COMMERCIAL (CORE)

1. IMPORTATION OF SERVICES AND EXPORT APPROVALS (Core)

Draft COC reference: clauses 3.4 and 3.5

Note to tenderers: Tenderers must inform themselves of the export control status of the tendered Services and comply with Australian and Foreign Government controls related to the export of defence and dual-use goods, including if the export is from an Australian contractor to an overseas subcontractor or Related Body Corporate, for the purposes of a contract.

Advice on the control status of goods and services can be requested by emailing Defence Export Controls at [ExportControls@defence.gov.au](mailto:ExportControls@defence.gov.au). Further information may be found at:

* <https://www.defence.gov.au/business-industry/export/controls>.
  1. Tenderers proposing to import parts of the Services are to provide:
     1. an indication of what is being imported;
     2. evidence from the Government of the country of origin that the tenderer will be granted an Export Approval for those items if the tenderer is awarded any resultant Contract;
     3. identification of any specific limitations or provisos that the Government of the country of origin could reasonably be expected to place on the Export Approval with respect to individual items of tendered Services including, as applicable, TD and Software;
     4. details of other approvals required in addition to, or as part of, the grant of Export Approvals (eg, technical assistance agreements) and the impact to schedule of gaining such approvals; and
     5. details of any rejected application for, or refusal to grant, an Export Approval for goods, similar to those within the Services, which may have a bearing on an application to export the Services.

1. LIABILITY (Core)

Draft COC reference: clause 10.10

Note to drafters: Refer to clause 10.10 of the draft COC for notes on liability risk assessments.

Note to tenderers: The liability caps and insurance requirements in clauses 10.10 and 9 respectively of the draft COC are based on a liability risk assessment conducted by the Commonwealth in accordance with the Defence Liability Principles and the standard Defence methodology described in the Liability Risk Assessment template; both can be accessed at:

* <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/liability-risk-management>.
  1. If a tenderer proposes to limit its liability on an alternative basis to that set out in clause 10.10 of the draft COC (eg, by proposing a liability limitation or exclusion additional to those set out in clause 10.10), the tenderer is to provide the following details:
     1. the terms of the tenderer’s proposed limitation of liability, including their proposed monetary cap for each category of loss/liability set out in clause 10.10.1 and 10.10.3 (if applicable) of the draft COC;
     2. an explanation of why the tenderer requires a limitation of its liability regime different to that proposed in clause 10.10 of the draft COC; and
     3. the impact (if any) of these changes on the insurance requirements of the draft COC.

1. INSURANCE (Core)

Draft COC reference: clause 9

Note to tenderers: Refer to clause 9.1 of the draft Contract for information on the Approved Contractor Insurance Program (ACIP) and the current ACIP status of participating companies.

For insurance policies other than ACIP approved insurance policies, the Commonwealth will seek comprehensive details from the preferred tenderer(s) during negotiations for any resultant Contract. The Commonwealth reserves the right to request additional insurance policies based on any circumstances assessed as being relevant to the Commonwealth’s risk assessments.

* 1. All tenderers are to indicate in their Statement of Non-Compliance the extent to which they do not comply with the insurances required by the draft COC (provided that tenderers with ACIP status are deemed compliant in relation to the insurances that are within their ACIP approval).
  2. All tenderers are to identify in their tendered prices detailed in the ‘Specific Prices’ worksheet of the Support Pricing Workbook (SPTPW) submitted under TDR D, details of all costs associated with the insurance policies covered in the tenderer’s insurance response.

1. TECHNICAL DATA AND SOFTWARE RIGHTS (Core)

Draft COC reference: clause 5

Note to drafters: Refer to clause 5 of the draft COC regarding analysis and tailoring requirements

Note to tenderers: Tenderers are required to submit a draft TDSR Schedule, and ensure that any restrictions set out in their draft TDSR Schedule do not materially limit the achievement of the Commonwealth’s sustainment objectives with respect to the Products Being Supported, affect the Commonwealth’s rights at clause 5.3 of the draft COC (otherwise than as provided for below), or the tenderer's compliance with the warranties contained in clause 5 of the draft COC.

Tenderers should familiarise themselves with the ASDEFCON Technical Data and Intellectual Property Commercial Handbook, which can be accessed at:

* <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/intellectual-property-framework>.
  1. Tenderers are to provide a draft TDSR Schedule in the form of Attachment G to the draft COC by specifying the following:

Note to tenderers: Highly Sensitive TD and Highly Sensitive Software listed in Annex A should only include TD or Software the disclosure of which would have a major adverse effect on the commercial interests of the Contractor or Approved Subcontractor. This TD or Software must be clearly identified at its lowest constituent / configuration item and linked to the TDL. Highly Sensitive TD and Highly Sensitive Software would generally already exist at the Effective Date and not include TD or Software specifically created under the Contract for the Commonwealth.

* + - 1. Annex A - all items of TD and Software to be identified as Highly Sensitive TD and Highly Sensitive Software and all proposed restrictions that will apply to the Commonwealth's rights to Use and Sublicense the specified TD and Software;
      2. Annex B - all restrictions proposed that would limit the:
         1. TD and Software rights to be granted under clause 5.3.3b(ix) of the draft COC; and
         2. delivery of TD and Software to the Commonwealth or other persons under clause 5.13 of the draft COC;

Note to tenderers: The Commonwealth may require that a Commercial Item be listed as a Key Commercial Item in Annex C to the TDSR Schedule, notwithstanding that it is not owned by the Contractor, Approved Subcontractor or a Related Body Corporate of the Contractor. This may be required if the Commonwealth considers that the relevant Commercial Item is of high value or particular significance to the sustainment of the Products Being Supported.

* + - 1. Annex C - any Key Commercial Items proposed to be provided as, or as part of, the Deliverables and the proposed licence terms in respect of the related Commercial TD and Commercial Software in accordance with clause 5.4.3 of the draft COC;

Note to tenderers: The Commonwealth may require ownership of certain TD and Software for reasons relating to national security and / or strategic interests associated with the sustainment of the Products Being Supported (Commonwealth TD or Commonwealth Software). If TD and Software is specified as Commonwealth TD / Commonwealth Software, then ownership of IP created under the Contract in respect of those items will vest in the Commonwealth.

If any Commonwealth TD or Commonwealth Software contains IP created outside the Contract and Subcontracts (eg, in existence prior to Effective Date), the Contractor is to grant a licence to the Commonwealth under clause 5.3 of the draft COC (subject to any proposed restrictions listed in Annex B to Attachment G). Tenderers should not propose restrictions that prevent the use of the Commonwealth TD or Commonwealth Software as provided by clause 5.16.1b of the draft COC.

* + - 1. Annex D - in relation to any items or equipment specified in Annex D for which the Commonwealth has identified that it is to own the IP created under the Contract or a Subcontract (Commonwealth TD or Commonwealth Software), the tenderer is to include, to the extent known, details of the TD or Software of those items or equipment at the system, subsystem or component level;

Note to tenderers: The Commonwealth will only agree to entities being Excluded Parties in exceptional circumstances, to prevent certain competitors from being Commonwealth Service Providers for the sole purpose of the licences granted under clauses 5.3.3a and 5.7.1b(i) of the draft COC. However, the Commonwealth will be permitted to grant Sublicences to Excluded Parties in other circumstances permitted under clause 5 of the draft COC.

* + - 1. Annex E - those parties who are proposed by the tenderer to be excluded from being a Commonwealth Service Provider for the sole purpose of the licences granted under clauses 5.3.3a and 5.7.1b(i) of the COC. The tenderer is to include the period of the restriction, which cannot be perpetual; and
      2. Annex F - details of any restrictions that limit the licences granted to the Commonwealth under the Contract in relation to Patents, Registrable Designs or Circuit Layouts, in accordance with clause 5.18 of the draft COC.
  1. Tenderers are to provide detailed justification for all proposed restrictions or other terms included in the draft TDSR Schedule (to the extent it knows what the restrictions are or are likely to be), including a detailed explanation of how any such restrictions will not detrimentally impact the sustainment of the Products Being Supported.
  2. Tenderers are to identify in their tender any Commercial TD and Commercial Software for which the licence to be granted to the Commonwealth for the purposes of clause 5.4.4 of the draft COC, will or is likely to require the Commonwealth to pay a Royalty or other fee (not otherwise included in the tendered price and payment details).

1. Economic Benefits TO THE AUSTRALIAN ECONOMY (Core)

Note to tenderers: For an explanation of economic benefits, refer to the Department of Finance:

* <https://www.finance.gov.au/sites/default/files/2024-07/consideration-of-broader-economic-benefits-in-procurement_july-2024.pdf>.
  1. Tenderers are to provide details of the direct economic benefits that any resultant Contract would achieve for the Australian economy.