement Policy (https://www.dcceew.gov.au/environment/protection/waste/sustainable-procurement).</p> <p>This clause identifies that, if the Applicant is invited to submit a tender, the tender must include a Supplier Environmental Sustainability Plan and, if selected as the successful tenderer, the Consultant will be required to comply with the Environmentally Sustainable Procurement Policy and its Supplier Environmental Sustainability Plan under the Design Services Contract.</p>
Registration of Interest Form		
	Insert the ATM ID, Project Number, Project Name and description of works and services, as applicable.	<p>These details should be the same as those stated elsewhere in the Invitation to Register Interest.</p> <p>If a Registration of Interest Form is to be submitted by an Applicant on a Joint Bid Basis then the Applicant should complete a single Registration of Interest Form on behalf of all entities forming the Applicant, separately executed by each entity.</p>
Schedule A - Proposed resources		
	Nothing to insert.	The Applicant is requested to provide details of its proposed key people for the services including the key people for the roles identified in the Table contained in this Schedule A. The Applicant is permitted to submit the information in A3 or landscape format.
Schedule B - Previous performance		

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
	<p>In paragraph (a), insert information requested in regards to relevant projects carried out / completed in the number of years prior to the ATM Close Date and ATM Close Time.</p> <p>In paragraph (b), insert the maximum number of projects to be nominated by the Applicant.</p> <p>Insert the same information in the note above the table.</p>	<p>The Applicant is requested to provide details of previous performance by providing details in the table format contained in this Schedule B. The Applicant is permitted to lodge the information in A3 or landscape format.</p> <p>If the Registration of Interest is lodged on a Joint Bid Basis the maximum number of projects listed for the Applicant to provide details of in the table applies to the Joint Bid parties cumulatively.</p>
Schedule C - Information security		
	Nothing to insert.	<p>The Applicant is requested to confirm whether or not it currently holds DISP membership and, if so, provide details of such membership in item A of Schedule C, including details of the relevant level held for each of the Security Domains.</p> <p>If the Applicant indicates that it does not currently hold DISP membership it must complete the Questionnaire contained in item B of Schedule C.</p> <p>DISP means Defence Industry Security Program described at: http://www.defence.gov.au/dsvs.industry.</p>
Schedule D - Conditions for Participation		

Invitation to Register Interest for Design Services Contract

Clause	Information to be inserted by ITR Administrator	Guidance
	<p>Insert any conditions for participation, provided that the prior approval of the Delegate has been obtained.</p> <p>If there will be no conditions for participation (which is the default position), delete the three paragraphs commencing <i>["None stated" IS THE DEFAULT POSITION"...].</i></p> <p>If there will be conditions for participation and approval has been given, delete the "None stated" and the guidance provided. Insert the condition/s for participation and the two paragraphs commencing <i>"The Applicant should note that..."</i>.</p>	<p>See guidance above regarding clause 3.1(c) of the Invitation to Register Interest.</p> <p>Conditions for participation are basic requirements (that is, minimum standards or essential characteristics) with which Applicants must comply in order to participate in a procurement for a particular project. If a condition for participation is not satisfied by the Applicant in its Registration of Interest, the Registration of Interest will be non-conforming and cannot be evaluated or continue to be evaluated. As noted above in the guidance for clause 3.2, the Commonwealth does not have any discretion to evaluate or continue to evaluate a Registration of Interest that does not satisfy a condition for participation.</p> <p>Because a failure to satisfy a condition for participation has serious consequences for any Registration of Interest, prior approval from the Delegate is required to be obtained before any conditions for participation are specified in Schedule D - Conditions for Participation.</p> <p>Importantly, there is a distinction between conditions for participation (which are a pass/fail issue) and matters which are particularly relevant for a particular project.</p> <p>In short, the Commonwealth may, but is not required to and usually does not, specify conditions for participation. It will almost always be preferable to specify a particular requirement as a matter for evaluation than as a condition for participation.</p> <p>If conditions for participation are to be specified for particular services, the Delegate will take into account the following guidelines:</p>

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		<p>(a) conditions for participation must be limited to those that will ensure that an Applicant has the legal, commercial, technical and financial abilities to fulfil the requirements of the procurement for the project; and</p> <p>(b) conditions for participation may require relevant prior experience where this is essential to meet the requirements of the Invitation to Register Interest but must not require that Applicants have previous experience with the Commonwealth, with the Australian Government or in a particular location.</p>
Schedule E – Statement of Tax Record		
	<p>If clause 20 applies, delete the guidance note.</p> <p>If clause 20 does not apply, delete the content of this Schedule and mark it “Schedule E - Not used”.</p>	<p>Schedule E only applies if clause 20 of the Invitation to Register Interest applies. If it does apply, the Applicant must complete and lodge Schedule E – Statement of Tax Record, noting that this is a minimum form and content requirement under clause 3.1(b) of the Invitation to Register Interest.</p> <p>A few practical points worth noting:</p> <p>(a) if an Applicant has an existing Statement of Tax Record (STR) applying for itself, it should check that the validity period will not expire at a time prior to the ATM Close Date and ATM Close Time. If it will so expire, a fresh STR should be sought from the ATO in sufficient time so as to comply with the requirements in Schedule E; and</p> <p>(b) depending on the particular circumstances relevant to the Applicant, an STR may be required for not only the Applicant entity itself but also separate STRs for other relevant entities</p>

Invitation to Register Interest for Design Services Contract		
Clause	Information to be inserted by ITR Administrator	Guidance
		contemplated in Schedule E eg if the Applicant is a member of a Consolidated Group, the STR of the head of the Consolidated Group will also be required.

Part 3 – Guidance for release of Tender Documents

3.1 General

Defence commences the tender stage of a project when:

- (a) for a **one-stage** procurement process:
 - (i) it issues a notification on AusTender notifying potential consultants about the tender process; or
 - (ii) it has finalised the list of potential consultants from whom it wishes to request tenders; or
- (b) for a **two-stage** procurement process:
 - (i) it has completed the Invitation to Register Interest process; and
 - (ii) has compiled a shortlist of Applicants from whom it wishes to request tenders.

Part 3 of this Manual gives guidance as to:

- (a) how either Defence personnel or a consultant to Defence, known as the “Tender Administrator”, is to complete the Tender Documents before they are issued to Tenderers;
- (b) details of the manner in which, and the conditions under which, a Tenderer is to lodge its response (its Tender); and
- (c) the prerequisites to and basis for consideration and acceptance of a Tender by Defence.

3.2 Completing the Disclaimer and Confidentiality Agreement

It should be noted that “Disclaimer and Confidentiality Agreement” is to be sent to, executed and returned by the Tenderer **before** the Tender Documents and Information Documents are sent to the Tenderer.

The purpose of the Disclaimer and Confidentiality Agreement is to establish a legally binding agreement in order to:

- (a) obtain certain acknowledgments, releases and warranties in respect of the Tender process;
- (b) obtain an obligation from the Tenderer to hold Confidential Information in strict confidence and not to disclose, use or deal with it or otherwise make it available to any person and to ensure that all Confidential Information is strictly kept secure and protected from all unauthorised use;
- (c) require the Tenderer to detect all actual or potential Security or Confidentiality Incidents;
- (d) require the Tenderer to respond to any direction of the Tender Administrator or the Commonwealth to provide evidence of the Tenderer's (including all persons who have been provided with or had access to Confidential Information) compliance with clauses 4 to 23 of the Disclaimer and Confidentiality Agreement; and
- (e) require the Tenderer, after returning the Disclaimer and Confidentiality Agreement but prior to notification of the outcome of the process after lodging its Tender, if it becomes aware of any Strategic Notice Event to notify the Tender Administrator by email of the details of such Strategic Notice Event.

There is a separate copy of the Disclaimer and Confidentiality Agreement available on the Defence Website.

The proforma wording of the Disclaimer and Confidentiality Agreement is not to be amended without authorisation from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance (except the Schedule Items, as described in Part 3.2 of this Manual below). To facilitate this authorisation, project teams are encouraged to seek advice in a timely manner.

The Tender Administrator must ensure that the information in the Disclaimer and Confidentiality Agreement is consistent with the information in the Tender Documents. If in doubt, seek guidance from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.

The Disclaimer and Confidentiality Agreement contains a note to Tenderers that they are requested to ensure that the Disclaimer and Confidentiality Agreement is complete, accurate and validly executed. Because the Disclaimer and Confidentiality Agreement

contains important legal obligations, it is important that it is validly executed by a person authorised to execute such documents. For further information on the execution of legal documents, see **Part 4.5** of this Manual below.

It is most important to note that if the Tenderer executes the Disclaimer and Confidentiality Agreement by means other than in accordance with s127 of the *Corporations Act 2001 (Cth)*, the Tenderer is required to provide evidence of authority of the 'authorised signatory' to sign the Disclaimer and Confidentiality Agreement e.g. a copy of a power of attorney or a board resolution.

The signature block in the Disclaimer and Confidentiality may be amended to accord with the particular manner in which the entity is required to execute legal documents. However, any proposed amendments must be subject to legal review by the legal adviser engaged by Defence for the project in question.

The Tender Administrator must have particular regard to the following before issuing the Disclaimer and Confidentiality Agreement for a Design Services Contract.

Disclaimer and Confidentiality Agreement Design Services Contract		
Reference	Information to be inserted by Tender Administrator	Guidance
Schedule – Item 1. Tenderer	Nothing to insert.	The information in this Item is to be inserted by the Tenderer.
Schedule – Item 2. (Recital A) ATM ID, Project No, Project Name	Insert the ATM ID, Project Number and Project Name, and a brief description of the works and services	This should be the same as the information to be inserted on the Title Page of the Tender Documents. The description should be of the entity that is the Tender Administrator, and not an individual of the entity.
Schedule – Item 3.	Insert the name of	This should be the same as

Disclaimer and Confidentiality Agreement Design Services Contract		
Reference	Information to be inserted by Tender Administrator	Guidance
(Recital A) Tender Administrator	the Tender Administrator.	the information to be inserted in the Tender Particulars for the Tender Documents.
Schedule – Item 4. Email address of Tender Administrator	Insert the email address of the Tender Administrator.	This should be the same as the email address to be inserted in the Tender Particulars for the Tender Documents.
Schedule – Item 5. Clause 9(a)(ii)(A)	Insert any additional Information Security or confidentiality requirements.	If there are no additional information security or confidentiality requirements, then complete this item as “None stated”.
Schedule – Item 6. Governing Law	Insert the governing law of the Disclaimer and Confidentiality Agreement. This should be the same as the governing law set out in the Tender Documents. (if nothing is inserted, the default is Australian Capital Territory).	Abbreviations should be avoided (e.g. use “New South Wales” and not “NSW”). If the project involves multiple jurisdictions, often the law of the Australian Capital Territory is used. If the governing law is not stated, the law of the Australian Capital Territory will apply.
Attachment 1 – Information Security	Delete the applicable text depending on whether or not an Invitation to Register Interest process was used.	The Tenderer is referred to clause 17 of the Disclaimer and Confidentiality Agreement. If an Invitation to Register Interest process was used, the Tenderer is requested to

**Disclaimer and Confidentiality Agreement
Design Services Contract**

Reference	Information to be inserted by Tender Administrator	Guidance
		<p>confirm whether any of the information provided as part of that process has changed.</p> <p>If an Invitation to Register Interest process has not been used, the Tenderer is requested to provide details of its DISP membership (if any) and, if it does not hold such membership, to complete the questionnaire in Part B of Attachment 1 in respect of its approach to information security.</p>

3.3 Completing the Tender Documents

3.3.1 Introduction, including background and overview of various parts comprising the Tender Documents

In order for the Tender Documents to be effective, the Tender Administrator must carefully complete those parts of the document to be completed by Defence before issue.

Please note the distinction between those parts of the Tender Documents to be completed by the Commonwealth/Tender Administrator which are ***[THOSE MATTERS IDENTIFIED IN SQUARE BRACKETS, BOLD AND ITALICS]*** as opposed to those to be completed by the Tenderer, which are **[THOSE MATTERS IDENTIFIED IN SQUARE BRACKETS AND BOLD]**. Matters in ***[SQUARE BRACKETS, BOLD AND ITALICS]*** may contain guidance notes and should be deleted before the Tender Documents are issued.

The proforma wording of the Tender Documents is not to be amended without authorisation from the Directorate of Program Assurance and/or Directorate of Quality and Compliance, except as described below. To facilitate this approval, project teams are encouraged to seek advice and authorisations in a timely manner.

The Tender Documents are separated into five parts, namely:

- Part 1 – Tender Conditions;
- Part 2 – Tender Particulars;
- Part 3 – Tender Form;
- Part 4 - Tender Schedules; and
- Part 5 - Contract.

In essence, the Tender Administrator will be required to complete the information necessary for Part 1, Part 2 and Part 4, and include a copy of the Contract as Part 5 (with the known elements of the Contract Particulars completed as described in Part 3.4.1 below). The Tenderer

is responsible for providing the information requested or required by Part 3 and Part 4 as part of its Tender.

3.3.2 Tender Conditions

The Tender Administrator must have regard to the following Tender Conditions before issuing the Tender Documents for a Design Services Contract:

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
Title page		
	<p>Insert the ATM ID, Project Number, Project Name and description of works, as applicable.</p> <p>Delete:</p> <p>(a) the “[LAST AMENDED...]” date; and</p> <p>(b) the bullet point reading “matters in [SQUARE BRACKETS AND ITALICS] are to be completed by Defence before the Tender Documents are issued to Tenderers; and”; and</p> <p>(c) the [NOTE TO COMMONWEALTH /TENDER ADMINISTRATOR...].</p>	
1. Information for Tenderers		

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
1.1 General	Nothing to insert	<p>This clause invites Tenderers to lodge a Tender for the Services on the terms of the Tender Documents.</p> <p>The Tenderer must direct all questions related to the Tender Documents or the tender process to the Tender Administrator under clause 2.2(a).</p> <p>Tenderers are reminded that participation in the tender process is governed by, and subject to, the Disclaimer and Confidentiality Agreement and the Tender Conditions.</p>
1.2 AusTender, the Australian Government Tender System	Nothing to insert.	<p>The Tenderer must direct all queries and requests for technical or operational support related to AusTender to the AusTender Help Desk using the Contact Us Form (at the URL provided in the clause).</p> <p>The Tenderer’s attention is also drawn to clauses 1.8 and 1.9 of the AusTender terms and condition in relation to late receipt of Tenders and proof of lodgement.</p>
2. Interpretation of Tender Documents, Questions and Amendments		
2.1 Interpretation	Nothing to insert.	<p>All words and expressions in the Tender Conditions (and in the other Tender Documents) have the meanings assigned to them under the Tender Conditions and clauses 1.1 and 1.2 of the Conditions of Contract in Part 5.</p>
2.2 Questions, Communications and Amendments to	Nothing to insert.	<p>If the Tenderer:</p> <ul style="list-style-type: none"> • finds any discrepancy, ambiguity, error or omission in the Tender

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
Tender Documents		<p>Documents; or</p> <ul style="list-style-type: none"> • has any questions or concerns, or wishes to make any enquiry concerning the Tender Documents or the tender process, <p>then it must notify the Tender Administrator in writing by email no later than 7 days prior to the ATM Close Date and ATM Close Time. This is important to ensure that all Tenderers are dealt with fairly and in accordance with general principles of probity. A Tenderer that directs a question or enquiry by phone or to any other person (including Defence project personnel) should be referred immediately to the Tender Administrator and this clause.</p> <p>Subject to the Commonwealth Procurement Rules neither the Commonwealth nor the Tender Administrator is required to respond to all such notices, questions, concerns or inquiries. However, the Commonwealth may, in its absolute discretion, respond to such notices, questions, concerns or inquiries in the form of addenda or as an Information Document.</p> <p>This clause provides the Commonwealth with the discretion to issue addenda under clause 2.2(d) of the Tender Conditions.</p> <p>Care should be taken to ensure that information issued to Tenderers during the tender process is properly characterised as and described as either:</p> <ul style="list-style-type: none"> (a) addenda under clause 2.2(d), in that the content amends the Tender Documents; or (b) Information Documents as defined in

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>clause 2.1(l) of the Tender Conditions, in that the content merely provides background information or clarification but does not amend nor form part of the Tender Documents. Tenderer questions and answers which do not amend the Tender Documents are typically categorised as “Information Documents”. If the answer given means that an amendment to the Tender Documents is needed, addenda will also be required.</p> <p>Because addenda have a legal effect, the Tender Administrator must give careful consideration to drafting addenda and should obtain legal advice on content. As a matter of good practice, all addenda and information documents should also be reviewed by Probity before they are released to the Tenderers.</p> <p>In issuing addenda or Information Documents close to the ATM Close Date and ATM Close Time, Defence should give proper consideration to extending the tender period to permit Tenderers a reasonable opportunity to respond to such information. Further advice should be sought from the Probity adviser on the project and advice is also available from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p> <p>If there is a discrepancy between AusTender and the Tender Particulars, AusTender will prevail and if there is a discrepancy between a communication by AusTender and a communication by the Tender Administrator by any other means, the communication by AusTender will</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>prevail (clause 2.2(f)(i) and (ii)).</p> <p>At the time of its notice under clause 2.2(a), the Tenderer may request that a matter notified and any response remain confidential on the basis that the whole or any part of the matter notified contains commercial-in-confidence information.</p> <p>The Commonwealth may, in its absolute discretion, agree or disagree that the matter notified contains commercial-in-confidence information. If the Commonwealth does not agree that the matter notified is commercial-in-confidence and the Tenderer does not withdraw the matter raised, then that matter and any response will be published on AusTender or otherwise issued to all Tenderers. The Commonwealth must keep agreed “Commercial-in-Confidence Information” confidential after the Award Date, subject to the disclosure obligations as set out in clause 20(b) of the Tender Conditions.</p> <p>Also see commentary on clause 20 below for further guidance.</p>
2.3 Industry Briefing	Nothing to insert.	<p>The Commonwealth may conduct any one or more industry briefings (including any Site visit which is part of the industry briefing) in relation to the Tender documents, the tender process, the Services, the Works and the Project. If an industry briefing will be conducted, the Tender Administrator will notify the Tenderer the details of the industry briefing. It should be noted that a site visit is to be considered part of the industry briefing. If a site visit is to be made available then an industry briefing may be divided into two parts – part one covering</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>the formal presentation to Tenderers and addressing the items noted in paragraphs (a) to (e) below; and part two of the industry briefing covering the site inspection itself.</p> <p>Clause 2.3 sets out a process for the conduct of an industry briefing. The clause details the information required to be provided to and by the Tenderer for the purposes of any industry briefing.</p> <p>As noted in clause 2.3(d), all industry briefings will be conducted for the purpose of providing background information only.</p> <p>An industry briefing is used to explain and emphasise:</p> <ul style="list-style-type: none"> (a) the scope of the Services; (b) what constitutes a conforming tender in accordance with clause 3.1 of the Tender Conditions, and what will constitute a non-conforming tender and how these tenders will be dealt with in accordance with clause 3.3 of the Tender Conditions; (c) the administrative arrangements of the tender; (d) how the evaluation criteria will be applied and what information is required or requested in the Tender Schedules; and (e) any other key points to note regarding the Tender Conditions. <p>Tenderers may, at the discretion of the Tender Administrator, be provided with copies of industry briefing materials (including presentations) as an Information Document. Tenderers are not</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>permitted to take photographs or other electronic recordings of the industry briefing (including any presentation, site visit or inspection), and, if applicable, any Tenderer meeting.</p> <p>Subject to the Commonwealth Procurement Rules, neither the Commonwealth nor the Tender Administrator is required to respond to any or all questions, enquiries or other matters notified during the industry briefing.</p> <p>The Commonwealth may (in its absolute discretion) publish or issue addenda or Information Documents to address any matters arising out of or in connection with the industry briefing.</p>
3. Tenders		
3.1 Conforming Tender, including ATM Close Date and ATM Close Time, Minimum Form and Content Requirements and Conditions for Participation	Nothing to insert	<p>Clause 3.1 of the Tender Conditions is of critical importance in light of the Commonwealth Procurement Rules. This clause sets out the requirements which must be met for a Tender to be “conforming”, including minimum form and content requirements and conditions for participation (if any). The Tender Administrator and all Defence project staff are expected to understand the importance and potential impact of non-conformance and to brief prospective Tenderers accordingly.</p> <p>Defence’s standard form Invitation to Register Interest and Tender Documents have been drafted on the basis that all procurements will be “covered” procurements under the Commonwealth Procurement Rules (that is, the relevant</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>procurement threshold for construction works and services is at or above \$7.5m (GST inclusive)).</p> <p>A Tenderer and /or its Tender must meet all of the requirements set out in clause 3.1 of the Tender Conditions for its Tender to be “conforming”.</p> <p>The requirements in clause 3.1 are:</p> <ul style="list-style-type: none"> (a) the Tender must be lodged electronically via AusTender and received before the ATM Close Date and ATM Close Time; (b) the Tender must satisfy each minimum form and content requirement, being: <ul style="list-style-type: none"> (i) the Tender must remain valid for the duration of the Tender Validity Period (namely 90 days or up to a maximum of 130 days if the procurement is suspended) during which period the Tenderer cannot withdraw its Tender; (ii) if clause 27.1 applies, completion and lodgement of Tender Schedule I - Statement of Tax Record; (iii) if the Tender Particulars state that it applies, completion and lodgement of Tender Schedule J – Indigenous Procurement Policy; (iv) the Tenderer must complete and lodge item C of Tender Schedule K – Environmentally Sustainable Procurement; and (v) the Tenderer must accept without departure, qualification,

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>amendment, limitation or exclusion) the Contract in Part 5, except to the extent provided for under clause 3.1(b)(v)A (Alternative Proposals – Tender Schedule G) and clause 3.1(b)(v)B (in respect of clauses 5.1 – 5.5 of the Conditions of Contract (item 1 of Tender Schedule H); and</p> <p>(c) the Tenderer must at the time of lodging its Tender (except as specified below) satisfy each condition for participation, specified in the Tender Particulars (if any).</p> <p>The Tender Administrator and Defence may specify conditions for participation in the Tender Particulars. If the Tender Administrator considers that any conditions for participation are required, approval must be obtained from the Delegate.</p> <p>Essentially, the Commonwealth can only evaluate (or continue to evaluate) conforming Tenders. This principle is subject to the two narrow exceptions in clause 3.3 of the Tender Conditions.</p> <p>This is why great care should be taken in specifying any “conditions for participation” (e.g. the “Tenderer must have the following qualifications...”) elsewhere in the Tender Documents.</p> <p>In most cases, where such matters are particularly relevant to the Services or the project in question, they can be incorporated into the Tender Documents as matters relevant to evaluation rather than as matters of strict conformance/non-conformance. If in</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>doubt, seek advice from the Delegate.</p> <p>Any industry briefing should specifically draw Tenderers’ attention to the importance of compliance with clause 3.1 and the effect of clause 3.3 of the Tender Conditions.</p>
3.2 Alternative Proposals	Nothing to insert.	<p>Under clause 3.2 of the Tender Conditions, a Tenderer can provide an alternative proposal (that may result in changes to the Conditions of Contract, Special Conditions, Brief or other contract document) on the basis that such proposals will provide greater value for money for the Commonwealth.</p> <p>Any alternative proposal must be set out in Tender Schedule G.</p> <p>However, any alternative proposal will only be evaluated if the Tenderer lodges a conforming Tender. That is, the Tenderer must accept, without departure, qualification, amendment, limitation or exclusion (other than in respect of clauses 5.1 to 5.5 of the Conditions of Contract), the Contract in Part 5 before any alternative proposal will be considered.</p> <p>If the Tenderer wishes to submit an alternative proposal, it should ensure that Item 1 (being alternative proposal excluding pricing/financial information) and Item 2 (being alternative proposals – financial) of Tender Schedule G – Alternative Proposals are each lodged as separate files.</p>
3.3 Non-Conforming	Nothing to insert.	The Commonwealth Procurement Rules provide significant restrictions to the evaluation (or continued evaluation) of

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
Tender		<p>non-conforming Tenders.</p> <p>The Commonwealth can only evaluate (or continue to evaluate) conforming Tenders. This principle is subject to two narrow exceptions in clause 3.3 of the Tender Conditions.</p> <p>The first exception may apply if the Tender was not lodged in accordance with clause 3.1(a) (e.g. it was late or it was not lodged electronically via AusTender). If the reason it was not lodged in accordance with the requirements of clause 3.1(a) was solely due to mishandling by the Commonwealth, then the Tender will be evaluated (or will continue to be evaluated).</p> <p>The Tender Conditions also make it clear that the Tenderer is responsible for lodging its Tender in accordance with the requirements of clause 3.1(a) and managing all surrounding risks, including those associated with the use of AusTender and all information technology risks.</p> <p>The cases in which a Tender is not lodged in accordance with clause 3.1(a) and the reason for this is solely due to Commonwealth mishandling are anticipated to be rare.</p> <p>The second exception may apply if the Tenderer does not satisfy each minimum form and content requirement specified in clause 3.1(b) and the Commonwealth considers (in its absolute discretion) that the failure was due to an unintentional error by the Tenderer. In such circumstances, the Commonwealth may (in its absolute discretion), seek, review</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>and accept any correction to the unintentional error. This is often a question of fact in each case, and Defence personnel must seek immediate assistance from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance (and seek input from the project’s probity and legal advisers as appropriate) in determining whether or not it is appropriate for Defence to exercise its discretion in all of the circumstances.</p> <p>In addition, it is important to note that the extent that the correction of the unintentional error involves the provision of any valid and satisfactory STRs required for the Tenderer’s entity type, such STRs must be provided by no later than 10 business days after the date of the Tender Administrator’s notice. If the Tenderer fails to meet this timeframe, the Tender will be non-conforming.</p> <p>It should be noted that the Commonwealth does not have any discretion to evaluate or continue to evaluate a Tender that does not satisfy a condition for participation.</p>
3.4 Administrative Arrangements	Nothing to insert.	<p>For the purpose of allowing the Commonwealth to evaluate its Tender under clause 4 the Tenderer is requested to lodge the following:</p> <ul style="list-style-type: none"> (a) the Tender Form in Part 3; (b) Tender Schedule A – Draft Project Plans; (c) Tender Schedule B – Proposed Resources; (d) if the Tender Particulars state that it applies, Tender Schedule C – Previous Performance;

Design Services Contract – Tender Conditions

Reference	Information to be inserted by Tender Administrator	Guidance
		<ul style="list-style-type: none"> (e) Tender Schedule D – Program and Minimum Resource Schedule; (f) Tender Schedule E – Commonwealth Procurement Rules Compliance; (g) Tender Schedule F – Financial; (h) subject to clause 3.1(b)(v) (minimum form and content requirement) and only if it wishes to submit an alternative proposal, Tender Schedule G – Alternative Proposals; (i) Tender Schedule H – Miscellaneous Matters for Evaluation; (j) if clause 27.1 applies, (minimum form and content requirement) Tender Schedule I – Statement of Tax Record; (k) if the Tender Particulars state that it applies (minimum form and content requirement) Tender Schedule J – Indigenous Procurement Policy; and (l) if clause 29 applies, Tender Schedule K - Environmentally Sustainable Procurement. <p>The Tenderer is requested to lodge the Tender Form and each Tender Schedule in separate, stand-alone, unsecured, electronic files in the format specified in the Tender Particulars.</p> <p>The Tenderer Administrator may also ask the Tenderer to provide clarification and authentication of materials included in the Tender.</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
4. Evaluation of Tenders		
	<p>In respect of the evaluation criteria in clause 4(a), the relevant weighting percentages in respect of those weighted evaluation criterion are to be inserted by reference to the approved Project Development and Delivery Plan.</p> <p>Delete guidance note directly below clause 4 heading.</p>	<p>Tenders will be evaluated to determine which Tender represents the best value for money to the Commonwealth.</p> <p>In considering which Tender represents the best value for money, the Commonwealth will apply the evaluation criteria listed in clause 4(a) of the Tender Conditions.</p> <p>The Tender Conditions contain the following evaluation criteria:</p> <ul style="list-style-type: none"> (a) Draft Project Plans: including Site Management Plan, Work, Health and Safety Plan and any additional Project Plans specified in the Tender Particulars. Note, not all Project Plans need to be sought for evaluation purposes, but only those of key importance for the selection process in question. In any event, it should be remembered that the Consultant will be required to submit all Project Plans in accordance with the Contract, regardless of whether or not certain Project Plans were requested as part of a Tender; (b) Proposed Resources: The type of information the Commonwealth is seeking is outlined in Tender Schedule B – Proposed Resources and Tender Schedule D – Program and Minimum Resource Schedule; (c) Previous Performance, (if the Tender Particulars state that it applies): the type of information the Commonwealth is seeking is

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>outlined in Tender Schedule C – Previous Performance;</p> <p>(d) Program and Minimum Resource Schedule: the type of information the Commonwealth is seeking is outlined in Tender Schedule D – Program and Minimum Resource Schedule;</p> <p>(e) Commonwealth Procurement Rules compliance: The type of information the Commonwealth is seeking is outlined in Tender Schedule E – Commonwealth Procurement Rules Compliance;</p> <p>(f) Financial: the type of information the Commonwealth is seeking is outlined in Tender Schedule F – Financial;</p> <p>(g) Alternative Proposals: the type of information the Commonwealth is seeking is outlined in Tender Schedule G – Alternative Proposals</p> <p>(h) Miscellaneous Matters for Evaluation comprising:</p> <p>A. insurance details and Tenderers commercial-in-confidence information (Tender Schedule H - Miscellaneous Matters for Evaluation); and</p> <p>B. information security (Tender Schedule H - Miscellaneous Matters for Evaluation)</p> <p>(i) Indigenous Procurement Policy (if the Tender Particulars state that it applies): the type of information the Commonwealth is seeking is outlined in Tender Schedule J – Indigenous Procurement Policy;</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>(j) Environmentally Sustainable Procurement (if clause 29 applies): the type of information the Commonwealth is seeking is outlined in Tender Schedule K – Environmentally Sustainable Procurement; and</p> <p>(k) any Additional Evaluation Criteria specified in the Tender Particulars.</p> <p>Further, the Commonwealth may (in its absolute discretion) take into account the information that the Tenderer provides under clause 7.2 of the Tender Conditions but not clause 7.1 (see below) and may (in its absolute discretion):</p> <p>(a) obtain and take into account information from referees, enquiries and investigations, including from referees on prior or current projects (whether or not nominated by the Tenderer in any registration of interest or its Tender), in connection with any other Commonwealth project, or from financial information or documents (whether provided by the Tenderer under clause 24 or otherwise and any Financial Viability Assessment under clause 24); and</p> <p>(b) take into account information lodged by a Tenderer in any registration of interest process, tender process or similar procurement process in connection with the Project or any other Commonwealth Project.</p> <p>The Commonwealth may also decide (in its absolute discretion) not to evaluate a Tender, discontinue negotiations (or continue to evaluate a Tender) or decide</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>to discontinue negotiations or dealings with any preferred Tenderer if:</p> <ul style="list-style-type: none"> (a) the Commonwealth considers (in its absolute discretion), and whether as a result of the exercise of its rights under clause 24 (regarding Financial Viability Assessment) or otherwise, that the Tenderer does not have the necessary financial viability to perform the Services, achieve Completion and otherwise meet its obligations under the Contract; or (b) the Tenderer has failed to comply with any of its obligations in the Disclaimer and Confidentiality Agreement or the Tender Conditions or has otherwise acted inconsistently with the tender process. <p>The evaluation criteria are closely aligned with the information to be lodged in a Tender and must be consistent with the evaluation criteria identified in the PDDP and any TEP.</p> <p>Tenderers should seek to address the evaluation criteria listed in this clause by providing the information requested in each relevant Tender Schedule. The Tender Schedules themselves indicate the general nature and extent of the information which should be lodged.</p> <p>The distinction between information provided under clause 7.1 (which is not taken into account) and 7.2 (which is taken into account) is to ensure that any Tender “speaks for itself”.</p> <p>In other words, information concerning a “proposed Tender” cannot be used if such information is provided before the</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		submission of the Tender. On the other hand, if a Tenderer provides information under clause 7.2, that is, further information or clarification of an actual Tender, this information will be taken into account during the evaluation.
5. Tenderer’s due diligence		
	Nothing to insert.	<p>This clause seeks to minimise the possibility of Defence being liable to the Tenderers for any information it provides to the Tenderers (in the Tender Documents or otherwise) and requires Tenderers to carry out their own due diligence.</p> <p>Although this clause has been drafted to minimise the legal liability of Defence in relation to the accuracy or otherwise of information provided in Information Documents, there is some risk that liability may still exist if information provided is inaccurate or misleading. In view of this, all possible steps must be taken to ensure that any information given to the Tenderers is accurate and free from errors and that the relevant procedures under the Tender Documents are followed.</p> <p>The Tenderer is required to do, and will be deemed to have done, everything that would be expected of an expert professional provider of the Services in assessing the risks it is assuming under the Contract and ensuring that its tendered Fee contains allowances to protect it against any of these risks.</p>
6. Information Documents		

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Reference	Information to be inserted by Tender Administrator	Guidance
	Nothing to insert.	<p>The Tenderer acknowledges and agrees that the Information Documents are for the information only of the Tenderer and that they do not form part of the Tender Documents and will not form part of the Contract.</p> <p>Importantly, the Tenderer warrants that it has duly completed, executed and returned the Disclaimer and Confidentiality Agreement by email to the Tender Administrator and agrees that, if requested by the Tender Administrator, it must provide the names and addresses of all persons to whom the Tenderer has issued the Tender Documents and Information Documents by the time and date specified in the Tender Administrator’s request.</p> <p>Note: there is no longer a list of Information Documents included in the Schedule to the Disclaimer and Confidentiality Agreement. Rather, Information Documents will be any document issued by the Tender Administrator prior to the ATM Close Date and ATM Close Time that is expressly stated to be an “Information Document”. Prior to the release of the Tender Documents the Tender Administrator should consider internally within Defence which documents (if any) should be included as part of an initial bundle of documents to be issued to Tenderers as Information Documents. It is important that the documents are issued under a formal document titled “Information Document” and lists and identifies by clear title description, date, author etc the documents that form the Information</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>Documents.</p> <p>By way of practical guidance, the types of documents which may (depending on the facts) be issued as Information Documents may include (for example) geotechnical investigation reports, site information or environmental reports which are provided to the Tenderers for information and are not intended to lessen the Tenderers’ obligations to perform their own due diligence.</p>
7. Proposed procedure before and after ATM Close Date and ATM Close Time		
	Nothing to insert.	<p>This clause sets out the parameters within which tender clarification and negotiations can take place to obtain information and clarify aspects of the Tenderer’s proposed Tender and explain the intention and answer questions about any aspect of the Tender Documents.</p> <p>This clause has been drafted to minimise the legal liability of Defence in relation to the tender process before and after the ATM Close Date and ATM Close Time.</p> <p>The Tender Administrator and other project personnel must nevertheless be careful not to make any representations or engage in any conduct which does not meet all probity requirements during the tender process.</p> <p>In seeking to maximise the likelihood that Defence will receive competitive Tenders from each Tenderer, Defence has a number of options available to it.</p> <p>Before the ATM Close Date and ATM Close Time, Defence has the discretion to meet separately with each Tenderer and</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>discuss with them information and clarification in relation to their proposed Tenders. Defence may be selective in the issues it raises or discusses with Tenderers. However, information provided in this period is not taken into account during evaluation. In other words, the Tender speaks for itself.</p> <p>After the ATM Close Date and ATM Close Time, Defence may meet with representatives of the Tenderer to obtain further information in relation to or otherwise clarify aspects of the Tender and require the Tenderer to provide certain information or clarification within a certain time. Defence may also require a Tenderer to present key elements of its Tender. This information or clarification may be taken into account during evaluation.</p> <p>The Tenderer must attend and participate in all meetings and presentations required by Defence under this clause.</p> <p>Defence has an absolute discretion to issue a written notice to appoint one or more preferred Tenderers for the purpose of negotiating or otherwise seeking to document and finalise a Contract. The Commonwealth may by notice discontinue negotiations or dealings at any time and for any reason with a preferred Tenderer.</p> <p>The selection of a preferred Tenderer does not bind Defence to a contractual or other legal relationship with that Tenderer and may be subject to any conditions stated in the notice, including the conduct of a Financial Viability assessment and the signing of a “preferred tenderer</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>negotiation protocol”.</p> <p>A preferred tenderer negotiation protocol represents best practice in public sector procurement of major project delivery. The intent of any preferred tenderer negotiation protocol is to bind the preferred Tenderer to a strict process for the negotiation of its tender to avoid “deal creep”, in which the preferred Tenderer is able to dilute the risk allocation from Defence’s perspective and incur delays in finalising the agreed terms and signing the contract.</p> <p>Before appointing a preferred Tenderer, the Directorate of Program Assurance and/ or Directorate of Quality and Compliance should be approached for advice as to whether a preferred tenderer negotiation protocol is required and, if so, its proposed terms.</p> <p>The procedure for negotiation with preferred Tenderers is entirely at the discretion of Defence and may be discontinued at any time and for any reason and one or more other preferred Tenderers appointed instead.</p> <p>Under the Commonwealth Procurement Rules there are restrictions on varying, suspending, discontinuing or terminating tender processes. One reason for this is that tender processes involve considerable “bid costs”.</p> <p>Accordingly, specific advice must be obtained from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance in circumstances where Defence is considering such action.</p> <p>In addition, clause 7.3 sets out various Tender Process acknowledgements,</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>relating to:</p> <ul style="list-style-type: none"> • the manner in which the Commonwealth conducts the Tender process; • reliance on Information Documents or meeting conduct; and • the ability of the Commonwealth to vary, suspend or discontinue the Tender process.
8. Acceptance of Tenders		
	Nothing to insert.	<p>The Commonwealth is not bound or required to accept the lowest or any Tender.</p> <p>The Tender Administrator and project personnel must ensure that any acceptance of a Tender complies strictly with the requirements of clause 8 of the Tender Conditions in order for a contractual relationship to be created between Defence and the Tenderer.</p> <p>A Tender will not be deemed accepted unless and until the Contract set out in Part 5 is completed and the Formal Agreement is signed by the Tenderer and the Commonwealth. This is to ensure that each contract being entered into by Defence contains all appropriate terms.</p> <p>This clause does not allow Defence to accept Tenders by using a letter of acceptance or any other document or form of communication.</p>
9. Notification and debrief		

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Reference	Information to be inserted by Tender Administrator	Guidance
	Nothing to insert.	<p>Under clause 7.17 of the Commonwealth Procurement Rules, following the rejection of a submission or the award of a contract, officials must promptly inform affected Tenderers of the decision.</p> <p>This clause provides that if:</p> <ul style="list-style-type: none"> (a) the Tender was non-conforming, the Tenderer will be notified by the Commonwealth in writing and no debrief will be provided unless the Commonwealth considers, in its absolute discretion, that it would be appropriate in the particular circumstances to do so following a written request from the Tenderer; or (b) the Tender was conforming, the Tenderer: <ul style="list-style-type: none"> (i) may be notified that its Tender has been “set aside” pending negotiations with one or more preferred Tenderers; and (ii) will be notified in writing by the Commonwealth if its Tender was unsuccessful. <p>Within 14 days of receiving:</p> <ul style="list-style-type: none"> (c) notice that its Tender was unsuccessful; or (d) the date upon which the Tender is accepted under clause 8 of the Tender Conditions, <p>the Tenderer may notify the Tender Administrator by email that a debrief is required.</p> <p>Debriefs will be provided by the Commonwealth. The Tender Administrator may assist in the</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>Commonwealth in preparing for the debrief and may also attend the debrief. A debrief will typically be given orally or, if required by Commonwealth policy, in writing.</p> <p>It is important that any debrief be provided promptly. However, the suitable time for the debrief is to be determined by the Commonwealth (in its absolute discretion) after the Award Date.</p> <p>Although a 14 day notification period has been inserted to provide some certainty, if a Tenderer seeks a debrief outside this period, Defence should still consider providing one. If in doubt, seek advice from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p> <p>Any debrief must be prepared carefully and based on clear and objective evidence. Matters that should be addressed in a debrief include:</p> <ul style="list-style-type: none"> • why a tender was successful or unsuccessful; • areas of strength or weakness in the tender; • areas of non-compliance in the tender; and/or • what tenderers can do to improve future tenders. <p>Comparisons with other Tenderers or Tenders should not be made, nor can any Commercial-in-Confidence Information be provided.</p> <p>If there is any doubt as to whether or not certain information should be included in a proposed briefing or debriefing, advice</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.
10. Costs and claims		
	Nothing to insert.	This clause provides that the Commonwealth will not make any payment to the Tenderer or any other entity for costs (and other amounts) incurred or suffered by the Tenderer or other entity arising out of or in connection with preparing a Tender, the tender process (including, if applicable, any industry briefing or any Tenderer meeting) or any discussions, negotiations or enquiries or any work undertaken by the Tenderer before or after the ATM Close Date and ATM Close Time or any failure to comply with the Disclaimer and Confidentiality Agreement or the Tender Conditions.
11. Joint bids		
	Nothing to insert.	If a registration of interest process was used and the registration of interest: <ul style="list-style-type: none"> (a) was not lodged on a Joint Bid Basis, the Tenderer must not lodge its Tender on a Joint Bid Basis; or (b) was lodged on a Joint Bid Basis, the Tenderer must lodge its Tender on the same basis, unless it emails the Tender Administrator no later than 14 days prior to the ATM Close Date and ATM Close Time requesting permission from the Commonwealth to change the basis of its bid under this clause. The Tender

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>Administrator will notify the Tenderer that the Commonwealth either grants permission (with or without conditions) or refuses permission.</p> <p>These discretions exist because a Tenderer may have been shortlisted as a result of its joint bid arrangements and Defence always wishes to know the relevant entities with which it is dealing. The onus is on the prospective Tenderer to communicate with Defence about any proposed changes to the basis for its Tender.</p> <p>If a Tender is permitted to be lodged on a Joint Bid Basis, it should address the matters identified in the Tender Documents as relevant for Joint Bids. For example, in the Tender Form, the Tenderer is requested to provide certain additional information.</p> <p>If a registration of interest process was not used, the Commonwealth offers the Tenderer the opportunity to lodge its Tender on a Joint Bid Basis.</p> <p>This clause also provides that the Commonwealth reserves the right to amend the Contract in Part 5 to address joint bid matters, including joint and several liability and otherwise to provide it with sufficient protection in the event of default or financial difficulty of any type, including in relation to the provision of cross guarantees, parent company guarantees, indemnities, collateral warranties, direct collateral covenants with subconsultants or otherwise.</p> <p>Where the Tender is lodged on a Joint Bid Basis the Tenderer must complete and</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>lodge a single Tender Form on behalf of all entities that are lodging the Tender on a Joint Bid Basis and ensure that the Tender Form is duly executed by each such party.</p>
12. Restriction on use of personnel in preparation of Tender		
	<p>Nothing to insert.</p>	<p>Subject to the Commonwealth’s permission, the Tenderer must ensure that its Tender is not prepared (in whole or in part) by any officer, employee, agent or adviser of the Tenderer who was:</p> <ul style="list-style-type: none"> (a) an employee of Defence, or involved in any capacity in the planning or performance of the Services, the Works, or the Project at any time during the 12 months immediately preceding the date on which the Tender Documents were issued to the Tenderer; or (b) involved in any capacity in the Commonwealth’s management of the tender process or preparation of the tender documents at any time. <p>If the Tenderer wants to involve a person described above to participate in the preparation of the Tender it must make a request by email for the Commonwealth’s permission no later than 14 days prior to the ATM Close Date and ATM Close Time.</p> <p>Prior approval from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance must be obtained before any action is taken in respect of or in reliance on this clause.</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
13. Conflict of interest		
	Nothing to insert.	<p>The objective of this clause is to ensure the Commonwealth can decide not to evaluate (or continue to evaluate) a Tender if the Tenderer fails to notify or resolve a conflict of interest.</p> <p>It includes a process for the Tenderer to immediately notify the Tender Administrator of conflicts and taking steps to prevent, end, avoid, mitigate, resolve or otherwise manage such conflicts.</p> <p>The Commonwealth may in its absolute discretion decide not to evaluate (or continue to evaluate) a Tenderer if the Tenderer does not comply with any of clause 13(a), (b) or (c).</p> <p>Prior approval from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance must be obtained before any action is taken in respect of or in reliance on this clause.</p>
14. Use of Tenders		
	Nothing to insert.	<p>The Tenderer acknowledges that its Tender and any other documents arising out of or in connection with the tender process become the property of the Commonwealth.</p> <p>Subject to the Commonwealth Procurement Rules the Commonwealth may use, retain and copy the information in connection with the tender process for a range of purposes set out in clause 14(b).</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
15. Improper or Unlawful conduct		
	Nothing to insert.	<p>The Tenderer must not, in preparing its tender, communicate or make any arrangement or arrive at any understanding with any of the other Tenderers concerning the Tender Documents or any aspect of the Services. The Commonwealth may in its absolute discretion decide not to evaluate (or continue to evaluate), a Tender submitted by a Tenderer who is in breach of this prohibition.</p> <p>In addition, the Commonwealth may decide not to evaluate (or continue to evaluate) a Tender if it has been prepared in breach of a statutory requirement regarding the offering of unlawful inducements or otherwise with the utilisation of information unlawfully obtained from the Commonwealth.</p>
16. Commonwealth policies		
	Nothing to insert.	<p>This objective of this clause is to draw the Tenderer’s attention to the fact the Commonwealth is subject to certain requirements and policies regarding the scrutiny of its tendering and contracting processes, including requirements to publish details on AusTender of agency agreements, Commonwealth contracts, amendments and variations to any agreement or contract and standing offers with an estimated value of \$10,000.00 or more.</p>
17. Australian National Audit Office		

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Reference	Information to be inserted by Tender Administrator	Guidance
	Nothing to insert.	The objective of this clause is to draw the Tenderer’s attention to the <i>Auditor-General Act 1997</i> (Cth), which provides the Auditor-General or an authorised person with certain rights to have access to information, documents and records.
18. Procurement Complaints		
18.1 General Procurement Complaints	Nothing to insert	This clause explains the process under which the Tenderer may make a complaint in relation to the tender process.
18.2 Complaints under the Government Procurement (Judicial Review) Act 2018	Nothing to insert	<p>This clause explains the process under which the Tenderer may submit a complaint in relation to the tender process in circumstances where the Tender is a Covered Procurement for the purposes of the Judicial Review Act.</p> <p>It is noted that section 5 of the Judicial Review Act provides that a procurement is a “Covered Procurement” if the rules in Divisions 1 and 2 of the Commonwealth Procurement Rules apply to the procurement and the procurement is not included in a class of procurements specified in a determination under section 5(2) which provides that the Minister may, by legislative instrument, make a determination for the purpose of section 5(1)(b).</p> <p>Under Part 2 of the Judicial Review Act an interested party may obtain an injunction restraining an official of a Commonwealth entity from breaching the Commonwealth Procurement Rules. However, this is subject to Section 22 of the Act which</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		provides that the accountable authority of a Commonwealth entity may issue a public interest certificate stating that it is not in the public interest to suspend a specified procurement. If such a certificate is to be considered then liaise with the Directorate of Program Assurance and/ or Directorate of Quality and Compliance in this regard.
19. Freedom of Information		
	Nothing to insert.	The objective of this clause is to draw the Tenderer’s attention to the <i>Freedom of Information Act 1982 (Cth)</i> , which gives members of the public certain rights of access to official documents of the Commonwealth Government and its agencies.
20. Tenderer’s Commercial-In-Confidence Information		
	Nothing to insert.	<p>This clause permits Tenderers to specify information it has provided during the tender process as “Commercial-in-Confidence Information” and gives Defence the discretion to agree to the classification of such information. The Tender Administrator is required to notify the Tenderer whether the Commonwealth agrees, or otherwise, to the classification of Commercial- in-Confidence Information.</p> <p>As outlined in Item 2 of Tender Schedule H, the following types of information in, or provided in relation to, contracts would generally not be considered Commercial-in-Confidence Information:</p> <p>(i) performance and financial</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>guarantees;</p> <ul style="list-style-type: none"> (ii) indemnities; (iii) the price of an individual item, or groups of items of goods or services; (iv) rebate, liquidated damages and service credit clauses; (v) performance measures applicable to the Contract; (vi) clauses which describe how Intellectual Property Rights are to be dealt with; (vii) payment arrangements; and (viii) the performance of the Consultant against the requirements of the Contract and agreed assessment criteria. <p>The following types of information may meet the criteria of being protected as Commercial-in-Confidence Information:</p> <ul style="list-style-type: none"> (i) trade secrets; (ii) proprietary information (this could be information about how a particular technical or business solution is to be provided); (iii) internal costing information or information about profit margins; and (iv) pricing structures (if this information would reveal whether there was a profit or loss on the supply of a particular good or service). <p>It should be noted that the</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>Commonwealth policy principles of transparency and accountability promote the disclosure of contractual information to the maximum extent and that information provided by the Tenderer is only kept confidential where there are sound reasons for doing so.</p> <p>The Commonwealth is also subject to the disclosure requirements referred to in clause 20(b) of the Tender Conditions.</p>
21. Privacy		
	Nothing to insert.	<p>This clause provides that the Tenderer agrees that, for the purposes of lodging its Tender, it will comply with the Australian Privacy Principles as if the Tenderer were an agency as defined in the Privacy Act.</p>
22. Workplace Gender Equality		
	Nothing to insert.	<p>The Workplace Gender Equality Procurement Principles impose obligations on the Commonwealth to obtain a letter of compliance from any Tenderer who is a “Relevant Employer” as defined in the <i>Workplace Gender Equality Act 2012</i> (Cth) (WGE Act). The Australian Government has a policy of not purchasing goods or services from suppliers who do not comply with their obligations, if any, under the WGE Act.</p> <p>At the Award Date, the successful Tenderer must comply with the WGE Act if it applies to the successful Tenderer.</p>
23. Employee entitlements		

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Reference	Information to be inserted by Tender Administrator	Guidance
	Nothing to insert.	<p>It is a requirement of the Commonwealth Procurement Rules that the Commonwealth must not enter into a contract with a tenderer who has a judicial decision (being a decision of any court, tribunal or other body with authority to make a decision or determination which is binding on the Tenderer) against it (not including a decision under appeal) relating to employee entitlements and who has not satisfied any resulting order (e.g. where an entitlement remains unpaid).</p> <p>This means that at the Award Date, the successful Tenderer must not have a judicial decision against it (not including a decision under appeal) relating to employee entitlements where the resulting order remains unsatisfied.</p> <p>Under clause 23(b) the Tenderer must make the declaration set out in section 6 of the Tender in Part 3.</p>
24. Financial viability		
24.1 Solvency Statement and Financial Information	Nothing to insert.	<p>At any time before the Award Date, the Tender Administrator may notify the Tenderer that the Commonwealth requires the Tenderer to provide to the Tender Administrator (or the Independent Financial Adviser engaged by the Commonwealth) the information or documents listed in clause 24.1(a) to (h). This includes a duly executed solvency statement in the form attached to the Tender Administrator’s notice.</p> <p>Additionally, clause 24.1(k) allows the Commonwealth to request the provision of “any additional financial information or</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		documents” and does not restrict the Commonwealth’s request to the information listed in clause 24.1.
24.2 Independent Financial Adviser	Nothing to insert.	<p>The Tenderer acknowledges that the Commonwealth may (in its absolute discretion) engage an Independent Financial Adviser to assess whether or not the Tenderer has the necessary financial viability to perform the Services and otherwise meet its obligations under the Contract if it is the successful Tenderer.</p> <p>The Tenderer is required to co-operate and do everything necessary to assist the Commonwealth, the Tender Administrator and Independent Financial Adviser in the Financial Viability Assessment process.</p>
25. Strategic Notice Events		
25.1 Tenderer’s warranty 25.2 Tenderer to give notice	Nothing to insert.	<p>Under clause 25.1, the Tenderer warrants that, at the time of lodging its Tender, it is not aware of any Strategic Notice Event.</p> <p>Under clause 25.2, the Tenderer agrees that it will comply with its obligations under the Disclaimer and Confidentiality Agreement in respect of the notification and management of any Strategic Notice Event.</p>
25.3 Release	Nothing to insert.	Under clause 25.3, the Tenderer must bear, and releases the Commonwealth in respect of, all expenses, costs, damages or liabilities suffered or incurred by the Tenderer or any other person or entity arising out of or in connection with the Strategic Notice Event or the exercise of any of the Tender Administrator’s or the

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Reference	Information to be inserted by Tender Administrator	Guidance
		Commonwealth’s absolute discretion under clause 25 or a corresponding clause in respect of any other Tenderer.
26. Agreed Subconsultants		
	In clause 26(b)(i), insert either “Fee” or “Planning Phase Fee and Indicative Delivery Phase Fee”	<p>Defence may have already engaged certain consultants for services which form part of the Consultant’s Services under the Design Services Contract, in which case Defence is entitled to require the Consultant to engage such consultants as Agreed Subconsultants to perform the pre-determined services as a subconsultant to the Consultant under the Contract.</p> <p>If Defence wishes to allow part of the Services to be carried out by an Agreed Subconsultant, insert details of the Agreed Subconsultant, the Agreed Subconsultant Services and the amount to be allowed by the Tenderer in its lump sum Fee and its program for those Services.</p>
27. Statement of Tax Record		
27.1 Tenderer to provide valid and satisfactory STRs	Nothing to insert	<p>This clause would apply if the Tender Particulars states that it applies – see guidance in relation to this clause 27.1 in the Tender Particulars in Part 3.3.3 below.</p> <p>The Tenderer’s attention is drawn to the Shadow Economy Procurement Connected Policy. More information about the requirements arising under this policy is available at: Shadow Economy Procurement Connected Policy – Increasing the integrity of government</p>

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Reference	Information to be inserted by Tender Administrator	Guidance
		<p>procurement Treasury.gov.au.</p> <p>If this clause applies, the Tenderer must complete and lodge Tender Schedule I – Statement of Tax Record, which includes providing all of the satisfactory and valid STRs required for the Tenderer’s entity type under (and as set out in) Schedule I – Statement of Tax Record and making the Declaration in the form set out in item b of Tender Schedule I – Statement of Tax Record.</p> <p>It should be noted that this is a minimum form and content requirement for a Tender under clause 3.1(b)(iii) of the Tender Conditions. For further information to the Shadow Economy Procurement Connected Policy, see the below link: https://treasury.gov.au/policy-topics/economy/shadow-economy/procurement-connected-policy</p>
27.2 Tenderer to confirm it holds valid and satisfactory STRs	Nothing to insert	<p>Clause 27.2 does not apply unless the Tender Particulars state that it applies.</p> <p>If any STR provided by the Tenderer as part of any Invitation to Register Interest process or as part of the tender process is or will be no longer valid and satisfactory at the time of the proposed award date, the Tenderer must, if and within the time required by the Tender Administrator, provide the Tender Administrator with a copy of each STR required for its entity type that will be valid and satisfactory on the proposed Award Date.</p> <p>The Tenderer must obtain and hold valid and satisfactory STRs required for the entity type of each subconsultant that it will engage for the Services under a</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		subcontract with an expected value of over \$4 million (GST inclusive) if known as at the ATM Close Date and ATM Close Time.
27.3 Acknowledgement	Nothing to insert	<p>This clause 27.3 applies where either of clause 27.1 or 27.2 applies.</p> <p>The Tenderer acknowledges that the Commonwealth may exclude the Tenderer from further consideration if the Tenderer does not provide the Tender Administrator with copies of all STRs required for its entity type.</p>
27.4 Definitions	Nothing to insert	This clause sets out the definitions that apply to clause 27.
28. Indigenous Procurement Policy		
28.1 General	Nothing to insert.	<p>The Tenderer’s attention is drawn to the Indigenous Procurement Policy available on the Indigenous Procurement website.</p> <p>The purpose of the Indigenous Procurement Policy is to stimulate Indigenous entrepreneurship and business development and provide Indigenous Australians with more opportunities to participate in the economy. This may involve the Tenderer’s direct engagement of Indigenous Enterprises as subconsultants, suppliers or otherwise or further along the supply chain.</p> <p>More information on Indigenous Enterprises is available at: www.supplynation.org.au and in the Indigenous Procurement Policy.</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
28.2 Tenderer’s Response – High Value Contract	Nothing to insert	<p>Where the Tender Particulars state that clause 28 applies, the Tenderer must complete and lodge Tender Schedule J - Indigenous Procurement Policy. As part of Tender Schedule J, this includes signing a Declaration of Compliance, providing an Indigenous Participation Plan and details of its past performance in increasing Indigenous participation, including, where relevant, complying with any Indigenous Participation Plan.</p> <p>Completing and lodging Tender Schedule J is a minimum form and content requirement under clause 3.1(b)(iii) of the Tender Conditions.</p>
28.3 High Value Contract and Remote Area Contract	Nothing to insert.	<p>A procurement will involve a “Remote Area” if the area is identified on the map on the Indigenous Procurement Policy website.</p> <p>If clause 28.3 applies (i.e., if the procurement involves a “Remote Area”), the Tenderer is requested to describe in its Indigenous Participation Plan how it will ensure that the Services deliver significant Indigenous employment or Indigenous supplier use outcomes in the Remote Area. More information on Remote Areas can be found in section 4.5 of the Indigenous Procurement Policy.</p>
29. Environmentally Sustainable Procurement		
29. Environmentally Sustainable Procurement	Nothing to insert.	<p>As part of its Tender, the Tenderer must complete and lodge Tender Schedule K – Environmentally Sustainable Procurement.</p> <p>The Tenderer’s attention is drawn to the</p>

Design Services Contract – Tender Conditions		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>Environmentally Sustainable Procurement Policy. More information on the Environmentally Sustainable Procurement Policy is available at: www.dcceew.gov.au/sustainable-procurement.</p> <p>This clause requires that Tenderers complete and lodge item C of Tender Schedule K – Environmentally Sustainable Procurement, as this is a minimum form and content requirement in accordance with clause 3.1(b)(iv).</p> <p>This also identifies that the Tenderer will have to comply with the Supplier Environmental Sustainability Plan it provides in its response to Tender Schedule K – Environmentally Sustainable Procurement as part of any Contract it is awarded for the Services.</p>
30. Special Conditions of Tender		
	Nothing to insert.	The Tender Administrator is required to specify any special conditions to be included and attached to the Tender Documents. See guidance in relation to this clause 30 in the Tender Particulars in Part 3.3.3 below.

3.3.3 Completing the Tender Particulars and Tender Schedules

The Tender Particulars must be completed by the Tender Administrator prior to issue of the Tender Documents.

Matters in **[SQUARE BRACKETS, BOLD AND ITALICS]** may contain guidance notes and must be deleted before the Tender Documents are issued.

Set out below is a summary and a short explanation as to the type of information which should be included in the Tender Particulars.

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
Tender Particulars		
ATM Close Date and ATM Close Time: (Part 1, clause 2.1(b))	Insert details of the ATM Close Date and ATM Close Time.	<p>The Commonwealth needs to provide sufficient time for Tenderers to prepare and lodge a Tender.</p> <p>The Tender Administrator must have regard to the minimum timeframes in the Commonwealth Procurement Rules and Defence policy when specifying the closing date. For example, the tender period must be at least 25 days from the date and time the Commonwealth publishes the Tender Documents on AusTender.</p> <p>The appropriate length of the tender period will need to be considered in each case and will be governed by the urgency of the need for the project, the complexity of the project and what constitutes a reasonable period of time for Tenderers to respond.</p> <p>Under clause 3.3(a) if the Tender is not lodged before the ATM Close Date and ATM Close Time it will be non-conforming and will not be evaluated (or continue to be evaluated) unless the reason it was not lodged in accordance with clause 3.1(a) was solely due to mishandling by the Commonwealth.</p> <p>12:00 pm noon (ACT local time) is the default time (which incorporates any effect of daylight savings).</p>
Tender Administrator:	Insert the name and email address of the person or	This may be an individual, a firm, a company, a member of the Australian

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
(Part 1, clause 2.1(u))	firm/company who will act as the Tender Administrator.	<p>Defence Force or a public servant of Defence. If a firm or a company, the ABN should be specified.</p> <p>The Tender Administrator will almost invariably be a private sector consultant engaged pursuant to the Defence Infrastructure Panel arrangements. In such cases, the firm or company should be specified as the Tender Administrator. Correspondence can be marked to the “attention” of an individual within that organisation as specified in the following Tender Particular but the individual in that circumstance should not be the Tender Administrator.</p> <p>Please take care to ensure that these details are accurate.</p> <p>In order to minimise enquiries, and so as to comply with the method of communication referred to in clause 2.2(a) of the Tender Conditions, it is suggested to include an email address, but do not include a telephone number. Please ensure the contact details are the same as the those inserted in the Disclaimer and Confidentiality Agreement.</p>
Conditions for Participation: (Part 1, clause 3.1(c)(ii))	<p>Insert any conditions for participation (if any) once approval from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance has been obtained.</p> <p>Also insert the paragraph starting “The Tenderer should note...” and select the applicable text in the</p>	<p>See commentary on Schedule D of the Invitation to Register Interest under Part 2.3 above regarding conditions for participation.</p> <p>Because a failure to satisfy any condition for participation has serious consequences for any Tender, prior approval from the Delegate must be obtained before any conditions for participation are specified in the Tender Particulars.</p> <p>If approval has been obtained from the</p>

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
	<p>first sentence (ie. from “this is/these are” etc).</p> <p>If no conditions for participation are approved, use the default position “None stated”.</p>	<p>Delegate, the Tender Administrator must also include the default paragraph that draws the Tenderer’s attention to ensuring all information is provided in respect of the conditions for participation and that the respective information from each joint bid party must be included (if applicable).</p>
<p>Format of Tender: (Part 1, clause 3.4(b)(iii))</p>	<p>Complete requirements for format of electronic copy including relevant version requirements for each of Microsoft Word, Microsoft Excel and PDF. For example, Microsoft Word (compatible with Microsoft Office 2021), text searchable PDF.</p>	<p>The Tenderer is referred to the tender lodgement requirements in clause 3.4(b).</p> <p>The Tenderer must lodge its tender in accordance with the response lodgement procedures described in the Tender Documents and the procedures on AusTender. For example, the Tender Form and each Tender Schedule must be lodged in separate, stand-alone, unsecured electronic files in the format specified in this Tender Particular.</p>
<p>Maximum file size: (Part 1, clause 3.4(b)(iii)B)</p>	<p>Insert the number of megabytes per upload (with files compressed or zipped as required).</p>	<p>The Tenderer is referred to the tender lodgement requirements in clause 3.4(b), including ensuring that the Tenderer lodges each of the Tender Form and each Tender Schedule in the format specified and which (among other things) do not exceed the file size specified in this Tender Particular.</p>
<p>Previous Performance: (Part 1, clause 3.4(b)(ii)C and 4(a)(iii) and Part 4, Tender Schedule C – Previous Performance)</p>	<p>Select whether or not previous performance will apply.</p>	<p>If an Invitation to Register Interest process has only very recently been conducted and previous performance was evaluated, then consider whether previous performance will also need to be evaluated at the Tender stage. The approach must be consistent with the PDDP.</p>

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
<p>Additional Evaluation Criteria: (Part 1, clause 4(b))</p>	<p>If the Commonwealth or the Tender Administrator wish to insert additional Evaluation Criteria, prior approval must be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance and approach must be consistent with the PDDP.</p> <p>Any weighting placed on the Evaluation Criteria must be specified or, if none, state that there is no weighting for the additional criterion/ criteria and whether evaluation will be on the basis that the criteria is met or whether value for money is achieved.</p> <p>Accordingly, if there to be additional evaluation criteria insert and complete the paragraph starting “The Tenderer should note...” and select the applicable text in the first sentence (ie. from “this is an/these are” etc).</p> <p>If no additional evaluation criteria, use the default position “None stated”.</p>	<p>Tender Documents are required to identify all additional evaluation criteria.</p> <p>In formulating this list of additional evaluation criteria, the Tender Administrator needs to understand the other, broad range of, matters already addressed in the Tender and ensure that there is as little “doubling-up” as possible.</p> <p>Defence’s evaluation criteria are set out in clause 4 of the Tender Conditions. The evaluation criteria listed are closely aligned with the information requested or required in the Tender Schedules.</p> <p>However, it is recognised that there may be other matters which are important to Defence in respect of a particular project.</p> <p>For this reason, highly desirable characteristics or qualities should not be listed as conditions for participation but should instead be specified as evaluation criteria in this Tender Particular.</p> <p>Tenders are usually evaluated based on the relative importance of each criterion. A common method is to weight criteria according to their relative significance using a rating scale.</p> <p>When considering additional matters for evaluation, the following should be considered:</p> <ul style="list-style-type: none"> (a) any additional matters to form part of the evaluation criteria should be identified in the PDDP and the TEP and be directly relevant to the requirements for the project; (b) any additional matters forming part of the evaluation criteria must be appropriately drafted to ensure that

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>they are “true” matters for evaluation;</p> <p>(c) the Tender Documents must clearly identify such additional matters forming part of the evaluation criteria (if any) that are to be treated as critical or essential in the evaluation of Tenders and care should be taken to ensure these do not become “conditions for participation” or “minimum form and content requirements” as a result of “mandatory” language used in describing the additional matter; and</p> <p>(d) because Tenders cannot be ranked using conditions for participation (if any), conditions for participation (if any) that also form part of the evaluation criteria should be listed twice.</p> <p>Approval for any additional evaluation criteria must be obtained from the Delegate.</p>
<p>Email address for submitting general procurement complaints: (Part 1, clause 18.1)</p>	Nothing to insert	The default email address has been included into the template already, being cfiqualityandcompliance@defence.gov.au
<p>Complaints under the Judicial Review Act (Part 1, clause 18.2)</p>	<p>If the tender process is a covered procurement insert: Procument.complaints@defence.gov.au</p> <p>If not a covered</p>	<p>A tender process will be a covered procurement for the purposes of the Judicial Review Act if the rules in Division 1 and Division 2 of the Commonwealth Procurement Rules apply to the procurement.</p> <p>Defence personnel / Tender Administrator</p>

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
	<p>procurement insert “not applicable”.</p> <p>If the tender process is a covered procurement insert whether a public interest certificate has or has not been issued.</p> <p>If it is not a covered procurement insert “not applicable”.</p> <p>Delete the guidance notes.</p>	<p>to liaise with the project’s legal and probity adviser as appropriate.</p>
<p>Agreed Subconsultants : (Part 1, clause 26)</p>	<p>Insert details of Agreed Subconsultants and details of the Agreed Subconsultant Services, including the amount to be allowed by the Tenderer in its lump sum Fee for those Services, as applicable.</p> <p>If Defence does not have all the details at the time of issuing the Tender Documents insert “To be advised via addendum”.</p> <p>If there are no Agreed Subconsultants, insert “None stated”.</p> <p>Delete the guidance notes.</p>	<p>Defence may have already engaged certain consultants for services which form part of the Consultant’s Services under the Design Services Contract, in which case Defence is entitled to require the Consultant to engage such consultants as Agreed Subconsultants to perform the pre-determined services as a subconsultant to the Consultant under the Contract.</p> <p>If Defence wishes to allow part of the Services to be carried out by an Agreed Subconsultant, insert details of the Agreed Subconsultant, the Agreed Subconsultant Services and the amount to be allowed by the Tenderer in its lump sum Fee and its program for those Services.</p>
<p>Shadow Economy Procurement Connected Policy –</p>	<p>Select whether clause 27.1 does or does not apply.</p> <p>Delete the guidance</p>	<p>Clause 27.1 applies unless stated otherwise.</p> <p>Clause 27.1 will apply if no invitation to register interest process has been</p>

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
Tenderer to provide valid and satisfactory STRs: (Part 1, clause 27.1)	notes.	conducted and the procurement is an open tender with an estimated value over \$4m (GST inclusive).
Shadow Economy Procurement Connected Policy – Tenderer to confirm it holds valid and satisfactory STRs: (Part 1, clause 27.2)	Select whether clause 27.2 does or does not apply. Delete the guidance notes.	Clause 27.2 does not apply unless stated otherwise. Clause 27.2 will apply where an invitation to register interest process has been conducted and the procurement has an estimated value over \$4m (GST inclusive).
Indigenous Procurement Policy: (Part 1, clauses 3.1(b)(iii), 4(a)(ix) and 28 and Part 4, Tender Schedule J - Indigenous Procurement Policy)	Delete the option that is not applicable, depending on whether or not the Contract is a “High Value Contract”. Delete the guidance notes.	“High Value Contract” has the meaning given to that term in the Indigenous Procurement Policy, and is for contracts valued (over all phases (if any)) at \$7.5m where more than half of the value of the contract is being spent in one or more of the Mandatory Minimum Requirement industry sectors listed in The Indigenous Procurement Policy. Please note that Option 1, the Contract is not a high value contract, is the default option for the Design Services Contract. Defence personnel / Tender Administrator to liaise with the project’s legal and probity advisor as appropriate.
Indigenous Procurement	Insert whether clause 28.3 does or does not	“Remote Area” has the meaning in the Indigenous Procurement Policy and under

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
Policy – Remote Area: (Part 1, clause 28.3)	apply. Clause 28.3 does not apply unless stated otherwise. Delete the guidance notes.	clause 2.1 of the Tender Conditions. The Tender Administrator is to review and consider the Remote Area Map to determine whether this is applicable to the Project (See https://www.niaa.gov.au/resource-centre/indigenous-affairs/ripp-map-data).
Environmentally Sustainable Procurement Policy: (Part 1, clause 29)	Insert whether clause 29 does or does not apply. Clause 29 applies unless stated otherwise.	Clause 29 will apply where the value of the Services (over all phases – if any) will exceed \$7.5m (GST inclusive).
Special Conditions of Tender (Part 1, clause 30)	Insert any special conditions of Tender (if any) once approval from the Directorate of Program Assurance and/or Directorate of Quality and Compliance has been obtained. If no special conditions of tender are required or approved, use the default position “None stated”. Delete the guidance notes.	“None stated” is the default position. Special conditions of tender must be used for genuine project-specific requirements and are not the same as the Special Conditions of Contract which may be included in Part 5. Advice and approval must be obtained from the Delegate if special conditions of Tender are to be used.
Additional Project Plans: (Part 4, Tender Schedule A – Draft Project Plans, item (e))	Insert the description of any additional Project Plans. If no additional Project Plans will be required, insert “Nil” or “None stated”.	Project Plans which are already requested by Defence to be provided by each Tenderer in draft form at time of tender comprise the: (a) Site Management Plan; and (b) Work Health and Safety Plan. The types of project plans necessary for evaluation purposes must be determined on a project-by-project basis, having

Design Services Contract – Tender Particulars		
Reference	Information to be inserted by Tender Administrator	Guidance
		<p>regard to its particular requirements and features.</p> <p>Note also that it may be necessary to prepare special conditions to provide the detailed requirements and purposes of each additional project plan in question. If so, advice from Defence’s legal adviser for the project should be sought.</p>
<p>Program Format: (Part 4, Tender Schedule D – Program and Minimum Resource Schedule, Item 1(g))</p>	<p>Insert either Primavera Suretrak/Microsoft Project</p>	<p>Insert the appropriate program format which would allow the Tender Evaluation Board to review the information provided. Some program format may be preferred over others, depending on the level of information which can be reviewed. The wording here also allows the Tenderers to request approval from the Tender Administrator that the program be lodged in a different but equivalent format.</p>

3.3.4 Tender Form

This document should be completed by the Tenderer. No changes need to be made by the Tender Administrator.

Design Services Contract – Tender Form		
Clause	Information to be inserted by Tender Administrator	Guidance
Tender Form		
	Nothing to insert.	<p>The Tender Form to be submitted by the Tenderer consists of thirteen sections as follows:</p> <ol style="list-style-type: none"> 1. the Tenderer’s offer which includes an unconditional agreement by the Tenderer to be bound by the Tender Conditions and the Tender Form; 2. allowance in the Tender for requirements of all addenda identified in the Tender Form; 3. details of Tenderer; 4. a declaration by the Tenderer that subject to any disclosures in the Tender Form it has the necessary financial viability to perform the Services and otherwise meet its obligations under the Contract in Part 5 if it is the successful Tenderer; 5. the Tenderer is requested to identify, by ticking the relevant box in Section 5, whether or not it is a “Relevant Employer” as defined in the <i>Workplace Gender Equality Act 2012 (Cth)</i>; 6. the Tenderer declares that it does not have any judicial decision against it (not including a decision under appeal) relating to employee entitlements where the resulting order remains

Design Services Contract – Tender Form		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>unsatisfied;</p> <p>7. the Tenderer is requested to provide details of any procedures or policies the Tenderer has in place to identify, assess and address risks of modern slavery. If the Tenderer does not have any such policies or procedures in place the Tenderer is to state what it is doing or plans to do to manage modern slavery risks in its operations and supply chains;</p> <p>8. the Tenderer is requested to identify whether or not it is a “Reporting Entity” for the purposes of the Payment Times Procurement Connected Policy;</p> <p>9. approach to employing and engaging Australian veterans in connection with the delivery of the Services;</p> <p>10. the Tenderer is requested to provide the tendering entities country of tax residency and ultimate parent entities country of tax residency noting that, if the tendering entity or its ultimate parent entity has multiple tax residencies, the Tenderer should disclose each country in which each country that Tenderer is a tax resident; and</p> <p>11. the Tenderer agrees to act consistently with the Commonwealth Supplier Code of Conduct and ensure that its officers’ and employees’ dealing with Commonwealth personnel are at all times conducted in a professional manner;</p> <p>12. in executing the Tender Form, the Tenderer makes the declarations</p>

Design Services Contract – Tender Form		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>as set out in certain Tender Schedules and as required under specified Commonwealth policies. As a result of this inclusion in the Tender Form, there is no longer the need for Tenderers to separately sign relevant declarations that appear in any of the Tender Schedules themselves; and</p> <p>13. the Tenderer is requested to provide evidence of the full authority of the person or persons executing the Tender Form.</p>

3.3.5 Tender Schedules

Certain sections of the Tender Schedules need to be completed by the Tender Administrator prior to issuing the Tender Documents for the Design Services Contract. Guidance on completing those Tender Schedules is provided below.

Please note matters in **[SQUARE BRACKETS, BOLD AND ITALICS]** may contain guidance notes and must be deleted before the Tender Documents are issued.

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
Tender Schedule A – Draft Project Plans		
Draft Project Plans: (Part 4, Tender Schedule A -	Nothing to insert, delete guidance note.	<p>The Tenderer is requested to prepare and provide the following draft Project Plans:</p> <p>(a) Site Management Plan;</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
Draft Project Plans)		<p>(b) Work Health and Safety Plan; and</p> <p>(c) any additional Project Plans specified in the Tender Particulars.</p> <p>The Tenderer is also requested to either propose a certified quality assurance procedure, system or framework and details of such certification, or an overview of its quality assurance procedure, system or framework where this is not certified. This is relevant for the definition of the term “Quality Plan” in the Contract.</p> <p>The Tenderer is requested to ensure that its draft Project Plans are focused on the Services described in the Contract in Part 5. The Tenderer is also requested to ensure that the information provided in Tender Schedule A is consistent with information given by the Tenderer in other parts of its Tender (as applicable).</p> <p>If the Tenderer will be required to prepare a preliminary design solution for the works as part of its Tender, amendments will be required to the evaluation criteria and an appropriate clause included. This should be developed in consultation with the project's legal adviser.</p>
Tender Schedule B - Proposed resources		
Proposed Resources: (Part 4, Tender Schedule B – Proposed Resources)	In the table under section 1, delete “[OTHER ROLES]” and insert roles which Defence and the Tender Administrator considers to be applicable for the project. If no	<p>The Tenderer is requested to provide details of its proposed key people for the Services in the table format set out in Tender Schedule B. The Tenderer is also requested to provide details of its proposed subconsultants for the Services if it is the successful Tenderer.</p> <p>If the Tenderer has lodged a registration of interest for this Project, the Tenderer is requested to provide details of any changes to</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
	<p>additional roles are considered to be appropriate, delete this row.</p> <p>Complete paragraph (c) under item 2 as appropriate depending on whether Tender Schedule C applies.</p>	<p>its nominated key personnel and its subconsultants (and the reasons for these changes) as against those nominated in the corresponding schedule in the Tenderer’s registration of interest.</p> <p>The information provided in Tender Schedule B is for evaluation purposes only and does not limit or effect the scope of the Services or the Contract in Part 5.</p>
Tender Schedule C – Previous Performance		
<p>Previous Performance: (Part 4, Tender Schedule C – Previous Performance)</p>	<p>Tender Schedule C applies unless the Tender Particulars state that it does not apply. If Tender Schedule C applies, insert the number of years of projects to be covered and the maximum number of projects which may be referred to in Schedule C.</p>	<p>If Tender Schedule C applies the Tenderer is requested to provide details of previous performance by reference to any relevant projects being carried out or completed in the specified years in the table format set out in Tender Schedule C.</p> <p>The Tender Administrator must consider and insert the number of years of projects to be covered and the maximum number of projects as appropriate having regard to the Services.</p> <p>It should also be noted that if a two-stage procurement process is being used, “Previous Performance” information is not usually requested nor evaluated again at time of tender (unless there has been a significant period of time between the Applicant submitting its Registration of Interest and the Commonwealth issuing the Tender Documents). This means that the information provided with the Registration of Interest must be as relevant and as complete as possible.</p> <p>If the Tender is lodged on a Joint Bid Basis the maximum number of projects listed for the Tenderer to provide details of in the table referred to above applies to the Joint Bid</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
		parties cumulatively.
Tender Schedule D - Program and Minimum Resource Schedule		
<p>Program and Minimum Resource Schedule: (Part 4, Tender Schedule D – Program and Minimum Resource Schedule)</p>	<p>The page limit for the supporting narrative in item 1(b) may be amended as appropriate to reflect the complexity of the project including if there are a number of Stages.</p> <p>Insert an assumed Award Date in clause 1(c)(i) and complete the relevant details in clause 1(c)(ii).</p> <p>Complete item 2 with reference to the guidance provided in the adjacent column. Also delete the applicable table(s) depending on whether the Contract contains no phases or two phases.</p> <p>Complete item 3 by including the relevant Milestones and Phases consistent with item 2. Relevant</p>	<p>The Tenderer is requested to provide a detailed program showing its order of work, periods for carrying out all design, documentation and other activities forming the Services and key dates.</p> <p>The Tenderer is also requested to provide a supporting narrative (not part of the program itself) in respect of the Tenderer’s approach to execution of the Services. The supporting narrative should be no more than 10 pages (unless more pages were specified in the Tender Schedule to reflect the complexity of the project). The Commonwealth has an absolute discretion not to evaluate or continue to evaluate any material provided in excess of the page limit specified.</p> <p>The assume Award Date should be an anticipated date on which the contract may be awarded and is provided to assist the Tenderer to provide a proposed program for the Services.</p> <p>Item 2 of Tender Schedule D should be deleted if the Commonwealth intends to lock in its required Date(s) for Completion of Milestones in the Contract Particulars without seeking any potential earlier date from Tenderers.</p> <p>On the other hand, if the Commonwealth wishes to give the Tenderers an opportunity to tender a Date for Completion of Milestones earlier than the Commonwealth’s Latest Date for Completion of Milestone then item 2 should insert dates in the “Latest Date for Completion” column but leave the column headed “Date for Completion” blank for the Tenderers to complete. In this scenario, the line item in the Contract Particulars relating to “Date for</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
	roles will also need to be included in each of the tables.	<p>Completion” should be completed at the time of release to Tenderers with the words “[To be inserted following the selection of the successful Tenderer]”.</p> <p>The Tenderer is also requested to provide a minimum resource schedule in the table format set out in Item 3. It is noted that the provision of a minimum resource schedule does not limit the scope of the Services and is included to provide the Commonwealth with an assurance as to the minimum level of resources which the Consultant will make available for the performance of the Services.</p>
Tender Schedule E – Commonwealth Procurement Rules Compliance		
<p>Commonwealth Procurement Rules Compliance: (Part 4, Tender Schedule E – Commonwealth Procurement Rules Compliance)</p>	Refer to guidance note, delete guidance note or paragraph (b) and guidance note as applicable. .	<p>The Tenderer is requested to:</p> <ul style="list-style-type: none"> (a) provide details of its practices regarding labour regulations and ethical employment practices; (b) if clause 29 (Environmentally Sustainable Procurement Policy) of the Tender Conditions does not apply, provide details of its practices regarding the promotion of environmental sustainability in relation to the Services, including having regard to the specific matters referred to in (i) to (iv) of item (b) in Tender Schedule E; (c) provide details of its practices regarding achieving efficiencies and savings in whole of life costs including opportunities to maximise WOL Objectives; (d) if an Australian standard is applicable as identified in the Brief, demonstrate its capability to meet the applicable Australian standard by providing evidence of any relevant certifications; and (e) provide details of the direct benefits

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>expected to be generated to the Australian economy through the project, the performance of the Services or more broadly through the Tenderer's business having regard to the specific matters referred to in (i) – (iv) of item (e) in Tender Schedule E.</p>
Tender Schedule F – Financial		
<p>Financial: (Part 4, Tender Schedule F - Financial)</p>	<p>Insert details of the pricing matters to which the Tenderer should respond, depending on whether there are no phases or two phases for the Services under the Contract.</p> <p>Specifically, the Tender Administrator will need to insert (or do) the following:</p> <p>(a) if there are no phases, then, in the section under the guidance “[IF THERE ARE NO PHASES]”, insert items 1 to 3, as follows:</p> <p>(i) (item 1) Fee;</p> <p>(ii) (item 2) Table of</p>	<p><u>If there are no phases</u></p> <p>If the Contract is not separated into the Planning Phase and the Delivery Phase, the Tenderer is requested to provide the information described in Tender Schedule F comprising:</p> <ol style="list-style-type: none"> 1. lump sum Fee and a breakdown of that Fee for each part of the Services; 2. Table of Variation Rates and Prices; and 3. a breakdown of proposed progress payments for the Fee. 4. proposed times for submission of payment claims. <p><u>If there are two phases</u></p> <p>If the Contract is comprised of two phases (i.e., the Planning Phase and the Delivery Phase), the Tenderer is requested to provide the information described in Tender Schedule F comprising:</p> <ol style="list-style-type: none"> 1. a lump sum Planning Phase Fee (for performing all of the Planning Phase Services) and a breakdown; 2. Table of Variation Rates and Prices; 3. a breakdown of proposed progress payments for the Planning Phase Fee; 4. a lump sum Indicative Delivery Phase Fee (for performing all of the Delivery Phase Services) and a breakdown;

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
	<p>Variation Rates and Prices; and</p> <p>(iii) (item 3) Payment of the Fee,</p> <p>and delete the remaining sections of Tender Schedule F – Financial.</p> <p>(b) if the Contract comprises two phases (ie, the Planning Phase and the Delivery Phase) then, in the section under the guidance “[IF THERE ARE TWO PHASES]”, insert items 1 to 6, as follows:</p> <p>(i) (item 1) Planning Phase Fee;</p> <p>(ii) (item 2) Table of Variation Rates and Prices;</p> <p>(iii) (item 3)</p>	<p>5. Delivery Phase Fee Proposal – which should contain details of the basis on which the Tenderer would propose any adjustment to the Indicative Delivery Phase Fee; and</p> <p>6. a breakdown of proposed progress payments for the Indicative Delivery Phase Fee.</p> <p>7. proposed times for submission of payment claims.</p> <p><u>General guidance</u></p> <p>The amounts submitted by the Tenderer are not subject to rise and fall and should be GST exclusive.</p> <p>The information sought under Tender Schedule F – Financial is critical for evaluation purposes and will facilitate the straight forward completion of the Contract Particulars once a successful Tenderer has been chosen. Problems arise when this information submitted by Tenderers in this Tender Schedule F is incomplete or unclear.</p> <p>In relation to each of the applicable Fee breakdown tables set out in this Tender Schedule, the Tender Administrator must also consider and amend the Fee breakdown tables having regard to the applicable Services.</p> <p>It is important that this Tender Schedule is consistent with other aspects of the Tender Documents, including pricing of “options” (which must be the subject of special conditions), the phased nature of the Services and matters characterised for inclusion in either the schedule of rates or the lump sum Fee.</p> <p>To the extent that the design team provides input into this Tender Schedule F, they should also be made aware of this requirement. It is not enough to rely on a “copy and paste” from another project or another form of</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
	<p>Payment of the Planning Phase Fee;</p> <p>(iv) (item 4) Indicative Delivery Phase Fee;</p> <p>(v) (item 5) Delivery Phase Fee Proposal; and</p> <p>(vi) (item 6) Payment of the Indicative Delivery Phase Fee,</p> <p>and, subject to the note in paragraph below, delete the remaining sections of Tender Schedule F – Financial.</p> <p>Delete, update and/or amend, as appropriate, all remaining guidance notes in Tender Schedule F.</p>	<p>contract. This Tender Schedule F must be carefully tailored for each project and in accordance with Defence’s requirements and terminology.</p> <p>If any other payment structures or tender options are to be priced (for example, additional services which are not included at the time of tender but which may be required to be priced now for further consideration by Defence), Special Conditions may be required –prior approval must be sought in relation to Special Conditions from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance. Liaise with the project’s legal and probity advisors as appropriate.</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
Tender Schedule G – Alternative Proposals		
<p>Alternative Proposals: (Part 4, Tender Schedule G - Alternative Proposals)</p>	Nothing to insert	<p>The Tenderer should note that:</p> <ul style="list-style-type: none"> (a) it is a minimum form and content requirement under clause 3.1(b)(v) of the Tender Conditions that the Tenderer must accept (without departure, qualification, amendment, limitation or exclusion) the Contract in Part 5, except to the extent completed and lodged in this Tender Schedule G (subject only to the exception for departure in respect of clauses 5.1 to 5.5 of the Conditions of Contract); (b) if it does not do so, its Tender may be regarded as non-conforming and clause 3.3 of the Tender Conditions will apply; and (c) if the Tenderer wishes to depart from, qualify, amend, limit or exclude any part of the Contract it must complete and lodge Tender Schedule G and not set out or describe such matters in any other Tender Schedule. <p>The Commonwealth offers the Tenderer the opportunity to provide alternative proposals in pursuit of greater value for money. The Tenderer must demonstrate how an alternative proposal will achieve greater value for money. It is noted that detailed comments from insurers, brokers or legal advice (without more information, including any effect on pricing) will be unlikely to meet this requirement.</p> <p>The Tenderer should complete the details in the form of the table at the end of Tender Schedule G.</p> <p>The Tenderer must ensure that all pricing and</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>financial information with respect of any alternative proposal is separately provided in item 2. Also, the Tenderer must lodge item 1 and item 2 as separate files as part of its Tender.</p> <p>The Tenderer must lodge a conforming Tender before an alternative proposal will be considered.</p>
Tender Schedule H – Miscellaneous Matters for Evaluation		
<p>Miscellaneous Matters for Evaluation: (Part 4, Tender Schedule H - Miscellaneous Matters for Evaluation)</p>	<p>Insert relevant details in the table in item 1 (insurances) of Tender Schedule H.</p> <p>In item 3, under Part B, delete “[INSERT ATM ID, PROJECT NUMBER, PROJECT NAME AND DESCRIPTION OF WORKS AND SERVICES, AS APPLICABLE]” and insert the relevant information.</p>	<p>To assist the Commonwealth in evaluating its Tender, the Tenderer is requested to provide the information as described in items 1 to 3 of this Tender Schedule H as follows:</p> <ol style="list-style-type: none"> 1. details of insurances as specified in the table set out in item 1, together with any proposed departures from clauses 5.1 to 5.5 of the Conditions of Contract in the table format provided. Note – this is an exception to the minimum form and content requirements (see clause 3.1(b)(v) of the Tender Conditions); 2. Tenderer’s Commercial-in-Confidence Information. The Tenderer may identify any specific information provided by the Tenderer to the Commonwealth that it wishes the Commonwealth to keep confidential and provide justification in accordance with paragraph (c) of section 2; and 3. Information Security. The Tenderer is requested to confirm whether or not it currently holds DISP membership and, if so, details of such membership should be inserted in Item A. If the Tenderer does not currently hold DISP membership, or if the Tenderer does not comply with the requirements under the Contract relating

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
		to the DISP, the Tenderer must complete the Questionnaire in Item B.
Tender Schedule I – Statement of Tax Record		
Statement of Tax Record: (Part 4, Tender Schedule I - Statement of Tax Records)	<p>Tender Schedule I only needs to be completed by Tenderers if clause 27.1 of the Tender Conditions applies i.e. if no invitation to register interest process has been conducted and the procurement is an open tender with an estimated value over \$4m (GST inclusive).</p> <p>If clause 27.1 of the Tender Condition does not apply, delete the content of Tender Schedule I and mark it “NOT USED”.</p>	<p>If clause 27.1 of the Tender Conditions applies, the Tenderer must complete and lodge Tender Schedule I – Statement of Tax Record.</p> <p>In this scenario, this is a minimum form and content requirement under clause 3.1(b)(ii) of the Tender Conditions.</p> <p>The Tenderer is to provide and attach each of the valid and satisfactory STRs referred to in the table in item A of Tender Schedule I as applicable to the Tenderer.</p> <p>The Tenderer is to provide the Declaration in item B, by executing the Tender Form and provide and attach each of the valid and satisfactory STRs referred to in the table in paragraph 1 of item A of Tender Schedule I as required as required for the Tenderer's entity type.</p>
Tender Schedule J – Indigenous Procurement Policy/Not Used		
Indigenous Procurement Policy: (Part 4, Tender Schedule J – Indigenous Procurement	<p>Tender Schedule J only applies if the Contract is a high value contract or a high value contract which is also in a remote area.</p>	<p>If applicable, the Tenderer must complete and lodge Tender Schedule J – Indigenous Procurement Policy which includes:</p> <p>(a) completing a Declaration of Compliance in the form set out in item A;</p> <p>(b) providing an Indigenous Participation</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
Policy)	If not applicable, delete the contents of Tender Schedule J and insert the words “Not used”.	<p>Plan in the form set out in item B;</p> <p>(c) providing details of the Tenderer’s approach to using Indigenous subconsultants in item C; and</p> <p>(d) providing details of the Tenderer’s past performance in item D.</p> <p>If the Contract is a high value contract or a high value contract which is also in a remote area, lodgement of Tender Schedule J is a minimum form and content requirement under clause 3.1(b)(iii) of the Tender Conditions.</p>
Tender Schedule K – Environmentally Sustainable Procurement		
Environmentally Sustainable Procurement: (Part 4, Tender Schedule – K - Environmentally Sustainable Procurement)	Tender Schedule K will only apply where the value of the Services (over all phases) is \$7.5 million (GST inclusive) or more.	<p>The Tenderer must complete and lodge responses (or note their contents as applicable) in relation to items A–C of this Tender Schedule which includes:</p> <ul style="list-style-type: none"> A. details of its practices regarding promoting environmental sustainability; B. the Declaration of Compliance, these declarations are made by executing the Tender Form; C. requirements for the Tenderer’s Supplier Environmental Sustainability Plan. <p>In relation to the Supplier Environmental Sustainability Plan, the Tenderer is directed to further guidance available at: Supplier Environmental Sustainability Plan Option B(ii) - SESP Base Metrics (dceew.gov.au)</p> <p>It is noted that the completion and lodgement of item C is a minimum form and content requirement under clause 3.1(b)(iv) of the Tender Conditions.</p> <p>The Tenderer’s responses in item C to 3(a) and 5(a) are to be separately included in the Attachment to Tender Schedule – K -</p>

Design Services Contract – Tender Schedules		
Clause	Information to be inserted by Tender Administrator	Guidance
		Environmentally Sustainable Procurement

3.4 Completing the Contract for Tender

3.4.1 Contract Particulars

The Tender Administrator must have regard to the following guidance and instructions for completion of the Contract Particulars before issuing Part 5 of the Tender Documents for a Design Services Contract. In addition, please note matters in **[SQUARE BRACKETS, BOLD AND ITALICS]** may contain guidance notes and must be deleted before the Tender Documents are issued:

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Clause 1 - Glossary of Terms, Interpretation and Miscellaneous		
Agreed Subconsultants: (Clause 1.1)	<p>Insert a description of the Agreed Subconsultants, Agreed Subconsultant Agreement, Agreed Subconsultant Services and the amount to be allowed by the Tenderer in its lump sum Fee and its program for the Services.</p> <p>If there are no Agreed Subconsultants, insert "None stated".</p>	<p>Agreed Subconsultants are either:</p> <p>(a) consultants engaged by the Commonwealth before the Award Date whose Agreed Subconsultant Agreement is to be novated to the Consultant; or</p> <p>(b) a consultant selected by the Commonwealth with whom the Consultant must enter into an Agreed Subconsultant Agreement after the Award Date,</p> <p>for "Agreed Subconsultant Services".</p> <p>If Defence wishes to allow part of the Services to be carried out by an Agreed Subconsultant, insert details of the Agreed Subconsultant, the Agreed Subconsultant Services and the amount to be allowed by the Tenderer in its lump sum for those services.</p> <p>It should also indicate whether or not</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>novation of these subconsultants is required.</p> <p>This detail will need to be consistent with the details inserted into the Tender Particulars for clause 26 of the Tender Conditions (see Part 3.3.3) and the Contract Particulars for clause 2.9(a)(i)A below.</p>
<p>Completion - additional conditions precedent to Completion: (Clause 1.1)</p>	<p>Specify all matters (other than actually completing the Services) which the Consultant is required to do as a condition precedent to Completion.</p> <p>If there are no additional conditions precedent to Completion, insert “None stated”.</p>	<p>The definition of Completion in clause 1.1 refers to Completion in respect of <u>each Milestone</u>, not “completion” of the Services. There may be some overlap with paragraphs (b) and (c) of the definition of Completion in clause 1.1 of the Conditions of Contract. However, it is preferable that this item contain superfluous detail rather than to miss something out.</p> <p>If the conditions precedent for each Milestone are different, it must be made clear which conditions precedent to Completion apply to all Milestones and which conditions precedent to Completion only apply to particular Milestones.</p> <p>For clarity, it may be best to list each Milestone and specify the conditions precedent to Completion for each Milestone individually, even if this leads to some repetition unless all the additional conditions apply to all Stages. Otherwise, the item (if it applies to only certain Stages), could commence with “In relation to Stages X and Y,”.</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Consultant: (Clause 1.1)	Nothing to insert.	This item is to be completed following selection of the successful Tenderer, and the template already includes the words “[To be inserted following selection of the successful Tenderer]”. Refer to Part 4.2 of this Manual below for further guidance.
Consultant’s Representative: (Clause 1.1)	Nothing to insert.	This item is to be completed following selection of the successful Tenderer, and the template already includes the words “[To be inserted following selection of the successful Tenderer]”. Refer to Part 4.2 of this Manual below for further guidance.
Contract - other documents forming part of the Contract: (Clause 1.1)	Insert a description of any relevant documents and where they are set out or located. If applicable, version numbers and dates for the documents should also be included. If there are no additional documents to form part of the Contract, insert “Nil”.	This item must describe any documents apart from: (a) the Formal Agreement; (b) the Conditions of Contract; (c) the Contract Particulars; (d) the Special Conditions; and (e) the Brief, which will govern the parties’ contractual relationship. This item must not include any documents which the Conditions of Contract expressly state do not form part of the Contract. For example, documents which were described as “Information Documents” for the

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>purpose of the tender should not be included.</p> <p>Further, it is intended that this item does not include the Project Plans, as these documents are often not complete as at the Award Date. Nevertheless, the Consultant is still required to comply with the Project Plans by application of clause 7.4 of the Conditions of Contract.</p> <p>Likewise, this item should not include documents which relate solely to the tender process. For example, Tender Conditions or the whole or parts of the Consultant’s tender submission should not be included. It is strongly recommended that the Consultant’s tender not be included as a document in its own right. If the Tender (or any part of the Tender) includes significant promises which have been accepted by Defence but which amend or are otherwise inconsistent with the Conditions of Contract (or any other part of the documents comprising the Contract), then it is preferable that these issues be dealt with specifically by way of Special Conditions or other amendments to the Contract. The same also applies to post-tender correspondence.</p> <p>Guidance must be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance before adding any documents to this Contract Particular.</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
<p>Contract Administrator: (Clause 1.1)</p>	<p>Insert the name of the person or firm/company who will act as the Contract Administrator.</p>	<p>This may be an individual, a firm or a company. If it is a firm or company, the ABN should also be specified.</p> <p>When using the Design Services Contract, the Contract Administrator will almost invariably be a private sector consultant engaged from the Defence Infrastructure Panel, in which case the name of the firm/company, rather than an individual, should be inserted. In this latter regard, see the Contract Particular titled “Contract Administrator’s representatives and their functions (Clause 3.4)”.</p> <p>While the individual/firm/company who performs the role of the Tender Administrator may be the same individual/firm/company who is to be the Contract Administrator, this does not have to be the case.</p>
<p>Date for Completion (of a Milestone): (Clause 1.1)</p>	<p>The Commonwealth may determine that the Services to be carried out by the Consultant are to be phased (or not phased).</p> <p>If there are no phases, delete the text “[IF NO PHASES]” and all the rows underneath that text in this item of the Contract Particulars.</p> <p>If there are phase, delete the text “[IF NO</p>	<p>If the precise Date for Completion for each Milestone is not known, if possible, guidance should be provided to Tenderers in respect of a “not later than” date or period.</p> <p>For example, “To be inserted following selection of successful Tenderer, but not later than 1 July 2025”. This provides Tenderers with some parameters within which to lodge a proposed Date for Completion.</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	<p><i>PHASES]</i> and the text <i>“[IF TWO PHASES]”</i>.</p> <p>Insert a description of the Milestones which are applicable to each phase or, if there are no phases, the Milestones applicable to the Services.</p> <p>If known prior to requesting tenders, also insert the Date for Completion of each of the Milestones. This can be either a fixed, certain date or a period of time following the Award Date.</p> <p>If the precise Date for Completion for each Milestone is not known at the time of issuing the Tender Documents and Defence is requesting the Tenderers to provide this as part of Tender Schedule D, insert “To be inserted following selection of successful Tenderer”.</p>	

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Date for Delivery Phase Agreement (Clause 1.1)	<p>If clause 9 applies, insert the Date for Delivery Phase Agreement.</p> <p>Otherwise, insert “Not applicable”.</p>	<p>If clause 9 of the Conditions of Contract applies, the Contract will be divided into a Planning Phase and a Delivery Phase.</p> <p>Clause 9.2 requires, amongst other things, for the Consultant to prepare an Updated Delivery Phase Fee Proposal and negotiate with the Contract Administrator to reach agreement on a number of matters before the Date for Delivery Phase Agreement.</p> <p>This date must, therefore, be achievable.</p> <p>The Date for Delivery Phase Agreement may be unilaterally extended by Defence if it wishes to do so. Circumstances in which Defence may wish to do so could be where Defence (by its own conduct or that of a third party) has prevented or will prevent the Consultant from undertaking the required activities as contemplated by clause 9 of the Conditions of Contract.</p>
Delivery Phase Fee Proposal (Clause 1.1)	<p>If clause 9 applies, insert “As set out in Attachment 1 to these Contract Particulars”.</p> <p>Otherwise, insert “Not applicable”.</p>	<p>If the Contract is phased, a Delivery Phase Fee Proposal will be submitted by Tenderers as part of their Tender and will be inserted into Attachment 1 to the Contract Particulars.</p> <p>The Consultant is required to prepare and submit an Updated Delivery Phase Fee Proposal for the Delivery Phase Services which is based on the Delivery Phase Fee Proposal. For more guidance, see Part 13 below.</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
EMOS Contractor: (Clause 1.1)	Insert the name and ABN of the Contractor engaged by Defence to provide the estate upkeep services for the establishment on which the Services will be undertaken at the time of preparing a Design Services Contract for tender.	<p>The relevant definition contemplates that, if the EMOS Contractor is replaced while the Services are being carried out, the Contract Administrator will notify the Consultant of the new EMOS Contractor (which will then be the EMOS Contractor under the Contract).</p> <p>For the purposes of this item of the Contract Particulars, the relevant company to be inserted will be whichever company is carrying out maintenance on the Site.</p> <p>If there is more than one site (for example, if Services are required to be carried out on multiple Defence bases), the applicable EMOS Contractor for each site should be listed.</p>
Environmental Management and Sustainability Plan (additional): (Clause 1.1)	<p>Insert any additional matters to be included in the Environmental Management and Sustainability Plan prepared by the Consultant and finalised under clause 7.4 of the Conditions of Contract.</p> <p>If there are no additional matters to be included in the Environmental Management and Sustainability Plan,</p>	<p>Depending on the project requirements, it may be necessary to include other additional matters in the Environmental Management and Sustainability Plan for the Consultant to implement and manage from an environmental perspective.</p> <p>Further guidance on the Environmental Management and Sustainability Plan can be found in the Conditions of Contract and under the commentary on clause 2.13 of the Conditions of Contract in the clause-by-clause guidance in Part 6.1.13 of this Manual.</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	insert “None stated” or “Nil”.	
Environmental Objectives (additional): (Clause 1.1)	<p>Insert any additional environmental requirements to be included in the definition of “Environmental Objectives”.</p> <p>If there are no additional Environmental Objectives, insert “None stated” or “Nil”.</p>	Refer to the definition of “Environmental Objectives” under clause 1.1 of the Conditions of Contract to identify what is already addressed.
Environmental Requirements (additional): (Clause 1.1)	<p>Insert any additional environmental requirements to be included in the definition of “Environmental Requirements”.</p> <p>If there are no additional Environmental Requirements, insert “None stated” or “Nil”.</p>	Refer to the definition of “Environmental Requirements” under clause 1.1 of the Conditions of Contract to identify what is already addressed.
Executive Negotiators: (Clause 1.1)	Nothing to insert.	The Consultant’s Executive Negotiator is to be inserted following selection of successful Tenderer, and the template already includes the words “[To be inserted

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>following selection of the successful Tenderer]”. This information will be provided by the Tenderer as part of its Tender Form.</p> <p>For the Commonwealth’s Executive Negotiator, the default position is to nominate the Director General Capital Facilities and Infrastructure (by title, rather than by name). Guidance should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance if a change to this default position is proposed.</p> <p>Refer to Part 17.2.5 of this Manual for further guidance.</p>
<p>Fee: (Clauses 1.1)</p>	<p>If there are no phases, retain the row under “<i>[IF NO PHASES]</i>” and insert “[To be inserted following selection of successful Tenderer]” after the word “Fee” and delete all other text.</p> <p>If there are two phases, retain the two rows under “<i>[IF TWO PHASES]</i>” and delete all other text.</p>	<p>Refer to Part 4.1 of this Manual below for further guidance.</p>
<p>Indicative Delivery Phase</p>	<p>If there are no phases, delete this item.</p>	<p>If there are two phases, the Tenderer will propose an Indicative Delivery Phase Fee</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Fee: (Clause 1.1)	If there are two phases, nothing to insert.	for the carrying out of the Delivery Phase Services. This item of the Contract Particulars will be completed following selection of the successful Tenderer.
Milestones: (Clause 1.1)	<p>If there are no phases, delete the text “[IF NO PHASES]” and all the rows underneath that text in this item of the Contract Particulars.</p> <p>If there are phase, delete the text “[IF NO PHASES]” and the text “[IF TWO PHASES]”.</p> <p>In each case, insert a description of the Milestones which are applicable to each phase or, if there are no phases, the Milestones applicable to the Services.</p>	The Milestones and their descriptions should not be inconsistent with the Contract Particular above setting out the relevant Dates for Completion of each Milestone.
Pandemic Adjustment Event (Additional): (Clause 1.1)	<p>Insert any additional matters to be included in the definition of “Pandemic Adjustment Event”.</p> <p>If there are no additional Pandemic Adjustment Events, insert “None stated” or</p>	Refer to the definition of “Pandemic Adjustment Event” under clause 1.1 of the Conditions of Contract to identify what is already addressed.

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	“Nil”.	
Preliminary Design Solution (if any): (Clause 1.1)	If the preliminary design solution does not apply, insert “Not Applicable”.	<p>The Preliminary Design Solution is either prepared by the Consultant or the Commonwealth’s design consultants before the Award Date.</p> <p>If the Tenderer is required to submit a preliminary design solution, then Tender Schedule A, will need to be amended to reflect this requirement.</p> <p>If Preliminary Design Solution is to apply, then note also clause 9 of the template Special Conditions.</p>
Project Plans (additional): (Clause 1.1)	<p>If the Special Condition relating to the Method of Work Plan for Airfield Activities apply, update the relevant cross reference to that clause of the Special Conditions. Otherwise, delete the words “<i>If clause [4] of the Special Conditions applies, Method of Work Plan for Airfield Activities.</i>”</p> <p>Insert any additional Project Plans (refer to definition of “Project Plans” under clause 1.1 of the Conditions of Contract). If there are no additional</p>	<p>The Contract requires the provision of the Project Plans referred to in paragraphs (a) to (h) of the definition of “Project Plan” in clause 1.1 of the Conditions of Contract together with any additional plans specified in this Contract Particular.</p> <p>The types of additional plans necessary must be determined on a project-by-project basis, having regard to its particular requirements and features. Under the Design Services Contract, extra care should be taken in specifying any general “methodology” type plans and advice from Defence’s legal adviser for the project should be sought if this is contemplated.</p> <p>Note also that it may be necessary to prepare special conditions to provide the detailed requirements and purposes of each additional plan, or alternatively this can be dealt with in the Brief. If so, advice from Defence’s legal adviser for the project</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	Project Plans, insert “None stated” or “Nil”.	should be sought.
Quality Manager: (Clause 1.1)	Nothing to insert.	This item is to be completed following selection of the successful Tenderer, and the template already includes the words “[To be inserted following selection of the successful Tenderer]”. Refer to Part 4.2 of this Manual below for further guidance.
Quality Objectives (additional): (Clause 1.1)	Insert any additional matters to be included in the definition of “Quality Objectives”. If there are no additional matters, insert “None stated” or “Nil”.	Depending on the project requirements it may be necessary to include other additional Quality Objectives to encourage best practice quality management, prevent and minimise adverse quality impacts, and optimise the value for money achieved by the Commonwealth. See also definition of Quality Objectives in clause 1.1 of the Conditions of Contract.
Quality Plan (additional): (Clause 1.1)	Insert any additional matters to be included in the Quality Plan to be prepared by the Consultant and finalised under clause 7.4 of the Conditions of Contract. If there are no additional Quality Plan matters, insert “None stated” or “Nil”.	Depending on the project requirements it may be necessary to include other additional matters in the Quality Plan for the Consultant to implement and manage from a Quality perspective. Further guidance on the Quality Plan can be found in the Conditions of Contract and under the commentary on clause 7.1 of the Conditions of Contract in the clause-by-clause guidance in Part 11 of this Manual.
Schedule of	Nothing to insert.	This item lists the documents which

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Collateral Documents: (Clause 1.1)		comprise the Schedule of Collateral Documents, as at the Award Date. It should not need to be amended. Guidance should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance if any amendment is proposed.
Site: (Clause 1.1)	<p>Insert a description of the Site. If a site plan is available, a reference to the relevant site plan should be inserted (e.g. "As set out in Annexure #").</p> <p>Consider whether Site and site access is covered in the Brief so there could be a cross-link to that document, so there is no inconsistency in approach.</p>	<p>The Site is the land (including the airspace above it) upon which Defence is obliged to give the Consultant reasonable access to carry out the Services.</p> <p>Care must be taken to ensure that no land or airspace with respect to which Defence has no authority to give a right of access or use is included in the description of the Site.</p> <p>For example, if access to an entire Base or area will not be permitted, Defence should prepare a site plan which indicates the boundaries of the "Site" for the purposes of the Works or each Stage. This should also include areas that may only be temporarily required (and still within Defence's authority to provide access), such as services lines or corridors.</p> <p>The definition of the "Site" has important access and risk implications.</p>
Site Management Plan (additional): (Clause 1.1)	<p>Insert any additional matters to be addressed by the Consultant in its Site Management Plan.</p> <p>If there are no additional Site</p>	<p>The management of the Site by the Consultant is of critical importance.</p> <p>The definition of "Site Management Plan" sets out a number of matters which must be addressed by the Consultant in its Site Management Plan. These matters are considered typical site considerations</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	Management Plan matters, insert “None stated” or “Nil”.	relevant to most Defence projects. However, if necessary, additional matters can be inserted in the Contract Particular to suit the requirements of particular projects.
WOL Objectives (additional): (Clause 1.1)	Insert any additional objectives for the purposes of paragraph (g) of the definition of WOL Objectives under clause 1.1. If there are no additional WOL Objectives, insert “None stated” or “Nil”.	Refer to the definition of “WOL Objectives” in clause 1.1 of the Conditions of Contract to identify what is already addressed.
Work Health and Safety Plan (additional): (Clause 1.1)	Insert any additional matters (e.g. project safety hazards or concerns) to be addressed in the Work Health and Safety Plan, as appropriate. If there are no additional matters to be addressed in the Work Health and Safety Plan, insert “None stated” or “Nil”.	Depending on the project requirements and the nature of Services to be carried out, it may be necessary to include other additional matters in the Work Health and Safety Plan for the Consultant to implement and manage from a work health and safety perspective. Further guidance on the required content of the Work Health and Safety Plan can be found in clause 1.1 of the Conditions of Contract.
Works: (Clause 1.1)	Insert a brief description of the Works.	The Works are the physical works which will be designed by the Consultant, and which a construction contractor will complete and handover to the Commonwealth.

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		Care must be taken to ensure that this description is precise and accurate. A cross-reference to the Brief may be appropriate, however care should also be taken to ensure the cross-reference and the description is as accurate and as precise as possible (eg. "As set out in section # of the Brief").
Governing Law: (Clause 1.3(a))	Insert the governing law of the Contract (i.e., an Australian State or Territory).	This is usually the law of the State or Territory in which the Site is located. If the Site is located in one or more States or Territories, a decision needs to be made by Defence about the appropriate governing law for the Contract. Further guidance should be sought from Defence's legal adviser for the Project and the Directorate of Program Assurance and/or Directorate of Quality and Compliance.
Clause 2 - Role of the Consultant		
Services which may be let to one of the named subconsultants: (Clause 2.9(a)(i)A)	To be inserted following selection of successful Tenderer. Insert "To be inserted following selection of successful Tenderer".	Refer to Part 4.2 of this Manual below for further guidance.
Statutory Requirements with which the Consultant does not need to comply:	Insert a list of any Statutory Requirements with which the Consultant does not need to comply.	There will be very limited circumstances in which a Consultant may be relieved of the obligation to comply with a Statutory Requirement. Any such Statutory Requirements should be clearly and particularly defined, including section

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
(Clause 2.10(a))	If the Consultant is required to comply with all Statutory Requirements, insert “The Consultant is required to comply with all Statutory Requirements”.	<p>numbers of legislation where relevant.</p> <p>Advice should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance if it is unclear whether the Consultant should be required to comply with certain Statutory Requirements.</p> <p>Include any Statutory Requirements from which an exemption has been obtained prior to the Award Date.</p>
<p>Approvals which the Consultant is to obtain: (Clause 2.10(b))</p>	<p>Identify all Approvals required to be obtained by the Consultant.</p> <p>If the Consultant is required to obtain all Approvals, insert “The Consultant is required to obtain all Approvals”.</p>	<p>Defence should ensure that all Approvals that the Consultant must obtain are adequately described.</p> <p>To the extent the Commonwealth will be responsible for obtaining an approval after the Award Date, the Commonwealth and Contract Administrator should consult with the Project's legal adviser in respect of any required special condition.</p>
Clause 3 – Role of the Commonwealth		
<p>Other conditions precedent to Site access: (Clause 3.3i)</p>	<p>Insert any other conditions precedent which must be fulfilled prior to the Consultant being granted Site access.</p> <p>If there are no other conditions precedent, insert “None stated” or</p>	<p>Where Defence wishes to have the right to refuse the Consultant access to the Site until certain conditions have been satisfied, then this item must be completed by describing the relevant conditions. The applicable conditions precedent will be a question for each project.</p> <p>Clause 3.3 of the Conditions of Contract already states that access to Site is subject to the following:</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	“Nil”.	<p>(a) the Construction Contract;</p> <p>(b) any other agreement or arrangement with a party other than the Consultant (including any Other Contractor);</p> <p>(c) the Environmental Management and Sustainability Plan, Site Management Plan and the Work Health and Safety Plan being finalised under clause 7.4; and</p> <p>(d) evidence satisfactory to the Contract Administrator under clause 5.1(f) of the Conditions of Contract that the Consultant has effected insurances then required.</p> <p>Therefore, it would not usually be necessary to include these conditions again in this Contract Particular.</p>
Clause-4 - Personnel		
<p>Contract Administrator’s representatives and their functions: (Clause 4.4)</p>	<p>This information (ie. details of all of the Contract Administrator’s representatives and the functions which they carry out) may be inserted either prior to or following the issuing of the Tender Documents.</p>	<p>As the Contract Administrator may be a firm or a company (eg. ABC Project Managers Pty Ltd), the Contract Administrator’s representative for the purposes of the project will be an employee of that company (eg. John Smith of ABC Project Managers Pty Ltd).</p> <p>However, if the Contract Administrator wishes to divide its functions amongst certain stated personnel, it could do so as follows (for example):</p> <p>“Bill Jones - Design Review Jane Taylor - Payment Certification John Smith - All remaining functions of the Contract Administrator.”</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		One key Contract Administrator’s representative can be appointed for a project, regardless of how the Contract Administrator’s organisation arranges to have its activities performed. For example: “Bill Jones - All Functions”. Bill Jones may not be performing all of the Contract Administrator’s roles under the Contract but, for the purposes of the Contract, he is the key point of contact between the Consultant and the Contract Administrator. This is the most typical way of completing this Contract Particular.
Consultant’s key people: (Clause 4.5(a))	Nothing to insert.	This item is to be completed following selection of the successful Tenderer, and the template already includes the words “[To be inserted following selection of the successful Tenderer]”. Refer to Part 4.2 of this Manual below for further guidance.
Clause–5 - Insurance		
Insurance policies required to be obtained by the Consultant: (Clause 5.1)	Insert the various amounts and limits for each of the insurances required to be effected by the Consultant. Delete the guidance notes in square brackets. For Public Liability	Insurance advice from appropriately qualified and licenced persons should be obtained prior to completing these amounts and percentages. Do not amend the standard wording provided without seeking such advice first. The Contract Particular contains guidance about using “N/A” to select whether Public Liability Insurance will be written on either

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	<p>Insurance, for whichever of “occurrence basis” or “claims made basis” does not apply, insert “N/A” after the \$ references.</p> <p>Insert any other insurances that may be specified (see guidance in Part 3.3.5 of this Manual above in respect of Tender Schedule H).</p>	<p>an “occurrence basis” or on a “claims made basis” (ie, the Contract Administrator must specify one, but not both).</p> <p>The Contract Particular also contains similar guidance about using “N/A” for one of Professional Indemnity Insurance and Errors and Omissions Insurance. In other words, it is typical to specify one of either Professional Indemnity Insurance or Errors and Omissions Insurance, but not both.</p> <p>Guidance is included in the Contract Particular for the Contract Administrator to consider and seek assistance on whether any other additional insurances may be required for the project (eg transit insurance, product liability insurance or industrial special risks insurance).</p>
<p>Minimum amounts of subconsultant’s Professional Indemnity Insurance: (Clause 5.1(f))</p>	<p>Insert the various amounts.</p>	<p>If it is contemplated that some or all of the design work will be carried out by subconsultants, such subconsultants must maintain Professional Indemnity Insurance.</p> <p>Insurance advice should be obtained from appropriately qualified and licenced persons prior to completing these amounts.</p> <p>Do not amend the standard wording provided without seeking such advice first.</p>
<p>Run-off Period for Public liability Insurance (if written on a claims made</p>	<p>Nothing to insert.</p> <p>This Contract Particular already includes standard periods (i.e., 7 years or 11 years) which apply</p>	<p>The standard wording and the associated periods (ie, 7 years or 11 years) in this Contract Particular should not be amended.</p> <p>The default periods are based on the statutory limitation periods relating to the making of claims in the various States and</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
basis): Clause 5.3(a)(ii)	automatically, depending on the location of the Site.	Territories. If Public Liability Insurance is “claims-based”, then the relevant policy must be in existence at the time the claim is made. Therefore, to ensure sufficient time to issue proceedings, the default period should be (at least) as long as the relevant limitation period applicable in that State or Territory.
Run-off Period for Professional Indemnity Insurance: (Clause 5.3(c))	Nothing to insert. This Contract Particular already includes standard periods (i.e., 7 years or 11 years), depending on the location of the Site.	The standard wording and the associated periods (i.e., 7 years or 11 years) in this Contract Particular should not be amended. Similarly to the Contract Particular immediately above, Professional Indemnity Insurance are “claims-based” insurances. That is, in order for a particular claim to be covered the relevant policy must be in existence at the time the claim is made, as opposed to when the work the subject of the claim was performed. This means that Professional Indemnity Insurance should continue to be effected for as long as it remains possible for a claim to be made in respect of negligent services.
Maximum Aggregate Liability of the Consultant to the Commonwealth (Clause 5.7)	Insert relevant amount by which the Consultant’s liability to the Commonwealth under the Contract or otherwise at law is to be limited, subject to the specified carve outs set out in clause 5.7.	In completing this line item, it is important that the Commonwealth and Contract Administrator consider the appropriate cap amount by reference to a detailed risk analysis of the Services and the project.

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Clause 6 – Design and Documentation		
<p>Number of days for review: (Clause 6.3(a)(ii))</p>	<p>Insert the number of days within which the Contract Administrator may (if it elects to do so) review any Design Documentation lodged by the Consultant.</p>	<p>It is important to state the number of days which the Consultant must allow for such review by the Contract Administrator in preparing its program.</p> <p>The amount of time which should be allowed for review of Design Documentation is a question which must be determined in light of the circumstances of each project, such as the overall timeframe within which the project is to be completed, the availability of Defence staff to review design (if necessary) and the complexity of the design etc.</p> <p>This period must be based on “calendar days” given the definition of “days” set out in clause 1.2 of the Conditions of Contract, e.g. “14” or “21”. It is not appropriate to state, for example: “14 working days”.</p> <p>If the Design Documentation is rejected in this period, the Consultant must lodge amended Design Documentation.</p>
<p>Number of copies of Design Documentation to be submitted by the Consultant to the Contract Administrator: (Clause 6.5)</p>	<p>Insert the number of copies of the Design Documentation which will be required to be submitted by the Consultant to the Contract Administrator. Specify whether the copies are to be “hard” copies and/or “electronic” copies.</p>	<p>It is a matter for the Contract Administrator to determine how many copies of the Design Documentation are to be submitted for review. However, in respect of hard copies, regard should be had to the costs involved with printing an excessive number of documents.</p> <p>This needs to be balanced against the number of key stakeholders requiring a hardcopy for review.</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Design Documentation hard copy requirements: (Clause 6.5(a))	Nothing to insert.	This item sets out the requirements for presenting hard copy documentation. If necessary, these matters can be amended or tailored to suit the particular project.
Design Documentation electronic copy requirements: (Clause 6.5(b))	Nothing to insert.	This item sets out the requirements for presenting electronic copy documentation. If necessary, these matters can be amended or tailored to suit the particular project.
Order of precedence of documents in the case of any ambiguity, discrepancy or inconsistency: (Clause 6.10(a))	Nothing to insert, except where other documents are to form part of the Contract and advice has been sought from Defence’s legal adviser for the project.	It is essential that certain documents are listed in the order of precedence. The purpose of the order of precedence is to enable the interpretation of a provision in one document to take precedence over others where there is ambiguity, discrepancy or inconsistency as between one or more documents. That ambiguity, discrepancy and/or inconsistency etc is then to be determined such that the document listed higher in the order of precedence is taken to be the correct interpretation (to the extent of the ambiguity, discrepancy or inconsistency). The default position is stated in the Contract Particulars. Where other documents are to form part of the Contract or are provided by the Consultant, then it will generally be the case that those documents will be at a lower order of precedence (as set out in the default position). If it is considered necessary to amend the

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		default order of precedence, advice from Defence’s legal adviser for the project should be sought. All changes to the order of precedence must also be authorised by the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.
Number of days for sample review: (Clause 6.14(b)(ii))	Insert the number of days the Contract Administrator has to review submitted/resubmitted samples or range of samples.	The amount of time which should be allowed for review of samples (or range of samples) is a question which must be determined in light of the circumstances of each project, such as the overall timeframe within which the project is to be completed, the complexity of the samples required etc. This period must be based on “calendar days”, given the definition of “days” set out in clause 1.2 of the Conditions of Contract, e.g. “14” or “21”. It is not appropriate to state, for example: “14 working days”.
Clause 7 – Quality		
Number of days for submission of Project Plans: (Clause 7.4(a)(ii)A)	Insert the applicable number of days for submission of each Project Plan. Insert reference to any additional “Project Plan”, if applicable.	It is important that the Consultant be required to lodge Project Plans (where applicable), based on the draft Project Plans lodged by the Consultant in its Tender) to the Contract Administrator as soon as reasonably practicable following the Award Date, so that there is no undue delay to the carrying out of the Services. The period applicable will depend on the Project Plan. For example, because finalisation of certain plans are conditions precedent to access to the Site, these should be completed relatively early, such as within 7-21 days of the Award Date.

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>This period must be based on “calendar days”, given the definition of “days” set out in clause 1.2 of the Conditions of Contract, e.g. “14” or “21”. It is not appropriate to state, for example: “14 working days”.</p> <p>Any additional Project Plan specified here will need to accord with the “Project Plans (additional)” Contract Particulars for clause 1.1 above and referred to in the Tender Particulars (refer to Part 3.3.3 of this Manual).</p>
<p>Number of days for review of Project Plans: (Clause 7.4(a)(ii)B)</p>	<p>Insert the applicable number of days for review of each Project Plan.</p>	<p>Defence must select an appropriate number of days in which the Contract Administrator may review draft Project Plans.</p> <p>The number of days must strike a balance between allowing the Contract Administrator adequate time to review the Project Plans, while guarding against allowing an unnecessarily long period of time which may affect programming and delay carrying out of the Services.</p> <p>This period must be based on “calendar days”, given the definition of “days” set out in clause 1.2 of the Conditions of Contract, e.g. “14” or “21”. It is not appropriate to state, for example: “14 working days”.</p>
Clause–8 - Time		
<p>Maximum intervals between program updates</p>	<p>Insert the maximum length of time permitted between the Consultant’s first</p>	<p>The Consultant may, of course, update the program at shorter intervals if required.</p> <p>If based on days, this must be based on calendar days (eg “14 days”).</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
by Consultant: (Clause 8.2(b))	program and the first update of the program and between all further updates of the program.	
Program format to be compatible with: (Clause 8.2(d))	Insert the applicable software to be used on the project.	Either “Primavera Suretrak or an equivalent requested by the Consultant and approved by the Contract Administrator” or “Microsoft Project or an equivalent requested by the Consultant and approved by the Contract Administrator”.
Clause 9 – Planning Phase and Delivery Phase		
Planning Phase and Delivery Phase: (Clause 9)	Delete the square brackets and insert either “does” or “does not” depending on whether or not clause 9 applies.	If the project is to contain more than one phase, clause 9 is to apply.
Clause 11 – Payment		
Times for submission of payment claims by the Consultant to the Contract Administrator: (Clause 11.2(a))	Nothing to insert. The Tenderer is requested to provide the day of each month upon which payment claims must be submitted to the Contract Administrator in Tender Schedule F –	Payment claims are made at monthly intervals but, where applicable, subject to the achievement of the applicable milestone in the Fee Payment Schedule. On reviewing the Tenderer’s proposed payment date, suggest that it not be a date after the “28 th ” to avoid confusion as to the months without 29 th , 30 th or 31 st dates.

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	Financial.	
Email address for copy of tax invoice: (Clause 11.5(a))	Nothing to insert.	Defence’s default email address for a copy of the tax invoice to be sent to is invoices@defence.gov.au
Number of business days for payment: (Clause 11.5(b))	Nothing to insert.	<p>The default position is that to the extent that the relevant part of the Services is carried out in:</p> <p>(a) Queensland, New South Wales or the Australian Capital Territory, 5 business days; or</p> <p>(b) any other State or Territory, 10 business days,</p> <p>is the relevant period for payment.</p> <p>Clauses 11.5 and 1.2 of the Conditions of Contract provide that these are “business days”. The definition of “business days” differs across jurisdictions and is referred to in the interpretation provisions in the Conditions of Contract.</p> <p>These timeframes should not be altered without advice from Defence’s legal adviser for the project.</p>
Interest rate: (Clause 11.9)	Nothing to insert.	<p>The formulation for the payment of interest may vary, depending on whether interest is to be payable on damages or late payment by the Commonwealth.</p> <p>Where interest is payable on damages, the following formulation is used by default in the Contract Particulars, in accordance with Commonwealth policy:</p> <p>“In the case of damages – The Australian Taxation Office-sourced General Interest</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>Charge Rate current at the due date for payment or such other rate nominated in writing from time to time by the Contract Administrator”.</p> <p>This rate should only be altered if Commonwealth policy on this issue is amended.</p> <p>However, where interest is payable on overdue payments by the Commonwealth, the interest rate payable will be the higher of the ATO-sourced General Interest Charge Rate (above) and the rate prescribed under any applicable security of payment legislation.</p>
<p>Appointed Adjudicator/ Prescribed Appointer/ Authorised Nominating Authority: (Clause 11.14(d))</p>	<p>Nothing to insert.</p> <p>For the Northern Territory the Resolution Institute of the Northern Territory Chapter.</p> <p>For Western Australia: - the Resolution Institute of the Western Australian Chapter.</p> <p>For Victoria, any of the following:</p> <ul style="list-style-type: none"> (a) Resolution Institute, Victorian Chapter; (b) Building Adjudication Victoria Inc.; or (c) Rialto Adjudications 	<p>If required, further guidance should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	<p>Pty Ltd.</p> <p>For any other State or Territory (save for Queensland): - the Resolution Institute of the Chapter in that state or territory.</p>	
<p>Facilities and infrastructure accounting (additional): (Clause 11.17(b))</p>	<p>Insert any additional matters to be included in any cost report required pursuant to clause 11.17 of the Conditions of Contract.</p> <p>If no additional matters are required, insert “None stated” or “Nil”.</p>	<p>This allows the Commonwealth to specify any additional information required by it to comply with its accounting obligations.</p>
<p>Clause 12 – Termination</p>		
<p>Number of days to remedy breach: (Clauses 12.3(c) and 12.4(b))</p>	<p>Insert the number of days the Consultant will have to remedy a breach of the Contract specified in clause 12.2.</p>	<p>The Commonwealth needs to balance the need to have a period that is:</p> <ul style="list-style-type: none"> (a) short enough so that the Commonwealth can terminate the Contract before the Consultant’s breach causes substantial loss to the project; but (b) long enough to provide the Consultant with a reasonable opportunity to remedy a breach. <p>Alternatively, clauses 12.3(c) and 12.4(b) of the Conditions of Contract could be amended (with appropriate legal advice from Defence’s legal adviser for the project) to allow periods for remedying breaches to be determined on a case by</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>case basis.</p> <p>This period must be based on “calendar days”, given the definition of “days” set out in clause 1.2 of the Conditions of Contract, e.g. “14” or “21”. It is not appropriate to state, for example: “14 working days”.</p>
Clause 13 – Dispute Resolution		
<p>Directions to be subject of an expert determination if disputed: (Clause 13.2)</p>	Nothing to insert.	<p>The relevant directions are listed in the proforma Contract Particulars.</p> <p>Any disputed directions not listed here will be directly referred to executive negotiation and, if necessary, arbitration.</p> <p>This list should not be altered without appropriate advice from Defence’s legal adviser for the project and prior approval must be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.</p>
<p>Industry expert who will conduct expert determinations: (Clause 13.3(a)(i))</p>	<p>The Tender Administrator may insert the name of the person to carry out the expert determination under clause 13.2 of the Conditions of Contract.</p> <p>Alternatively, it may wish to confirm the name of such a person with the successful Tenderer. If so, insert: “To be advised”.</p>	<p>If no person is specified, the person to carry out the expert determination will be nominated by a third party (refer to the next item in the Contract Particulars).</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	If not, insert “None specified”.	
Nominating authority for industry expert: (Clause 13.3(a)(ii))	Insert nominating authority.	Unless stated otherwise, nominating authority is the President for the time being of the Resolution Institute
Clause 14 – Notices		
Address and email address, for the giving or serving of notices, upon: (Clause 14.7(b)(i))	<p>Insert the addresses, email address and the contact names of the Commonwealth and the Contract Administrator for the purpose of service of notices under clause 14.7 of the Conditions of Contract.</p> <p>For the Consultant, insert “To be inserted following selection of successful Tenderer”.</p>	<p>Ensure that these details are up to date and accurate. A post office box is not appropriate. The postal address and email address needs to be checked every day, even over vacation periods. The postal address should also be available for hand deliveries.</p> <p>There are certain security issues associated with using project document management systems software (such as Aconex or equivalents) as the designated email address for the giving and serving of notices. A special condition may be required. Advice from Defence’s legal adviser for the project should be sought.</p>
Clause 16 – General		
Option for Indigenous Procurement Policy: (Clauses 16.2	Select whether Option 1 or Option 2 applies.	Select Option 1 if the Contract is a Non-High Value Contract for the purposes of the Indigenous Procurement Policy – that is, the anticipated Fee will not exceed \$7.5 million inclusive of GST.

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
and 16.3)		Select Option 2 if the Contract is a High Value Contract for the purposes of the Indigenous Procurement Policy – that is, the anticipated Fee will exceed \$7.5 million inclusive of GST. The default option is Option 1.
Defence’s Security Alert System level: (Clause 16.4(d)(i))	Insert relevant level. If the level is “Aware”, delete all other text in this item other than the word “Aware”	The default Alert State is currently “Aware”.
Shadow Economy Procurement Connected Policy: (Clause 16.14)	Select whether clause 16.15 does or does not apply. Unless otherwise stated clause 16.14 will apply.	The Shadow Economy Procurement Connected Policy imposes obligations on the Commonwealth to obtain from Tenderers valid and satisfactory statements of tax record. Further, in anticipation of entering into a contract the successful tenderer must hold and provide to the Tender Administrator copies of all STRs that will be valid and satisfactory on the Award Date.
Environmentally Sustainable Procurement Policy: (Clause 16.18)	Select whether clause 16.18 does or does not apply. Unless otherwise stated clause 16.18 will apply.	The Environmentally Sustainable Procurement Policy will apply, and this clause must be included where the value of the Services (over all phases) is \$7.5 million (GST inclusive) or more.
Clause 17 – Commercial in Confidence Information		
Commercial-in-Confidence	Nothing to insert.	Clause 17 of the Conditions of Contract does not apply unless the Contract

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
Information: (Clause 17)		<p>Particulars state that it applies.</p> <p>This clause allows a Consultant to make a written request to keep specific information confidential whether provided to the Commonwealth before or after the Award Date and the justification for keeping such information confidential has been expressly made by the Consultant to the Commonwealth in its Tender.</p> <p>Where the Commonwealth agrees (in its absolute discretion) that such information is commercial-in-confidence information the Commonwealth must, subject to clause 17(b), keep such information confidential.</p>
Information which is Commercial-in-Confidence Information: (Clause 17)	Nothing to insert.	<p>If there is any information that the Commonwealth agrees should be Commercial-in-Confidence Information, this Contract Particular will be completed before entry into a Contract with the successful Tenderer.</p> <p>Tender Schedule H of the Tender Documents provides guidance as to the nature and type of information which will and will not be regarded as falling within this category.</p> <p>See Part 3.3.2 of this Manual in relation to clause 20 of the Tender Conditions and Part 21.1 of this Manual for further clause-by-clause guidance.</p>
Clause 18 – Information Security		
Sensitive and Classified Information: (Clause 18)	<p>State whether DISP membership is or is not required.</p> <p>Where DISP</p>	<p>The Consultant must have obtained as at the Award Date and thereafter maintain for the term of the Contract the level of DISP membership.</p> <p>Refer to Control 16.1 of the Defence</p>

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
	membership is required, insert required level of DISP Membership, as well as the level and specified details as required for each of the categories of Governance, Personnel Security, Physical Security and Information / Cyber Security.	Security Principles Framework (available at https://www.defence.gov.au/security) for guidance as to when DISP membership should be required and the relevant levels for each Domain.
Minimum level of security clearance and roles required to hold such clearance: (Clause 18.2(e)(ii)A)	Insert minimum level of security clearance and roles required to hold such clearance.	
Anticipated highest security classification of information and assets : (Clause 18. 2(f))	Insert highest security classification of information and assets.	
Clause 22 – Payment Times Procurement Connected Policy		
Reporting Entity (Clause 22)	For the purposes of completing this item of the Contract Particular for tender, nothing to insert.	This Contract Particular will be completed following selection of the successful Tenderer. Each Tenderer is to nominate whether they are or are not a Reporting Entity in item 7 of

Design Services Contract – Contract Particulars		
Clause	Information to be inserted by Tender Administrator	Guidance
		<p>the Tender Form.</p> <p>Following selection of the successful Tenderer, select whether as at the Award Date, the Consultant is or is not a Reporting Entity for the purposes of the Payment Times Procurement Connected Policy</p>

For completeness, Attachment 1 to the Contract Particulars (Delivery Phase Fee Proposal) will also need to be completed. If clause 9 of the Conditions of Contract applies and there are two phases, leave in the heading and insert the words “To be inserted following selection of the successful Tenderer”. Otherwise, delete the entirety of the heading in Attachment 1.

3.4.2 Annexure 1 – Brief

The purpose of the Brief is to provide a clear statement as to the scope, background, aims, objectives and fundamental requirements of the Services. The reader of the Brief must be able to determine from the Brief, with a reasonable degree of certainty, requirements of the Services.

The Brief needs to be carefully completed as the quality of the content very much impacts on the robustness of the Contract itself. In addition, the Brief should include:

- (a) clear description of each of the parts of the works; and
- (b) a description of the purposes of each of the works (noting also the application of clause 2.2(c)(ii) of the Conditions of Contract which links the fitness for purpose obligation to “the purposes as set out in, or reasonably to be inferred from, the Brief”). In this regard, the Tender Administrator should appropriately reflect within the Brief all applicable purposes, including as appropriate the user requirements from the ‘sponsor’s functional requirements brief’ which would have been developed by the Contract Administrator as part of its PMCA services.

In this regard, a proforma Brief can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Brief" on that page and should be used as the base document for any new procurement and fully reviewed and amended as necessary to reflect the requirements for the project and contract in question.

While it is not intended that the Brief be an extremely lengthy document, it is important that the Brief is sufficiently detailed to enable Tenderers to provide appropriate Tenders to meet Defence's requirements. It is preferable to err on the side of caution by including additional detail rather than providing inadequate detail.

It is also critical that the author or person putting together the parts of the Brief has a detailed understanding of the Conditions of Contract and the Special Conditions so as to reduce the possibilities of inconsistencies between them.

It is critical that the Brief is prepared having regard to the risk and provisions of the Conditions of Contract and Special Conditions to ensure maximum consistency is achieved. The requirements of the Brief must be clear, certain and legally enforceable, as this is the part of the Contract where disputes and differences are most likely to arise.

3.4.3 Annexure 2 - Special Conditions

Annexure 2 to the Conditions of Contract contains the Special Conditions to the Contract. Part 27 of this Manual below provides clause-by-clause guidance and commentary on those Special Conditions which should be referred to for the purposes of completing this Annexure 2 as part of the Tender Documents.

The purpose of the Special Conditions is to provide specific provisions dealing with project and/or Site-specific issues relevant to the Contract and also to reflect any particular agreements reached by the parties which are not already set out in the Conditions of Contract. Special Conditions are not to be used to restate the provisions already contained in the Conditions of Contract.

It is intended that the Special Conditions will have been settled and included in Annexure 2 to the Conditions of Contract prior to the issuing of the Tender Documents, as the terms of the Special Conditions may

be critical for the purposes of the tender process. They should always be settled by Defence's legal adviser for the project.

However, if issues arise subsequent to the issue of the Tender Documents or if the parties negotiate certain issues which require further project-specific Special Conditions to be included, further legal advice should be sought.

3.4.4 Annexure 3 – Fee Payment Schedule

If a Fee Payment Schedule will be used, the amounts in Annexure 3 will be completed following selection of a successful Tenderer. That is, a proposed Fee Payment Schedule will be completed in light of the information provided by Tenderers as part of their Tender.

The Tender Administrator should work closely with the Project team to complete the first two columns of the template table set out in Annexure 3 (titled "Payment milestone name" and "Payment milestone description"). This is an important table as it sets out when the Consultant may be entitled to be paid a portion of their Fee. Legal advice should be sought from the legal advisers for the project in regard to the payment milestone descriptions as appropriate. Description of each payment milestone should be clear, succinct and use (where applicable) defined terms set out in the Contract (including the Brief).

The "Amount (GST exclusive)" column of this table sets out the amount payable at each payment milestone and should include the words as suggested by the template table set out in Annexure 3, that is "\$[To be inserted following selection of successful Tenderer]".

3.4.5 Annexure 4 – Table of Variation Rates and Prices

Annexure 4 is to be inserted following selection of a successful Tenderer. That is, a proposed Table of Variation Rates and Prices will be submitted by Tenderers as part of their Tender.

Accordingly, for the purposes of issuing the Design Services Contract for Tender, insert "[To be inserted following selection of successful Tenderer]" under the heading for Annexure 4.

3.4.6 Annexure 5 – Indigenous Participation Plan

If clause 16.2 of the Conditions of Contract does not apply, that is, the Contract is not a “High Value Contract” for the purposes of the Indigenous Procurement Policy, Annexure 5 will not be used. In the heading, delete the square brackets, insert “**NOT USED**” and delete the other text in square brackets.

If clause 16.2 of the Conditions of Contract applies, that is, the Contract is a “High Value Contract” for the purposes of the Indigenous Procurement Policy, Annexure 5 to the Conditions of Contract will contain the Consultant’s Indigenous Participation Plan. As this is a document required to be submitted by a Tenderer as part of its Tender, this Annexure is left blank for the purpose of issuing the Tender Documents. As part of the tender process, Tenderers will be required to complete and lodge Tender Schedule J - Indigenous Procurement Policy which includes lodging a Declaration of Compliance, providing an Indigenous Participation Plan and providing details of its past performance.

Prior to executing the Contract, the successful Tenderer’s Indigenous Participation Plan is to be attached at Annexure 5 to the Conditions of Contract.

Refer also to the guidance provided in this Manual at:

- (a) Part 3.3.5 above in relation to Tender Schedule J - Indigenous Procurement Policy; and
- (b) Part 20.1.2 below which relates to clause 16.2 and 16.3 of the Conditions of Contract.

3.4.7 Annexure 6 – Supplier Environmental Sustainability Plan

As this document is required to be submitted by a Tenderer as part of its Tender, this Annexure is left blank for the purpose of issuing the Tender Documents. As part of the Tender process, Tenderers will submit a response to Tender Schedule K– Environmentally Sustainable Procurement. The successful Tenderer’s response to item C of this Tender Schedule (along with any negotiated amendments) will be attached as Annexure 6 to the Contract prior to it being executed.

Refer also to the guidance provided in this Manual at:

- (c) Part 3.3.5 above in relation to Tender Schedule K – Environmentally Sustainable Procurement; and
- (d) Part 20.1.17 below which relates to clause 16.18 of the Conditions of Contract.

Part 4 – Guidance for contract finalisation and execution

4.1 Finalising the Contract for execution

The Tender Administrator should ensure that the Contract Particulars have been fully and accurately completed and that each of Annexures 1 to 6 are complete and part of the Contract documentation.

The Tender Administrator should also ensure that no extraneous material is included in the Contract documentation or otherwise incorporated by reference. For example, correspondence, emails, notes of meetings should not form part of the final executed Contract.

Prepare Formal Agreement including all relevant details.

4.2 Completing the Contract Particulars for Execution

Care must be taken in completing the Design Services Contract Contract Particulars to ensure they reflect the parties' agreement and are consistent with the Conditions of Contract.

To assist the parties in this task, guidelines to the information and details to be included in the Contract Particulars and that follow on after the selection of the successful Tenderer are set out below. Refer to Part 3.4 of this Manual above regarding the Contract Particulars not included in the table below but which would have been completed as part of the Tender Documents or updated as part of the procurement process.

If amendments, revisions or addenda have been issued to any of the documents, the most recent versions/revisions should be noted. This applies generally to all documents specified in the Contract Particulars. If changes have been made to any of the documents, the description of that document must reflect the changes. For example, the item might state "[name of document] version 1 dated 1 January 20##." See commentary in Part 3.4.1 of this Manual above.

As always, guidance should be obtained from the Delegate prior to amending the proforma Contract Particulars.

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
Clause 1 - Glossary of Terms, Interpretation and Miscellaneous		
Consultant: (Clause 1.1)	Insert the name and ABN of the Consultant once the successful tenderer is chosen.	Ensure these details are inserted accurately. This information should have been provided in the Tender Form. Also carry out a free search at www.asic.gov.au to ensure that the correct entity has been inserted. If in doubt, advice from the legal adviser for the Project should be sought (e.g. if a joint venture, partnerships or other legal entities comprise "the Consultant").
Consultant's Representative: (Clause 1.1)	Insert the name of the person who will act as the Consultant's Representative.	Ensure these details are inserted accurately. The Consultant's Representative is generally the person with "day to day" responsibility for the Services. This person should not be the same person as the Consultant's Executive Negotiator. This information should have been provided in Tender Schedule B (or as negotiated).

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
Date for Completion (of a Milestone): (Clause 1.1)	<p>This may have already been inserted during the preparation of the Tender Documents.</p> <p>If not, this Contract Particular must be completed prior to execution of the Contract.</p> <p>If the Tenderer was requested to tender these dates, refer to Tender Schedule D (or such other dates as negotiated).</p>	Refer to guidance for this Contract Particular at Part 3.4.1 of this Manual above.
Date for Delivery Phase Agreement: (Clause 1.1)	<p>If clause 9–applies - this may have already been inserted during the preparation of the Tender Documents.</p> <p>If clause 9 applies, this Contract Particular must be completed prior to execution of the Contract.</p>	Refer to guidance for this Contract Particular at Part 3.4.1 of this Manual above.
Delivery Phase Fee Proposal: (Clause 1.1)	<p>If clause 9 of the Conditions of Contract applies, that is the Services are phased, this Contract Particulars would have been completed to read “As set out in Attachment 1 to these Contract Particulars”.</p> <p>Attachment 1 to the</p>	Refer to guidance for this Contract Particular at Part 3.4.1 of this Manual above.

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
	Contract Particulars will need to be updated to include the Delivery Phase Fee Proposal as lodged by the Consultant as part of its response to Tender Schedule F (or as negotiated).	
EMOS Contractor: (Clause 1.1)	This will have already been inserted during the preparation of the Tender Documents and will only require amendment if the EMOS Contractor has changed in the intervening period.	Refer to the guidance on the same Contract Particular in Part 3.4.1 of this Manual above.
Executive Negotiators: (Clause 1.1)	<p>The Commonwealth's Executive Negotiator is Director General, Capital Facilities and Infrastructure and should have already been inserted during preparation of the Tender Documents.</p> <p>The Consultant's Executive Negotiator must also be inserted before execution of the Contract.</p>	<p>Ensure that details of the Consultant's executive negotiator are inserted correctly. This information should be provided in the Tender Form, or as negotiated.</p> <p>Before a dispute is submitted to arbitration, it must first be referred for executive negotiation in an attempt to resolve it. The Executive Negotiators must undertake "genuine and good faith negotiations" to resolve the dispute or alternatively agree upon a procedure to resolve it.</p> <p>The persons nominated</p>

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
		<p>by the parties in this item should not be directly involved in the project. For this reason, it is not appropriate for the Consultant's Representative (nor any other person directly involved in the day to day activities of the project) to also be the Executive Negotiator.</p> <p>A State or Territory or national manager of the Consultant may be more appropriate.</p> <p>Each Executive Negotiator must have authority to resolve disputes on behalf of the respective party.</p>
Fee: (Clause 1.1)	<p>If clause 9 of the Conditions of Contract does not apply and there are no phases, insert the lump sum Fee as a lump sum.</p> <p>If clause 9 of the Conditions of Contract applies and there are two phases, insert the amount of the Planning Phase Fee. Please note that the Delivery Phase Fee cross refers to the definition in clause 1.1 of the Conditions of Contract, do not delete</p>	<p>This will be set out in Tender Schedule F (or as negotiated).</p> <p>It should be noted that the Design Services Contract does not provide for "provisional sum services" or "reimbursable work". If required, advice will be required from the legal adviser for the Project.</p>

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
	<p>this wording from the Contract Particulars.</p> <p>In each case, the amount inserted should be GST exclusive. The words "GST exclusive" has been included as part of the template and should be retained, for clarity.</p>	
<p>Indicative Delivery Phase Fee: (clause 1.1)</p>	<p>If there are phases, this item must be completed before execution of the Contract.</p> <p>If applicable, insert the Indicative Delivery Phase Fee. The words "GST exclusive" as suggested by the template should be retained, for clarity.</p> <p>If there are no phases, this item should have been deleted prior to release of the Tender Documents.</p>	<p>This will be set out in Tender Schedule F (or as negotiated).</p>
<p>Quality Manager: (Clause 1.1)</p>	<p>Insert the name of the person who will act as the Consultant's Quality Manager.</p>	<p>Ensure that these details are inserted accurately. This information should be provided in the table in Item 1 of Tender Schedule B (Proposed Resources).</p> <p>The Quality Manager is</p>

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
		generally the person with “day to day” responsibility for quality. Depending on the type and nature of the project, this person may perform dual roles (e.g the Quality Manager may also act as the Consultant’s Representative.)
Clause 2 - Role of the Consultant		
Services which may be let to one of the named subconsultants: (Clause 2.9(a)(i)A)	Insert a description by reference to the Consultant’s response to Tender Schedule B – Proposed Resources.	The Consultant’s response to Tender Schedule B – Proposed Resources will contain the details of Services the Consultant will be letting to named subconsultants. If the Commonwealth agrees to these arrangements, insert the details here.
Clause 4 - Personnel		
Contract Administrator’s representatives and their functions: (Clause 4.4)	Insert the names and functions of any Contract Administrator’s representative(s) which will be appointed as at the Award Date.	Refer to guidance on this Contract Particular at Part 3.4.1 of this Manual above.
Consultant’s key people: (Clause 4.5(a)(i))	Insert the names of the key people and their positions for the	Clause 4.5 of the Conditions of Contract requires the Consultant

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
	<p>purposes of clause 4.5 of the Conditions of Contract. The positions and names should be drawn from the Consultant's response to Tender Schedule B.</p> <p>If the list of key people and positions is too lengthy to be inserted in the Contract Particulars, this information could be inserted as a new Annexure to the Contract. If so, insert a new Annexure and insert a cross reference in this item (e.g. "As set out in Annexure #").</p>	<p>to employ certain key people in certain positions. They may only be replaced in certain circumstances.</p> <p>Tenderers are requested to nominate their key people in their Tender. Therefore, this item will name the key people acceptable to Defence, whether as nominated by the successful Tenderer in its Tender or otherwise agreed in negotiations.</p>
Clause 5 - Insurances		
	<p>The Contract Particulars relating to insurance would have already been completed during the preparation of the Tender Documents. However, if there are any agreed changes to the insurance requirements, the updated requirements should be inserted.</p>	<p>Seek advice from Defence's legal adviser for the Project as appropriate.</p>

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
Clause 11 – Payment		
Times for submission of payment claims by the Consultant to the Contract Administrator: (Clause 11.2(a))	Insert the time for submission of payment claims.	Tenderers are requested to nominate the day of the month for submission of payment claims with their tenders (in Tender Schedule F).
Clause 14 - Notices		
Address and email address, for the giving or serving of notices, upon: (Clause 14.7(b)(i))	The details for the Commonwealth and the Contract Administrator will have been inserted in the Contract Particulars which formed part of the Tender Documents. Insert the address, email address and contact name of the Consultant for the purpose of service of notices under clause 14.7 of the Conditions of Contract.	Ensure that all details (including those previously inserted for Defence and the Contract Administrator) are up-to-date and accurate. The Consultant’s information should be set out in the Tender Form. Post office boxes are not appropriate. Please also ensure the name of the Consultant’s Representative be inserted into the notice details, rather than the name of the executive negotiator. Refer also to guidance on this Contract Particular at Part 3.4.1 of this Manual above.
Clause 17 - Commercial-in-Confidence Information		
Commercial-in-Confidence Information:	Insert whether or not clause 17 of the	Refer to guidance on this Contract Particular at

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
(Clause 17)	Conditions of Contract applies and delete other text.	Part 3.4.1 of this Manual above.
Information which is Commercial-in-Confidence Information: (Clause 17)	Insert any specific information justification and period of confidentiality from Tender Schedule H (if appropriate).	Refer to guidance on this Contract Particular at Part 3.4.1 of this Manual above. Insert this information only if the Commonwealth agrees that such information is Commercial-in-Confidence Information. Guidance must be obtained from the Delegate before agreeing to insert any information here. If clause 17 does not apply, insert "None stated" under each of "Specific Information", "Justification" and "Period of confidentiality"
Clause 22 – Payment Times Procurement Connected Policy		
Reporting Entity (Clause 22)	Insert whether or not clause 22 of the Conditions of Contract applies. The Tenderer will have nominated in its Tender Form whether it is a "Reporting Entity" for the purposes of the Payment Times Procurement	Refer to the guidance on the same Contract Particular in Part 3.4.1 of this Manual above. See also Part 26 of this Manual below.

Design Services Contract - Contract Particulars		
Clause	Information to be inserted by Contract Administrator	Guidance
	Connected Policy.	

For completeness, if clause 9 of the Conditions of Contract applies, Attachment 1 to the Contract Particulars should be completed to contain the Delivery Phase Fee Proposal lodged by the Consultant – as may be updated through negotiations.

4.3 Completing the Annexures

Annexures 1 and 2 to the Design Services Contract Conditions of Contract (Brief and the Special Conditions) will have already been inserted during the preparation of the Tender Documents.

If changes have been made to any of the documents set out in or referred to in an Annexure by addenda, the content of that document must reflect the change. For example, in the case of the Brief, it is **always** preferable for the Brief at time of execution to comprise a consolidated version (including all changes issued by addenda or as negotiated). If this is done, insert “[document title] version # dated #”.

In relation to completing Annexures 3 to 6 for execution, refer to the guidance in the Parts of this Manual that follow.

4.3.1 Annexure 3 – Fee Payment Schedule

The final Fee Payment Schedule submitted by the successful Tenderer as part of its Tender (i.e., in Tender Schedule F) and/or as agreed during negotiations are to be inserted here prior to execution.

4.3.2 Annexure 4 – Table of Variation Rates and Prices

The Table of Variation Rates and Prices submitted by the successful Tenderer as part of its Tender (i.e., in Tender Schedule F) and/or as agreed during negotiations are to be inserted here prior to execution.

4.3.3 Annexure 5 – Indigenous Participation Plan

If applicable, the successful Tenderer's Indigenous Participation Plan is to be attached at Annexure 5 to the Conditions of Contract. See also Part 3.4.6 above for further guidance.

4.4 Attaching the Contract documents

Whether Contract documents should be physically attached to or bound with the Conditions of Contract (and other Contract documents) will depend on the physical size of the other documents. If possible, it is preferable that all Contract documents be spiral bound in one volume. However, if this is impracticable, the documents should be bound in volumes (with a cover page on each volume stating "Volume # of #").

If it is not possible to bind the Contract documents at all, it is acceptable (though not ideal) to describe the documents (including the version/revision number and date) and the physical location where the document can be found. This description must be clearly set out in the relevant item of the Contract Particulars or in the applicable Annexure itself. The Design Services Contract refers to the creation of other documents as part of the Consultant's obligations under the Contract. For example, under the Design Services Contract, the Consultant is required to finalise and then comply with certain "Project Plans" which, at the time of tender, have been provided by the Consultant in outline only. Defence may have a number of amendments/concerns with their content which need to be resolved. If the parties wish to bind such drafts or other documents into the "Contract", the basis on which this is being done must be made clear (for example, if content is agreed or is still to be agreed and whether or not the content is binding on or limits the rights etc. of Commonwealth) and any such wording should be subject to legal review by Defence's legal adviser for the project.

If an electronic version of the Contract is to be compiled to facilitate electronic execution, the ideal approach is to incorporate all Contract documents into one single, consolidated PDF. Once executed, this PDF document should also be updated to include the execution blocks with the signatures. If for file size restriction reasons, the documents comprising the Contract needs to be split into more than one document, legal advice should be sought as to the best practice in this regard - both in transmission of those files to facilitate Contract execution and for retained copies of the executed Contract.

Certain terms of the Design Services Contract refer to the creation of other documents as part of the Consultant's obligations under the Contract. For example, under the Design Services Contract, the Consultant is required to finalise and then comply with the "Project Plans" which, at the time of tender, certain but not all of which have been provided by the Consultant in draft form only. Defence may have a number of amendments/concerns with their content which need to be resolved and can be done so during the review process under clause 7.4 of the Conditions of Contract but could be raised with the successful Tenderer prior to Contract Award Date.

4.5 Formalities for the execution of the Contract

It is important to ensure that the Contract is validly executed.

Where the Consultant is a company incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**) execution of the contract may be effected by any of the following methods:

1. under section 127 of the Corporations Act;
2. by an individual under a power of attorney granted by the company to that individual (or within a class of a titled position) authorising execution of the contract (or type of contract); or
3. by an individual expressly authorised by a Board resolution.

The most common form of execution by a company is under section 127 of the Corporations Act which requires the signature of two directors *or* one director and the secretary (or by a single director if the company only has one director). Ensure:

1. printed names of signatories are included under signatures, as well as the capacity (director, secretary or sole director) in which each officer signs; and
2. if the director is the sole director with no appointed secretary the execution block should state that they are the sole director of the company and that the company does not have a company secretary (in accordance with section 129(5)(c) of the Corporations Act).

Where a natural person as agent or attorney executes on behalf of a Corporation Act company (permitted under section 126 of the Corporations Act):

1. the Tender Administrator should always review (utilising the legal adviser for the Project as necessary) any power of attorney to ensure that the proposed signatory is properly authorised. Similarly, where an individual is authorised by a board resolution to sign the contract, the Tender Administrator should be provided with a copy of the relevant Board minute (or an extract of the minutes); and
2. where the signatory is relying on a delegations manual, the Tender Administrator should be provided with a Board minute confirming the content of the delegations manual.

Electronic execution of agreements is permissible for Corporations Act companies executing under section 127 or by a natural person as agent or attorney, unless the document is subject to contrary statutory writing or signing requirements (for example some land registry requirements may require wet-ink signatures).

If the Consultant is an unincorporated joint venture (made up of Corporations Act company joint venture entities) then each of the joint venture entities must execute the contract, and the above principles apply separately to each joint venture entity.

It should also be borne in mind that a single director of a company (where the company is not a sole director company) does not of him/herself have an ostensible authority to execute contracts on behalf of the company unless the company holds that director out as having the requisite authority. The principle is that directors act as a board and not as individuals.

This Manual does not cover execution by foreign corporations, statutory corporations, or other companies not incorporated under the Corporations Act. With regards to statutory corporations is not possible to give an answer without looking at the specific piece of legislation relevant to the statutory corporation although there are often no special requirements on how agreements to other documents not under seal must be signed (in contrast to deeds where technical formalities remain).

If the Tender Administrator has any doubt about the proposed method of execution by the Consultant it should seek guidance from the legal adviser for the project.

Part 5 - Glossary of Terms, Interpretation and Miscellaneous

5.1 Glossary of terms, interpretation and miscellaneous (clause 1)

5.1.1 Glossary of terms (clause 1.1)

Clause 1.1 of the Conditions of Contract contains definitions of important terms used throughout the Contract. With the exception of the defined term “direction”, all defined terms in clause 1.1 are identifiable as their first letter is in uppercase.

It should also be noted that certain non-capitalised terms are given meaning or interpretation in clause 1.2 of the Conditions of Contract – see Part 5.1.2

5.1.2 Interpretation (clause 1.2)

Clause 1.2 of the Conditions of Contract contains a number of provisions relating to how the Contract should be read and interpreted.

Of particular relevance will be the provisions in:

- (a) paragraphs (l), (m), (n) and (o) of clause 1.2 which define “day” and “business day” in relation to particular clauses of the Conditions of Contract; and
- (b) paragraph (t) which interprets reference to Standards Australia standards, overseas standards or other similar reference documents in the Brief; and
- (c) paragraph (u) of clause 1.2 which interpret the words “extra costs” in certain specified clauses to include “a reference to extra costs reasonably incurred by the Consultant as a direct result of the applicable event delaying the Consultant”.

5.1.3 Miscellaneous (clause 1.3)

(a) Governing Law (clause 1.3(a))

The governing law of the Contract is specified in the Contract Particulars. This is usually the law of the State or Territory in which the Site is located. If the Site is located in one or more States or Territories, a decision needs to be made by Defence

about the appropriate governing law for the Contract. As different jurisdictions' laws may impact differently upon the Services, if there is any doubt as to which jurisdiction is to apply, legal advice should be sought.

(b) Waiver (clause 1.3(b))

None of the terms of Contract can be waived, discharged or released unless both parties agree in writing, or, to the extent that the term involves a request of one party seeking to waive a term or one party seeking to waive an obligation of the other party, there is written notice to the other party. However, certain statutory obligations and equitable principles (such as estoppel) cannot be contracted out of and therefore the parties need to remain very careful that they do not act in a way that their words or conduct may be inconsistent with the clauses of the Contract.

(c) Contract is entire agreement (clause 1.3(c))

Both parties acknowledge that the Contract constitutes the entire agreement between them and supersedes any correspondence or other documents relating to the subject matter of the Contract between the parties before the Award Date. Only those matters which are contained in the Contract (as defined in clause 1.1 of the Conditions of Contract) constitute the enforceable contract between the parties.

If a dispute arose in relation to what documents formed the Contract, clause 1.3(c) of the Conditions of Contract would exclude evidence of prior agreements, prior correspondence and previous drafts of the Contract. However, if a dispute arose in relation to the interpretation of the Contract evidence of surrounding circumstances would generally be admissible to resolve the ambiguity.

Therefore, any contract-specific matters which are at variance to, or beyond the scope of, the Contract need to be incorporated within the wording of any one of the documents which comprise the "Contract".

(d) Joint and several liability (clause 1.3(d))

This clause is only relevant where a number of separate legal entities make up the Consultant, such as where there is a

consortium or joint venture. In such circumstances, this clause seeks to preserve the right of Defence to take action against either or all of the separate entities making up the Consultant. However, given the proportionate liability legislation in a number of jurisdictions that affects the traditional approach to joint and several liability, if the Consultant will consist of more than one separate legal entity, legal advice should be obtained. In regard to joint and several liability, see also clause 11 of the Special Conditions in Part 27 which could also be used where the Consultant is comprised of a joint venture.

If proportionate liability legislation applies (see commentary under clause 13.14 of the Conditions of Contract), it may allow a person to reduce its liability, including liability under the Contract, to the amount that a Court considers just having regard to the extent of its responsibility for the underlying loss and damage (excluding personal injury), notwithstanding that it may have assumed responsibility for the full amount of that loss and damage under the express terms of the Contract (including by virtue of a 'joint and several liability' clause such as this clause).

The proportionate liability legislation is complex legislation and not identical in each State and Territory. Legal advice concerning its potential or actual impact should be obtained from the Directorate of Program Assurance and/ or Director of Quality and Compliance.

(e) Severability of invalid terms (clause 1.3(e))

This clause provides that any provisions of the Contract which are illegal, void or unenforceable are severable (i.e. removable) to the extent of the illegality, unenforceability or other reason causing the provision to be void and that they will not invalidate other provisions of the Contract.

(f) Indemnity (clause 1.3(f))

Under this clause, the Consultant provides an indemnity in favour of Defence for breach of the Contract by the Consultant. The purpose of the indemnity is to make it easier for Defence to recover amounts which it claims from the Consultant under the Contract. Legal advice should be sought before taking any action in respect of the indemnity. See also commentary above in

respect of the potential impact of the proportionate liability legislation.

(g) Survival of indemnities (clause 1.3(g))

All indemnities provided survive termination of the Contract and may be relied upon and enforced by Defence in the event that the Contract has been terminated.

(h) Defence Website (clause 1.3(h))

If a document referred to as being available on the Defence Website is not so available, the Contract Administrator may provide such document to the Consultant by other means.

With the decommissioning of the former “DEQMS” website, the Design Services Contract now uses the defined term “Defence Website”. When compiling the Brief, it is important for the Tender Administrator to consider whether all the Defence related technical documents which are referenced in the Brief can be accessed by, and are accessible to, all the tenderers and, following Contract award, the Consultant. It should be noted that “ERIK” (Estate Resources Information Kiosk) is not a publicly available source.

(i) Services at Consultant’s Cost (clause 1.3(i))

Unless expressly stated to the contrary in the Contract, the Consultant must perform the Services at its cost.

Part 6 - Role of the Consultant

6.1 Role of the Consultant (clause 2)

6.1.1 Engagement (clause 2.1)

This clause sets out the Consultant's basic obligation to carry out the Services in accordance with the Contract.

6.1.2 Standard of Care (clause 2.2)

The purpose of clause 2.2 of the Conditions of Contract is to ensure that the Services performed by the Consultant and its subconsultants (including Agreed Subconsultants) are of the standard expected of an expert professional provider of the Services. The Consultant must ensure that the Design Documentation meets the requirements of the Contract and must use its best endeavours to ensure that the Design Documentation will be fit for the purposes as set out in, or reasonably to be inferred from, the Brief.

This clause also requires the Consultant to perform the Services economically and within any budget that is notified to it by Defence and imposes on the Consultant a general obligation to act in the utmost good faith in the best interests of Defence and to keep Defence informed of any matters that may affect the Services and the Works.

6.1.3 Authority to Act (clause 2.3)

This clause limits the authority of the Consultant to act on behalf of Defence. In particular, the Consultant is prohibited, unless expressly authorised otherwise, from entering into contracts, commitments, other legal documents or arrangements, or taking steps to bind or commit Defence.

This clause further clarifies the role of the Consultant as an independent consultant and prohibits the Consultant from purporting to be a partner or joint venturer of the Commonwealth.

6.1.4 Knowledge of Commonwealth's Requirements (clause 2.4)

This clause ties in with the Consultant's general obligation under clause 2.2(e) of the Conditions of Contract to act in the utmost good faith in

the best interests of Defence. In particular, this clause requires the Consultant to inform itself of Defence's requirements with respect to the Services and the Works, to refer to the Commonwealth Material and the Commonwealth's Program and consult with Defence during the Services and the Works.

6.1.5 Notice of Matters Impacting on the Services or the Works (clause 2.5)

This clause requires the Consultant to give notice to the Contract Administrator promptly upon becoming aware of any matter which:

- (a) is likely to change or which has changed the scope, timing or cost of the Services or the Works;
- (b) affects or may affect the Commonwealth's Program or the Consultant's then current program;
- (c) involves any error, omission or defect in any continuing or completed aspect of the Services; or
- (d) involves any Defect (or similar term used or defined in the "Construction Contract" – as defined in clause 1.1 of the Conditions of Contract) in any continuing or completed aspect of the Works.

This clause further states that such notice should include, as far as practicable in the circumstances, particulars of the change, error, omission or defect, its likely effect, and the Consultant's recommendation as to how to minimise the effect upon the scope, timing and cost of the Services and the Works.

A proforma notice for notifying the Contract Administrator of any matter which impacts or is likely to impact the Services or the Works titled 'Notice of matters impacting on the Services or the Works' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

6.1.6 Co-operation with Other Contractors (clause 2.6)

This clause imposes obligations on the Consultant to cooperate and coordinate with Other Contractors (as defined in clause 1.1 of the

Conditions of Contract), regardless of whether such Other Contractors are engaged either on the same project or on a different project.

It should be noted that “Other Contractors” is broadly defined (in clause 1.1 of the Conditions of Contract) to mean any person engaged to do work (other than the Consultant and its subconsultants) and is not limited to persons engaged by Defence.

6.1.7 Access to the Consultant’s premises (clause 2.7)

The purpose of this clause is to make it clear that (without limiting clause 6.12 of the Conditions of Contract) the Consultant is obliged at all reasonable times to permit the Contract Administrator, or any person authorised by the Contract Administrator, to inspect the carrying out of the Services and any Design Documentation or other Project Document. Thus, it gives Defence a right to access to the Consultant’s premises if this is required to inspect the carrying out of the Services, Design Documentation or other Project Documents.

6.1.8 Conflict of Interest (clause 2.8)

This clause seeks to eliminate any conflict of interest that the Consultant or any of its subconsultants have or may have in the performance of their obligations.

The Consultant provides a warranty that, at the Award Date, no conflict exists or is likely to arise in its performance of the Services, and that it will use its best endeavours to ensure that no conflicts exists or is likely to arise in the performance of the obligations of any subconsultants.

The Consultant must immediately notify the Contract Administrator of any conflict of interest or risk of conflict of interest and to take all steps required by the Contract Administrator to avoid or minimise such conflict or risk of conflict. A proforma notice titled ‘Notice of conflict of interest’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

6.1.9 Subcontracting (clause 2.9)

This clause sets out the conditions the Consultant must satisfy before a subconsultant may be validly engaged to perform any of the Services. If the Consultant wishes to engage a subconsultant in respect of work

which is described in the Contract Particulars but the subconsultant is neither named in the Contract Particulars nor an Agreed Subconsultant specified in the Contract Particulars, it must get written approval from the Contract Administrator. Where Defence is concerned about the provision of particular services, disciplines or subconsultants, it should specify the services, disciplines or subconsultants in the Contract Particulars.

A proforma notice titled 'Request to subcontract' (which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page) can be used by the Consultant to request approval to engage a subconsultant other than one named in the Contract Particulars or an Agreed Subconsultant. A proforma notice for the Contract Administrator to accept or reject the proposed subconsultant titled 'Response to request to subcontract' can also be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Under clause 2.9(a)(ii) of the Conditions of Contract the Consultant remains responsible for all of the Services regardless of whether they are ultimately subcontracted to a third party. Further, the Consultant will be vicariously liable to Defence for all acts, omissions and defaults of the subconsultants – see clause 2.9(a)(iii). Clauses 2.9(b)(ii)A and 2.9(b)(ii)B of the Conditions of Contract ensure that the Consultant will be similarly liable to Defence where Services are subcontracted to subconsultants.

Clause 2.9(a)(iv) of the Conditions of Contract requires that any subcontract must contain provisions which bind the subconsultant to participate in any novation of the agreement to Defence in the event that Defence terminates the Contract. This enables the subconsultant to continue performing the contracted work on the project (under a new head consultant or directly contracted to Defence) despite the termination if Defence thinks this would be beneficial in the circumstances. This clause also requires that the subcontract contain provisions as otherwise required by the Contract.

Under clause 8.5(d) of the Conditions of Contract, the Consultant must obtain and hold satisfactory and all valid and satisfactory STRs required for the entity type of any subconsultant where the subcontract price is valued (or estimated) to be over \$4 million (inclusive of GST). Reference

should be made to clause 16.14(f) of the Conditions of Contract for the meaning of “satisfactory” and “valid”.

Subconsultant Deed of Covenant

Clause 2.9(a)(v) of the Conditions of Contract requires, where requested to do so by the Contract Administrator, the Consultant to execute and procure the relevant subconsultant to execute a Subconsultant Deed of Covenant and provide this to the Contract Administrator as a condition precedent to seeking approval to subcontract the services under clause 2.9(a) of the Conditions of Contract or, if no such approval is required, within the time required by the Contract Administrator and in any event prior to the commencement of the Services by the relevant subconsultant.

A proforma notice titled ‘Request for Subconsultant Deed of Covenant’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

A Subconsultant Deed of Covenant is a deed entered into by Defence, the Consultant and the subconsultant. As there is no direct contractual relationship between Defence and the subconsultant, the purpose of the deed is to provide a direct relationship between each of the parties so that all parties may enforce rights against one another.

A copy of the deed which is to be filled out and executed is attached in the Schedule of Collateral Documents. If a Subconsultant Deed of Covenant is provided, it should not be executed by Defence unless and until Defence wants to novate the subconsultant from the Consultant to Defence or its nominee.

A common question is whether or not a Subconsultant Deed of Covenant will be required for all subcontracts. While Defence could insist that all subconsultants provide such deeds, in practice (because of the administrative burden of obtaining and properly executing such deeds for all subcontract packages on large projects) it is a matter for the Contract Administrator to determine. Factors to consider will include:

- (a) the risks (such as time, cost, quality and other political pressures) inherent in the subcontract (i.e. the greater the risk, the greater the need for a Subconsultant Deed of Covenant);

- (b) the value of the subcontract (i.e. other than in particularly high risk subcontracts, it would not be necessary to obtain such deeds in relatively minor subcontracts);
- (c) the timeframe for commencement of the services;
- (d) the term/length of time required to carry out the services (i.e. the longer the time, the greater the likelihood that problems could arise hence the greater need for such a deed);
- (e) the technical complexity of both the subcontract and the project generally (i.e. the greater the complexity, the greater the need for such a deed, as there may be fewer replacement subconsultants); and
- (f) the financial stability of the Consultant (i.e. if the Consultant becomes insolvent, then Defence may wish to novate into the subcontract).

The Subconsultant Deed of Covenant provides that:

- (a) the parties will novate the subcontract to Defence (or its nominee) if the Contract (i.e. the Design Services Contract) is terminated; and
- (b) the Consultant will exercise a duty of care in the performance of the services to be provided under the subcontract such that (amongst other things) it will exercise the standard of care of an expert professional provider of the services and will ensure that the Design Documentation complies with the requirements of the subcontract.

It should be noted that this deed cannot be construed in any way to modify or limit the Commonwealth's rights against the Consultant.

If the Contract Administrator makes a request for a Subconsultant Deed of Covenant is required, the Consultant will need to certify with each payment claim that the Consultant have complied with this request – see clause 11.3(a) of the Conditions of Contract.

Agreed Subconsultant Services

Clauses 2.9(b) and 2.9(c) of the Conditions of Contract prescribe the basis on which Agreed Subconsultant Services are subcontracted to Agreed Subconsultants.

Agreed Subconsultant Services must be subcontracted on the terms of either:

- (a) an Agreed Subconsultant Agreement, the terms of which are agreed by Defence and the Consultant; or
- (b) a contract novated to the Consultant which Defence entered into with an Agreed Subconsultant prior to the Award Date and which is specified in the Contract Particulars.

In the latter case, the Consultant must accept novation of the contract by Defence by executing the relevant Deed of Novation set out in the Schedule of Collateral Documents to give effect to the novation within 7 days of receipt of the deed from Defence and deliver the executed Agreed Subconsultant Deed of Novation to the Contract Administrator. In effecting novation, the Consultant acknowledges that some of the Agreed Subconsultant Services have already been performed prior to novation and warrants that it has considered the performed services and that they are proper, adequate and suitable for their intended purposes.

The Consultant must also make an adequate allowance in its Fee and in its program for the performance of the Agreed Subconsultant Services.

Statement of Tax Record (STRs)

Clause 2.9(d) of the Conditions of Contract requires the Consultant to obtain and hold valid and satisfactory STRs of any subconsultant where the subcontract price is valued (or estimated) to be over \$4 million (inclusive of GST). For further guidance on STRs and the meaning of “valid and satisfactory” – see Part 20.1.13 below.

6.1.10 Statutory Requirements (clause 2.10)

This clause confirms that, unless otherwise specified, the Consultant bears the risk of, including the cost of obtaining and maintaining all necessary Approvals and compliance with any Statutory Requirements. The definition of Statutory Requirements is set out in clause 1.1 of the Conditions of Contract.

The Contract Particulars may set out the Approvals which the Consultant is to obtain and also any Statutory Requirements with which the Consultant does not need to comply. To avoid potential delays to the Consultant, ideally any Approvals to be obtained (which are not the

responsibility of the Consultant) should be obtained and in place prior to the Award Date

It should be appreciated that the definition of “Statutory Requirements” is broader than legislation, regulations and Approvals. It also covers (each as defined in clause 1.1):

- (a) “Defence Requirements” which includes all policies, plans, manuals guidelines, instructions (including departmental procurement policy instructions). and other Commonwealth or Defence requirements which may be applicable to the Site, the Services or the Works;
- (b) “Environmental Requirements”; and
- (c) “Information Security Requirements”.

The Consultant must also promptly give the Contract Administrator copies of all documents (which includes Approvals and other notices), that any authority, body or organisation having jurisdiction over the Site, the Services or the Works issues to the Consultant.

6.1.11 Change in Statutory Requirements or Variance with the Contract (clause 2.11)

Under this clause, Defence accepts the risk of any change in Statutory Requirement or a Statutory Requirement being at variance with the Contract (sometimes referred to as a “change in law”) after the Award Date. What constitutes a Statutory Requirement is defined in clause 1.1 of the Conditions of Contract.

A party must promptly give notice in writing to the Contract Administrator and the other party upon discovery of:

- (a) any change in a Statutory Requirement after the Award Date; or
- (b) a Statutory Requirement being at variance with the Contract.

A proforma notice to be used by either Defence or the Consultant to advise the other party of a change or variance titled ‘Notice of change in Statutory Requirement’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Defence is not liable to pay any costs associated with the change or variance which are incurred before the Consultant submits a notice of

such change or variance. This provides incentive for the Consultant to issue its notice promptly.

Within 14 days of the Contract Administrator receiving notice of a change or variance, it must instruct the Consultant as to the course it must adopt insofar as the Services are affected by the change or variance in the relevant Statutory Requirement. A proforma notice titled 'Instruction in response to change in Statutory Requirement' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The Consultant will be entitled to have the Fee increased by the extra costs reasonably incurred directly as a result of the change or variance and any instructions issued in relation to such change or variance. The relevant increase in the Fee is to be determined by the Contract Administrator.

Conversely, Defence will be entitled to a decrease in the Fee if any savings are made by the Consultant which arise directly from the change or variance and the Contract Administrator's instructions issued in relation to such change or variance. The relevant decrease in the Fee is to be determined by the Contract Administrator.

6.1.12 Novation (clause 2.12)

Defence may at any time without the consent of the Consultant elect to novate the Contract to a Contractor engaged under the relevant construction contract. This is usually relevant where Defence is using the document and construction delivery method to deliver the project, under which the Contractor assumes full responsibility to Defence for design and construction, including the design performed prior to novation.

Where Defence elects to novate the Contract, the Consultant must execute the relevant Deed of Novation set out in the Schedule of Collateral Documents to give effect to the novation within 7 days of receipt of the novation Deed from Defence.

The Consultant must also, if requested by the Contract Administrator, execute the Consultant Deed of Covenant and provide this to the Contract Administrator within the period specified by the Contract Administrator in the request.

A proforma notice titled 'Request for Consultant Deed of Covenant' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

A copy of the deed which is to be filled out and executed is included in the Schedule of Collateral Documents.

A Consultant Deed of Covenant is a deed entered into by Defence, the Contractor and the Consultant. As there is no direct contractual relationship between Defence and the Consultant once novation has occurred, the purpose of the deed is to provide a direct relationship between each of the parties so that all parties may enforce rights against one another. If a Consultant Deed of Covenant is provided, it should not be executed by Defence unless and until Defence wants to novate the Consultant back from the Contractor to Defence or its nominee.

It is a matter for the Contract Administrator to determine whether a Consultant Deed of Covenant will be required. Factors to consider will include:

- (a) the risks (such as time, cost, quality and other political pressures) inherent in the contract (i.e. the greater the risk, the greater the need for a Consultant Deed of Covenant);
- (b) the value of the contract (i.e. other than in particularly high risk contracts);
- (c) the timeframe for commencement of the services;
- (d) the term/length of time required to carry out the services (i.e. the longer the time, the greater the likelihood that problems could arise and hence the greater need for such a deed); and
- (e) the technical complexity of both the contract and the project generally (i.e. the greater the complexity, the greater the need for such a deed).

It should be noted that the deed cannot be construed in any way to modify or limit the Commonwealth's rights, powers or remedies of the Commonwealth (whether under the Contract or otherwise at law or in equity) against the Consultant.

If the Contract Administrator makes a request for a Consultant Deed of Covenant is required, the Consultant will need to certify with its payment

claim that the Consultant have complied with this request – see clause 11.3(a) of the Conditions of Contract.

6.1.13 The Environment (clause 2.13)

Environmental concerns carry significance on all Defence projects, the management of which is considered of utmost importance by Defence. The Contract therefore contains considerable detail in relation to the requirements and considerations necessary for the protection of the Environment. These are specified in clause 2.13 of the Conditions of Contract.

Set out below is guidance on the following:

- (a) the primary environmental obligations under clause 2.13 of the Conditions of Contract;
- (b) matters to be covered by the Environmental Management and Sustainability Plan and Site Management Plan;
- (c) the Contract Administrator's role in relation to the Environment; and
- (d) the ability to suspend the Services due to environmental concerns.

Each of these are discussed in turn below.

Primary environmental obligations under clause 2.13 of the Conditions of Contract

Quite apart from and in addition to the general requirement to comply with all Statutory Requirements (unless otherwise specified in the Contract Particulars), clause 2.13 of the Conditions of Contract sets out the Environmental requirements the Consultant must comply with in carrying out the Services.

Clause 2.13 of the Conditions of Contract requires the Consultant to comply with all Statutory Requirements (that is all requirements under the Commonwealth, State or Territory or local laws) and any other requirements contained in the Contract for the protection of the Environment. This includes:

- (a) obtaining any necessary Approvals and complying with any condition or requirement under them;
- (b) complying (where applicable) with the Environmental Clearance Certificate;

(c) complying with the Defence Environmental Management System and Defence Environmental Plan which relate to the Site, the Services or the Works; and

(d) complying with all policies, plans, manuals, guidelines, instructions and other Commonwealth or Defence which are applicable to the Site or the Services.

The Consultant is obliged to ensure that in carrying out the Services it does not cause any Environmental Incidents or cause or contribute to any Contamination, either of the Site or elsewhere.

The Consultant must comply with any notices, orders or communications from authorities for the protection of the Environment and is required to immediately inform the Contract Administrator of:

(a) any non-compliance with clause 2.13 of the Conditions of Contract;

(b) any breach of Statutory Requirement for the protection of the Environment;

(c) any Environmental Incident; or

(d) the receipt of any notice, order or communication received from any authority for the protection of the Environment.

A proforma notice for such notification titled 'Notice regarding the Environment' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The Consultant will be responsible for cleaning up and restoring the Environment to the condition it was in before the commencement of the Services. This includes cleaning up any Contamination or Environmental Harm that may be caused by the Consultant or its subconsultants whilst carrying out the Services. The Consultant may be entitled to have the Fee increased by the extra costs reasonably incurred by the Consultant which arise directly from the cleaning up and restoration of the Environment in accordance with clause 2.13 of the Conditions of Contract, as determined by the Contract Administrator.

Environmental Management and Sustainability Plan and Site Management Plan

The Consultant is required by clause 7.4 of the Conditions of Contract to implement, and carry out the Services in accordance with, the Project Plans. These include the Environmental Management and Sustainability Plan and the Site Management Plan. See guidance under commentary on clause 7.4 of the Conditions of Contract below for procedure in relation to Project Plans.

The specific matters to be included in the Environmental Management and Sustainability Plan will differ from project to project, however, it must set out in adequate detail the procedures the Consultant will implement to:

- (a) ensure compliance with the Environmental Requirements and the Statutory Requirements; and
- (b) maximise achievement of the Environmental Objectives.

Without limiting the above, generally the Environmental Management and Sustainability Plan will be expected to address, as a minimum:

- (a) all Environmental Requirements, Statutory Requirements, Environmental Objectives;
- (b) the roles and responsibilities of all Consultant and subconsultant personnel regarding the Environment;
- (c) the procedure for consultation, cooperation and coordination of activities with the Contract Administrator, the Commonwealth and Other Contractors regarding the Environment during the Services and the Works;
- (d) the training and awareness programmes provided to Consultant and subconsultant personnel regarding the Environment;
- (e) the procedure for preparing (including tailoring) and finalising the Environmental Management and Sustainability Plan under clause 7.4;
- (f) the procedure for regularly identifying, controlling and monitoring possible and actual impacts on the Environment associated with the Services and the Works;

- (g) the procedure for regularly reviewing, updating and amending the Environmental Management and Sustainability Plan under clause 7.4;
- (h) the procedure for ensuring subconsultant compliance with the Environmental Management and Sustainability Plan;
- (i) the procedure for regular auditing or other monitoring of Consultant and subconsultant compliance with the Environmental Management and Sustainability Plan;
- (j) all matters in the Smart Infrastructure Handbook and Sustainable Procurement Guide;
- (k) the additional matters specified in the Contract Particulars; and
- (l) any other matters required by the Contract or the Contract Administrator.

The Site Management Plan must address the procedures the Consultant will implement to manage the Services on and near the Site as set out in the Contract and must include detail on how the Consultant proposes to address, as a minimum:

- (a) all Statutory Requirements;
- (b) the roles and responsibilities of all Consultant and subconsultant personnel regarding management of the Services on and near the Site;
- (c) the procedure for consultation, cooperation and coordination of activities with the Contract Administrator, the Commonwealth and Other Contractors regarding the occupation, use, operation and maintenance of Commonwealth property and the Site (including for the purpose of military activities, expeditions and exercises) during the Services;
- (d) procedures for access to Commonwealth property (including any Defence location) and the Site by Consultant and subconsultant personnel, visitors, pedestrians and vehicles;
- (e) Site inductions, training and other awareness programmes provided to Consultant and subconsultant personnel in respect of Commonwealth property and the Site;
- (f) procedures for:

- (i) establishing the Site (including site amenities, laydown areas and parking zones);
 - (ii) cleaning, maintenance, waste management and debris control on Commonwealth property and the Site; and
 - (iii) any dangerous or prohibited substances, material or goods (including Commonwealth property) on the Site relevant to the Services;
- (g) if the Services are to be carried out on or in the vicinity of an airfield, the procedure for preparation and approval of a Method of Work Plan for Airfield Activities;
- (h) the procedure for preparing (including tailoring) and finalising the Site Management Plan under clause 7.4;
- (i) the procedure for regularly reviewing, updating and amending the Site Management Plan under clause 7.4 (including as a result of any Site management complaint, incident, near-miss and other situation or accident on Commonwealth property or the Site during the Services);
- (j) the procedure for ensuring subconsultant compliance with the Site Management Plan;
- (k) the procedure for regularly identifying, controlling and monitoring possible and actual Site management impacts on Commonwealth property and the Site associated with the Services;
- (l) the procedure for regular auditing or other monitoring of Consultant and subconsultant compliance with the Site Management Plan;
- (m) the additional matters specified in the Contract Particulars; and
- (n) any other matters required by the Contract or the Contract Administrator.

The Contract Administrator's role in relation to the Environment

As noted in the commentary for clause 4.1 of the Conditions of Contract, the Contract Administrator is an agent of the Commonwealth

nominated in the Contract Particulars or by the Commonwealth from time to time and is responsible for overseeing and administering the operation of the Contract.

Defence expects that the Contract Administrator will have trained environmental personnel to address environmental issues that may arise in relation to the Services.

Amongst other things, the Contract requires the Contract Administrator to:

- (a) review and (where appropriate) reject draft Project Plans and amendments submitted by the Consultant;
- (b) provide instructions to the Consultant in relation to matters concerning the Environment; and
- (c) suspend the Services if necessary under clause 8.4.

Any notifications required to be made by the Consultant under the Contract must be made to the Contract Administrator. The Contract Administrator is responsible for determining what action needs to be taken if any as a result of such notifications or otherwise under the Contract. The Consultant must comply with any directions or instructions given by the Contract Administrator where required by the Contract.

Suspension of the Services due to environmental concerns

The Contract Administrator has broad power to suspend the Services under clause 8.4 of the Conditions of Contract. This power may be exercised at any time and for any reason and may be exercised expeditiously to ensure environmental protection is a priority.

Where the Contract Administrator's power is exercised for reasons other than the Consultant's failure to carry out its obligations in accordance with the Contract, the Consultant may be entitled to make a Claim against the Commonwealth arising out of the suspension.

The Consultant will not be entitled to make any Claim against the Commonwealth where it has been instructed to suspend the Services where (for example):

- (a) the Consultant has not complied with all Statutory Requirements and/or other requirements of the Contract for the protection of the Environment;
- (b) the Consultant has caused an Environmental Incident;
- (c) the Consultant has caused or contributed to Contamination of the Site or any other land, air or water, or caused or contributed to Contamination emanating from the Site;
- (d) the Consultant has not immediately notified the Contract Administrator of:
 - (i) any non-compliance with the requirements of clause 2.13 of the Conditions of Contract;
 - (ii) a breach of any Statutory Requirement for the protection of the Environment;
 - (iii) any Environmental Incident; or
 - (iv) the receipt of any notice, order or communication received from any authority for the protection of the Environment; or
- (e) the Consultant's subconsultants have not complied with the requirements under clause 2.13 of the Conditions of Contract.

Except to the extent permitted by the relevant Security of Payment Legislation, the Consultant is not entitled to suspend the Services unless it is ordered to do so by the Contract Administrator. See Part 15.2.13 below.

6.1.14 Pandemic Adjustment Event (clause 2.14)

Under clause 2.14 if either party considers that there has been a Pandemic Adjustment Event then the party discovering it must promptly give the Contract Administrator of the other party notice, in writing, together with detailed particulars of the relevant event and such other information as the Contract Administrator may require.

The Contract Administrator must, within 14 days of receipt of a notice under paragraph (a) notify the Consultant and the Commonwealth of its determination whether a Pandemic Adjustment Event has occurred.

If a Pandemic Adjustment Event occurs the Consultant will be entitled to:

(a) an extension of time to any relevant Date for Completion where it is otherwise so entitled under clause 8.8 of the Contract; and

(b) have the Fee increased by the extra costs reasonably incurred by the Consultant after the giving of the notice under paragraph (a) which arise directly from the Pandemic Adjustment Event or any instruction of the Contract Administrator under clause 2.14(c).

Subject to clause 2.14(f) the Fee will be decreased by any savings made (or which would have been made if the Consultant had taken all reasonable steps to maximise savings) by the Consultant which arise directly from the Pandemic Adjustment Event or any instruction of the Contract Administrator under clause 2.14(c).

By way of practical guidance, fundamental to the application of this clause is to critically assess whether, based on the particular facts, the definition of "Pandemic Adjustment Event" in clause 1.1 of the Conditions of Contract has been triggered. It should be noted that to trigger the definition there must be an event which:

(a) arises as a direct result of Coronavirus (COVID-19) which was characterised to be a pandemic by the World Health Organisation on 11 March 2020, and not some other pandemic or other circumstance; and

(b) first occurs after the Award Date,

which directly impacts the supply of labour, equipment, materials or services required for the carrying out of the Services. In this latter regard, the impact is not to be considered in circumstances where the Consultant has failed to take all reasonable steps to avoid or overcome any adverse effects of the Pandemic Adjustment Event (see clause 2.14(f) of the Conditions of Contract).

6.2 Proforma notices (Role of the Consultant)

The following table contains a list of the proforma notices relating to the Role of the Consultant under clause 2 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Clause	Title of proforma notice
2.5	Notice of matters impacting on the Services or the Works
2.8(c)(i)	Notice of conflict of interest
2.9(a)	Request to Subcontract
2.9(a)	Response to Request to Subcontract
2.9(a)(v)	Request for Subconsultant Deed of Covenant
2.11(a)	Notice of change in Statutory Requirement
2.11(b)	Instruction in response to change in Statutory Requirement
2.12(b)	Request for Consultant Deed of Covenant
2.13(a)(i)D	Notice regarding the Environment
2.14(a)	Notice of Pandemic Adjustment Event
2.14(b) [and] (c)	Response to Notice of Pandemic Adjustment Event

Part 7- Role of the Commonwealth

7.1 Role of the Commonwealth under the Design Services Contract (clause 3)

7.1.1 Information and Services (clause 3.1)

This clause requires Defence to make available to the Consultant as soon as practicable all information, documents and particulars relating to the Works and to Defence's requirements for the Works including Defence's program, and details of budget for the Works insofar as these are relevant to the Services.

7.1.2 Additional Information (clause 3.2)

This clause ties in with Defence's obligation under clause 3.1 of the Conditions of Contract to provide the Consultant with all information relating to the Works insofar as these are relevant to the Services.

If the Consultant, in its reasonable opinion, considers that in order for it to carry out the Services it requires additional information not provided to it by Defence or by an Other Contractor, it must notify the Contract Administrator in writing and provide details of the additional information and the reasons why it is required by the Consultant. A proforma notice 'titled 'Request for additional information' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

If the Contract Administrator believes that such additional information requested by the Consultant is needed by the Consultant, then Defence must use its best endeavours to provide such additional information, document or particulars.

7.1.3 Access to the Site (clause 3.3)

This clause sets out Defence's obligations in relation to providing Site access to the Consultant and, in particular, makes it clear that the Consultant's right of access is subject to the Construction Contract and any agreement with any other party with whom Defence has made arrangements for access (including any Other Contractor).

In addition, before providing Site access, the Environmental Management and Sustainability Plan, Site Management Plan and the

Work Health and Safety Plan prepared by the Consultant must also have been finalised to the satisfaction of the Contract Administrator and the Consultant must also provide satisfactory evidence to the Contract Administrator that it has caused to be effected and maintained (or otherwise has the benefit of) the insurances required under the Contract. Note also any other conditions precedent which may be specified in the Contract Particulars or elsewhere in the Contract (for example, the Brief).

7.2 Proforma notices (Role of the Commonwealth)

The proforma notice which may be used in conjunction with clause 3 of the Conditions of Contract (Role of the Commonwealth) is set out below and can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
3.2(c)	Request for additional information

Part 8 - Personnel

8.1 Personnel

8.1.1 Contract Administrator (clause 4.1)

The Contract Administrator's rights to issue directions or otherwise exercise a function is limited to those types of directions and functions of the Contract Administrator contemplated under the Contract.

The requirement that the Contract Administrator act as agent of Defence and not as an independent certifier, assessor or valuer when exercising the Contract Administrator's functions under the Contract ensures that the Contract Administrator can act on Defence's instructions and does not have to exercise its functions independently of these instructions. This is appropriate given that the Contract Administrator will usually be a consultant to Defence.

Defence will generally engage the Contract Administrator from the Defence Infrastructure Panel (**DIP**). The relevant agreement setting out the Contract Administrator's responsibilities in respect of a particular project will be the "Terms of Engagement" under the DIP.

Regardless of the terms of the agreement between Defence and the Contract Administrator, as between the Consultant and the Contract Administrator, the Consultant will be entitled to rely on the actions of the Contract Administrator under the Contract. Defence will be bound by those actions of the Contract Administrator, as against the Consultant, because the Contract Administrator is the agent of Defence. The Consultant must not comply with any direction of Defence other than those expressly stated in the Contract.

To afford the Consultant a measure of comfort, disputes arising out of any direction of the Contract Administrator which would ordinarily be classed as a certifying function (one in which the Contract Administrator would have been required to act independently) may be referred to expert determination under clause 13.2 of the Conditions of Contract. Clause 13.2 of the Conditions of Contract (by reference to the Contract Particulars) specifies each of the clauses in respect of which disputes are to be dealt with in this way. See the commentary at Part 17.2.2 of this Manual below for a further explanation of those clauses.

A “direction” of the Contract Administrator is defined widely in clause 1.1 of the Conditions of Contract. That wide definition is then adopted throughout the Contract including for the purposes of the following clauses:

- (a) clause 4.1 of the Conditions of Contract, under which the Consultant must comply with a direction by the Contract Administrator given under the Contract;
- (b) clause 4.5 of the Conditions of Contract, under which a direction given to the Consultant’s Representative is deemed to have been given to the Consultant (discussed below in Part 8.1.5 of this Manual);
- (c) clause 6.4(b) of the Conditions of Contract, under which the Consultant is not relieved of any of its Contract obligations because of a direction by the Contract Administrator in relation to the Design Documentation (discussed below in Part 10.1.4 of this Manual);
- (d) clause 14.1 of the Conditions of Contract, under which the Consultant must give a notice if it believes a direction constitutes a Variation (discussed below in Part 18.2.1 of this Manual below); and
- (e) those clauses listed in the item of the Contract Particulars for clause 13.2 - which list the directions in respect of which disputes must be resolved by an expert determination.

Set out below is guidance on the various ways in which the Contract Administrator may have contact with the Consultant and a list of the specific functions of the Contract Administrator under the Contract:

(a) **Directions**

Before issuing a direction (the scope of which is widely defined under clause 1.1 of the Conditions of Contract), the Contract Administrator must ensure that it has the authority to issue the direction under the specific terms of the Contract. The Contract Administrator must also be aware that, if a direction changes the obligations of the Consultant, the Consultant may have subsequent entitlements under the Contract against Defence. The Contract Administrator must always confirm such directions with Defence before issuing them. The Contract Administrator should

also note that it has certain obligations to Defence under the terms of its agreement with Defence.

Whilst directions may be given orally, they should always be confirmed in writing so that written evidence exists if ever required to be called upon; this is, in any case, required by clause 4.1 of the Conditions of Contract. Therefore, if an oral notice is given, it should be followed by the relevant completed proforma notice within 24 hours or otherwise as soon as practicable. A suite of proforma notices with the relevant clause to which the direction or notice relates can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The Contract Administrator must ensure that it gives all directions in a timely manner, and in any event within the timeframes required by the Contract.

(b) Notices under the Contract

As noted above, the Contract imposes obligations on the Consultant and the Contract Administrator to give a notice to the other party in various circumstances. From the Consultant's perspective, its notices must be given to preserve various entitlements under the Contract. From Defence's perspective, the object of the notice requirements is to ensure that it is kept fully informed of relevant developments and any circumstances in which it may be liable to pay extra money to the Consultant.

All notices must be given in accordance with the particular requirements of the relevant Contract provision (in particular, in terms of timing, content and signing).

(c) Correspondence

Correspondence with the Consultant should be treated in the same manner as detailed for directions above.

Where applicable, originals of correspondence from the Consultant should not be annotated with comments as these may need to be disclosed to a Court or during arbitration; many a court case and arbitration have changed course because of ill-conceived comments.

Email is both an efficient and common form of communication in business today. Parties may use and rely upon email for the giving of notices under the Contract, subject to the satisfaction of the delivery and receipt requirements set out in clauses 14.7 and 14.8 of the Conditions of Contract. For further guidance on giving and receiving notices under the Contract by e-mail, refer to Part 18.2.7 and 18.2.8 below in this Manual.

There are certain security issues associated with the use of project document management software systems such as Aconex or equivalents, particularly where documents will not be stored in Australia (or on Australian servers). See also guidance in relation to the handling and use of Confidential Information and Sensitive and Classified Information in Part 22. Advice from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance should be sought before incorporating software and such systems in the Contract. A special condition may be required.

(d) Specific functions of the Contract Administrator

The Contract Administrator must operate in accordance with the express provisions of the Contract. Contract administration personnel must be aware of - and apply - the terms of the Contract entered into by Defence.

The table set out in Part 8.3.2 of this Manual lists all of the specific functions/duties of the Contract Administrator under the Contract.

8.1.2 Replacement of Contract Administrator (clause 4.2)

Defence is entitled to change the Contract Administrator at any time.

A proforma notice informing the Consultant that the Contract Administrator has been replaced titled 'Replacement of Contract Administrator' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

8.1.3 Parties' Conduct (clause 4.3)

This clause places a general obligation on the parties to co-operate with each other. It reflects the general law position.

8.1.4 Contract Administrator's Representative (clause 4.4)

As the Contract Administrator's functions under the Contract are broad, it will often be necessary for the Contract Administrator to delegate certain functions to others. These representatives are specified in the Contract Particulars and will carry out the functions as set out in the Contract Particulars. The Consultant must comply with any instructions or directions issued by the Contract Administrator's Representative (**CAR**).

As at the Award Date, one or a number of CARs may be listed in the Contract Particulars, together with their respective functions. Refer also to the guidance provided in relation to this clause in the Contract Particulars at Part 3.4.1 and Part 4.2 of this Manual above.

A CAR may also be appointed after the Award Date by the Contract Administrator. The Consultant must also comply with any instructions or directions issued by the CAR appointed after the Award Date as long as the Contract Administrator has provided written notice to the Consultant that the person has been appointed as its representative in respect of the described functions.

A proforma notice titled 'Appointment of Contract Administrator's Representative' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The Contract Administrator must also provide written notice to the Consultant of any revocation of authority to a representative under clause 4.4(a)(ii) of the Conditions of Contract. A proforma notice titled 'Revocation of appointment of Contract Administrator's Representative' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

8.1.5 Key People for the Services (clause 4.5)

The primary purpose of this clause is to ensure that the Consultant retains the people on the project whom it represented would be put on the project in its tender. It should be noted that one person may fill more than one key role under the Contract (e.g., may be both the Design Manager and the Quality Manager).

The Consultant must obtain the written approval of the Contract Administrator if it wishes to replace any of these key people (as specified in the Contract Particulars and including the Consultant's Representative and the Quality Manager).

Proforma notices for use under clause 4.5 titled 'Request to replace Key Person' and 'Response to request to replace Key Person' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The Contract Administrator has an absolute discretion as to whether to approve a replacement and is not required to give reasons for any rejection or approval.

8.1.6 Removal of Persons (clause 4.6)

This clause allows the Contract Administrator to remove any persons from the Site or Services who, in its reasonable opinion, are guilty of misconduct, incompetence or negligence. The Contract Administrator must issue a written notice to the Consultant directing the Consultant to remove the person from the Site. The Consultant must ensure that this person is not again involved in the Services.

A proforma notice titled 'Removal of Person' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

"Misconduct" generally means wrongful, improper, or unlawful conduct, motivated by a premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts. Misconduct may involve either gross negligence or a deliberate departure from accepted standards so as to portray indifference and an abuse of privileges.

“Incompetent” does not have a strict legal meaning. This term generally means a lack of ability or skill to do something successfully or as it should be done.

“Negligence” is a term with a complex legal meaning. For the purposes of clause 4.6 of the Conditions of Contract, negligent conduct would be conduct which is characterised by a lack of care or attention to things which are that person’s responsibility (which may or may not result in loss, injury or damage).

There is no requirement that the Contract Administrator prove that the individual is guilty of the conduct alleged, but the Contract Administrator should be careful to ensure that there are reasonable grounds for its belief and should maintain records where possible, especially because the removal of a person from Site or Services may cause industrial unrest. If the Contract Administrator is in any doubt as to the acceptability of conduct of persons on the Site or Services, it should seek advice from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance and, potentially, legal advice from Defence’s legal adviser for the project.

8.1.7 Monthly Meeting (clause 4.7)

The purpose of this clause is to ensure that there are regular meetings between the parties involved in the project. This is a common feature of construction projects and is aimed at maintaining communication and information flow.

The Consultant is required to attend every monthly meeting or such other meetings as the Contract Administrator requires. The Contract Administrator can also nominate other persons to attend the meetings. More than mere attendance at the meeting by the Consultant is required and the obligations of the Consultant at each meeting are set out in the clause. The Contract Administrator is responsible for:

- (a) preparing and issuing an agenda before each meeting; and
- (b) preparing and issuing minutes after each meeting.

Set out below is a discussion on the meetings under clause 4.7 of the Conditions of Contract and reporting generally, along with a note on the effect of informal contact and collaboration:

(a) Reports and Meetings

Reports and meetings are a vital part of contract administration and are valuable for agreeing facts, committing people to objectives, and problem identification and solving.

The Consultant will be required to discuss the monthly report the Consultant prepares under clause 4.8 of the Conditions of Contract and also respond to any questions the Contract Administrator asks in relation to any report. The Consultant must also make necessary recommendations if it requires instructions from the Commonwealth.

Meetings must be planned and managed. Minutes should be accurately recorded by the Contract Administrator of meetings and agreed and signed by both the Contract Administrator and the Consultant (or their relevant representatives). Accurate minutes will provide a written record of the discussion and instructions in such circumstances.

Notwithstanding clause 1.3(b) of the Conditions of Contract, which provides that Contract terms cannot be waived except in certain circumstances, the Contract Administrator should ensure that there are no representations made at the meetings which might subsequently be argued to be a waiver of Defence's rights under the Contract.

Care also needs to be taken to ensure that matters discussed at meetings which constitute "directions" are followed up with a written direction.

(b) Informal Contact and Collaboration

Under the Contract, it is to be expected that informal discussions and meetings will take place during the course of the Services. These informal interactions are important. However, it is imperative that the Contract Administrator (and the CARs) at all times takes utmost care during any such discussions or meetings not to deal with, by implication or directly, any matters that should be dealt with formally.

Should matters requiring notification be discussed in a preliminary manner, the Contract Administrator must ensure that formal notification (in writing) is issued promptly.

If there are any matters in doubt following informal contact, the Contract Administrator should take steps to clarify those matters and inform the Consultant.

At all times it is important to record such contact in a log or diary kept as a formal record of contact with the Consultant. This is particularly so in the case of telephone conversations which, if necessary, should be confirmed in writing if the subject matter impacts on the Contract or the Services.

8.1.8 Consultant's Monthly Report (clause 4.8)

This clause requires the Consultant to prepare and submit a report to the Contract Administrator in advance of the monthly meeting contemplated by clause 4.7. The purpose of that report is to fully inform the Contract Administrator of issues to be discussed and resolved during the monthly meeting.

The report prepared by the Consultant is required to include, at a (among other things):

- (a) detailed particulars on the progress of the Services and the Works (including status of all Design Documentation);
- (b) detailed particulars of all payment claims, variation issues, claims, actions taken for non-conforming Services and Defects (as defined under the Construction Contract), disputes and notices made by the Consultant;
- (c) detailed particulars of risks, opportunities, issues or matters which are (or may) significantly impacting the Services and the Works;
- (d) confirmation of compliance with relevant WHS legislation work, health and safety legislation and details of any work, health and safety matters arising out of or in connection with clause 6.16;
- (e) confirmation of compliance with various contract requirements (including quality assurance requirements and the other requirements listed in clause 4.8(e));
- (f) matters relating to Hazardous Substances (if any); and
- (g) other matters required by the Contract Administrator.

8.2 Proforma notices (Personnel)

The following table contains a list of the proforma notices relating to Personnel under clause 3 of the Design Services Contract Conditions of

Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
4.2	Replacement of Contract Administrator
4.4(a)(i)	Appointment of Contract Administrator’s Representative
4.4(a)(ii)	Revocation of appointment of Contract Administrator’s Representative
4.5(a)(ii)	Request to replace Key Person
4.5(a)(ii)	Response to request to replace Key Person
4.6	Removal of Person

8.3 Contract Administrator’s Functions

8.3.1 Introduction to the Contract Administrator’s functions

The Contract Administrator must operate in accordance with the express provisions of the Contract. This will include compulsory functions (many of which must be completed within a specified timeframe) and some discretionary powers (e.g. ordering a Variation) which the Contract Administrator will typically exercise at Defence’s discretion.

Whilst there is no express obligation that the Contract Administrator act in any particular way when exercising certain functions, there are certain functions where there are express benchmarks against which the function must be exercised – see table below for some examples (eg determine a “reasonable period” to extend the relevant Date for Completion under clause 8.8 of the Conditions of Contract where a Consultant’s extension of time claim satisfies the necessary conditions). For this reason, this Manual repeatedly emphasises the need for contract administration personnel to be aware of - and apply - the terms of the Contract entered into by Defence. In other words, the Contract Administrator should carefully consider its role under the Contract and the relevant circumstances when exercising its functions. The Contract Administrator should also keep in mind that those of its decisions which are made on a “certifier” basis are appealable. These decisions are listed in the Contract Particulars (see the detailed discussion on clause 13.2 in Part 17.2.2 of this Manual below).

The specific functions/duties of the Contract Administrator under the Contract are listed in the table appearing in Part 8.3.2 of this Manual.

In addition to the Contract Administrator’s specific functions under a Contract, the Contract Administrator may also be required to carry out additional functions which are implicit or otherwise necessary to enable the persons involved with the project to carry out their respective activities.

Once the relevant function is identified in the table below, it is necessary to go to the corresponding clause/s of the Contract to determine the

exact circumstances in which the function must, should or may be exercised and any further constraints or instructions as to the exercise or discharge of that particular function. Commentary on each of these clauses is provided in the relevant part of this Manual. In addition, it should be noted there may also be various functions of the Contract Administrator reflected in the Special Conditions and the Brief. As these are bespoke documents for the contract in question, the Contract Administrator should also become familiar with these additional functions (if any).

8.3.2 Contract Administrator’s functions

The table below provides guidance for the Contract Administrator in relation to the carrying out of its roles, duties and functions under the Design Services Contract delivery model.

Clause	Contract Administrator’s functions under the Design Services Contract
1.1	<p>For the purposes of the following definitions (Contract Administrator to review the Project Plans under clause 7.4 to check that all the minimum requirements in these definitions are reflected):</p> <ul style="list-style-type: none"> • “Project Lifecycle and HOTO Plan” • “Environmental Management and Sustainability Plan” • “Estate Information Provision Plan” • “Quality Plan” • “Site Management Plan” • “Work Health and Safety Plan”, <p>determine any other matters required to be included in those plans by the Consultant.</p>
1.1	<p>For the purposes of the definition of “Completion”, in respect of the relevant Milestone, ensure that it receives all documents and other information (if any) required in respect of that Milestone and checks off the other conditions to Completion.</p>
1.2(t)	<p>Determine relevant standards of Australian Standards and other documents. Request copies of standards as necessary.</p>

Clause	Contract Administrator's functions under the Design Services Contract
2.5	Receive notice of matters impacting on the Services or the Works.
2.7	Inspect the carrying out of the Services, Design Documentation and Project Documents and issue notices to Consultant authorising persons to access premises occupied by the Consultant or its subconsultants for inspections.
2.8(c)	Receive notice of conflicts of interest from the Consultant and instruct the Consultant on what steps to take to avoid or minimise a conflict of interest or risk of conflict of interest.
2.9(a)	Determine whether to grant approval to the Consultant to appoint a subconsultant that is neither named in the Contract Particulars (in respect of a part of the Services specified in the Contract Particulars) nor is an Agreed Subconsultant.
2.9(a)(v)	Determine if Subconsultant Deed of Covenant is required and ensure it is received.
2.10(d)	Ensure that it receives from the Consultant copies of any documents issued by any authority, body or organisation having jurisdiction over the Site, the Services or the Works, to the Consultant.
2.11	<p>Receive notice from a party discovering a change in Statutory Requirement after the Award Date or a variance between a Statutory Requirement and the Contract.</p> <p>Within 14 days of receipt of any notice under clause 2.11(a), instruct the Consultant as to the course it must adopt insofar as the Services are affected by a change in a Statutory Requirement or variance between a Statutory Requirement and the Contract.</p> <p>Determine whether the Fee is to be adjusted as a direct result of such change or variance and the Contract Administrator's instruction under clause 2.11(b) of the Conditions of Contract.</p>
2.12(b)	Determine if a Consultant Deed of Covenant is required and ensure it is received.

Clause	Contract Administrator's functions under the Design Services Contract
2.13	<p>Ensure that it receives immediate notice from the Consultant of any non-compliance with clause 2.13 of the Conditions of Contract (relating to the Environment); any breach of a Statutory Requirement for the protection of the Environment; any Environmental Incident; or any notice, order or communication received from an authority for the protection of the Environment.</p> <p>Determine the Consultant's entitlement (if any) to have its Fees increased by extra costs reasonably incurred which arise directly from cleaning up and restoration of the Environment under clause 2.13.</p>
2.14	<p>Notify the Consultant if further detailed particulars are required in respect of a notice of a Pandemic Adjustment Event provided under clause 2.14(a).</p> <p>Within 14 days of a Consultant's notice that a Pandemic Adjustment Event has occurred, determine whether a Pandemic Adjustment Event has occurred. At its absolute discretion advise the Consultant as to the course of action it must adopt in relation to the affected Services.</p> <p>Determine the Consultant's entitlement (if any) to have its Fees increased by extra costs reasonably incurred for any Pandemic Adjustment Event.</p> <p>Determine whether the Fee will be decreased by any savings made (or which would have been made if the Consultant had taken all reasonable steps to maximise savings) by the Consultant.</p>
3.2(c) and 3.2(d)	<p>Receive notice from the Consultant requesting additional information, determine whether additional information, documents or particulars are needed by the Consultant. Where needed, use its best endeavours to assist the Commonwealth to arrange for the provision of the additional information, documents or particulars.</p>
4.1	<p>Confirm all oral directions in writing as soon as practicable.</p>
4.2	<p>Comply, if it is a substitute Contract Administrator, with anything done by the former Contract Administrator to the extent that it would have been bound.</p>
4.4	<p>Make/revoke appointments of Contract Administrator's representatives and notify Consultant.</p>

Clause	Contract Administrator's functions under the Design Services Contract
4.5(a)(iii)	Determine whether to approve the Consultant's key people (and substitutes).
4.6	Instruct the Consultant to remove any person from the performance of the Services whom the Contract Administrator believes is guilty of misconduct or is incompetent or negligent.
4.7(a)	Establish a schedule for monthly meetings with the Consultant, nominate any other persons who are to attend such meetings and meet with the Consultant. Discuss the report prepared under clause 4.8 of the Conditions of Contract and determine any other matters for discussion with the Consultant. Propose and provide questions (if any) to the Consultant in relation to any report.
4.7(b)	Before each meeting, prepare and issue an agenda for the meeting. After each meeting, prepare and issue minutes of the meeting.
4.8	Ensure it receives the Consultant's Monthly Report. Determine any additional matters to be provided in the Consultant's Monthly Report.
5.1(a) and 5.1(e)	Determine whether insurances are on satisfactory terms (confirmation of which must not be unreasonably withheld or delayed). Receive and review evidence of insurance policies procured by the Consultant, their currency and confirmation those insurances comply with, and that the Consultant has complied with, clause 5.1 of the Conditions of Contract.
5.1(f)	Determine whether to grant consent to the Consultant to allow an insurance policy to be cancelled or to lapse. Ensure that it receives notice (in writing) of any event which may result in an insurance policy lapsing or being cancelled. Where the Consultant cancels, rescinds or fails to renew any required insurance policy, determine, on the basis of reasonably required evidence, whether replacement insurances comply in all relevant aspects with the Contract.
5.1(g)(iv)	Request where appropriate and ensure it obtains receipts for payment of premiums of the required insurance policies.

Clause	Contract Administrator's functions under the Design Services Contract
5.1(g)(vii) and 5.1(g)(viii)	Determine whether to grant consent to the Consultant to allow an insurance policy to be cancelled or to lapse. Ensure that it receives notice (in writing) of any event which may result in an insurance policy lapsing, being cancelled or being rescinded.
5.1(g)(x)	Send reasonable instructions to the Consultant to enable the Commonwealth to claim and to collect or recover money due under any of the insurances in respect of which it is required to have the benefit of coverage under the Contract.
6.1	Ensure it receives a documentation program from the Consultant, which makes allowance for the Design Documentation to be submitted to the Contract Administrator in a manner and at a rate which will give the Contract Administrator a reasonable opportunity to review the Design Documentation.
6.3	Review/reject any Design Documentation and provide necessary comments.
6.5	Ensure it receives the number of hard and electronic copy or copies of the Design Documentation required by the Contract.
6.10(d)(i)	Ensure that it receives proper notice of any ambiguity, discrepancy or inconsistency in the documents which make up the Contract, or between the Contract and any Design Documentation or any other Project Document, from the party discovering such ambiguity, discrepancy or inconsistency. Within 14 days of receipt of such a notice , instruct the Consultant as to the course it must adopt. Please note that the Contract Administrator must provide this instruction even where a notice may be issued in respect of a matter applicable under clause 6.10(a), (b) or (c) – including by applying the principles outlined in those paragraphs.
6.10(d)(ii)	If an ambiguity, discrepancy or inconsistency in the documents which make up the Contract is discovered by the Contract Administrator, give the Commonwealth and the Consultant notice and instruct the Consultant as to the course the Consultant must adopt.

Clause	Contract Administrator's functions under the Design Services Contract
6.11(a)	<p>Ensure that the Consultant provides and makes available, upon request by the Commonwealth:</p> <ul style="list-style-type: none"> • access to its premises and the Project Documents for inspection (whether by the Contract Administrator or any other person acting on behalf of the Commonwealth); • such copies of the Project Documents as the Contract Administrator or any other person acting on behalf of the Commonwealth may require; • facilities and assistance, answers and co-operation; and • the Consultant's officers, employees, agents or subconsultants for interviews.
6.11(b)	<p>Ensure that it receives prior to Completion (as defined in the Construction Contract), a copy of the installed version of each item of software comprising the IT Equipment incorporated in the Works or the Stage (as defined in the Construction Contract) and ensure that it receives a copy of all documentation, including licence terms, warranty terms and operating manuals associated with each item of such software.</p>
6.12	<p>Direct where appropriate the Consultant's required actions in regards to the checking of all relevant measurements and dimensions and other matters as contemplated by clause 6.13.</p>
6.13	<p>Ensure that it requests and receives the relevant design certifications at the relevant times.</p>
6.14(a)	<p>Ensure that it receives samples or ranges of samples in accordance with the program approved under clause 6.1 of the Conditions of Contract.</p>
6.14(b) and 6.14(c)	<p>Review the sample or range of samples, or any resubmitted sample or range of samples, and determine whether to reject them (if, in the reasonable opinion of the Contract Administrator, the sample or range of samples does not comply with the requirements of the Contract) within the number of days specified in the Contract Particulars.</p>

Clause	Contract Administrator's functions under the Design Services Contract
6.15(c)	<p>Ensure that:</p> <ul style="list-style-type: none"> • it is notified immediately of all notifiable incidents (within the meaning of the WHS Legislation); • it is notified within 24 hours of work health and safety incidents or accidents (which are not notifiable incidents) that indicate a potential systemic failure to identify hazards and manage risks, of the accident or incident occurring; and • all other work health and safety matters arising out of or in connection with the Services are included in the reports under clause 4.8 of the Conditions of Contract.
6.15(d)	<p>Ensure it receives a copy of the notice required to be provided by the Consultant to the relevant Commonwealth, State or Territory regulator including all witness statements, investigating reports or other documentation, and a summary (within 10 days of the date of notification) of the related investigations and any impact on the Contract that may result from any notifiable incident.</p>
6.15(e), 6.15(f) and 6.15(g)	<p>Specify the format and receive the written assurances required to be provided by the Consultant regarding its ongoing compliance with the WHS Legislation. Receive copies of all formal notices, written communications issued by a regulator or work health and safety representative to the Consultant or subconsultant. Also, receive copies of all formal notices, written communications and written undertakings given by the Consultant or subconsultant to the regulator in compliance with the WHS Legislation.</p>
6.15(m) and 6.15(n)	<p>Request the Consultant to provide all information or copies of documentation held by the Consultant of a subconsultant to enable the Commonwealth to comply with its obligations under WHS Legislation. Also, may request evidence of any Approvals including authorisations, licences, registrations, prescribed qualifications, experience or other information relevant to work health and safety before the Consultant or any subconsultant commences such work.</p>
6.15(o)	<p>Receive relevant information from the Consultant (where the Consultant is a supplier, manufacturer, designer or importer for the purposes of WHS Legislation) prior to Completion (as defined in the Construction Contract) and before the expiry of the Defects Liability Period (as defined in the Construction Contract).</p>

Clause	Contract Administrator's functions under the Design Services Contract
6.15(s)	Specify the form and receive a certificate (with each submission of Design Documentation) which states that all (including imported) materials, goods, products, equipment and plant described in the Design Documentation to be used in or incorporated into the Works are entirely (meaning 100%) free of asbestos and ACM and that the Consultant has complied with all Statutory Requirements in relation to asbestos and ACM in carrying out the Services.
6.15(t)	Receive sample test reports and test report information, in the form of an analysis certificate from a NATA accredited laboratory (or equivalent) in relation to the imported materials, goods, products, equipment and plant to be used in or incorporated into the Works.
6.15(u)	Receive from the Consultant (where the Consultant is a designer of a structure or part of a structure for the purposes of WHS Legislation), with each submission of Design Documentation under clause 6.2, a written report that specifies the hazard relating to the design of the structure (or part) which creates a risk to health or safety to those carrying out construction and are associated only with the particular design.
7.1(b) and 7.1(c)	Monitor and audit the Consultant's quality assurance process, system or framework and direct the Consultant with respect to any compliance or non-compliance of that quality assurance process, system or framework.
7.2	Consider whether any Services have not been performed in accordance with the Contract and direct the Consultant on how to proceed in relation to any non-complying Services.
7.4	Ensure it receives Project Plans (and where rejected, an amended Project Plan) from the Consultant. Review/reject the Project Plans within the number of days from receipt specified in the Contract Particulars. Continue to identify any defects or omissions in the Project Plans. Give directions concerning finalising, updating or amending Project Plans, or the Consultant's compliance or non-compliance with a Project Plan, as appropriate.
7.5	Provide directions (as required) in regards to requirements for drawings prepared by the Consultant.

Clause	Contract Administrator's functions under the Design Services Contract
8.2(a)	Direct the Consultant to include any reasonable details in the program of the Services and ensure that it receives the program of the Services within 14 days of the Award Date.
8.2(b) and (c)	Ensure that it receives, reviews and provide comments on programs required to be provided by the Consultant.
8.4(a)	Instruct the Consultant to suspend/recommence the carrying out of all or part of the Services.
8.4(b)(ii)	Determine the amount (if any) by which the Fee is to be increased by any extra costs reasonably incurred by the Consultant as a direct result of the suspension.
8.6(a)	Ensure that it receives any claims for an extension of time (not later than 28 days after the commencement of the delay).
8.6(b)	Ensure that it receives additional claims for extension of time every 28 days after the first written claim if the delay continues beyond 28 days.
8.8	Determine the amount of time, if any, by which to extend any relevant Date for Completion and notify the Commonwealth and the Consultant within 21 days of receiving the Consultant's written claim.
8.10	Instruct, in its absolute discretion, the Consultant to accelerate the performance of the Services.

Clause	Contract Administrator's functions under the Design Services Contract
8.11	<p>Review the Prolongation Proposal submitted by the Consultant and advise the Commonwealth as to whether the Prolongation Proposal has demonstrated that a Prolongation Event has occurred which has caused a Material Adverse Effect. Issue a written notice to the Consultant:</p> <ul style="list-style-type: none"> • as contemplated by clause 8.1(b) to accept the Prolongation Proposal, to require the Consultant to submit an amended Prolongation Proposal, or to require a meeting with the Consultant to negotiate the Prolongation Proposal; or • under clause 8.1(c) rejecting the Prolongation Proposal. <p>Attend any meeting(s) to negotiate a Prolongation Proposal. Determine the reasonable extra cost incurred by the Consultant as a result of the Material Adverse Effect under clause 8.1(c)(ii).</p>
9.2(a)	<p>Ensure it receives from the Consultant an Updated Delivery Phase Fee Proposal and that it includes the minimum content as required by clause 9.2(a).</p>
9.2(b)	<p>Negotiate with the Consultant to reach agreement as to the matters set out in the Updated Delivery Phase Fee Proposal including the resource schedule for the Delivery Phase Services and the adjustment (if any) to the Indicative Delivery Phase Fee and any Fee Payment Schedule. Ensure appropriate reference is had to the Indicative Delivery Phase Fee and the Table of Variation Rates and Prices.</p>
9.2(c)	<p>Reject the Updated Delivery Phase Fee Proposal if appropriate and direct the Consultant in regards to reasonable steps to be taken to ensure the proposed Delivery Phase Fee in its Updated Delivery Phase Fee Proposal does not exceed the Indicative Delivery Phase Fee.</p>
9.3(a)	<p>If agreement is reached in regards to the matters in clause 9.2(b) and the Updated Delivery Phase Fee Proposal is approved by the Contract Administrator, prepare the Delivery Phase Agreement Minutes and provide the finalised Delivery Phase Agreement Minutes to the Consultant.</p>
9.3(b)	<p>Engage, as appropriate, a third party to perform an external audit of any Updated Delivery Phase Fee Proposal. Notify the Consultant of any documents and information that may be required for the purposes of this external audit or otherwise as may be required.</p>

Clause	Contract Administrator's functions under the Design Services Contract
9.3(c)	Notify the Commonwealth if the Contract Administrator does not approve any Updated Delivery Phase Fee Proposal, noting that the Commonwealth may elect to issue a notice in writing directing the Consultant not to proceed with the Delivery Phase Services.
9.3(d)	Ensure the Consultant returns the signed Delivery Phase Agreement Minutes to the Contract Administrator by the date required by the Contract Administrator.
10.1	Issue a Variation Price Request setting out details of proposed Variation and ensure that it receives written notice from the Consultant in response to the Variation Price Request. If appropriate, agree with the Consultant a longer period than 14 days for the Consultant to provide a written notice under clause 10.1(c).
10.2	Instruct the Consultant to carry out a Variation by issuing a Variation Order prior to the completion of the Services.
10.3	Determine the value of a Variation in accordance with clauses 10.3(b) or (c) of the Conditions of Contract.
11.2	Ensure that it receives payment claims at the times required by the Contract from the Consultant. Determine the format of such claims and whether evidence attached to the claims is satisfactory (including determining any supporting documentation or information to be provided and notifying the Consultant to set out or attach such documentation or information in each payment claim).
11.3	Ensure that the Consultant has satisfied the requirements set out in clause 11.3(a) with the submission of each payment claim.
11.4	Issue a payment statement to the Consultant (and a copy to the Commonwealth) within 10 business days of receiving a payment claim or at any other time if the Consultant fails to submit a claim in accordance with clause 11.2 of the Conditions of Contract.
11.5(a)	Ensure the Consultant provides, within 3 business days of receiving a payment statement, a copy of a tax invoice for the amount stated as then payable by the Commonwealth to the Consultant in that payment statement.

Clause	Contract Administrator's functions under the Design Services Contract
11.7	If applicable, notify the Consultant in writing of any period longer than 28 days for the purposes of allowing the Consultant to submit a completion payment claim in accordance with this clause.
11.10	Correct or modify any previous payment statement.
11.12	Ensure that it receives with each payment claim a duly completed declaration in the form set out in the payment claim (in the form set out in Schedule of Collateral Documents) for each applicable jurisdiction in which the Services were carried out during the relevant period.
11.14(a)(ii)	Give payment statements and carry out all other functions of Defence (without affecting Defence's right to carry out those functions itself) under the relevant security of payment legislation as the agent of Defence.
11.16	Ensure that it receives with each payment claim accurate information which apportions monthly costs against buildings, infrastructure and expenses for all Services completed since the Commonwealth's previous payment to the Consultant.
11.17	Ensure the Consultant provides a cost report which sets out required information to assist the Commonwealth to bring all completed facilities and infrastructure to account, prior to Completion (as defined in the Construction Contract).
11.18	Determine the adjustment to the Fee Payment Schedule where the Fee is adjusted and the parties could not agree on the adjustment to the Fee Payment Schedule.
12.8(a)	Determine the cost for Services carried out prior to termination of the Contract in relation to which the Consultant would otherwise have been entitled to payment, and the cost of goods or materials (if any) reasonably ordered by the Consultant for the Services.
13.1	Ensure that any notice of a dispute contains the information required by clause 13.1(b).

Clause	Contract Administrator's functions under the Design Services Contract
14.1(a)	When it receives notice from the Consultant that the Consultant considers a direction given by the Contract Administrator to involve a Variation, check that this notice is submitted within 7 days of receiving the direction and before the Consultant commences the relevant services.
14.1(b)	Following a notice under clause 14.1(a), check that the Consultant's written claim include the details required by clause 14.3(b) of the Conditions of Contract and such claim is submitted to the Contract Administrator within 21 days of receiving a notice under clause 14.1(a) of the Conditions of Contract.
14.2 and 14.3	For any claims contemplated by clause 14.2, check that the Consultant has lodged a notice in accordance with clause 14.3(a) and then a claim in accordance with clause 14.3(b) of the Conditions of Contract.
14.4	Where applicable, check that the Consultant provides ongoing notices as required under clause 14.3 of the Conditions of Contract – being every 28 days after the written claim was submitted under clauses 14.1(b) or 14.3(b) of the Conditions of Contract until after the direction or fact, matter or thing upon which the Claim is based, or the consequences, have ceased.
15.2	Schedule meetings as necessary with the Consultant, the Commonwealth and Other Contractors to review the progress of the Design Documentation and the Services against the WOL Objectives. At these meeting(s), consult with the Consultant, the Commonwealth and Other Contractors as to any design, materials or methods of construction which might maximise the achievement of the WOL Objectives.
15.3	Where the Consultant provides recommendations regarding proposals for maximising achievement of the WOL Objectives, consult with the Consultant, the Commonwealth and Other Contractors about any such proposals.

Clause	Contract Administrator's functions under the Design Services Contract
15.4(b)	<p>Require the Consultant to provide (as required) specific assistance as may be required by the Commonwealth to facilitate the timely, efficient, comprehensive and smooth completion of the HOTO Process.</p> <p>Schedule any meetings necessary between the Contract Administrator, the Consultant, the Commonwealth and Other Contractors for the purpose of ensuring that the Contract Administrator, the Commonwealth and Other Contractors have sufficient Project Documents to enable the Contract Administrator, the Commonwealth and Other Contractors to occupy, use, operate and maintain the Works or each Stage (as defined in the Construction Contract) and perform such other activities as may be required by the Commonwealth in respect of the Works or each Stage (as defined in the Construction Contract).</p>
15.5(a)	<p>Ensure that it carries out (or procures an Other Contractor to carry out) a post occupancy evaluation of the Works.</p> <p>Inspect the Works to review the extent of to which the Consultant has maximised the achievement of the WOL Objectives in the design of the Works.</p> <p>Issue a report to Defence and the Consultant stating the extent to which the Consultant has maximised the achievement of the WOL Objectives in the design of the Works, as well as listing any aspects of the Works which do not conform with the requirements of the Construction Contract, comparing the actual resource intensity performance to the predicted design performance target. Consult with the Consultant, the Commonwealth and such other persons as necessary.</p>
16.2	<p>If the Contract is not a "High Value Contract" for the purposes of the Indigenous Procurement Policy, and at any time if the Fee exceeds \$7.5 million (inclusive of GST) such that the Contract becomes a "High Value Contract", request that the Consultant submits an Indigenous Participation Plan. Ensure the Consultant submits this plan within 14 days of this request. Review the Consultant's Indigenous Participation Plan and notify the Consultant of any required revisions and the timeframe within which the revision is to be made.</p>

Clause	Contract Administrator's functions under the Design Services Contract
16.3	<p>If the Contract is a "High Value Contract" for the purposes of the Indigenous Procurement Policy:</p> <ul style="list-style-type: none"> • require the Consultant to provide additional detail in relation to its implementation of and overall ability to comply with the Indigenous Participation Plan; and • ensure receipt of any notice from the Consultant of enabling and disabling and other matters relating to access of IPP Contractor Portal.
16.4(c)	<p>Request that the Consultant and its subconsultants attend security briefings and direct the Consultant and its subconsultants to participate in any rehearsal of Defence Security Alert System whenever necessary.</p>
16.4(e)(i)	<p>Notify the Consultant of the change to the Defence Security Alert System level and instruct the Consultant as to the course it is to adopt insofar as the Services are affected by the change to the Defence Security Alert System level.</p>
16.4(e)(ii) and 16.4(e)(iii)	<p>Determine the extent to which, if at all, the Fee is to be:</p> <ul style="list-style-type: none"> • increased by the extra costs reasonably incurred by the Consultant; and/or • decreased by any saving made by the Consultant after the giving of notice in clause 16.3(e)(i), <p>which arise directly from any change to the Defence Security Alert System level and the Contract Administrator's direction under clause 16.4(e)(i).</p>
16.6(a)(iv)	<p>Determine whether to approve (in writing) the disclosure of Personal Information by the Consultant.</p>
16.6(a)(v)	<p>Determine whether or not to approve (in writing) the Consultant collecting, transferring, storing or otherwise using Personal Information outside Australia or allowing parties outside Australia to have access to it.</p>
16.6(a)(vi)	<p>If necessary, make demands or inquiries of the Consultant in relation to the management of Personal Information and ensure that the Consultant co-operates with such demands or inquiries.</p>

Clause	Contract Administrator's functions under the Design Services Contract
16.6(a)(ix)	Determine whether records containing Personal Information received, created or held by the Consultant are to be returned to Defence or are to be deleted or destroyed at the expiration or earlier termination of the Contract and authorise any person to oversee the deletion or destruction.
16.6(a)(xi) and (xii)	Direct the Consultant as is necessary to ensure any subcontract contains enforceable obligations requiring the subconsultant to comply with the obligations under clause 16.6 of the Conditions of Contract as if it were the Consultant.
16.7(a)(ii)	Ensure it receives from the Consultant genuine consents in writing to the use of the Project Document or the Works.
16.11	Determine whether to approve the furnishing of any information or issuing any written or printed material concerning the Services or the Works for publication in the media. Ensure that the Consultant has referred to the Contract Administrator any enquiries from the media concerning the Services or the Works.
16.13(c)	Request as necessary that the Consultant provide a certificate certifying that the Design Documentation or the Services complies with the Applicable Standards, and a corresponding certificate from each relevant subconsultant all design carried out by that subconsultant or the Services performed by that subconsultant complies with the Applicable Standards.
16.14(e)	Require the Consultant to provide copies of valid and satisfactory STRs for the Consultant or a subconsultant (where the total value of all work under that subcontract is expected to exceed \$4 million (inclusive of GST)).
16.16(c)	Where the Consultant provides a notice under clause 16.17(c) regarding Modern Slavery practices arising in connection with the Contract, request relevant information as necessary and ensure the Consultant provides updates in regards to any Modern Slavery practices.

Clause	Contract Administrator's functions under the Design Services Contract
16.17(b)(ii)	Request to be provided information from the Consultant regarding the policies, frameworks or systems it has established to monitor and assess compliance with the Commonwealth Supplier Code of Conduct and the Consultant's compliance with clause 16.17(a) (ensuring compliance with the Code).
16.17(c)	Ensure receipt of the Consultant's notice upon the Consultant becoming aware of any breach of clause 16.17(a) in accordance with this clause.
16.17(d)	<p>Notify the Consultant in writing upon becoming aware of a possible breach of clause 16.17(a) and:</p> <ul style="list-style-type: none"> - if the Consultant considers that a breach has not occurred, ensure receipt of the Consultant's notice that there has not been a breach and relevant supporting information for this; or - if the Consultant considers that a breach has occurred, ensure receipt of the Consultant's notice in accordance with clause 18.17(c).
16.17(e)	Notify the Consultant in writing if the Contract Administrator considers that the Consultant has breached clause 16.17(a) and ensure receipt of the Consultant's notice in accordance with clause 16.17(c).
16.18(b)	Request and ensure receipt a copy of the Supplier Environmental Sustainability Plan and evidence of the Consultant's compliance with that plan.
16.18(d)	Ensure receipt of the Consultant's notice that it may not be able to comply with the Supplier Environmental Sustainability Plan and its reporting obligations under clause 16.18(b).
16.18(f)	Ensure receipt of a report in the form of the Reporting Template in the timeframes set out in the clause, including after a reasonable request from the Contract Administrator.
16.18(h)	Request and ensure receipt of evidence verifying the details of a report submitted in accordance with clause 16.18(f).

Clause	Contract Administrator's functions under the Design Services Contract
16.18(i)	Reject a report provided under clause 16.18(f) by notice and with reasons, if it does not contain the required details.
16.18(j)	Ensure receipt of an amended report following a rejected in accordance with clause 16.18(i).
16.18(k)	<p>Provide the Supplier Environmental Sustainability Plan and reports to the Commonwealth agency responsible for administering the Environmentally Sustainable Procurement Policy.</p> <p>Do anything else in clause 16.18(k) following the expiration or early termination of the Contract.</p>
17(a)(iii)	Notify the Consultant in writing if the Commonwealth agrees (in its absolute discretion) with the request to keep specific information as commercial-in-confidence information.
18.1(b)	Direct the Consultant as necessary in relation to the DISP.
18.2(g)	<p>Direct the Consultant to provide (within such period as the Contract Administrator or the Commonwealth requires) the following:</p> <ul style="list-style-type: none"> • evidence of the Consultant's (including all persons who have had access to Confidential Information) compliance with the confidentiality requirements set out in clause 18; and • a statutory declaration in an authorised form satisfactory to the Commonwealth declaring that the Consultant (including all persons who have had access to Confidential Information) have complied with the confidentiality requirements set out in Clause 18.
19.3(c)	If the Consultant has given a notice of a Strategic Notice Event under clause 19.2 or has given a false warranty under clause 19.1, notify the Consultant that it is required within three business days of the request to provide further information, documents or evidence in relation to the Strategic Notice Event and the steps which the Consultant has taken (or will take) to resolve or otherwise manage the risk of any adverse effect of the Strategic Notice Event on the Commonwealth's interests.

Clause	Contract Administrator's functions under the Design Services Contract
19.4(c)	Review the Draft Strategic Notice Event Remediation Plan submitted by the Consultant in accordance with clause 19.4(a) and either approve it or give the Consultant details of any changes that are required.
19.5(i)	Direct the Consultant to take measures associated with the prevention, detection and investigation of known or suspected Fraud or Corruption, and direct the Consultant to undertake corrective action to mitigate the loss or damage to the Commonwealth resulting from known or suspected Fraud or Corruption.
19.5(ii)	Seek reasonable assistance from the Consultant in relation to any investigation into known or suspected Fraud or Corruption.
20(c)	Ensure it is fully and regularly informed by the Consultant as to all financial viability matters which could adversely affect the Consultant's (or subconsultant's) ability to perform the Services, achieve Completion or otherwise meet its obligations under the Contract (or subcontract).
20(d)	May request the Consultant (at any time) to provide (or have a subconsultant provide) a solvency statement in the form required by the Commonwealth, ensure its (and any subconsultant's) Financial Representative is available, provide financial information and documents (including internal monthly management accounts), answer questions, co-operate with and do everything necessary to assist the Commonwealth.
20(e)	May direct the Consultant to take such steps as the Commonwealth considers necessary to secure the performance of the Services, achieve Completion or otherwise meet its (or a subconsultant's) obligations under the Contract or a subcontract (including providing a deed of guarantee, undertaking and substitution, establishing a trust account for the payment of subconsultants, Subconsultant or Consultant Deeds of Covenant or collateral warranties).

Clause	Contract Administrator's functions under the Design Services Contract
21.1	<p>As necessary, require the Consultant Estate Information Obligations are carried out within a particular timeframe.</p> <p>As necessary, request the Consultant to provide Project Documents and such other documents, drawings, recording or other information required for the occupation, use, operation and maintenance of the Works or a Stage (as defined in the Construction Contract) to the Contract Administrator within a specified period.</p>
21.2	<p>May review any Estate Information or resubmitted Estate Information, prepared and submitted by the Consultant and may reject the Estate Information.</p>

Part 9 - Insurance

9.1 Insurance (clause 5)

9.1.1 General issues

A number of issues commonly arise in relation to questions of risk and insurance, including:

- (a) the nature and amount of insurance required for each project; and
- (b) the applicability of limitations on liability to Defence contracts.

A general discussion of each of the above issues is set out below.

(a) **Amount and nature of insurance required**

The amount of insurance required will depend on an assessment of the relevant risks and this may differ from project to project. If required, assistance can be obtained from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.

An essential distinction needs to be kept in mind between “direct loss” policies, which provide cover against loss or damage to the insured’s own property or property for which it is responsible and “liability” policies which, as the name suggests, provide cover against legal liabilities either toward third parties, for personal injury or property damage, or towards the Commonwealth for other conduct, such as negligence.

In all cases, a basic principle is that insurance follows the risk, never the other way around.

This means that the risk allocation provisions in the Contract are inextricably linked to the insurance requirements and the Consultant will only be required to provide insurance (either for its own benefit or the benefit of Defence), to the extent that it bears the risk of loss of or damage to property or bears legal liability in connection with the Services.

(b) Limitations on liability

As with the “expert” standard of care issue, a number of consultants to Defence have requested that the Contract include a limitation on the amount of the Consultant’s liability under the Contract.

However, while it is a matter of commercial judgment to be carefully considered in each case in light of the risks involved, it is not general Defence policy to agree to a limitation of liability, in respect of risks or obligations which the Contract places on the Consultant. Rather, liability is to be assessed in accordance with general law and it is a matter for the Consultant to insure, pass through or otherwise manage this liability. Any departure from this policy may only occur in special commercial circumstances, subject to certain Delegate approvals.

Further assistance can be obtained from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.

9.1.2 Consultant Insurance Obligations (clause 5.1)

This is the primary clause of the Contract requiring the Consultant to effect and maintain or otherwise have the benefit of different types of insurance. There are a number of different types of insurance listed in the clause itself and additional types of insurance may be specified in the Contract Particulars. The precise nature and extent of the insurances required will differ according to the nature and circumstances of the Contract although some, such as statutory Workers Compensation Insurance, will almost always be required.

The Contract Particulars set out the detailed requirements of the insurance required by the Consultant.

The policy limit amounts will vary according to the “Probable Maximum Loss” associated with the risk, which is calculated on a project-by-project basis. An important consideration will be whether or not, in each case, Defence requires the policy limit to be based on an “each and every claim/occurrence” basis (that is, subject to automatic reinstatement after each paid loss) or is satisfied with an annual aggregate policy limit. Further information on this distinction is

available from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.

In short, policy limits and the basis of those limits is a complex commercial question, which will depend on factors such as the relative cost and availability of one or more reinstatements and the likelihood of losses amounting to more than the policy limit in a single policy year. Where a Consultant has arranged insurance under a worldwide program, the possibility that the policy limit may be eroded by claims made outside Australia will also need to be considered.

Further assistance with respect to insurance is available from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.

The insurance policies which the Consultant must have in place (clause 5.1(a) of the Conditions of Contract) are:

- (a) Public Liability Insurance;
- (b) Workers Compensation Insurance;
- (c) If the Services are performed, or the Consultant's Employee's perform work, are employed or normally reside, in any jurisdiction outside Australia, Employers' Liability Insurance;
- (d) Professional Indemnity Insurance; and
- (e) other insurance on such terms as specified in the Contract Particulars.

The above insurances must be in place from the Award Date and before any of the Services are commenced. The provision to the Contract Administrator of evidence (which is satisfactory to the Contract Administrator) that the policies are current is also a condition precedent to making a payment claim under clause 11.2 of the Conditions of Contract.

The Consultant must also ensure that any policy of Professional Indemnity Insurance has a retroactive date of no later than the commencement of the Services and is not subject to any worldwide or jurisdictional limits which might limit or exclude the jurisdictions in which the Services are being carried out.

As stated above, the Consultant must provide the Contract Administrator with evidence which is satisfactory to the Contract

Administrator of the insurance arrangements as required under clause 5.1(e) of the Conditions of Contract. The determination as to requisite evidence of the arrangements and of currency is for the Contract Administrator to make. Such evidence may include certificates of currency (no more than 20 days old), current policy wordings (except where such insurances are prescribed by Statutory Requirement) and written confirmation from a relevant insurer or reputable broker stating that the relevant insurance is current and complies with clause 5.1.

A proforma notice for the Contract Administrator to request this from the Consultant titled 'Request to produce evidence of currency' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The insurance arrangements should be carefully examined for compliance and, where necessary, the Contract Administrator should **seek specialist advice** regarding insurance details provided by Tenderers at the tender stage.

It is relatively common for a Consultant to state that confidentiality provisions prevent the Consultant from complying with the Contract Administrator's requests for details of coverage and supporting evidence. This is unacceptable, as confirmation that the insurance is in place and on the required terms is fundamental to the Contract. However, where there are sufficient commercial reasons to do so, the Contract Administrator may be prepared to accept confirmation from an international insurance broker that the terms of insurance accord with the requirements of the Contract. Further advice should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.

Diary entries should be made by the Contract Administrator to follow up and ensure appropriate renewals/extensions to policies occur as necessary during the performance of the Services, and (for the purpose of the Professional Indemnity Insurance or a Public Liability Insurance if written on a claims made basis) following the later of the end of the last Defects Liability Period (as defined in the Construction Contract) and the completion of the Services.

The Consultant should notify the Contract Administrator if it is given a notice of expiry, cancellation or rescission of any required insurance

policy. Proforma notices titled 'Notice of expiry, cancellation or rescission of insurance policy', 'Request for information following notice of expiry, cancellation or rescission of insurance policy', 'Notice of replacement insurer' and 'Request to produce evidence that replacement insurance complies with the Contract' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Proforma notices titled 'Request to [*cancel an insurance policy/allow an insurance policy to lapse*]' and 'Response to request to [*cancel an insurance policy/allow an insurance policy to lapse*]' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page. These notices can be used for the Consultant to request permission to cancel an insurance policy or allow an insurance policy to lapse as required under clause 5.1(g)(vii) of the Conditions of Contract and for the Contract Administrator to respond to any such request.

Further, a proforma notice titled 'Notice of event in relation to insurance policy' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page, to be used by the Consultant to notify the Contract Administrator of an event that may result in the lapsing, cancellation or rescission of an insurance policy as required under clause 5.4(g)(viii) of the Conditions of Contract.

When reviewing policy documents, Defence must ensure that the policy covers all activities required in performance of the Works and does not exclude (if applicable):

- (a) removal of asbestos;
- (b) tunnelling; and
- (c) activities near to air fields,

as this cover may be specifically required for the purposes of a particular project.

There are some specific matters relating to each type of insurance. Some aspects to consider when reviewing policy documents are:

Public Liability Insurance

This is liability based insurance (see below). It may be purchased as a stand-alone policy, in respect of static risks.

This policy must cover:

- (a) the Consultant and all subconsultant for their respective liabilities; and
- (b) Defence for all liabilities arising out of or in connection with any act, error, omission, negligence or breach of contract by the Consultant (or any subconsultant),

(in each case, to third parties and to each other) for loss of or damage to property and death of or injury to any person arising out of, or in any way in connection with the Services. A pure Public Liability Insurance policy is not required to cover liabilities insured under Worker's Compensation Insurance, Employers' Liability Insurance or Professional Indemnity Insurance.

The level of cover must be not less than the amount per occurrence and in the aggregate specified in the Contract Particulars. It would not be unusual to have a level of at least \$20 million and up to \$150 million. However, the amount depends on a number of factors, including the risk of loss or damage to persons or property or the death or injury of any person and the "Probable Maximum Loss" amount. For example, the risks in respect of a Site located in a rural or sparsely populated area may be less than those risks in respect of a Site located in a metropolitan area or on a highly-populated Base.

As stated above, in addition to bodily injury and damage to property of third parties, the policy must cover liability for loss and damage to other existing property of Defence (not the Works), for example, an existing structure next to which geotechnical investigations are being undertaken by the Consultant.

The period of cover must extend to the end of:

- (a) if written on an occurrence basis, the completion of Services;
or
- (b) if written on a claims made basis, the expiration of the run-off period specified in the Contract Particulars following the end of the Defects Liability Period (as defined in the Construction

Contract) or the completion of the Services (whichever is the later).

Workers' Compensation Insurance and Employers' Liability Insurance

Again, this is liability based insurance (see below).

Where permitted by law, the policy should be extended to provide indemnity to Defence for its statutory liability to the Consultant's employees.

The Consultant must ensure that each of its subconsultants legally required to do so has similar insurance covering its statutory liability to employees.

This insurance must be held in accordance with the laws applicable in the relevant State or Territory in the minimum amount required by law.

Professional Indemnity Insurance

These are "claims made" liability insurances and will respond only if the policy is current at the time when a claim is made against the insured, as opposed to when the negligent or defective work was performed. See further guidance under clause 5.3 of the Conditions of Contract below.

Professional Indemnity Insurance covers claims of civil liability made during the relevant policy period against the Consultant for breach of professional duty on the part of the Consultant or its subconsultants. It covers the Consultant's duty to ensure that in performing the Services (which includes design) it exercises the requisite professional skill and care.

The insurance must be maintained for the whole of the period in which a person may make a claim against Defence or the Consultant for faulty or negligent design or supervision i.e., the relevant limitation periods.

The specified amount of cover ideally should be maintained for at least 7 years (or, if any part of the Site is located in the Australian Capital Territory, New South Wales, South Australia, Northern Territory, Tasmania or Victoria, the period is 11 years as the result of "long-stop" limitation periods with respect to defective building work) after the end of the last Defects Liability Period (as defined in the Construction Contract) and the completion of the Services (whichever is the latest). This is so that the policy is in place to respond to any claim for

breach of professional duty or professional negligence (e.g. faulty design work) brought after the Services have been completed.

There may be some resistance with respect to the period of “run-off” coverage. In principle, if a Consultant can afford to purchase ongoing professional indemnity cover in respect of its future activities, it can reasonably be expected to buy run-off cover to meet its contractual obligations.

The level of cover must be as stated in the Contract Particulars. This is specified at the time of tendering for the Contract. Consultant’s offers will therefore be based upon that specified level. It would not be unusual to have a level of at least \$5 million in cover. However, that amount will depend on the risks, circumstances and “Probable Maximum Loss” involved with the particular project.

A further important point to note, in relation to Professional Indemnity Insurance, is that it often covers only consequential damage resulting from breach of professional duty and excludes the cost of rectifying the negligent performance itself. If this comes to light before any resultant damage has been suffered, the only claim against the Consultant may be to have it properly perform the original task and the cost of rectifying the negligent performance may be excluded from the insurance.

9.1.3 Failure to Insure (clause 5.2)

Clause 5.2 of the Conditions of Contract gives Defence the right to take out the insurance required under clause 5.1 of the Conditions of Contract if the Consultant fails to provide evidence of currency of the policy, or if the insurance procured by the Consultant is not on terms satisfactory to the Contract Administrator. The costs of such insurance are treated as a debt due by the Consultant to Defence. If the Consultant fails to procure the required insurance or fails to provide sufficient evidence of currency to the Contract Administrator or where the Contract Administrator is not satisfied that the insurance is satisfactory, legal advice should be sought from the project advisor for the Project before exercising the powers conferred by this clause.

Notwithstanding the above, clause 12.2 of the Conditions of Contract (see guidance below) provides that if the Consultant is in breach of the Contract (which includes failing to procure, maintain and provide evidence of the currency of the policies when requested as required by

clause 5.1 of the Conditions of Contract), Defence is entitled to issue a notice of default under clause 12.3 of the Conditions of Contract. If the Consultant then fails to procure, maintain or provide evidence of (as the case may be) the relevant insurance within the required timeframe, Defence is then entitled to terminate the Contract by written notice under clause 12.4(b) of the Conditions of Contract.

9.1.4 Period of Insurance (clause 5.3)

This clause sets out the different requirements in relation to the period of time for which the Consultant must maintain the various insurances required under the Contract. The period of cover required will differ depending on the risk assumed by the Consultant under the Contract and whether the insurance is “claims made” or “occurrence based”.

Workers’ Compensation Insurance and Employers’ Liability Insurance are all “occurrence based” insurances. Professional Indemnity Insurance is a “claims made” insurance. Public Liability Insurance may be taken out by a Consultant on either an “occurrence based” or “claims made” basis.

Insurances which are “occurrence based” will respond if they are current at the time that the damage was done, regardless of whether it is still current at the time when the actual claim is made against the insured. In contrast, “claims made” insurances respond only if the policy is current at the time when the claim is made against the insured by a third party.

Importantly, “claims made” insurances (e.g., Professional Indemnity Insurance) must be maintained for the whole of the period in which a person may make a claim against Defence or the Consultant, such as for faulty or negligent design. Where the Contract is terminated or completed prior to the expiration of the period for which the insurance is required, it is the responsibility of the Contract Administrator (subject to the terms of its engagement) to ensure that the relevant “run-off” insurances are nevertheless maintained for the periods required under the Contract.

9.1.5 Notice of Potential Claim (clause 5.4)

This clause sets out the requirements for the Consultant to notify Defence in writing of any occurrence that may give rise to a claim under any insurance policy, although slightly different obligations apply if the

claim is in respect of Professional Indemnity Insurance (on the basis that such policies often include circumstance or notification provisions). This must be done “as soon as possible” after the Consultant becomes aware of the occurrence or potential claim. A proforma notice titled ‘Notice of potential claim under insurance policy’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page, which the Consultant can use when such an event has occurred.

The Consultant must also keep Defence informed of significant developments. A proforma notice titled ‘Notice of significant developments concerning claim’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

The Consultant is also required to ensure that its subconsultants similarly inform the Consultant and Defence in respect of an occurrence which may give rise to claims by them.

Finally, the Consultant must notify the Commonwealth if the estimated total combined value of claims made against the Consultant and claims which may arise from circumstances reported by the Consultant to its insurer in a policy year would potentially reduce the available limit of policy indemnity for that year below the amount required by the Contract. A proforma notice titled ‘Notice of reduction of professional indemnity insurance indemnity’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

9.1.6 Cross Liability (clause 5.5)

This clause sets out the specific requirements for liability insurance policies which are required to cover the interest of Defence as well as that of the Consultant and its subconsultants. This clause does not apply to Professional Indemnity Insurance or Workers Compensation Insurance since additional interests are not covered under these policies. Nor does it apply to direct loss policies. Please see further additional guidance on clause 5.1 of the Conditions of Contract above.

9.1.7 Insurances Secondary (clause 5.6)

The Commonwealth may enforce any rights or remedies under the indemnities which the Consultant has provided under the Contract before making a claim or instituting proceedings against any insurer under the relevant insurances.

The Consultant remains fully liable under the Contract and at law irrespective of whether the insurances respond or fail and irrespective of the reason why any insurance responds or fails to respond.

9.1.8 Exclusion of Consequential Loss and Limitation of Liability (clause 5.7)

Under clause 5.7 neither the Commonwealth nor the Consultant will be liable to the other for any Consequential Loss howsoever arising. Consequential Loss is defined in clause 5.7(d)(i) and includes, amongst others, loss of income, loss of revenue, loss of profit and loss of use (other than loss of use of the Works or other Commonwealth property).

Additionally, under clause 5.7(a)(ii) there is a cap on the Consultant's liability described in the clause as the "maximum aggregate liability of the Consultant" which is the amount specified in the Contract Particulars. However, the Consultant does not have the benefit of the exclusion of Consequential Loss, and the cap, in the specific circumstances set out in clause 5.7(b).

To provide a practical example in relation to the operation of the liability cap and carve out regime – if the Consultant's cap amount is \$100 and the Consultant was required to pay the Commonwealth \$10 by way of resulting from a liability for deliberate breach of the Contract, then the payment of the \$10 would not be taken into account in determining whether the cap amount is reached as this type of liability is expressly carve out to the cap regime. A similar approach would be taken for the other carve outs to the liability cap.

9.2 Proforma notices (Risks and Insurance)

The following table contains a list of the proforma notices relating to Risks and Insurance for use under clause 5 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Clause	Title of proforma notice
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Clause	Title of proforma notice
5.1(e)	Request to produce evidence of currency
5.1(f)(i)	Notice of expiry, cancellation or rescission of insurance policy
5.1(f)(i)	Request for information following notice of expiry, cancellation or rescission of insurance policy
5.1(f)(ii)	Request to produce evidence that replacement insurance complies with the Contract
5.1(f)(ii)	Notice of replacement insurer
5.1(g)(iv)	Request for receipts for payment of insurance premiums
5.1(g)(vii)	Request to <i>[cancel an insurance policy/allow an insurance policy to lapse]</i>
5.1(g)(vii)	Response to request to <i>[cancel an insurance policy/allow an insurance policy to lapse]</i>
5.1(g)(viii)	Notice of event in relation to insurance policy
5.4(a)	Notice of potential claim under insurance policy
5.4(b)	Notice of significant developments concerning claim
5.4(e)	Notice of reduction of professional indemnity insurance indemnity

Part 10 - Design and Documentation

This Part 10 provides guidance in relation to the relevant clauses dealing with design and documentation.

10.1 Design and Documentation under the Design Services Contract (clause 6)

10.1.1 Consultant's Documentation Program (clause 6.1)

The Consultant, as part of the program is to prepare under clause 8.2 and submit to the Contract Administrator for approval, a documentation program in a manner and at a rate which will give the Contract Administrator a reasonable opportunity to review the design documentation within the period given to the Contract Administrator under clause 6.3.

When considering a program submitted by the Consultant, the Contract Administrator will need to allow sufficient time for any review under clause 6.3(a)(ii) of the Conditions of Contract. The program should also take into account the fact that the Contract Administrator may, upon review, reject any of the Design Documentation submitted by the Consultant.

Note that the Contractor Administrator is only to approve the documentation program for the purposes of clause 6.1 but does not approve the overall program under clause 8.2 (only a review and comment right).

10.1.2 Consultant's Design (clause 6.2)

The Consultant must design the Works and prepare and submit Design Documentation for review by the Contract Administrator in accordance with the documentation program approved by the Contract Administrator under clause 6.1 of the Conditions of Contract. It should be noted that "Design Documentation" is broadly defined in clause 1.1 of the Conditions of Contract.

A flowchart titled 'Flowchart 1: Design' provided in Part 10.3 of this Manual below indicates the process for developing the Design Documentation.

The nature and extent of Design Documentation is generally determined by the requirements set out in the Brief and any Preliminary Design Solution.

Generally, at a minimum Defence expects the Brief and any Preliminary Design Solution (and therefore the Design Documentation) to address the following matters:

(a) Functional Requirements

As part of the Design Documentation, the Consultant may be required to provide information relating to functional requirements for each element of the Works described in the Brief. Such information might:

- (i) describe the performance requirements, parameters and functional relationships between elements of the Works;
- (ii) identify relevant organisational structures, personnel and equipment numbers; and
- (iii) include functional data sheets,

for each element of the Works. This information is referred to below as Functional Requirements Information (**FRI**).

(b) Design Reports

As part of the Design Documentation, the Consultant is likely to be required to prepare design reports at different stages of design development, from concept designs and schematic designs. The reports may involve design of each of the key infrastructure components of the Works, such as:

- (i) fuel farms and fuel reticulation systems;
- (ii) aircraft pavements and apron areas;
- (iii) maintenance hangars;
- (iv) airfield lighting;
- (v) electrical systems;

- (vi) communications systems;
- (vii) security systems;
- (viii) engineering services (e.g. water supply, trade waste, stormwater, sewerage, civil works, hydraulics); and
- (ix) office and living-in accommodation.

The design reports forming part of the Design Documentation should:

- (i) be stand-alone documents that provide the logic behind design decisions and contain sufficient drawings and information without the need to refer to additional information such as other drawings or minutes of design reviews;
- (ii) provide detail on how the FRI are achieved and confirm compliance or otherwise with the FRI, the requirements of the Contract (e.g. Statutory Requirements, certification requirements) and allow Defence to determine that the level of design is adequate;
- (iii) contain clear descriptions of the Works so that they may form a reference for other similar projects and comprise an important briefing document for user groups, Commonwealth regional staff and new personnel;
- (iv) incorporate a statement of design intent for each element of the Works, a summary of the major design issues and the background to the solution;
- (v) address the other matters set out in the Brief.

In this regard, a proforma Brief can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Brief” on that page and should be used as the base document for any new procurement and fully reviewed

and amended as necessary to reflect the requirements for the project and contract in question (see Part 3.4.2 above).

(c) Design Reviews

Clause 6.2(c) of the Conditions of Contract requires the Consultant to conduct design reviews at each of the Milestones identified in the Brief.

Design reviews may result in the issue of further design reports as part of the Design Documentation. Such reports may be required where there are outstanding issues raised in the review of the previous reports provided as part of the Design Documentation.

Such reports must be prepared prior to construction of the relevant element of the Works and are to be used to “close out” any outstanding design issues (thus minimising claims from a Contractor at a later stage). They must be revised and resubmitted in accordance with the review of Design Documentation process.

These reports should be based on previous issues of reports (if any) and revised as required to adequately cover issues raised in review of the previous report.

Prior to issue of tenders to prospective Contractors for the Works, the Consultant should prepare and submit a design report containing all “for construction” (and tendering purposes) Design Documentation which reflects all changes or updates to the design.

10.1.3 Contract Administrator May Review Design Documentation (clause 6.3)

This clause deliberately provides that the Contract Administrator “may review” the design rather than, for example, “approve” or “allow use of” the design. This seeks to avoid the argument that the Contract Administrator has participated in the design process and in that way affected the Consultant’s warranty under clause 2.2(c)(ii) of the Conditions of Contract that the design will be fit for the purposes as set out in, or reasonably to be inferred from, the Brief.

The Contract Administrator may reject all or part of any submitted Design Documentation.

There is no express limit on the number of times that the Contract Administrator may reject a design. However, if the Contract Administrator reasonably believes that the design is not in accordance with the Contract, such rejection must be made within the number of days set out in the Contract Particulars. The Contract Administrator should provide reasons as to why the Design Documentation is being rejected.

A proforma notice titled 'Rejection of Design Documentation' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page. This can be used by the Contract Administrator when the Contract Administrator rejects the submitted Design Documentation.

10.1.4 No Obligation to Review (clause 6.4)

This clause anticipates the argument that warranties provided by the Consultant might be undermined or derogated by Defence's participation in the design process.

This clause ties in with clause 6.3 of the Conditions of Contract and seeks to ensure that the Consultant's warranty that the design is fit for its intended purpose under the Contract is not affected by any comments, review or rejection of that design by the Contract Administrator.

Despite this clause, the Contract Administrator should endeavour not to unduly interfere with the Consultant's design as distinct from simply reviewing and commenting on design. To do otherwise may lead to the Consultant being relieved of sole responsibility for design problems - notwithstanding the existence of clause 6.4 of the Conditions of Contract.

10.1.5 Copies of Design Documentation (clause 6.5)

The Contract Particulars will describe how many copies of the Design Documentation the Consultant is required to provide on the particular project. The Consultant must submit to the Contract Administrator the number of copies specified (in both hard and electronic copies) and in the format stated in the Contract Particulars. Refer also to the guidance provided in relation to the Contract Particulars in Part 3.4 of this Manual above.

10.1.6 Licence over Project Documents (clause 6.6)

This clause is intended to ensure that Defence is able to exercise the rights held by the actual owner of the Intellectual Property in the Project Documents. The definition of Project Documents in clause 1.1 of the Conditions of Contract is broad and includes the Design Documentation and any other material produced by the Consultant or subconsultants for the purpose of the Contract, the Services or the Works.

Whilst the clause does not purport to make Defence the owner of the Intellectual Property, its intent is to confer all of the rights of the owner via a perpetual licence which arises immediately upon the creation of any Project Documents or upon the provision of any Project Documents to Defence or the Contract Administrator. This licence survives the termination of the Contract on any basis.

10.1.7 Intellectual Property Warranties (clause 6.7)

This clause is intended to ensure that the Consultant is able to grant the licences referred to in clause 6.6 of the Conditions of Contract. This gives a separate right to Defence to take action against the Consultant if the warranties set out in clause 6.7 are not complied with.

Neither Defence nor any sublicensee or sub sub-licensee will be liable to pay any third party any licence or other fee in respect of the use of the Project Documents.

10.1.8 Intellectual Property Rights (clause 6.8)

This clause requires the Consultant to ensure that the Services do not infringe any intellectual property rights of any third party and requires the Consultant to indemnify Defence in respect of all claims should any third party's intellectual property rights be infringed.

10.1.9 Commonwealth Material (clause 6.9)

This clause ensures that any materials given to the Consultant by Defence remain the property of Defence, are adequately protected and maintained while in the Consultant's possession and are not used in any way that may infringe any copyright that a third party may have in the materials.

10.1.10 Resolution of Ambiguities (clause 6.10)

This clause provides assistance to the parties and the Contract Administrator in determining how to resolve inconsistencies, discrepancies or ambiguities in the documents constituting the Contract or between such documents any Project Document (including the Design Documentation).

Clause 6.10(a) states that the Contract Particulars set out the order of precedence for the standard Contract documents. Where other documents are stated to form part of the Contract in the relevant item in the Contract Particulars under clause 1.1 of the Conditions of Contract, such documents are also included in the order of precedence list.

Clause 6.10(b) states that the higher requirement prevails where there is ambiguity, discrepancy or inconsistency between the Brief and any other requirement of the Contract (including any other requirement of the Brief).

Clause 6.10(c) states the higher standard, quality or quantum will prevail where there is ambiguity, discrepancy or inconsistency between the Contract and any part of the Design Documentation or any other Project Document. If this does not resolve the ambiguity, discrepancy or inconsistency, the Contract will prevail.

Please note that it is important to understand the separate processes contemplated by clauses 6.10(d)(i) and 6.10(d)(ii), as well as the separate proforma notices which have been developed for use with those clauses – they can be found on the Defence Suites of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause 6.10(d)(i) requires the Consultant and/or Defence (as the case may be) to notify the Contract Administrator and the other party in writing if they discover an ambiguity, discrepancy or inconsistency.

Separate proforma notices are provided below for either the Consultant or the Contract Administrator to notify of an ambiguity, discrepancy, or inconsistency in documents which make up the Contract and between the Contract and Design Documentation or any other Project Document titled ‘Notice of *[ambiguities / discrepancies / inconsistencies]* in documents which make up the Design Services Contract clause 6.10(d)(i)’, and ‘Notice of *[ambiguities / discrepancies / inconsistencies]*

between the Contract and Design Documentation or other Project Documents clause 6.10(d)(i)' (they can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page).

The Contract Administrator has 14 days after a notice describing the ambiguity, discrepancy or inconsistency has been issued (by Defence or by the Consultant) in which to instruct the Consultant as to the course it must adopt. A proforma notice for such an instruction titled 'Response to notice regarding [*ambiguities / discrepancies / inconsistencies*]' clause 6.10(d)(i)' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Clause 6.10(d)(ii) requires the Contract Administrator to promptly notify the Consultant and Defence of details of ambiguity, discrepancy or inconsistency and must also give instructions to the Consultant as to the course it must adopt. A proforma notice for such a notice (together with instructions to the Consultant) titled 'Notice of [*ambiguities / discrepancies / inconsistencies*]' in documents which make up the Contract clause 6.10(d)(ii)' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

To provide some practical guidance – the above regime should be adopted rather than the use or issue of general "RFIs" or "Requests for Information" (which, of themselves, are not contemplated in the template Design Services Contract) and it is therefore important to follow and adopt the clause 6.10 process. The instruction by the Contract Administrator may or may not lead to a Variation Order, as this will depend on whether the resolution will require there to be a change to Works as described in the Contract.

10.1.11 Access to Premises and Project Documents (clause 6.11)

The Australian National Audit Office (**ANAO**) requires particular rights to access the Consultant's premises and to review certain project documents on Defence projects. This clause therefore provides a general right for Defence (and any nominated person or other person acting on behalf of the Commonwealth, which may include the ANAO) to access the Consultant's premises and the Project Documents and

requires the Consultant to provide the installed version of each item of software comprising the IT equipment prior to Completion of each Stage or the Works (as defined in the Construction Contract).

A proforma notice for the issuing of a request by the Contract Administrator titled 'Request for access to premises and Project Documents' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The Consultant must also ensure all subcontracts impose obligations on the subconsultant equivalent to the Consultant's obligations arising out of this clause as if the subconsultant were the Consultant.

10.1.12 Measurements and Dimensions (clause 6.12)

This clause requires the Consultant to obtain and check all relevant measurements and dimensions on the Site before proceeding with the Services. The clause does allow different requirements to be specified in other parts of the Contract (such as the Brief) or for the Contract Administrator to direct that different requirements apply.

This clause also states that the layout of plant, equipment, ductwork, pipe work and cabling shown in the Brief (if any) is to be taken as diagrammatic only. Additionally, to the extent permitted by law, the Commonwealth will not be liable upon any Claim arising out of or in connection with a failure to obtain and check measurements and dimension information concerning the Site and the layout of items discussed above.

10.1.13 Design Certification (clause 6.13)

This clause requires the Consultant to provide the Contract Administrator with (as applicable) Consultant Design Certificates and/or Subconsultant Design Certificates.

Such certificates are to accompany each payment claim under clause 11.2 of the Conditions of Contract and are also required to be provided by the Consultant prior to completion of the relevant Works under the Construction Contract.

Consultant Design Certificate

The form of the Consultant Design Certificate is set out in the Schedule of Collateral Documents.

By issuing the Consultant Design Certificate, the Consultant certifies that:

(a) the Design Documentation complies with the requirements of the Contract and, subject to clause 2.10(a) of the Conditions of Contract, all Statutory Requirements and the requirements of the Contract; and

(b) as constructed, the Works comply or the Stage (as defined in the Construction Contract) complies with the Design Documentation which has not been rejected by the Contract Administrator under clause 6.3 of the Conditions of Contract),

except to the extent set out in the certificate.

Subconsultant Design Certificate

The form of the Subconsultant Design Certificate is set out in the Schedule of Collateral Documents.

The Consultant must procure a Subconsultant Design Certificate from each subconsultant that performs design work forming part of the Services certifying that:

(a) all design carried out by the subconsultant giving the certificate complies with the requirements of the subcontract and (subject to the terms of the subcontract) all Statutory Requirements and the requirements of the subcontract; and

(b) the Works comply or the Stage complies with the design carried out by that subconsultant,

except to the extent set out in the certificate.

The purpose of the Consultant Design Certificate and the Subconsultant Design Certificate is for Defence to obtain a level of assurance from the designers that both the design and the Works (as constructed) comply with the requirements of the Contract and the subcontract.

The Consultant and the relevant subconsultant can identify exceptions in the certificate, although clearly it would be preferable for Defence that

this does not occur. The intended dynamic is that either the relevant Consultant/Subconsultant resolve any outstanding issue before issuing their certificate or they will be drawn to Defence's attention and Defence can then require their rectification.

10.1.14 Samples (clause 6.14)

This clause obliges the Consultant to obtain and submit to the Contract Administrator for approval each sample or range of samples required by the Contract in accordance with the approved program. The nature and extent of samples will usually be specified in the Brief.

The Contract Administrator has the discretion to review (and if necessary, reject) samples or range of samples submitted by the Consultant. A proforma notice titled 'Rejection of Samples' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page. If the Contract Administrator rejects any samples or range of samples, the Consultant must resubmit samples (or a range of samples) to the Contract Administrator. There is no limit to the number of times the Contract Administrator may review and reject samples or ranges of samples if, in the reasonable opinion of the Contract Administrator, the sample or range of samples does not comply with the requirements of the Contract.

The Contract Particulars specify the time period within which the Contract Administrator may reject such samples.

Similar provisions to clause 6.4 are also included in clause 6.14 to ensure the Consultant remains responsible for the samples, despite the Contract Administrator's review.

10.1.15 Work Health and Safety (clause 6.15)

Clause 6.15 contains detailed provisions relating to WHS compliance.

This clause makes it clear that the Consultant is responsible for ensuring that it and all subconsultants comply with:

- (a) all Statutory Requirements and other requirements of the Contract in relation to work health and safety; and

(b) its duties under WHS Legislation to consult, co-operate and co-ordinate activities with others having a work health and safety duty.

The clause also requires the Consultant to notify the Contract Administrator:

(a) in relation to notifiable incidents (within the meaning of the WHS Legislation), immediately. Further, if a notifiable incident occurs, the Consultant is required to properly provide any notices (received from and provided to relevant authorities), witness statements, and (within 10 days of notifying the relevant authority) a summary of the investigations, actions to be taken, and any impact on the Consultant that may result from the notifiable incident;

(b) in relation to other WHS incidents or accidents (which are not notifiable incidents within the meaning of WHS Legislation) where the nature of the incident or accident indicates a potential systemic failure to identify hazards and manage risks to health and safety, so far as is reasonably practicable within 24 hours of the incident or accident occurring;

(c) in respect of all other work health and safety matters arising out of or in connection with the Services, including the occurrence of any other incident or accident (not required to be reported above), in the Consultant's Monthly Report under clause 4.8 of the Conditions of Contract.

A proforma notice titled 'Notice of Work Health and Safety matters' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page. This notice may be used to inform the Contract Administrator of any relevant WHS matters under this clause.

10.1.16 Local Industry Capability (clause 6.16)

Local industry participation is an expected outcome of Commonwealth expenditure. This expectancy builds on the Commonwealth Procurement Rules, which require procurement practices that do not unfairly discriminate against Small and Medium Enterprises and provide appropriate opportunities for SMEs to compete for Commonwealth funded work.

This clause requires the Consultant to design the Works so as to ensure that appropriate opportunities are provided for local industry to participate in the delivery of the Works.

This provision is one of key steps undertaken by Defence to facilitate local industry participation early on in the design phase of a project.

10.2 Proforma notices (Planning, Design and Documentation)

The following table contains a list of the proforma notices relating to Design and Documentation for use under clause 6 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
6.3(a)(ii)	Rejection of Design Documentation
6.10(d)(i)	Notice of [<i>ambiguities / discrepancies / inconsistencies</i>] between the Contract and the Design Documentation or any other Project Documents [Note: this proforma notice is to be used by the Consultant or Defence]
6.10(d)(ii)	Notice regarding [<i>ambiguities / discrepancies / inconsistencies</i>] between the Contract and the Design Documentation or any other Project Documents [Note: this proforma notice is to be used by the Contract Administrator]
6.10(d)(i)	Notice of [<i>ambiguities / discrepancies / inconsistencies</i>] in documents which make up the Contract [Note: this proforma notice is to be used by the Consultant or Defence]

Clause	Title of proforma notice
6.10(d)(ii)	Notice regarding [<i>ambiguities / discrepancies / inconsistencies</i>] in documents which make up the Contract [Note: this proforma notice is to be used by the Contract Administrator]
6.10(d)(i)	Response to notice regarding [<i>ambiguities / discrepancies / inconsistencies</i>]
6.11(a)	Request for access to premises and Project Documents
6.14(b)(ii)	Rejection of samples
6.15(c)	Notice of work health and safety matters

10.3 Flowchart (Design)

**FLOWCHART 1:
DESIGN SERVICES CONTRACT - DESIGN**

DESIGN OBLIGATIONS

The Consultant must:

- (as part of the program it is preparing under clause 8.2) submit to the Contract Administrator for approval a documentation program which makes allowance for the Design Documentation to be submitted to the Contract Administrator in a manner and at a rate which will give the Contract Administrator a reasonable opportunity to review the Design Documentation within the period of time within which the Contract Administrator may review the Design Documentation (i.e. the number of days set out in the Contract Particulars) **[cl 6.1]**;
- design the part of the Works required to be designed in accordance with the Brief, the Preliminary Design Solution and other requirements of the Contract and prepare all relevant Design Documentation **[cl 6.2(a)]**;
- coordinate the work of its subconsultants in a manner and at a rate of progress so that the Consultant complies with its obligations under cl 6.2(d) **[cl 6.2(b)]**
- conduct design reviews at each of the Milestones identified in the Brief **[cl 6.2(c)]**.

DOCUMENTATION PROGRAM APPROVED?

No

Submit amended documentation program to the Contract Administrator.

Yes

DESIGN DOCUMENTATION

The Consultant must:

- submit the Design Documentation it prepares to the Contract Administrator in accordance with the documentation program approved by the Contract Administrator **[cl 6.2(d)]**; and
- submit to the Contract Administrator the number of copies of the Design Documentation in hard copy and electronic copy as specified in the Contract Particulars **[cl 6.5]**.

HAS THE DESIGN DOCUMENTATION BEEN REJECTED WITHIN THE NUMBER OF DAYS SET OUT IN THE CONTRACT PARTICULARS?

Yes

No

Submit amended Design Documentation to the Contract Administrator **[cl 6.3(b)]**.

Part 11 - Quality

11.1 Quality (clause 7)

11.1.1 Quality Assurance (clause 7.1)

This clause is related to the Quality Plan required to be prepared by the Consultant and requires the Consultant to:

- (a) **implement** the quality assurance processes, systems and/or frameworks set out in its Quality Plan; and
- (b) provide the Contract Administrator or anyone else acting on behalf of the Commonwealth with access to conduct audits and monitoring of the Consultant's and subconsultant's quality assurance processes, systems and/or frameworks.

Further, clause 7.1(c) provides that the Consultant will not be relieved of its obligations under the Contract (or at law or in equity) as a result of:

- (c) having implemented the quality assurance requirements of the Contract; and/or
- (d) any involvement by the Commonwealth or the Contract Administrator in auditing or directing the Consultant in relation to those requirements.

11.1.2 Non-complying Services (clause 7.2)

The Consultant has primary responsibility for ensuring that the Services are performed in accordance with the Contract and for correcting any part of the Services that do not comply with the Contract, regardless of whether the non-complying service is performed by the Consultant or by subconsultants engaged by the Consultant.

This clause enables the Contract Administrator to instruct the Consultant to respond to any non-complying Services by requiring the Consultant to:

- (a) re-perform the non-complying Services by a specified time;
- (b) take all reasonable steps to mitigate the effect of the non-compliance on Defence; and

(c) take all reasonable steps to put Defence as closely as possible in the position in which it would have been if the Consultant had carried out the Services in accordance with the Contract.

Alternatively, the Contract Administrator may advise the Consultant that Defence will accept the non-complying Services despite the non-compliance.

A proforma notice for the Contract Administrator to notify the Consultant of non-complying Services and issue instructions in relation to such non-conformance titled 'Instructions relating to Non-complying Services' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

11.1.3 Reperformance of the Non-complying Services (clause 7.3)

This clause provides that where a direction is given under clause 7.2 of the Conditions of Contract, the Consultant must reperform the non-complying Services within the time specified in the Contract Administrator's direction.

If the performance of the non-complying Services takes place after the Date for Completion, they must be performed so as to minimise the delay and disruption to the execution of the Services or the Works.

11.1.4 Project Plans (clause 7.4)

This clause provides the procedure for dealing with Project Plans. The areas in which the Consultant is requested (during the tender period) and required (after the Award Date) to provide Project Plans are detailed "Tender Schedule A – Project Plans" and the Contract Particulars.

The suite update in 2021 has changed the requirement for all draft Project Plans to be lodged as part of the tender. The only draft Project Plans requested during the tender period is the Site Management Plan, the Work Health and Safety Plan and any additional Project Plans specified in the Tender Particulars. The required additional draft Project Plans will have been determined by Defence at the time of tender. Project Plans also include the Project Lifecycle and HOTO Plan, Estate Information Provision Plan, Environmental Management and Sustainability Plan and Quality Plan. Guidance on what is to be included

within each of these plans can be found within their respective definitions in clause 1.1.

In addition, refer to the guidance provided in Part 6.1.13 of this Manual above for the matters to be covered by the Environmental Management and Sustainability Plan and the Site Management Plan more specifically. The Site Management Plan may also include a Method of Work Plan for Airfield Activities, if this is relevant to the project being considered.

The Consultant's obligations in relation to Project Plans are described in clause 7.4(a)(ii). The Consultant's obligations include preparing Project Plans (where applicable, based on the draft Project Plans lodged in the Consultant's tender) by the date set out in the Contract Particulars, so as to ensure no delay or disruption to the Services.

The Consultant must re-submit any rejected Project Plans until such time as the Contract Administrator does not reject the Project Plans in the time provided under the Contract. After a Project Plan has been finalised, the Consultant must also:

- (a) regularly review, update and amend each Project Plan in accordance with the process set out in that Project Plan, or if requested to do so by the Contract Administrator and otherwise at least on each anniversary of the Award Date and, if clause 9 of the Conditions of Contract applies (that is, the Services are phased), prior to the Date for Delivery Phase Agreement; and
- (b) continue to correct any defects or omissions in any Project Plan.

The Consultant must also document and maintain detailed records of all:

- (a) reviews, updates, amendments and submissions of each Project Plan undertaken as part of any Project Plans;
- (b) audits or other monitoring of each Project Plan; and
- (c) training and awareness programs provided to the Consultant and its subconsultants in respect of each Project Plan.

A proforma notice for the Consultant to submit the Project Plans, titled 'Project Plans' can be found on the Defence website, on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page, as can a

proforma notice for the Contract Administrator to reject the Project Plans, titled 'Rejection of Project Plans'.

This clause also makes it clear that compliance with submitted Project Plans does not relieve the Consultant of its other obligations under the Contract or otherwise according to law.

Clause 7.4(b) further provides that the Consultant will not be relieved of its obligations under the Contract or otherwise according to law where the Contract Administrator or other relevant person fails (due to negligence or otherwise) to detect a defect or omission in the Project Plans.

11.1.5 Drawings (clause 7.5)

This clause requires the Consultant to ensure that the drawings required to be provided by the Consultant under the Contract be prepared by competent draftspersons in accordance with:

- (a) the standard prescribed in the Contract (or if not prescribed, a standard consistent with the best industry standard for drawings of a nature similar to those required for the Works);
- (b) all Statutory Requirements;
- (c) the directions of the Contract Administrator; and
- (d) the requirements of all relevant standards of Standards Australia to the extent not inconsistent with the requirements of the Contract.

11.2 Proforma notices (Quality)

The following table contains a list of the proforma notices relating to Quality under clause 7 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Clause	Title of proforma notice
7.2	Non-complying Services
7.4(a)(ii)A/C	Project Plans

Clause	Title of proforma notice
7.4(a)(ii)	Rejection of Project Plans

Part 12 - Time

12.1 Time (clause 8)

12.1.1 Progress (clause 8.1)

This clause sets out the primary obligations of the Consultant to complete on time. Essentially, the Consultant must regularly and diligently progress the Services and achieve Completion of each Milestone by the relevant Date for Completion.

The relevant Date for Completion will be the time specified in the Contract Particulars, as adjusted under the Contract. As to the circumstances in which the Date for Completion may be extended – refer to Part 12.1.4 below.

12.1.2 Programming (clause 8.2); and Consultant Not Relieved (clause 8.3)

Clause 8.2 of the Conditions of Contract requires the Consultant to provide the Contract Administrator with a program within 14 days of the Award Date. Programs are used as a management tool to assist the parties and the Contract Administrator. The Consultant is also required to periodically (at the intervals specified in the Contract Particulars) update the program to take account of any changes to the program or delays which may have occurred or extensions of time which may have been granted under the Contract.

Further, clause 8.3 of the Conditions of Contract provides that no review or comment on the program by the Contract Administrator will alter the Consultant's primary responsibility under the Contract.

The program is to:

- (a) be based upon the Commonwealth's Program and otherwise developed based on the initial program lodged by the Consultant in its tender for the Services (as may be updated prior to the Award Date with the approval of the Commonwealth); and
- (b) contain "the details required by the Contract or which the Contract Administrator otherwise reasonably directs".

The programs must be provided in a format compatible with the software described in the Contract Particulars.

To be useful, a program should:

- (a) include sufficient detail to describe the services and taskings which are being carried out, including the documentation program required under clause 6.1;
- (b) include allowance for usual details/events including design review periods and meetings;
- (c) identify key activities by others, such as:
 - (i) supply of documentation or information by the Contract Administrator;
 - (ii) review processes by both the Contract Administrator or Defence and other authorities; and
 - (iii) dates for Defence-dependent milestones;
- (d) provide estimated duration of activities and key precedence relationships between critical or near critical activities;
- (e) provide the sequence of activities which constitute the critical path at the time of inception of the program and its logic;
- (f) provide the levels of administrative, management and supervisory staff required over the duration of the Contract.

In reviewing the program and as noted above, the Contract Administrator should consider whether the program provided by the Consultant sets out “the details required by the Contract or which the Contract Administrator otherwise reasonably directs”. Accordingly, in preparing the Brief consideration to be given to setting out Defence’s minimum requirements for the program. Subject to the Contract requirements, the Contract Administrator may have regard to matters such as:

- (a) **Does the program sufficiently detail activities and elements and provide key precedence relationships and the sequence of activities representing critical path?**

This will be particularly relevant when assessing the impact of events on particular activities including concurrency of events and criticality of activity. It may be that an extension of time in respect of a delaying event to one activity is such that a subsequent separate delaying event on another activity has no effect upon reaching Completion of the Milestone by the due Date for Completion.

(b) Is the resourcing of each activity clearly detailed and able to be monitored and compared on a daily basis?

Without proper resourcing information, a program is not truly useful. If progress is not able to be clearly identified and compared with actual resourcing and progress, it will be a major constraining element when attempting to assess the program.

It is important to note that the Contract Administrator's function is only to review and comment on the program and not to approve it.

12.1.3 Suspension (clause 8.4)

The Consultant has no right to suspend the Services unless it is ordered to do so by the Contract Administrator under this clause. However, in certain limited circumstances the Consultant may have a right to suspend the work by operation of the security of payment legislation, if such legislation applies. See commentary on clause 11 of the Conditions of Contract for further guidance.

The Contract Administrator may instruct the Consultant to suspend the whole or part of the Services; such a power might need to be exercised in various circumstances, for example where aspects of the Services need to be put on hold pending confirmation of particular project requirements or approvals. If the suspension is to be lifted, then an instruction to re-commence will need to be issued by the Contract Administrator at the appropriate time.

If an instruction to suspend is given, the Consultant:

(a) may be entitled to claim an increase in its payment entitlements under the Contract for the extra costs reasonably incurred as a direct result of the suspension – if the suspension is not the result of the Consultant's failure to carry out its obligations in accordance with the Contract; and

(b) may also claim an extension of time provided that the suspension is not the result of the Consultant's failure to perform its Contract obligations and where the Consultant is otherwise so entitled under clause 8.8 of the Conditions of Contract.

The Consultant must take all steps possible to mitigate any extra costs incurred by it as a result of the suspension. The Consultant's entitlement to payment for those extra costs is its only entitlement to money in these circumstances. The Consultant will not be entitled to costs which could have reasonably been avoided (i.e. it must mitigate the extra costs incurred).

A proforma notice instructing the Consultant to suspend work titled 'Instruction to suspend' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

A proforma notice titled 'Instruction to re-commence' can also be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page. This notice can be used for the purpose of instructing the Consultant to re-commence work or the performance of Services (as the case may be).

12.1.4 Claims for Extensions of Time (clauses 8.5 to 8.6)

The primary intention of Defence in incorporating time for Completion provisions in Design Services Contract is to improve the management delivery of design against significant project milestones. The primary intention is not to create fixed time obligations in default of which the Consultant becomes liable to liquidated damages (as under the Defence Head Contract).

Having said that, the Consultant could nevertheless be liable to Defence in general damages for failure to meet a Milestone by the relevant Date

for Completion (e.g. where that failure results in Defence having exposure to delay costs to a Contractor).

Claims for extensions of time need to be assessed with care. In particular, the Contract Administrator should be mindful that the Consultant has no entitlement to an extension of time under the Contract unless it satisfies a number of requirements. These requirements are set out in clauses 8.5-8.7 of the Conditions of Contract and can be categorised as follows:

(a) the **substantive requirements**, being:

(i) whether the occurrence notified of by the Consultant is, if occurring:

(A) prior to the Date for Completion of a Milestone, an Act of Prevention or a Pandemic Adjustment Event; or

(B) after the Date for Completion of a Milestone, an Act of Prevention;

(ii) the cause of the delay was beyond the reasonable control of the Consultant; and

(iii) the Consultant must have actually been, or be likely to be, delayed in the manner set out in clause 8.5(b)(i) (prior to the Date for Completion) or clause 8.5(b)(ii) (after the Date for Completion)); and

(b) that the **procedural requirements** set out in clause 8.6 of the Conditions of Contract have been strictly followed by the Consultant.

In addition, to dovetail with the Contract Administrator's power to instruct the Consultant to accelerate through a delay under clause 8.10 of the Conditions of Contract, the Consultant is not entitled to an extension of time if it has received such an instruction (see clause 8.7(d) of the Conditions of Contract).

Each of the matters above are discussed in turn as follows:

(a) **Substantive Requirements**

Qualifying events of delay

The occurrences applicable in the circumstances depend upon whether an occurrence is claimed to have delayed the Consultant before or after the Date for Completion.

If the Consultant is delayed **before** the Date for Completion, the occurrences are an Act of Prevention or a Pandemic Adjustment Event:

An **Act of Prevention** is defined in clause 1.1 of the Conditions of Contract to include any of:

- (a) a breach of the Contract by the Commonwealth;
- (b) any other act or omission of the Commonwealth, the Contract Administrator or an Other Contractor engaged by the Commonwealth; or

(c) a Variation directed by the Contract Administrator, but excluding any act of omission of the Commonwealth, the Contract Administrator or an Other Contractor engaged by the Commonwealth in accordance with or otherwise permitted by the Contract. To provide an explanation as to the intent of the last two lines of this definition - if, for example, the Contract Administrator is entitled under the Contract Particulars to a period of 14 days to review a Project Plan the Consultant could not argue that there was an Act of Prevention if the Contract Administrator took the full 14 day period to undertake the review even though the Consultant believed a response in a shorter duration should be provided.

A **Pandemic Adjustment Event** is defined in clause 1.1 of the Conditions of Contract as:

A disruption which has an adverse effect on the supply of labour, equipment, materials or services required for the carrying out of the Services provided that the:

(a) disruption arises from a change in circumstances relating to the Pandemic first occurring after the Award Date and is a direct result of the Pandemic; and

(b) adverse effect is one which the Consultant could not have avoided or overcome by the taking of all reasonable steps (but without the need to expend additional costs).

After the Date for Completion has passed, the only applicable occurrences are “Acts of Prevention”.

Occurrence is beyond the reasonable control of the Consultant.

This requirement is self-explanatory but should not be overlooked. Likewise, as noted below (see commentary on clause 8.8 of the Conditions of Contract, below), the Consultant will be disentitled to the extent that it has contributed to the delay or failed to take all necessary steps to preclude the cause of the delay and to avoid or minimise the consequences of the delay.

Manner of delay

If the relevant occurrence is beyond the reasonable control of the Consultant and recognised by the Contract as being applicable in the circumstances, the next requirement is that the Consultant show that it has been delayed by the occurrence in a manner which will delay it in achieving Completion of the Milestone (noting that this applies to occurrences which take place both before and after the relevant Date for Completion).

A detailed analysis of techniques for assessing claims for extensions of time is beyond the scope of the Manual.

(b) Procedural Requirements

The purpose of clause 8.5 of the Conditions of Contract is to ensure that the Consultant promptly informs the Contract Administrator of any event which it considers will entitle it to an extension of time, rather than bundling together a series of claims near the end of the project if the Consultant realises it is running out of time. If the Consultant becomes aware of any occurrence that is likely to delay it in carrying out the Services it must, as soon as practicable and in any event within 14 days of becoming aware inform the Contract Administrator in writing of the occurrence and the likely delay.

The procedural requirements for claiming an extension of time for delay must be strictly adhered to by the Consultant if it is to be entitled to an extension of time under the Contract.

Therefore, to claim an extension of time, the Consultant must:

(i) not later than 28 days after the commencement of the delay submit a written claim to the Contract Administrator for an extension to the relevant Date for Completion which:

(a) gives detailed particulars of the delay and the occurrence causing the delay; and

(b) states the number (not exceeding 28) of days extension of time claimed together with the basis of calculating the period, including evidence that it has been or is likely to be delayed in achieving Completion in the manner set out in clause 8.5(b)(i) or 8.5(b)(ii) of the Conditions of Contract (as discussed above); and

(ii) if the delay continues beyond 28 days from the commencement of that delay, and the Consultant wishes to claim an extension of time in respect of any further period, the Consultant must submit a further written claim to the Contract Administrator:

(a) every 28 days after the last date for submitting the first written claim (but the final written claim must be submitted not later than 7 days after the end of the delay); and

(b) containing the information required with the first claim.

Any claim for an extension of time must be accompanied by evidence that the Consultant is able to comply with the substantive requirements set out above.

Such evidence would be expected to include a detailed program and accompanying explanation and such other details as the Contract Administrator requires in the circumstances.

Proforma notices for claiming an initial extension of time and for submitting further written claims titled 'Initial claim for an Extension of Time' and 'Claim for a further Extension of Time' can each be found on the Defence Suite of Facilities Contracts webpage for the Design

Services Contract, under the subheading “Proforma Notices” on that page.

By way of some additional practical guidance – the extension of time regime described above only deals with the Consultant’s entitlement to claim an extension to the Date for Completion, it does not cover the Consultant’s entitlement to claim delay costs which is to be separately addressed by the Consultant under (among other provisions) clauses 14.2 to 14.4 of the Conditions of Contract.

12.1.5 Extension of Time (clause 8.8)

If the substantive and procedural requirements summarised in Part 12.1.4 of this Manual above have been satisfied, the Contract Administrator will be required to extend the relevant Date for Completion by a reasonable period. What is a reasonable period is a question of fact and will depend on the particular circumstances at the time of the determination by the Contract Administrator. However, it will not necessarily be the period of time claimed by the Consultant.

It is worth noting here that as agent and under the DIP Terms of Engagement the Contract Administrator has certain obligations under the DIP Terms of Engagement to consult with Defence with respect to numerous matters, which include proposed extensions of time.

The Contract Administrator must notify Defence and the Consultant of the length of the extension, if any, within 21 days of receiving the Consultant’s written claim under clause 8.6(a) or (if the effects of the delay continue beyond 28 days) under clause 8.6(b) of the Conditions of Contract.

A proforma notice for the Contract Administrator to notify whether or not an extension has been granted and for how long, titled ‘Determination of Extension of Time claim’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page. Further, the flowchart provided below in Part 12.3 of this Manual set out the process for granting an extension of time for Completion and the factors that should be considered in making a determination on extending time for Completion of the Milestone.

Note that under clause 8.10 of the Conditions of Contract, the Contract Administrator has the alternative option to instruct the Consultant to

accelerate through the delay. See further guidance on this issue in the commentary on clause 8.10 below.

12.1.6 Unilateral Extension of Time (clause 8.9)

The Commonwealth needs to have the power to unilaterally extend the Date for Completion in order to preserve Defence's right to insist upon the Consultant completing the Contract by the Date for Completion (even where the cause of delay is because of an Act of Prevention).

The Commonwealth should only exercise this right where the Consultant fails to lodge a claim for an extension of time and where some or all of the delay has been caused by an Act of Prevention.

The Consultant acknowledges that clause 8.9 does not give the Consultant any rights.

A proforma notice titled 'Unilateral Extension of Time' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page. This notice can be used by the Commonwealth to notify the Consultant and the Contract Administrator of a unilateral extension of time.

12.1.7 Acceleration (clause 8.10)

The Contract Administrator may (in its absolute discretion) at any time and from time to time, by written notice to the Consultant require the Consultant to use its best endeavours to achieve a Milestone by a date earlier than the Date for Completion (**Accelerated Date for Completion**).

It is important to note that:

- (a) the Contract Administrator's power to require acceleration is not predicated on the Consultant first having submitted a claim for an extension of time;
- (b) the Commonwealth can unilaterally seek to nominate an Accelerated Date for Completion; and
- (c) the Consultant only has a "best endeavours" obligation to achieve the "Accelerated Date for Completion".

The intention is to enable Defence to require the Consultant to deliver design earlier than originally agreed, because of changes in the project

program. In exchange, the Consultant is entitled to the extra costs reasonably incurred by the Consultant as a direct result of complying with the Contract Administrator's direction to accelerate.

A proforma for the Contract Administrator to instruct the Consultant to accelerate titled 'Instruction to accelerate' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page .

12.1.8 Prolongation (clause 8.11)

Clause 8.11 sets out the Consultant's entitlements with respect to "Prolongation Events". Prolongation Events are defined in clause 1.1 of the Conditions of Contract and include the following events under a Construction Contract:

- (a) a suspension instructed by the Commonwealth;
- (b) a variation directed by the Commonwealth; or
- (c) an Act of Prevention (as defined in the Construction Contract),

which has the effect of extending the duration of the performance of the Services beyond the Services End Date.

Services End Date is defined to mean the date which is 12 months after the last Date for Completion under the Construction Contract (as at the Award Date under the Construction Contract).

If clause 9 of the Conditions of Contract does not apply (that is, the Services are not phased), the process in clause 8.11 applies when a Prolongation Event occurs **after the Award Date** which causes (or is likely to cause) a Material Adverse Effect not caused or contributed to by an act or omission of the Consultant - and where the Consultant has done everything required under the Contract to prevent or mitigate the effect of the Prolongation Event.

If clause 9 of the Conditions of Contract does apply (that is, the Services are phased), the process in clause 8.11 applies when a Prolongation Event occurs **after the date on which the Commonwealth issues a notice under clause 9.4(a) (to proceed with the Delivery Phase Services)** which causes (or is likely to cause) a Material Adverse Effect not caused or contributed to by an act or omission of the Consultant - and where the Consultant have done everything required under the Contract to prevent or mitigate the effect of the Prolongation Event.

The Consultant may submit a "Prolongation Proposal" to the Contract Administrator within 14 days of the date on which the Consultant becomes aware, or should reasonably have become aware, of the Prolongation Event. It is important the timeframe within which this proposal is lodged is carefully noted and considered by the Contract Administrator, as the Consultant must comply with this requirement to be entitled to costs under clause 8.11.

The Prolongation Proposal is required to contain particular information, including:

- (a) full details of the Prolongation Event;
- (b) the Material Adverse Effect directly caused by the Prolongation Event (demonstrated on a fully open book cost transparent basis); and
- (c) the Consultant's proposal to address the Prolongation Event, including all possible steps to mitigate the cost and other effects of the Prolongation Event and provide the Commonwealth with value for money.

The Contract Administrator will review the Prolongation Proposal submitted by the Consultant. The Contract Administrator must do this promptly and discuss this proposal as appropriate with the Defence legal team and the project advisors for the Project. This is because under clause 8.11 of the Conditions of Contract, the Contract Administrator must give the Consultant a written response within 20 days of the Prolongation Proposal being received.

If the Prolongation Proposal **demonstrate** that a Prolongation Event has occurred which has caused a Material Adverse Effect and was lodged on time, the Contract Administrator's response can state that:

- (a) the Commonwealth accepts the Prolongation Proposal;
- (b) the Commonwealth requires the Consultant to submit an amended Prolongation Proposal; or
- (iii). the Commonwealth requires a meeting with the Consultant to negotiate the Prolongation Proposal.

If the Contract Administrator notifies the Consultant that the Commonwealth requires a meeting to negotiate the Prolongation Proposal, the parties are required to undertake good faith negotiations to agree the costs payable to the Consultant as a result of the

Prolongation Event. The Contract Administrator will determine the costs if the parties are unable to reach agreement within 40 days (or longer agreed period) of the Prolongation Proposal being received by the Contract Administrator.

If the Prolongation Proposal **does not demonstrate** that a Prolongation Event has occurred which has caused a Material Adverse Effect or was not lodged on time, the Contract Administrator will reject the Prolongation Proposal.

To the extent permitted by law, the Consultant will not be entitled to make (nor will the Commonwealth be liable upon) any Claim arising out of or in connection with a Prolongation Event, other than under clause 8.11.

It should be noted that notwithstanding the existence of a Prolongation Event, the Consultant is required to continue to carry out the Services and otherwise comply with its obligations under the Contract.

12.2 Proforma notices (Time)

The following table contains a list of the proformas relating to Time for use under clause 8 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
8.2(b)(ii)	Timeframe for submitting updated program prior to the Date for Delivery Phase Agreement
8.2(b)(ii)	Submission of updated program prior to the Date for Delivery Phase Agreement
8.4(a)(i)	Instruction to suspend
8.4(a)(i)	Instruction to recommence
8.6(a)	Initial claim for an extension of time
8.6(b)	Claim for a further extension of time

Clause	Title of proforma notice
8.8(a)	Determination of extension of time claim
8.9	Unilateral extension of time
8.10	Instruction to accelerate
8.11(a)	Notification of Prolongation Event
8.11(b)	Response to prolongation proposal

12.3 Flowchart (Time)

**FLOWCHART 2:
DESIGN SERVICES CONTRACT - EXTENSIONS OF TIME**

If the Consultant become aware of any occurrence that is likely to delay it in carrying out the Services it must, as soon as practicable, and in any event within 14 days of becoming aware, inform the Contract Administrator in writing of the occurrence and the likely delay [cl 8.5(a)].

IS THE CONSULTANT DELAYED IN CARRYING OUT THE SERVICES IN A MANNER WHICH HAS DELAYED OR IS LIKELY TO DELAY THE CONSULTANT:

- PRIOR TO THE DATE FOR COMPLETION OF A MILESTONE, BY AN ACT OF PREVENTION OR A PANDEMIC ADJUSTMENT EVENT IN ACHIEVING COMPLETION OF THE MILESTONE, OR
- AFTER THE DATE FOR COMPLETION OF A MILESTONE BY AN ACT OF PREVENTION IN ACHIEVING COMPLETION OF THE MILESTONE [cl 8.5(b)]?

PANDEMIC ADJUSTMENT EVENT
Means any of the following events which arise as a direct result of the Pandemic and first occurs after the Award Date:
(a) a change in Statutory Requirements (including a change in border requirements or quarantine requirements); or
(b) such other events as may be specified in the Contract Particulars, in each case which directly impacts the supply of labour, equipment, materials or services required for the carrying out of the Services [cl 1.1].

ACT OF PREVENTION
An Act of Prevention is any one of:
• a breach of the Contract by the Commonwealth;
• any other act or omission of the Commonwealth, the Contract Administrator or an Other Contractor engaged by the Commonwealth; or
• a Variation the subject of a direction by the Contract Administrator (refer Flowchart 3) but excluding any act or omission of the Commonwealth, the Contractor Administrator or an Other Contractor engaged by the Commonwealth in accordance with or otherwise permitted by the Contract [cl 1.1].

No

The Consultant cannot claim an extension of time.

Yes

HAS THE CONSULTANT SUBMITTED A WRITTEN CLAIM TO THE CONTRACT ADMINISTRATOR FOR AN EXTENSION TO THE RELEVANT DATE FOR COMPLETION:

- NOT LATER THAN 28 DAYS AFTER THE COMMENCEMENT OF THE DELAY
- WHICH GIVES DETAILED PARTICULARS OF THE DELAY AND THE OCCURRENCE CAUSING THE DELAY
- WHICH STATES THE NUMBER (NOT EXCEEDING 28) OF DAYS EXTENSION OF TIME CLAIMED
- WHICH STATES THE BASIS OF CALCULATING THAT PERIOD AND INCLUDES EVIDENCE OF THE DELAY/LIKELY DELAY [cl 8.6(a)]?

No

The Consultant is barred from making a claim for an extension of time.

Yes – Consultant may claim an extension of time

HAVE THE FOLLOWING CONDITIONS PRECEDENT ENTITLING THE CONSULTANT TO AN EXTENSION OF TIME BEEN SATISFIED?

UNILATERAL EXTENSION OF TIME
Whether or not the Consultant has made, or is entitled to make, a claim for an extension of time, the Commonwealth may, in its absolute discretion at any time and from time to time by written notice to the Consultant and the Contract Administrator, unilaterally extend any Date for Completion [cl 8.9].

CONDITIONS PRECEDENT

- The cause of the delay was beyond the reasonable control of the Consultant; and [cl 8.7(b)]
- The Consultant must have actually been, or be likely to be, delayed by:
 - prior to the Date for Completion of a Milestone or a Pandemic Adjustment Event, an Act of Prevention in a manner which has delayed, or is likely to delay it in achieving Completion of the Milestone; or
 - after the Date for Completion of a Milestone, an Act of Prevention in a manner which has delayed, or is likely to delay it in achieving Completion of the Milestone [cl 8.7(c)]
- The Consultant must not have been given a direction to accelerate under clause 8.10 with which it has been able to comply [cl 8.7(d)].

No

The Consultant is not entitled to an extension of time.

Yes

EXTENSION OF TIME
The relevant Date for Completion will be extended by a reasonable period determined by the Contract Administrator and notified to the Commonwealth and the Consultant within 21 days of the Consultant's written claim under clause 8.6(a) or (b) as applicable [cl 8.8(a)]. In determining a reasonable period, the Contract Administrator must not include any period of delay in respect of which the Consultant:
• contributed to the delay [cl 8.8(b)(i)]; or
• failed to take all steps necessary both to preclude the cause of the delay and to avoid or minimise the extent of the delay [cl 8.8(b)(ii)].

HAS THE DELAY CONTINUED BEYOND 28 DAYS FROM THE COMMENCEMENT OF THAT DELAY?

Yes

The Consultant must submit a further written claim every 28 days after the last date for submitting the first written claim, provided however that the final written claim must be submitted not later than 7 days after the end of the delay [cl 8.6(b)].

No

The Consultant cannot make any further claim for an extension of time arising out of the relevant Act of Prevention and/or Pandemic Adjustment Event.

Part 13 - Planning Phase and Delivery Phase

13.1 Overview

As at the time of preparing the Contract for tender, the Tender Administrator must work with the Defence project team to select whether or not clause 9 is to apply and complete the Contract Particulars appropriately. The default position is that clause 9 applies unless the Contract Particulars state that it does not apply.

Clause 9 will only be appropriate where the Services are to be carried out in the following two phases:

- (a) Planning Phase; and
- (b) Delivery Phase.

13.1.1 Planning Phase and Delivery Phase (Clause 9.1)

This clause provides that the Services are divided into two distinct phases - the Planning Phase and Delivery Phase and requires the Consultant to acknowledge and accept the purpose of this division.

The Consultant is required to acknowledge and agree:

- (a) there may not be a Delivery Phase;
- (b) the Consultant may not be engaged to carry out the Delivery Phase Services (if any); and
- (c) there may be periods of inactivity between phases and that such periods do not amount to a suspension. The Consultant will not be entitled to any Claim arising out of or in connection with such periods of inactivity.

The Consultant must ensure that between phases it retains appropriate, suitably qualified persons to carry out the Services, notwithstanding any periods of inactivity.

13.1.2 Updated Delivery Phase Fee Proposal (Clause 9.2)

If clause 9 applies, the Consultant's Delivery Phase Fee Proposal (which is submitted at the tender stage) will be attached at Attachment 1 to the Contract Particulars. This document, along with the Table of Variation Rates and Prices, should be reviewed by the Contract Administrator in undertaking the process contemplated by clause 9.2.

Prior to the Date for Delivery Phase Agreement, the Consultant must prepare and submit to the Contract Administrator for approval an Updated Delivery Phase Fee Proposal for the Delivery Phase Services.

The Updated Delivery Phase Fee Proposal will be based on the Delivery Phase Proposal, and must include information including:

- (a) a resource schedule based on the minimum resource schedule included in the Delivery Phase Fee Proposal, and must identify in detail (amongst other things) any change in resources as a result of design, cost and programming carried out in the Planning Phase; and
- (b) proposed adjustments to the Indicative Delivery Phase Fee and the Fee Payment Schedule, and how such adjustments were calculated (by reference to the Delivery Phase Fee Proposal).

The Contract Administrator may also require in writing that the Updated Delivery Phase Fee Proposal address additional matters.

After the submission of the Updated Delivery Phase Fee Proposal, the Consultant must undertake genuine and good faith negotiations with the Contract Administrator to reach agreement as to the matters set out in the Updated Delivery Phase Fee Proposal.

If any Updated Delivery Phase Fee Proposal submitted by the Consultant is **rejected** by the Contract Administrator, the Consultant must promptly submit a revised Updated Delivery Phase Fee Proposal.

Note that the Consultant is required to take all possible steps necessary to ensure that the proposed Delivery Phase Fee in its Updated Delivery Phase Fee Proposal does not exceed the Indicative Delivery Phase Fee – including all such reasonable steps directed by the Contract Administrator.

13.1.3 Approval (or otherwise) of Updated Delivery Phase Fee Proposal (Clause 9.3)

Before approving any Updated Delivery Phase Fee Proposal, the Contract Administrator may engage a third party to perform an external audit of this proposal.

If agreement is reached on the Updated Delivery Phase Fee Proposal, the following steps are contemplated:

- (a) the Contract Administrator will record the agreement in the Delivery Phase Agreement Minutes (in the form set out in the Schedule of Collateral Documents);
- (b) the Contract Administrator will provide the finalised Delivery Phase Agreement Minutes to the Consultant;
- (c) the Consultant must sign the Delivery Phase Agreement Minutes and return them to the Contract Administrator by the date required by the Contract Administrator; and
- (d) the Commonwealth will execute the Delivery Phase Agreement Minutes on the same day that it issues a notice to proceed with the Delivery Phase (under clause 9.4(a)).

The parties' rights and obligations under the Contract will be subject to the matters agreed, as recorded in the Delivery Phase Agreement Minutes.

If agreement is not reached on the Updated Delivery Phase Fee Proposal and the Contract Administrator does not approve any Updated Delivery Phase Fee Proposal prior to the Date for Delivery Phase Agreement, the Commonwealth may issue a notice directing the Consultant not to proceed with the Delivery Phase Services (under clause 9.4(b)).

13.1.4 Notice to Proceed (or not Proceed) with Delivery Phase Services (clause 9.4)

This clause provides that the Commonwealth may or may not elect to issue a notice directing the Consultant to proceed with the Delivery Phase Services.

If various approvals were not achieved, agreement is not reached in respect of the Updated Delivery Phase Fee Proposal prior to the Date for Delivery Phase Agreement, the Commonwealth is not satisfied (in its absolute

discretion) that it will maximise value for money for the Commonwealth to have the Consultant proceed with the Delivery Phase Services, or the Commonwealth has elected (in its absolute discretion) not to proceed with the Consultant to the Delivery Phase, the Commonwealth may (in its absolute discretion) issue a notice directing the Consultant not to proceed with the Delivery Phase Services.

The Commonwealth may also unilaterally extend the Date for Delivery Phase Agreement by notice to the Consultant. The Consultant acknowledges this does not grant any rights to the Consultant.

If directed not to proceed, this clause sets out what (if anything) the Consultant will and will not be entitled to, including any payments or Claims. The Consultant is obligated to take such steps as set out under clause 9.4(c)(iv).

If the Commonwealth issues the notice not to proceed, the Commonwealth may retender or procure the performance of the Delivery Phase Services and use the Project Documents for this purpose.

13.2 Proforma notices (Planning Phase and Delivery Phase)

The following table contains a list of the proformas relating to the Planning Phase and Delivery Phase for use under clause 9 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
9.2(c)(i)	Rejection of Updated Delivery Phase Fee Proposal
9.2(a)(iii)D	Notice of other relevant considerations
9.2(a)(iv)	Notice of other matters to be included in updated Delivery Phase Fee Proposal
[9.3(b)(ii)B./9.3(b)(ii)C.]	[Documents/information] required for [external audit/updated Delivery Phase Fee Proposal]

Clause	Title of proforma notice
9.4(a)	Notice to proceed with Delivery Phase Services
9.4(b)	Notice to not proceed with Delivery Phase Services
9.4(c)(iv)D	[Documents/information] required following notice not to proceed with Delivery Phase Services
9.4(f)	Unilateral Extension of Date for Delivery Phase Agreement

Part 14 - Variations

14.1 Overview

Valuation of Variations is an area of contract administration which is often not accorded the appropriate timely action by all or some involved in the process. It is also often an area of high disputation relative to value in accordance with the terms of the Contract.

Whilst the Contract does not expressly state any time constraint as to when valuation of a Variation is to occur, it is preferable, if possible but not required, to wrap up all implications of a Variation (that is, both time and cost) at the time of its instruction. It should be noted that the Consultant has no right to refuse to carry out a Variation Order until the valuation has been agreed or determined. The reason for this is that there is a clear process under clause 10.3 which sets out the regime under which the valuation of Variations is to be determined and therefore that can be addressed after the Variation Order has been issued.

A Variation is defined in clause 1.1 of the Conditions of Contract as being any change to the Services (including any addition, increase, decrease, omission, deletion or removal to or from the Services), unless otherwise stated in the Contract.

Note that the definition contemplates or describes a change to the Services. Depending on the impact of a Variation, not every Variation will necessarily involve a change to the Fee. It should also be noted that other types of changes (e.g. to Milestones, to the timing for certain aspects of the Services and other requirements of the Contract) not impacting on the scope of the Service may need to be dealt with in another way (e.g. in a deed of amendment), rather than by using the variation provisions. Further information is available from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance.

A Variation is the primary means by which Defence can change the Services under the Contract. It is critical that the Contract Administrator follow the procedure set out in clause 10 of the Conditions of Contract when issuing a Variation.

Contemporaneous records of any discussions and/or correspondence regarding Variations will be essential, from both the Contract Administrator's and the Consultant's viewpoint, particularly if the proposed adjustment to the Fee is not agreed and, even if agreed, in the case of any dispute arising.

It is also important to remember that:

(a) in directing and assessing Variations, the Contract Administrator is acting as Defence's agent and must therefore act in Defence's best interests. As an agent of Defence, the Contract Administrator should only issue a Variation Price Request or Variation Order if authorised to do so by Defence. See guidance above at Part 8.1.1 of this Manual in relation to clause 4.1 of the Design Services Contract Conditions of Contract; and

(b) when directing Variations or otherwise acting in a manner which will constitute a Variation, Defence personnel (including the Contract Administrator) must ensure that the value of the relevant Defence internal purchase order will meet the liability incurred as a result of carrying out the Variation. This confirmation must occur **prior** to directing a Variation. If the value of the Variation will not fall within the value of the purchase order, then Defence must ensure that the value of the purchase order is increased.

Clause 10 of the Conditions of Contract should also be read in light of clause 14.1, which provides a mechanism for the Consultant to assert that a direction of the Contract Administrator constitutes a Variation even if the Contract Administrator did not issue the direction by way of a formal Variation Order. See further guidance below in relation to clause 14.1 of the Conditions of Contract.

Flowcharts relating to Variations can be found below in Part 14.4 of this Manual, which visually depict the processes to be carried out where a Variation is requested by the Consultant or directed by the Contract Administrator/Defence.

14.2 Variations (clause 10)

14.2.1 Variation Price Request (clause 10.1)

All Variations directed by the Contract Administrator should be issued using either (1) the proforma notice titled 'Variation Price Request' (which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page)

or (2) by issuing a Variation Order under the Contract (in which case any adjustment to the Fee will be determined later).

The Contract Administrator may issue a Variation Price Request to the Consultant detailing a proposed Variation at any time prior to completion of the Services.

Upon receipt of a Variation Price Request, the Consultant must immediately take all action required under any relevant subcontract(s) for any subconsultant(s) involved in carrying out the proposed Variation works to gather relevant information to be able to provide a full response to the Variation Price Request under the Design Services Contract. It must be remembered that a Variation Price Request does not change the Services but only seeks information so Defence and the Contract Administrator can consider whether or not to issue a Variation Order.

The Consultant must respond to any Variation Price Request within 14 days (or such longer period as may be agreed by the Contract Administrator), providing details of the effect that the proposed Variation would have on the then current program (including each Date for Completion) and/or any adjustment to the Fee.

Where a Variation Price Request is issued, the Consultant will price the proposed Variation and submit this information to the Contract Administrator for agreement. As a consequence, the onus will generally be on the Consultant to present adequate detail and substantiation of the amounts and quantities included in its response. If the Contract Administrator agrees with the Consultant's response, it can issue a Variation Order confirming this. However, if the Consultant fails to provide a compliant response within 14 days (or such longer period as may be agreed by the Contract Administrator) or if the Contract Administrator does not agree with the response, the Contract Administrator is entitled to issue a Variation Order and determine any adjustment to the Fee and Date for Completion in accordance with the Variation Order procedures set out below.

It is a strategic decision whether or not to issue a Variation Price Request and appropriate advice (including through the project's legal advisor or Directorate of Program Assurance and/ or Directorate of Quality and Compliance) should be sought if a significant change to the Services is contemplated.

The Consultant is not entitled to any costs incurred in the preparation of a response to a Variation Price Request.

14.2.2 Variation Order (clause 10.2)

Once Defence is ready to order a Variation, the proforma notice titled 'Variation Order' should be used – this notice can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page. Verbal instructions which could involve a Variation should be avoided. Variation Orders may be issued by the Contract Administrator any time prior to the completion of the Services.

A Variation Order may be issued without the need for a prior Variation Price Request. However, it is always preferable to first issue a Variation Price Request, to maximise the likelihood of the parties agreeing the time and cost consequences of the Variation.

There are three different options as to how the Variation may be priced under clause 10.3 of the Conditions of Contract.

In preparing the Variation Order to be issued to the Consultant, the Contract Administrator should select one of the following options for **pricing** the Variation:

- (a) clause 10.2(a) – which should be selected if the Contract Administrator has issued a Variation Price Request and is satisfied with the proposed adjustment to the Fee set out in the Consultant's response under clause 10.1 of the Conditions of Contract; or
- (b) clause 10.2(b) – any adjustment to the Fee will be determined under clause 10.3(b) – see guidance in Part 14.2.3 below; or
- (c) clause 10.2(b) – any adjustment to the Fee will be determined under clause 10.3(c) – see guidance in Part 14.2.3 below.

14.2.3 Valuation of Variation (clause 10.3); and Table of Variation Rates and Prices (clause 10.4)

The valuation of a Variation under this clause represents the Consultant's total entitlement to payment for that Variation, including for any costs of delay.

Where the Consultant has issued a response to a Variation Price Request which has been accepted in the Contract Administrator's Variation Order, the Fee will be adjusted as agreed.

Where the Contract Administrator has not issued a Variation Price Request or has not accepted the Consultant's written notice in response to a Variation Price Request, or where the Consultant did not issue a written response to a Variation Price Request, the cost of the Variation will be determined in accordance with clauses 10.3(b) and 10.3(c) of the Conditions of Contract.

Under clause 10.3(b) of the Conditions of Contract, the Contract Administrator determines the cost of the Variation by reference to any relevant rates or prices included in the Table of Variation Rates and Prices of the Contract. It is important to note that the question of applicability of rates or prices as a means of valuing a Variation requires careful consideration by the Contract Administrator. Generally, if the Consultant contends that other rates and prices are to apply rather than a rate in the Table of Variation Rates and Prices, it is up to the Consultant to clearly demonstrate to the Contract Administrator's satisfaction why such rates or prices are not applicable against the background of the surrounding circumstances.

Clause 10.4 also makes it clear that the rates and prices in the Table of Variation Rates and Prices are deemed to cover all labour, materials, overheads and profit related to the work the subject of the Variation and compliance with the Consultant's obligations under the Contract, as well as all costs which will be incurred by the Consultant arising out of or in connection with the Variation.

Where the Table of Variation Rates and Prices does not apply, the parties may agree the cost of the Variation or, if they cannot agree, the Contract Administrator will determine a reasonable amount under clause 10.3(c) of the Conditions of Contract.

Whilst there is no express requirement under the Contract that the Contract Administrator notify the Consultant of the amount of an adjustment under clause 10.3 of the Conditions of Contract, nevertheless, it would be good practice to ensure that this is done.

14.2.4 Omissions (clause 10.5)

Under this clause, the Contract Administrator is entitled to issue a Variation which omits any part of the Services. Defence may then elect to carry out the omitted work itself or by engaging Other Contractors.

This clause is very important, as otherwise at common law, the handing over of work in this manner could constitute a repudiation of the Contract. Nonetheless, given the common law restrictions on exercising such a power, the Contract Administrator should not attempt to exercise its power without seeking specialist advice.

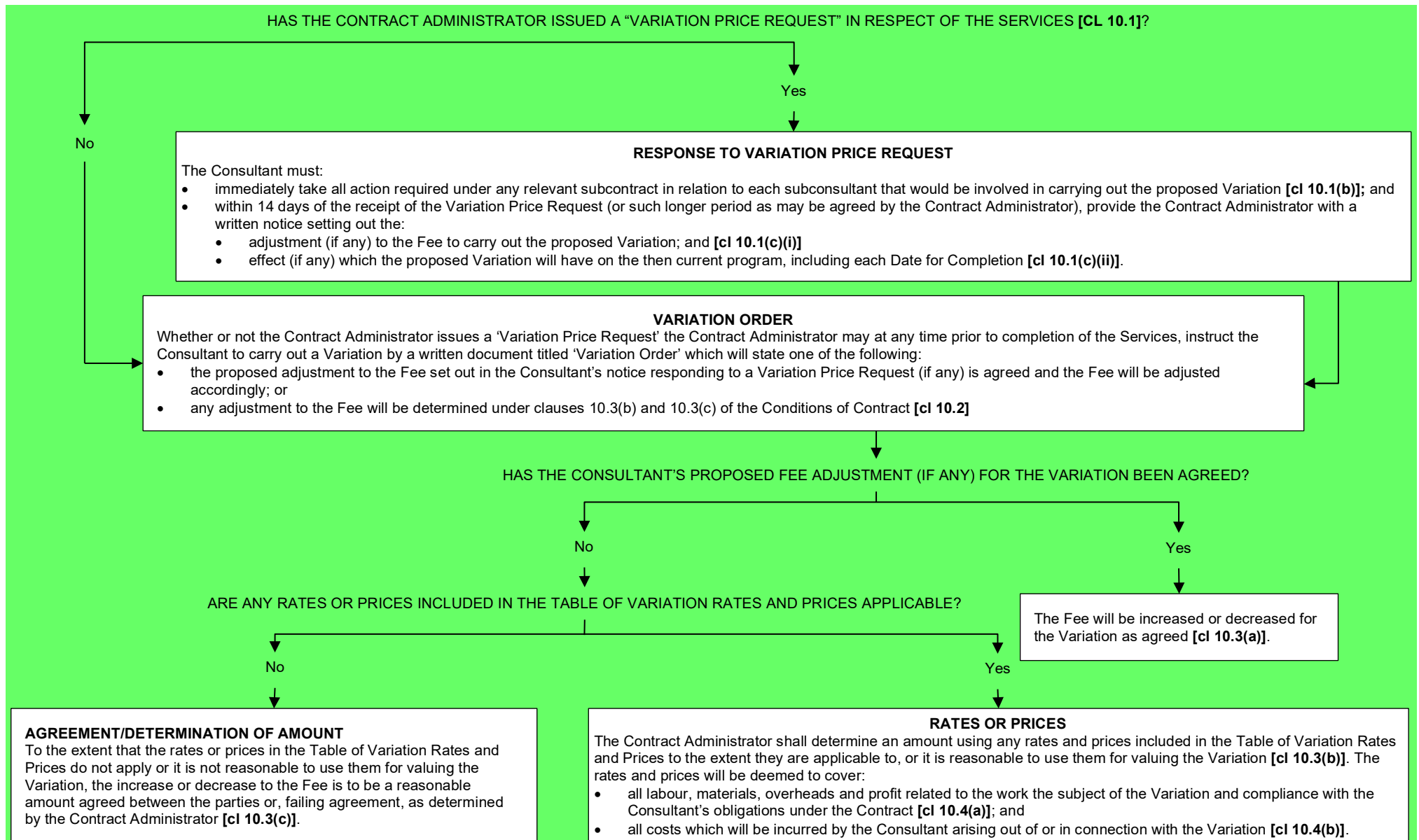
14.3 Proforma notices (Variations)

The following table contains a list of the proformas relating to Variations for use under clause 10 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page:

Clause	Title of proforma notice
10.1	Variation Price Request
10.1	Response to Variation Price Request
10.2	Variation Order

14.4 Flowchart (Variations)

**FLOWCHART 3:
DESIGN SERVICES CONTRACT - VARIATIONS**



Part 15 - Payment

15.1 Overview

This clause sets up the contractual mechanisms for assessing the amounts due to the Consultant and other amounts under the Contract.

The procedure for assessing payments is outlined in the flowchart in Part 15.4.

It is for the Contract Administrator to determine the value of the Services completed in accordance with the Contract. The Contract Administrator must not merely accept the Consultant's claims for payment – they must form their own view as to the Consultant's entitlement to be paid the amounts claimed.

It is important for both Consultants and Contract Administrators to remember that Defence is neither obligated, nor in the position, to compensate a Consultant for an inadequate tender. A Contract Administrator cannot disburse Defence money without a clear and substantiated legal basis for the claim. To do so would give rise to a breach of the *Public Governance, Performance and Accountability Act 2013* (Cth) and related legislation and legislative instruments. If there is any doubt as to the legal or factual basis for a claim, expert professional advice (be it legal, engineering, accounting or otherwise) should be sought.

Whilst the Contract Administrator may probe and test the veracity and validity of the claim, it is to be noted that the onus rests with the Consultant to establish its contractual entitlement to a payment. The Contract Administrator must not attempt to "make the claim" for the Consultant.

In essence, the Consultant should provide the claims in a format, and with such backup detail as is necessary, to allow the Contract Administrator to readily establish the progress and value of the work done under the Contract during the relevant claim period. Ideally, there should be some discussion and agreement at the commencement of the project about the nature and extent of information to be submitted by the Consultant with each payment claim. Further, the Consultant will also need to certify a number of conditions precedent before it is entitled to submit any payment claims, but the requirements of each

project will dictate the other details that the Contract Administrator requires to assess the claim. These details should be communicated to a Consultant by written as early on in the project as possible to minimise delays and potential problems occurring later.

Security of Payment Legislation

In addition to the contractual entitlement to progress payments contained in the relevant payment provisions for each delivery model, security of payment legislation in place in all States and Territories creates a statutory entitlement to progress payments as long as the requirements of the legislation giving rise to the relevant entitlement are satisfied.

The New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian and Western Australian (for contracts entered into on or after 1 August 2022) legislation goes further by also establishing a statutory procedure for a Consultant to claim and recover progress payments to which it is entitled. That statutory procedure exists independently of, and in addition to, any contractual procedure for claiming progress payments.

Defence requires (so far as it is able) all payment claims submitted under the Contract to also be claims under the relevant statutory procedure to the extent that the relevant New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian, or Western Australian (for contracts entered into on or after 1 August 2022) security of payment legislation applies.

The clauses relating to payment have been drafted so that the requirements of the statutory procedure, in terms of documents and timeframes, are also reflected in the Contract.

Therefore, if the parties meet the requirements of those clauses, they should also satisfy the requirements of the relevant statutory procedures applicable in New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, South Australia, or Western Australia (for contracts entered into on or after 1 August 2022).

On the other hand, the Western Australian (for contracts entered into before 1 August 2022) and Northern Territory security of payment legislation implies terms for making claims for progress payments and

responding to such claims, unless the contract makes express written provision about such matters.

This clause has been drafted so that it contains those express written provisions. The result is that the terms about such matters set out in the security of payment legislation are not implied.

Although this clause has been drafted to align with the security of payment legislation around Australia, each security of payment legislation regime imposes additional rights and responsibilities on the respective parties which cannot (and should not) be included in the Contract or contracted out of by the parties.

15.2 Payment (clause 11)

15.2.1 Payment Obligation (clause 11.1)

Defence is obliged to pay the Consultant the Fee and any other amounts which are payable to the Consultant under the Contract. This payment obligation is subject to Defence's right to set-off which is set out in clause 11.11 of the Conditions of Contract. That right entitles Defence to deduct from moneys which it would otherwise be paying to the Consultant in particular circumstances – see Part 15.2.10 below.

Defence should carefully consider before it exercises the set-off right, including to consider whether, based on the facts, it may wish to issue a notice of demand to the Consultant in the first instance, although the approach will need to be considered on a case by case basis in light of the specific facts.

15.2.2 Payment Claims (clause 11.2)

This clause requires the Consultant to issue payment claims at certain times and in a certain format.

This clause provides that each payment claim must:

- (a) be made at the times specified in the Contract Particulars, noting that a "completion payment claim" is also required within a specified time under clause 11.7);
- (b) be in the format set out in the Schedule of Collateral Documents or in any other format which the Contract Administrator reasonably requires;

(c) be based on the Table of Variation Rates and Prices to the extent it is relevant;

(d) show separately the amounts (if any) claimed on account of the Fee and all other amounts then payable by the Commonwealth to the Consultant under the Contract; and

(e) set out or attach sufficient details, calculations, supporting documentation and other information in respect of all amounts claimed by the Consultant to enable the Contract Administrator to determine the amounts then payable by the Commonwealth to the Consultant under the Contract.

A proforma payment claim is provided in the Schedule of Collateral Documents.

The Contract Administrator may request the Consultant (in writing) at any time to provide further information or documentation in relation to any payment claim or all payment claims generally. A proforma notice titled 'Request for documentation or information' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

15.2.3 Certification to Accompany Submission of Payment Claim (clause 11.3)

The matters in respect of which the Consultant is to provide certification to accompany a payment claim are set out in clause 11.3(a) to (i).

It is important to note that clause 11.4 of the Conditions of Contract provides that the Contract Administrator must issue a payment statement in response to the payment claim even if the requirements of clause 11.2 have not been met. As discussed in the commentary on security of payment under the heading "Security of Payment Legislation" (see Part 15.2.13), the Contract Administrator should identify in the payment statement the reasons why the Consultant is not entitled to the progress payment under the terms of the Contract, citing the specific conditions that have not been satisfied.

15.2.4 Payment Statement (clause 11.4)

The Contract Administrator must provide to the Consultant a payment statement in the form set out in the Schedule of Collateral Documents within 10 business days of receiving a payment claim.

A payment statement must set out all the details listed under this clause. The proforma payment statement in the Schedule of Collateral Documents seeks to facilitate this.

It is important to ensure that all reasons for reducing the value claimed, withholding payment or refusing payment claimed (such as where the payment claim includes amounts on account of Variations which are greater than the amount valued by the Contract Administrator) are set out in full in the payment statement - see the further discussion of this issue in the guidance provided under the clause headed "Security of Payment Legislation" (see Part 15.2.13).

The Contract Administrator must issue a payment statement within 10 business days of receiving a payment claim submitted or purported to be submitted under clause 11.2. If the Contract Administrator is of the view that the Consultant is not entitled to the full progress payment claimed, they must identify in the payment statement the reasons why citing the specific provisions of the Conditions of Contract, Brief or other contractual requirements that have not been satisfied. In doing so, Defence personnel and the Contract Administrator must bear in mind that the Contract Administrator must issue the payment statement within the timeframe specified in clause 12.4 of the Conditions of Contract.

Issuing a payment statement within the relevant timeframe ensures that the requirements of the Contract are satisfied and, where the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian or Western Australian (for contracts entered into on or after 1 August 2022) legislation applies, to avoid Defence becoming liable under that legislation to pay the whole of the claimed amount - see the further discussion of this issue below under the heading "Security of Payment Legislation". Because there are serious consequences if a payment statement is not issued within the relevant period, specialist legal advice should be sought immediately from the legal adviser for the project if there is a failure to do this.

If the Contract Administrator makes an error or otherwise wishes to amend something in a payment statement after it has been issued, it can, for the purpose of the Contract, correct or modify the payment statement in a subsequent payment statement (see clause 11.10 of the Conditions of Contract). However, insofar as the payment statement is a response to a claim made under the security of payment legislation in

New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, South Australia, or Western Australia (for contracts entered into on or after 1 August 2022), the payment statement cannot be corrected or modified.

For the purposes of clauses 11.4 and 11.5 of the Conditions of Contract, a “business day” is defined in clause 1.2(m) of the Conditions of Contract. The relevant period within which the payment statement is to be issued should be calculated carefully in each State and Territory.

15.2.5 Payment (clause 11.5)

The Consultant must, within three business days of the Consultant receiving a payment statement under clause 11.4, give to the Contract Administrator a tax invoice for the amounts stated as then payable in the payment statement. A copy must also be sent to the email address set out in the Contract Particulars.

Defence must, within the number of business days specified in the Contract Particulars of receiving the copy of the payment statement under clause 11.4 of the Conditions of Contract from the Contract Administrator but subject to clause 11.13(c) (relating to the Consultant’s obligation to issue a valid tax invoice for GST purposes), pay the Consultant the amount set out as then payable in the payment statement.

Specific limitations on the period of time for payment are imposed by security of payment legislation around Australia. These must be kept in mind when completing the Contract Particulars. The proforma Contract Particulars have been drafted to reflect these limitations.

In Queensland, New South Wales and the Australian Capital Territory, the Contract can only provide for a maximum of 15 business days between the date of service of the payment claim and the date of payment. If the Contract provides for a longer period, the clause is void and payment is due 10 business days in Queensland or 15 business days in New South Wales and the Australian Capital Territory after a payment claim under the statutory regime is made. The limitation does not apply to contracts for work that is not construction work.

In Western Australia:

(a) for contracts entered into before 1 August 2022, the Contract can only provide for a maximum of 50 days between the date of the payment claim and the date of payment. If the Contract provides for a longer period, the clause is read as requiring payment to be made within 50 days of the payment claim. The proforma Contract Particular for Western Australia is 10 business days; and

(b) for contracts entered into on or after 1 August 2022, the Contract can only provide for a maximum of 20 business days between the date of the payment claim and the date of payment.

In the Northern Territory, the Contract can only provide for a maximum of 50 days between the date of the payment claim and the date of payment. If the Contract provides for a longer period, the clause is read as requiring payment to be made within 28 days of the payment claim. The proforma Contract Particular for the Northern Territory is 10 business days.

In all other jurisdictions, the proforma Contract Particular is 10 business days.

15.2.6 Payment on Account (clause 11.6)

Clause 11.6 of the Conditions of Contract (and the final part of clause 11.4 of the Conditions of Contract) seeks to preserve Defence's right to subsequently make claims in respect of Services (such as where Services were not performed in accordance with the requirements of the Contract) even if the relevant amounts have been included in a payment statement or paid for by Defence.

15.2.7 Completion Payment Claim and Notice (clauses 11.7 and 11.8)

Clause 11.7 of the Conditions of Contract requires the Consultant to issue a payment claim in respect of anything that occurred in relation to the Services or the Contract prior to the completion of the Services within 28 days (or longer period if agreed in writing by the Contract Administrator) after the completion of the Services. This payment claim must include all amounts which the Consultant claims from Defence under the Contract and notice of any other amounts which the Consultant claims from Defence.

The proforma payment claim provided in the Schedule of Collateral Documents can be used as a starting point for the Completion payment claim. See commentary above in respect of clause 11.2 of the Conditions of Contract.

The payment claim and notice required under this clause are in addition to any other notice which the Consultant is required to issue in order to protect its entitlements under the Contract. In turn, clause 11.8 of the Conditions of Contract provides a release to Defence in respect of matters which occurred prior to the completion of the Services which are not set out in a claim and notice under clause 11.7 of the Conditions of Contract.

Payment claims that are issued in relation to a completion payment claim or a final payment claim are also considered to be “progress claims” under the terms of the security of payment legislation.

15.2.8 Interest (clause 11.9)

Except where the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian, or Western Australian (for contracts entered into on or after 1 August 2022) security of payment legislation applies, this clause limits Defence’s liability to pay interest on late payments and damages to the rate stated in the Contract Particulars. The rate payable will depend on whether the interest payment is in respect of late payments or damages. The applicable rate is set out in the Contract Particulars.

By stating that this will “be the Consultant’s sole entitlement to interest including damages for loss of use of, or the cost of, borrowing, money” this clause is intended to limit Defence’s liability for what are sometimes referred to as *Hungerfords v Walker* damages for loss of the use of the overdue money sometimes referred to as loss of opportunity damages.

Unless otherwise specified, the rate in respect of damages will be the Australian Taxation Office-sourced General Interest Charge rate current at the due date for payment. This rate can be found on the Australian Taxation Office web site: www.ato.gov.au.

Where the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian, or Western Australian (for contracts entered into on or after 1 August 2022) security of payment

legislation applies, the Consultant will be entitled to statutory interest on late payments at the higher of the rate for late payments which is stated in the Contract or the rate which is identified in the applicable security of payment legislation.

15.2.9 Correction of Payment Statements (clause 11.10)

Under this clause, the Contract Administrator may correct or modify anything written in a previous payment statement in a subsequent payment statement.

However, as discussed above, insofar as the payment statement is a response to a claim made under the security of payment legislation in New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, South Australia, or Western Australian (for contracts entered into on or after 1 August 2022) the payment statement cannot be corrected or modified by any subsequent payment statement.

15.2.10 Right of Set-Off (clause 11.11)

This clause makes it clear that Defence may deduct debts or other moneys due from the Consultant to the Commonwealth from any moneys otherwise due to the Consultant.

To avoid arguments about the scope of the right to set off, the Contract's set off provisions expressly state that the payment obligation (under clause 11.1 of the Conditions of Contract) is subject to the set off right.

This clause states that Defence may deduct from moneys otherwise due to the Consultant (1) any debt, moneys due from the Consultant to the Commonwealth, as well as (2) any claim to money which Defence asserts in good faith against the Consultant which arise under the Contract or otherwise at law or in equity arising out of or in connection with the Services or the Works. Further, the Commonwealth may deduct any debt, other moneys due or any claim to money from any amount which may be or thereafter become payable to the Consultant in respect of any Variation the subject of a 'Variation Order' under the Contract.

The amount of any such deduction should always be contained in the payment statement issued in response to the Consultant's payment claim. Failure to do so may mean that Defence has to pay the full

amount of the payment statement, without any further right of set off, by virtue of the security of payment legislation.

15.2.11 Payment of Workers and Subconsultants (clause 11.12)

The purpose of this clause is to ensure that the Consultant pays its workers, subconsultants and suppliers and that subconsultants and suppliers also pay their workers. It does this by requiring the Consultant to provide, with each payment claim a duly completed declaration in the format set out in the Schedule of Collateral Documents, which requires:

- (a) a statutory declaration, together with supporting evidence reasonably required by the Contract Administrator, that, except to the extent disclosed in the statutory declaration (such disclosure to specify all relevant amounts, workers and subconsultants):
 - (i) all workers who have at any time been employed by the Consultant in connection with the Services have at the date of the payment claim been paid all moneys due and payable to them in respect of their employment in connection with the Services; and
 - (ii) all subconsultants have been paid all moneys due and payable to them in respect of the Services; and
- (b) documentary evidence that, except to the extent otherwise disclosed, all workers who have been employed by a subconsultant of the Consultant have been paid all moneys due and payable to them in respect of their employment on the Services as at the date of the payment claim.

The payment claim set out in the Schedule of Collateral Documents provides guidance on the appropriate format for the statutory declarations, depending on the jurisdiction where the Services were performed.

Defence is entitled to withhold from any payment otherwise due to the Consultant any amounts disclosed as unpaid under this clause. If required, the withholding must be done in the payment statement issued in response to the relevant payment claim. If that has not occurred, then Defence should not withhold the payment, and should pay the full amount stated as payable in the payment statement.

15.2.12 GST (clause 11.13)

Generally, rates and prices under the Contract are to be tendered on a GST-exclusive basis and grossed-up for any applicable GST under clause 11.13 of the Conditions of Contract.

15.2.13 Security of Payment Legislation (clause 11.14)

The provisions in this clause are intended to assist in the administration of the processes under, and compliance with, the relevant security of payment legislation.

For instance, the security of payment legislation requires the person who is liable to pay the payment claim to issue the payment statement. Clause 11.14 of the Conditions of Contract provides that, for the purposes of the legislation, the Contract Administrator issues payment statements as agent of Defence. Defence may revoke the appointment of the Contract Administrator as Defence's agent for the above stated purposes at any time (without affecting the Commonwealth's right to carry out those functions itself). It must give notice of such revocation to the Consultant for the revocation to have effect with regards to the Consultant. A proforma notice titled 'Revocation of appointment of Contract Administrator as the Commonwealth's agent under security of payment legislation' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

In addition, clause 11.14(e) of the Conditions of Contract contains provisions intended to ensure confidentiality of Defence information in the event that an adjudication application is made and Defence provides information in response to that application. A proforma notice from the Consultant requesting Defence's consent to divulge information in relation to a Security of Payment Legislation adjudication application and a proforma notice from Defence to the Consultant in response to this request titled 'Request for consent to divulge information in relation to a security of payment legislation adjudication application' and 'Response to request for consent to divulge information in relation to a Security of Payment Legislation adjudication application' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Defence personnel and agents of Defence such as the Contract Administrator must ensure that they are familiar with the requirements of the security of payment legislation (if any) which applies to the contracts they are administering. To assist with that familiarisation, the following discussion provides an overview of the legislation.

Security of Payment Legislation

The current security of payment legislation is as follows:

- (a) *Building and Construction Industry Security of Payment Act 1999* (NSW);
- (b) *Building and Construction Industry Security of Payment Act 2002* (Vic);
- (c) *Building Industry Fairness (Security of Payment) Act 2017* (Qld);
- (d) *Construction Contracts Act 2004* (WA), which applies to contracts entered into before 1 August 2022 and the *Building and Construction Industry (Security of Payment) Act 2021* (WA), for contracts entered into on or after 1 August 2022;
- (e) *Construction Contracts (Security of Payment) Act 2004* (NT);
- (f) *Building and Construction Industry Security of Payment Act 2009* (Tas);
- (g) *Building and Construction Industry (Security of Payment) Act 2009* (ACT); and
- (h) *Building and Construction Industry Security of Payment Act 2009* (SA).

Apart from some very limited types of contracts which are excluded from the legislation, the legislation in each jurisdiction applies to all contracts for the performance of construction work (and related goods and services) in that jurisdiction. That is, the New South Wales legislation applies to all contracts for construction work (and related goods and services) performed in New South Wales, and the Western Australian legislation applies to all contracts for construction work (and related goods and services) performed in Western Australia, and so on. There are complexities where the site is split by a State or Territory border, and specialist advice should be sought in these instances.

The definition of “construction work” in all the legislation is very wide in scope, although there are some differences in the wording of the

definition in each regime. Universally, the definition captures activities such as the construction, alteration, repair, restoration, maintenance, extension or demolition of buildings and structures, roadworks, power lines, aircraft runways, railways, pipelines, reservoirs and more. It also includes the installation of heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply, security and communication systems, and fire protection, as well as the erection/dismantling of scaffolding, prefabrication of components, and painting and decorating.

The legislative regimes also extend to the supply of “related goods and services” for construction work. This term is also widely defined in each regime and captures materials and components to form part of any building, structure or work arising from construction work; plant or materials used in construction work, the provision of labour, architectural, engineering, quantity surveying and design services. The wide definition has a number of consequences. For instance, the New South Wales legislation will apply to a contract for a related goods or services if that good or service is to be used in construction work being performed in New South Wales, even though that good or service is being supplied or performed outside of New South Wales. The same consequences arise in respect of the other jurisdictions with security of payment legislation.

If the security of payment legislation applies to the Services (or the provision of any related goods and services) under the Contract, it is likely that it will also apply to subcontracts which the Consultant lets. In such circumstances, Defence will be required to comply with the relevant security of payment legislation in respect of payments to the Consultant, and the Consultant will also be required to comply with the provisions of the security of payment legislation in the administration of its subcontracts (to which the security of payment legislation applies). Legislation in New South Wales and Victoria gives a subcontractor an entitlement to obtain payment of adjudicated amounts out of money that is payable or becomes payable by Defence to the Consultant in circumstances where:

- (a) an adjudicator has determined that an amount is payable by the Consultant to the subconsultant;
- (b) that adjudicated amount has not been paid;

(c) the subconsultant has obtained judgment for the adjudicated amount and a debt certificate has been issued;

(d) a notice of claim is given to Defence (which notice operates as an assignment of the obligation of Defence to pay money owed to the Consultant).

In New South Wales, the relevant legislation is the *Contractor Debts Act 1997* (NSW), and in Victoria it is the *Building & Construction Industry Security of Payment Act 2002* (Vic).

Queensland has a similar “subcontractors’ charge” regime, which can be found in Chapter 4 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).

Although the security of payment legislation is similar in intent and objectives, each State and Territory security of payment legislation is different and has its own complexities. Advice on the impact of the security of payment legislation on a particular contract should be sought from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance, if necessary. Given the short timeframes provided for under the security of payment legislation generally, this advice should always be sought as a matter of utmost urgency.

Achieving the purpose of the legislation

The security of payment legislation in each jurisdiction is common in granting contractors and subcontractors at all levels a statutory entitlement to progress payments. The legislation is also common in providing a process of rapid adjudication of payment disputes with the goal of obtaining a quick, interim, determination of those disputes and the payment of any amount which is determined by the adjudicator as being payable. The determination does not finally decide the rights of the parties. They may continue to pursue those rights through court, arbitration or any other dispute resolution process. Significantly however, except in Victoria, or in very rare instances where a stay of the determination might be obtained, where a claimant is determined by an adjudicator to be entitled to payment of an amount, that amount must be paid now by the other party, despite the disputed entitlement being referred to court, arbitration or other dispute resolution process. The Victorian legislation stands alone in permitting security to be given in the form of a bank guarantee or payment into a designated trust

account as an alternative to payment of a determined amount to the claimant.

The security of payment legislation in New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, South Australia and Western Australia (for contracts entered into on or after 1 August 2022) also includes a statutory process for the making of payment claims and responding to them. This statutory process exists alongside and is in addition to any contractual provisions dealing with the making of payment claims and responding to them. The statutory process involves:

- (a) the claimant making a payment claim which, in some jurisdictions, must be stated to be a claim under the relevant Act;
- (b) the respondent responding to the payment claim within a very limited timeframe (10 business days for all jurisdictions other than Queensland, South Australia and Western Australia (for contracts entered into on or after 1 August 2022), which is 15 business days or such shorter period prescribed by the contract) by way of a payment schedule.

If a claimant disputes the amount that the respondent proposes to pay in respect of the claim, it can refer the dispute to the rapid adjudication process. Compliance with the statutory procedure is the only way for a claimant to access the rapid adjudication process in those States and Territory. Enlivening the statutory process for making progress payment claims and responding to them is at the sole discretion of a claimant, and it is only a claimant who can refer a dispute to the rapid adjudication process.

The security of payment legislation in Western Australia (for contracts entered into before 1 August 2022) and the Northern Territory does not provide a similar statutory process. The contract alone governs the process by which progress payments are claimed and responses made, although the legislation implies terms about those matters into the contract if the written contract is silent about them. If, as a result of that contractual claim and response process, there is a dispute about payment, that payment dispute can be referred by either party to the rapid adjudication process for interim determination. Disputes about the return of retention of money and security may also be referred by either party to adjudication.

Where projects are to be undertaken in New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, South Australia and Western Australia (for contracts entered into on or after 1 August 2022), it is extremely important that the Contract Administrator understands how and when progress payments are to be claimed and responded to under the statutory process in those States and Territory, and the timeframes involved. There are potentially serious implications to Defence under the security of payment legislation in those States and Territory if the requirements and timeframes are not strictly followed.

Nonetheless, the following discussion is also important to projects in other jurisdictions because the statutory process for making payment claims and responding which exists in New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, South Australia and Western Australia (for contracts entered into on or after 1 August 2022) has been incorporated into clause 11 and is therefore reflected in contractual obligations.

Payment Claim

Under the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian and Western Australian (for contracts entered into on or after 1 August 2022) legislation, a contractor is entitled to submit regular payment claims under the statutory process. Clauses 11.2(a) and 11.2(b) of the Conditions of Contract prescribe the time for submitting payment claims. It is very important that the Contract Particulars be completed because, in the absence of any stated date, the date for payment claims will be, for the purposes of the New South Wales, Queensland, Tasmanian, Australian Capital Territory, South Australian and Western Australian (for contracts entered into on or after 1 August 2022) legislation, the last day of each month in which work was performed or related goods and services supplied (and in Western Australia, on or after the last day of each subsequent named month), and under the Victorian legislation, it will be 20 business days after work was performed or related goods and services supplied.

There are certain statutory requirements for a valid payment claim:

- (a) it is in writing and addressed to the respondent (i.e. Defence);
- (b) it clearly identifies or describes the construction work or related goods and services to which it relates;

(c) it states the amount claimed as payable; and

(d) it states that it is made under the relevant legislation.

So far as possible, these requirements have been incorporated into clause 11 of the Conditions of Contract and in the proforma payment claim set out in the Schedule of Collateral Documents. Whether the elements described in (b) and (c) are satisfied depends on what detail the Consultant provides in its claim. Whether the element described in (d) is satisfied depends on the Consultant ticking the relevant box in the proforma or, if the proforma is not used, in some jurisdictions, must include a statement prescribed by the legislation that it is a claim under the applicable security of payment legislation.

Statutory payment claims can only be served within a period prescribed under the construction contract, or generally within 12 months (except in South Australia, Queensland and Western Australia (for contracts entered into on or after 1 August 2022) it is 6 months and it is 3 months after the applicable reference date) after the construction work or supply of related goods and services the subject of the payment claim were carried out or supplied, whichever is the later.

The Contract Administrator must carefully examine all documentation received by the claimant to identify whether it is a valid payment claim under the Contract and, if the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian or Western Australian (for contracts entered into on or after 1 August 2022) security of payment legislation applies, if it is a valid claim under the relevant legislation. If the claim is not valid, that fact and the reason why the Contract Administrator says the claim is not valid (whether under the Contract or under the legislation) must be set out in the payment statement which responds to the claim (discussed below).

Payment Statement

The most important feature of the payment claim regime set up by the New South Wales, Victorian, Queensland, Tasmanian, Western Australian and Australian Capital Territory security of payment legislation is the need for a respondent to issue a payment schedule within 10 business days of receiving a payment claim made under the relevant security of payment legislation. In South Australia and Western Australia (for contracts entered into on or after 1 August 2022), a payment schedule must be provided within the time required by the

relevant contract or within 15 business days after the payment claim is served, whichever is earlier. Clause 11.4 of the Conditions of Contract provides for the delivery of a payment schedule (called payment statement) within 10 business days of receipt of a payment claim. This reflects the time period within which a payment schedule must be issued under the New South Wales, Victorian, Tasmanian and Australian Capital Territory legislation and in accordance with the Queensland, South Australian and Western Australian (for contracts entered into on or after 1 August 2022) legislation.

For contracts subject to the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian or Western Australian (for contracts entered into on or after 1 August 2022) security of payment legislation, it is vital that a payment schedule is issued within the period prescribed by the Contract. If a payment schedule is not served within that time period, Defence will become liable under the legislation to pay the full amount of the claim (as a statutory debt) on the due date for the progress payment to which the claim relates. The Consultant will be entitled to recover the unpaid portion of the claim as a debt in summary proceedings, and Defence generally cannot bring any cross claim or raise any defence in relation to matters arising under the Contract in those proceedings (alternatively, the Consultant may refer the payment claim for adjudication). The Consultant is also given a statutory right to suspend the work under the Contract by giving written notice of suspension and is not liable for any loss or damage suffered by Defence as a result of that suspension.

Regardless of whether or not a payment claim complies with the contractual or statutory requirements for a valid payment claim, the Contract Administrator must nonetheless issue a payment schedule in response to the claim. A Contract Administrator must not refuse to deal with the claim because in their view the payment claim is invalid. The reason for that is because, under the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian and Western Australian (for contracts entered into on or after 1 August 2022) security of payment legislation, if a payment schedule is not issued, Defence becomes liable to pay the whole of the amount claimed. While that liability is conditional on a valid payment claim, it is clearly preferable to avoid potential liability where the amount claimed is not accepted (in full or in part) by issuing a payment schedule within

time. The need to issue a payment schedule has been reinforced by including a contractual requirement that a payment statement be issued (clause 11.4 of the Conditions of Contract).

The New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian and Western Australian (for contracts entered into on or after 1 August 2022) legislation does not prescribe a format for a payment schedule, except that it must:

- (a) identify the payment claim to which it relates;
- (b) state the amount of the payment, if any, that the respondent proposes to make (this is known as the 'scheduled amount'); and
- (c) if the scheduled amount is less than the claimed amount, state the reasons why it is less.

As noted in the earlier discussion of clause 11.4, the Contract Administrator must ensure that all reasons for reducing the payment claimed, withholding payment or refusing the payment claimed are set out in the payment statement. While setting out the reasons is a requirement of clause 11.4 of the Conditions of Contract and reflects good practice in any event, it is critical where the New South Wales, Victorian, Queensland, Tasmanian, Australian Capital Territory, South Australian or Western Australian (for contracts entered into on or after 1 August 2022) security of payment legislation applies. In those jurisdictions, if the Consultant subsequently refers the payment claim to adjudication, Defence will be limited to making submissions on the reasons for reducing the amount claimed to those that were included in the payment schedule.

If the Contract Administrator complies with clause 11.4 of the Conditions of Contract and uses the proforma payment statement that is included in the Schedule of Collateral Documents, it should ensure that Defence meets the requirements and timeframe of the legislation in relation to the delivery of payment schedules. Of course, as with the Consultant's completion of the payment claim, much depends on the information that is inserted into the proforma document.

Adjudication

Upon receipt of an adjudication application, the Contract Administrator must immediately notify the Directorate of Program Assurance and/ or Directorate of Quality and Compliance and seek legal advice. Defence

has only a very short timeframe within which to respond to the adjudication application:

(a) in New South Wales, Victoria and South Australia, the time for submitting a response is the later of 5 business days after receiving a copy of the application or 2 business days after receiving notice of an adjudicator's acceptance of the application;

(b) in Queensland, the time for submitting a response is variable, but may be as short as 10 business days after receiving a copy of the application or 7 business days after receiving notice of the adjudicator's acceptance of the application (whichever is the latter) for a "standard payment claim";

(c) in Western Australia, the time for submitting a response is 10 business days after receipt of an adjudication application (for all contracts);

(d) in the Northern Territory, the time for submitting a response is 15 working days after receipt of an adjudication application;

(e) in Tasmania, the time for submitting a response is 10 business days after receipt of an adjudication application or 5 business days after receiving notice of an adjudicator's acceptance of the application;

(f) in the Australian Capital Territory, the time for submitting is 7 business days after receipt of an adjudicator application or 5 business days after receiving notice of an adjudicator's acceptance of the application.

15.2.14 Accounting Records (clause 11.15)

This clause requires the Consultant to keep accurate and up-to-date accounting records in relation to Variations and all amounts paid to the Consultant on account of the Fee and otherwise in accordance with the Contract.

This is required in order that the Consultant can substantiate any claims, and the Contract Administrator can be properly and fully informed through the perusal of proper accounts, when considering any payment claims made by the Consultant.

15.2.15 Cost Allocation Advice (clause 11.16)

This clause obliges the Consultant to assist the Commonwealth to report on an accrual basis. The Consultant must with each payment claim under clause 11.2 of the Conditions of Contract provide the Contract Administrator with accurate information which apportions monthly costs against buildings, infrastructure and expenses for all Services completed since Defence's previous payment to the Consultant.

15.2.16 Facilities and Infrastructure Accounting (clause 11.17)

This clause obliges the Consultant to assist the Commonwealth in bringing all completed facilities and infrastructure to account prior to Completion (as defined in the Construction Contract).

The Consultant must provide a cost report to the Contract Administrator setting out details of the Fee and all other amounts payable under the Contract paid by Defence to the Consultant in respect of the Works or a Stage (as defined in the Construction Contract).

If other information is required to be included into this cost report for a project, this can be specified in the Contract Particulars, the Contract Administrator may also require the Consultant to include other information as contemplated by clause 11.17(c).

15.2.17 Fee Payment Schedule (clause 11.18)

This clause deals with the changes to be made to a Fee Payment Schedule in the event that the Fee is adjusted under the Contract. If such a change occurs, the Fee Payment Schedule will be adjusted either as agreed or, if agreement cannot be reached, as determined by the Contract Administrator.

A "Fee Payment Schedule" is defined in clause 1.1 of the Conditions of Contract as being the fee payment schedule (if any) set out in Annexure 4 to the Contract, as adjusted from time to time in accordance with clause 11.18 and which sets out:

(a) the instalments in which the Fee (or any part of the Fee) will be payable; and

(b) if applicable, the milestones which must be achieved for each instalment to become payable (failing which the Consultant’s entitlement to be paid the relevant instalment of the Fee will not arise until such time as the applicable milestone is achieved).

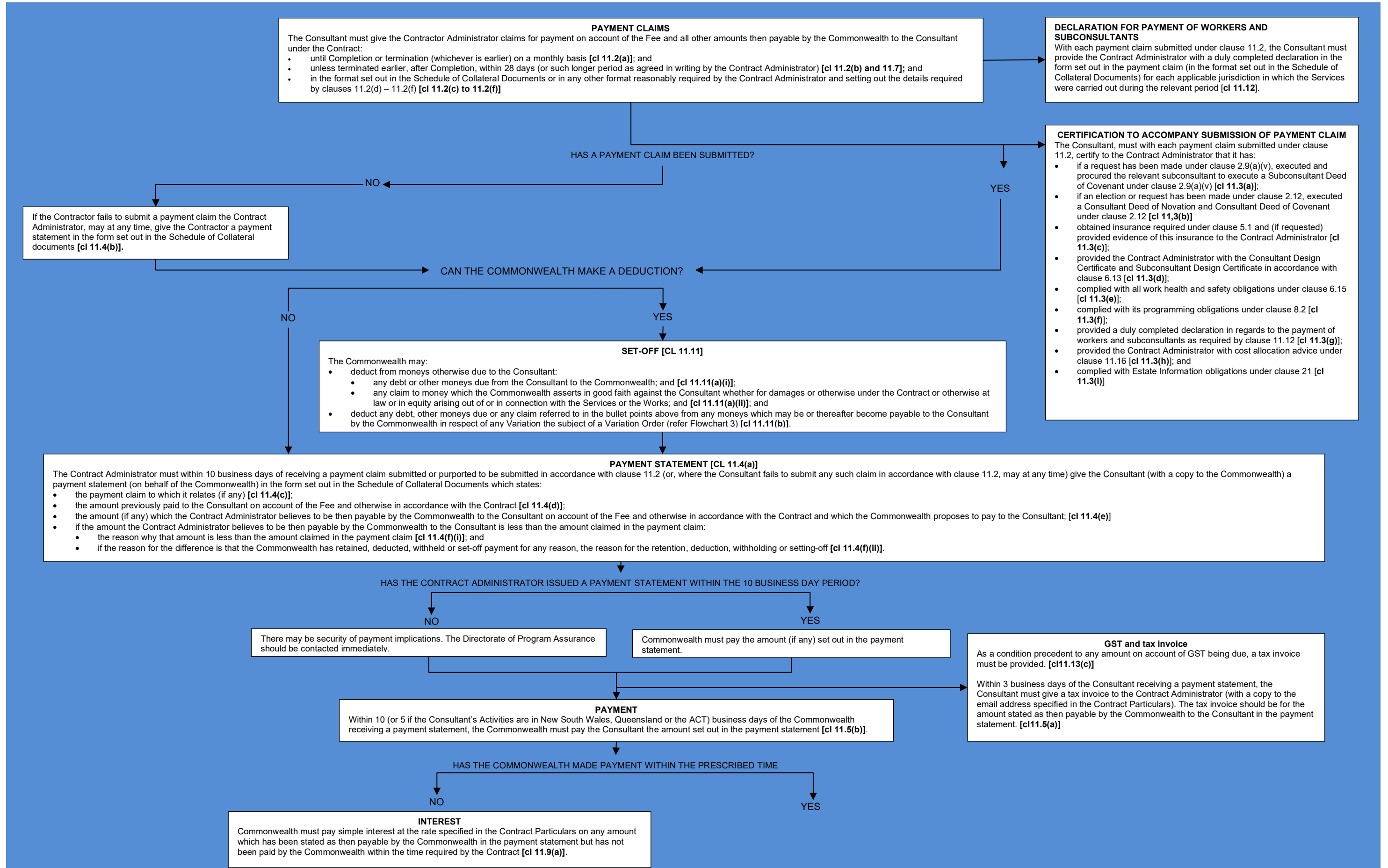
15.3 Proforma notices (Payment)

The following table contains a list of the proforma notices relating to Payment for use under clause 11 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
11.2(f)(ii)	Request for documentation or information
11.14(a)(ii)	Revocation of appointment of Contract Administrator as the Commonwealth’s agent under Security of Payment Legislation
11.14(e)	Request for consent to divulge information in relation to a Security of Payment Legislation adjudication application
11.14(e)	Response to request for consent to divulge information in relation to a Security of Payment Legislation adjudication application

15.4 Flowchart (Payment)

**FLOWCHART 4:
DESIGN SERVICES CONTRACT - PAYMENT**



Part 16 - Termination

16.1 Overview

This clause sets out the procedure which must be followed if Defence is contemplating terminating the Contract before the Consultant's obligations have been fully discharged.

These rights are expressed to be exercised by Defence rather than the Contract Administrator. This is deliberate: termination is a very serious matter and is not to be contemplated without appropriate strategic consideration (including specialist legal and other advice). For this reason, a detailed analysis of this clause is beyond the scope of this Manual.

Having said that, by way of summary, the Contract sets out three categories in which Defence may have the right to terminate the Contract:

- (a) for default and breach (clauses 12.2, 12.3 and 12.4 of the Conditions of Contract);
- (b) for Insolvency of the Consultant (clauses 12.4 of the Conditions of Contract); and
- (c) for the Commonwealth's "convenience" (clauses 12.7 - 12.8 of the Conditions of Contract).

Each of these categories has its own procedures and consequences. These are outlined below.

16.2 Termination

16.2.1 Preservation of Rights (clause 12.1)

The purpose of this clause is to prevent the termination provisions in clause 12 of the Conditions of Contract from being read or interpreted as a "code". That is, this clause seeks to ensure that, whilst the Contract creates a right to terminate the Contract in accordance with clause 12 of the Conditions of Contract, both parties also have access to any common law rights or remedies in the event of default (subject to the express terms of clause 12 of the Conditions of Contract).

16.2.2 Consultant Default and Contents of Notice of Default (clauses 12.2 and 12.3)

Under clause 12.2 Defence may give a written notice to the Consultant under clause 12.3 if the Consultant is in breach of any of the provisions of the Contract.

A notice of default under clause 12.3 must state the following:

- (a) that it is a notice under clause 12.3;
- (b) the failure or breach relied upon; and
- (c) that Defence requires the Consultant to remedy the failure or breach within the number of days specified in the Contract Particulars after receiving the notice.

16.2.3 Termination for Insolvency or Breach (clause 12.4)

Defence has a right of immediate termination by written notice for:

- (a) the occurrence of an "Insolvency Event" (as defined in clause 1.1 of the Conditions of Contract);
- (b) the failure of the Consultant to remedy a breach within the period specified in a notice under clause 12.3;
- (c) where a direction has been given under clause 7.2 (in regards to non-complying Services), a failure to comply with clause 7.3 (re-performance of the non-complying Services); and
- (d) a failure to comply with clause 16.14(e)(i) (warranty in relation to holding STRs as at the Award Date), 16.14(e)(ii) (warranty in relation to holding STRs following the Award Date) 16.17 (Compliance with Commonwealth Supplier Code of Conduct), clause 18 (Information Security) and, clause 19 (Strategic Notice Event).

Such a notice should be prepared with appropriate legal advice and must be in accordance with clause 12.4 of the Conditions of Contract - as such there is no 'proforma notice' provided.

It should be noted that the ipso facto regime consisting of amendments to the *Corporations Act 2001 (Cth)* came into effect on 1 July 2018 and affects all non-exempt contracts entered into with companies made

after that date. Under that regime a right to terminate a Contract on the occurrence of an insolvency event or a company restructuring will be stayed.

However, the regime does not apply to contracts relating to Australia's national security or the provision of a defence capability.

16.2.4 Commonwealth's Entitlements (clause 12.5)

Where the Contract has been terminated under clause 12.4 of the Conditions of Contract, the Consultant must do certain things to "hand over" the Contract. These are set out in clause 12.5 of the Conditions of Contract.

Subject to the security of payment legislation, where the Commonwealth terminates the Contract, the Consultant will not be entitled to any further payments under the Contract including any amount the subject of a payment claim or a payment statement under clause 12.4.

16.2.5 Consultant's Entitlements (clauses 12.6)

If Defence has repudiated the Contract and the Consultant has validly terminated the contract in response, the Consultant's entitlement to payment will be limited to an amount determined in accordance with clause 12.8 of the Conditions of Contract (see below).

This clause expressly prevents the Consultant from claiming an amount in such circumstances via a quantum meruit action. In certain circumstances under the general law, the Consultant could have the right to elect to recover on the basis of either damages or a quantum meruit and would naturally choose the basis which resulted in greater compensation for the Consultant.

Again, if any allegation is made that Defence has repudiated the Contract (and, therefore, that clause 12.6 of the Conditions of Contract applies), urgent legal advice should be sought.

16.2.6 Termination for Convenience and the Consultant's entitlements (clauses 12.7 and 12.8)

Exercising the power to terminate for "convenience" should not be considered without appropriate strategic and legal advice. Should Defence wish to exercise its right then it must provide written notice to

the Consultant stating its intention to do so. Such a notice should only be prepared with appropriate legal advice and must be in accordance with clause 12.7 of the Conditions of Contract - as such there is no 'proforma notice' provided.

Defence should note that there would be a risk if a termination for convenience power was exercised arbitrarily, capriciously or for an improper purpose.

Users should note that the Consultant will be entitled to payment in accordance with clause 12.8 of the Conditions of Contract if Defence exercises its right to terminate under clause 12.7 of the Conditions of Contract. The amount of that payment, although a limitation on the compensation payable, could nevertheless be significant. The Consultant must take all steps possible to mitigate the costs referred to in clause 12.8(a)(i)(B) - these costs cover the cost of goods or materials reasonably ordered by the Consultant for the Services for which the Consultant is legally bound to pay.

Part 17 - Disputes

17.1 Overview

This clause sets out a procedure for the resolution of disputes. The procedure relating to disputes can be found in the flowchart set out in Part 17.3 of this Manual below.

Essentially, there are 4 stages / avenues through which a dispute can be resolved under the Design Services Contract Conditions of Contract:

- (a) commencing the process (clause 13.1 of the Conditions of Contract);
- (b) expert determination (clauses 13.2 - 13.10 of the Conditions of Contract) - note this stage only applies if the dispute or difference relates to a direction of the Contract Administrator under one of the clauses specified in the Contract Particulars (essentially a certifying function); if not, the parties are to proceed directly to executive negotiation;
- (c) executive negotiation (clause 13.11 of the Conditions of Contract); and
- (d) arbitration (clauses 13.12 and 13.13 of the Conditions of Contract).

The intent of the provisions relating to disputes is that:

- (a) disputes be resolved at the earliest stage possible; and
- (b) to the extent possible, disputes are not the subject of court proceedings.

17.2 Disputes

17.2.1 Notice of Dispute (clause 13.1)

Where a dispute or difference arises between the Consultant and Defence or between the Consultant and the Contract Administrator in respect of the Services, Works or the Contract, Defence or the Consultant may give notice in writing to the Contract Administrator and the other party. This notice must specify the dispute or difference, particulars of the party's reasons for being dissatisfied and the position which the party believes is correct.

17.2.2 Expert Determination (clause 13.2)

The Contract Administrator is expressed (under clause 4.1 of the Conditions of Contract) to act as an agent of Defence (and not as a certifier) when exercising all its functions under the Contract. If this were not the case, then the Contract Administrator would be required to exercise a number of those functions as a certifier. This could mean that the Contract Administrator (who will typically be a Defence consultant) might have to act independently of Defence when exercising those functions. As agent and under the DIP Terms of Engagement the Contract Administrator has to act in accordance with Defence's directions.

To afford the Consultant a measure of comfort that the Contract Administrator is acting in accordance with the Contract, disputes arising out of certain directions of the Contract Administrator must be submitted to expert determination, if the parties cannot otherwise resolve the dispute within 14 days. The functions to which the expert determination procedure applies under the Design Services Contract are those specified in the Contract Particulars and listed below:

- (a) clause 2.11(c) and 2.11(d) of the Conditions of Contract - valuation of extra costs reasonably incurred / savings made by the Consultant as a direct result of carrying out instructions in notice in relation to change in Statutory Requirements or variance with the Contract;
- (b) clause 2.13(a)(ii) of the Conditions of Contract – valuation of extract costs reasonably incurred by the Consultant where the Consultant as required to clean up and restore the Environment other than as a result of the failure by the Consultant to carry out the Services in accordance with Statutory Requirements and the Contract;
- (c) clause 2.14 of the Conditions of Contract – determination of Pandemic Adjustment Event and associated instructions;
- (d) clause 8.4(b)(ii)B of the Conditions of Contract - determination of the increase in the Fee due to the extra costs reasonably incurred as a direct result of suspension not caused by the Consultant's failure to carry out its obligations in accordance with the Contract;
- (e) clause 8.8 of the Conditions of Contract - determination of reasonable time by which to extend the Date for Completion

- including assessment of whether the extension of time should be reduced due to contribution to or failure to mitigate delay by the Consultant;
- (f) clause 10.3(b) of the Conditions of Contract - determination of amount for Variations, using rates and prices in the Table of Variation Rates and Prices (to the extent applicable or it is otherwise reasonable to use them);
 - (g) clause 10.3(c)(ii) of the Conditions of Contract - determination of a reasonable amount for Variations where rates in Table of Variation Rates and Prices are inapplicable and the parties cannot otherwise agree;
 - (h) clause 11.4 of the Conditions of Contract - issue of payment statements;
 - (i) clause 11.18(b) of the Conditions of Contract – if the Fee is adjusted, determination of the adjustment to the Fee Payment Schedule where the parties cannot otherwise agree on the adjustment to the Fee Payment Schedule;
 - (j) clause 12.8(a)(i) of the Conditions of Contract – determination of the amount payable to the Consultant after termination for convenience by Defence;
 - (k) clause 16.4(e)(ii) or (iii) of the Conditions of Contract - valuation of extra costs reasonably incurred / savings made by the Consultant as a direct result of carrying out instructions in notice relating to altered level of Defence’s Security Alert System.

Because this default list is designed to pick up most of the functions in which the Contract Administrator performs a type of certifier role, it should not be altered without appropriate advice.

17.2.3 Conducting Expert Determination (clauses 13.3 to 13.9)

The following clauses set out the procedures to be followed in conducting the expert determination: The Expert (clause 13.3); Not Arbitration (clause 13.4); Procedure for Determination (clause 13.5); Disclosure of Interest (clause 13.6); Costs (clause 13.7); Conclusion of Expert Determination (clause 13.8); and Expert Determination Agreement (clause 13.9). These will be supplemented by the Expert Determination Agreement (as set out in the Schedule of Collateral

Documents) between Defence, the Consultant and the expert, which is required to be executed under clause 13.9 of the Conditions of Contract.

A detailed analysis of these provisions is beyond the scope of the Manual. Almost inevitably, complex factual and legal issues must be considered by the parties before an expert determination. If any issues arise (including a request by either party, or the expert, to alter these procedures), appropriate specialist advice should be sought.

17.2.4 Determination of Expert (clause 13.10)

This clause provides that the parties agree to be bound by the determination of the expert unless either party gives a notice of appeal to the other party within 21 days of the determination. Legal advice should be sought with respect to the contents of any notice of appeal.

Clause 13.10(b) of the Conditions of Contract provides that, unless a party gives notice of appeal to the other party within 21 days of receiving such determination, the determination of the expert will be substituted for the relevant direction of the Contract Administrator.

17.2.5 Executive Negotiation (clause 13.11)

Before a dispute is submitted to arbitration, it must first be referred for executive negotiation (i.e. the process described in clause 13.11 of the Conditions of Contract) in an attempt to resolve it. The Executive Negotiators (being the Commonwealth and the Consultant's Executive Negotiators listed in the Contract Particulars) are required to undertake "genuine and good faith negotiations" to resolve the dispute or, if the dispute or difference cannot be resolved, to agree upon a procedure to resolve the dispute.

Executive negotiation applies to:

- (a) appeals from determinations of experts; and
- (b) disputes which do not have to be first referred to expert determination (i.e. all disputes other than those referred to in relation to clause 13.2 of the Conditions of Contract, discussed above).

17.2.6 Arbitration Agreement (clause 13.12)

This clause requires all disputes not resolved by Executive Negotiation to be referred to arbitration, by the giving of written notice by either party. Legal advice must be obtained for the preparation of the arbitration notice.

17.2.7 Arbitration (clause 13.13)

Arbitration is a method of dispute resolution which parties can agree to submit to. Unlike expert determination, the process of arbitration is more formal, is partly governed by legislation and can produce final and binding outcomes.

Arbitration pursuant to clause 13.13 will be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce current at the time of the reference arbitration. The seat of the arbitration will be Melbourne, Australia and the law of Victoria will be the proper law of the arbitration.

The other procedural requirements in relation to arbitration are set out in clause 13.13(c) to 13.13(i).

Because arbitrations result in formal and binding awards, appropriate and specific legal advice must be taken in preparation for any arbitration. Accordingly, no further general guidance is provided here.

17.2.8 Proportionate Liability (clause 13.14)

A number of the Australian States and Territories have enacted proportionate liability legislation.

This statutory regime has the potential to change the risk allocation set out in the Contract.

The effect of the proportionate liability regime is to limit the liability of a concurrent wrongdoer to an injured party to the extent of that concurrent wrongdoer's share of responsibility for the relevant loss or damage. That share of responsibility will be what a court considers to be just in the circumstances. For the purposes of the regime a concurrent wrongdoer is one of two or more wrongdoers who have caused the same loss or damage. The regime does not apply to claims for personal injury. It is limited to claims for economic loss or damage to property.

It is unclear whether or not, in calculating the proper amount in light of a person's responsibility for loss or damage, a court will take the express provisions of the relevant contract into account. However, there is support in the Australian cases for the proposition that a contractual indemnity may not be limited by the proportionate liability regime.

The real risk to Defence in relation to the regime is that a Consultant may seek to limit its liability where the Consultant is in breach of a duty to take reasonable care.

Courts commonly make findings as to the degree to which plaintiffs and various defendants have contributed to the loss and damage, especially in circumstances where there are "contribution proceedings" on foot between various defendants.

The fundamental difference between the contribution legislation and the proportionate liability legislation is that in the latter the plaintiff carries the risk that a concurrent wrongdoer is insolvent. Prior to the proportionate liability regime, the liability of concurrent wrongdoers for negligence was joint and several. That enabled an injured party to seek full compensation from the party with the deepest pocket. The result of the proportionate liability regime was to remove the concept of joint and several liability of concurrent wrongdoers. It is now critical for an injured party to ensure that it joins all concurrent wrongdoers to secure recovery of 100% of that injured party's loss or damage.

The obligations of financial guarantors, performance bond issuers and insurers fall outside the ambit of the legislation which only impacts concurrent wrongdoers.

The proportionate liability legislation is complex and is not the same in each State and Territory. Relevantly, the legislation may be excluded by agreement in New South Wales, Western Australia and Tasmania. In Queensland it is non-excludable and in the other States and in the Northern Territory the legislation is silent. However, in these latter cases the better view is that the legislation is non-excludable.

Legal advice concerning the potential impact of the legislation on Defence's rights should be obtained from Defence's legal adviser for the project.

17.2.9 Continuation of Services (clause 13.15)

This clause makes it clear that the Consultant must continue to carry out the Services and other obligations under the Contract despite any dispute under the Contract. This would be subject to any suspension validly implemented under the security of payment legislation.

17.3 Flowchart (Disputes)

**FLOWCHART 5:
DESIGN SERVICES CONTRACT - DISPUTES**

NOTICE OF DISPUTE

If a dispute or difference arises between the Consultant and the Commonwealth or between the Consultant and the Contract Administrator in respect of any fact, matter or thing arising out of, or in connection with, the Services, the Works or the Contract, or either party's conduct before the Contract ("**Dispute**"), then either party may give a notice in writing to the Contract Administrator and the other party specifying:

- the Dispute;
- particulars of the party's reasons for being dissatisfied; and
- the position which the party believes is correct [cl 13.1].

IS THE DISPUTE RELATED TO ANY OF THE FOLLOWING DIRECTIONS OF THE CONTRACT ADMINISTRATOR?

CONTRACT ADMINISTRATOR DIRECTIONS

- Determination as to the increase/decrease in the Fee arising directly from either a change in a Statutory Requirement after the Award Date or a Statutory Requirement being at variance with the Contract [cl 2.11(c) and (d)].
- Determination of the increase in Fee due to the extra costs reasonably incurred which arise directly from the cleaning up and restoration of the Environment under clause 2.13 [cl 2.13(a)(ii)]
- If a Pandemic Adjustment Event occurs, determination of any increase in Fee due to the extra costs reasonably incurred which arise directly from the Pandemic Adjustment Event and to the extent such costs were exclusively incurred for the purpose of performing the Services as determined by the Contract Administrator [cl 2.14]
- Determination of the increase in the Fee due to the extra costs incurred as a result of suspension caused other than by the Consultant's failure to carry out its obligations in accordance with the Contract [cl 8.4(b)(ii)B].
- Determination of extension of the Date for Completion by a reasonable period where a claim for an extension of time has been submitted [cl 8.8].
- Determination of whether the rates and prices in the Table of Variations Rates and Prices are applicable to, or are reasonable to use for valuing Variations the subject of a direction by the Contract Administrator [cl 10.3(b)]
- The Contract Administrator's determination of the increase/decrease in Fee by a reasonable amount for Variations the subject of a direction by the Contract Administrator, where the parties have failed to agree the reasonable amount of that increase / decrease [cl 10.3(c)(ii)].
- Issue of payment statements (refer Flowchart 4) [cl 11.4].
- Where failing agreement between the parties, the Contract Administrator's determination of how the Fee Payment Schedule will be adjusted (if the Fee is adjusted under the Contract and a Fee Payment Schedule applies) [cl 11.18(b)].
- Where the Commonwealth terminates the Contract, the Contract Administrator's determination of the amount to which the Consultant is entitled to payment for Services carried out prior to the date of termination and the cost of goods or materials (if any) reasonably ordered by the Consultant for the Services [cl 12.8(a)(i)].
- Determination as to the increase in the Fee by any extra costs reasonably incurred by the Consultant, or decrease in the Fee by any savings made, arising directly from a change to Defence's Security Alert System or individual measure [cl 16.4(e)(ii) and 16.4(e)(iii)].

No

A further expert (which must not be an expert previously appointed under clause 13.3(a) must be appointed [cls 13.3(b) and 13.3(c)].

No

Yes

EXPERT DETERMINATION

Unless otherwise agreed between the parties, to the extent the Dispute is not resolved within 14 days after a notice of dispute is given, the Dispute must be submitted to expert determination [cl 13.2] which is to be conducted by:

- the independent industry expert specified in the Contract Particulars [cl 13.3(a)(i)]; or
- where no such independent industry expert is specified, an independent industry expert appointed by the person specified in the Contract Particulars [cl 13.3(a)(ii)].

HAS THE EXPERT BEEN APPOINTED AND NONE OF THE EVENTS REFERRED TO IN CLAUSE 13.3(b) OF THE CONDITIONS OF CONTRACT OCCURRED?

Yes

PROCEDURE FOR DETERMINATION

- The expert determination will proceed in accordance with clauses 13.5 and 13.6 of the Conditions of Contract
- Each party will:
 - bear its own costs in respect of any expert determination; and
 - pay one-half of the expert's costs [cl 13.7].
- Unless otherwise agreed between the parties, the expert must notify the parties of his or her decision upon an expert determination conducted within 28 days from the acceptance by the expert of his or her appointment [cl 13.8].

DETERMINATION OF EXPERT

- The determination of the expert:
- must be in writing [cl 13.10(a)]; and
 - will be substituted for the relevant direction of the Contract Administrator [cl 13.10(b)].

HAS A PARTY GIVEN NOTICE OF APPEAL TO THE OTHER PARTY WITHIN 21 DAYS OF RECEIVING THE EXPERT'S DETERMINATION?

Yes

No

EXECUTIVE NEGOTIATION

- The Dispute is to be referred to the Executive Negotiators [cl 13.11(a)] who must:
- within 21 days of the latest of:
 - if the Dispute is not one which is to be referred to expert determination pursuant to clause 13.3, the notice of dispute given under clause 13.1 of the Conditions of Contract [cl 13.11(b)(i)A]; or
 - otherwise, the notice of appeal given under clause 13.10 [cl 13.11(b)(i)B]; or
 - within such longer period of time as the Executive Negotiators may agree in writing [cl 13.11(b)(ii)], meet and undertake genuine and good faith negotiations with a view to resolving the Dispute, and if they cannot resolve the Dispute, endeavour to agree upon a procedure to resolve the Dispute (such as mediation, a further expert determination) [cl 13.11].

The expert's determination will be final and binding [cl 13.10(c)].

HAS THE DISPUTE BEEN RESOLVED WITHIN THE TIME PRESCRIBED FOR THE NEGOTIATIONS?

Yes

No

ARBITRATION

The Dispute will be referred to arbitration by written notice from either party to the other party [cl 13.12] and such arbitration will be conducted in accordance with clause 13.13.

Part 18 - Notices

18.1 General

This clause aims to ensure that claims for extra money are dealt with promptly throughout the project and not “banked up” by the Consultant. It does this by barring, under clause 14.5 of the Conditions of Contract, any claims which have not been made by the Consultant in accordance with the relevant provisions of clause 14.1 of the Conditions of Contract (in the case of alleged Variations) or clauses 14.2-14.4 of the Conditions of Contract (in the case of other claims).

Contract administration staff who are in any doubt as to whether a claim has been made in accordance with clause 14 of the Conditions of Contract (including as to the timeframes for submission of notices) should seek appropriate legal advice immediately.

It should be noted that the conduct of a Contract Administrator or Defence in respect of time bar/notification provisions can affect the contractual enforceability of a particular provision (i.e. through estoppel, election or waiver). Such conduct may be as simple as proceeding to consider the merits of a claim notwithstanding non-compliance with time bars.

That is, if by Defence’s or the Contract Administrator’s conduct, it could be argued by the Consultant that Defence or the Contract Administrator represented to the Consultant that it was not going to rely upon those provisions, then Defence or the Contract Administrator may not be able to rely on them at a later date. In such circumstances, Defence may be no longer able to subsequently reject the claim in reliance on that clause or clauses.

Accordingly, contract administration staff must carefully consider their conduct upon receipt of a claim. It is strongly suggested that in the absence of legal advice the express wording of the contract be strictly applied to protect Defence’s interests. This may be done by using proforma notices.

There are certain security issues associated with the use of project document management software systems such as Aconex or equivalents, particularly where documents will not be stored in Australia (or on Australian servers). See also guidance in relation to the handling

and use of Confidential Information and Sensitive and Classified Information in the clause-by-clause guidance below. Advice from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance should be sought before incorporating software and such systems in the Contract. A special condition may be required.

18.2 Notices

18.2.1 Notice of Variation (clause 14.1)

This clause deals with the situation where the Consultant claims that a direction, other than one framed as a “Variation Order”, constitutes a Variation (and therefore may entitle the Consultant to extra payment under clause 11 of the Conditions of Contract). This may arise because the Contract Administrator, in issuing a direction, has not appreciated that complying with the direction results in a change to the Services and therefore a Variation.

The Consultant is required to notify the Contract Administrator within 7 days of receiving a direction, if it considers that the direction constitutes a Variation and no Variation Order notice has been issued. A proforma notice titled ‘Notice of Variation’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

The Consultant must also provide a written claim under clause 14.1(b) of the Conditions of Contract within 21 days after submitting its written notice under clause 14.1(a) of the Conditions of Contract. This claim must include the details required under clause 14.3(b) of the Conditions of Contract. A proforma notice titled ‘Claim for Variation’ can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

18.2.2 Notices of Other Claims (clause 14.2)

Where the Consultant wishes to make a Claim against Defence in respect of any direction by the Contract Administrator or in respect of any other fact, matter or thing (including a breach of the Contract by Defence) under or in connection with the Contract or the Services, other than those which involve:

- (a) an extension of time under clause 8.6 of the Conditions of Contract;
- (b) payment under clause 11 of the Conditions of Contract of the original Fee specified in the Contract Particulars;
- (c) a Variation instructed in accordance with clause 10.2 of the Conditions of Contract or to which clause 14.1 of the Conditions of Contract applies; or
- (d) contribution or indemnity for loss or damage caused or contributed to by the negligence of the Commonwealth where a third party (other than a subconsultant of the Consultant or other party for whom the Consultant is legally responsible) makes a claim (whether in tort, under statute or otherwise at law) against the Consultant,

it must submit notices as required by clause 14.3 of the Conditions of Contract.

Note that where the Claim is alleged to arise in connection with a provision of the Contract (even where the provision may indicate that the Consultant is given an express entitlement under the contract), the Consultant is required to submit a Claim under clause 14 of the Conditions of Contract in addition to any notice or other document required under the relevant provision (see also clause 14.6 of the Conditions of Contract). This is a fundamental point in the administration of the Design Services Contract and needs to be carefully adhered to by the Consultant and also by the Contract Administrator in an assessment of an applicable Claim by the Consultant.

18.2.3 Prescribed Notices (clause 14.3)

Under clause 14.3(a) of the Conditions of Contract, the Consultant must issue an initial written notice containing certain details within 21 days of the first occurrence of the thing upon which the Claim is based. A proforma notice titled 'Initial Notice of Claim' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

Clause 14.3(b) of the Conditions of Contract sets out the provision relating to the content of a written claim which must be issued within 21 days of giving the notice under clause 14.3(a) of the Conditions of

Contract. A proforma notice titled 'Notice of Claim' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

18.2.4 Continuing Events (clause 14.4)

The Consultant is to submit a notice of continuing events every 28 days after the written claim under clauses 14.1(b) or 14.2 of the Conditions of Contract was submitted, if the direction or fact, matter or thing upon which the Claim is based (or the consequences thereof) are continuing.

Although this document contains the same information as a Claim under clause 14.3(b) of the Conditions of Contract, a separate proforma notice titled 'Notice of continuing events' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

18.2.5 Time Bar (clause 14.5)

If the Consultant fails to comply with clause 14.1 (Notice of Variation), 14.2 (Notices of other Claims), 14.3 (Prescribed Notices) or 14.4 (Continuing Events) the Consultant will be absolutely barred from making any claim against the Commonwealth arising out of or in connection with the relevant direction or, fact, matter or thing which clause 14.1 or 14.2.

Again, if contract administration staff are in any doubt about whether an alleged claim has been barred by clause 14.5 of the Conditions of Contract, appropriate legal advice should be sought immediately.

18.2.6 Other Provisions Unaffected (clause 14.6)

Nothing in clauses 14.1 to 14.5 limits any other provision of the contract which requires the Consultant to give notice to the Contract Administrator to preserve the Consultant's entitlement to make a Claim against the Commonwealth. The Consultant is thus required to comply with other notice requirements under the Contract – including for example the applicable requirements under clause 8 of the Conditions of Contract in relation to a claim for an extension of time.

18.2.7 Address for Service (clause 14.7)

This clause requires that any notice to be given under the Contract must be in writing and must be delivered to the address set out in the Contract Particulars or last notified in writing to the party giving the notice. This can be by way of personal delivery, by prepaid express post or by email (except for notices under clause 12 (termination) or clause 13 (disputes) which, if sent by email, must **also** be delivered by hand or sent by prepaid express post). A notice must be signed by one of the persons identified in clause 14.7(c).

In the case of notices sent by email, the notice must be attached to the email in Portable Document Format (pdf) and the subject line of the email must also include the words “This is a notice under clause 14.7 of the Contract”.

18.2.8 Receipt of Notices (clause 14.8)

This clause sets out the dates upon which a notice will be deemed to have been given and received depending on the form of service chosen including, importantly, delivery by email. This is especially important given the importance (noted above) of time in relation to notices under clause 14 of the Conditions of Contract and elsewhere.

See clause 14.8(b) for the time at which notices under clauses 12 and 13 is taken to be received if that notice is also sent by email as well as delivered by hand or sent by prepaid express post.

18.3 Proforma notices (Notices)

The following table contains a list of the proforma notices relating to Notices for use under clause 14 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
14.1(a)	Notice of Variation
14.1(b)	Claim for Variation

Clause	Title of proforma notice
14.2 and 14.3(a)	Initial Notice of Claim
14.2 and 14.3(b)	Notice of Claim
14.4	Notice of continuing events

Part 19 - Whole of Life

19.1 Whole of Life

19.1.1 General (clause 15.1)

The Consultant must prepare the Design Documentation and carry out the Services in a manner which maximises the achievement of the Whole of Life (**WOL**) Objectives.

WOL obligations should also be addressed in the Brief. Clearly, the extent to which the Consultant can do so will be directly proportional to the level of its design obligations.

Readers should also be mindful of the WOL Objectives, each of which are defined in clause 1.1 of the Conditions of Contract.

19.1.2 Consultation (clause 15.2)

This clause obliges the Consultant to attend meetings and consult with the Contract Administrator, the Commonwealth and Other Contractors for discussion regarding the progress of the Design Documentation and the Services against the WOL Objectives. In practice, the Other Contractors will most likely be Defence's maintenance contractors (i.e. the EMOS Contractors).

The Contract Administrator must notify the Consultant of any such meetings it is to attend. There is no express limit under the Contract on the number of meetings which the Contract Administrator may schedule and require attendance at. The Consultant is not entitled to any additional money for preparing for and attending meetings. The Consultant's attempts to maximise their achievement of the WOL Objectives (including under this clause) are deemed to be included in the Fee.

19.1.3 WOL Proposals (clause 15.3)

Defence is entitled to make proposals regarding WOL issues. The Consultant is also obliged under clause 15.3(a) of the Conditions of Contract to use its best endeavours to identify and recommend proposals for maximising the achievement of and the WOL Objectives.

The Consultant must also consult with the Contract Administrator, the Commonwealth and Other Contractors in relation to proposals (whether proposed by the Consultant or the Commonwealth) under clause 15.3(b).

19.1.4 HOTO Process (clause 15.4)

This clause requires the Consultant to fully co-operate with the Contract Administrator, the Commonwealth and Other Contractors and take all steps necessary to ensure the timely, efficient, comprehensive and smooth completion of the HOTO Process. Clause 15.4(b)(i) and (ii) require the Consultant to carry out all Consultant HOTO Obligations and to ensure that those Consultant HOTO Obligations are performed within the time prescribed by, or determined in accordance with, the HOTO Requirements.

Under clause 15.4(b)(v) the Consultant must, as and when required by the Contract Administrator, meet with the Contract Administrator, the Commonwealth and Other Contractors to ensure that those parties have sufficient Project Documents to enable them to occupy, use, operate and maintain the Works or the Stage (as defined in the Construction Contract) and to perform such other activities as may be required by the Commonwealth in respect of the Works or the Stage (as defined in the Construction Contract).

19.1.5 Post Occupancy Evaluation (clause 15.5)

The Contract Administrator may at any time carry out or procure an Other Contractor to carry out a post occupancy evaluation of the Works.

The Contract Administrator may at any time inspect the Works to review the extent to which the Consultant has maximised its achievement of the WOL Objectives and provide a report to the Commonwealth and the Consultant as to such matters.

The Commonwealth may take into account a post occupancy evaluation in any registration of interest process, tender process or similar procurement process in connection with any other Commonwealth project.

19.1.6 Rights and Obligations not affected (clause 15.6)

The purpose of this clause is to make it clear that the rights, remedies and obligations of the parties under the Contract generally are not altered or affected by in clause 15 of the Conditions of Contract.

Part 20 - General

20.1 General

20.1.1 Workplace Gender Equality (clause 16.1)

This clause expressly requires the Consultant to comply with its obligations under the *Workplace Gender Equality Act 2012* (Cth) (**WGE Act**). The WGE Act requires certain employers (which may or may not include the Consultant or a subconsultant) to, amongst other things, prepare a public report containing information including in relation to gender equality indicators and to comply with minimum standards determined by the Workplace Gender Equality Agency within relevant time periods specified in the WGE Act.

Clause 16.1(b) of the Conditions of Contract prohibits the Consultant from entering into subcontracts (under this Contract) with a subconsultant that has been named by the Workplace Gender Equality Agency as an employer currently not complying with the WGE Act.

20.1.2 Indigenous Procurement Policy (clause 16.2 and 16.3)

Clauses 16.2 and 16.3:

- (a) reflects the Commonwealth's commitment to creating opportunities for Indigenous businesses to grow and employ more people, under the Indigenous Procurement Policy (**IPP**); and
- (b) sets out the Consultant's obligations in relation to the employment of Indigenous Australians, using Indigenous Enterprises in its supply chain and, where applicable, compliance under the Consultant's Indigenous Participation Plan.

The IPP is a policy implemented by the Department of the Prime Minister and Cabinet and is broken down into three key components:

- (a) to set a target for purchasing from Indigenous enterprises;
- (b) to set-aside and direct some Commonwealth contracts to Indigenous enterprises; and
- (c) to prescribe minimum Indigenous participation requirements for certain Commonwealth contracts.

The Contract Particulars are to be completed which will indicate which one of clause 16.2 or clause 16.3 will apply.

If Option 1 is selected in the Contract Particulars (that is, if the Contract is a Non-High Value Contract for the purposes of the Indigenous Procurement Policy and the anticipated Fee will not exceed \$7.5 million inclusive of GST), clause 16.2 will apply. If Option 1 is selected, the Consultant is required to use its reasonable endeavours to increase its purchasing from Indigenous Enterprises and employment of Indigenous Australians in carrying out the Services. The Consultant will not have prepared an Indigenous Participation Plan so none will be annexed to the Contract. However, if at any time the Fee exceeds \$7.5 million inclusive of GST the Consultant must prepare and submit an Indigenous Participation Plan within 14 days of a request from the Contract Administrator. Clause 16.3(b) to (g) will also apply as if Option 2 had been selected in the Contract Particulars. The Consultant must then comply with its Indigenous Participation Plan (once finalised) and will have other obligations including providing a written report and managing the Consultant's access to the IPP Contractor Portal.

If Option 2 is selected in the Contract Particulars (that is, if the Contract is a High Value Contract for the purposes of the Indigenous Procurement Policy and the anticipated Fee will exceed \$7.5 million inclusive of GST), clause 16.3 will apply. Under this clause, the Consultant is required to use its reasonable endeavours to increase its purchasing from Indigenous Enterprises and employment of Indigenous Australians in carrying out the Services and also comply with its Indigenous Participation Plan, which will be annexed to the Contract. The Consultant also have other obligations including providing a written report and managing the Consultant's access to the IPP Contractor Portal.

20.1.3 Defence's Security Alert System (clause 16.4)

The Consultant must be, and must ensure that its subconsultants are, fully familiar with the requirements of Defence's Security Alert System. The Consultant must also ensure that its subconsultants comply with the requirements of Defence's Security Alert System.

Clause 16.4(c) of the Conditions of Contract requires the Consultant and any subconsultants to:

- (a) attend any security briefings as requested by; and
- (b) participate in any rehearsal of the Defence's Security Alert System, as directed by,

the Contract Administrator.

If there is any change to Defence's Security Alert System level specified in the Contract Particulars (or individual measure from a higher level to meet a specific threat or threats), the Contract Administrator will notify the Consultant of the change to the level and instruct the course it is to adopt in relation to that change, and will determine the extent to which (if any):

- (a) the Fee will be *increased* by the extra costs reasonably incurred by the Consultant; and
- (b) the Fee will be *decreased* by any saving made by the Consultant after the Contract Administrator gives its notice,

which arise directly from the change in Defence's Security Alert System level and the Contract Administrator's instruction.

To the extent permitted by law, the Consultant will not be entitled to make a Claim in relation to the Contract Administrator's determination regarding the increase or decrease to the Fee, other than under this clause.

20.1.4 IT Equipment (clause 16.5)

This clause outlines the obligations of the Consultant to ensure that its IT Equipment is free of defects in materials and workmanship and that no viruses will be introduced into Defence's system as a result of the Services.

Additionally, the Consultant must assign the benefit of warranties given by any supplier from who the Consultant sources any IT Equipment, to Defence.

20.1.5 Privacy (clause 16.6)

The Consultant must comply with its obligations under the *Privacy Act 1988* (Cth) and comply with the Australian Privacy Principles.

This clause contains detailed provisions relating to the handling of personal information as defined in the *Privacy Act 1988* (Cth). Personal Information is defined in clause 1.1 of the Conditions of Contract, which

cross-refers to the *Privacy Act 1988* (Cth). Personal Information means information or opinion about an identified individual (or an individual who is reasonably identifiable). The clause essentially requires the Consultant to handle Personal Information according to the same rules which Defence must observe under the Privacy Act.

In addition, the Consultant must obtain the Contract Administrator's written consent prior to disclosing any Personal Information or using Personal Information for a purpose other than meeting the Consultant's obligations under the Contract. The Contract Administrator should exercise caution in considering any such request under clause 16.5(a)(iv) of the Conditions of Contract and must obtain legal advice from Defence's legal advisor for the project before approving that request. Accordingly, there is no proforma response to such request.

Clause 16.5(a)(xi) of the Conditions of Contract requires the Consultant to ensure that any subconsultant is bound by substantially similar terms as those outlined in clause 16.5 of the Conditions of Contract. The Contract Administrator should bear this in mind in reviewing any subcontracting arrangements proposed by the Consultant.

Under clause 16.5(a)(xiv) of the Conditions of Contract, the Consultant indemnifies Defence for any costs, expenses, losses, damages or liabilities suffered or incurred by Defence arising out of any breach by the Consultant or subconsultants of the obligations under clause 16.5 of the Conditions of Contract. The meaning of the phrase "costs, expenses, losses, damages or liabilities" is expanded upon in clause 16.5(b).

The Consultant has considerable notification obligations under clause 16.6(c) of the Conditions of Contract. A proforma notice titled 'Notice of breach of Privacy Principles' can be found on the Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading "Proforma Notices" on that page.

The Consultant must indemnify the Commonwealth in respect of all costs, expenses, losses, damages or liabilities suffered or incurred by the Commonwealth arising out of or in connection with the events set out in clause 16.5(a)(xiv)A to D.

The Contract Administrator should obtain legal advice from Defence's legal adviser for the project if it receives a notification from the Consultant under clause 16.5(c) of the Conditions of Contract.

20.1.6 Moral Rights (clause 16.7)

Certain works which attract copyright protection are also protected by Moral Rights. These are rights under the *Copyright Act 1968* (Cth) and are additional to traditional copyright. Unlike copyright, Moral Rights cannot be assigned, licensed or waived. Moral Rights attach to individual authors and not organisations (such as companies).

An author's Moral Rights in respect of a work are:

- (a) the right to be identified as author of that work;
- (b) the right to prevent authorship of the work being falsely attributed to someone else; and
- (c) the right not to have the work subjected to derogatory treatment.

In an extreme case, an author may exercise the third right in the list above to limit how Defence could use material created by that author. As an example, an architect who prepared a design for a building may claim that changes to the design subsequently required by Defence amount to a derogatory treatment of the original design. This risk exists despite the broad licence which the Consultant grants to Defence under clause 6.6 of the Conditions of Contract, as Moral Rights cannot be licensed.

This clause 16.7 is intended to protect the Commonwealth by imposing an obligation on the Consultant to ensure that each of the Consultant and subconsultant personnel engaged by the Consultant in the production or creation of Project Documents or the Works (as applicable) for the Specified Acts, even though such use would otherwise be an infringement of their Moral Rights.

The expression "Specified Acts" is defined in clause 16.7(b) and includes, for example, falsely attributing the authorship of any Project Document or the Works or any content in a Project Document or the Works (including literary, dramatic, artistic works and cinematograph films within the meaning of the *Copyright Act 1968* (Cth)).

20.1.7 Freedom of Information (clause 16.8)

This clause is required under the Commonwealth Procurement Rules. Further guidance is provided at <https://www.defence.gov.au/about/information-disclosures/freedom-information>.

20.1.8 Long Service Leave (clause 16.9)

This clause only applies the Long Service Leave Legislation if it applies to the Services.

It provides that the Consultant:

- (a) must comply with the Long Service Leave Legislation;
- (b) must pay any levy, charge, contribution or associated amount in respect of the Services required by the Long Service Leave Legislation; and
- (c) such amounts paid are deemed to be included in the Fee.

“**Long Service Leave Legislation**” is defined in clause 1.1 of the Conditions of Contract.

20.1.9 Assignment (clause 16.10)

This clause prevents the Consultant from assigning, in any way, any part of the Contract or any part or any benefit or monies or interest under the contract without the prior written approval of Defence.

This clause also incorporates a broad definition of assignment to include a Change of Control (as defined in clause 1.1) of the Consultant.

20.1.10 Publicity (clause 16.11)

The effect of this clause is to prevent the Consultant from disclosing any matters about the Services or the Works to the media, without the prior written approval of the Contract Administrator.

Proforma notices for the Consultant’s request and the Contract Administrator’s response titled ‘Request to *[furnish information/issue document or other material]*’ and ‘Response to request to *[furnish information/issue document or other material]*’ can be found on the

Defence Suite of Facilities Contracts webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

20.1.11 Building Works Manual and National Construction Code Certification (clause 16.12)

This clause requires the Consultant to obtain certifications from an Accredited Building Surveyor at particular times. See the definition of “Accredited Building Surveyor” in clause 1.1 of the Conditions of Contract.

The Consultant is required to provide the Contract Administrator with written certification from an Accredited Building Surveyor:

- (a) that the Design Documentation complies with the Building Works Manual and the National Construction Code - such certification is to be provided at the time it submits any Design Documentation to the Contract Administrator under clause 6.2 of the Conditions of Contract;
- (b) before issue of any Design Documentation for the purpose of engaging a Contractor - that the Design Documentation to be issued complies with the Building Works Manual and the National Construction Code; and
- (c) prior to Completion (defined in the Construction Contract) that the Works or a Stage (as defined in the Construction Contract) complies with the Building Works Manual and the National Construction Code, except to the extent of any dispensation which is granted by the Assistant Secretary Environment and Engineering and identified in the certificate. If there is an inconsistency between the Building Works Manual and the National Construction Code, the Building Works Manual prevails.

20.1.12 Applicable Standards (clause 16.13)

Under clause 16.13 of the Conditions of Contract, the Consultant acknowledges that the Contract identifies the Australian standards which are applicable to the Services or in the absence of an applicable Australian standard the relevant international standards which apply to the Services.

The Consultant must comply with the Applicable Standards in performing the Services.

The Contract Administrator may at any time request the Consultant to provide a certificate of compliance with the Applicable Standards in respect of the Design Documentation or the Services. The Contract Administrator may also request that the Consultant provides a corresponding certificate from relevant subconsultants certifying design carried out by that subconsultant or the Services performed by that subconsultant complies with the Applicable Standards.

20.1.13 Shadow Economy Procurement Connected Policy (clause 16.14)

Clause 16.14 does apply unless the Contract Particulars state that it does not apply.

Without limiting clause 2.9 (subcontracting), the Consultant must not enter into a subcontract with a subconsultant (or agree to a novation of a subcontract to a subconsultant) if the total value of all work under the subcontract is expected to exceed \$4 million (inclusive of GST) unless the Consultant has obtained and holds the STRs required for the relevant subcontractor's entity type referred to in the table in clause 16.14(b).

The Consultant must also obtain and hold additional valid and satisfactory STRs in the circumstances set out in the table in clause 16.14(c) within 10 business days of the Consultant becoming aware of any of those circumstances. Importantly, it should be noted that STRs may be required not only in relation to the Consultant itself but also any other applicable entities referenced in that table.

The Consultant warrants that as at the Award Date it holds a valid and satisfactory STR and is required to hold a valid and satisfactory STR at all times during the Services and provide a copy to the Contract Administrator on request.

20.1.14 Commonwealth Publication and Reporting Requirements (clause 16.15)

The Consultant acknowledges that the Commonwealth is and will be subject to a number of Commonwealth requirements and policies which support internal and external security of its tendering and contracting processes and the objectives of transparency, accountability and value for money including report and post on the internet, a list of contracts valued at \$100,000 or more and identify

confidentiality requirements in accordance with a Senate order on Department Agency Contracts.

20.1.15 Modern Slavery (clause 16.16)

For the purposes of this clause the term “Modern Slavery” has the same meaning as it has in the *Modern Slavery Act 2018* (Cth).

The Consultant must take reasonable steps to identify, assess and address risks of Modern Slavery practices arising in connection with the Contract. The Consultant must promptly notify the Contract Administrator if the Consultant becomes aware of Modern Slavery practices arising in connection with the Contract.

20.1.16 Compliance with the Commonwealth Supplier Code of Conduct (clause 16.17)

This clause requires the Consultant to comply, and ensure the compliance of its officers, employees, agents and subconsultants, with the Commonwealth Supplier Code of Conduct. dated 1 July 2024 (Code). The Code is available at <https://www.finance.gov.au/government/procurement/commonwealth-supplier-code-conduct/commonwealth-supplier-code-conduct>, as amended from time to time.

The Consultant is required to regularly monitor compliance with the Code in accordance with this clause and provide information of such monitoring upon request from the Contract Administrator. The Consultant will notify the Contractor Administrator of any breach of the Code by any of the relevant classes of people identified in this clause and the Consultant may be notified of any breaches (or potential breaches) of the Code identified by the Contract Administrator.

The Consultant acknowledges and agrees that the Commonwealth may take the Consultant's compliance with the Code into account in any registration of interest process, tender process or similar procurement process in connection with any other Commonwealth project.

20.1.17 Environmentally Sustainable Procurement Policy (clause 16.18)

This clause requires the Consultant to comply with the Supplier Environmental Sustainability Plan and maintain and provide evidence of its compliance with this plan at no additional cost to the Commonwealth.

Under this clause, the Commonwealth agrees to periodically meet with the Consultant no fewer than once every six months before the end of the Defects Liability Period to identify any risks or issues that may affect the Consultant's compliance with the Supplier Environmental Sustainability Plan or its ability to monitor and report on its performance of the plan.

Should the Consultant become aware that it may be unable to comply with the Supplier Environmental Sustainability Plan or its reporting obligations in this clause, the Consultant must provide notice of this to the Contract Administrator. This notice must address those matters set out in clause 16.18(e).

The Consultant must regularly report on its compliance with the Supplier Environmental Sustainability Plan to the Contract

Administrator in accordance with this clause at least every six months before the end of the last Defects Liability Period, within 7 days of the end of the last Defects Liability Period and any other time during the term of the Contract following a request from the Contract Administrator. The Contractor Administrator may request additional information in relation to this report and may reject a report by notice with reasons, the reasons must be addressed in an amended report to be resubmitted.

The Consultant makes a number of acknowledgments in relation to use and recording of the Supplier Environmental Sustainability Plan and the disclosure of the plan and reports to other Commonwealth agencies.

20.2 Proforma notices

The following table contains a list of the proforma notices for use under clause 16 of the Design Services Contract Conditions of Contract, each of which can be found on the Defence Suite of Facilities Contract webpage for the Design Services Contract, under the subheading “Proforma Notices” on that page.

Clause	Title of proforma notice
16.6(c)	Notice of breach of Privacy Principles
16.11(a)	Request to <i>[furnish information/issue document or other material]</i>
16.11(a)	Response to request to <i>[furnish information/issue document or other material]</i>

Part 21 - Commercial-In-Confidence Information

21.1 Commercial-in-Confidence Information (clause 17)

21.1.1 Commercial-in-Confidence Information (clause 17)

This clause is an optional clause and therefore does not apply unless the Contract Particulars state that it applies.

“Commercial-in-Confidence Information” is information provided by the Consultant before or after the Award Date, where the Consultant has requested that Defence keep the specific information confidential. The Consultant must make such request in writing to Defence in its Tender Schedule H and must have set out the justification for keeping such information confidential and Defence so agrees with that request. If Defence agrees to such request, such information will be designated ‘Commercial-in-Confidence’ information and kept confidential, subject to the types of disclosure referred to in paragraph (b) of this clause.

Further guidance is provided in the relevant Part of this Manual dealing with the Tender Documents, in particular in regard to clause 20 of the Tender Conditions and Tender Schedule H.

Part 22 - Information Security (clause 18)

22.1 Overview

The Design Services Contract includes a strict obligation of confidentiality in relation to Confidential Information subject to limited carve outs.

The term Confidential Information includes (among other things) the terms of the Contract itself, Project Documents and other documents given to the Consultant connected with the Services or the Works which by its nature is confidential or the Consultant knows or ought to know is confidential.

It should be noted that Confidential Information does not include (and, therefore, the confidentiality provisions below will not apply to) any document, drawing, information or communication (whether in written, oral or electronic form) given to the Consultant by the Commonwealth, the Contract Administrator or anyone on the Commonwealth's behalf, whether or not owned by the Commonwealth which:

- (a) is in the possession of the Consultant without restriction in relation to its disclosure or use before the date of its receipt from the Commonwealth, the Contract Administrator or anyone on the Commonwealth's behalf;
- (b) is in the public domain otherwise than due to a breach of clause 18 of the Conditions of Contract; or
- (c) has been independently developed or acquired by the Consultant.

22.2 DISP Membership (clause 18.1)

The Consultant must at its cost have obtained as at the Award Date and thereafter maintain for the term of the Contract the level of DISP Membership specified in the Contract Particulars in accordance with Control 16.1 of the DSPF and comply with any other direction or requirement of the Contract Administrator in relation to the DISP.

It should be noted that the Commonwealth may not enter into the Contract until the required DISP membership has been obtained by the Consultant and therefore this issue needs to be monitored and managed prior to the

Award Date to make sure the Consultant has obtained the necessary DISP membership so as to avoid any delay to the entering into of the Contract.

22.3 Confidential Information and Information Security (clause 18.2)

The Consultant acknowledges and agrees that the Confidential Information is confidential to the Commonwealth and that any unauthorised use or disclosure of the Confidential Information may cause loss or damage to the Commonwealth and part of the Confidential Information may be Sensitive and Classified Information.

Under clause 18.2(b), except as otherwise provided in clause 18.2, the Consultant must hold the Confidential Information in strict confidence and must not disclose, use or deal with it or otherwise make available to any person and ensure all Confidential Information is strictly kept secure and protected from all unauthorised use.

Under clause 18.2(c), the Consultant may disclose Confidential Information where such disclosure is required by law subject to the requirements set out in that clause.

Under clause 18.2(d), the Consultant may disclose Confidential Information to an employee, officer, agent, legal adviser, insurer, subconsultant or proposed subconsultant on a 'need to know' basis and to such other persons provided that the Consultant has obtained the prior written approval of the Contract Administrator. However, in addition to these requirements, no Sensitive and Classified Information may be released to any third party without the prior approval of the originator through the Contract Administrator.

Under clause 18.2(e), the Consultant must strictly comply with all Information Security Requirements including as set out in Control 10 of the DSPF. The Consultant must also ensure that persons performing the roles specified in the Contract Particulars hold and maintain a security clearance at or above the level specified in the Contract Particulars.

Under clause 18.2(g), within such period as the Contract Administrator or the Commonwealth may direct, the Consultant must, in accordance with the other terms of the direction, provide evidence of the Consultant's (including all persons who have been provided with or had access to Confidential Information), compliance with this clause 18 and a statutory declaration in a form from an Authorised Officer satisfactory

to the Commonwealth (acting reasonably) in respect of the Consultant's (including all persons who have been provided with or had access to Confidential Information) compliance with clause 18.

22.4 Security or Confidentiality Incidents (clause 18.3)

The Consultant must detect all actual or potential Security or Confidentiality Incidents and immediately notify the Contract Administrator and the Commonwealth if it becomes aware of any actual or potential Security or Confidentiality Incident.

The Consultant must also comply with clause 18.3(c) and (d) in respect of any Security or Confidentiality Incident.

22.5 Return and Retention of Confidential Information (clause 18.4)

- (a) Under clause 18.4(a), the Consultant must subject to paragraph (b) return to the Commonwealth or destroy all documents in its possession, power or control which contains any Confidential Information: in accordance with the Information Security Requirements; and
- (b) without limiting (a) above where the Confidential Information is no longer required for the purposes of the Contract.

Subject to ongoing compliance and the other requirements of clause 18 in respect of Confidentiality and Information Security, the Consultant may retain Confidential Information in its records if retention is required to comply with the Information Security Requirements or any other Statutory Requirement, insurance obligation or otherwise with the prior written approval of the Contract Administrator.

If the Consultant is aware that documents containing the Confidential Information are beyond its possession or control, then the Consultant must provide full particulars of the whereabouts of the documents containing the Confidential Information.

22.6 Release and Indemnity (clause 18.5)

The Consultant must bear, and releases the Commonwealth in respect of all costs, expenses, losses, damages or liabilities suffered or incurred

by the Consultant or any other person or entity arising out of or in connection with a Security or Confidentiality Incident.

Part 23 - Strategic Notice Event (clause 19)

23.1 Overview

Clause 19 covers issues relating to a Strategic Notice Event. This term covers four particular categories, namely:

- (a) a Material Change;
- (b) a Defence Strategic Interest Issue;
- (c) a Significant Event; or
- (d) any known or suspected Fraud or Corruption which is occurring or has occurred in connection with the Contract or the Services,

each of the above capitalised terms are in turn separately defined in clause 1.1 of the Conditions of Contract.

The Directorate of Program Assurance and/or the Directorate of Quality and Compliance should be notified immediately if any notice is received under this clause, and further advice should thereafter be sought in relation to what further steps are necessary and/or appropriate in order to protect Defence's interests.

23.2 Consultant's Warranty on Award Date (clause 19.1)

The Consultant warrants that, on the Award Date, it is not aware of any Strategic Notice Event.

23.3 Consultant to give Notice (clause 19.2)

If, at any time, the Consultant becomes aware of any Strategic Notice Event, the Consultant must, as soon as reasonably practicable, notify the Contract Administrator, providing details, to the extent such details are known by or reasonably available to the Consultant of:

- (a) the Strategic Notice Event including whether the Consultant considers that it is a Material Change, Defence Strategic Event Issue or a Significant Event; and
- (b) the steps which the Consultant has taken (or will take) to prevent, end, avoid, mitigate, resolve or otherwise manage the risk of any adverse effect of the Strategic Notice Event on the interests of the Commonwealth.

23.4 Commonwealth rights upon occurrence of Strategic Notice Event (clause 19.3)

If the Consultant notifies the Contract Administrator under clause 19.2 or has given a false warranty in any respect under clause 19.1 or has failed to strictly comply with clause 19 or the Commonwealth otherwise considers that there exists (or is likely to exist) a Strategic Notice Event, then the Commonwealth may (either itself, or through the Contract Administrator), notify the Consultant that it is required to provide further information, documents or evidence in relation to, and otherwise clarify, the matters referred to in clause 19.3(c) and in accordance with the clause.

The actual approach to be adopted by the Commonwealth will need to be assessed depending on the severity of the facts described in the Strategic Notice Event itself. The range of approaches may include a combination of any one or more of the following (among others):

- (a) seek from the Consultant further information, documents or evidence to clarify the position;
- (b) require the Consultant to prepare and implement a Strategic Notice Event Remediation Plan;
- (c) take into account the Strategic Notice Event at any time, including when (among other times) conducting performance reviews, exercising any access or audit rights or deciding whether or not to exercise any termination rights.

23.5 Strategic Notice Event Remediation Plan (clause 19.4)

If notified by the Commonwealth under clause 19.3(d), the Commonwealth must prepare and submit a draft Strategic Notice Event Remediation Plan through the Contract Administrator for approval within 10 business days of the Commonwealth's notice (or longer period agreed in writing by the Contract Administrator). The draft Strategic Notice Event Remediation Plan must include the information referred to in clause 19.4(b).

Following a review by the Contract Administrator, the Consultant must comply with each Strategic Notice Event Remediation Plan as approved by the Contract Administrator.

23.6 Additional Obligations in respect of Known or Suspected Fraud or Corruption (clause 19.5)

The Consultant must take all necessary actions to prevent, detect and investigate any known or suspected Fraud or Corruption; mitigate any loss or damage to the Commonwealth resulting from known or suspected Fraud or Corruption; and take all reasonable steps to ensure that known or suspected Fraud or Corruption is reported by the Consultant's officers, employees, subconsultants or agents.

The Consultant must also provide all assistance reasonably required in relation to any investigation undertaken in relation to known or suspected Fraud or Corruption.

23.7 Release (clause 19.6)

The Consultant must bear, and releases the Commonwealth in respect of all costs, expenses, losses, damages or liabilities suffered or occurred by the Consultant or any other person or entity arising out of or in connection with the Strategic Notice Event or the exercise of any of the Contract Administrator's or the Commonwealth's absolute discretions under clause 19.

23.8 Consultant's Compliance (clause 19.7)

The Consultant is not required to act in any manner or disclose any information which would have any of the consequences set out in clause 19.7(a)(i) to (iv), such as (among other circumstances) would breach an existing obligation of confidentiality that is owed to an unrelated third party or cause the Consultant to breach any law or contractual obligation regarding privacy or security or have an effect of waiving legal professional privilege.

The Consultant must use reasonable endeavours to ensure that the overarching intent of clause 19 is achieved.

Part 24- Financial Viability

24.1 Financial viability (clause 20)

24.1.1 Consultant's Warranty and Payment of Subconsultant (clauses 20(a) and 20(b))

Under clause 20(a), the Consultant:

(a) warrants to the Commonwealth that, on the Award Date, and on each date, it submits a payment claim, that it has the financial viability to meet its obligations under the Contract (and further warrants that each subconsultant has the ability to perform its relevant subcontract); and

(b) acknowledges that the Commonwealth has entered into the Contract in reliance on the Consultant's warranties under clause 20.

Further, the Consultant is obliged under clause 20(b) to pay all subconsultants in accordance with the payment terms in the relevant subcontract.

24.1.2 Consultant's / Subconsultants performance (clauses 20(c), 20(d), 20(e) and 20(f))

Clauses 20(c) to (f) describe the process through which the Consultant is obliged to notify the Contract Administrator of any matters which could affect or impact upon the Consultant's ability to meet its obligations under the Contract (including any actual or potential change in its (and/or its subconsultants') financial viability) – and the steps that the Commonwealth and/or the Contract Administrator may take in response to any such notice or regardless of whether or not any such notice has been issued.

In particular:

(a) under clause 20(c), the Consultant is obliged to keep the Contract Administrator fully and regularly informed of matters which may affect its (and its subconsultants') ability to meet its obligations under the Contract (and/or the relevant subcontract, as the case may be).

(b) under clause 20(d), the Contract Administrator may request the Consultant (at any time, and regardless of whether or not the Consultant has issued a notice under clause 20(c)):

(i) to provide a statement signed by the Consultant or a subconsultant attesting to the solvency of the Consultant or the relevant subconsultant; and/or

(ii) make a Financial Representative of the Consultant or any subconsultant available to the Contract Administrator or other entity engaged by the Commonwealth to answer questions and provide information relating to the Consultant's or the subconsultant's financial viability.

(c) under clause 20(e), the Contract Administrator may direct the Consultant to take such steps as the Commonwealth considers necessary to secure the performance of the Contract (including those steps set out in this sub-clause) if the Commonwealth considers (in its absolute discretion) that a change in either the Consultant's or a subconsultant's financial viability may adversely affect the Consultant's or subconsultant's ability to perform the Contract or the subcontract (as the case may be).

(d) under clause 20(f), the Consultant is required to comply with any steps the Commonwealth considers necessary to better secure a subconsultant's ability to perform the relevant subcontract.

24.1.3 Consultant's Acknowledgements and Assurances (clauses 20(g) and (h))

Under clauses 20(g) and (h), the Consultant:

(a) acknowledges that nothing in clause 20 limits, reduces or otherwise affects any of the Commonwealth's rights under other provisions of the Contract or otherwise at law or in equity and clause 20 does not give the Consultant (or any subconsultant) any rights; and

(b) unless otherwise approved by the Contract Administrator, the Consultant must ensure that each subcontract includes provisions equivalent to the obligations of the Consultant in clause 20.

Part 25 - Estate Information (clause 21)

25.1 Overview

Estate Information is defined in clause 1.1 and refers to information and data created in connection with and relating to the design and construction of, or each element of, the Works or a Stage (as defined in the Construction Contract) and that part of the Defence Estate upon which they are constructed.

The provision of accurate and complete Estate Information is a key requirement for Defence under these provisions, to ensure the successful use, operation and maintenance of completed projects after handover by a contractor.

25.2 Estate Information (clause 21)

25.2.1 Consultant Estate Information Obligations (clause 21.1)

This clause requires the Consultant to:

- (a) carry out and fulfil all Consultant Estate Information Obligations (as defined in clause 1.1); and
- (b) fully co-operate with (including providing information to) the Other Contractors to comply with their Estate Information Obligations; and
- (c) carry out Consultant Estate Information Obligations within any applicable timeframe; and
- (d) if requested by the Contract Administrator, provide within the requested period Project Documents (and other documents, drawings, recording or other information) required for the occupation, use, operation and maintenance of the Works or each Stage (as defined in the Construction Contract).

The Consultant also makes particular warranties at clause 21.1(b) including in regard to the Estate Information being in accordance with the requirements of the Contract and is complete, fit for purpose and free from errors and omissions.

25.2.2 No Obligation to Review (clause 21.2)

This clause is worded similarly to that of clause 6.4 and anticipates the argument that warranties provided by the Consultant in regards to the Estate Information might be undermined or derogated by the Contract Administrator's participation in the review process.

This clause seeks to ensure that the Consultant's warranty that the Estate Information is fit for purpose is not affected by any comments, review or rejection of that design by the Contract Administrator.

Despite this clause, the Contract Administrator should endeavour not to unduly interfere with the Estate Information provided by the Consultant. To do otherwise may lead to the Consultant being relieved of sole responsibility for problems in the Estate Information - notwithstanding the existence of clause 21.2 of the Conditions of Contract.

Part 26 – Payment Times Procurement Connected Policy (clause 22)

This clause will apply (and should be stated in the Contract Particulars as being applicable) if the Consultant is a Reporting Entity for the purposes of the Payment Times Procurement Connected Policy (PTPCP).

“Reporting Entity” is defined in section 7 of the *Payment Times Reporting Act 2020* (Cth) and includes an entity which carries on an enterprise in Australia and having a total income for the most recent income year of more than \$100 million. If the successful Consultant is a Reporting Entity, the Contract Particulars should be completed to state that clause 22 applies.

A key requirement of this clause (and consistent with PTPCP) is that if the Consultant enters into a PTPCP Subcontract, the Subcontract **must** include an obligation that the Consultant pay the PT PCP Subcontractor within 20 days after acknowledgement of the satisfactory delivery of the goods or services and receipt of a Correctly Rendered Invoice.

A PT PCP Subcontract means a subcontract between a Reporting Entity and another party where the component for goods or services has a total value less than, or is reasonably estimated to not exceed, \$1,000,000 (GST inclusive) during the period of the subcontract.

The obligations of a Consultant who enters into a Reporting Entity Subcontract are set out in clause 23(c). Reporting Entity Subcontractors are a Reporting Entity who provide goods or services directly or indirectly to the Consultant for the purposes of the Contract where the value of such goods or services are estimated to exceed \$4,000,000 (GST inclusive). In relation to Reporting Entity Subcontracts a key requirement of this clause is that, if the Consultant enters into a Reporting Entity Subcontract, the Consultant **must use its reasonable endeavours to include** in the Reporting Entity Subcontract:

- (a) an obligation that the Consultant pay the Reporting Entity Subcontractor within 20 days after acknowledgement of the satisfactory delivery of the goods or services and receipt of a Correctly Rendered Invoice; and

- (b) a requirement that if the Reporting Entity Subcontractor in turn enters into a Reporting Entity Subcontract (and likewise down the supply chain) then that applicable Reporting Entity Subcontract will include equivalent payment obligations.

Part 27 – Annexure 2: Special Conditions

27.1 Special Conditions

Refer to Part 3.4.3 of this Manual above for general guidance on the considerations which may be relevant to completing the Special Conditions.

In order for Special Conditions to be effective, Defence and the Tender Administrator / Contract Administrator must ensure that they complete those parts of the Special Conditions to be completed by Defence before issue of the Tender Documents and later, the Contract for execution.

All matters that are required to be completed by Defence and the Tender Administrator / Contract Administrator are identified in ***[SQUARE BRACKETS, BOLD AND ITALICS]***. As such, all information in ***[SQUARE BRACKETS, BOLD AND ITALICS]*** should be completed and the brackets deleted.

It is unlikely that all of the template special conditions set out Annexure 2 (Special Conditions) to the Contract will be applicable for each and every project. **Judgment is required.** The special conditions necessary must be determined on a project-by-project basis, having regard to a project's particular requirements.

All amendments required to the Conditions of Contract or the Special Conditions should be directed to and approved by the Delegate and not implemented "by stealth", through extensive use of special conditions. For example, it would not generally be appropriate for the special conditions to address (and impact on) each clause of the Conditions of Contract.

Special Conditions must be used for genuine project-specific requirements. If any further special conditions are necessary, advice from the Directorate of Program Assurance and/ or Directorate of Quality and Compliance and Defence's legal adviser for the project should be sought.

Whilst it is recognised that the special conditions used on other projects may be used, particular care needs to be taken to ensure that:

(a) the special condition is required for the particular project in question; and

(b) the terminology used in the special condition is consistent with the terminology in the Conditions of Contract. The use of Standards Australia terminology (eg, “Principal”, “Practical Completion”) is not appropriate. Defence and the Contract Administrator / Contract Administrator are expected to be familiar with the terminology used in the relevant Conditions of Contract.

Where whole clauses in the Special Conditions are inapplicable, they should be deleted, and Defence and the Contract Administrator / Contract Administrator should carefully check the clause numbering. The clause references below are based on the clause number attributed to the particular special condition in the template Special Conditions.

The Special Conditions clauses which must be completed by Defence and the Contract Administrator prior to issuing the Tender Documents and/or the Conditions of Contract for execution are as follows:

Annexure 2 - Special Conditions to the Design Services Contract		
Clause	Information to be inserted by Defence / Tender Administrator / Contract Administrator	Guidance
1. Use of Hazardous Substances (including Hazardous Chemicals)	No changes required.	<p>This clause seeks to eliminate or minimise (so far as is reasonably practicable) the risk that workers or other persons are exposed to Hazardous Substances as a consequence of activities conducted on Commonwealth Premises.</p> <p>If Hazardous Substances are known by the Commonwealth to be within the Commonwealth Premises and any other Commonwealth property provided to the Consultant relevant to the Services, the Commonwealth is required to notify the Consultant.</p> <p>In accordance with clause 1.2(c) of the</p>

Annexure 2 - Special Conditions to the Design Services Contract

Clause	Information to be inserted by Defence / Tender Administrator / Contract Administrator	Guidance
		<p>Special Conditions, the Consultant must:</p> <ul style="list-style-type: none"> (a) prepare, update and provide to the Contract Administrator (as applicable) a Hazardous Substance Register; (b) provide to the Contract Administrator a Safety Data Sheet; and (c) provide to the Contract Administrator (information in the form required by the Commonwealth (ChemAlert Information) for entry into the ChemAlert database. <p>The Consultant must also:</p> <ul style="list-style-type: none"> (a) receive prior written consent of the Contract Administrator under clause 1.2(d) of the Special Conditions before using, handling or storing Hazardous Chemicals, as described under clause 1.3(d) of the Special Conditions; (b) comply with the requirements under clause 1.2(e) of the Special Conditions in relation to Hazardous Substances, ChemAlert Information and the ChemAlert database; and (c) ensure compliance with WHS Legislation, any applicable Code of Practice and Statutory Requirements, in accordance with clause 1.2(f) of the Special Conditions. <p>As set out as clause 1.2(g), the Consultant is also responsible for all</p>

Annexure 2 - Special Conditions to the Design Services Contract		
Clause	Information to be inserted by Defence / Tender Administrator / Contract Administrator	Guidance
		Hazardous Substances used in the Services or incorporated into the Works by subconsultants.
2. Site Restrictions	Delete wording “[<i>INSERT DESCRIPTION OF RESTRICTIONS</i>]”. Insert details of any restrictions on Site based Services or insert “None stated”.	This special condition will be appropriate where any of the Services will be carried out on Site and such Site based Services will be subject to certain restrictions. Restrictions on Site based Services might include: (a) days and hours of access; (b) areas of Site or access; and (c) that persons seeking access register, pass security clearances or other clearance processes.
3. Requests for Information	No changes required.	This special condition will be appropriate where the Consultant is required to respond to Requests for Information as part of the Services. All documentation provided by the Consultant in responding to Requests for Information will be deemed to be “Design Documentation” for the purposes of the Contract. Without limiting the Conditions of Contract, the Consultant is required to: (a) perform the Request for Information Services so as to fully address each Request for Information, reduce the need for further Requests for Information and minimise any exposure to delay and extra costs under the Construction Contract; (b) submit/resubmit the relevant

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		<p>Design Documentation in accordance with the Design and Documentation provisions in the Contract;</p> <p>(c) perform the Request for Information Services within the time required by the Contract Administrator; and</p> <p>(d) ensure its personnel and resources have appropriate qualifications, experience, ability, expertise and availability to perform the Request for Information Services.</p>
4. Method of Work Plan for Airfield Activities	Delete wording “[<i>INSERT EG 14 days</i>]” in clause 4(a) and insert the latest number of days after the Award Date (and as a condition precedent to access being given to the Site) by which the Consultant must prepare and implement a Method of Work Plan for Airfield Activities.	<p>This Special Condition is only relevant when the Site is located on or near an operating airfield.</p> <p>If this special condition is to apply, then in relation to the line item of the Contract Particulars titled “Project Plans (additional) the link to this applicable clause of the Special Conditions must be completed.</p> <p>By virtue of paragraph (g) of the definition of Site Management Plan, it is important to check that the Site Management Plan prepared by the Consultant addresses the procedure for the preparation and approval of the Method of Work Plan for Airfield Activities.</p> <p>Without limiting clause 7.4 of the Conditions of Contract applicable to Project Plans, this special condition requires the Consultant to prepare and implement a Method of Work Plan for Airfield</p>

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		<p>Activities for all aspects of the Services. This plan must incorporate Site specific management and control procedures and set out in adequate detail all procedures the Consultant will implement to manage the Services on and near the Site, including (as applicable) the matters set out in clause 4(b) of the Special Conditions.</p>
5. Operating Airfield	No changes required.	<p>This special condition is only relevant when the Site is located on or near an operating airfield.</p> <p>It provides that the Consultant must ensure that the Services do not compromise aircraft operations or the safety of aircraft.</p> <p>Further, as part of the Services, the Consultant must liaise with the Commonwealth and the Contract Administrator as required to co-ordinate the Services with, and prevent interruption of, Commonwealth activities including aircraft operations and the safety of aircraft.</p>
6. Civil Liability Act (Western Australia)	No changes required.	<p>This special condition will only be appropriate where the governing law is the law of Western Australia, and the Site is in Western Australia.</p> <p>This clause amends clause 13.14 of the Conditions of Contract by inserting a paragraph to make it clear that provisions of Part 1F of the Civil Liability Act 2002 (WA), which deals with proportional liability, are excluded from</p>

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		application to the Contract.
7. Adjustment of Table of Variation Rates and Prices	No changes required.	<p>This special condition will be appropriate where the rates and prices in the Table of Variation Rates and Prices are to be adjusted annually on the anniversary of the Award Date.</p> <p>The Fee will not be subject to rise and fall.</p> <p>Note also that the Indicative Delivery Phase Fee and the Delivery Phase Fee Proposal will not be adjusted purely on the basis that:</p> <ul style="list-style-type: none"> (a) the Consultant used the Table of Variation Rates and Prices to calculate the Indicative Delivery Phase Fee; and (b) the Table of Variation Rates and Prices is subject to adjustment, except to the extent expressly stated in the Delivery Phase Fee Proposal.
8. Child Safety	Delete the guidance notes and square brackets which are in <i>[BOLD and ITALICS]</i>	<p>This clause is to be used in circumstances where the Consultant (and its employees, subconsultants) will or may interact with children during the term of the contract in an incidental way. For example, if the Consultant is carrying out activities that may be provided on a school's premises even where interacting with children is not a part of the contracted activities.</p> <p>If any part of the Services involves employing a person that is required by State or Territory law to have a working with children check the Consultant must comply with all applicable State and</p>

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		Territory law relating to people who work with children in connection with the Services.
9. Preliminary Design Solution	Delete the guidance notes and square brackets which are in <i>[BOLD and ITALICS]</i> and complete clause 10(a) to specify whether prior to the Award Date the Consultant or the Commonwealth's Design Consultants have prepared the Preliminary Design Solution.	<p>This clause is to be used in circumstances where the Commonwealth requires the Consultant to use a Preliminary Design Solution but still bear all risks. The Preliminary Design Solution may be prepared by either the Consultant (and lodged as part of its Tender) or by the Commonwealth's Design Consultant before the Award Date.</p> <p>This Special Condition requires the Consultant to design the Works in accordance with the Preliminary Design Solution except to the extent where a variation necessitates a consequential change.</p> <p>The Consultant bears all risks as a result of its use of the Preliminary Design Solution and such use does not affect any of its warranties or other obligations under the Contract.</p> <p>The following additional guidance points should be noted:</p> <p>(a) the definition of "Preliminary Design Solution" in clause 1.1 of the Conditions of Contract is linked to the description in the applicable line item in the Contract Particular. As the Consultant bears all risk in relation to the Preliminary Design Solution, it is suggested the documents forming the Preliminary Design Solution be linked to a stand-alone new Annexure to the Contract eg</p>

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		<p>“the documents as set out in Annexure [6].”; and</p> <p>(b) there is currently no contemplation in the Tender Schedules for the Tenderers to produce any preliminary design documents as part of its Tender.</p> <p>If any preliminary design documents are to be produced by Tenderers to be evaluated by the Commonwealth, then this will need to be reflected in the applicable PDDP and the Tender Documents amended as appropriate – need prior approval of the Delegate to amend the Tender Documents.</p>
10. Early Contractor Involvement (ECI)	If applicable, delete the guidance notes and square brackets which are in <i>[BOLD and ITALICS]</i> .	<p>This clause is to be used where the Commonwealth is delivering the Project on the basis of an ECI delivery model, a key purpose of which is to provide for early involvement of the Contractor(s) in the design, planning, programming and cost planning of the works and to maximise the achievement of the ECI Objectives.</p> <p>The Consultant acknowledges that, under the ECI delivery model, the Consultant has prior responsibility to prepare, program and integrate the Design Documentation and otherwise perform the Services in accordance with the Contract.</p> <p>Among other obligations under the Contract, the Consultant must proactively work to identify and propose options to maximise achievement of the ECI objectives.</p>

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Clause	Information to be inserted by Defence / Tender Administrator / Contract Administrator	Guidance
11. Joint and Several Liability	Delete the guidance notes and square brackets which are in <i>[BOLD and ITALICS]</i> .	<p>This clause is only to be used where the Consultant is comprised of a joint venture (i.e. the Consultant is comprised of two or more parties). Accordingly, this clause is to be retained at the time of tender in its current form if one or more tenderers will be on a Joint Bid Basis – but should be deleted prior to execution of the Contract if the Consultant is not comprised of a joint venture.</p> <p>It is noted that this clause only applies where the Consultant itself comprises of more than one entity, and this Special Condition is not relevant if the Consultant is a single entity which will subcontract some of the Services to one or more entities.</p>