



## Australian Government

### Defence

[INSERT NAME OF CAPABILITY/SYSTEM] ACQUISITION CONTRACT

CONTRACT NO: (INSERT NUMBER)

#### DETAILS SCHEDULE

#### PARTIES

**COMMONWEALTH OF AUSTRALIA** represented by the Department of Defence

ABN 68 706 814 312 (**Commonwealth**)

<b>Commonwealth Representative:</b>	(INSERT DETAILS)	
<b>Notice Details:</b>	Address:	(INSERT ADDRESS)
	Fax:	(INSERT FAX NUMBER)
	Email:	(INSERT EMAIL ADDRESS)

(Insert full name of Contractor) ABN (Insert Contractor's ABN) (Contractor)

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

#### INFORMATION TABLE

Item	Information	
<b>Item 1</b> (clause 1.4)	<b>Effective Date:</b> (Core)	(INSERT DATE)
<b>Item 2</b> (clause 1.8)	<b>Option Date:</b> (Optional)	(INSERT DATE/MILESTONE)
<b>Item 3</b> (clause 3.5)	<b>Base Date:</b> (Core)	[INSERT DATE] <b>Note to drafters: The Base Date is ordinarily one month before the Closing Time.</b>
<b>Item 4</b> (clause 7.3)	<b>Exchange Rate:</b> (Core)	The spot selling rate of [INSERT THE RELEVANT FOREIGN CURRENCY/CURRENCIES] relative to the dollar used by [INSERT THE RELEVANT FINANCIAL INSTITUTION].
<b>Item 5</b> (clause 7.4)	<b>Bank Guarantee for Mobilisation Payment:</b> (RFT Core)	Mobilisation Security Amount: (INSERT \$ AMOUNT BEING 50% OF THE MOBILISATION PAYMENT)
		Mobilisation Security Date: (INSERT DATE)

Item	Information					
<b>Item 6</b> (clause 7.5)	<b>Bank Guarantee for Performance:</b> (RFT Core)	Performance Security Amount:	\$[INSERT AMOUNT]			
		Performance Security Date:	[INSERT DATE AFTER THE EFFECTIVE DATE]			
		Release Event:	[INSERT EVENT THAT WILL LEAD TO RELEASE OF PERFORMANCE SECURITY BY THE COMMONWEALTH]			
<b>Item 7</b> (clause 7.7)	<b>Deed of Guarantee and Indemnity:</b> (RFT Core)	<input type="checkbox"/> Yes / <input type="checkbox"/> No  Guarantor: (INSERT NAME)				
<b>Item 8</b> (clause 7.11)	<b>Incentive Payment:</b> (Optional)	[INSERT MAXIMUM AMOUNT PAYABLE]				
<b>Item 9</b> (clause 7.12.7)	<b>GST Agent:</b> (RFT Core)	Name:	(INSERT NAME)	ABN:	(INSERT ABN)	
		Address:	(INSERT ADDRESS)			
		Fax:	(INSERT FAX NUMBER)			
		Email:	(INSERT EMAIL ADDRESS)			
<b>Item 10</b> (clause 8.1.1)	<b>Defect Notification Period:</b> (Core)	From the Effective Date until [INSERT PERIOD] after expiry or earlier termination of the Contract.				
<b>Item 11</b> (clause 8.2.1)	<b>Defect Rectification Period:</b> (Core)	If the Defect is a Latent Defect, the period of [INSERT PERIOD] after Acceptance of the Supplies (or if the Contract does not provide for Acceptance of the relevant Supplies, Final Acceptance).  If the Defect is not a Latent Defect, the period of [INSERT PERIOD] after Acceptance of the Supplies (or if the Contract does not provide for Acceptance of the relevant Supplies, Final Acceptance) or such other period determined in accordance with clause 8.2.6.				
<b>Item 12</b> (clause 9.1)  <b>Note to drafters: Delete insurance policies if they do not apply.</b>	<b>Approved Contractor Insurance Program Status:</b> (Core)	<input type="checkbox"/> Yes / <input type="checkbox"/> No				
	<b>Limits of indemnity for required insurances:</b> (Core)	Public liability: (clause 9.1.4a)	\$[INSERT AMOUNT] million			
		Products liability: (clause 9.1.4b)	\$[INSERT AMOUNT] million			
		Public and products liability tangible property sublimit: (clause 9.1.4e)	\$[INSERT AMOUNT] million			
		Professional indemnity: (clause 9.1.5)	\$[INSERT AMOUNT] million			

Item	Information		
		Industrial special risks business interruption period: (clause 9.1.6b)	[INSERT NUMBER ] weeks
		Motor vehicle insurance: (clause 9.1.8b)	\${[INSERT AMOUNT]} million
		Aviation liability: (clause 9.1.10a)	\${[INSERT AMOUNT]} million
		Aviation products liability: (clause 9.1.10b)	\${[INSERT AMOUNT]} million
		Aviation liability tangible property sublimit: (clause 9.1.10e)	\${[INSERT AMOUNT]} million
		Hangarkeepers: (clause 9.1.11)	\${[INSERT AMOUNT]} million
		Marine liability: (clause 9.1.13)	\${[INSERT AMOUNT]} million
		Marine liability tangible property sublimit: (clause 9.1.13c)	\${[INSERT AMOUNT]} million
		Ship builders: (clause 9.1.14)	\${[INSERT AMOUNT]} million
		Cyber (clause 9.1.15)	\${[INSERT AMOUNT]} million
		Contract works advanced consequential loss period: (clause 9.1.16b)	[INSERT NUMBER ] weeks
Item 13 (clause 10.10.1)	Limitation Amount: (Core)	Loss of or damage to Defence property (other than Supplies): (clause 10.10.1a)	\${[INSERT AMOUNT]} million
		Liquidated Damages: (clause 10.10.1b)	\${[INSERT AMOUNT]} million
		Loss of or damage to Supplies (including loss of use of Supplies), and Losses other than those referred to in clauses 10.10.1a and 10.10.1b: (clause 10.10.1c)	\${[INSERT AMOUNT]} million
Item 14 (clause 10.10.3)	Overall Limitation Amount: (Optional)	Loss of any kind:	\${[INSERT AMOUNT]} million
Item 15 (clause 10.11)	Renegotiation Threshold: (Core)	[INSERT \$ AMOUNT OR % OF THE CONTRACT PRICE]	

Item	Information				
<b>Item 16</b> (clause 11.9.3a)	<b>Approved Subcontractor Threshold:</b> (Core)	<b>[INSERT \$ AMOUNT OR % OF THE CONTRACT PRICE]</b>			
<b>Item 17</b> (clause 11.10)	<b>Defence Security:</b> (Core)	Security classification of information, assets and work to be performed under the Contract: (clause 11.10.3)	<b>[INSERT CLASSIFICATION]</b>		
		Personnel security clearance: (clause 11.10.3b)	<b>[INSERT CLASSIFICATION]</b>		
		DISP membership required: (clause 11.10.4 or 11.10.5)	<input type="checkbox"/> Yes / <input type="checkbox"/> No		
		<b>Note to Drafters: Delete DISP Governance Level, DISP Personnel Security Level, DISP Physical Security Level and DISP Information / Cyber Security Level if DISP membership is not required.</b>			
		DISP Governance Level:	<b>[INSERT LEVEL]</b>	<b>[INSERT SPECIFIC DETAILS IF REQUIRED]</b>	
		<b>Note to Drafters: In accordance with Control 16.1 of the DSPF, the DISP membership level required for the Governance element must equal the highest DISP membership level required for the other elements.</b>			
		DISP Personnel Security Level:	<b>[INSERT LEVEL]</b>	<b>[INSERT SPECIFIC DETAILS IF REQUIRED]</b>	
		DISP Physical Security Level:	<b>[INSERT LEVEL]</b>	<b>[INSERT SPECIFIC DETAILS IF REQUIRED]</b>	
		DISP Information / Cyber Security Level:	<b>[INSERT LEVEL]</b>	<b>[INSERT SPECIFIC DETAILS IF REQUIRED]</b>	
		Security Classification and Categorisation Guide included: (clause 11.10.7)	<input type="checkbox"/> Yes / <input type="checkbox"/> No		
COMSEC material: (clause 11.10.9 and 11.10.10)	<input type="checkbox"/> transmitted in Australia	<input type="checkbox"/> transmitted overseas	<input type="checkbox"/> Yes / <input type="checkbox"/> No		

Item	Information		
<b>Item 18</b> (clause 12.1)	<b>Governing Law:</b> (Core)	<b>[INSERT RELEVANT STATE OR TERRITORY]</b>	
<b>Item 19</b> (clause 13.1.3)	<b>Management Representatives</b> (position): (Core)	<b>Commonwealth:</b>	<b>(INSERT DETAILS)</b>
<b>Item 20</b> (clause 13.1.5)	<b>Senior Representatives</b> (position): (Core)	<b>Commonwealth:</b>	<b>(INSERT DETAILS)</b>
		<b>Contractor:</b>	<b>(INSERT DETAILS)</b>

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## **1 CONTRACT FRAMEWORK**

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

---

1.1.1 In the Contract, unless the contrary intention appears, words, abbreviations and acronyms have the meanings given to them in the Details Schedule, or by the Glossary at Attachment M. The Glossary also contains definitions of WBS elements, a list of documents referred to in the Contract and details of the version that is applicable to the Contract.

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

---

1.2.1 In the Contract, unless the contrary intention appears:

- a. headings are for the purpose of convenient reference only and do not form part of the Contract;
- b. the singular includes the plural and vice-versa;
- c. a reference to one gender includes any other;
- d. a reference to a person includes a body politic, body corporate or a partnership;
- e. if the last day of any period prescribed for the doing of an action falls on a day which is not a Working Day, the action shall be done no later than the end of the next Working Day;
- f. a reference to an Act is a reference to an Act of the Commonwealth, State or Territory of Australia, as amended from time to time, and includes a reference to any subordinate legislation made under the Act;
- g. a reference to a clause includes a reference to a subclause of that clause;
- h. a reference to a "dollar", "\$", "\$A" or "AUD" means the Australian dollar;
- i. a reference to a specification, publication, Commonwealth policy or other document is a reference to that specification, publication, Commonwealth policy or document, in effect on the Effective Date specified in the Details Schedule, or alternatively, a reference to another version of the document if agreed in writing between the parties;
- j. the word "includes" in any form is not a word of limitation;
- k. a reference to a party includes that party's administrators, successors, and permitted assigns, including any person to whom that party novates any part of the Contract; and
- l. a provision stating that a party "may" agree or consent to something, approve or reject something, or take or decline to take an action, means that the party may exercise its discretion in deciding whether or not to do so, and may impose conditions on any such agreement, consent or approval.

### **1.3 Objectives (Core)**

---

1.3.1 The objectives of the parties in entering into the Contract are:

- a. to ensure that, for the payments provided for under the Contract, the Contractor delivers the Supplies on time, on budget and to the required safety, quality and capability, in accordance with the Contract;
- b. to provide materiel elements and associated services, Intellectual Property (IP) rights, Technical Data (TD), know-how and know-why, which enable an effective Capability that:
  - (i) achieves the ADF's mission(s) for the Capability, as set out in the Contract;
  - (ii) achieves Defence's Sovereignty needs, including providing the Commonwealth with the capability to have enduring sovereign control over the operation and sustainment of the Mission System; and
  - (iii) ensures Materiel Safety, achieves Environmental Outcomes, and complies with, and enables the Commonwealth to comply with, all applicable environmental and safety laws and related regulatory requirements,  
(collectively, the 'ADF Capability Objectives');
- c. to:

- (i) within the context of clause 1.3.1d, identify and pursue opportunities to maximise the participation of Australian Entities in the performance of the Contract;
  - (ii) facilitate the creation, enhancement and/or maintenance of Industry Capabilities within Australia and New Zealand to satisfy the Contract requirements, achieve the ADF Capability Objectives, and support government's and Defence's goals for Australian Industry, as set out in Defence industry policy; and
  - (iii) ensure that Australian Industry has the necessary technology, IP rights, TD, know-how and know-why to participate in future development and sustainment work in relation to the Materiel System,  
(collectively, the 'Australian Industry Capability (AIC) Objectives');
- d. to obtain value for money for the Commonwealth on a whole-of-life basis in relation to the Supplies in accordance with the Commonwealth Procurement Rules (CPRs), including through minimising Life Cycle Cost for the Materiel System as required by the Contract;
- e. to obtain for the Contractor as a commercial entity a reasonable return on its investment when it performs the Contract efficiently and successfully, being a return that appropriately reflects properly managed risks involved in the performance of the Contract;
- f. for each party to perform their respective obligations under the Contract with full commitment to fostering trust, cooperation and collaboration, including by:
- (i) communicating openly and honestly and in a timely manner;
  - (ii) sharing information to support effective decision making and using information shared for positive outcomes;
  - (iii) working together respectfully, productively and in a timely manner to achieve best for Capability outcomes;
  - (iv) taking accountability and delivering on commitments;
  - (v) assigning personnel with the requisite capability and capacity for collaborative working;
  - (vi) providing proactive, cooperative and flexible support when challenges arise; and
  - (vii) accepting and respecting decisions once made; and
- g. **[INSERT PROJECT SPECIFIC OBJECTIVES IF ANY].**
- 1.3.2 Without in any way affecting or overriding the other terms of the Contract, each party agrees to perform its obligations and enforce its rights under the Contract having regard to, and with the aim of, achieving the objectives described in clause 1.3.1.

#### **1.4 Effective Date (Core)**

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- 1.4.1 The Contract commences on the Effective Date specified in the Details Schedule.

#### **1.5 Entire Agreement (Core)**

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- 1.5.1 To the extent permitted by law, the Contract represents the parties' entire agreement in relation to the subject matter of the Contract and supersedes all tendered offers and prior representations, communications, agreements, statements and understandings, whether oral or in writing.

#### **1.6 Precedence of Documents (Core)**

---

- 1.6.1 If there is any inconsistency between parts of the Contract, a descending order of precedence shall be accorded to:
- a. the COC (including the Details Schedule) and the Glossary (other than the referenced documents in the Glossary);
  - b. the SOW and its annexes;
  - c. the attachments other than the SOW and the Glossary; and
  - d. any document incorporated by express reference or otherwise referenced as part of the Contract,

so that the provision in the higher ranked document, to the extent of the inconsistency, shall prevail.

### **1.7 Contracted Requirement (Core)**

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1.7.1 The Contractor shall, for the Contract Price and any other payment required under the Contract, provide the Supplies and comply with all of its other obligations under the Contract.

### **1.8 Option for Further Quantities and Optional Extras (Optional)**

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1.8.1 The Contractor grants the Commonwealth the option to purchase additional quantities of Supplies and optional extras as set out in Annex F to Attachment B, at any time prior to the Option Date specified in the Details Schedule. The option shall be subject to the terms of the Contract, including those detailed in Annex F to Attachment B.

1.8.2 The Commonwealth may exercise the option by giving a notice to the Contractor identifying the optional extras or quantity and type of additional quantities of Supplies (as appropriate) to be purchased. The Contractor shall, within 30 days after receipt of the notice, submit a CCP in accordance with clause 11.1 to give effect to the exercise of the option.

## **2 CONTRACT GOVERNANCE**

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

---

2.1.1 The Commonwealth Representative is responsible for managing the Contract on behalf of the Commonwealth.

2.1.2 The Contractor shall comply with the reasonable directions of the Commonwealth Representative made within the scope of the Contract.

2.1.3 The parties may discuss the effect of a direction on the Contractor, including through the Contract Governance Framework set out in Attachment P. If the parties agree that the direction is not consistent with clause 2.1.2, the Contractor may submit a CCP to give effect to the direction.

2.1.4 If given orally, a direction shall be confirmed in writing by the Commonwealth Representative within 10 Working Days. Unless otherwise specified in the Contract, the Commonwealth Representative has no authority to waive any provision of, or release the Contractor from, its obligations under the Contract except in accordance with clause 11.1 or clause 8.4 of the SOW.

2.1.5 The Contractor Representative has the authority to represent the Contractor for the purposes of the Contract.

2.1.6 The Commonwealth Representative or the Contractor Representative:

- a. shall advise of a change in representative; and
- b. may delegate their functions under the Contract, or authorise another person on their behalf to carry out their functions under the Contract,

by giving a notice to the other party (including updated Notice Details specified in the Details Schedule, and the scope of the delegation or authorisation, as applicable).

2.1.7 Unless authorised by the Contract, any work performed or cost incurred by the Contractor in response to a communication from the Commonwealth Representative is at the Contractor's sole risk.

### **2.2 Notices (Core)**

---

2.2.1 Unless the contrary intention appears, any notice under the Contract shall be effective if it is in writing and sent from and delivered to the Commonwealth Representative or Contractor Representative, as the case may be, in accordance with the Notice Details specified in the Details Schedule.

2.2.2 A notice given in accordance with this clause 2.2 is deemed to be delivered:

- a. if hand delivered, when received at the address;
- b. if sent by pre-paid post, in three Working Days when sent within Australia and in eight Working Days when sent by air mail from one country to another; or

- c. if sent as an email, when the email enters the recipient's information system, unless the sender's information system receives a message within one Working Day that the email has not been delivered to the recipient,

but if the receipt, transmission or entry into the information system is not on a Working Day or is after 5.00pm (recipient's local time) on a Working Day, the notice is taken to be received at 9.00am (recipient's local time) on the next Working Day.

### **2.3 Governance Framework (Core)**

---

- 2.3.1 The Commonwealth and the Contractor shall manage their Contract relationship, and oversee and manage their respective performance of the Contract, in accordance with the Contract Governance Framework set out in Attachment P.

## **3 PRODUCTION OF THE SUPPLIES**

### **3.1 Language and Measurement (Core)**

---

- 3.1.1 All information delivered as part of the Supplies under the Contract shall be written in English. If such documentation is a translation into the English language, the translation shall be accurate and free from ambiguity.
- 3.1.2 Measurements of physical quantity shall be in Australian legal units as prescribed under the *National Measurement Act 1960* (Cth), or, if Supplies are imported, units of measurement as agreed in writing by the Commonwealth Representative.

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

---

- 3.2.1 The Contractor shall:
- a. carry out its work under the Contract (including designing, developing, manufacturing, constructing, installing, integrating and testing the Supplies, and providing services):
    - (i) in accordance with the standards specified in the Contract and all applicable laws; and
    - (ii) otherwise in accordance with good industry practice;
  - b. ensure that the Supplies conform to the requirements of the Contract; and
  - c. ensure that the Supplies are compatible with and do not restrict the performance of, or adversely affect, other equipment specified or referred to in the Contract that will, or may, be used with the Supplies.
- 3.2.2 For the purpose of this clause, "good industry practice" means practices, methods and standards that would reasonably be expected from professional and experienced contractors in the relevant industry undertaking the same type of work as the Contractor in the same or similar circumstances.

### **3.3 Fitness for Purpose (Core)**

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- 3.3.1 The Contractor shall ensure that the Supplies are fit for the purposes provided for in the Contract, except to the extent that the failure of the Supplies to be fit for purpose results from a Commonwealth Default.

### **3.4 Authorisations (Core)**

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- 3.4.1 The Contractor shall, and shall ensure that its Subcontractors:
- a. obtain and maintain in full force all Authorisations (other than Export Approvals);
  - b. take all reasonable steps to obtain and maintain in full force all Export Approvals;
  - c. provide a copy of any Authorisations to the Commonwealth within five Working Days after request by the Commonwealth; and
  - d. ensure that all work under the Contract is performed and the Supplies are provided in accordance with all Authorisations.
- 3.4.2 The Contractor shall notify the Commonwealth Representative within five Working Days after receiving notification that an Authorisation is refused, revoked or qualified.
- 3.4.3 The Contractor shall notify the Commonwealth Representative within five Working Days after:

- a. the application for an Export Approval; or
  - b. the grant of, or a new requirement for, an Export Approval.
- 3.4.4 The Commonwealth shall, on request by the Contractor, give the Contractor all assistance reasonably required to facilitate the provision of an Export Approval, including the provision of a certificate by the Commonwealth as to the end use of the Supplies.
- 3.4.5 The Commonwealth shall take all reasonable steps to ensure that the provision and use of GFM under the Contract is permitted under all applicable Export Approvals.
- 3.4.6 The Contractor shall, on request by the Commonwealth, give the Commonwealth all assistance reasonably required to ensure that the provision and use of GFM under the Contract is permitted under all applicable Export Approvals.
- 3.4.7 If a party becomes aware of a breach of an Export Approval, it shall promptly notify the other party and co-operate with any investigation or disclosure to the relevant government authorities in relation to the breach.

### **3.5 Imported Supplies and Customs Entry (Core)**

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- 3.5.1 The Contractor shall arrange customs entry and the payment of any customs duty applicable to the Supplies at no additional cost to the Commonwealth, except as provided in this clause 3.5.
- 3.5.2 The Contractor shall give the Commonwealth Representative a notice, including supporting evidence, of any variation to the rate of customs duty applicable to the Supplies between the Base Date specified in the Details Schedule and the relevant date of entry and:
- a. in the case of an increase, the Contractor may claim reimbursement of an amount equivalent to the extra customs duty payable as a consequence of the increase; or
  - b. in the case of a decrease, the Commonwealth may elect to recover under clause 13.6 an amount equivalent to the reduction in the customs duty payable as a consequence of the decrease. No amount shall be owing to the Commonwealth under this clause 3.5.2 until the Commonwealth elects to recover the amount.
- 3.5.3 The Commonwealth shall not be liable to reimburse the Contractor for any fine or penalty incurred by the Contractor under any Australian customs, excise or duty legislation applicable to the importation of the Supplies.

### **3.6 Personnel (Core)**

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- 3.6.1 The Commonwealth may give a notice, including reasons, directing the Contractor to remove specified Contractor Personnel from work in respect of the Contract if, in the Commonwealth Representative's reasonable opinion, for reasons relating to WHS, security, equity and diversity, workplace gender equality, probity or the relationship between the Commonwealth and the Contractor.
- 3.6.2 If the Commonwealth gives the Contractor a notice under clause 3.6.1, the Contractor shall (or shall ensure that the relevant Subcontractor shall) remove the Contractor Personnel from work in respect of the Contract.

### **3.7 Key Persons (Core)**

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**Note to drafters: Key Persons are those individuals named in the Approved PMP for the corresponding Key Staff Position in accordance with clause 3.4 of the SOW.**

- 3.7.1 The Contractor shall ensure that each person named in the Approved Project Management Plan is appointed to the Key Staff Position nominated for the person by the date specified in the Approved Project Management Plan, and that each vacancy is filled as soon as practicable by a person accepted under this clause 3.7.
- 3.7.2 If the Contractor becomes aware that a Key Person will or may become unavailable to fill the relevant Key Staff Position for a period of four consecutive weeks or more, the Contractor shall:
- a. promptly notify the Commonwealth of the impending unavailability; and
  - b. as soon as practicable, nominate a replacement with comparable experience, skills and expertise.

- 3.7.3 Without limiting clause 3.6.1, the Commonwealth may give a notice, including reasons, directing the Contractor to remove a Key Person from the Key Staff Position occupied by the person, if in the Commonwealth Representative's reasonable opinion the Key Person is unable to perform the work of the Key Staff Position for reasons of incapacity or incompetence.
- 3.7.4 If the Commonwealth gives the Contractor a notice under clause 3.6.1 or 3.7.3 in respect of a Key Person, the Contractor shall (or shall ensure that the relevant Subcontractor shall):
- a. within the period specified in the notice, remove the Key Person from the relevant Key Staff Position; and
  - b. as soon as practicable, nominate a replacement with comparable experience, skills and expertise.
- 3.7.5 For any person nominated as a Key Person or to replace a Key Person, the Contractor shall give the Commonwealth the documentation required by clause 3.4 of the SOW.
- 3.7.6 The Commonwealth shall notify the Contractor within 10 Working Days after receiving the documentation referred to in clause 3.6.5 whether or not a nomination has been accepted (including reasons if the nomination is rejected). The Commonwealth shall act reasonably in determining whether to accept or reject the nomination. If the Commonwealth notifies the Contractor that a nomination is rejected, the Contractor shall promptly nominate another person to replace the person.
- 3.7.7 The Contractor shall not be entitled to postponement of a date for delivery of Supplies or a Milestone Date under clause 6.3 as a result of:
- a. any obligation of the Contractor to remove or replace a person under clause 3.6 or this clause 3.7 or any failure by the Contractor to provide a replacement person; or
  - b. the exercise by the Commonwealth of any right under clause 3.6 or this clause 3.7.
- 3.7.8 If the Contractor is required to replace any Key Person under this clause and a replacement person satisfactory to the Commonwealth is not accepted within three months after the Commonwealth first receives or provides notice under clause 3.6.2 or clause 3.6.3, the Commonwealth may give the Contractor a Default Notice in accordance with clause 13.3.
- 3.8 GFM – Provision and Management (RFT Core)**

***Note to drafters: Clause 3.7 of the conditions of contract and clause 3.13 of the SOW are optional but interdependent and must be inserted, amended or omitted as a package.***

- 3.8.1 The Commonwealth shall deliver or provide access to, and the Contractor shall manage, GFM in accordance with the Contract.
- 3.8.2 The Commonwealth shall notify the Contractor of any known damage, defect or deficiency in the GFM.
- 3.8.3 The Contractor acknowledges and agrees that:
- a. the Commonwealth's obligations to provide GFM on the dates or at the times described in Attachment E is subject to the Contractor delivering the Supplies in accordance with clause 6.1.1; and
  - b. any delay of the Contractor in meeting its obligations under the Contract may result in the Commonwealth not being able to provide GFM at the time the Contractor requires delivery of or access to that GFM.
- 3.8.4 Subject to the Commonwealth's rights under clause 6.5, if at any time the Contractor requires a change to the timing of delivery or access to GFM, the Commonwealth shall use reasonable endeavours to accommodate such change.
- 3.8.5 To avoid doubt, clause 3.7.4 does not require the Commonwealth to remove GFM from operational requirements, amend any other contracts, incur any additional costs or provide the Contractor with GFM allocated to or available for other contracts.
- 3.8.6 The Contractor shall not be entitled to postponement of a date for delivery of Supplies or a Milestone Date, or to postponement costs, on the basis of any failure by the Commonwealth to deliver or provide access to GFM in accordance with any changed requirement under clause 3.7.4, except to the extent that the requirement for the change resulted from an event or circumstance in respect of which the Contractor was entitled to postponement in accordance with clause 6.3.

- 3.8.7 The Contractor shall ensure that the GFM does not adversely impact on the production, delivery or functionality of Supplies.

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

- 3.8.8 The parties acknowledge that the GFI is not furnished to the Contractor for the purpose of either directing or guiding the Contractor's task under the Contract. The Commonwealth does not warrant the suitability of such GFI for any particular use or application, nor does the Commonwealth warrant the accuracy or precision of the GFI.
- 3.8.9 Except as otherwise provided in this clause 3.7, the Contractor shall be responsible for the application or use of the GFI and any conclusions, assumptions or interpretations made by the Contractor on the basis of the GFI, or its application or use of them.

**Option: For use if the Contract includes GFD or Commonwealth Mandated GFM.**

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

- 3.8.10 The Commonwealth shall ensure that each item of GFD and Commonwealth Mandated GFM is fit for the purpose provided for in Attachment E in respect of that item, except to the extent that the failure of the item to be fit for the relevant purpose results from:
- a. a Defect that was present in the item when it was provided to the Commonwealth by or through the Contractor or a Related Body Corporate of the Contractor, whether under the Contract or another contract; or
  - b. a Contractor Default.

### 3.9 Government Furnished Facilities (Optional)

**Note to drafters: Use clause 3.8 if there is to be a licence of GFF to the Contractor. If there is not to be a licence of GFF, mark clause 3.8 "Not Used".**

**All necessary approvals under the Lands Acquisition Act 1989 (Cth) (LAA) to grant a licence of GFF must be obtained before the Contract is signed. Failure to obtain the necessary LAA approvals before then will breach the LAA.**

**Drafters must engage with Directorate of Licensing and Leasing (DELL), Infrastructure Division, Security and Estate Group (SEG) when entering into a Contract that will licence GFF to the Contractor.**

- 3.9.1 The Commonwealth grants to the Contractor a non-exclusive licence to occupy and use the GFF on the terms set out in Attachment O.
- 3.9.2 Each party shall comply with its obligations under Attachment O and the SOW.

### 3.10 Commonwealth Property (Core)

- 3.10.1 The Contractor acknowledges that GFM and any other Commonwealth Property provided to or used by the Contractor or a Subcontractor for the purposes of the Contract, remains the property of the Commonwealth.
- 3.10.2 The Commonwealth retains the right to identify Commonwealth Property as its property and the Contractor shall preserve any means of identification.
- 3.10.3 The Contractor shall only use Commonwealth Property:
- a. for the purposes of the Contract;
  - b. in a manner consistent with any applicable requirements for the Commonwealth Property, including as set out in the SOW; and
  - c. for the purposes for which the Commonwealth Property was designed, manufactured or constructed or otherwise as expressly permitted or required by any prior written Approval of the Commonwealth Representative.
- 3.10.4 The Contractor shall not, without the prior written approval of the Commonwealth Representative, do any of the following:
- a. modify Commonwealth Property;



- b. move Commonwealth Property from the location to which it was delivered (except to return the property to the Commonwealth); and
  - c. transfer possession or control of Commonwealth Property to any other person, except to the extent reasonably necessary to enable the Contractor to satisfy an express requirement of the Contract.
- 3.10.5 The Contractor shall not, without the prior written approval of the Commonwealth Representative, create or allow to be created any Security Interest over any Commonwealth Property.
- 3.10.6 The Contractor shall return all items of Commonwealth Property (including GFM) that are required to be returned to the Commonwealth in accordance with the SOW, Attachment E, Attachment O or as otherwise directed by the Commonwealth Representative.
- 3.10.7 The Contractor acknowledges that it may be provided with the ability to access Commonwealth-held information in connection with its performance of the Contract, including through access to Commonwealth information technology systems. The Contractor shall not access or use Commonwealth-held information except to the extent strictly required for the performance of the Contractor's obligations under the Contract.
- 3.10.8 Without limiting the Contractor's obligations with respect to Commonwealth Property as set out in the SOW and Attachment O, the Contractor shall notify the Commonwealth Representative within five Working Days after becoming aware of any material loss or damage to, or any material defect in, any Commonwealth Property provided to, or used by, the Contractor or a Subcontractor for the purposes of the Contract.

### **3.11 Government Furnished Services (Optional)**

**Note to drafters: GFS may apply for Defence information system use. Refer to Attachment E.**

- 3.11.1 The Commonwealth shall provide the GFS, and the Contractor shall coordinate the provision of GFS, in accordance with the Contract.
- 3.11.2 If the Commonwealth fails to provide the GFS on the dates set out in Attachment E, the Contractor may make a claim for postponement, except to the extent that the failure to provide the GFS was caused by a Contractor Default. The process for submission and consideration of the claim shall be undertaken, and any rights of the Contractor determined, in accordance with clauses 6.2 and 6.3.

**Option: For when the Commonwealth mandates GFS.**

- 3.11.3 The Commonwealth shall ensure that the Commonwealth Mandated GFS is fit for its intended purpose (being the purpose specified in respect of the GFS in Attachment E) except to the extent that the failure of the GFS to be fit for the relevant purpose results from:
- a. any deficiency or other non-compliance in the GFS when it was provided to the Commonwealth, by the Contractor or a Related Body Corporate of the Contractor (whether under the Contract or another contract); or
  - b. a Contractor Default.
- 3.11.4 If the Contractor becomes aware of a deficiency or other issue that may result in the GFS not being fit for its intended purpose, the Contractor shall, as soon as reasonably practicable, notify the Commonwealth of the deficiency or issue.

## **4 AUSTRALIAN INDUSTRY CAPABILITY**

### **4.1 General AIC Requirements (Core)**

- 4.1.1 The Contractor shall:
- a. comply with the AIC Obligations;
  - b. comply with the Approved AIC Plan; and
  - c. ensure that the AIC Subcontractors comply with their respective AIC Subcontractor Obligations.

- 4.1.2 The Contractor acknowledges and agrees that it is of critical importance to the Commonwealth that the Contractor complies with its AIC Obligations and that the Contractor ensures the involvement of Australian Industry in the provision of the Supplies as required by the Contract.
- 4.1.3 The Contractor shall undertake the required activities to comply with the AIC Obligations. Without limiting the AIC Obligations, and with the aim of achieving the AIC Objectives, the Contractor shall continually:
- a. identify and promote opportunities for enhancing the quality of Australian Industry participation in the performance of the Contract, particularly in relation to developing, enhancing and maintaining Industrial Capabilities;
  - b. monitor and explore opportunities for the increased involvement of Australian Industry in the performance of the Contract; and
  - c. liaise with the Commonwealth in relation to AIC in the performance of the Contract and reporting on its performance of the AIC Obligations in accordance with the SOW.
- 4.1.4 Where the Contractor fails to comply with any AIC Obligation, or anticipates that it is likely to fail to comply with any AIC Obligation, it shall notify the Commonwealth Representative in writing as soon as reasonably practicable.
- 4.1.5 The Contractor acknowledges and agrees that:
- a. compliance with the AIC Obligations shall not relieve the Contractor from its liabilities or other obligations under the Contract;
  - b. Acceptance of the Supplies shall not relieve the Contractor from complying with its AIC Obligations; and
  - c. the public AIC Plan section of the Approved AIC Plan will be made publicly available on a Commonwealth internet website.

## **4.2 Essential AIC Obligations (Core)**

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- 4.2.1 The Contractor shall:
- a. comply with the obligations under the Contract (including in Attachment F and clause 10 of the SOW) in relation to the Australian Industry Activities; and
  - b. in respect of each ACE Measurement Point, ensure that the Achieved ACE Percentage is equal to or greater than the Prescribed ACE Percentage for that ACE Measurement Point.

## **4.3 Independent AIC Audit Program (Core)**

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- 4.3.1 Without limiting the Commonwealth's rights under clause 11.7, the Contractor acknowledges and agrees that the Contractor's compliance with its AIC Obligations and an AIC Subcontractor's compliance with its AIC Subcontractor Obligations may be audited as part of the Independent AIC Audit Program.
- 4.3.2 Each person conducting an audit under the Independent AIC Audit Program is a person authorised by the Commonwealth Representative for the purposes of clause 11.7 of the Contract.

## **4.4 AIC Remediation (Core)**

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- 4.4.1 Without limiting the Commonwealth's other rights and remedies under the Contract or at law, if, at any time, the Commonwealth Representative considers on reasonable grounds (including having regard to the outcomes of any audit including an audit under the Independent AIC Audit Program) that:
- a. the Contractor has failed to comply with, or is likely to fail to comply with, an AIC Obligation; or
  - b. an AIC Subcontractor has failed to comply with, or is likely to fail to comply with, an AIC Subcontractor Obligation,
- the Commonwealth Representative may, by notice to the Contractor, require the Contractor to develop and deliver an AIC Remediation Plan in accordance with CDRL Line Number AIC-160 ('**AIC Remediation Plan**').

- 4.4.2 The Contractor shall ensure that the Approved AIC Remediation Plan and the steps taken to implement an Approved AIC Remediation Plan:
- a. do not limit or affect the Contractor's ability to perform its obligations under the Contract; and
  - b. are not otherwise inconsistent with the Contract.
- 4.4.3 The date for submission of an AIC Remediation Plan for Approval by the Commonwealth Representative shall be agreed between the parties, or, if the parties cannot agree within 15 Working Days of the Commonwealth Representative's notice under clause 4.4.1, a reasonable period determined by the Commonwealth Representative.
- 4.4.4 Following the Commonwealth's Approval of the AIC Remediation Plan, the Contractor shall comply with the Approved AIC Remediation Plan.
- 4.4.5 The Approved AIC Remediation Plan does not limit or affect the Contractor's obligations under the Contract including the AIC Obligations.

#### **4.5 AIC Remedies (Core)**

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- 4.5.1 The Contractor acknowledges and agrees that:
- a. the Commonwealth may suffer loss or damage if the Contractor fails to comply with any AIC Obligation, an AIC Subcontractor fails to comply with any AIC Subcontractor Obligation or the Contractor fails to comply with an Approved AIC Remediation Plan;
  - b. damages may not be an adequate remedy for a failure of:
    - (i) the Contractor to comply with any AIC Obligation;
    - (ii) an AIC Subcontractor to comply with any AIC Subcontractor Obligation; or
    - (iii) the Contractor to comply with an Approved AIC Remediation Plan,and that remedies such as specific performance or injunctive relief may be sought by the Commonwealth;
  - c. the Essential AIC Obligations are each essential and fundamental terms of the Contract; and
  - d. the rights of the Commonwealth under this clause 4.5 are in addition to, and do not limit or affect, any other rights or remedies under the Contract or at law.
- 4.5.2 Without limiting clause 7.9.1a, the Commonwealth may suspend payment under clause 7.9.1b if:
- a. the Contractor does not develop and deliver an AIC Remediation Plan in accordance with clause 4.4.1 by the date being 15 Working Days after the date for submission determined in accordance with clause 4.4.3, for the period from that date until the AIC Remediation Plan is Approved;
  - b. the Commonwealth Representative does not Approve the AIC Remediation Plan developed and delivered by the Contractor under clause 4.4.1, for the period from the date being 15 Working Days after the date the Commonwealth Representative notifies the Contractor that the AIC Remediation Plan is not Approved until the AIC Remediation Plan is Approved; or
  - c. the Commonwealth Representative considers that the Contractor has not complied with the requirements of an Approved AIC Remediation Plan, for the period from the date being 15 Working Days after the date the Commonwealth Representative notifies the Contractor of the non-compliance until the Commonwealth is satisfied that the Contractor is complying with the requirements of the Approved AIC Remediation Plan.
- 4.5.3 The Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1e if:
- a. an AIC Remediation Plan has not been Approved by the Commonwealth Representative within four months of the date for submission determined in accordance with clause 4.4.3;

- b. the Contractor has not complied with the requirements of an Approved AIC Remediation Plan within three months of the Contractor being notified by the Commonwealth that the Contractor is not complying with the Approved AIC Remediation Plan; or
- c. the Contractor commits a breach of an Essential AIC Obligation that, in the Commonwealth's opinion, is not capable of being remedied.

## 5 TECHNICAL DATA, SOFTWARE AND CONTRACT MATERIAL

**Note to drafters: Ensure that the outcomes of the Commonwealth's TD Requirements Analysis (TDRA) align to the PES, OCD / Support Concept and FPS, and are accurately reflected in this clause 5 and the TDSR Schedule. Information for conducting a TDRA can be found in CASG Handbook (E&T) 12-2-003 Technical Data Management Handbook, which can be accessed at:**

- <http://modelpedia.dpe.protected.mil.au/PublishedWebsite/LatestFinal/5E812EBC-90FE-4E4C-9064-3810D9E9C084/Item/AC2783A0-E8CA-4479-BCE7-A1B7A6CF1D9A>.

**Drafters should also refer to the ASDEFCON TD / IP Handbook to assist with understanding and tailoring this clause and the TDSR Schedule. These clauses have been drafted following Defence industry consultation and reflect an endorsed Defence corporate position. Changes to the clauses may result in additional risk to the Commonwealth or a reduction in the Commonwealth's capacity to utilise TD, Software and Contract Material required to operate and support the Capability.**

### 5.1 Ownership of Intellectual Property (IP) (Core)

**Note to tenderers: The Commonwealth's default position reflected in clause 5.1 is that the Contractor (or its nominee) will own all IP created under the Contract. However, under clause 5.1.3 an exception exists to enable the Commonwealth to own newly created IP in specific items of TD and Software that are identified in Annex D to the TDSR Schedule (i.e. Commonwealth TD and Commonwealth Software). The Commonwealth may require ownership of this TD and Software for reasons relating to national security and/or strategic interests associated with the program or a Capability's Life-of-Type requirements.**

**Clause 5.1.3 states that the Commonwealth will own any new IP created under the Contract in relation to GFM (including new IP in updates or amendments to GFM), unless otherwise specified in Attachment E (e.g. where the Contractor owns the IP in GFM delivered to Defence under a separate contract). The Commonwealth's default position is that ownership of newly created IP created under a subcontract will be determined by the terms of the relevant Subcontract between the Contractor and Subcontractor. However, clause 5.1.3 states that the Contractor is obliged to ensure that the Commonwealth is assigned any IP created under a Subcontract in Commonwealth TD, Commonwealth Software and GFM, whether the IP is owned by the Subcontractor or the Contractor.**

- 5.1.1 Nothing in the Contract affects the ownership of IP, except as expressly provided for in this clause 5.
- 5.1.2 Subject to the other provisions of this clause 5.1, the parties agree that all IP created under the Contract in respect of TD, Software or Contract Material is assigned to the Contractor (or its nominee) immediately upon its creation.
- 5.1.3 The Contractor shall ensure that all IP created under the Contract or a Subcontract in respect of:
  - a. Commonwealth TD or Commonwealth Software; and
  - b. GFM (except as provided for in clause 5.1.4),
 is assigned to the Commonwealth (or its nominee) immediately upon its creation.
- 5.1.4 The parties agree that IP created under the Contract or a Subcontract in respect of GFM is not required to be assigned to the Commonwealth under clause 5.1.3 if:
  - a. the Contractor or a Subcontractor owns all of the IP in the GFM to be provided to it under the Contract; or
  - b. Attachment E specifies that the Contractor (or its nominee) is to own any IP created under the Contract or a Subcontract in respect of the GFM.

## **5.2 Highly Sensitive Software (Core)**

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- 5.2.1 This clause 5.2 applies to all Highly Sensitive TD or Highly Sensitive Software delivered or required to be delivered to the Commonwealth or any other person under the Contract.
- 5.2.2 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all TD and all Software to which this clause 5.2 applies, to:
- a. Use the TD or Software for any Defence Purpose; and
  - b. grant a Sublicence to any other person in accordance with clause 5.9 to Use the TD or Software, or to grant a further sublicence to Use the TD or Software,
- subject to the restrictions specified in Annex A to the TDSR Schedule.

## **5.3 TD and Software (Core)**

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- 5.3.1 This clause 5.3 applies to all TD and Software delivered or required to be delivered to the Commonwealth or any other person under the Contract, other than:
- a. Highly Sensitive TD or Highly Sensitive Software to which clause 5.2 applies;
  - b. Commercial TD or Commercial Software to which clause 5.4 applies;
  - c. Commonwealth TD or Commonwealth Software to the extent that clause 5.4.4 applies to that TD or Software; and
  - d. TD or Software in GFM where clause 5.6 applies to that GFM.
- 5.3.2 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all TD and all Software to which this clause 5.3 applies, to:
- a. Use the TD or Software for any Defence Purpose; and
  - b. grant a Sublicence in accordance with clause 5.3.3 and clause 5.9 to Use the TD or Software.
- 5.3.3 The Commonwealth may grant a Sublicence in respect of all TD and all Software to which this clause 5.3 applies, to:
- a. a Commonwealth Service Provider to Use the TD or Software to enable the Commonwealth Service Provider to perform its obligations, functions or duties to the Commonwealth;
  - b. any person to Use the TD or Software, or to grant a further sublicence to Use the TD or Software, to do any of the following:
    - (i) installing or configuring the Supplies;
    - (ii) physically integrating the Supplies with other systems;
    - (iii) operating or maintaining the Supplies;
    - (iv) rectifying any Defect in the Supplies where the Contractor has failed to comply with its obligations under clause 8.1.2 in relation to the Defect;
    - (v) undertaking training in relation to the Supplies;
    - (vi) removing or uninstalling the Supplies;
    - (vii) decommissioning or destroying the Supplies;
    - (viii) for the person to respond to a Request to be engaged for any of the above purposes; and
    - (ix) for any other purpose (including to modify and upgrade the Supplies) but subject to any restrictions specified in Annex B to the TDSR Schedule; and
  - c. any person for a purpose referred to in clause 11.4.3.

## **5.4 Commercial TD and Commercial Software (Core)**

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- 5.4.1 This clause 5.4 applies to all Commercial TD and Commercial Software delivered or required to be delivered to the Commonwealth or any other person under the Contract.
- 5.4.2 The Contractor shall ensure that each Commercial Item (and related Commercial TD or Commercial Software) delivered or required to be delivered under the Contract is specified as

a Key Commercial Item in Annex C to the TDSR Schedule, if the IP in the related Commercial TD or Commercial Software is owned by:

- a. the Contractor;
- b. an Approved Subcontractor; or
- c. a Related Body Corporate of the Contractor,

unless otherwise agreed by the Commonwealth in writing.

5.4.3 The Contractor shall ensure that the Commonwealth is granted a licence in respect of all Commercial TD and all Commercial Software to which this clause 5.4 applies, on the following terms:

- a. for TD and Software relating to a Key Commercial Item, a licence to Use the TD or Software, or to grant a sublicense to any person to Use the TD or Software, to do any of the following:
  - (i) installing or configuring the Supplies;
  - (ii) physically integrating the Supplies with other systems;
  - (iii) operating or maintaining the Supplies;
  - (iv) rectifying any Defect in the Supplies where the Contractor has failed to comply with its obligations under clause 8.1.2 in relation to the Defect;
  - (v) undertaking training in relation to the Supplies;
  - (vi) removing or uninstalling the Supplies;
  - (vii) decommissioning or destroying the Supplies; and
  - (viii) for the person to respond to a Request to be engaged for any of the above purposes,

subject to any restrictions specified in Annex C to the TDSR Schedule for that item; and

- b. for all other TD and Software, on the best commercial terms available to the Contractor.

5.4.4 The Contractor shall ensure that any licence granted to the Commonwealth in respect of Commercial TD and Commercial Software under this clause 5.4 does not require the Commonwealth to pay a Royalty or other fee (not otherwise included in the Contract Price) unless the Commonwealth has agreed in writing to the payment.

## 5.5 Commonwealth TD and Commonwealth Software (Core)

***Note to tenderers: This clause covers IP relating to Commonwealth TD and Commonwealth Software that is assigned to the Commonwealth under clause 5.1.3. If, in respect of any Commonwealth TD or Commonwealth Software, there also exists IP owned by the Contractor (or a Subcontractor), the Commonwealth's rights with respect to the Use and Sublicensing of that IP are covered under clause 5.3.***

5.5.1 This clause 5.5 applies to all Commonwealth TD and Commonwealth Software delivered or required to be delivered to the Commonwealth or any other person under the Contract, to the extent that the IP in that TD or Software is assigned to the Commonwealth under clause 5.1.3.

5.5.2 The Commonwealth grants to the Contractor a non-exclusive, Royalty-free licence in respect of the Commonwealth TD and Commonwealth Software to the extent that this clause 5.5 applies to:

- a. Use the TD and Software for the purpose of enabling the Contractor to perform its obligations under the Contract;
- b. grant a sublicense to a Subcontractor to Use the TD and Software for the purpose of enabling the Subcontractor to perform its obligations under the Subcontract; and
- c. grant a sublicense to a person for a purpose referred to in clause 11.4.3,

subject to any restrictions specified in Annex D to the TDSR Schedule or as otherwise notified by the Commonwealth.

5.5.3 The Contractor shall ensure that any IP in Commonwealth TD or Commonwealth Software not assigned to the Commonwealth under clause 5.1.3 is specified in Annex D to the TDSR

Schedule and capable of being clearly distinguished from the IP assigned to the Commonwealth.

## **5.6 GFM Licence (Core)**

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- 5.6.1 This clause 5.6 applies to all TD or Software:
- a. in GFM; or
  - b. created under the Contract or a Subcontract in respect of GFM
- except to the extent that IP in the TD or Software is owned by the Contractor or a Subcontractor.
- 5.6.2 The Commonwealth grants to the Contractor (or shall ensure the Contractor is granted), a non-exclusive, Royalty-free licence in respect of the TD or Software to the extent that this clause 5.6 applies to:
- a. Use the TD or Software for the purpose of enabling the Contractor to perform its obligations under the Contract;
  - b. grant a sublicense to a Subcontractor to Use the TD or Software for the purpose of enabling the Subcontractor to perform its obligations under the Subcontract; and
  - c. grant a sublicense to a person for a purpose referred to in clause 11.4.3,
- subject to any restrictions specified in Attachment E or as otherwise notified by the Commonwealth.
- 5.6.3 The licence under clause 5.6.2a (and any sublicense granted under clause 5.6.2b) expires upon the expiry or termination (whichever is the earlier) of the Contract or the relevant Subcontract (if any).
- 5.6.4 The Commonwealth shall ensure that any Export Approvals that apply to an item of GFM are specified in Attachment E.

## **5.7 Contract Material (Core)**

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- 5.7.1 The Contractor grants to the Commonwealth (or shall ensure the Commonwealth is granted) a Licence in respect of all Contract Material to:
- a. Use the Contract Material for any Defence Purpose; and
  - b. grant a Sublicence in accordance with clause 5.8 to:
    - (i) a Commonwealth Service Provider to Use the Contract Material to perform its obligations, functions or duties to the Commonwealth;
    - (ii) any person to Use the Contract Material, or to grant a further sublicense to Contract Material, provided that any related disclosure of Confidential Information in the Contract Material complies with clause 11.4.1d; and
    - (iii) any person for a purpose referred to in clause 11.4.3.

## **5.8 Contractor Sublicences (Core)**

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- 5.8.1 Without limiting any restrictions specified in Annex D to the TDSR Schedule, Attachment E or notified by the Commonwealth under clause 5.5.2 or 5.6.2, the Contractor's right to grant a sublicense under clause 5.5.2a and 5.6.2b is subject to the following conditions:
- a. the sublicense shall include (as a minimum) the same restrictions on Use and sublicensing as are applicable to the Contractor;
  - b. the rights granted under the sublicense shall be limited to the rights that are reasonably necessary to enable the sublicensee to Use the TD or Software to efficiently perform its obligations, functions or duties to the Contractor;
  - c. the rights granted under the sublicense shall expire when no longer required for the purposes referred to in clauses 5.5.2a and 5.6.2b; and
  - d. any right of the sublicensee to grant a further sublicense shall be subject to the same conditions as set out in this clause 5.8.

**5.9 Commonwealth Sublicences (Core)**

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- 5.9.1 The Commonwealth's right to grant a Sublicence to a person (in this clause 5.9, a "Sublicensee") in accordance with clause 5.2, 5.3 or 5.7 is subject to the following conditions:
- a. the Sublicence shall include (as a minimum) the same restrictions on Use and sublicensing as are applicable to the Commonwealth;
  - b. the rights granted under the Sublicence shall be limited to the rights that are reasonably necessary to enable the Sublicensee to Use the TD, Software and Contract Material (as applicable) to efficiently perform its obligations, functions or duties to the Commonwealth or a Commonwealth Contractor;
  - c. the rights granted under the Sublicence shall expire when no longer required for the purposes referred to in clause 5.9.1a; and
  - d. any right of the Sublicensee to grant a further sublicense shall be subject to the same conditions as set out in this clause 5.8.

**5.10 No Commercialisation (Core)**

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- 5.10.1 A Licence or Sublicence granted in accordance with this clause 5 does not permit the Commonwealth or its Sublicensee to Commercialise any IP in the TD, Software or Contract Material.
- 5.10.2 For the avoidance of doubt, clause 5.10.1 does not prevent the Commonwealth from granting a sublicense in accordance with the rights granted in this clause 5 to a person for the purpose of the person providing goods or services to the Commonwealth for a Defence Purpose.

**5.11 Failure to obtain IP rights (Core)**

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- 5.11.1 The Contractor shall promptly notify the Commonwealth if the Contractor considers it will be unable to comply with any of its obligations under this clause 5 in respect of IP (in this clause 5.11, an "IP Issue"), including if the Contractor is not able to ensure that the Commonwealth is:
- a. assigned any IP as required under clause 5.1.3;
  - b. granted rights to TD, Software or Contract Material as required by this clause 5; or
  - c. provided with an Approved Subcontractor Deed as required under clause 11.9.2.
- 5.11.2 The Contractor shall ensure that a notice under clause 5.11.1 includes details of:
- a. the relevant IP Issue, including the steps taken by the Contractor to ensure compliance with this clause 5 or to mitigate the effects of the IP Issue;
  - b. the Supplies (and related TD, Software or Contract Material) to which the IP Issue relates;
  - c. the rights that the Contractor is able to ensure are granted to the Commonwealth in respect of the relevant TD, Software or Contract Material; and
  - d. options available to remedy, or mitigate the effects of, the IP Issue.
- 5.11.3 If the Contractor gives a notice of an IP Issue, or the Commonwealth considers that an IP Issue has occurred, the Commonwealth may by notice to the Contractor, without limiting any of its other rights under the Contract do any one or more of the following:
- a. require that the Contractor:
    - (i) use alternative goods or services, or obtain the goods or services from another supplier, to ensure that the Contractor complies with the requirements of this clause 5; or
    - (ii) modify the Supplies to the extent necessary to ensure that the Contractor complies with the requirements of this clause 5;
  - b. agree to waive a requirement of this clause 5 on such conditions as the Commonwealth may determine;
  - c. reduce the scope of the Contract to exclude the Supplies to which the IP Issue relates; or



- d. require the Contractor to submit a CCP to amend the Contract to implement any of the actions required under this clause 5.11.3 or any other option to remedy the IP Issue, or mitigate the effects of the IP Issue.

5.11.4 The Contractor shall comply with a notice issued by the Commonwealth under clause 5.11.3.

5.11.5 Any notice issued by the Commonwealth under clause 5.11.3 is not an event or circumstance beyond the reasonable control of the Contractor for the purposes of clause 6.3 and the Contractor is not entitled to schedule recovery costs under clause 6.6 in respect of complying with the Commonwealth's notice.

## **5.12 TDSR Schedule (Core)**

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5.12.1 The Contractor shall take all reasonable steps (including by submitting a CCP in accordance with clause 11.1) to ensure the TDSR Schedule is up to date and contains an accurate description of all restrictions applicable to the Commonwealth's rights in respect of TD, Software and Contract Material, delivered or required to be delivered under the Contract.

5.12.2 The Commonwealth's rights in respect of TD, Software and Contract Material under this clause 5 are not subject to any restrictions, unless such restrictions are permitted under these Conditions of Contract and expressly set out in the TDSR Schedule.

5.12.3 Despite clause 11.4.1, the Commonwealth may disclose a restriction included in the TDSR Schedule to a person for the purposes of the Commonwealth exercising a right or complying with a restriction under this clause 5 or the TDSR Schedule.

## **5.13 TD and Software required to be delivered (Core)**

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5.13.1 The Contractor shall deliver all TD and Software required to be delivered under the Contract to the recipients at the times and locations, and in the manner, specified in the Contract.

5.13.2 Without limiting the Contractor's obligation under clause 5.13.1 (and subject to clause 5.13.3), if the Commonwealth is not specified as a recipient of any item of TD listed in the CDRL, or in an Approved data item derived from the MTDI or any item of Software listed in the Approved Software List, the Commonwealth may by notice to the Contractor require the delivery of the item to the Commonwealth.

5.13.3 The Contractor shall comply with a notice given under clause 5.13.2 unless compliance with the notice would be inconsistent with any restricted delivery requirements specified in Annex A or B (as applicable) to the TDSR Schedule.

5.13.4 If the time, location or manner of delivery of any item of TD or Software required to be delivered under the Contract is not specified in the Contract, the Contractor shall deliver the relevant item in accordance with a notice given by the Commonwealth.

5.13.5 The Commonwealth shall act reasonably when giving a notice under clause 5.13.1 or clause 5.13.4, including in relation to specifying a time for delivery of the item of TD or Software.

5.13.6 If the Contract is terminated (except under clause 13.4), the Contractor shall, within the period set out in the notice of termination (which shall be a reasonable period), deliver to the Commonwealth all TD and Software required to be delivered under the Contract, each in its then current state of development.

5.13.7 An obligation under this clause 5.13, or any other provision of the Contract that requires the Contractor to deliver TD or Software (other than under clause 5.13.5), includes an obligation to create, develop or acquire the TD or Software to enable the TD or Software to be delivered to the Commonwealth at the times and in the manner required under the Contract.

5.13.8 Any Approved data item derived from the MTDI and the Approved Software List do not operate to restrict the rights of the Commonwealth in respect of IP in any TD or Software under this clause 5 or otherwise under the Contract.

5.13.9 For the purposes of this clause 5, an item of TD, Software or Contract Material is not taken to have been delivered under the Contract if, at the time it is provided:

- a. the Contractor identifies that the item is provided for the information of the Commonwealth only; and
- b. the item is not otherwise required to be delivered under the Contract

**5.14 Electronic Delivery of TD, Software and Contract Material (Core)**

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- 5.14.1 If an item of TD, Software or Contract Material is permitted by the Contract to be delivered in electronic form to the Commonwealth, the item is deemed to have been delivered:
- a. if the item is to be delivered by access to an information system of the Contractor – when all of the following requirements are met:
    - (i) the item is present in the information system;
    - (ii) the Commonwealth has been notified that the item is present in the information system; and
    - (iii) the item is accessible for use by the Commonwealth in accordance with the SOW; or
  - b. if the item is to be delivered by an electronic communication or by transfer into an information system nominated by the Commonwealth – when all of the following requirements are met:
    - (i) the electronic communication or transferred item enters the information system, unless the Contractor receives notification within one Working Day that the electronic communication or transfer has not been successful; and
    - (ii) the Commonwealth has been notified that the item has been successfully sent or transferred to the information system.

**5.15 Markings (Core)**

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- 5.15.1 Where markings are used by the Contractor or a Subcontractor in relation to TD, Software or Contract Material, the Contractor:
- a. shall ensure that those markings accurately reflect the rights and obligations of the Commonwealth, the Contractor or any other person; and
  - b. acknowledges that the markings are not determinative as to the rights and obligations of the parties.

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

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- 5.16.1 The Contractor warrants that:
- a. the TD listed in the Approved SSTDL and the Software listed in the Approved Software List shall enable the relevant requirements of the Support System Functional Baseline to be satisfied;
  - b. the rights granted to the Commonwealth in accordance with clause 5 (including in relation to Commercial TD and Commercial Software), will not prevent the Materiel System from being used and supported as provided for in the Contract;
  - c. the rights granted to the Commonwealth in accordance with clause 5.4.3a in relation to a Key Commercial Item shall be on terms that are no less favourable than the best commercial terms available to the Contractor;
  - d. the TD listed in the MTDI and the DAL (taken together) includes all of the TD used or generated by the Contractor and its Subcontractors in the performance of the Contract; and
  - e. the TD listed in the MTDI and the ASTDL (taken together) will enable the AIC Obligations to be met.
- 5.16.2 The Contractor warrants and shall ensure that:
- a. all Software delivered or required to be delivered to the Commonwealth under the Contract or a Subcontract is free from Malware, at the time of delivery to the Commonwealth; and
  - b. no Malware will be installed on the Supplies or any other Commonwealth system as a result of an act or omission of any of the Contractor Personnel.

**5.17 Intellectual Property Warranties (Core)**

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- 5.17.1 The Contractor warrants and shall ensure that, in respect of any IP assigned or licensed to the Commonwealth under or in connection with this Contract, at all times:

- a. the relevant assignor or licensor (as applicable) has the right, title or authority to assign or license, and has been made aware of, the rights granted in respect of IP under this clause 5 or under an Approved Subcontractor Deed; and
  - b. the Contractor shall notify the Commonwealth if the Contractor becomes aware of any challenge, claim or proceeding referred to in clause 5.17.3 arising in respect of any IP after the relevant TD, Software or Contract Material is delivered to the Commonwealth.
- 5.17.2 If the Commonwealth, Commonwealth Personnel or a Sublicensee infringes the IP or any Moral Rights of any third party as a consequence of:
- a. an activity permitted or purportedly permitted by or under a licence or assignment of IP rights under or referred to in the Contract (including in clause 5); or
  - b. a failure by the Contractor to grant (or ensure the grant) of a licence or assign (or ensure the assignment) of IP rights under or referred to in the Contract (including in clause 5),
- the Contractor shall, without limiting the Contractor's obligations under clause 5, use its best endeavours to:
- c. modify the item in order to avoid continuing infringement and so that the Supplies meet the requirements of the Contract with the modified item;
  - d. procure at its own cost the rights or additional rights necessary to ensure that the Commonwealth, Commonwealth Personnel and Sublicensees are entitled to exercise the rights under clause 5 or an Approved Subcontractor Deed in respect of the item; or
  - e. remove the item from the Supplies and modify the Supplies to the extent necessary to ensure that the Supplies meet the requirements of the Contract without the item.
- 5.17.3 The Contractor warrants and shall ensure that, in respect of any IP in any TD, Software or Contract Material delivered or required to be delivered under the Contract, and as at the time of delivery to the Commonwealth of the relevant TD, Software or Contract Material and after making diligent inquiries:
- a. the IP is licenced to, or owned by, the Commonwealth as required by this clause 5;
  - b. the Contractor has no notice of any challenge to the validity or enforceability of any of the IP and has no knowledge of any actual or threatened claim or proceeding in relation to any of the IP;
  - c. neither the Contractor, nor any Approved Subcontractor is engaged in litigation, arbitration or other proceedings in relation to any of the IP; and
  - d. there are no proceedings threatened by or against the Contractor or any Approved Subcontractor in relation to any of the IP and there is nothing that is likely to give rise to any such proceedings.
- 5.17.4 The warranty under clause 5.17.1 and the obligations under clause 5.17.2 do not apply to the extent that the infringement arises from a failure by the Commonwealth, Commonwealth Personnel or a Sublicensee of the Commonwealth to comply with a relevant restriction specified in the TDSR Schedule.

## **5.18 Patents, Registrable Designs and Circuit Layouts (Core)**

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- 5.18.1 The Contractor warrants and shall ensure that a licence is granted or obtained under the Contract for the Commonwealth to exercise any Patent, Registrable Design or Circuit Layout that is necessary to use or support the Supplies for the purposes provided for under the Contract.
- 5.18.2 The Contractor warrants and shall ensure that any restriction on a right referred to in clause 5.18.1 is specified in Annex F to the TDSR Schedule.

## **5.19 Escrow (Optional)**

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**Note to tenderers: If the tenderer proposes to utilise an Escrow Agreement, the tenderer is to identify the proposed Escrow Agent in responding to TDR C-5.**

- 5.19.1 The Contractor shall, within **[INSERT PERIOD]** after the Effective Date or the effective date of the relevant CCP in relation to the Escrow Items, deliver to the Commonwealth an Escrow Agreement in respect of the Escrow Items specified in Annex G to the TDSR Schedule that is:
- a. in a form agreed by the Commonwealth; and

- b. duly executed by an Escrow Agent and the Contractor.
- 5.19.2 The Contractor shall ensure that the Escrow Agent:
- a. is not the Contractor, a Subcontractor or a Related Body Corporate of the Contractor or a Subcontractor;
  - b. has premises located in Australia for the purposes of storing the Escrow Items; and
  - c. obtains and maintains all necessary security clearances and Authorisations certifying all designated storage facilities and relevant personnel.
- 5.19.3 Subject to clauses 5.19.1 and 5.19.1b, the Commonwealth shall execute the Escrow Agreement and provide executed copies to the Escrow Agent and the Contractor.
- 5.19.4 The Contractor shall deliver the Escrow Items to the Escrow Agent at its premises in Australia in accordance with the Escrow Agreement.
- 5.19.5 The Contractor shall ensure that:
- a. the Escrow Items delivered to the Escrow Agent are current and up to date in accordance with the Escrow Agreement and SOW; and
  - b. any Subcontracts for the delivery of an Escrow Item include terms that enable the Contractor to meet its obligations under this clause 5.18.2.

## **5.20 Export Approvals (Core)**

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- 5.20.1 Nothing in this clause 5 affects the obligations of either party to comply with the terms of any Export Approval that is binding on it.

## **5.21 Existing IP Licences (Core)**

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- 5.21.1 The licences, rights and obligations under this clause 5 are in addition to, and do not affect, any other licences, rights or obligations relating to IP under any other contracts between the parties, unless expressly stated otherwise for the purposes of this clause 5.

## **6 DELIVERY, ACCEPTANCE AND OWNERSHIP**

### **6.1 Delivery (Core)**

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- 6.1.1 The Contractor shall deliver Supplies in accordance with the Contract, including the Delivery Schedule at Attachment C and clause 2.2 of the SOW. The Contractor shall achieve the Milestones by the relevant Milestone Dates.
- 6.1.2 Without limiting the Commonwealth's other rights and remedies under the Contract or at law, if the Contractor does not comply with its obligations under clause 6.1.1, the Commonwealth may be entitled to:
- a. issue a direction under clause 6.5;
  - b. suspend a payment under clause 7.9;
  - c. recover liquidated damages or accept compensation under clause 10.6; or
  - d. terminate the Contract under clause 13.2.1.
- 6.1.3 Without limiting the Contractor's obligations in clause 6.1.1, the Contractor shall, for each Milestone, ensure that the Commonwealth is placed in a position where it can perform the Commonwealth's tasks required for achievement of that Milestone in sufficient time before the Milestone Date.

### **6.2 Delay (Core)**

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- 6.2.1 Without affecting the Contractor's obligations under clause 6.1.1, the Contractor shall take all reasonable steps to prevent and minimise delay and to mitigate both parties' Losses due to delay.
- 6.2.2 If the Contractor becomes aware that delivery of Supplies or the achievement of a Milestone will or may be delayed for any reason, the Contractor shall notify the Commonwealth Representative of the following matters, to the extent that the Contractor is aware of them:
- a. the cause and nature of the delay;

- b. the steps that the Contractor and its Subcontractors are taking and will take to minimise the delay;
- c. the anticipated duration of the delay; and
- d. whether the Contractor proposes to claim postponement of a date for delivery of Supplies or the Milestone Date, or seeks any other change to the Contract, on the basis of the delay.

6.2.3 A notice under clause 6.2.2 shall be given as soon as practicable after the Contractor becomes aware of the delay or potential delay, but no later than 30 days after the Contractor becomes so aware.

6.2.4 The Contractor shall notify the Commonwealth as soon as practicable after the Contractor becomes aware of a material change to information notified under clause 6.2.2.

6.2.5 The Contractor shall comply with any request by the Commonwealth Representative for information concerning a delay or potential delay in the delivery of Supplies or the achievement of a Milestone.

### **6.3 Postponement (Core)**

6.3.1 Subject to clauses 6.3.2, 6.3.3 and 6.5, the Contractor shall be entitled to postponement of a date for delivery of Supplies or a Milestone Date to the extent that:

- a. an event or circumstance:
  - (i) delays the Contractor in the performance of its obligations under the Contract;
  - (ii) is beyond the reasonable control of the Contractor and its Subcontractors; and
  - (iii) could not have been reasonably contemplated and allowed for by the Contractor or its Subcontractors before entering the Contract; or
- b. the Contractor is delayed in the performance of its obligations under the Contract by:
  - (i) a Commonwealth Default;
  - (ii) an Excepted Risk; or

***Option: Insert if GFF is included in the draft Contract.***

- (iii) a GFF Delay Event,

but only if:

- c. the Contractor notified the Commonwealth as required by clauses 6.2.2 to 6.2.5 in relation to the relevant event or circumstance;
- d. the work under the Contract cannot be performed in such a way as to meet the date for delivery of Supplies or the Milestone Date as is reasonable having regard to the Contract Price and any other relevant circumstances;
- e. the Contractor has made and will make all reasonable endeavours to minimise delay and mitigate both parties' Losses;
- f. in the case of a delay resulting from an Excepted Risk, the Contractor has taken reasonable steps to prevent the delay occurring; and
- g. the Contractor submits a claim for postponement in accordance with clauses 6.3.4 and 6.3.6.

6.3.2 The Contractor shall not be entitled to postponement of a date for delivery of Supplies or a Milestone Date to the extent that the relevant delay resulted from:

- a. a Contractor Default;
- b. compliance with a direction under clause 12.4.10; or
- c. a cessation of work under clause 8.3.3 of the SOW or the Commonwealth's inability to action a data item within the timeframes described in the CDRL in circumstances described in clause 2.4.8.2 of the SOW.

6.3.3 The Contractor shall not be entitled to postponement of a date for delivery of Supplies or a Milestone Date for a period longer than the duration of the relevant delay.

- 6.3.4 The Contractor claims postponement of a date for delivery of Supplies or a Milestone Date by submitting to the Commonwealth:
- a notice setting out the details of its claim and the relevant event or circumstance;
  - a CCP for the postponement; and
  - documentation demonstrating the Contractor's entitlement to postponement.
- 6.3.5 If the delay affects more than one delivery date or Milestone Date, the CCP shall include a revised Attachment B and Attachment C, as appropriate.
- 6.3.6 If the Contractor has notified the Commonwealth that it proposes to claim postponement of a date for delivery of Supplies or a Milestone Date, or to seek some other change to the Contract, on the basis of a delay, the Contractor shall make the claim, or seek the change:
- as soon as it is practicable to do so after that notification; or
  - if the Commonwealth directs the Contractor to do so, in accordance with the direction.
- 6.3.7 Whether or not the Contractor has sought, or is entitled to, postponement under this clause 6.3, the Commonwealth Representative may, at any time, by notice to the Contractor, postpone the date for delivery of Supplies or a Milestone Date to a date specified in the notice.
- 6.3.8 The parties acknowledge that:
- a notice under clause 6.3.7 does not affect any rights the Contractor may have to claim under this clause 6.3 for postponement of the date for delivery of Supplies or a Milestone Date to a date that is later than the date specified in the notice;
  - the Commonwealth Representative is not required to give a notice under clause 6.3.7 merely because it would benefit the Contractor; and
  - giving, or failing to give, a notice under clause 6.3.7 is not capable of being the subject of a dispute for the purposes of clause 13.1 or otherwise subject to review.
- 6.3.9 If the Commonwealth Representative issues a notice under clause 6.3.7 and unless the Contractor proposes to claim for postponement under this clause 6.3, the Contractor shall submit a CCP to give effect to the notice.

#### **6.4 Postponement Costs (Core)**

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- 6.4.1 Subject to clause 6.4.3 and except to the extent that another provision of the Contract provides to the contrary, the Contractor shall only be entitled to postponement costs in respect of a delay when all of the following are satisfied:

**Note to drafters: If GFF is included in the draft Contract include the text in square brackets below, otherwise delete.**

- the delay resulted from a Commonwealth Default **[or GFF Delay Event]**;
  - a CCP postponing a date for delivery of Supplies or postponing a Milestone Date in accordance with clause 6.3 in respect of the delay has come into effect;
  - the Contractor claims the postponement costs by notifying the Commonwealth Representative of the amount of the postponement costs as soon as practicable after the determination of the amount by the Contractor but no later than six months after the CCP came into effect; and
  - the Contractor provides substantiating evidence to the satisfaction of the Commonwealth Representative of the costs and steps taken to mitigate the Contractor's Loss.
- 6.4.2 The Commonwealth Representative shall, within 30 days after receiving a claim under clause 6.4.1:
- Approve the claim, if it satisfies the requirements of clause 6.4.1, and notify the Contractor of the amount of the postponement costs to be paid; or
  - reject the claim, if it does not satisfy the requirements of clause 6.4.1, and notify the Contractor of the reason for rejection.

**Note to drafters: If GFF is included in the draft Contract include the text in square brackets below, otherwise delete.**

6.4.3 The Contractor shall only be entitled to postponement costs equal to the unavoidable additional costs incurred by the Contractor as a direct consequence of the Commonwealth Default **[or GFF Delay Event]** referred to in clause 6.4.1a.

6.4.4 The Contractor shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify all postponement costs claimed to have been incurred by the Contractor.

## **6.5 Schedule Recovery (Core)**

6.5.1 The Commonwealth Representative may direct the Contractor to take any measures the Commonwealth Representative considers reasonably necessary to ensure delivery of the Supplies or completion of all or part of the Contract within the timeframes (including Milestone Dates) specified in the Contract, if:

- a. the Commonwealth Representative receives a CCP requesting postponement of the date for delivery of the Supplies or a Milestone Date under clause 6.3.4b and the requirements of clauses 6.3.1c to 6.3.1e, 6.3.4, 6.3.5 and 6.3.6 have not been met;
- b. the Contractor fails to meet a Milestone or other requirement of the Contract by the relevant Milestone Date or other due date for performance under the Contract;
- c. the Contractor fails to deliver the CMS or fails to achieve Approval of the CMS (or any update to the CMS) by the date(s) specified in the Contract; or
- d. the Commonwealth Representative receives a CCP requesting postponement of the date for delivery of the Supplies or a Milestone Date under clause 6.3 and the requirements of clauses 6.3.1c to 6.3.1e, 6.3.4, 6.3.5 and 6.3.6 have been met and the parties have negotiated, in accordance with clause 6.5.6, the contents of a direction to expedite the Contractor's progress under this clause 6.5.1.

6.5.2 A direction made under clause 6.5.1:

- a. shall not be inconsistent with the Contract; and
- b. does not limit or affect the Contractor's obligation to comply with the Contract.

6.5.3 Before issuing a direction under clauses 6.5.1a, 6.5.1b or 6.5.1c, the Commonwealth Representative may request from the Contractor information on any matter which may materially affect the Contractor's ability to comply with a direction issued under clause 6.5.1. The Contractor shall provide such information within the timeframes and in the manner specified by the Commonwealth Representative at the time of request.

6.5.4 In addition to the Commonwealth's right in clause 6.5.3, the Commonwealth shall consult with the Contractor before issuing a direction under clause 6.5.1, to ensure that:

- a. the Commonwealth is as well informed as is reasonably possible about the implications of a proposed direction for the Contract or any other contract between the Contractor and the Commonwealth; and
- b. the Contractor has a reasonable opportunity to propose options for alternative ways of meeting the Commonwealth's timing requirements.

6.5.5 Before issuing a direction under clause 6.5.1 the Commonwealth shall ensure the direction takes into account:

- a. the Commonwealth's ability to reschedule the provision of or access to GFM;
- b. the extent to which timing is affected by an event that is beyond the reasonable control of the Contractor; and

**Note to drafters: If GFF is included in the draft Contract include the text in square brackets below, otherwise delete.**

- c. any relevant Excepted Risk, Commonwealth Default **[or GFF Delay Event]**.

6.5.6 If the Commonwealth receives a CCP referred to in clause 6.5.1d, the Contractor shall, at the request of the Commonwealth negotiate in good faith the feasibility and contents of a direction proposed by the Commonwealth Representative under clause 6.5.1, including schedule recovery costs in accordance with clause 6.6.4, and the matters referred to in clause 6.5.4b.

The Contractor shall be available to meet with the Commonwealth within the timeframes and in the manner specified by the Commonwealth Representative. If agreement cannot be reached or a direction under clause 6.5.1 is either not feasible or not used by the Commonwealth Representative, then, without limiting the Commonwealth's rights, the Commonwealth shall consider the CCP in accordance with the provisions of clause 6.3.

- 6.5.7 The Contractor shall comply with a direction under clause 6.5.1 within the timeframes and in the manner specified by the Commonwealth Representative.
- 6.5.8 Subject to clause 6.6, the Contractor is not entitled to any additional payment for complying with a direction under clause 6.5.1, including any payment under clause 6.4.
- 6.5.9 To avoid doubt and despite anything else in the Contract:
- a. the Contractor shall, if any changes to the Contract are discussed or proposed by the parties in the context of this clause 6.5, submit a CCP to give effect to the changes;
  - b. the Commonwealth's rights under this clause are in addition to any other rights or remedies the Commonwealth may have; and
  - c. by issuing a direction under clause 6.5.1, the Commonwealth will not be taken to have waived any right it may have to terminate the Contract.
- 6.5.10 The Commonwealth Representative may reject a CCP under clause 11.1.5 requesting a postponement of the date for delivery of the Supplies or the Milestone Date if the Commonwealth Representative has issued a direction under clause 6.5.1a or 6.5.1d.
- 6.5.11 If the Contractor fails to comply with a direction under clause 6.5.1 the Commonwealth may give the Contractor notice of termination for default under clause 13.2.1e.

## **6.6 Schedule Recovery Costs (Core)**

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- 6.6.1 Subject to clause 6.6.2, the Contractor shall be entitled to schedule recovery costs if:
- a. the Commonwealth Representative has issued a direction under clause 6.5.1a after receiving a CCP under clause 6.3.4b, and the delay notified in that CCP was caused by an act or omission of the Commonwealth in relation to the Contract; or
  - b. the Commonwealth Representative has issued a direction under clause 6.5.1d after negotiation with the Contractor in accordance with clause 6.5.6,
- and all of the following are satisfied:
- c. the Contractor has complied with the requirements of the direction issued under clause 6.5.1a or clause 6.5.1d;
  - d. subject to clause 6.6.4, the Contractor notifies the Commonwealth Representative of the quantum of the schedule recovery costs it claims as soon as practicable after the incurring and determination of the costs by the Contractor but no later than six months after complying with the direction under clause 6.5.1a or clause 6.5.1d; and
  - e. the Contractor provides substantiating evidence to the satisfaction of the Commonwealth Representative of the costs reasonably incurred by the Contractor.
- 6.6.2 The Commonwealth Representative shall, within 30 days after receiving a claim under clause 6.6.1:
- a. Approve the claim, if it satisfies the requirements of clause 6.6.1, and notify the Contractor of the amount of schedule recovery costs to be paid; or
  - b. reject the claim, if it does not satisfy the requirements of clause 6.6.1, and notify the Contractor of the reason for rejection.
- 6.6.3 Subject to clause 6.6.4, the Contractor shall only be entitled to schedule recovery costs equal to the unavoidable additional costs incurred by the Contractor as a direct consequence of complying with a direction under clause 6.5.1, such costs to be determined consistent with Attachment B. Schedule recovery costs shall not include postponement costs.
- 6.6.4 If the Commonwealth issues a direction under clause 6.5.1d subsequent to negotiation in accordance with clause 6.5.6, the Contractor shall be entitled to schedule recovery costs equal to all reasonable costs, including loss of profit, if any, incurred by the Contractor as a direct consequence of complying with the direction, such costs to be determined by the



Commonwealth in a manner which is consistent with Attachment B to the Contract and agreed in writing at the time of negotiation under clause 6.5.6.

- 6.6.5 The Contractor shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify any schedule recovery costs claimed to have been incurred by the Contractor.

## **6.7 Progress Certification (Core)**

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- 6.7.1 If the Contractor seeks Progress Certification of a Milestone, the Contractor shall complete and present a signed Progress Certificate certifying that the Milestone has been achieved in accordance with the Contract.
- 6.7.2 The Commonwealth Representative shall, within 10 Working Days after the presentation of the Progress Certificate in accordance with clause 6.7.1, notify the Contractor that:
- a. the Contractor has achieved the Milestone, in which case the Commonwealth Representative shall sign and issue the Progress Certificate; or
  - b. the Contractor has failed to achieve the Milestone, in which case the Commonwealth Representative shall notify the Contractor of the reason for the failure.
- 6.7.3 If the Contractor has failed to achieve a Milestone because the Contractor has failed to deliver Supplies that were required for the Milestone (**'missing Milestone Supplies'**), the Commonwealth Representative may, instead of notifying the Contractor as described in clause 6.7.2b:
- a. sign and issue the Progress Certificate but only in respect of the Supplies that were delivered; and
  - b. require the Contractor to submit a CCP to amend Attachment C:
    - (i) to adjust the Milestones by postponing the delivery requirements for the missing Milestone Supplies; and
    - (ii) to adjust Milestone Payments to reflect the adjustment of the Milestones.
- 6.7.4 If the parties have not agreed the amendments to the Contract within 10 Working Days after submission of the CCP under clause 6.7.3b, or another period agreed in writing by the Commonwealth, the Commonwealth Representative shall notify the Contractor that it has failed to achieve the Milestone.
- 6.7.5 The issue of a Progress Certificate by the Commonwealth Representative does not constitute Acceptance, or bind the Commonwealth Representative to any later Acceptance, of any Supplies to which the Progress Certificate relates.
- 6.7.6 The Commonwealth Representative may issue a Progress Certificate despite the existence of Defects in the Supplies. The Commonwealth Representative shall set out the detail of the Defects on the Progress Certificate or on an attachment to the Progress Certificate. The Contractor shall rectify the Defects within 10 Working Days (or another period agreed in writing by the Commonwealth) after issue of the Progress Certificate.
- 6.7.7 If the Contractor fails to rectify a Defect in accordance with clause 6.7.6, the Commonwealth may:
- a. without limiting the Contractor's other obligations, rectify the Defect itself or by a third party; and
  - b. elect to recover from the Contractor under clause 13.6 the costs incurred by the Commonwealth in rectifying the Defect. No amount shall be owing to the Commonwealth under this clause 6.7.7 until the Commonwealth elects to recover the amount.
- 6.7.8 If the Commonwealth Representative notifies the Contractor under clause 6.7.2b or 6.7.4 that it has failed to achieve the Milestone, the Contractor shall, within 10 Working Days after receipt of the notice, provide full written details to the Commonwealth Representative of its proposed remedy.
- 6.7.9 The Commonwealth Representative shall by notice, within 10 Working Days after receipt of the Contractor's proposed remedy referred to in clause 6.7.8:
- a. direct the Contractor to complete any course of action proposed by the Contractor within a specified period; or

- b. reject the Contractor's proposal and direct the Contractor to submit an alternative proposal within 10 Working Days.

6.7.10 Each resubmitted:

- a. application for Progress Certification; and
  - b. remediation proposal following rejection under clause 6.7.9b,
- shall be subject to the same process as the original.

**6.8 Acceptance (Core)**

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6.8.1 The Contractor shall, in accordance with Attachment C (including the delivery points and dates specified in that attachment), offer to the Commonwealth Representative Supplies for Acceptance that conform with the requirements of the Contract except for minor Defects (if any).

6.8.2 The Contractor shall, when offering Supplies for Acceptance:

- a. develop and deliver a signed Supplies Acceptance Certificate in accordance with CDRL Line Number MGT-1300, certifying that the Supplies listed on the Supplies Acceptance Certificate conform with the requirements of the Contract, except for the minor Defects (if any) detailed on the Supplies Acceptance Certificate or on an attachment to the Supplies Acceptance Certificate; and
- b. provide any other supporting evidence reasonably required by the Commonwealth Representative, including confirmation of successful completion of any V&V activities or Acceptance testing required by the Contract.

6.8.3 The Commonwealth Representative shall, within 15 Working Days (or such other period as is specified in the Contract) after an offer of Supplies for Acceptance:

- a. Accept the Supplies by signing the Supplies Acceptance Certificate;
- b. if there are minor Defects in the Supplies:
  - (i) Accept the Supplies by signing the Supplies Acceptance Certificate on the basis that the Contractor shall, within 10 Working Days after signature of the Supplies Acceptance Certificate by the Commonwealth Representative, or within such further period as the Commonwealth Representative may allow, rectify the Defects; or
  - (ii) notify the Contractor that the Commonwealth Representative proposes to Accept the Supplies on the basis that:
    - 1) an Application for a Deviation in accordance with clause 8.4 of the SOW to reflect the Defects is Approved; and
    - 2) if required by the Commonwealth, a CCP to amend the Contract to either (or both) reduce the Contract Price to reflect the Defects or to provide for additional Supplies or services relating to the Supplies; or
- c. reject the Supplies, in which case the Commonwealth Representative shall notify the Contractor of the reasons for the rejection.

6.8.4 If clause 6.8.3b(i) applies but the Contractor fails to rectify a Defect in accordance with that clause, the Commonwealth may:

- a. without limiting the Contractor's warranties and other obligations, rectify the Defect itself or by a third party; and
- b. elect to recover from the Contractor under clause 13.6 the costs incurred by the Commonwealth in rectifying the Defect. No amount shall be owing to the Commonwealth under this clause 6.8.4 until the Commonwealth elects to recover the amount.

6.8.5 If clause 6.8.3b(ii) applies, but the parties have not agreed the amendments to the Contract (or the Deviation is not Approved) within 10 Working Days after the Commonwealth's notification (or another period agreed in writing by the Commonwealth), the Commonwealth Representative shall reject the offer of the Supplies for Acceptance.

- 6.8.6 If the Commonwealth Representative rejects an offer of Supplies as not conforming to the requirements of the Contract, the Contractor shall, within 10 Working Days after receipt of the notification of rejection, provide full written details of its proposed remedy to the Commonwealth Representative.
- 6.8.7 The Commonwealth Representative shall, within 10 Working Days after receipt of the Contractor's proposed remedy as referred to in clause 6.8.6:
- a. direct the Contractor to complete, within a specified period, any course of action proposed by the Contractor; or
  - b. reject the Contractor's proposal and direct the Contractor to submit an alternative proposal within 10 Working Days.
- 6.8.8 A further offer of Supplies for Acceptance shall be subject to the same process as the original.
- 6.8.9 If an alternative proposal is rejected under clause 6.8.7b, clause 6.8.12 shall apply.
- 6.8.10 The Contractor acknowledges and agrees that:
- a. the specification of the requirements for the Supplies in the Contract is the result of resource-intensive Commonwealth definition, approval and procurement processes;
  - b. the Commonwealth has relied on the Contractor's representations about time (including as reflected in the Milestone Dates in the Contract);
  - c. the Commonwealth has determined that the Contract is value for money on the basis that full Acceptance of all Supplies is achieved by the applicable Milestone Dates; and
  - d. it is reasonable that the Commonwealth at all times during the period of the Contract has current knowledge of:
    - (i) progress under the Contract;
    - (ii) risks to achievement of Acceptance or other Milestones including potential minor Defects;
    - (iii) any other potential or actual non-compliance with the Contract;
    - (iv) risk management by the Contractor including of emerging risks; and
    - (v) any potential delay in meeting any timing obligation in the Contract, for any reason, and whether or not the delay risk was foreseeable or has been previously identified.
- 6.8.11 The Contractor shall:
- a. proactively ensure that the Commonwealth is kept informed of matters relevant to the issues set out in clause 6.8.10, using the communication channels and reporting processes in the Contract; and
  - b. comply with any directions by the Commonwealth or the exercise of any other Commonwealth powers under or in relation to the Contract in dealing with such matters.
- 6.8.12 If an offer of Supplies for Acceptance is rejected, the Commonwealth Representative may by notice require the Contractor to retake possession of the Supplies within five Working Days after the date of the notice.
- 6.8.13 The Contractor shall bear the costs of replacing or rectifying rejected Supplies and of complying with the directions of the Commonwealth Representative.
- 6.8.14 Any action of the Contractor in correcting or replacing the Supplies and in complying with the directions of the Commonwealth Representative under this clause 6.8 shall not entitle the Contractor to postponement of the date for delivery of the Supplies or the Milestone Date, or relieve the Contractor from performing its obligations under the Contract.

## **6.9 Final Acceptance (Core)**

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- 6.9.1 The Contractor shall, when seeking Final Acceptance:
- a. complete and provide a signed Final Acceptance Certificate certifying that the Contractor has fulfilled its obligations under the Contract, except to the extent that the Contractor's obligations expressly, or by implication, survive the Final Acceptance Milestone, including the obligations in clause 13.7; and

- b. provide any other supporting evidence reasonably required by the Commonwealth Representative, including confirmation of successful completion of any Final Acceptance testing required by the Contract.
- 6.9.2 The Commonwealth Representative shall, within **[INSERT PERIOD]** after the Contractor provides the Final Acceptance Certificate and other evidence referred to in clause 6.9.1:
- a. endorse the Final Acceptance Certificate if:
- (i) the Contractor has achieved all previous Milestones and Acceptance of all Supplies in accordance with clause 6.8; and
- (ii) the Commonwealth Representative is satisfied that the Contractor has fulfilled all of its obligations under the Contract, except to the extent that the Contractor's obligations (including the obligations in clause 13.7) expressly or by implication survive the Final Acceptance Milestone; or
- b. notify the Contractor that it has failed to achieve the requirements of Final Acceptance detailed in clause 6.9.2a, in which case the Commonwealth Representative shall notify the Contractor of the reasons for the failure.
- 6.9.3 If the Commonwealth Representative notifies the Contractor under clause 6.9.2b that it has failed to achieve Final Acceptance, the Contractor shall, within 10 Working Days after receipt of that notice, provide full written details to the Commonwealth Representative of its proposed remedy.
- 6.9.4 The Commonwealth Representative shall, within 10 Working Days after the Commonwealth receives the details of the proposed remedy as referred to in clause 6.9.3 either:
- a. direct the Contractor to complete, within a specified period, any course of action proposed by the Contractor; or
- b. reject the Contractor's proposal and direct the Contractor to submit an alternative proposal within 10 Working Days.
- 6.9.5 A resubmitted application for Final Acceptance shall be subject to the same process as the original.
- 6.9.6 The Commonwealth Representative may require the Contractor to retake possession of Supplies within five Working Days when a notice of failure to achieve Final Acceptance is issued under clause 6.9.2b. Repossession of Supplies does not affect the obligation of the Contractor to provide conforming Supplies.
- 6.9.7 The Contractor shall bear the costs associated with achieving Final Acceptance and of complying with the directions of the Commonwealth Representative.
- 6.9.8 Any action of the Contractor in achieving Final Acceptance and in complying with the directions of the Commonwealth Representative under clause 6.9 does not relieve the Contractor from performing its obligations under the Contract.

**6.10 Approval, Acceptance and Final Acceptance Not to Affect Commonwealth's Other Rights (Core)**

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- 6.10.1 Approval, Acceptance or Final Acceptance of Supplies does not affect the Commonwealth's continuing rights, or the Contractor's continuing obligations, in relation to Supplies, including under clauses 8 and 10.

**6.11 Ownership (Core)**

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- 6.11.1 Subject to clauses 5 and 13.5.3, ownership of Supplies shall pass to the Commonwealth at the following times:
- a. for Supplies that are identified in the Delivery Schedule as being included in a Milestone, upon payment of a claim for that Milestone in accordance with clause 7.2; or
- b. for all other Supplies:
- (i) if the Supplies are to be Accepted, upon payment of a claim for the Milestone relating to the Acceptance of the Supplies or, if no Milestone applies, upon Acceptance of the Supplies, unless the Delivery Schedule states that the Commonwealth shall not obtain ownership of the Supplies; or

- (ii) if the Supplies are not subject to Acceptance, upon delivery to the Commonwealth (or its nominee as directed by the Commonwealth) under or in accordance with the Contract.
- 6.11.2 The Contractor warrants and shall ensure that, at the time ownership of any item of Supplies passes to the Commonwealth under clause 6.11.1:
- a. the Contractor has full power and authority to transfer full legal and beneficial ownership in those Supplies to the Commonwealth; and
  - b. the Commonwealth will obtain good title to those Supplies, free from any Security Interest.
- 6.11.3 When ownership of Supplies passes to the Commonwealth in accordance with clause 6.11.1a and those Supplies are subsequently rejected by the Commonwealth Representative in accordance with clause 6.8 or 6.9, the Commonwealth Representative may elect to re-pass ownership of those Supplies to the Contractor by giving the Contractor notice within 10 Working Days after issuing a notice of rejection under clause 6.8.3 or 6.9.4.

## 7 PRICE AND PAYMENT

### 7.1 Price (Core)

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- 7.1.1 The Contract Price is set out in Attachment B and shall be payable in accordance with the Contract.

### 7.2 Milestone Payments (Core)

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- 7.2.1 If the Contractor submits a claim for a Milestone Payment, the claim shall be accompanied by:
- a. if the Milestone relates to Progress Certification of the Supplies, the relevant Progress Certificate signed by both parties;
  - b. if the Milestone relates to Acceptance of the Supplies, the SAC signed by both parties for the Supplies listed in Attachment B in relation to that Milestone and other Supplies Accepted since the previous Milestone;
  - c. if the Milestone relates to Final Acceptance of the Supplies, the FAC signed by both parties;
  - d. details of all calculations used to adjust the amount claimed in accordance with clause 7.3; and
  - e. any other relevant documentation necessary to establish, to the satisfaction of the Commonwealth Representative, that the claim is in accordance with the Contract.
- 7.2.2 On receipt of a claim for a Milestone Payment the Commonwealth Representative shall either:
- a. Approve the claim if it is submitted in accordance with clause 7.2.1; or
  - b. reject the claim if it is not submitted in accordance with clause 7.2.1.

**Note to drafters: Option A below should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant Contract. If the Commonwealth and Contractor agree to use the PEPPOL framework, the maximum payment term will be 5 days. However, the Commonwealth Pay On-Time Policy does not apply if the nature of the goods or services being procured, or the structure of the procurement, would make it impractical for the policy to be applied. If this is the case, and the**

**Commonwealth does not intend to use the PEPPOL framework, Option A and the Note to Tenderers should be removed prior to RFT release.**

**Note to tenderers: Per the Commonwealth Pay On-Time Policy, maximum payment terms will depend on the applicability of the Pan-European Public Procurement On-Line (PEPPOL) framework. The maximum payment term will be either:**

- a. **5 days, where the Commonwealth and the Contractor both have the capability to deliver and receive electronic invoices (e-invoices) through the PEPPOL framework and have agreed to use e-invoicing; or**
- b. **20 days where the PEPPOL framework does not apply.**

**Further information on the Pay On-Time Policy is available at:**

- <https://www.finance.gov.au/publications/resource-management-guides/supplier-pay-time-or-pay-interest-policy-rmg-417>.

**The option selected below will depend on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.**

**Option A: For when the PEPPOL framework has been agreed by the Commonwealth and the Contractor.**

7.2.3 The Commonwealth and the Contractor shall use electronic invoices through the Pan-European Public Procurement On-Line (PEPPOL) framework for the purposes of the delivery and receipt of payment claims under the Contract.

7.2.4 When a claim is Approved under clause 7.2.2a, the Commonwealth shall make payment within 5 days after the Milestone Date or Approval of the claim, whichever occurs last.

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

7.2.5 When a claim is Approved under clause 7.2.2a., the Commonwealth shall make payment within 20 days after the Milestone Date or Approval of the claim, whichever occurs last.

7.2.6 If the Commonwealth Representative rejects the claim under clause 7.2.2, the Commonwealth Representative shall, within 10 Working Days after receipt of the claim, notify the Contractor of the need to resubmit the claim and the reasons for rejection and any action to be taken by the Contractor for the claim to be rendered correct for payment.

7.2.7 Upon receipt of a notice issued pursuant to clause 7.2.6 the Contractor shall promptly take all necessary steps to make the claim for payment conform to the requirements of the Contract and shall submit a revised claim to the Commonwealth Representative. The resubmitted claim shall be subject to the same conditions as if it were the original claim.

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

7.3.1 Subject to clause 7.3.2, the formula in clause 4.2 of Attachment B shall be applied to:

- a. Milestone Payments, for fluctuations in the cost of labour and materials occurring between the Base Date and the Milestone Date or achievement by the Contractor of that Milestone, whichever occurs first;

**Option: For use if clause 7.8 Cost Reimbursement is included.**

- b. Cost Reimbursement Payments, for fluctuations in the cost of labour and materials occurring between the Base Date and the date of the Cost Reimbursement Payment claim; and
- c. the Mobilisation Payment, for fluctuations in the cost of labour and materials occurring between the Base Date and the date the Mobilisation Payment is made by the Commonwealth.

- 7.3.2 No later than three months after the publication of the final indices for the period referred to in clause 7.3.1 to which the application of the formula relates (**'the relevant period'**), the Contractor shall:
- a. if the amount calculated in accordance with clause 7.3.1 is to the credit of the Contractor, submit a separate claim for payment of any amount calculated in accordance with clause 7.3.1; or
  - b. if the amount calculated in accordance with clause 7.3.1 is to the credit of the Commonwealth, notify the Commonwealth of the amount of the credit.
- 7.3.3 The Commonwealth shall not be liable for any claims for payment under clause 7.3.2a submitted after the end of the three month period referred to in clause 7.3.2.
- 7.3.4 On receipt of a claim for payment under clause 7.3.2a, the Commonwealth Representative shall:
- a. Approve the claim if it is submitted in accordance with clause 7.3 and make payment within 30 days after receipt of the claim; or
  - b. reject the claim and notify the Contractor, within 10 Working Days after receipt of the claim, of the reasons for the rejection.

**Note to drafters: Option A below should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant Contract. If the Commonwealth does not intend to use the PEPPOL framework, Option A and the Note to Tenderers should be removed prior to RFT release.**

**Note to tenderers: The option selected below will depend on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.**

**Option A: For when the PEPPOL framework has been agreed by the Commonwealth and the Contractor.**

- 7.3.5 When a claim is Approved under clause 7.3.4a, the Commonwealth shall make payment within 5 days of Approval of the claim.

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

- 7.3.6 When a claim is Approved under clause 7.3.4a, the Commonwealth shall make payment within 20 days of Approval of the claim.

- 7.3.7 If a claim is rejected under clause 7.3.4b, the Contractor may resubmit the claim no later than 30 days after notice of the rejection. The Commonwealth shall deal with the resubmitted claim as if it were the original claim for the purposes of clause 7.3.4. If the Contractor fails to resubmit the claim within 30 days, or the Commonwealth rejects the resubmitted claim, the Commonwealth will not be liable for any adjustment claims in relation to the relevant period.
- 7.3.8 If an amount calculated in accordance with clause 7.3.1 is to the credit of the Commonwealth, the Commonwealth may elect to recover the amount from the Contractor under clause 13.6. No amount shall be owing to the Commonwealth under this clause 7.3.8 until the Commonwealth elects to recover the amount.

**Note to tenderers: When the Contract Price will be payable in Australian dollars only, a clause that enables claims to be made for adjustments caused by exchange rate fluctuation shall be included following negotiation with the successful tenderer.**

#### **7.4 Bank Guarantee for Mobilisation Payment (RFT Core)**

**Note to tenderers: If the tenderer proposes a Mobilisation Payment for any resultant Contract (refer to TDR D-2), the Commonwealth will (generally) require a non-reducing Bank Guarantee for 50% of the amount of the Mobilisation Payment, in accordance with this clause 7.4.**

- 7.4.1 The Contractor shall provide a bank guarantee equal to the Mobilisation Security Amount specified in the Details Schedule to the Commonwealth no later than the Mobilisation Security Date specified in the Details Schedule. The bank guarantee shall be unconditional and shall

be from a bank or financial institution acceptable to the Commonwealth Representative, and in the form of the Bank Guarantee Deed set out at Annex G to Attachment I.

- 7.4.2 The Commonwealth shall not be obligated to pay the Mobilisation Payment identified in the Details Schedule until it has received the bank guarantee in accordance with clause 7.4.1.
- 7.4.3 The Mobilisation Payment shall be offset against amounts payable by the Commonwealth to the Contractor under the Contract. The Commonwealth shall be deemed to have paid those claims for payment Approved in accordance with clauses 7.2 and 7.3, until the sum of the Approved claims for payment equals the amount of the Mobilisation Payment.
- 7.4.4 The Commonwealth shall release the bank guarantee provided under clause 7.4.1 within 10 Working Days after the date on which the sum of the amounts deemed to have been paid under clause 7.4.3 equals or is greater than the amount of the Mobilisation Payment.
- 7.4.5 The Commonwealth's rights under the bank guarantee provided under clause 7.4.1 shall be exercisable by the Commonwealth for either or both of the following:
- a. to obtain repayment of an amount equal to the value of any part of the Mobilisation Payment that has not been offset against amounts payable by the Commonwealth to the Contractor under the Contract in the event of termination of the Contract in accordance with clause 13.2; and
  - b. to recover any debts owing by the Contractor to the Commonwealth in relation to the Contract.

#### 7.5 Bank Guarantee for Performance (RFT Core)

**Note to drafters: Drafters must include both clause 7.5 Bank Guarantee for Performance and clause 7.7 Deed of Guarantee and Indemnity in the RFT. Although it is unlikely that both forms of security will be required, it may not be possible to determine the form of any required security until the preferred tenderer has been identified and the risk associated with the preferred**

**Note to tenderers: Whether the Commonwealth requires both a bank guarantee in respect of the Contractor's performance and a Deed of Guarantee and Indemnity (clause 7.7) will be determined during negotiations with the preferred tenderer, considering risks associated with the provision of the Supplies**

**If the Commonwealth determines that it does not require a security, the amount nominated for a security within the tender response will not be included in any resultant Contract.**

**If, under the [Master Guarantee Program](#), Defence and the tenderer have pre-agreed amendments to the template Bank Guarantee Deed, the tenderer should identify this within the 'Statement of Non-Compliance' tendered in accordance with TDR A-4 and indicate which alterations it is seeking to apply, and if any further amendments are proposed.**

- 7.5.1 The Contractor shall provide a bank guarantee equal to the Performance Security Amount specified in the Details Schedule to the Commonwealth no later than the Performance Security Date specified in the Details Schedule. The bank guarantee shall be unconditional and shall be from a bank or financial institution acceptable to the Commonwealth Representative, and in the form of the Bank Guarantee Deed set out at Annex G to Attachment I.
- 7.5.2 The Commonwealth shall release the bank guarantee provided under clause 7.5.1 within 10 Working Days after the Release Event specified in the Details Schedule occurs.
- 7.5.3 The Commonwealth's rights under the bank guarantee provided under clause 7.5.1 shall be exercisable by the Commonwealth for either or both of the following:
- a. to obtain compensation for Loss suffered in the event that the Contractor fails to perform the Contract, including upon termination of the Contract in accordance with clause 13.2; and
  - b. to recover any debts owing by the Contractor to the Commonwealth in relation to the Contract.



**7.6 Exercise of Securities (RFT Core)**

- 7.6.1 If the Commonwealth exercises any or all of its rights under the securities provided under clause 7.4 or 7.5, the Commonwealth shall not be liable for, and the Contractor shall release the Commonwealth from liability for, any resultant Loss suffered by the Contractor.
- 7.6.2 The rights of the Commonwealth to recover from the Contractor the balance, after exercise of any securities provided under clauses 7.4 or 7.5, of Loss suffered by the Commonwealth shall not be limited by the Commonwealth's exercise of those securities.

**7.7 Deed of Guarantee and Indemnity (RFT Core)**

**Note to tenderers: If the tenderer has a Master Guarantee and Indemnity Deed with Defence that it wishes to apply to any resultant Contract, and this includes pre-agreed amendments to the template Bank Guarantee, the tenderer is to indicate which alterations it is seeking to apply within the 'Statement of Non-Compliance' tendered in accordance with TDR A-3. Information on the Master Guarantee Program is available at:**

- <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/master-guarantee-program>.

**Option: For use when the Contractor does not have a Master Guarantee and Indemnity Deed with Defence, or elects not to add the Contract to its Master Guarantee and Indemnity Deed.**

- 7.7.1 The Contractor shall, on the Effective Date specified in the Details Schedule, provide the Commonwealth Representative with a Deed of Guarantee and Indemnity in the form of Annex H to Attachment I executed by the Guarantor specified in the Details Schedule.

**Option: For use when the Contractor has a Master Guarantee and Indemnity Deed with Defence and elects to apply the Master Guarantee and Indemnity to the Contract.**

- 7.7.2 The Contractor shall, by the Effective Date specified in the Details Schedule, ensure that the Contract is included as a Guaranteed Agreement at Attachment 1 to the Master Deed of Guarantee and Indemnity.

**7.8 Cost Reimbursement (Optional)**

- 7.8.1 Cost Reimbursement Payments shall be payable to the Contractor for Supplies specified in [INSERT ANNEX or ANNEXES] to the SOW ('Cost Reimbursement Supplies') in accordance with this clause 7.8.
- 7.8.2 Subject to this clause 7.8, the Cost Reimbursement Payments shall comprise costs that are:
- determined in accordance with Attachment B; and
  - actually and properly incurred by the Contractor in providing the Cost Reimbursement Supplies.
- 7.8.3 The maximum amounts payable to the Contractor as Cost Reimbursement Payments are detailed in Attachment B.
- 7.8.4 Cost Reimbursement Payments shall be payable by the Commonwealth to the Contractor for Cost Reimbursement Supplies on the last day of each month for work completed in that month in accordance with the Contract.
- 7.8.5 The Commonwealth shall only pay Cost Reimbursement Payments when the Contractor has provided evidence of the actual costs incurred to the satisfaction of the Commonwealth Representative.
- 7.8.6 The Contractor is not entitled to claim costs relating to taxes and duties already provided for under the Contract, including GST.
- 7.8.7 The Commonwealth shall not be liable to pay the Contractor the maximum amount of Cost Reimbursement Payments detailed in Attachment B unless that amount has been incurred in accordance with this clause 7.8.
- 7.8.8 The Contractor shall maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify all costs claimed to have been incurred in respect of the Cost Reimbursement Supplies.

- 7.8.9 If a Cost Reimbursement Payment claim is received by the Commonwealth Representative, the Commonwealth Representative shall:
- Approve the claim;
  - reject the claim; or
  - conduct a further cost investigation of the claim.

**Note to drafters: Option A below should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant Contract. If the Commonwealth does not intend to use the PEPPOL framework, Option A and the Note to Tenderers should be removed prior to RFT release.**

**Note to tenderers: The option selected below will depend on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.**

**Option A: For when the PEPPOL framework has been agreed by the Commonwealth and the Contractor.**

- 7.8.10 When a claim is Approved under clause 7.8.9a., the Commonwealth shall make payment within 5 days of Approval of the claim.

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

- 7.8.11 When a claim is Approved under clause 7.8.9a., the Commonwealth shall make payment within 20 days of Approval of the claim.

- 7.8.12 If the Commonwealth Representative rejects a claim, the Commonwealth Representative shall, within 10 Working Days after receipt, notify the Contractor of the need to resubmit the claim and the reasons for the rejection.
- 7.8.13 If the Commonwealth Representative requires further cost investigation of a claim, the Commonwealth Representative shall notify the Contractor within 10 Working Days after receipt of the claim. The Commonwealth Representative shall conduct the cost investigation process and Approve or reject the claim within **[INSERT PERIOD]**.

**Note to drafters: The option of 5 days should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant Contract. If the Commonwealth does not intend to use the PEPPOL framework, the 5 day option and note to tenderers should be removed prior to RFT release.**

**Note to tenderers: The selection of 5 or 20 days below will depend on whether the PEPPOL framework has been agreed by the Commonwealth and the Contractor. This will be determined based on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.**

- 7.8.14 If a claim is Approved under clause 7.8.13, payment shall be made within **[INSERT 5 or 20]** days after the Approval. If a claim is rejected and resubmitted, processing of the resubmitted claim shall be subject to the same conditions as if it were the original claim.
- 7.8.15 The Commonwealth shall review progress made in the delivery of Cost Reimbursement Supplies when the cumulative amount of claims submitted by the Contractor against a relevant annex to the SOW totals 25%, 50% and 75% of the amount allocated in Attachment B for those Cost Reimbursement Supplies.
- 7.8.16 At each review point the Commonwealth may:
- authorise the Contractor to proceed in accordance with the relevant annex to the SOW; or
  - require the Contractor to submit a CCP to change the relevant annex to the SOW and any other affected part of the Contract.

## **7.9 Suspending Payment (Core)**

- 7.9.1 The Commonwealth may suspend some or all payments under the Contract if one or more of the following events occurs:

- a. a Stop Payment Milestone is not achieved by the relevant Milestone Date (and the Commonwealth may continue to suspend payments until the relevant Stop Payment Milestone has been achieved); or
- b. an event referred to in clause 4.5.2 occurs (and the Commonwealth may continue to suspend payments for the periods set out in clause 4.5.2).

7.9.2 The exercise by the Commonwealth of its rights under this clause 7.9 shall not:

- a. entitle the Contractor to claim postponement under clause 6.3;
- b. relieve the Contractor from performing any of its obligations under the Contract; or
- c. in the case of a suspended payment which is subsequently made, entitle the Contractor to claim interest in accordance with clause 7.10.

7.9.3 The Commonwealth's rights under this clause 7.9 do not affect the Commonwealth's rights in respect of any Default of the Contractor, including:

- a. to give the Contractor a Default Notice under clause 13.3;
- b. to recover compensation or damages; or
- c. to terminate the Contract for Contractor Default.

#### 7.10 Early and Late Payment (Core)

**Note to drafters: In accordance with the Supplier Pay On-Time or Pay Interest Policy, the Commonwealth is obliged to pay interest when it does not make payment in full within the maximum payment terms. Refer to Resource Management Guide 417 for further information, including exceptions to the application of the policy:**

- <https://www.finance.gov.au/publications/resource-management-guides/supplier-pay-time-or-pay-interest-policy-rmq-417>

7.10.1 If payment of an amount due to the Contractor under the Contract is made early, interest shall be payable by the Contractor to the Commonwealth in accordance with the formula at clause 7.10.3.

7.10.2 If payment of an amount due to the Contractor under the Contract is made late, interest shall be payable by the Commonwealth to the Contractor in accordance with the formula at clause 7.10.3. Any payment not made within 60 days after the date it is to be made under the Contract shall be in breach of the Contract.

7.10.3 Interest payments shall be calculated in accordance with the following formula:

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

where:

- |                         |  |
|-------------------------|--|
| 'I%' for early payments | means the Reserve Bank of Australia cash rate target current at the date of payment expressed as a percentage;   |
| 'I%' for late payments  | means the ATO sourced General Interest Charge rate current at the due date of payment expressed as a percentage; |
| 'P'                     | means the amount of the early or late payment; and   |
| 'n'                     | means the number of days before or after the due date for payment that the payment is made.                      |

**Note to drafters: The option of 5 days should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant**

**Contract. If the Commonwealth does not intend to use the PEPPOL framework, the 5 day option and note to tenderers should be removed prior to RFT release.**

**Note to tenderers: The selection of 5 or 20 days below will depend on whether the PEPPOL framework has been agreed by the Commonwealth and the Contractor. This will be determined based on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.**

- 7.10.4 If the interest payment is not offset or paid as part of the subject claim, the Commonwealth Representative shall adjust the next Approved payment under the Contract. If there are no further payments, the relevant party shall pay the interest payment within **[INSERT 5 or 20]** days after being provided with notice.

#### **7.11 Incentive Payments (Optional)**

- 7.11.1 In addition to the Contract Price, the Commonwealth shall pay the Contractor incentive payments ('**Incentive Payments**') for superior performance as evidenced by the Contractor achieving the key performance indicators set out in Annex I to Attachment B, to the Commonwealth Representative's satisfaction but subject to clause 7.11.2.
- 7.11.2 The Commonwealth shall not pay the Contractor Incentive Payments for any assessment period if, during the assessment period:
- a. the Contractor did not achieve a Milestone due to be achieved during the assessment period;
  - b. the Commonwealth was entitled to claim liquidated damages under clause 10.6; or
  - c. the Commonwealth was entitled to terminate the Contract for default under clause 13.2.
- 7.11.3 The maximum amount payable as Incentive Payments under the Contract, to be apportioned over the assessment periods set out in Annex I to Attachment B, shall be the Incentive Payment amount specified in the Details Schedule.
- 7.11.4 The weightings for the key performance indicators for each assessment period are set out in Annex I to Attachment B.
- 7.11.5 At the end of each assessment period the Contractor shall provide the Commonwealth Representative with a written statement of the Contractor's achievement of the key performance indicators and reasonable information as requested by the Commonwealth Representative to evaluate the Contractor's performance. No Incentive Payments shall be awarded until the Contractor has given the Commonwealth Representative the written statement and reasonable information as requested.
- 7.11.6 Within 30 days after the completion of the assessment period, the Commonwealth Representative shall assess the information provided under clause 7.11.5 and notify the Contractor of the amount of Incentive Payments awarded, if any.

**Note to drafters: The option of 5 days should only be included where the Commonwealth intends to use the Pan-European Public Procurement On-Line (PEPPOL) framework under any resultant Contract. If the Commonwealth does not intend to use the PEPPOL framework, the 5 day option and note to tenderers should be removed prior to RFT release.**

**Note to tenderers: The selection of 5 or 20 days below will depend on whether the PEPPOL framework has been agreed by the Commonwealth and the Contractor. This will be determined based on the tenderer's response to clause 2.9 of Annex A to Attachment A to the Conditions of Tender.**

- 7.11.7 On receipt of notice as to the amount of the Incentive Payments, the Contractor shall submit to the Commonwealth Representative a claim for the amount detailed in the notice. The Commonwealth shall pay the claim for Incentive Payments within **[INSERT 5 or 20]** days after the Commonwealth's notification under clause 7.11.6.
- 7.11.8 Incentive Payments not awarded for the assessment period to which they apply shall not be payable by the Commonwealth in any subsequent assessment period.

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

- 7.12.1 All Taxes imposed or levied in Australia or overseas in connection with the Contract shall be met by the Contractor and the Contractor agrees that, with the exception of GST, they are included within the Contract Price.

- 7.12.2 Subject to clause 7.12.4 the Commonwealth shall, in addition to the Contract Price, pay the amount of GST imposed on any taxable supply made by the Contractor to the Commonwealth under the Contract.
- 7.12.3 For the purposes of clause 7.12.2 the additional amount is the amount of GST payable on that part of the Contract Price to which the taxable supply relates as if that part of the Contract Price is the value of the taxable supply for the purpose of the GST Act.
- 7.12.4 The Contractor shall submit each claim for payment under clause 7 in the form of a valid tax invoice. The tax invoice shall include the amount and method of calculation of any GST payable by the Contractor in relation to that claim for payment as a separate item.
- 7.12.5 If the Contractor incorrectly states the amount of GST payable, or paid, by the Commonwealth on an otherwise valid tax invoice, the Contractor shall issue to the Commonwealth a valid adjustment note in accordance with the GST Act.
- 7.12.6 If the Commonwealth makes, or is assessed by the ATO as having made, a taxable supply to the Contractor under or in connection with the Contract, the Commonwealth shall be entitled to recover from the Contractor upon presentation of a valid tax invoice, the amount of GST paid or payable by the Commonwealth to the ATO.
- 7.12.7 The Commonwealth may elect to recover from the Contractor under clause 13.6 any amount of GST to be paid by the Contractor under clause 7.12.6. No amount shall be owing to the Commonwealth under this clause 7.12.7 until the Commonwealth elects to recover the amount.

### 7.13 GST Agent (RFT Core)

***Note to tenderers: This clause will only be included if the Contractor appoints a resident agent. Tenderers should make their own inquiries regarding the suitability of proposing an agent to act for them for the purposes of Division 57 of the GST Act. Tenderers should indicate, within the 'Statement of Non-Compliance' tendered in accordance with TDR A-4, the requirement for this clause in any resultant Contract and, if so, their ability to comply with it.***

- 7.13.1 The Contractor has appointed the GST Agent specified in the Details Schedule as its resident agent for the purposes of Division 57 of the GST Act.
- 7.13.2 The Contractor, by appointing a resident agent, shall not be relieved of its liabilities or obligations under the Contract and shall at all times be responsible for ensuring that the resident agent complies with the requirements of this clause 7.12.7.
- 7.13.3 Without limiting clause 7.13.2, the Contractor shall ensure that its resident agent:
- a. provides all necessary documentation required by the Commonwealth for a claim for payment to be considered under clause 7.11.8; and
  - b. complies with Division 57 of the GST Act.
- 7.13.4 The Commonwealth shall make all payments otherwise due to the Contractor under clause 7 to the resident agent. The Contractor agrees that such payments to the resident agent shall discharge, to the extent of the payment, the Commonwealth's liability to the Contractor for those Supplies.
- 7.13.5 If the Contractor appoints an alternative resident agent, the Contractor shall notify the Commonwealth Representative within 10 Working Days after the change, and provide the information required in the Details Schedule.
- 7.13.6 The Contractor, if requested by the Commonwealth Representative, shall provide the Commonwealth Representative a copy of the resident agency agreement, which copy need not contain prices.

### 7.14 Cost Principles (Core)

- 7.14.1 Without in any way affecting or overriding the other provisions of the Contract, the Contractor shall apply the Defence Cost Principles when preparing any:
- a. claim for postponement costs under clause 6.4;
  - b. claim for schedule recovery costs under clause 6.6;

**Option: For use when Defence Cost Principles are applied**

**Note to drafters: Use unless not required as per cl 2.31. of the Defence Cost Principles**

- c. price for any CCP under clause 11.1; or
- d. claim for costs if the Contract is terminated.

## **7.15 ACE Measurement Rules (Core)**

- 7.15.1 Where the Contractor is required to calculate ACE and ICE under the Contract, ACE and ICE shall be calculated in accordance with the ACE Measurement Rules, and any alternate and/or additional deeming rates that are detailed in Attachment B.
- 7.15.2 The Contractor shall, and shall ensure that AIC Subcontractors maintain books, records, documents and other evidence and accounting procedures and practices, sufficient to justify the calculation of ACE and ICE in accordance with the ACE Measurement Rules.

## **8 DEFECT NOTIFICATION AND RECTIFICATION**

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

- 8.1.1 If during the Defect Notification Period specified in the Details Schedule the Contractor becomes aware of any Defect in the Supplies which adversely affects, or is likely to adversely affect:
  - a. the safety of Supplies or the safety of persons, the Contractor shall notify the Commonwealth Representative of the Defect within one Working Day; or
  - b. the operation or capability of the Supplies, the Contractor shall notify the Commonwealth Representative of the Defect within five Working Days.
- 8.1.2 The Contractor shall, within 30 days after a notification under clause 8.1.1, provide the Commonwealth with a report on the nature of the Defect, its cause and effects, and proposed rectification action.

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

- 8.2.1 If the Commonwealth Representative notifies the Contractor of a Defect in Supplies during the Defect Rectification Period (specified in the Details Schedule) applicable to the Supplies, the Contractor shall, within **[INSERT PERIOD]** after the notification, or a longer period agreed in writing by the Commonwealth, by repair, replacement or modification:
  - a. rectify the Defect; and
  - b. rectify any damage or other adverse effect to the extent caused by the Defect or the rectification of the Defect,

whether or not the Defect arises out of or as a consequence of a Contractor Default.
- 8.2.2 The Contractor shall be entitled to claim for an additional amount (calculated in accordance with Attachment B and on the same basis as the Contract Price) for any rectification work performed under clause 8.2.1, but only to the extent that the Contractor demonstrates that:
  - a. the Defect arose out of, or as a consequence of:
    - (i) a Commonwealth Default; or
    - (ii) the Commonwealth wilfully damaging the Supplies; or
  - b. if the Defect comprises damage to the Supplies, the damage arose while the risk of loss of or damage to the Supplies resided with the Commonwealth under clause 10.7.1 and the Contractor is not otherwise liable for the damage under clause 10.8.2 and:
    - (i) the damage arose out of or as a consequence of:
      - 1) the Supplies not being stored, installed, configured, used, maintained or modified by the Commonwealth or a Commonwealth Contractor in accordance with any specifications, instructions or manuals delivered to the Commonwealth in respect of the relevant Supplies (provided that compliance with the specifications, instructions or manuals would not prevent the relevant Supplies from being fit for purpose in accordance with clause 3.3);

- 2) an Excepted Risk occurring after the Supplies were delivered to the Commonwealth; or
  - 3) a breach of a general law duty or an applicable law by an Unrelated Party; or
- (ii) the damage has not arisen out of or as a consequence of a Contractor Default and the damage could not reasonably have been prevented or mitigated by reasonable care on the part of the Contractor or Contractor Personnel.
- 8.2.3 The Contractor's obligations under clause 8.2.1a do not require the Contractor to rectify a Defect in GFM incorporated into Supplies, except to the extent that the Defect:
- a. arose out of or as a consequence of a Contractor Default; or
  - b. was present in the item when it was provided to the Commonwealth by or through the Contractor or a Related Body Corporate of the Contractor (whether under the Contract or another contract).
- 8.2.4 Subject to clauses 8.2.2 and 8.2.8, the Contractor shall, except to the extent that the Commonwealth Representative otherwise agrees, bear all costs of, and incidental to, any rectification work performed under clause 8.2.1, including the costs of any removal, disassembly, packing, freight (not exceeding the freight cost between the Contract delivery point and the Contractor's nominated repair facility and return), relevant testing, re-assembly and reinstallation.
- 8.2.5 If the Contractor fails to rectify a Defect within the period specified in clause 8.2.1, the Commonwealth may itself or by a third party ensure that the rectification is performed. If the Commonwealth engages a third party to perform the rectification work, the Contractor's warranties and obligations in relation to the Supplies will be reduced to the extent of the warranty given by the third party in relation to the rectification work. The Commonwealth may elect to recover from the Contractor under clause 13.6 the amount of the Commonwealth's costs of the rectification work. No amount shall be owing to the Commonwealth under this clause 8.2.5 until the Commonwealth elects to recover the amount.
- 8.2.6 If a Defect (other than a Latent Defect) in any Supplies is rectified in accordance with clause 8.2.1, the Defect Rectification Period for the affected Supplies shall expire on the later of:
- a. the end of the original Defect Rectification Period; or
  - b. the date that is half the original Defect Rectification Period after the rectified Supplies are returned to the Commonwealth.
- 8.2.7 If the Contractor has performed rectification work as required by this clause 8.1.2 and the Commonwealth is not satisfied that the Defect has been rectified, the Contractor shall perform any additional tests that are required by the Commonwealth to determine whether the Defect has been rectified.
- 8.2.8 If tests conducted under clause 8.2.7 show that the Defect has been rectified, the cost of the tests shall be borne by the Commonwealth. If the tests show that the Defect has not been rectified:
- a. the Contractor shall rectify the Defect as soon as practicable; and
  - b. the costs of the rectification work and the tests shall be borne by the Contractor.
- 8.2.9 Nothing under this clause 8.2 limits or affects:
- a. the obligations of the Contractor under clause 3.2, 3.3, 10.7 or 10.8; or
  - b. any other right of the Commonwealth under the Contract or otherwise arising out of or as a consequence of a Defect.

### **8.3 Manufacturer and Other Warranties (Optional)**

***Note to tenderers: This clause may be included if there are warranties that are available from the relevant manufacturer or supplier that will extend beyond the end of the relevant Defect Rectification Period and these warranties represent value for money for the Commonwealth. Tenderers should identify any warranties of this nature in their tenders, including the additional cost (if any) associated with such warranties.***

- 8.3.1 The Contractor shall ensure that the Commonwealth obtains the benefit of any manufacturer, supplier or other third party warranty applicable to the Supplies (including after the expiry of

the Defect Rectification Period for the relevant Supplies), including by taking all reasonable action to enforce such a warranty, until the expiry of the warranty or clause 8.3.2 applies.

- 8.3.2 Following achievement of Final Acceptance or the termination or expiry of the Contract, the Contractor shall:
- a. assign the benefit of any remaining third party warranties for those Supplies to the Commonwealth; or
  - b. if the Contractor is not permitted to assign those third party warranties, otherwise ensure that the Commonwealth obtains the benefit of any remaining third party warranties for those Supplies, including by taking all reasonable action to enforce such a third party warranty until the expiry of the warranty.

#### **8.4 Spare Parts and Support Equipment (Optional)**

- 8.4.1 The Contractor shall, for the period of **[INSERT PERIOD IN YEARS]** commencing immediately after delivery of the Supplies, maintain facilities or other arrangements for the supply to the Commonwealth or Commonwealth Contractors of sufficient quantities of spare parts and support equipment to enable the Supplies to be maintained.
- 8.4.2 If during the period set out in clause 8.4.1, the Contractor becomes aware that its ability to supply spare parts or support equipment may be adversely affected, it shall give the Commonwealth at least three months prior notice of that event. If there will be a final production run of spare parts or support equipment, the Contractor shall nominate in the notice the date by which the Commonwealth may place final orders.
- 8.4.3 The Contractor shall ensure that provisions corresponding to clauses 8.4.1 and 8.4.2 are included in all Approved Subcontracts under which spare parts or support equipment may be provided.
- 8.4.4 The Commonwealth is not bound to order any, or any particular quantity of, spare parts or support equipment from the Contractor.

### **9 INSURANCE**

#### **9.1 Insurance (Core)**

***Note to drafters: Drafters are to tailor this clause by selecting only those insurance policies actually required for the draft Contract and by inserting the required limit of indemnity for the relevant insurances in the Details Schedule. (Note: the LRA provides the basis for determining the insurance requirements). As a guide, insurance policy indemnity limits should be based on the Maximum Probable Loss (MPL) determined by the LRA. The MPL represents the financial consequence of a risk event occurring after taking into account any risk treatments that mitigate consequence – it is NOT to be discounted by multiplying consequence x likelihood.***

***The ACIP Initiative applies to CASG procurements in accordance with Functional Policy (Procurement) – Mandatory Procurement Policy Requirements for the Approved Contractor Insurance Program Initiative. Drafters should refer to the ASDEFCON Insurance Handbook for guidance to assist with understanding and tailoring this clause. In accordance with paragraphs 28 to 31 of Functional Policy (Procurement) – Mandatory Procurement Policy Requirements for the Approved Contractor Insurance Program Initiative, material changes to this clause must be approved by the ACIP Management Team at:***

***[ACIP.ManagementTeam@defence.gov.au](mailto:ACIP.ManagementTeam@defence.gov.au).***

***Information on the ACIP Initiative is available at:***

- ***<http://ibss/PublishedWebsite/LatestFinal/%7B836F0CF2-84F0-43C2-8A34-6D34BD246B0D%7D/Item/331E4CAE-EEBE-45A0-9DA6-9B2C24E1DE33>.***

***For non-CASG procurements, drafters may seek approval to apply the ACIP Initiative by emailing the ACIP Management Team at:***

***[ACIP.ManagementTeam@defence.gov.au](mailto:ACIP.ManagementTeam@defence.gov.au).***

***Drafters using this clause for non-CASG procurements (unless otherwise approved by the ACIP Management Team) or for CASG procurements in which no tenderer with ACIP status will***



**participate, must delete the Note to tenderers below and also delete clause 9.1.29 and its associated Note to tenderers.**

**Note to tenderers: The operation of clause 9.1 will vary depending on whether the Contractor has Approved Contractor Insurance Program (ACIP) status and, where a Contractor has ACIP status, to the extent any of the policies required by clause 9.1 are within the Contractor's ACIP.**

**As per clause 9.1.29, for Contractors with ACIP status, the Contractor will be deemed compliant with relevant requirements of this clause where the policy is within the scope of the Contractor's ACIP. Information on the ACIP Initiative and the list of companies with current ACIP status is at:**

- <https://www.defence.gov.au/business-industry/procurement/policies-guidelines-templates/procurement-guidance/acip-initiative>

9.1.1 The Contractor shall effect and maintain the insurances (which, for the purposes of this clause 9.1 will be satisfied where the Contractor causes such insurances to be effected and maintained or where the Contractor is insured under such insurances) for the times and in the manner specified in this clause 9.1, without requiring insurance to be effected to the extent that a particular risk:

- is insured against under other insurance effected in compliance with this clause 9.1; or
- has been expressly retained by the Commonwealth, except to the extent that such retention by the Commonwealth is dependent on the Contractor being liable only to the extent that it is insured for the liability.

For the avoidance of doubt, the terms of this clause 9.1 do not alter the allocation of risk or liability between the parties as provided for under any other clause of the Contract.

9.1.2 The Contractor shall use its reasonable endeavours to ensure that Subcontractors and their employees, officers and agents are insured as required by this clause 9.1, as is appropriate (including with respect to the amount of insurance, types of insurance and period of insurance) given the nature of services or work to be performed by them, as if they were the Contractor.

**Option: For use if workers compensation insurance is required.**

9.1.3 **(workers compensation)** The Contractor shall effect and maintain workers compensation insurance or registrations as required by law, in respect of the Contractor's liability to its employees engaged in the performance of any obligation or the exercise of any right under the Contract. Where permitted under the relevant statutory workers compensation or accident compensation scheme, the insurance or registrations shall extend to cover the vicarious liability of the Commonwealth for the acts or omissions of the Contractor. However, the requirements of this clause 9.1.3 (workers compensation) do not apply to the extent and for such time as the Contractor is a licensed self-insurer or exempt employer in the relevant jurisdiction.

**Note to tenderers: Alternative clause 9.1.3 to be used where workers engaged by the Contractor will be performing work outside of Australia. If this alternative clause is used, prior to Contract signature the clause number and cross-references in this clause 9.1.3 will need to be automated and automatic cross-references elsewhere in clause 9.1 to this clause will need to be reinserted.**

9.1.3 **(workers compensation)** The Contractor shall effect and maintain:

- workers compensation insurance or registrations as required by law, in respect of the Contractor's liability to its employees engaged in the performance of any obligation or the exercise of any right under the Contract. Where permitted under the relevant statutory workers compensation or accident compensation scheme, the insurance or registrations shall extend to cover the vicarious liability of the Commonwealth for the acts or omissions of the Contractor. However, the requirements of this clause 9.1.3a do not apply to the extent and for such time as the Contractor is a licensed self-insurer or exempt employer in the relevant jurisdiction; and
- in each jurisdiction where common law claims can be brought outside of the statutory workers compensation or accident compensation scheme referred to in clause 9.1.3a, employer's liability insurance with a limit of indemnity of not less than the amount customarily effected by prudent insureds for this risk in each relevant jurisdiction, covering any work-related injury, damage, expense, loss or liability suffered or incurred by any person engaged by the Contractor in the work under the

Contract (or their dependants). Such insurance shall extend to cover the vicarious liability of the Commonwealth for the acts or omissions of the Contractor.

**Option: For use if public and products liability insurance is required.**

9.1.4 **(public and products liability)** The Contractor shall effect and maintain public and products liability insurance written on an occurrence basis with a limit of indemnity of not less than:

- a. the amount specified in the Details Schedule each and every occurrence for public liability claims; and
- b. the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period for products liability claims,

which covers:

- c. the Contractor, its employees, officers and agents (including for liability to each other); and
- d. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents,

for their respective liabilities for any:

- e. loss of, damage to, or loss of use of, any tangible property (including GFF, GFE and any other Commonwealth Property in the care, custody or control of the Contractor or its Subcontractors) for a sublimit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and damage under the insurance referred to in clause 9.1.6 (property [or Industrial Special Risks]); and
- f. the bodily injury, disease, illness or death of any person,

caused by, arising out of, or in connection with the negligent performance of any obligation or the exercise of any right under the Contract or under any GFF Licence entered into for the purposes of this Contract by the Contractor or Contractor Personnel, including in respect of the manufacture, processing, alteration, repair, installation, supply, distribution or sale of any product. **[Note: The following sentence is optional and should be used where the works under the contract will occur only in Australia and the acquired items will not be used outside of Australia.]** This insurance shall have a territorial limit which includes Australia. **[Note: The following sentence is optional and should be used where the works under the contract will occur in whole or part outside of Australia and the acquired items may be used outside of Australia.]** This insurance shall have a worldwide territorial limit.

**Note to drafters: Alternative clause 9.1.4 to be used where only products liability insurance is required. If this alternative clause is used, the clause number in this clause 9.1.4 will need to be automated and automatic cross-references elsewhere in clause 9.1 to this clause will need to be reinserted.**

9.1.4 **(products liability)** The Contractor shall effect and maintain products liability insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, which covers:

- a. the Contractor, its employees, officers and agents; and
- b. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents,

for their respective liabilities for any:

- c. loss of, damage to, or loss of use of, any tangible property (including GFF, GFE and any other Commonwealth Property in the care, custody or control of the Contractor or its Subcontractors) for a sub-limit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and

damage under the insurance referred to in clause 9.1.6 (property [or Industrial Special Risks]); and

- d. the bodily injury, disease, illness or death of any person, caused by, arising out of, or in connection with the negligent manufacture, processing, alteration, repair, installation, supply, distribution or sale of any product by the Contractor or Contractor Personnel. **[Note: The following sentence is optional and should be used where the acquired items will not be used outside of Australia.]** This insurance shall have a territorial limit which includes Australia. **[Note: The following sentence is optional and should be used where the acquired items may be used outside of Australia.]** This insurance shall have a worldwide territorial limit.

**Option: For use if professional indemnity insurance is required.**

9.1.5 **(professional indemnity)** The Contractor shall effect and maintain professional indemnity insurance with a limit of indemnity of not less than the amount specified in the Details Schedule any one claim and in the aggregate for all claims in any 12 month policy period, and including a right of reinstatement, which covers the liability of the Contractor at general law arising from a negligent breach of duty owed in a professional capacity, by reason of any act or omission of the Contractor or Contractor Personnel. Such insurance shall:

- a. have a definition of professional services broad enough to include all professional services, activities and duties to be provided or performed by the Contractor and Contractor Personnel under the Contract;

**Note to drafters: Paragraphs b, c, d and f are optional depending on the services and risks. Where b or c is selected, f should also be included.**

- b. extend to cover claims related to Software and IT risks;
- c. extend to cover claims for unintentional breaches of intellectual property rights;
- d. extend to cover claims for unintentional breaches of trade practices laws;
- e. have a retroactive date of no later than the earlier of the commencement of the work under the Contract or any preparatory work by the Contractor and Contractor Personnel; and
- f. have worldwide territorial and jurisdictional limits.

**Option: For use if property or Industrial Special Risks insurance is required.**

9.1.6 **(property)** The Contractor shall effect and maintain all risks property insurance covering:

- a. the tangible Supplies, unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability **[or products liability]**);
- b. GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability **[or products liability]**); and
- c. all other property, plant and equipment in the care, custody or control of the Contractor or its agents, material to the Contractor's ability to perform its obligations under the Contract,

against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris. The insurance shall insure the respective interests of the Contractor and the Commonwealth in the property insured. **[Note: The following sentence is optional and should only be used where GFF constitutes a part of a building or facility.]** Where the GFF constitutes only a part of a building or facility, the requirement for insurance for GFF under this clause 9.1.6 only applies in respect of the Licensed Fittings (as defined in the GFF Licence).

**Note to drafters: Alternative clause 9.1.6 to be used where business interruption insurance is required. If this alternative clause is used, the clause number and cross-references in this clause 9.1.6 will need to be automated and automatic cross-references elsewhere in clause 9.1 to this clause will need to be reinserted.**

9.1.6 **(Industrial Special Risks)** The Contractor shall effect and maintain:

- a. all risks property insurance covering:
  - (i) the tangible Supplies, unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability [**or products liability**]);
  - (ii) GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors unless and to the extent that the liability of the Contractor for the loss or damage of that property is insured under the insurance referred to in clause 9.1.4 (public and products liability [**or products liability**]); and
  - (iii) all other property, plant and equipment in the care, custody or control of the Contractor or its agents, material to the Contractor's ability to perform its obligations under the Contract,

against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris. The insurance shall insure the respective interests of the Contractor and the Commonwealth in the property insured. **[Note: The following sentence is optional and should only be used where GFF constitutes a part of a building or facility.]** Where the GFF constitutes only a part of a building or facility, the requirement for insurance for GFF under this clause 9.1.6 only applies in respect of the Licensed Fittings (as defined in the GFF Licence); and

- b. business interruption insurance for a period of not less than the period specified in the Details Schedule with a limit sufficient to cover the loss of profit and increased costs of working due to the interruption of the Contractor's operations or activities caused by damage to insured property by a peril required to be insured against under clause 9.1.6a.

**Option: For use if transit insurance is required.**

9.1.7 **(transit)** The Contractor shall effect and maintain insurance covering any tangible property referred to in clause 9.1.6, against the risks of loss, damage or destruction caused by all commercially insurable risks for an amount not less than their full replacement value plus freight and insurance on an indemnity basis during transits of such property by land, sea or air and during loading or unloading and storage during transit, where such transits are at the risk of the Contractor. The insurance shall insure the respective interests of the Contractor and the Commonwealth in the property insured.

**Option: For use if motor vehicle insurance is required.**

9.1.8 **(motor vehicle)** The Contractor shall effect and maintain:

- a. compulsory third party insurance as required by law in respect of all registered plant and motor vehicles used by the Contractor, its employees, officers and agents in connection with the work under the Contract; and
- b. motor vehicle liability insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence covering:
  - (i) third party property loss or damage arising out of the use by the Contractor, its employees, officers and agents of any registered or unregistered plant or vehicles; and
  - (ii) third party bodily injury, disease, illness or death arising out of the use by the Contractor, its employees, officers and agents of any unregistered plant or

vehicles and, any registered vehicles not required to be insured under compulsory third party insurance in a foreign jurisdiction,  
in connection with the work under the Contract or on or around any GFF by the Contractor or Contractor Personnel.

**Option: For use if aircraft hull insurance is required.**

9.1.9 (aircraft hull) The Contractor shall effect and maintain aircraft hull insurance for the full replacement value (or, where it is the practice for such property to be insured for its market or agreed value by prudent insureds in accordance with insurance market practice for this type of risk, then for such market or agreed value) of each aircraft to be used in the performance of the work under the Contract against the risks of loss, damage or destruction by all commercially insurable risks (including hull war cover as provided by LSW555D and spares all risks cover) whilst each aircraft is at the risk of the Contractor and which insures the respective interests of the Contractor and the Commonwealth in the property insured.

**Option: For use if aviation liability insurance is required.**

9.1.10 (**aviation liability**) The Contractor shall effect and maintain aviation and aviation products liability insurance written on an occurrence basis with a limit of indemnity of not less than:

- a. the amount specified in the Details Schedule each and every occurrence for aviation liability claims; and
- b. the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period for aviation products liability claims, which covers:
  - c. the Contractor, its employees, officers and agents (including for liability to each other); and
  - d. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents, for their respective liabilities for any:
    - e. loss of, damage to, or loss of use of, any tangible property (including GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors) for a sublimit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and damage under the insurance referred to in clause 9.1.6 (property [or Industrial Special Risks]) or 9.1.9 (aircraft hull); and
    - f. bodily injury, disease, illness or death of any person, caused by, arising out of, or in connection with, the manufacture, processing, alteration, supply, distribution, sale, use, operation, repair, maintenance or ownership of any aircraft or aviation products in the performance of the Contract by the Contractor or Contractor Personnel. Such insurance shall:
      - g. cover all aviation activities and services to be provided by the Contractor, its employees, officers and agents under the Contract;
      - h. not exclude claims related to the effects of noise or wind produced as a result of the use, operation or ownership of any aircraft;
      - i. not exclude claims arising from an alleged breach of duty owed in a professional capacity;
      - j. cover war risks as provided by AVN52E;
      - k. cover third party passenger liability;
      - l. cover claims by pilots and operational crew as provided by AVN73; and
      - m. include confirmation that the insurance is compliant with requirements of the *Civil Aviation (Carriers Liability) Act 1959* (Cth) as provided by AVN57A.

**Option: For use if hangarkeepers insurance is required.**

- 9.1.11 (**hangarkeepers**) The Contractor shall effect and maintain hangarkeepers liability insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence which covers the liability (including premises liability and airside liability) of:
- a. the Contractor, its employees, officers and agents (including for liability to each other); and
  - b. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents, caused by, arising out of, or in connection with, the occupation, use or ownership of any hangar, runways or related infrastructure and facilities used in the performance of the work under the Contract by the Contractor or Contractor Personnel.

**Option: For use if marine hull insurance is required.**

- 9.1.12 (**marine hull**) The Contractor shall effect and maintain marine hull insurance for the full replacement value (or, where it is the practice for such property to be insured for its market or agreed value by prudent insureds in accordance with insurance market practice for this type of risk, then for such market or agreed value) of each vessel to be used in the performance of the work under the Contract against the risks of loss, damage or destruction by all commercially insurable risks (including war risks) whilst each vessel is at the risk of the Contractor and which insures the respective interests of the Contractor and the Commonwealth in the property insured.

**Option: For use if marine liability insurance is required.**

- 9.1.13 (**marine liability**) The Contractor shall effect and maintain marine liability (or protection and indemnity) insurance written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence which covers:
- a. the Contractor, its employees, officers and agents (including for liability to each other); and
  - b. the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents, for their respective liabilities for any:
    - c. loss of, damage to, or loss of use of, any tangible property (including GFE, GFF and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors for a sublimit of not less than the amount specified in the Details Schedule each occurrence and in the aggregate for all occurrences in any 12 month policy period, unless that property is insured against the risks of loss and damage under the insurance referred to in clause 9.1.6 (property [**or Industrial Special Risks**]) or clause 9.1.12 (marine hull)); and
    - d. bodily injury, disease, illness or death of any person, caused by, arising out of, or in connection with, the use, operation or ownership of any vessel by the Contractor or Contractor Personnel in the performance of the Contract, including cover for war risks.

**Option: For use if ship builders insurance is required.**

- 9.1.14 (**ship builders**) The Contractor shall effect and maintain ship builders insurance written on an occurrence basis:
- a. which covers the hull under construction and any plant and equipment used in the construction of the hull (including GFF, GFE and any other property of the Commonwealth in the care, custody or control of the Contractor or its Subcontractors) against the risks of loss, damage or destruction by all commercially insurable risks for their full replacement or reinstatement value (or, where it is the practice for such property to be insured for its market or agreed value by prudent insureds in accordance with insurance market practice for this type of risk, then for such market

	<p>or agreed value), which insures the respective interests of the Contractor and the Commonwealth in the property insured; and</p> <p>b. which covers:</p> <p>(i) the Contractor, its employees, officers and agents (including for liability to each other); and</p> <p>(ii) the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor, its employees, officers and agents,</p> <p>for their respective liabilities for any:</p> <p>(iii) loss of, damage to, or loss of use of, any tangible property; and</p> <p>(iv) the bodily injury, disease, illness or death of any person,</p> <p>caused by, arising out of, or in connection with the negligent performance of ship building work under the Contract by the Contractor or Contractor Personnel, with a limit of indemnity of not less than the amount specified in the Details Schedule each and every occurrence. The insurance referred to in clause 9.1.14b shall include war risks cover. The insurance referred to in clause 9.1.14a and 9.1.14b shall include:</p> <p>c. Institute Clauses for Builders Risks (1/6/88) subject to the following amendments:</p> <p>(i) clause 5.1 (perils) amended to include cover for the cost of renewing faulty welds;</p> <p>(ii) clause 6 (earthquake and volcanic eruption exclusion) deleted;</p> <p>(iii) clause 10 (deductible) amended in respect of claims for total loss or constructive total loss, the deductible should not apply to clause 17, 18, 19 or 20 if claim arising from same incident;</p> <p>(iv) clauses 17.4.5 and 19.3.10 (pollution exclusion) deleted;</p> <p>(v) clause 19.3.4 (cargo exclusion) deleted; and</p> <p>(vi) clauses 22 (strikes exclusion) and 23 (malicious acts exclusion) deleted;</p> <p>d. seepage and pollution buy back clause;</p> <p>e. leased equipment clause; and</p> <p>f. consequential loss following insured loss (but excluding delay due to lack of performance).</p>
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**Option: For use if Cyber insurance is required.**

9.1.15	<p>(cyber) The Contractor shall effect and maintain cyber insurance which covers the Contractor for:</p> <p>a. liability arising from the alleged or actual theft or unauthorised dissemination, or unauthorised use of, or unauthorised access to personal, confidential, security classified or proprietary information;</p> <p>b. "network security liability" being a liability arising from unauthorised access to, unauthorised use of, or unauthorised modification of computer systems or applications (other than the Defence Protected Network), including hacker attacks, the inability of an authorised party to access, use or modify the systems or applications (other than the Defence Protected Network) including because of "denial of service" attacks, except to the extent caused by a mechanical or electrical failure not in the direct operational control of the insured;</p> <p>c. liability arising from Malware included in the Supplies , or introduced into equipment, networks or existing applications or systems (other than the Defence Protected Network), or data relating thereto, belonging to or used by the Commonwealth, the Contractor, a Subcontractor, a Commonwealth Contractor or a third party;</p> <p>d. costs and expenses of government investigations into events of the kind described in clauses 9.1.15a to 9.1.15c;</p>
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- e. fines and penalties imposed in relation to events of the kind described in clauses 9.1.15a to 9.1.15c;
- f. mitigation (including web clean-up) costs, crisis management costs and investigation (including forensic) costs in relation to events of the kind described in clauses 9.1.15a to 9.1.15c;
- g. cyber ransom and extortion; and
- h. data recovery costs incurred in relation to events of the kind described in clauses 9.1.15a to 9.1.15c;

**Option: For use where business interruption insurance is required.**

**Note to drafters: Use clause 9.1.15i a non-physical business interruption resulting from a cyber event will materially affect the Contractor's ability to complete the Contract or unacceptably extend the Contract.**

- i. non-physical business interruption;

written on an occurrence basis with a limit of indemnity of not less than the amount specified in the Details Schedule any one occurrence and in the aggregate for all occurrences in any 12 month policy period. The insurance shall:

- j. cover the liability of the Contractor by reason of any act or omission of the Contractor, its employees, officers, Subcontractors and agents;
- k. cover the Commonwealth and the Commonwealth Representative for their vicarious liability for the acts or omissions of the Contractor;
- l. have a retroactive date of no later than 36 months before the commencement of the work under the Contract; and
- m. have worldwide territorial and jurisdictional limits.

**Option: For use if contract works insurance is required.**

**Note to drafters: 'Construction works', 'site' and 'defects correction period' are in square brackets in case there is a more appropriate defined or undefined term.**

9.1.16 **(contract works)** The Contractor shall effect and maintain all risks insurance covering the whole of the **[construction works]** (including any temporary works), plant and equipment and any other property on **[site]** (including while in storage off **[site]** and while in transit to or from the **[site]**) for use in performing or incorporation into the **[construction works]** against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris and insuring the respective interests of the Contractor, its employees, officers and agents and the Commonwealth in the property insured.

**Note to drafters: Alternative clause 9.1.16 to be used where advanced consequential loss insurance is required. If this alternative clause is used, the clause number and cross-references in this 9.1.16 will need to be automated and automatic cross-references elsewhere in clause 9.1 to this clause will need to be reinserted.**

9.1.16 **(contract works)** The Contractor shall effect and maintain:

- a. all risks insurance covering the whole of the **[construction works]** (including any temporary works), plant and equipment and any other property on **[site]** (including while in storage off **[site]** and while in transit to or from the **[site]**) for use in performing or incorporation into the **[construction works]** against the risks of loss, damage or destruction by all commercially insurable risks (including earthquake, fire, flood, lightning, storm and tempest, theft, malicious damage and resulting loss or damage arising from faulty material, workmanship or design), for the full replacement or reinstatement value of such insured property and including cover for professional fees, extra costs of reinstatement, and removal of debris and insuring the respective interests of the Contractor, its employees, officers and agents and the Commonwealth in the property insured; and



- b. advanced consequential loss insurance for a period of not less than the period specified in the Details Schedule with a limit sufficient to cover the increased costs of working and other costs and expenses incurred by the Contractor due to a delay in the progression of the **[construction works]** due to the occurrence of a peril required to be insured against under clause 9.1.16a.

9.1.17 The insurances and registrations referred to in:

- a. the following clauses shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed **[Note: Include the following words in brackets only if contract works insurance has been selected]** (and all applicable [defects corrections periods] in respect of any works have expired):
- (i) clause 9.1.3 (workers compensation);
  - (ii) clause 9.1.6 (property **[or Industrial Special Risks]**);
  - (iii) clause 9.1.9 (aircraft hull);
  - (iv) clause 9.1.11 (hangarkeepers liability);
  - (v) clause 9.1.12 (marine hull);
  - (vi) clause 9.1.13 (marine liability);
  - (vii) clause 9.1.14 (ship builders); and
  - (viii) clause 9.1.15 (cyber);
- b. clause 9.1.4 (public and products liability **[or products liability]**) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed **[Note: Include the rest of this sentence only if the products supplied have a life which exceeds the contract period]** and, in respect of products liability for **[Note: Insert period sufficient to cover the life of the product if it extends beyond the Contract term or, where this is commercially too long, some reasonable period eg, 7/10]** years following completion of the work under the Contract];
- c. clause 9.1.10 (aviation liability) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until all work under the Contract is completed **[Note: Include the rest of this sentence only if the aviation products supplied have a life which exceeds the contract period]** and, in respect of products liability for **[Note: Insert period sufficient to cover the life of the aviation product if it extends beyond the Contract term or, where this is commercially too long, some reasonable period eg, 7/10]** years following completion of the work under the Contract];
- d. clause 9.1.5 (professional indemnity) shall be effected before the Contractor commences work under the Contract, and thereafter be maintained until the earlier of:
- (i) **[7/10]** years following completion of the work under the Contract; or
  - (ii) **[7/10]** years following an earlier termination of the Contract;
- e. clause 9.1.7 (transit) shall be effected on or before the start of each conveyance and maintained until the end of each conveyance by delivery at the **[site]**;
- f. clause 9.1.8 (motor vehicle) shall be effected on or before the date the plant or vehicle is used in connection with the work under the Contract or on or around the GFF (whichever is the earlier) and maintained until such plant or vehicle ceases to be so used; and
- g. clause 9.1.16 (contract works) shall be effected on or before the **[construction works]** commence and maintained until the expiry of any **[defects correction period]** in relation to the **[construction works]** to which the insurance relates.

9.1.18 To the extent that the Contractor's insurances and registrations required by clause 9.1 of this Contract are in fact written on a claims made basis (notwithstanding any requirements of this Contract for such insurances to be written on an occurrence basis) then the Contractor shall maintain those insurances and registrations until the earlier of:

- a. **[7/10]** years following completion of the work under the Contract; or
- b. **[7/10]** years following an earlier termination of the Contract.

9.1.19 Not Used.

9.1.20 With the exception of statutory insurances, the insurances referred to in this clause 9.1 shall:

- a. be effected with an insurer with a financial security rating of "A-" or better by Standard & Poors (or the equivalent rating with another recognised rating agency), or an insurer approved by the Commonwealth, acting reasonably; and
- b. provide that the insurer agrees:
  - (i) to provide at least 30 days written notice of cancellation to the policyholder;
  - (ii) that the policy operates (with the exception of limits of indemnity) as if there was a separate policy of insurance covering each party comprising the insured;
  - (iii) that a failure by any insured to observe and fulfil the terms of the policy or to comply with the pre-contractual duty of disclosure does not prejudice the insurance of any other insured;
  - (iv) that the state of mind and knowledge of one insured will not be imputed to any other insured for the purposes of determining the availability of cover under the policy;
  - (v) to waive all rights of salvage in respect of property of the Commonwealth which the Commonwealth notifies to the Contractor at or before the time of loss is of a sensitive nature from a national security perspective. Where the Commonwealth obtains proceeds from the salvage sale from any such property of the Commonwealth insured under the Contractor's insurance, the insurer may deduct the actual payment of such salvage sale proceeds obtained by the Commonwealth from the amount of claim payment. Where the Commonwealth does not sell but instead reuses such property, the insurer may deduct a reasonable amount from the amount of the claim payment to reflect the value the Commonwealth has obtained from the reuse of the property. However this clause 9.1.20b(v) only applies to the insurances referred to in the following clauses:
    - 1) clause 9.1.4 (public and products liability **[or [products liability]]**);
    - 2) clause 9.1.6 (property **[or Industrial Special Risks]**);
    - 3) clause 9.1.7 (transit);
    - 4) clause 9.1.9 (aircraft hull);
    - 5) clause 9.1.11 (hangarkeepers liability);
    - 6) clause 9.1.12 (marine hull); and
    - 7) clause 9.1.14 (ship builders);
  - (vi) that a notice of a claim by any insured will be accepted as notice by all insureds; and
  - (vii) that in respect of the liability insurances required by this clause 9.1 (except statutory insurances), the policies will cover the Contractor for liabilities assumed by it under the provisions of clause 10.12.

9.1.21 The Contractor shall, on request, produce evidence satisfactory to the Commonwealth Representative of the currency and terms of the insurances referred to in this clause 9.1, including:

- a. certificates of currency issued by the insurer or by the Contractor's insurance broker which contains sufficient detail to enable the Commonwealth to ascertain whether the insurances are in compliance with this clause 9.1;
- b. copies of all policies (except for statutory insurances and provided that, in relation to commercially sensitive policies only, for the purpose of complying with this clause 9.1.21b, such policies may be made available for inspection by the Commonwealth or the Commonwealth's advisers, at a place and time reasonably convenient to the Commonwealth or the Commonwealth's advisers); and

c. other evidence of the insurances which the Commonwealth reasonably requires.

9.1.22 If the Contractor fails to comply with clause 9.1.21, the Commonwealth may, but is not obliged to, effect and maintain the relevant insurances and may:

- a. elect to recover from the Contractor under clause 13.6 the cost of effecting and maintaining the insurance; or
- b. deduct the premiums payable for the relevant insurances from amounts payable to the Contractor under the Contract.

No amount shall be owing to the Commonwealth under this clause 9.1.22 until the Commonwealth elects to recover the amount.

9.1.23 In the event the Commonwealth elects to exercise its rights under clause 9.1.22, the Contractor shall provide the Commonwealth with all reasonable assistance to allow the Commonwealth to exercise those rights, including by executing documents and providing insurance proposal information to the Commonwealth's insurance broker and proposed insurers.

9.1.24 In respect of each insurance referred to in this clause 9.1, the Contractor shall:

- a. pay (or cause to be paid) all premiums and deductibles as and when they are due;
- b. not do anything or fail to do anything or (insofar as it is reasonably within its power) permit anything to occur which prejudices any insurance;
- c. if necessary, rectify anything which might prejudice any insurance;
- d. reinstate an insurance policy if it lapses;
- e. not cancel, materially adversely vary or allow an insurance policy to lapse without the prior written consent of the Commonwealth;
- f. promptly notify the Commonwealth of any event (including the issue of a notice of intention to cancel by the insurer to the policyholder) which may result in an insurance policy lapsing or being cancelled;
- g. promptly inform the Commonwealth if it becomes aware of any actual, threatened or likely claims (with the exception of claims or potential claims by the Commonwealth against the Contractor) which could materially reduce the available limits of indemnity or which may involve the Commonwealth, and shall reinstate or replace any depleted aggregate limit of indemnity resulting from claims that are unrelated to the work under the Contract, if requested to do so in writing by the Commonwealth;
- h. give full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any way prejudice or affect any policy or the payment of any claims under the insurance; and
- i. do everything reasonably required by the Commonwealth in order to allow the Commonwealth or any other person for whose benefit the policy is effected to claim and to collect or recover monies due under any insurance policy.

9.1.25 The Contractor shall not do anything which has been notified to the Contractor by the Commonwealth that may invalidate or prejudice any insurance policy held by the Commonwealth or any indemnity to which the Commonwealth may be entitled.

**Note to drafters: The following clauses 9.1.26, 9.1.27 and 9.1.28 are only appropriate to include where the term of the Contract exceeds 3 years.**

9.1.26 The Commonwealth may increase or decrease the limits of indemnity required for the insurances referred to in, or change the types of insurances required by, this clause 9.1 at each renewal date of the relevant insurance by providing three months prior notice to the Contractor. The Commonwealth shall only increase the limits of indemnity required for the insurances referred to in, or require additional insurances under, this clause 9.1 where it has obtained an opinion from a reputable insurance broker or otherwise appropriately qualified consultant that an increase is required in order to conform with current prudent insurance practice for a company with a risk profile comparable to the Contractor. The Contractor shall, within 30 days after receipt of a notice from the Commonwealth to increase or decrease the limits of indemnity required for the insurances referred to in, or change the types of insurances required by, this clause 9.1, submit a CCP to effect a change to the Contract.

- 9.1.27 If the Contractor becomes aware that a risk to be covered by an insurance policy referred to in this clause 9.1 has or is to become Uninsurable then:
- a. the Contractor shall promptly notify the Commonwealth together with all details available to the Contractor as to the reason why the risk is Uninsurable, steps taken by the Contractor to obtain insurance for the risk, the date on which the risk became or will become Uninsurable, and details as to what the Contractor suggests is appropriate to mitigate, manage or control the risk while it remains Uninsurable;
  - b. the parties shall meet as soon as reasonably practicable, but (unless otherwise agreed in writing between the parties) no later than five Working Days after the notification in clause 9.1.27a to discuss all practical means by which the risk shall be managed (including, if the risk is material, the option of the Commonwealth providing an indemnity to the Contractor covering substantially the risks which have become Uninsurable or varying the Contract);
  - c. if the parties cannot agree as to how an Uninsurable risk is to be managed then, if the Uninsurable risk is material, either party (provided that the party is adversely affected by the Uninsurable risk), acting reasonably and in good faith, may terminate the Contract by notice with the exception that the Contractor shall not terminate the Contract if the Commonwealth offers an indemnity in substitution for insurance for the Uninsurable risk and that indemnity is no less broad than the insurance held by the Contractor for that risk immediately before the risk became Uninsurable. For the avoidance of doubt, termination pursuant to this clause is not to be treated under any circumstances as the exercise of a termination right under any other provision of this Contract, even if such a right may otherwise exist;
  - d. the Contractor shall, in respect of any risk that has become Uninsurable:
    - (i) monitor the insurance industry on a regular basis (and not less than twice a year) and attempt to obtain insurance for the risk which is Uninsurable;
    - (ii) provide the Commonwealth with details of attempts made by the Contractor to obtain insurance for the Uninsurable risk; and
    - (iii) as soon as it is able to do so, obtain insurance for the Uninsurable risk;
  - e. the Contractor acknowledges that the Commonwealth may undertake its own enquiries as to the availability of insurance for Uninsurable risks and as to the terms and conditions, including price, on which it is available. If the Commonwealth's own enquiries show that the insurance for Uninsurable risks is available on terms and conditions that are commercially reasonable in all of the circumstances, the Contractor shall obtain that insurance without unreasonable delay; and
  - f. the Contractor is relieved of its obligations under clause 9.1 to effect insurance for any risk that is Uninsurable for the period that the risk remains Uninsurable.
- 9.1.28 For the purposes of clause 9.1.27, "Uninsurable" means, in relation to a risk, either that:
- a. insurance required pursuant to this clause 9.1 is not available in the international insurance markets with insurers with a financial security rating of "A-" or better by Standard & Poors (or the equivalent rating with another reputable rating agency); or
  - b. the insurance premium for insuring that risk is at such a level or the terms and conditions are such that the risk is not generally being insured against in the international insurance market with reputable insurers by prudent corporates with a risk profile comparable to the Contractor.

**Note to drafters: When using this clause for non-CASG procurements (unless otherwise approved by the ACIP Management Team) or for CASG procurements in which no tenderer with ACIP status will participate, delete clause 9.1.29 and its associated Note to tenderers.**

**Note to tenderers: Clause 9.1.29 will only be included if the Contractor has an ACIP and may require amendment to only apply to those insurances to be covered by the ACIP.**

- 9.1.29 The Contractor shall be:
- a. deemed compliant with the requirements of the following clauses:
    - (i) clause 9.1.1;
    - (ii) clause 9.1.3 (workers compensation);

- (iii) clause 9.1.4 (public and products liability [**or products liability**]);
- (iv) clause 9.1.5 (professional indemnity);
- (v) clause 9.1.6 (property [**or Industrial Special Risks**]);
- (vi) clause 9.1.7 (transit);
- (vii) clause 9.1.8 (motor vehicle);
- (viii) clause 9.1.9 (aircraft hull);
- (ix) clause 9.1.10 (aviation liability);
- (x) clause 9.1.11 (hangarkeepers liability);
- (xi) clause 9.1.12 (marine hull);
- (xii) clause 9.1.13 (marine liability);
- (xiii) clause 9.1.14 (ship builders);
- (xiv) clause 9.1.15 (cyber);
- (xv) clause 9.1.16 (contract works); and
- (xvi) clauses 9.1.17, 9.1.18 and 9.1.20; and

b. relieved of its obligations under clauses 9.1.21 and 9.1.24,

in respect of a particular insurance listed in clause 9.1.29a for any period during which the Contractor's insurance program holds Approved Contractor Insurance Program (ACIP) status under CASG's centralised process for monitoring the compliance of contractors with contractual insurance requirements, subject to any limitations on or conditions of that approval (including whether the Contractor's ACIP status extends to that type of insurance). The Contractor shall advise the Commonwealth Representative within five Working Days if its ACIP status is withdrawn or suspended by the Commonwealth.

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

### **10.1 Contractor's Employees and Officers (Core)**

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- 10.1.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with the death, personal injury, disease or illness of any employee or officer of the Contractor in relation to the Contract.
- 10.1.2 The liability of the Contractor under clause 10.1.1 shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.
- 10.1.3 The Contractor shall release the Commonwealth and Commonwealth Officers in respect of any liability for Loss referred to in clause 10.1.1, except to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.

### **10.2 Intellectual Property and Confidentiality (Core)**

---

- 10.2.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with a Claim by a third party in respect of the following:
- a. an infringement or alleged infringement of the third party's IP rights (including Moral Rights) arising out of or as a consequence of:
    - (i) an activity permitted or purportedly permitted by or under a licence or assignment of IP rights under or referred to in the Contract (including in clause 5); and
    - (ii) a failure by the Contractor to grant (or ensure the grant of) a licence or assign (or ensure the assignment) of IP rights under or referred to in the Contract (including in clause 5); and
  - b. breach or alleged breach of any obligation of confidentiality owed to that third party arising out of or as a consequence of any act or omission of the Contractor or Contractor Personnel.

10.2.2 The liability of the Contractor under clause 10.2.1 shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of a Commonwealth Default.

10.2.3 In this clause 10.2:

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

### **10.3 Other Third Party Claims (Core)**

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10.3.1 The Contractor shall indemnify the Commonwealth and Commonwealth Officers in respect of any Loss in connection with a Claim by a third party arising out of or as a consequence of a Contractor Default, including a Claim in respect of:

- a. the death, personal injury, disease or illness of any person; or
- b. loss of or damage to any third party property.

10.3.2 The liability of the Contractor under clause 10.3.1 shall be reduced to the extent that the Contractor demonstrates that the Loss arose out of or as a consequence of:

- a. a Commonwealth Default;
- b. an Excepted Risk; or
- c. a breach of a general law duty or an applicable law by an Unrelated Party.

### **10.4 Proceedings Relating to Indemnities (Core)**

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10.4.1 If:

- a. a Claim is brought or threatened against the Commonwealth; and
- b. the Claim is one that is or may be the subject of an indemnity given by the Contractor under the Contract,

the Commonwealth shall give the Contractor notice of the Claim, which shall include particulars of the Claim so far as known to the Commonwealth Representative.

10.4.2 The Commonwealth shall, for any proceedings relating to a Claim of the type referred to in clause 10.4.1:

- a. keep the Contractor informed of all developments in relation to the proceedings;
- b. conduct the proceedings in accordance with any reasonable directions of the Contractor, subject to the *Legal Services Directions 2017* and other relevant Commonwealth policies; and
- c. not agree to a settlement in relation to the Claim without the prior consent of the Contractor, unless a failure to agree the settlement would be contrary to the *Legal Services Directions 2017* and other relevant Commonwealth policies.

10.4.3 The Commonwealth may, following a request from the Contractor, agree to apply for leave to withdraw from proceedings relating to a Claim. If the Commonwealth is granted leave to withdraw from the proceedings:

- a. the Commonwealth shall withdraw from the proceedings;
- b. the Contractor shall comply with any conditions imposed by the court in relation to the grant of such leave; and
- c. the Contractor shall, in its own name and at its own expense, conduct the proceedings.

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

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10.5.1 The Commonwealth holds the benefit of each indemnity given in favour of a Commonwealth Officer (each a 'protected person') under clauses 10.1, 10.2 or 10.3 on trust for the protected person.

10.5.2 The Commonwealth may recover from the Contractor an amount under an indemnity given by the Contractor under the Contract before the Commonwealth makes a payment in respect of such amount.

**10.6 Liquidated Damages and Other Compensation (Optional)**

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- 10.6.1 The parties acknowledge that, if the Contractor fails to achieve a Milestone listed in Attachment D by the applicable Milestone Date:
- a. the Commonwealth will suffer loss and damage; and
  - b. such loss and damage will, having regard to the governmental and non-commercial nature of the Supplies and their significance to the defence of Australia, be impossible, complex or expensive to quantify accurately in financial terms,
- and therefore, the parties agree that the applicable LD Amount is:
- c. a genuine pre-estimate of the Loss that would be suffered by the Commonwealth resulting from a Contractor delay in achievement of the Milestone; and
  - d. an appropriate protection of the Commonwealth's legitimate interests in relation to the performance of the Contract.
- 10.6.2 If a Milestone listed in Attachment D is not achieved by the Milestone Date for the Milestone, the Commonwealth shall be entitled to recover from the Contractor, as liquidated damages and not as a penalty, the LD Amount for the Milestone.
- 10.6.3 No amount shall be owing to the Commonwealth under this clause 10.6 until the Commonwealth elects, in accordance with this clause 10.6, to recover the amount.
- 10.6.4 The Commonwealth may elect:
- a. to recover an LD Amount in one amount;
  - b. to recover an LD Amount in two or more amounts;
  - c. to accept compensation (instead of the LD Amount) as agreed in writing between the parties; or
  - d. to accept compensation as agreed between the parties and to recover part of the LD Amount as agreed in writing between the parties in one or more amounts.
- 10.6.5 If the Commonwealth makes an election under clause 10.6.4b or 10.6.4d in respect of a failure to achieve a Milestone, the Commonwealth may make one or more further elections in relation to the failure (up to any applicable cap on the LD Amount).
- 10.6.6 An election by the Commonwealth under this clause 10.6 in respect of a failure to achieve a Milestone shall, unless otherwise agreed in writing between the parties, be made and notified to the Contractor no later than:
- a. if an applicable cap on the LD Amount is reached before the Milestone is achieved, the end of four months after the Commonwealth receives notice from the Contractor that the cap has been reached; or
  - b. if the Milestone is achieved before the Commonwealth receives a notice under clause 10.6.6a, the end of four months after the Milestone is achieved.
- 10.6.7 If the Commonwealth does not elect before the end of the period determined in accordance with clause 10.6.6 in respect of all or some of the LD Amount for a Milestone listed in Attachment D, the Commonwealth will be taken to have elected and notified the Contractor at that time to recover the whole or the balance of the LD Amount (as relevant).
- 10.6.8 Unless the Commonwealth expressly agrees otherwise, a change to a Milestone Date effected by a CCP does not affect the Commonwealth's entitlement to liquidated damages already accrued in respect of the period from the original Milestone Date to the date when the CCP takes effect to change the Milestone Date.
- 10.6.9 If the Commonwealth elects to accept compensation instead of liquidated damages (whether in the form of further supplies or services or otherwise), the Contractor shall prepare a CCP to effect a change to the Contract and any other contract between the Commonwealth and the Contractor that may be affected.
- 10.6.10 The Commonwealth's rights under this clause 10.6 in respect of a delay in the achievement of a Milestone listed in Attachment D are the Commonwealth's only entitlement to recover compensation or damages in respect of Loss of the Commonwealth resulting from that delay. To avoid doubt, no Commonwealth rights other than to compensation or damages in respect

of that delay (for example, termination rights or rights in respect of a misrepresentation) are affected.

### **10.7 Loss of or Damage to the Supplies (Core)**

- 10.7.1 Risk in relation to any loss of, or damage to, the Supplies resides with the Contractor:
- a. until the Supplies are delivered to the Commonwealth in accordance with the Contract; and
  - b. at any time after delivery (but prior to Acceptance of the Supplies) where the Contractor retakes possession of the Supplies in accordance with the Contract.
- 10.7.2 The Contractor shall replace or reinstate any Supplies that are lost and repair any Supplies that are damaged while the risk resides with the Contractor under clause 10.7.1, except to the extent that the loss or damage to the Supplies arose out of or as a consequence of a Commonwealth Default.
- 10.7.3 The Commonwealth shall take reasonable care to prevent loss of, or damage to, Supplies that have been delivered to it in accordance with the Contract but which have not yet been Accepted.
- 10.7.4 Nothing in this clause 10.7 limits or affects the Contractor's obligations under clause 3.2,3.3, 8.2 or 10.8.

### **10.8 Loss of or Damage to Commonwealth Property (Core)**

- 10.8.1 The Contractor shall (and shall ensure that all Contractor Personnel) take reasonable care to prevent loss of, or damage to, Commonwealth Property in connection with:
- a. the work under the Contract; and

***Option: Insert clause 10.8.1b if GFF is included in the draft Contract.***

- b. the use or occupation of any GFF.

- 10.8.2 The Contractor shall be liable for any Loss incurred by the Commonwealth in connection with any loss of, or damage to:
- a. any Commonwealth Property (other than GFF) while it is:
    - (i) on any Contractor Premises; or
    - (ii) being stored or transported by or on behalf of the Contractor, a Related Body Corporate of the Contractor or a Subcontractor; or
  - b. any GFF (other than fair wear and tear) in respect of which the Contractor or a Subcontractor is responsible for controlling physical access,
- in connection with the Contract, whether or not the loss or damage arises out of or as a consequence of a Contractor Default.
- 10.8.3 The liability of the Contractor under clause 10.8.2 shall be reduced to the extent that the Contractor demonstrates that the loss or damage arose out of or as a consequence of:
- a. a Commonwealth Default; or
  - b. an Excepted Risk.
- 10.8.4 Without limiting clause 10.8.2, the Contractor shall be liable for any Loss incurred by the Commonwealth in connection with any loss of, or damage to, Commonwealth Property arising out of or as a consequence of a Contractor Default.
- 10.8.5 The liability of the Contractor under clause 10.8.3b shall be reduced to the extent that the Contractor demonstrates that the loss or damage arose out of or as a consequence of:
- a. a Commonwealth Default;
  - b. an Excepted Risk; or
  - c. a breach of a general law duty or an applicable law by an Unrelated Party.
- 10.8.6 Nothing in this clause 10.8 limits or affects the Contractor's obligations under clause 3.2, 3.3, 8.1.2 or 10.7.



**10.9 Exclusions of Certain Losses (Core)**

- 10.9.1 Subject to clause 10.10.4, the Contractor is not liable to:
- pay compensation or damages under or in relation to this Contract; and
  - make a payment under an indemnity in this Contract,
- for Loss incurred by the Commonwealth resulting from:
- damage to reputation or exemplary or punitive damages incurred by the Commonwealth; or
  - diminished revenue, profits or business opportunity suffered by the Commonwealth.
- 10.9.2 The Commonwealth is not liable to pay compensation or damages under or in relation to this Contract for Loss resulting from damage to reputation or for exemplary or punitive damages incurred by the Contractor.

**Option: Insert clause 10.9.3 if a GFF Licence is included in the draft Contract.**

- 10.9.3 The Commonwealth has no liability to the Contractor for any Loss resulting from loss of revenue or profits or loss of business opportunity suffered or incurred by the Contractor in connection with any occupation or use of the GFF by the Contractor for a purpose that is not related to the performance of the Contract.

**10.10 Liability Caps (Core)**

**Note to drafters: A liability risk assessment is to be undertaken by the Commonwealth in accordance with the Defence Liability Principles and the standard Defence methodology described in the Liability Risk Assessment template, both of which can be accessed at:**

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

**The liability risk assessment provides the basis for determining the liability caps in this clause 10.10 and the insurance requirements in clause 9.**

**Note to tenderers: The liability caps were determined by the Commonwealth based on a liability risk assessment conducted in accordance with the Defence Liability Principles and the standard Defence methodology described in the Liability Risk Assessment template, both of which can be accessed at:**

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

- 10.10.1 The liability of the Contractor to the Commonwealth in connection with the Contract (including at general law, in negligence or in equity) in respect of the following is limited (in each case) in aggregate to the relevant Limitation Amount specified in the Details Schedule:
- loss of or damage to Defence Property (other than Supplies);
  - liquidated damages (including the value of any agreed compensation provided by the Contractor instead of an LD Amount that would otherwise be payable); and
  - loss of or damage to Supplies (including loss of use of Supplies) and Losses suffered by the Commonwealth other than those referred to in clauses 10.10.1a and 10.10.1b.
- 10.10.2 Each of the liability caps referred to in clause 10.10.1 is mutually exclusive and is to be applied separately.

**Option: For use if an overall liability cap, as well as the individual caps in clause 10.10.1, are used.**

- 10.10.3 In addition to clause 10.10.1, the maximum amount that the Contractor is liable to pay as compensation or damages under the Contract (including at general law, in negligence or in equity) in respect of Loss suffered by the Commonwealth of any kind, is limited in aggregate to the Overall Limitation Amount specified in the Details Schedule.

- 10.10.4 The liability caps in this clause 10.10 and exclusions of liability under clause 10.9 do not apply to a liability of the Contractor under or arising out of the Contract in relation to:
- (third party claims)** a Claim by a third party in respect of:

- (i) the death, personal injury, disease or illness of any person; or
- (ii) loss of or damage to property of a third party;
- b. **(IP)** an infringement of an intellectual property right (including a Moral Right) of any person;
- c. **(confidentiality)** a breach of an obligation of confidence;
- d. **(death of or personal injury to Commonwealth Officers)** the death, personal injury, disease or illness of a Commonwealth Officer;
- e. **(non-Defence Commonwealth Property)** the loss of, or damage to, Commonwealth Property (other than Defence Property);
- f. **(Defence security)** a breach of the Contractor's obligations in relation to Defence security;
- g. **(privacy)** a breach of a written law with respect to privacy;
- h. **(criminal offences)** an act or omission of the Contractor or Contractor Personnel, where the person concerned has been convicted or found guilty of an offence comprised in the act or omission;
- i. **(Wilful Default)** a Wilful Default of the Contractor or Contractor Personnel;
- j. **(repudiation)** a repudiation of the Contract by the Contractor where the Contractor has intentionally abandoned the Contract; or
- k. **(restitution)** restitution of amounts paid under a mistake of fact or law in relation to the Contract.

10.10.5 Each paragraph of clause 10.10.4 is independent of, and its application is not affected by, any of the other paragraphs.

**Note to drafters: Choose either "clause 10.10.1" or "clauses 10.10.1 and 10.10.3" depending on whether or not the optional clause 10.10.3 is selected.**

10.10.6 The amount of a liability cap in [clause 10.10.1] [clauses 10.10.1 and 10.10.3] shall be adjusted in accordance with the formula:

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

where:

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

**'CPI'** means the Consumer Price Index, All Groups, Weighted Average of Eight Capital Cities published by the ABS in Catalogue number 6401.0, Table 7, Series ID A2325846C or, if that Index is no longer published by the ABS, the index published by the ABS that most closely corresponds to that Index; and

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

## 10.11 Renegotiation of Liquidated Damage and Liability Cap Amounts (Core)

10.11.1 If:

- a. a party proposes a change to the Contract Price by a CCP; and
- b. the change, together with other changes to the Contract Price since this clause 10.11 was last applied, increases or decreases the Contract Price by more than the Renegotiation Threshold specified in the Details Schedule,

the parties shall negotiate in good faith, taking into account any increased risk relating to the Contract, to make amendments to the liability caps and to the LD Amounts.

**Note to Drafters: If clause 10.6 is not included, drafters are to remove the words 'Liquidated Damage and' from the clause heading and remove ' and to the LD Amounts' from the end of this clause.**

## 10.12 Proportionate Liability Laws (Core)

10.12.1 The parties agree that, to the extent permitted by law, the provisions of the Contract:

- a. are express provisions for their rights, obligations and liabilities with respect to matters to which a Proportionate Liability Law applies; and
- b. exclude, modify and restrict the provisions of a Proportionate Liability Law to the extent of their inconsistency with the Proportionate Liability Law.

## 11 CONTRACT MANAGEMENT

### 11.1 Change to the Contract (Core)

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- 11.1.1 Except as expressly permitted in the Contract, the Contract shall be changed only in accordance with this clause 11.1. The parties shall not be liable to each other for any additional work undertaken or expenditure incurred unless the change has been Approved under clause 11.1.5 and taken effect in accordance with clause 11.1.5.
- 11.1.2 Either party may propose a change to the Contract. CCPs shall:
- a. be in the format set out at Annex F to Attachment I; and
  - b. if the proposal involves a change to the SOW and except where otherwise directed by the Commonwealth Representative, be accompanied by an ECP in the form of DID-CM-MGT-ECP.
- 11.1.3 If the Commonwealth Representative proposes a change to the Contract it shall:
- a. notify the Contractor and the Contractor shall submit a CCP to the Commonwealth Representative within a period of 30 days after receipt of such notice or such other period as agreed in writing; or
  - b. provide a CCP to the Contractor and the Contractor shall, within 30 days after receipt, notify the Commonwealth Representative of any changes it requires to the CCP.
- 11.1.4 Prior to the Contractor preparing a CCP, the Commonwealth may require the Contractor to provide a NTE quote for the preparation of a CCP. If the Commonwealth requires a NTE quote under this clause, the amount payable under clause 11.1.7 shall not exceed the NTE quote provided.
- 11.1.5 Unless otherwise agreed in writing, the Commonwealth Representative shall:
- a. within such period as specified in the CDRL for data items subject to CCP approval; or
  - b. if no such period is specified, within 30 days after receipt,
- either Approve the CCP or reject the CCP giving reasons for such rejection. A CCP that has been Approved takes effect when executed by both parties unless otherwise set out in the CCP.

**Note to drafters: The list included in clause 11.1.6 needs to be validated against the COC and the SOW to ensure that it is both accurate and complete.**

- 11.1.6 The cost of preparing the following CCPs shall be borne by the Contractor, including where the CCP is required by the Commonwealth:
- a. a CCP under clauses 1.8.2, 3.7.4, 6.3.4, 6.3.9, 7.8.16, 10.6.9 or 11.9.5;
  - b. a CCP under clause 2.4.6 of the SOW; and
  - c. any other CCP which is proposed or required to address any non-performance of the Contractor under the Contract.
- 11.1.7 Subject to clauses 11.1.4 and 11.1.6, the Commonwealth shall meet the reasonable cost of preparation of a CCP required by the Commonwealth whether or not the CCP is agreed by the Contractor.
- 11.1.8 The Commonwealth Representative may issue a consolidated version of the Contract to incorporate CCPs that have taken effect. The consolidated version does not affect the legal status of the CCP as determined under clause 11.1.5.

### 11.2 Conflicts of Interest and Other Disclosures by the Contractor (Core)

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- 11.2.1 The Contractor warrants that, to the best of its knowledge after making diligent inquiries, as at the Effective Date specified in the Details Schedule no conflict of interest exists or is likely to arise in connection with the performance of its obligations under the Contract by the Contractor, an Approved Subcontractor or the employees and officers of either of them.

- 11.2.2 The Contractor shall promptly notify and fully disclose to the Commonwealth, any event or occurrence actual or threatened during the performance of the Contract which may materially adversely affect the Contractor's ability to perform any of its obligations under the Contract.
- 11.2.3 Without limiting clause 11.2.2, the Contractor shall promptly notify the Commonwealth if a conflict of interest referred to in clause 11.2.1 arises or appears likely to arise.
- 11.2.4 Within five Working Days after giving notice under clause 11.2.2 or 11.2.3, the Contractor shall notify the Commonwealth of the steps the Contractor will take to resolve the issue. If the Commonwealth considers those steps are inadequate, it may direct the Contractor to resolve the issue in a manner proposed by the Commonwealth.
- 11.2.5 If the Contractor fails to notify the Commonwealth in accordance with clause 11.2.2, 11.2.3 or 11.2.4 or fails to resolve the issue in the required manner, the Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1e.
- 11.2.6 The Contractor shall include rights of the Commonwealth equivalent to those set out in this clause 11.2 in all Approved Subcontracts.

### 11.3 Waiver (Core)

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- 11.3.1 Failure by either party to enforce a provision of the Contract shall not be construed as in any way affecting the enforceability of that provision or the Contract as a whole.
- 11.3.2 The exercise of the Commonwealth's rights under the Contract does not affect any other rights of the Commonwealth under the Contract or otherwise, and does not constitute:
- a. an election to exercise those rights instead of other rights; or
  - b. a representation that the Commonwealth will not exercise other rights.

### 11.4 Confidential Information (Core)

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***Note to tenderers: Completion of Attachment N will be undertaken with the preferred tenderer(s) prior to / during negotiations for any resultant Contract. The preferred tenderer(s) will need to justify how each clause and other information that is contained or generated under any resultant Contract, which is proposed to be treated as Confidential Information, meets all four of the criteria listed in Attachment N.***

- 11.4.1 Each party shall ensure that Confidential Information provided by the other party under or in connection with the Contract or identified in Attachment N is not disclosed, except to the extent that:
- a. the disclosure is permitted under clause 11.4.3;
  - b. the Confidential Information is in TD or Software and the disclosure is in connection with the exercise of the rights provided for in clause 5;
  - c. the Confidential Information is in the Contract Material and the disclosure is to a Commonwealth Service Provider in connection with the exercise of the rights provided for in clause 5.7.1b; or
  - d. the other party provides its prior written consent to the disclosure (and such consent may be subject to conditions).
- 11.4.2 Each party shall ensure that, before disclosing Confidential Information under clause 11.4.1b or 11.4.1c, the recipient:
- a. executes a confidentiality deed poll substantially in the form of Annex B of Attachment I; or
  - b. is otherwise subject to an obligation not to disclose the Confidential Information to any other person on terms substantially equivalent to those in Annex B of Attachment I.
- 11.4.3 Clause 11.4.1 does not apply to a disclosure of Confidential Information to the extent that the disclosure is:
- a. required or authorised by law;
  - b. necessary for the conduct of any legal proceedings arising in connection with the Contract;

- c. made by the Commonwealth, a Minister or Parliament in accordance with statutory or portfolio duties or functions, or for public accountability reasons, including following a request by Parliament, a parliamentary committee or a Minister; or
  - d. to any of the following persons:
    - (i) a legal adviser, insurer, financier, auditor or accountant of a party to the extent required to enable them to perform those roles;
    - (ii) a Related Body Corporate for internal management purposes;
    - (iii) any Commonwealth Personnel who needs to know the information in order to undertake their duties or functions; and
    - (iv) an employee, officer or agent of the Contractor who needs to know the information to enable the Contractor to perform its obligations under the Contract.
- 11.4.4 The Contractor shall not, in marking information supplied to the Commonwealth, misuse the term "Confidential Information" or equivalent terms.
- 11.4.5 Subject to clause 11.4.6, the Contractor shall deliver to the Commonwealth, as required by the Commonwealth, all documents in its possession, power or control which contain or relate to any information that is Confidential Information of the Commonwealth on the earlier of:
- a. the date specified in a notice given by the Commonwealth (acting reasonably); and
  - b. the time the documents and other material are no longer required for the purposes of the Contract.
- 11.4.6 The Contractor may retain, and will not be required to return or destroy, any documents containing or relating to Confidential Information of the Commonwealth, where such documents are:
- a. retained in order to comply with any legal, professional or insurance obligations; or
  - b. stored in electronic backups or records that are produced in the normal course where it is not reasonably practicable to destroy such backups or records.
- 11.4.7 If the Commonwealth gives a notice under clause 11.4.5a and the Contractor has placed or is aware that documents containing the Confidential Information of the Commonwealth are beyond its possession or control, the Contractor shall provide full particulars of the whereabouts of the documents containing the Confidential Information, and the identity of the person in whose custody or control they lie.
- 11.4.8 Subject to clause 11.4.6 the Contractor, when directed by the Commonwealth in writing, agrees to destroy any document in its possession, power or control which contain or relate to any Confidential Information of the Commonwealth.
- 11.4.9 Return or destruction of the documents referred to in this clause 11.4 does not release the Contractor from its obligations under the Contract.

## **11.5 Assignment and Novation (Core)**

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- 11.5.1 Neither party may, without the written consent of the other, assign its rights under the Contract or novate its rights or obligations under the Contract.
- 11.5.2 If the Contractor proposes to enter into any arrangement which will require the novation of the Contract, it shall notify and seek the consent of the Commonwealth Representative within a reasonable period prior to the proposed novation.
- 11.5.3 The Commonwealth may refuse to consent to an arrangement proposed by the Contractor under clause 11.5.2.

## **11.6 Negation of Employment and Agency (Core)**

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- 11.6.1 The Contractor shall not represent itself, and shall ensure that Contractor Personnel do not represent themselves, as being employees, partners or agents of the Commonwealth.
- 11.6.2 None of the Contractor or Contractor Personnel shall, by virtue of the Contract, be, or for any purpose be taken to be, an employee, partner or agent of the Commonwealth.

**11.7 Commonwealth Access (Core)**

- 11.7.1 During the performance of the Contract, the Contractor shall, subject to the Commonwealth giving five Working Days' prior notice to the Contractor, provide the Commonwealth Representative, and any person authorised by the Commonwealth Representative, with access to its premises, records and accounts for any purpose related to the Contract. However, in the event of an emergency, an accident or incident investigation, a threat to WHS or the Environment, the Commonwealth may require, and the Contractor shall provide, immediate access to the premises, records or accounts for any purpose related to such emergency, investigation or threat. The Commonwealth may copy any records or accounts for such purposes.
- 11.7.2 The Contractor shall ensure that Approved Subcontracts require Approved Subcontractors to give the Commonwealth Representative and any person authorised by the Commonwealth Representative, access to Approved Subcontractors' premises, and to records and accounts in connection with the performance of work under the Subcontract, including the right to copy. However, in the event of an emergency, an accident or incident investigation, a threat to WHS or the Environment, the Commonwealth may require, and the Contractor shall ensure that the Approved Subcontractor provides, immediate access to the premises, records or accounts for any purpose related to such emergency, investigation or threat. The Contractor shall ensure that the Commonwealth may copy any records or accounts for such purposes.
- 11.7.3 Without limiting clauses 11.7.1, 11.7.2 and 11.7.4, the Contractor acknowledges and agrees that:
- a. the Auditor-General has the power under the *Auditor-General Act 1997* (Cth) to conduct audits (including performance audits) of the Contractor and Subcontractors in relation to the Contract;
  - b. the Auditor-General may give a copy of, or an extract from, a report on an audit in relation to the Contract to any person (including a Minister) who, in the Auditor-General's opinion, has a special interest in the report or the content of the extract; and
  - c. the Commonwealth Representative may authorise the Auditor-General, or member of the staff of the Australian National Audit Office, to access premises, records and accounts under clause 11.7.1 and 11.7.2.
- 11.7.4 Without limiting the generality of clauses 11.7.1 and 11.7.2, the purposes for which the Commonwealth Representative or any person authorised by the Commonwealth Representative may require access include:
- a. inspecting CMCA, attending, conducting or checking stocktakes of CMCA, including viewing and assessing the Contractor's inventory control and stocktaking systems, and removing CMCA that is no longer required for the performance of the Contract;
  - b. performing Audit and Surveillance activities in relation to Quality in accordance with clause 8 of the SOW;
  - c. auditing the Contractor's compliance with the AIC Obligations and each AIC Subcontractor's compliance with the respective AIC Subcontractor Obligations, including validating progress in meeting the Approved AIC Plan or Subcontractor AIC Plans (as applicable);
  - d. investigating the reasonableness of proposed prices or costs in any CCP submitted in accordance with clause 11.1;
  - e. investigating:
    - (i) postponement costs claimed under clause 6.4;
    - (ii) schedule recovery costs claimed under clause 6.6;
- Option: For use if Cost Reimbursement Payments are paid to the Contractor.**

  - (iii) Cost Reimbursement Payments claimed under clause 7.8;
- (iv) Defect rectification costs claimed under clause 8.2.2; and
  - (v) any other claims made by the Contractor under the Contract;

- f. determining whether and to what extent steps should be taken to register or otherwise protect Commonwealth IP;
  - g. validating the Contractor's compliance with clause 5 and the TDSR Schedule;
  - h. auditing raw data, Software Design Data, Software, and Source Code for the purpose of validating the Contractor's performance under the Contract;
  - i. performing reviews of the EVMS in accordance with clause 3.2.5 of the SOW;
  - j. without being under any obligation to do so, monitoring the Contractor's compliance with any applicable laws or Approved plans in connection with the protection of WHS or the Environment, including the development and implementation of any systems, policies or procedures related to WHS and environmental compliance as required under the Contract;
  - k. assessing the financial viability of the Contractor to perform and complete the Contract; and
  - l. monitoring and assessing compliance with the Commonwealth Supplier Code of Conduct in accordance with clause 12.10.1.
- 11.7.5 The Contractor shall permit the Commonwealth to, and shall facilitate the Commonwealth being able to, exercise its rights in this clause 11.7 to access Related Bodies' Corporate records (including subsidiary and parent company records) relating to transfer pricing, cross-subsidisation with Related Bodies Corporate and the allocation of overheads between the Contractor and the Related Bodies Corporate in connection with any investigation, audit or review referred to in clause 11.7.4.

***Note to drafters: When significant software management activities may be performed by Approved Subcontractors, the project should consider including a tripartite deed (ideally in the RFT or otherwise in the draft Contract for negotiation) to capture the obligations in clause 11.7.4h and 11.7.2 (as an annex to Attachment I to the Contract) within the context of a direct relationship between the Contractor, Approved Subcontractor and Commonwealth. An additional clause would need to be included in clause 11.7 requiring the Contractor to obtain and provide to the Commonwealth an executed deed substantially in accordance with the relevant annex to Attachment I from all Approved Subcontractors performing software management activities.***

- 11.7.6 The Commonwealth shall comply with, and shall require any delegate or person authorised by the Commonwealth Representative to comply with, any reasonable Contractor or Approved Subcontractor safety and security requirements or codes of behaviour for the premises.

## **11.8 Contractor Access (Core)**

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- 11.8.1 The Commonwealth shall, during the period of the Contract, provide access to any Commonwealth Premises for persons Approved under this clause 11.8 as necessary for the Contractor's performance of the Contract.
- 11.8.2 Subject to clause 3.8 and unless otherwise agreed in writing, the Contractor shall seek written permission from the Commonwealth Representative, at least five Working Days prior to entry being required, for each person the Contractor wishes to have access to Commonwealth Premises.
- 11.8.3 The Commonwealth Representative may grant or refuse to grant a person access to the Commonwealth Premises. If access to any person specified by the Contractor is refused, the Contractor may request access for another person if necessary for the performance of the Contract.
- 11.8.4 The Commonwealth Representative may by notice to the Contractor withdraw access rights to Commonwealth Premises at any time for any period.
- 11.8.5 The Contractor shall comply with, and require persons afforded access under this clause 11.8 to comply with, any relevant Commonwealth safety and security requirements, regulations, standing orders, or codes of behaviour for the Commonwealth Premises.
- 11.8.6 The Commonwealth Representative may notify the Contractor of, and the Contractor shall comply with, any special security or access provisions that apply to a particular Commonwealth Premises relevant to the Contract.

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

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

## 11.9 Subcontracts (Core)

11.9.1 The Contractor shall not Subcontract the whole of the work under the Contract.

11.9.2 The Contractor may, but shall not be required to, Subcontract with one or more of the Approved Subcontractors.

**Note to drafters: Exceptions identified in accordance with clause 11.9.3 may be defined in terms of specific Subcontractors, classes of Subcontractors, or levels in the WBS, etc. For instance, SMEs who become relevant only because they perform installation services might be exempted from requirements that are not in any way relevant to their Subcontract, such as measurement activities pertaining to software management.**

11.9.3 The Contractor shall not Subcontract work under the Contract to a Subcontractor and shall ensure that an Approved Subcontractor does not Subcontract work under an Approved Subcontract if:

- a. the total value of all work with the Subcontractor is expected to exceed the Approved Subcontractor Threshold specified in the Details Schedule;
- b. the work involves:
  - (i) design and development activities;
  - (ii) modification of systems or equipment, such as Deviations;
  - (iii) systems installation or integration; or
  - (iv) **[INSERT OTHER SPECIFIC TYPE OF WORK OR TASK(S) TO BE PERFORMED]**;
- c. the work involves bringing or creating IP in significant items of TD or Software;
- d. the Subcontractor will be located, on an on-going basis, on Commonwealth Premises; or
- e. the Subcontract is expected to exceed the Approved Subcontractor Threshold and the work involves establishing, enhancing or maintaining an Industrial Capability within an Australian Entity that is, or forms part of, a Defence-Required Australian Industrial Capability (DRAIC) or other ANZ Industrial Capability (identified as a required activity under clause 3.2 of Attachment F), including:
  - (i) transfer of technology, TD, IP rights, knowhow and/or know-why to an Australian Entity for the purposes of creating or enhancing a Defence-Required Australian Industrial Capability (DRAIC) or other ANZ Industrial Capability;
  - (ii) providing work to an Australian Entity that materially supports the maintenance of a DRAIC or other ANZ Industrial Capability; and/or
  - (iii) where the Approved Subcontractor is establishing, enhancing or maintaining an Industrial Capability within itself,

unless that Subcontractor is an Approved Subcontractor or unless otherwise Approved by the Commonwealth in writing pursuant to clause 11.9.5.

**Note to drafters: Clause 11.9.3e relates to the development of Industry Capability as a reason for identifying AIC Subcontractors. Clause 11.9.4c (below) is for contributions to the Australian economy and drafters need to insert a threshold ACE percentage that, in the context of the Approved Subcontractor Threshold, provide scope to pursue the AIC Objectives. As an example, if a Subcontract ACE percentage is greater than the Prescribed ACE Percentage for the Contract, this could indicate an overseas prime Contractor and a Subcontractor managing the local work activity, and it would be desirable to identify them as an AIC Subcontractor. Hence, the appropriate ACE percentage may depend on Commonwealth knowledge of market participants.**

11.9.4 If:

- a. an Approved Subcontractor performs work referred to in clause 11.9.3e.;



- b. an Approved Subcontractor is undertaking procurement of systems or equipment for which Industrial Capabilities need to be established in an Australian Entity to support achieving Sovereignty for the Mission System; or
  - c. the total value of all work with an Approved Subcontractor is expected to exceed the Approved Subcontractor Threshold and for which the percentage of ACE is expected to be equal to or greater than [... INSERT EG, 30% ...] of the Approved Subcontract price, that Approved Subcontractor shall also be an AIC Subcontractor.
- 11.9.5 Where clause 11.9.3 or clause 11.9.4 applies in respect of a Subcontractor, the Contractor may seek the Commonwealth's Approval by written request to the Commonwealth Representative (such request to include a detailed justification) for the relevant Subcontractor not to be treated as an:
- a. Approved Subcontractor for the purposes of the Contract;
  - b. AIC Subcontractor for the purposes of the Contract; and/or
  - c. Approved Subcontractor or an AIC Subcontractor for the purposes of the application of specific provisions of the Contract.
- 11.9.6 The Contractor may request the inclusion of additional Approved Subcontractors in Attachment H by submitting a CCP in accordance with clause 11.1. The CCP shall include full particulars of the work to be Subcontracted, the name and address of each proposed Subcontractor and any other information about the Subcontractor required by the Commonwealth Representative.
- 11.9.7 The Commonwealth Representative shall Approve or reject the CCP in accordance with clause 11.1.5. The Commonwealth Representative's Approval shall not be unreasonably withheld.
- 11.9.8 None of the following reduce or limit the Contractor's obligations or liabilities under or in relation to the Contract:
- a. the Contractor's subcontracting any part of the work under the Contract;
  - b. the Commonwealth's Approval of a Subcontractor or a Subcontract; or
  - c. an act or omission of Contractor Personnel,
- and the Contractor shall be responsible for all Subcontractors.
- 11.9.9 The Contractor shall not enter into a Subcontract if the terms of the Subcontract will result in the Contractor not complying with a requirement in clause 5, unless the Contractor has complied with clause 5.11.3(b).
- 11.9.10 If a Subcontract is terminated, repudiated or rescinded, whether in relation to its terms or as a result of any legislation relating to bankruptcy, liquidation or official management, the Contractor shall promptly notify the Commonwealth Representative and shall complete the work under the Contract either itself or by engaging another Subcontractor.
- 11.9.11 The Contractor acknowledges and shall inform its Subcontractors that the Commonwealth may be required to publicly disclose Subcontractors' participation in the performance of the Contract. If requested by the Commonwealth Representative, the Contractor shall provide the Commonwealth Representative with names of Subcontractors and copies of Subcontracts (which need not contain prices) for this purpose.
- 11.9.12 The Contractor shall not enter into a Subcontract with a Subcontractor named by the Workplace Gender Equality Agency as an employer currently not complying with the *Workplace Gender Equality Act 2012* (Cth).
- 11.9.13 The Contractor shall obtain and provide to the Commonwealth an Approved Subcontractor Deed duly executed by a relevant Approved Subcontractor before any goods or services are provided by that Approved Subcontractor and no later than 20 Working Days after executing the relevant Subcontract.
- 11.9.14 For the purposes of clause 11.9.13, "a relevant Approved Subcontractor" means:
- a. an Approved Subcontractor who performs work referred to in clause 11.9.3c;
  - b. an AIC Subcontractor; and

- c. an Approved Subcontractor identified in Attachment H as being required to provide an Approved Subcontractor Deed to the Commonwealth.

**Note to drafters: These clauses 11.9.15 to 11.9.19 must be included in the draft RFT in accordance with the Payment Times Procurement Connected Policy (PT PCP) if the procurement will be valued at over \$4 million (inc GST). If the value of the procurement is not known, it should be assumed for the purposes of the PT PCP, that the procurement is valued above \$4 million (inc GST), unless it is reasonable to assume otherwise.**

**It is not mandatory to include this clause if any of the limitations at 2.1 of the PT PCP apply. For example, this clause is not required to be included if the procurement is exempt from Division 2 of the CPRs under paragraph 2.6 of the CPRs (i.e. a Defence Exempt Procurement).**

**Note to tenderers: The Payment Times Procurement Connected Policy (PT PCP) imposes obligations on large businesses who enter into a contract with the Commonwealth to pay invoices under their new Subcontracts (up to \$1 million (inc GST)) within 20 days. Late payments of invoices in scope will incur interest. Further information about the Payment Times Procurement Connected Policy is available from the Department of Treasury at:**

- <https://treasury.gov.au/small-business/payment-times-procurement-connected-policy>.

**The PT PCP complements the Government Supplier Pay on Time or Pay Interest Policy.**

**The following clauses will be included in the Contract if:**

- **the Tenderer is a Reporting Entity as at the date of its tender response; and**
- **the value of the Contract is above \$4 million (inc GST) as at contract execution.**

- 11.9.15 The Contractor shall comply with the Payment Times Procurement Connected Policy (PT PCP), including the obligation to provide and comply with a PT PCP Remediation Plan (as defined in the PT PCP) when required to do so by the PT PCP Policy Team.
- 11.9.16 If the Contractor enters into a PT PCP Subcontract, the Contractor shall include in that subcontract:
- a. a requirement for the Contractor to pay the PT PCP Subcontractor:
    - (i) within 20 days after the acknowledgement of the satisfactory delivery of the goods or services and receipt of a Correctly Rendered Invoice, provided that this does not affect any other obligation to comply with applicable legislation that provides for a shorter payment period; and
    - (ii) subject to clause 11.9.18, for payments made by the Contractor after the payment is due, the unpaid amount plus interest on the unpaid amount calculated in accordance with the formula for late payments at clause 7.10.3;
  - b. a statement that the PT PCP applies to that subcontract;
  - c. a statement that the subcontractor may make a complaint to the PT PCP Policy Team in accordance with the PT PCP if there has been non-compliance with the requirements of this clause 11.9.16;
  - d. a statement that the Contractor must respond to any complaint of non-compliance made by the subcontractor under clause 11.9.16c; and
  - e. a statement that, if requested by the PT PCP Policy Team, the Contractor must complete a questionnaire in the form of Appendix C to the PT PCP.
- 11.9.17 If the Contractor enters into a Reporting Entity Subcontract, the Contractor shall use reasonable endeavours to include in that subcontract:
- a. obligations equivalent to those in clause 11.9.16; and
  - b. a requirement that if the Reporting Entity Subcontractor in turn enters into a Reporting Entity Subcontract, then that subcontract shall include:
    - (i) obligations equivalent to those in clause 11.9.16; and
    - (ii) obligations equivalent to this clause 11.9.17b (such that the obligations in this clause 11.9.17b are to continue to be flowed down the supply chain to all Reporting Entity Subcontractors).
- 11.9.18 The Contractor is not required to pay interest in accordance with clause 11.9.16a(ii) if either:

- a. the Commonwealth has failed to pay the Contractor in accordance with the timeframes and requirements under this Contract; or
  - b. the amount of the interest that would otherwise be payable is less than \$100 (inc GST).
- 11.9.19 If the Contractor agrees is the subject of a complaint in relation to its compliance with clauses 11.9.15 to 11.9.18, or the associated payment provisions of a PT PCP Subcontract, the Contractor shall:
- a. not take any prejudicial action against the complainant due to the complaint or any investigation or inquiry in relation to the complaint; and
  - b. co-operate in good faith with the PT PCP Policy Team in connection with any investigation or inquiry and any attempt to resolve the complaint.

#### 11.10 Defence Security (Core)

**Note to drafters: Where the procurement involves weapons or explosive ordnance, drafters must obtain the DSVS's approval for the security-related aspects of the request documentation prior to release.**

- 11.10.1 If the Contractor or Contractor Personnel require access to any Commonwealth Premises under the control or responsibility of Defence, the Contractor shall:
- a. comply with any security requirements (including those contained in the DSPF) notified to the Contractor by the Commonwealth Representative from time to time; and
  - b. ensure that Contractor Personnel are aware of and comply with the Commonwealth's security requirements.
- 11.10.2 The Contractor shall:
- a. ensure that Contractor Personnel undertake any security checks, clearances or accreditations as required by the Commonwealth;
  - b. promptly notify the Commonwealth of any changes to circumstances which may affect the Contractor's capacity to provide the Supplies in accordance with the Commonwealth's security requirements; and
  - c. provide a written undertaking in respect of security or access to the Commonwealth Premises in the form required by the Commonwealth.

**Note to drafters: For further information on personnel security clearances and types of accreditation, refer to Principles 23, 40 and 73 of the DSPF. Facility accreditations will be required for certain Business Impact Levels. For information on the types of Business Impact Levels, refer to**

- <http://drnet/eiq/Defence-Security/Security-Risk-Management/Pages/BIL.aspx>

**or contact the relevant Regional DSVS Office.**

**Where the procurement involves complex security arrangements or a range of personnel security clearances, details should be set out in the Security Classification and Categorisation Guide at Attachment J. In this event, reference to that attachment should be made in the relevant section of the Details Schedule.**

**Note to tenderers: For information on security classification, and required facility accreditations refer to the Security Classification and Categorisation Guide (SCCG) at Attachment J (if applicable), Principle 73 and Principle 10 of the DSPF, and the Australian Government's Protective Security Policy Framework at:**

- <https://www.protectivesecurity.gov.au/policies>.

- 11.10.3 The security classification of the information and assets accessible to the Contractor and work to be performed under the Contract will be up to and including the level specified in the Details Schedule. The Contractor shall:
- a. comply with the classification and protection of official information requirements of Principle 10 of the DSPF; and
  - b. ensure that all required personnel (if any) possess a personnel security clearance at the level specified in the Details Schedule, and comply with the requirements and procedures of Principle 40 of the DSPF.

**Note to drafters: DISP membership in accordance with Control 16.1 of the DSPF is required in various circumstances, including but not limited to where:**

- a contractor is working on classified information or assets, storing or transporting Defence weapons or explosive ordnance, providing security services for Defence bases and facilities;
- the procurement involves weapons or explosive ordnance; or
- as a result of a Defence business requirement..

**For further assistance and guidance in relation to determining whether DISP membership is required, refer to DISP Factsheet here:**

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

**Note to tenderers: For information on the DISP (and equivalent international agreements or arrangements for overseas tenderers) refer to Control 16.1 of the DSPF. For access to the DSPF tenderers should contact the Contact Officer listed in the Tender Details Schedule.**

**Option A: If the Contractor will require DISP membership in accordance with Control 16.1 of the DSPF.**

11.10.4 The Contractor shall obtain and maintain all elements of DISP membership at the levels specified in the Details Schedule (or an equivalent international agreement or arrangement) in accordance with Control 16.1 of the DSPF for the purposes of the Contract.

**Option B: If the Contractor will not require DISP membership in accordance with Control 16.1 of the DSPF.**

11.10.5 The Contractor is not required to hold DISP membership within the meaning of Control 16.1 of the DSPF for the purposes of the Contract.

**Note to drafters: Where work to be performed overseas will involve security classified information and/or assets, the following option is to be included. Otherwise the option should be deleted.**

**If, at the time of drafting, it is not clear that this clause will be required, the option is to be included in the draft Contract. Otherwise, the option should be deleted.**

**Note to tenderers: If the tenderer proposes to perform work at an overseas location and that work involves information and/or assets that is subject to a security classification, and that aspect proposal is agreed in any resultant contract, the following clauses will be included.**

**Option: If work is to be performed overseas and will involve security classified information and/or assets (as identified in the Details Schedule).**

11.10.6 Where work under the Contract is performed overseas, the Contractor shall hold a Facility Security Clearance at the relevant level verified by DS&VS through a bilateral security instrument in accordance with Principle 16 of the DSPF.

**Option: For when the procurement involves classified information or security-protected assets (as identified in the Details Schedule).**

11.10.7 The Contractor shall classify all information in its possession relating to the performance of the Contract according to the Security Classification and Categorisation Guide at Attachment J and shall ensure that such information is safeguarded and protected according to its level of security classification.

11.10.8 With respect to security classified information, the Contractor shall:

- a. ensure that no security classified information furnished or generated under the Contract shall be released to a third party, including a representative of another country, without prior written approval of the originator through the Commonwealth Representative;
- b. promptly report to the Commonwealth Representative any security incident, as defined by the DSPF, including instances in which it is known or suspected that security classified information furnished or generated under the Contract has been lost or disclosed to unauthorised parties, including a representative of another country; and

- c. ensure that all security classified information transmitted between the parties or a party and a Subcontractor, in Australia, whether generated in Australia or overseas, shall be subject to the terms of Principle 71 of the DSPF.

**Note to drafters: If, at the time of drafting, it is not clear that COMSEC material will be required to be transmitted within Australia, the following option is to be included in the draft Contract. Otherwise, the option should be deleted.**

**Option: For when COMSEC material is transmitted in Australia (as identified in the Details Schedule).**

11.10.9 Where COMSEC material is transmitted in Australia, the Contractor shall ensure that:

- a. without limiting clause 11.10.8b, all COMSEC material transmitted between the parties or a party and a Subcontractor in Australia shall be subject to the special security provisions of Principle 13 of the DSPF; and
- b. all security classified information transmitted between the parties or a party and a Subcontractor located overseas whether generated in Australia or by another country shall be subject to the laws of the overseas country regarding the custody and protection of security classified information and to any bilateral security instrument between Australia and the overseas country.

**Note to drafters: If, at the time of drafting, it is not clear that COMSEC material will be required to be transmitted overseas, the following option is to be included in the draft Contract. Otherwise, the option should be deleted.**

**Option: For when COMSEC material is transmitted overseas (as identified in the Details Schedule).**

11.10.10 Where COMSEC material is transmitted overseas, the Contractor shall ensure that:

- a. all COMSEC material transmitted between the parties or a party and Subcontractor located overseas shall be subject to approval in the first instance by the Director ASD, in respect of Australian COMSEC material, and by the respective COMSEC authorities in other countries in respect of COMSEC material originating from those countries; and
- b. once approved for release, the material shall be subject to the laws of the overseas country regarding the custody and protection of COMSEC material as determined by the Director ASD and to any bilateral security instrument between Australia and the overseas country.

11.10.11 If there has been a breach by the Contractor or Contractor Personnel of this clause 11.10, the Commonwealth Representative may give the Contractor a notice of termination for default under clause 13.2.1e.

11.10.12 The Contractor shall ensure the requirements of clause 11.10 are included in all Subcontracts where the Subcontractor requires access to any Commonwealth Premises, or to any security classified information or assets, in order to perform the obligations of the Subcontract.

## **11.11 Post Defence Separation Employment (Core)**

11.11.1 Except with the prior written Approval of the Commonwealth Representative, the Contractor shall not permit (and shall ensure that each Approved Subcontractor does not permit) any Defence Personnel or Defence Service Provider who, at any time during the preceding 12 month period was engaged or involved in:

- a. the preparation or management of the Contract;
- b. the assessment or selection of the Contractor; or
- c. the planning or performance of the procurement or any activity relevant or related to the Contract,

to perform, contribute to or advise on the performance of the Contract (or Approved Subcontract).

11.11.2 To avoid doubt, the 12 month period referred to in clause 11.11.1 applies from the date which is 12 months before the date on which the Contractor (or Approved Subcontractor) proposes

that the person start performing or contributing to the performance of the Contract (or Approved Subcontract).

- 11.11.3 The Commonwealth Representative shall not unreasonably withhold Approval of a person under clause 11.11.1 and, in making a decision, shall consider:
- a. the character and duration of the engagement, services or work that was performed by the person during the relevant 12 month period;
  - b. any information provided by the Contractor about the character and duration of the services proposed to be performed by the person under the Contract (or Approved Subcontract);
  - c. the potential for real or perceived conflicts of interest or probity concerns to arise if the person performs or contributes to the performance of the Contract (or Approved Subcontract) in the manner proposed under 11.11.3b, and the arrangements which the Contractor (or Approved Subcontractor) proposes to put in place to manage or reduce those conflicts of interest or probity concerns;
  - d. any information provided by the Contractor concerning any significant effect that withholding Approval will have on the person's employment or remuneration opportunities or the performance of the Contract (or Approved Subcontract); and
  - e. the policy requirements set out in DI Administration and Governance Provision 5- Conflicts of interest and declarations of interest AG5 and the *Integrity Policy Manual*, as applicable.
- 11.11.4 The Contractor shall include rights of the Commonwealth equivalent to those contained in clause 11.11 in all Approved Subcontracts.

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

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- 11.12.1 Subject to clause 11.12.2, the Contractor shall seek the Commonwealth Representative's prior written consent to any proposed Change of Control by providing notice to the Commonwealth at least 15 Working Days before the proposed Change of Control is to occur.
- 11.12.2 If a Change of Control occurs as a result of a transfer of shares or other interests listed on a recognised stock exchange and the consent of the Commonwealth Representative could not have been obtained in accordance with clause 11.12.1, the Contractor shall seek that consent by providing notice to the Commonwealth within 5 Working Days after the Change of Control.
- 11.12.3 In any notice given to the Commonwealth seeking consent to a Change of Control, the Contractor shall include the following details:
- a. the ownership and management arrangements of the Contractor or the Guarantor that were in place immediately before the change or, if the change has yet to occur, that were in place at the time the Contractor became aware of the prospective change;
  - b. the ownership and management arrangements of the Contractor or the Guarantor that have been or will be put in place as a consequence of the change or, if the change has yet to occur, that the Contractor reasonably expects to be put in place if the change occurs;
  - c. the impact (if any) that the change has had on the Contractor's or the Guarantor's ability to meet its obligations under the Contract or, if the change has yet to occur, that the Contractor reasonably expects the change to have on that ability; and
  - d. the steps the Contractor has taken or proposes to take to minimise the impact of the change or prospective change.
- 11.12.4 If there is a Change of Control and the Commonwealth Representative does not consent to the Change of Control, then the Commonwealth may:
- a. give the Contractor a notice of termination under clause 13.2.1e; or
  - b. agree not to give the Contractor a notice of termination under clause 13.2.1e, subject to the Contractor providing further information, giving specified undertakings, or executing further agreements (including a CCP), as may be required by the Commonwealth.
- 11.12.5 Nothing in this clause 11.12 requires the Contractor or the Guarantor to act in a manner inconsistent with its obligations under the *Corporations Act 2001* (Cth) or equivalent laws and regulations in a foreign jurisdiction.

**12 POLICY AND LAW****12.1 Governing Law (Core)**

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

**12.2 Compliance With Laws (Core)**

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- 12.2.1 The Contractor shall, in the performance of the Contract, comply with and ensure that Contractor Personnel comply with, the laws from time to time in force in the State, Territory, or other jurisdictions (including overseas) in which any part of the Contract is to be carried out.
- 12.2.2 The Contractor shall provide to the Commonwealth Representative within 10 Working Days after a request by the Commonwealth written confirmation that, to the best of the Contractor's knowledge and based on reasonable enquiries undertaken by the Contractor, the Contractor and Contractor Personnel are compliant with all laws (including foreign anti-corruption legislation) regarding the offering of unlawful inducements whether in Australia or otherwise in connection with the performance of the Contract and the Subcontracts.
- 12.2.3 The Contractor:
- a. shall take all reasonable measures to prevent, detect and investigate any fraud that may occur, is occurring or has occurred under the Contract or any Subcontract; and
  - b. acknowledges and agrees that its obligation in clause 12.2.3a extends to taking all reasonable measures to prevent, detect and investigate any fraud which has or may be committed by Contractor Personnel.
- 12.2.4 If the Contractor knows that any fraud is occurring or has occurred, it shall, as soon as practicable, provide written details to the Commonwealth, and provide such further information and assistance as the Commonwealth, or any person authorised by the Commonwealth, reasonably requires in relation to the fraud.

**12.3 Policy Requirements (Core)**

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***Note to drafters: Prior to RFT release and prior to the execution of any resultant Contract, the Glossary should be updated to reflect the version of the following documents and policies current at the time of RFT release and signature of any resultant Contract, as applicable.***

***If there are other Commonwealth or Defence policies relevant to the procurement activity, that are not otherwise referenced in the draft Contract, they can be listed below.***

- 12.3.1 Subject to clause 12.3.2, the Contractor shall comply with, and shall ensure that Contractor Personnel comply with, the following Commonwealth policies of general application relevant or applicable to the Contract:
- a. DI, and in particular:
    - (i) Administration and Governance Provision 4 AG4 – Incident reporting and management and the Incident Reporting and Management Manual;
    - (ii) Administration and Governance Provision 5, AG5 – Conflicts of interest and declarations of interest and the Integrity Policy Manual; and
    - (iii) People Provision 7, PPL 7 – Required behaviours in Defence and Chapter 3 of the Complaints and Alternative Resolutions Manual;
  - b. Financial Policy Gifts and Benefits;
  - c. Financial Policy Sponsorship;
  - d. Australian Defence Force alcohol policy as detailed in MILPERSMAN Part 4 Chapter 1;
  - e. Public Interest Disclosure policy detailed at:
 

<http://www.ombudsman.gov.au/about/making-a-disclosure>; and
  - f. **[DRAFTERS TO INSERT ANY OTHER RELEVANT COMMONWEALTH AND DEFENCE POLICIES THAT REGULATE DELIVERY OF THE SUPPLIES].**



- 12.3.2 Notwithstanding clause 1.6, if the SOW is inconsistent with a policy referred to in clause 12.3.1, the Contractor shall comply with the SOW to the extent of the inconsistency and provided that compliance with the SOW does not result in a breach of any laws.

**Option: For when a procurement is at or above the relevant procurement threshold, and does not meet the exemptions set out at Appendix A to the CPRs.**

**Note to drafters: If the procurement is specifically exempt from the additional rules detailed in Division 2 of the CPRs as a result of a Defence specific exemption (a list of Defence specific exemptions is found in the factsheet 'Exemptions from Division 2 of the Commonwealth Procurement Rules' which is available here:**

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

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

**Note to tenderers: These clauses 12.3.3 and 12.3.4 apply only to the extent that the tenderer has identified itself as a Relevant Employer for the purposes of the Workplace Gender Equality Procurement Principles. The Workplace Gender Equality Procurement Principles will only apply to overseas based contractors to the extent that they have 100 or more employees in Australia.**

- 12.3.3 The Contractor shall comply with its obligations under the *Workplace Gender Equality Act 2012* (Cth) (WGE Act).
- 12.3.4 If the Contractor becomes non-compliant with the WGE Act during the period of the Contract, the Contractor shall notify the Commonwealth Representative.



**Option: For when a procurement is subject to the Shadow Economy Procurement Connected Policy.**

**Note to drafters: A procurement will be subject to the Shadow Economy Procurement Connected Policy where the procurement is conducted by open tender, subject to the CPRs and is valued at over \$4 million (inc GST).**

**Note to tenderers: The Shadow Economy Procurement Connected Policy imposes obligations on the Commonwealth to obtain from contractors satisfactory and valid STRs and to require contractors to obtain and hold STRs in respect of certain Subcontractors. Further information about the requirements arising under the Shadow Economy Procurement Connected Policy is available from the Department of Treasury at:**

- <https://treasury.gov.au/publication/p2019-t369466>

**The Contractor will be required to obtain and hold copies of satisfactory and valid STRs for any Subcontractors that the Contractor directly engages (i.e. first tier Subcontractors) where the contract value will be over \$4 million (inc GST). Any STRs obtained from these Subcontractors must be provided to the Commonwealth upon request.**

12.3.5 The Contractor shall not enter into a Subcontract with a proposed direct Subcontractor (or agree to a novation of a direct Subcontract) if the total value of all work under the Subcontract is expected to exceed \$4 million (inc GST), unless the Contractor has obtained and holds any the following STRs, as applicable to the proposed direct Subcontractor:

If the proposed Subcontractor to enter into the Subcontract is:	STRs required:
(a)	(b)
a. a body corporate or natural person;	a satisfactory and valid STR in respect of that body corporate or person;
b. a partner acting for and on behalf of a partnership;	a satisfactory and valid STR: (i) on behalf of the partnership; and (ii) in respect of each partner in the partnership that will be directly involved in the delivery of the Subcontract;
c. a trustee acting in its capacity as trustee of a trust;	a satisfactory and valid STR in respect of the: (i) trustee; and (ii) the trust;
d. a joint venture participant;	a satisfactory and valid STR in respect of: (i) each participant in the joint venture; and (ii) if the operator of the joint venture is not a participant in the joint venture, the joint venture operator;
e. a member of a Consolidated Group;	a satisfactory and valid STR in respect of: (i) the relevant member of the Consolidated Group; and (ii) the head company in the Consolidated Group;
f. a member of a GST Group;	a satisfactory and valid STR in respect of the: (i) the GST Group member; and (ii) the GST Group representative.

12.3.6 The Contractor shall obtain and hold additional STRs in the following circumstances within 10 Working Days of the Contractor becoming aware of the circumstances arising:

If the Contractor or Subcontractor is:	Additional STRs required:

	(a)	(b)
	a. a partner acting for and on behalf of a partnership;	a satisfactory and valid STR in respect of any additional partner that becomes directly involved in the delivery of the Contract or Subcontract (as applicable);
	b. a trustee acting in its capacity as trustee of a trust;	a satisfactory and valid STR in respect of any new trustee appointed to the trust;
	c. a joint venture participant;	a satisfactory and valid STR in respect of: <ul style="list-style-type: none"> <li>(i) any new participant in the joint venture; and</li> <li>(ii) any new joint venture operator if the new operator is not already a participant in the joint venture;</li> </ul>
	d. a member of a Consolidated Group;	a satisfactory and valid STR in respect of any new head company of the Consolidated Group; and
	e. a member of a GST Group;	a satisfactory and valid STR in respect of any new representative for the GST Group.
12.3.7	The Contractor shall provide the Commonwealth with copies of the STRs referred to in clause 12.3.5 or 12.3.6 within 5 Working Days after a written request by the Commonwealth.	
12.3.8	For the purposes of the Contract, an STR is taken to be: <ul style="list-style-type: none"> <li>a. <b>satisfactory</b> if the STR states that the entity has met the conditions, as set out in the Shadow Economy Procurement Connected Policy, of having a satisfactory engagement with the Australian tax system; and</li> <li>b. <b>valid</b> if the STR has not expired as at the date on which the STR is required to be held.</li> </ul>	

## 12.4 Work Health and Safety (Core)

### 12.4.1 The Commonwealth and the Contractor:

- a. shall, where applicable, comply with, and the Contractor shall ensure that all Subcontractors comply with, the obligation under the WHS Legislation to, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with the Commonwealth, the Contractor or the Subcontractors (as the case may be) and any other person who, concurrently with the Commonwealth, the Contractor or the Subcontractor (as the case may be), has a WHS duty under the WHS Legislation in relation to the same matter; and
- b. acknowledge that they have a duty under the applicable WHS Legislation to ensure, so far as is reasonably practicable, the health and safety of:
  - (i) Commonwealth Personnel;
  - (ii) Contractor Personnel; and
  - (iii) other persons,
in connection with the Supplies or work performed under the Contract.

### 12.4.2 Without limiting the application of the WHS Legislation, the Contractor acknowledges that to the extent that any Commonwealth Personnel:

- a. are located on Contractor Premises in relation to the Contract; and
- b. whose activities in carrying out work in relation to the Contract are influenced or directed by the Contractor,

such Commonwealth Personnel will be taken to be workers for the purposes of the WHS Legislation.

### 12.4.3 The Contractor represents and warrants that:

- a. it has given careful, prudent and comprehensive consideration to the WHS implications of the work to be performed by it under the Contract; and

- b. the proposed method of performance of that work complies with, and includes a system for identifying and managing WHS risks which complies with, all applicable legislation relating to WHS including the WHS Legislation.

12.4.4 The Contractor shall:

- a. provide the Supplies in such a way that the Commonwealth and Commonwealth Personnel are able to undertake any roles or obligations in connection with the Supplies (such as in relation to testing or auditing); and
- b. ensure that the Commonwealth and Commonwealth Personnel are able to make full use of the Supplies for the purposes referred to in clause 3.3.1, and to maintain, support and develop the Supplies,

without the Commonwealth or Commonwealth Personnel contravening any legislation relating to WHS including the WHS Legislation, any applicable standards relating to WHS or any policy relating to WHS identified in the Contract.

12.4.5 Without limiting the application of the WHS Legislation (and subject to any relevant foreign government restrictions), the Contractor shall, in connection with or related to the Supplies or the work performed under the Contract, provide, and shall:

- a. ensure that an Approved Subcontractor provides;
- b. and use its reasonable endeavours to ensure that any other Subcontractor engaged in any Prescribed Activities provides in respect of those Prescribed Activities,

to the Commonwealth Representative:

- c. within 10 Working Days (or another period agreed in writing by the Commonwealth) of a request by the Commonwealth Representative any information or copies of documentation requested by the Commonwealth Representative and held by the Contractor or Subcontractor (as the case may be) to enable the Commonwealth to comply with its obligations under the WHS Legislation;
- d. in respect of:
  - (i) the Contractor or an Approved Subcontractor, within 10 Working Days after receipt or submission of the notice, written communication or written undertaking by the Contractor or Approved Subcontractor (as the case may be); or
  - (ii) any other Subcontractor engaged in any Prescribed Activities, within 10 Working Days of a request by the Commonwealth,

copies of:

- (iii) all formal notices and written communications issued by a regulator or agent of the regulator under or in compliance with the applicable WHS Legislation to the Contractor or Subcontractor (as the case may be) relating to WHS matters;
- (iv) all formal notices issued by a health and safety representative of the Contractor or Subcontractor (as the case may be), under or in compliance with the applicable WHS Legislation; and
- (v) all formal notices, written communications and written undertakings given by the Contractor or Subcontractor (as the case may be) to the regulator or agent of the regulator under or in compliance with the applicable WHS Legislation; and
- e. within 10 Working Days of a request by the Commonwealth Representative, written assurances specifying that to the best of the Contractor's or the Subcontractor's (as the case may be) knowledge that the Contractor and the Contractor Personnel are compliant with:
  - (i) the applicable WHS Legislation; and
  - (ii) any relevant or applicable approved codes of practice under the *Work Health and Safety Act 2011* (Cth) except where the Contractor complies with the WHS Legislation in a manner that is different from the relevant code of practice but provides a standard of WHS that is equivalent to or higher than the standard required in the code of practice,

and that the Contractor or Subcontractor (as the case may be) has made reasonable enquiries before providing the written assurances.

- 12.4.6 Subject to clause 10.10 and any relevant foreign government restrictions, the Commonwealth shall provide to the Contractor in a timely manner any information or copies of documentation reasonably requested by the Contractor and held by the Commonwealth to enable the Contractor to comply with its obligations under the applicable WHS Legislation in relation to the Contract.
- 12.4.7 The Contractor shall ensure that if the WHS Legislation requires that:
- a. a person (including a Subcontractor):
    - (i) be authorised or licensed (in accordance with the WHS Legislation) to carry out any works at the workplace, that person is so authorised or licensed and complies with any conditions of such Authorisation; and/or
    - (ii) has prescribed qualifications or experience, or if not, is to be supervised by a person who has prescribed qualifications or experience (as defined in the WHS Legislation), that person has the required qualifications or experience or is so supervised; or
  - b. a workplace, plant or substance (or design), or work (or class of work) be authorised or licensed, that workplace, plant or substance (or design), or work (or class of work) is so authorised or licensed.
- 12.4.8 If the Contractor becomes aware of any intention on the part of a regulatory authority to cancel, revoke, suspend or amend an Authorisation relating to WHS, it shall immediately notify the Commonwealth giving full particulars (so far as they are known to it).
- 12.4.9 Without limiting clause 11.7, the Contractor shall give and ensure that an Approved Subcontractor gives the Commonwealth Representative and any person authorised by the Commonwealth Representative access to:
- a. premises to conduct site inspections for the purpose of monitoring the Contractor's or the Approved Subcontractor's (as the case may be) compliance with any applicable laws, Authorisations or Approved plans in connection with WHS in relation to the Contract; and
  - b. all internal and third party audit results in relation to WHS in relation to the Supplies or work performed under the Contract.
- 12.4.10 To the extent not inconsistent with the express requirements of the Contract, the Commonwealth Representative may direct the Contractor to take specified measures that the Commonwealth Representative considers reasonably necessary to comply with applicable legislation relating to WHS including the WHS Legislation in relation to the Supplies or the work performed under the Contract. The Contractor shall comply with the direction unless the Contractor demonstrates to the reasonable satisfaction of the Commonwealth Representative that it is already complying with the WHS Legislation in relation to the matter to which the direction relates or the direction goes beyond what is reasonably necessary to achieve compliance with the WHS Legislation.
- 12.4.11 The Contractor shall comply with clause 9 of the SOW.
- 12.4.12 The Contractor shall not provide Supplies containing ACM and shall not take ACM onto Commonwealth Premises in connection with providing the Supplies.
- 12.4.13 The Contractor shall ensure, so far as is reasonably practicable, that the Supplies are without risk to the health and safety of persons who:
- a. use the Supplies for a purpose for which they were designed or manufactured;
  - b. handle or store the Supplies;
  - c. carry out any reasonably foreseeable activity in relation to the assembly or use of the Supplies for a purpose for which they were designed or manufactured, or the proper storage, decommissioning, dismantling, demolition or disposal of the Supplies; or
  - d. may be exposed to the Supplies or whose health or safety may be affected by a use or activity referred to in this clause 12.4.13a to 12.4.13c.
- 12.4.14 The Contractor shall carry out, or arrange the carrying out of, any calculations, analysis, testing or examination that may be necessary to comply with clause 12.4.13.
- 12.4.15 The Contractor shall give adequate information to the Commonwealth concerning:

- a. each purpose for which the Supplies were designed or manufactured;
- b. the results of any calculations, analysis, testing or examination referred to in clause 12.4.14, including any hazardous properties identified by testing; and
- c. any conditions necessary to ensure that the Supplies are without risks to health and safety when used for a purpose for which they were designed or manufactured or when carrying out any activity referred to in clauses 12.4.13a to 12.4.13c.

12.4.16 The Contractor shall, on request, so far as is reasonably practicable, give current relevant information on the matters referred to in clause 12.4.15 to the Commonwealth.

12.4.17 Subject to clause 12.4.17b and without limiting the Contractor's obligations under the Contract:

- a. the Contractor shall ensure that all Approved Subcontracts contain equivalent provisions to those set out in this clause 12.4 **[(other than clause 12.4.18)]**; and

**Note to drafters: Where the option at clause 12.4.18 below is adopted, insert the additional words in square brackets in clause 12.4.17a above.**

- b. where in relation to an Approved Subcontract:
  - (i) the WHS Legislation does not apply in respect of any work performed under that Approved Subcontract; and
  - (ii) the Commonwealth does not have any duties or obligations under the WHS Legislation in respect of the workers engaged or caused to be engaged by the relevant Approved Subcontractor,

the Contractor shall only be required to ensure that an Approved Subcontract contains equivalent provisions to those set out in clauses 12.4.3, 12.4.4, and 12.4.12 to 12.4.16 in respect of that Approved Subcontract.

**Option: The following clause must be included except where following receipt of advice from CASG Legal it is determined that the Commonwealth should be the principal contractor (refer to DPPI NO 4/2012 Engagement of Principal Contractors under the WHS Legislation).**

12.4.18 To the extent that work to be performed by the Contractor under the Contract is construction work for the purposes of the:

- a. WHS Legislation, in accordance with regulation 293 of the *Work Health and Safety Regulations 2011* (Cth) (in respect of the Commonwealth and the harmonised WHS Legislation of each of the States or Territories in which the construction work is carried out), the Contractor is engaged as the principal contractor for the construction work the subject of the Contract and is authorised to have management or control of the workplace and discharge the duties imposed on a principal contractor for the purpose of the WHS Legislation; and
- b. *Occupational Health and Safety Regulations 2007* (Vic), in accordance with regulation 5.1.14 of the *Occupational Health and Safety Regulations 2007* (Vic), the Contractor is appointed as the principal contractor for the construction work the subject of the Contract and is authorised to have management or control of the workplace and discharge the duties imposed on a principal contractor for the purpose of the *Occupational Health and Safety Regulations 2007* (Vic).

## 12.5 Environmental Obligations (Core)

12.5.1 The Contractor shall perform its obligations under the Contract in such a way that:

- a. the Commonwealth is not placed in breach of; and
- b. the Commonwealth is able to support and to make full use of the Supplies for the purposes for which they are intended without being in breach of,

any applicable environmental legislation including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

## 12.6 Severability (Core)

12.6.1 If any part of the Contract is or becomes illegal, invalid or unenforceable, the legality, validity or enforceability of the remainder of the Contract shall not be affected and shall be read as if that part had been severed.

**12.7 Privacy (Core)**

12.7.1 The Contractor shall:

- a. if it obtains Personal Information in the course of performing the Contract, use or disclose that Personal Information only for the purposes of the Contract subject to any applicable exceptions in the *Privacy Act 1988* (Cth);
- b. comply with its obligations under the *Privacy Act 1988* (Cth); and
- c. as a contracted service provider, not do any act or engage in any practice which, if done or engaged in by the Commonwealth, would be a breach of the Australian Privacy Principles.

12.7.2 The Contractor shall notify the Commonwealth as soon as reasonably practicable if:

- a. it becomes aware of a breach or possible breach of any of the obligations contained, or referred to, in this clause 12.7, whether by the Contractor, Contractor Personnel or any other person to whom the Personal Information has been disclosed for the purposes of the Contract; or
- b. in relation to Personal Information obtained in the course of performing the Contract:
  - (i) it becomes aware that a disclosure of such Personal Information may be required by law; or
  - (ii) it is approached by the Privacy Commissioner.

12.7.3 The Contractor shall ensure that Contractor Personnel who deal with Personal Information for the purposes of the Contract are aware of, and comply with, this clause 12.7.

12.7.4 The Contractor shall ensure that any Subcontract entered into for the purposes of fulfilling its obligations under the Contract, contains provisions to ensure that the Subcontractor complies with clauses 12.7.1, 12.7.2a, and 12.7.4.

**12.8 Child Safety (Optional)*****Option: For when the Commonwealth Child Safe Framework applies***

***Note to drafters: The Department of Prime Minister and Cabinet) has developed the [Commonwealth Child Safe Framework \(CCSF\)](#) to protect children and young people who may have contact with Commonwealth entities. The CCSF sets out the minimum standards for Commonwealth entities to protect children.***

***Defence and all Defence officials have an obligation under the [Child Protection legislation](#) and the [Work Health Safety Act 2011](#) (Cth) to ensure the health and safety of youth when they engage or interact with Defence. This obligation also extends to Defence contractors. Youth special care provisions also extend to over 18 year olds participating in a Defence Youth Program.***

***Defence policy relating to Child Safety is contained in [YOUTHPOLMAN](#), which can be found here:***

- <https://www.defenceyouth.gov.au/defence-youth-policy/>

***Defence has developed relevant clauses, for use with ASDEFCON based approaches to market, which address the requirements of the CCSF and YOUTHPOLMAN. These clauses are adapted from model clauses included in Department of Finance's ClauseBank and must be inserted into Defence procurements using the [ASDEFCON Suite of Tendering and Contracting Templates](#),***

**where the Contractor will engage with or interact with youth in performing its obligations under the Contract**

**The clauses can be found here:**

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>

**If you have any questions relating to the clauses please email:**

[procurement.asdefcon@defence.gov.au](mailto:procurement.asdefcon@defence.gov.au).

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

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

**For further assistance and guidance in relation to the application of the CCSF please refer to the Child Safety Framework Factsheet here.**

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

## 12.9 Modern Slavery (Optional)

**Option: For inclusion where the modern slavery risk assessment for the procurement has determined there is a risk of modern slavery existing in the relevant supply chain.**

**Note to drafters: The procurement should be assessed for the risk of modern slavery existing in the supply chain. Guidance on performing this risk assessment, as well as other guidance on the Modern Slavery Act 2018 (Cth), can be found on the Attorney-General's Department (AGD) Modern Slavery Register site here:**

- <https://modernslaveryregister.gov.au/resources/>.

**If the modern slavery risk assessment determines that there is a risk of modern slavery existing in the supply chain, drafters must include the model clauses for Defence procurements subject to the requirements of the Modern Slavery Act 2018 (Cth). These model clauses are based on the AGD's model clauses and have been developed for use with ASDEFCON-based contracts. They are contained in the ASDEFCON Clausebank which can be found here:**

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>

**If you have any questions relating to the clauses please email:**

[procurement.asdefcon@defence.gov.au](mailto:procurement.asdefcon@defence.gov.au).

**For further assistance and guidance in relation to the application of the Modern Slavery clauses please refer to the Modern Slavery Factsheet here:**

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

## 12.10 Commonwealth Supplier Code of Conduct (Core)

**Note to drafters: A procurement must incorporate the Commonwealth Supplier Code of Conduct in accordance with paragraph 6.11 of the CPRs.**

**Drafters must consider the interaction and alignment of this clause with clauses 3.4, 3.6, 11.2, 11.4, 11.7, 12.2, 12.3, 12.4, 13.2 prior to RFT release and prior to any resultant Contract.**

12.10.1 The Contractor shall (and shall ensure that all Contractor Personnel) comply with the Commonwealth Supplier Code of Conduct in the performance of the Contract.

12.10.2 The Contractor shall notify the Commonwealth Representative immediately after becoming aware of any potential or actual non-compliance with the Commonwealth Supplier Code of Conduct, including:

- a description of the non-compliance,
- the date that the non-compliance occurred, and

- c. whether any Contractor Personnel engaged in the performance of the Contract were or may have been involved in the non-compliance.
- 12.10.3 If the Commonwealth considers that a potential or actual non-compliance with the Commonwealth Supplier Code of Conduct has occurred, the Commonwealth may by notice to the Contractor, without limiting any of its other rights under the Contract, require that the Contractor:
- provide a response to the Commonwealth Representative within 3 Working Days on whether a potential or actual non-compliance has occurred; and
  - comply with its obligations under clause 12.10.
- 12.10.4 The Commonwealth Representative may request, and the Contractor shall provide, further information on any matter relating to:
- the policies, frameworks, or systems the Contractor has established to monitor and assess compliance with the Commonwealth Supplier Code of Conduct;
  - the Contractor's compliance with the Commonwealth Supplier Code of Conduct; or
  - an actual or potential non-compliance with the Commonwealth Supplier Code of Conduct, including its obligations under clauses 12.10.1 or 12.10.3a.
- The Contractor shall provide such information within the timeframes and in the manner specified by the Commonwealth Representative at the time of request.
- 12.10.5 The Contractor acknowledges and agrees that compliance with the Commonwealth Supplier Code of Conduct and the obligations under clause 12.10 shall not relieve the Contractor from its liabilities or other obligations under the Contract or at law.
- 12.10.6 The Contractor's performance of its obligations under this clause will be at no additional cost to the Commonwealth.
- 12.10.7 If the Contractor fails to comply with the Commonwealth Supplier Code of Conduct in accordance with clause 12.10.1, the Commonwealth may give the Contractor a notice of termination for default under clause 13.2.1e.

#### 12.11 Environmentally Sustainable Procurement Policy (Optional)

**Option: For when a procurement is subject to the Environmentally Sustainable Procurement Policy.**

**Note to drafters: A procurement will be subject to the Environmental Sustainable Procurement Policy (ESPP) where the procurement includes construction services (where the procurement value is over \$7.5million AUD inc GST) or furniture, fittings and equipment, ICT goods and textiles (where the procurement value is over \$1 million AUD inc GST)**

**If a procurement is subject to the ESPP, drafters must include the model clauses for Defence procurements subject to the requirements ESPP. These model clauses are based on the Department of Climate Change, Energy, the Environment and Water (DCCEEW)'s model clauses and have been developed for use with ASDEFCON-based contracts. They are contained in the ASDEFCON Clausebank which can be found here:**

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>.

**If you have any questions relating to the clauses please email the ASDEFCON and Contracting Initiatives team at:**

- [procurement.asdefcon@defence.gov.au](mailto:procurement.asdefcon@defence.gov.au).

**For information in relation to ESPP and policy related questions please email the Commercial Policy team at:**

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

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

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

#### 12.12 Australian Skills Guarantee (Optional)



**Option: For inclusion when a procurement is subject to the Australian Skills Guarantee Policy.**

**Note to drafters: A procurement will be subject to the Australian Skills Guarantee (ASG) Procurement Connected Policy (PCP) within ICT and Construction as follows:**

- Major construction projects (projects with a total contract value of \$10 million (GST Inclusive) or more;
- Direct Commonwealth procurements in the ICT sector, with a total contract value of \$10 million (GST Inclusive) or more; and
- Flagship construction projects (projects with a total contract value of \$100 million or more in the construction sector).

Information relating to the ASG PCP can be found at the Department of Employment and Workplace Relations (DEWR) website here:

- <https://www.dewr.gov.au/australian-skills-guarantee>.

If a procurement is subject to the ASG PCP drafters must include the model clauses for Defence procurements subject to the requirements of the ASG. These model clauses are based on the DEWR model clauses and have been developed for use with ASDEFCON-based contracts. They are contained in the ASDEFCON Clausebank which can be found here:

- <http://drnet/casg/commercial/CommercialPolicyFramework/Pages/ASDEFCON-Templates.aspx>.

If you have any questions relating to the clauses please email the ASDEFCON and Contracting Initiatives team at:

- [procurement.asdefcon@defence.gov.au](mailto:procurement.asdefcon@defence.gov.au).

If you have any questions relating to the ASG PCP or policy related questions, please email the Commercial Policy team at:

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

Or DEWR at:

[ASG@dewr.gov.au](mailto:ASG@dewr.gov.au).

## 13 DISPUTES AND TERMINATION

### 13.1 Resolution of Disputes (Core)

13.1.1 A party shall not commence court proceedings relating to any Dispute unless that party has complied with the procedure for resolving Disputes set out in this clause 13.1.

13.1.2 The parties acknowledge and agree that the intent of:

- a. this clause 13.1 is that the parties will seek to resolve Disputes in a non-adversarial manner, and at the lowest reasonably practicable level within their respective organisations; and
- b. the Contract Governance Framework set out in Attachment P includes facilitating problem solving and the resolution of Disputes.

13.1.3 The parties shall negotiate in good faith and use all reasonable efforts to resolve Disputes, and matters that may give rise to a Dispute, as quickly as practicable.

13.1.4 If the parties are unable to resolve a Dispute through the reasonable efforts of the Commonwealth Representative and the Contractor Representative, either party may give a notice ('Dispute Notice') to the other party setting out the nature of the Dispute and the Dispute shall then be referred to the Management Representatives specified in the Details Schedule.

**Note to drafters: For clauses 13.1.5 and 13.1.6 drafters should amend the period if circumstances require.**

13.1.5 If, despite using all reasonable efforts, the Management Representatives are unable to resolve the Dispute within 30 days (or such longer period agreed by the parties in writing) after the

referral under clause 13.1.3, the parties may refer the Dispute to the Senior Representatives specified in the Details Schedule.

- 13.1.6 If, despite using all reasonable efforts, the Senior Representatives are unable to resolve the Dispute within 30 days (or such longer period agreed by the parties in writing) after the referral under clause 13.1.5, and are unable to agree on an alternative dispute resolution process during that period, either party may commence legal proceedings in respect of the Dispute.

**Option: For use if access to arbitration is required.**

**Note to drafters: The following optional clause may be used if access to alternative dispute resolution under the Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules is to be sought. Further information on the Arbitration Rules is available from:**

- <https://acica.org.au/>.

**Because accessing arbitration can have significant cost implications, drafters should carefully consider the requirements of their project before including the clause. If the clause is included, drafters should delete clause 13.1.6 above and replace it with the following:**

- 13.1.7 If, despite using all reasonable efforts, the Senior Representatives are unable to resolve the Dispute within 30 days (or such longer period agreed by the parties in writing) after the referral under clause 13.1.5, the parties shall resolve the Dispute by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia **[OR INSERT ANOTHER CITY]**. The language of the arbitration shall be English. The number of arbitrators shall be **[INSERT NUMBER OR DELETE THIS SENTENCE AND RELY ON ARTICLE 8 OF THE ACICA ARBITRATION RULES, WHICH AUTHORISES ACICA TO DETERMINE THE NUMBER OF ARBITRATORS]**.

- 13.1.8 The parties shall, despite any Dispute occurring, continue to perform their respective obligations under the Contract.
- 13.1.9 Nothing in this clause 13.1, or the Contract Governance Framework set out in Attachment P, prevents either party from seeking urgent interlocutory relief in relation to a Dispute.

### **13.2 Termination Without Notice for Contractor Default (Core)**

- 13.2.1 The Commonwealth may terminate the Contract by notice to the Contractor if any of the following occurs:
- a. an Insolvency Event occurs in relation to the Contractor, except to the extent the exercise of a right under this clause 13.2.1a is prevented by law;
  - b. an Insolvency Event occurs in relation to the Guarantor and the Commonwealth does not receive a replacement Deed of Guarantee and Indemnity from another guarantor acceptable to the Commonwealth within 10 Working Days (or another period agreed in writing by the Commonwealth), except to the extent the exercise of a right under this clause 13.2.1a is prevented by law;
  - c. the Contractor has failed to remedy a Default specified in a Default Notice within the period specified in the Default Notice;
  - d. the Contractor commits a breach of the Contract that, in the Commonwealth's opinion, is not capable of being remedied;
  - e. an event occurs in respect of which the Contract provides that a notice of termination may be given under this clause 13.2.1e;
  - f. the Contractor assigns its rights under the Contract otherwise than in accordance with the requirements of the Contract; and
  - g. the Contractor would have, except for the operation of any limitation of liability under clause 10.10, been liable to the Commonwealth for Loss in aggregate for an amount greater than the relevant Limitation Amount.
- 13.2.2 To avoid doubt, the Commonwealth is not required to provide prior notice of an exercise of its rights under clause 13.2.1.

### **13.3 Default Notices (Core)**

- 13.3.1 If the Commonwealth considers that a Contractor Default has been committed, the Commonwealth may give the Contractor a notice ('Default Notice') specifying the Default and

requiring the Contractor to remedy the Default within a reasonable period, if the Default is capable of being remedied.

- 13.3.2 If the Commonwealth gives the Contractor a Default Notice, the Contractor shall:
- a. remedy the Default within the period specified in the Default Notice;
  - b. comply with any directions given to the Contractor by the Commonwealth in relation to the Default; and
  - c. mitigate all loss, costs (including the costs of its compliance with any directions) and expenses in connection with the Default, including those arising from affected Subcontracts.

#### **13.4 Termination or Reduction for Convenience (Core)**

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- 13.4.1 In addition to any other rights it has in relation to the Contract, the Commonwealth may at any time terminate the Contract or reduce the scope of the Contract by notifying the Contractor.
- 13.4.2 None of the other provisions of the Contract limit the Commonwealth's ability to terminate or reduce the scope of the Contract under this clause 13.4.
- 13.4.3 If the Contract is terminated or reduced under this clause 13.4, the Commonwealth's liability in respect of the termination or reduction is limited to:
- a. payments under the payment provisions of the Contract in respect of work performed before the date the termination or reduction takes effect; and
  - b. any reasonable costs incurred by the Contractor that are directly attributable to the termination or reduction,
- and then only when the Contractor substantiates these amounts to the satisfaction of the Commonwealth Representative. In particular, the Contractor shall not be entitled to profit calculated by reference to any period after the date the termination or reduction takes effect.
- 13.4.4 The Contractor, in each Approved Subcontract, shall secure a right of termination and reduction and provisions for compensation functionally equivalent to this clause 13.4.

#### **13.5 General Termination Provisions (Core)**

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- 13.5.1 If the Contract is terminated under clause 13.2 or otherwise:
- a. the termination takes effect on:
    - (i) the date of the notice of termination; or
    - (ii) if the notice of termination specifies a later date, the later date;
  - b. the Contractor shall:
    - (i) stop work in accordance with the notice of termination;
    - (ii) comply with any directions given to the Contractor by the Commonwealth; and
    - (iii) mitigate all loss, costs (including the costs of its compliance with any directions) and expenses in connection with the termination, including those arising from affected Subcontracts;
  - c. the Contractor shall deliver to the Commonwealth, as required by the Commonwealth, all documents in its possession, power or control or in the possession, power or control of Contractor Personnel that contain or relate to any Confidential Information or which are security classified;
  - d. the Contractor shall repay the Mobilisation Payment or any portion of the Mobilisation Payment that has not been offset in accordance with clause 7.4;
  - e. subject to clause 13.7, the parties shall be relieved from future performance, without prejudice to:
    - (i) any right, or cause of action that has accrued at the date of termination; or
    - (ii) any amount owing under or in connection with the Contract as at the date of termination;
  - f. subject to clauses 10.9, 10.10 and 13.4, the right to recover damages, including full contractual damages, shall not be affected;

- g. the Contractor shall, within 30 days after receipt of the notice of termination, or other period agreed in writing by the parties, deliver the Technical Data (in its then current state of development) for Supplies produced prior to the date of termination; and
  - h. the Contractor shall deliver to the Commonwealth all Commonwealth Property that the Contractor or Contractor Personnel have in their possession in connection with the Contract.
- 13.5.2 To avoid doubt, and despite anything else in the Contract, if the Contractor delays in meeting a Milestone, delivering Supplies or complying with any other obligation in accordance with the Contract, each day of delay is a new breach of the Contract for which the Commonwealth may exercise its rights under clause 13.2 or at law, despite any conduct by the Commonwealth or any election not to terminate the Contract for a previous breach of the Contract.
- 13.5.3 Upon termination of the Contract:
  - a. subject to clause 13.5.4, the Commonwealth shall retain ownership of any Supplies in respect of which title has passed to the Commonwealth under clause 6.11;
  - b. all Supplies that have been Accepted by the Commonwealth shall be deemed to be owned by the Commonwealth (whether or not ownership has passed under clause 6.11); and
  - c. the Contractor shall be entitled to payment of that part of the Contract Price attributable to the Supplies referred to in clause 13.5.3a, having regard to the amounts already paid or payable in respect of the Supplies and the condition of the Supplies at that time.
- 13.5.4 The Commonwealth may, in a termination notice under clause 13.2 or 13.4, require Supplies not owned by the Commonwealth in the possession of the Contractor or a Subcontractor (whether completed or not) to be delivered to the Commonwealth and:
  - a. the Contractor shall deliver the Supplies (in their current state of development) in accordance with the notice;
  - b. ownership in the Supplies shall pass to the Commonwealth upon delivery, free of any Security Interest; and
  - c. the Contractor shall be entitled to payment of that part of the Contract Price attributable to the Supplies, having regard to the amounts already paid or payable in respect of the Supplies and the condition of the Supplies at that time.
- 13.5.5 The Commonwealth may, in a termination notice under clause 13.2, require the Contractor to retake possession of Supplies previously delivered to the Commonwealth under the Contract and:
  - a. the Contractor shall retake possession of the Supplies in accordance with the notice;
  - b. ownership in the Supplies shall pass to the Contractor upon delivery, free of any Security Interest; and
  - c. the Commonwealth shall be entitled to repayment of that part of the Contract Price attributable to the Supplies, having regard to the amounts already paid or payable in respect of the Supplies.
- 13.5.6 The rights of the Commonwealth to terminate or reduce the scope of the Contract under clauses 13.2 and 13.4 are in addition to any other right or remedy the Commonwealth may have in relation to the Contract.

### **13.6 Right of Commonwealth to Recover Money (Core)**

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- 13.6.1 Without limiting the Commonwealth's other rights or remedies under the Contract, if the Commonwealth elects, in accordance with the Contract, to recover an amount from the Contractor or the Contractor otherwise owes any debt to the Commonwealth in relation to the Contract, the Commonwealth may:
  - a. deduct the amount from payment of any claim; or
  - b. give the Contractor a notice of the existence of a debt recoverable which shall be paid by the Contractor within 30 days after receipt of notice.
- 13.6.2 The Commonwealth may exercise any or all of its rights in respect of any security provided in accordance with clauses 7.4 or 7.5 to recover any debt owing by the Contractor, except to the extent otherwise recovered by the Commonwealth under clause 13.6.1.

- 13.6.3 If the Commonwealth deducts the amount of a debt from any payment or security, it shall notify the Contractor that it has done so.
- 13.6.4 If any sum of money owed to the Commonwealth is not received by its due date for payment, the Contractor shall pay to the Commonwealth interest at the ATO sourced General Interest Charge rate current at the date the payment was due for each day the payment is late.

**13.7 Survivorship (Core)**

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- 13.7.1 Any provision of the Contract which expressly or by implication from its nature is intended to survive the termination or expiration of the Contract and any rights arising on termination or expiration shall survive the termination or expiration of the Contract on its terms.
- 13.7.2 Without limiting clause 13.7.1 any provision dealing with Confidential Information, IP, Defence Security, Privacy, Spare Parts and Support Equipment and any warranties, guarantees, licences (other than the licence given under clause 3.8), indemnities, liability caps, rights to recover money or financial and performance securities given under the Contract shall survive the termination or expiration of the Contract on its terms.

SIGNED AS AN AGREEMENT

SIGNED for and on behalf of

THE COMMONWEALTH OF AUSTRALIA:

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

----- (signature)	----- (print name)	----- (date)
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SIGNED for and on behalf of

THE CONTRACTOR:

**Note for Contract Signature: Guidance on executing agreements, including some statutory requirements to ensure the execution is effective, are detailed in the 'Executing Agreements Fact Sheet', found on the Commercial Division intranet page at:**

- <http://drnet.defence.gov.au/casq/commercial/CommercialPolicyFramework/Pages/Fact-sheets-and-Guidance.aspx>

**This guidance is developed for Commonwealth Personnel and should be used to assess the Contractor's execution of the Contract. The Contractor should seek its own independent legal advice on its execution of the Contract.**

(INSERT APPROPRIATE CONTRACTOR'S EXECUTION CLAUSE)