

**CUSTOMER CONTRACT REQUIREMENTS**  
**Australian Super Hornet Sustainment**  
**CUSTOMER CONTRACT C388642**

CUSTOMER CONTRACT REQUIREMENTS

**1. Prime Contract Special Provisions** The following prime contract special provisions apply to this purchase order

**Definitions**

<b>AIC</b>	<b>Australian Industry Capability</b>
<b>CMCA</b>	<b>Contractor Managed Defense Asset</b>
<b>DPPM</b>	<b>Defense Procurement Policy Manual</b>
<b>DSD</b>	<b>Detailed Service Descriptions</b>
<b>ED</b>	<b>Effective Date</b>
<b>GFD</b>	<b>Government Furnished Data</b>
<b>GFE</b>	<b>Government Furnished Equipment</b>
<b>GFF</b>	<b>Government Furnished Facilities</b>
<b>GFI</b>	<b>Government Furnished Information</b>
<b>GFM</b>	<b>Government Furnished Material</b>
<b>KPI</b>	<b>Key Performance Indicator</b>

**3.5 Liability for Government Furnished Material**

**3.5.1** The Seller shall, within seven days of becoming aware that any GFM in its care, custody or control is lost, destroyed, damaged, defective or deficient, notify the Commonwealth Representative, through Buyer, of the event in writing.

**3.5.2** The Commonwealth shall be responsible for loss or destruction of, damage to or defects or deficiencies in the GFM if the GFM is lost or destroyed, or is delivered as, or subsequently becomes, damaged, defective or deficient except to the extent that the loss, destruction, damage, defectiveness, or deficiency of the GFM was caused by a default or an unlawful or negligent act or omission of the Seller or any of the Seller's Personnel.

**3.5.3** The Seller shall be responsible for loss or destruction of, damage to or defects or deficiencies in, the GFM if caused by a default or an unlawful or negligent act or omission of the Seller or any of the Seller's Personnel subject to clause or an agreement by the parties to replace the GFM, the Seller shall compensate the Commonwealth for the loss or destruction of, damage to or defects or deficiencies in, the GFM.

**3.5.4** If in the opinion of the Commonwealth Representative, the Seller has the necessary capacity, the Commonwealth Representative, through Buyer, may require the Seller by notice in writing to transport,

dispose of or repair damaged, defective or deficient GFM in the care of the Seller. If under clause 3.5.3, the Seller is liable for the damage, defect or deficiency, the work performed by the Seller under this clause 3.15.4 shall discharge or partially discharge the Seller's liability, if clause 3.5.3 does not apply, the Seller shall perform the work at the cost of the Commonwealth. The cost of the work shall be agreed by the parties prior to the work being undertaken by the Seller,

**3.5.5** The Seller shall be responsible for ensuring that the GFM does not adversely impact on the provision of the Services.

**3.5.6** The parties acknowledge that:

- a. the GFM is not furnished to the Seller for the purposes of either directing or guiding the Seller's task under the Contract; and
- b. other than GFD and Commonwealth Mandated GFE, the Commonwealth does not warrant:
  - (i) the suitability of any GFM for any particular use or application; or
  - (ii) the accuracy, precision or quality of any GFM.

**3.5.7** The Commonwealth warrants that GFD, and Commonwealth Mandated GFE (warranted GFM) is fit for its Intended purpose, except to the extent that the warranted GFM is not fit for its intended purpose as a result of:

- a. any failure, damage, defect or deficiency that would have become in the course of a proper examination or test of the warranted GFM In accordance with the SOW:
- b. misuse of the warranted GFM by the Seller or any of the Seller's Personnel;
- c. any failure, damage, defect or deficiency caused or contributed to by a modification or integration action by the Seller or any of the Seller's Personnel;
- d. any failure, damage, defect or deficiency otherwise within the control of the Seller or any of the Seller's Personnel; or
- e. any patent or latent damage, defect or deficiency in the warranted GFM, if:
  - (i) the warranted GFM was supplied to the Commonwealth by or through the Contractor or a Related Body Corporate (Whether under this or another contract); and
  - (ii) the damage, defect or deficiency existed at the time the warranted GFM was supplied to the Commonwealth.

### **3.6 Government Furnished Material Ownership and Restrictions**

3.6.1 Subject to clause 3.6.3, GFM remains the property of the Commonwealth. The Commonwealth retains the right to reasonably identify GFM as its property and the Seller shall preserve any means of identification.

3.6.2 The Seller shall not, and shall ensure that the Seller's Personnel do not:

- a. without the prior Approval of the Commonwealth Representative, except as specifically set out in this Contract
  - (i) use GFM other than for the purposes of the Contract;
  - (ii) modify GFM;
  - (iii) transfer possession or control of GFM to any other person;
  - (iv) move GFM from the location to which it was delivered; or (v) communicate or divulge or GFI or GFD to any other person; or
- b. create or allow to be created any lien, charge, mortgage or encumbrance over any GFM.

3.6.3 The Commonwealth Representative shall notify the Seller, through Buyer, of any IP rights applicable to the GFM and the Seller shall not act contrary to the existence of such rights.

3.6.4 The Seller shall return all items of GFM that are required to be returned to the Commonwealth.

### **3.7 Government Furnished Facilities**

3.7.1 The Commonwealth shall grant to the Seller a non-exclusive licence to occupy and use the GFF for the purpose of performing work under this contract.

3.7.2 Despite any provision of this Contract including the licence granted pursuant to clause 3.7.1, the Seller shall ensure that none of the Seller's Personnel have care, custody or control of any Commonwealth property on RAAF Base Amberley, unless the person with the care, custody or control is employed by the Seller on work under the Contract at the time the person has the care, custody or control of the property.

3.7.3 Despite any provision of this Contract including the licence granted pursuant to clause 3.7.1, the Seller shall obtain the Commonwealth Representative's prior written permission, through Buyer, for any invitee of the Seller or of any of the Seller's Personnel to enter RAAF Base Amberley, and the Seller shall ensure compliance with any condition imposed on the permission.

3.7.4 For the purposes of clause 3.7.2, 'Commonwealth property' includes Aircraft.

### **3.8 Use of Commonwealth Property**

3.8.1 Without limiting clause 3.6.2, the Seller shall not, and shall ensure that the Seller's Personnel do not:

- a. without the prior Approval of the Commonwealth Representative, except as specifically set out in this Contract
  - (i) use Commonwealth property other than for the purposes of the Contract;
  - (ii) modify Commonwealth property; or
  - (iii) transfer possession or control of Commonwealth property to any other person, except Subcontractors to the extent required by the Contract; or
- b. create or allow to be created any lien, charge, mortgage or encumbrance over any Commonwealth property.

### **3.12 Personnel**

3.12.1 The Seller shall:

- a. ensure that the Services are undertaken by suitably qualified personnel with appropriate skills and experience;
- b. obtain from each of the Seller's personnel to whom the Seller's obligations in the SOW apply, executed deeds, within 10 Working Days of the person becoming one of the Seller's Personnel; and
- c. give the Commonwealth Representative, through Buyer, a copy of each Deed executed in accordance with clause 3.12.1b, within 5 Working Days of receipt by the Seller.

3.12.18 To the extent that in the course of providing the Services, Seller Personnel exercise or purport to exercise any power for or on behalf of the Commonwealth (whether under a delegation or otherwise), the Seller shall require those Personnel to exercise that power:

- a. reasonably, lawfully and in good faith;
- b. in accordance with the requirements of the Commonwealth's financial legislation, including, the *Financial Management and Accountability Act 1997*, the *Financial Management and Accountability Regulations*, the Financial Management and Accountability Orders, and the *Auditor-General Act 1997*; and
- c. having regard to the purposes for which the power was conferred and to the applicable policies of the Commonwealth Including the Commonwealth Procurement Guidelines and the DMO Chief Executive Instructions.

3.12.19 Except to the extent that:

a, the Supply Support DSDs of this Contract require the Seller to perform purchasing functions on behalf of the Commonwealth; and

b. the Seller Personnel performing those functions for the Seller have authorization from the Commonwealth to perform those functions, the Seller shall not represent itself, and shall ensure that the Seller's Personnel do not represent themselves, as agents of the Commonwealth.

3.12.20 The Seller and Seller's Personnel shall not by virtue of the contract purpose be deemed to be, an employee or partner of the Commonwealth.

3.12.21 The Seller shall inform all Seller Personnel who perform purchasing functions on behalf of the Commonwealth for the purposes of this Contract, that any person who handles 'Public Money' within the meaning of the *Financial Management and Accountability Act 1997* will be 'officials' within the meaning of, and subject to obligations and penalties under, that Act.

## **5. INTELLECTUAL PROPERTY**

### **5.1 Ownership of Intellectual Property**

5.1.1 Nothing in this Contract affects the ownership of Background IP or Third Party IP.

5.1.2 Foreground IP:

a. created by the Seller vests in the Seller;

b. created by an Approved Subcontractor vests in the Approved Subcontractor;

c. created by the Commonwealth vests in the Commonwealth; and

d. created jointly, by two or more of the persons mentioned in paragraphs a, b and c, vests jointly in the persons who created the IP.

5.1.3 For any Foreground IP that vests solely in the Commonwealth, the Commonwealth has the exclusive right to apply for registration of that Foreground IP In all countries of the world. For any Foreground IP that vests solely in the Seller or an Approved Subcontractor, the Seller or the Approved Subcontractor (as the case may be) has the exclusive right to apply for registration of the Foreground IP in all countries of the world.

5.1.4 For any Foreground IP that vests jointly according to clause 5.1.2, each Foreground IP joint owner grants to the other joint owner(s) a royalty free, irrevocable, world-wide, perpetual, non-exclusive license to use, exploit and commercialize the jointly owned Foreground IP without the need to obtain consent from, or account to, the other joint owner(s),

### **5.2 Intellectual Property License**

5.2.1 Without limitation to any licence granted to the Commonwealth by the Seller or any related entity to the Contractor in any other contract, the Seller grants to the Commonwealth a royalty-free, irrevocable, world wide, perpetual, non-exclusive license in respect of all Background IP and any Foreground IP that is owned by the Seller, including the right to sub-license:

a. to use maintain and dispose of Deliverables for the purposes of supporting the Australian Super Hornet and its Support System, except that the Commonwealth's Background IP licence under this paragraph a. is subject to the limitations specified In the IP Plan in respect of sub-licensing specified items of Background IP;

b. to modify and develop the Deliverables for the purposes of supporting the Australian Super Hornet and its Support System, except that the Commonwealth's Background IP license under this paragraph b, is limited to the period of the Contract and is also

subject to the other limitations specified in the IP Plan in respect of sub-licensing specified items of Background IP;

c. to complete the Deliverables upon termination of this Contract:

d. to remedy defects or omissions in the Deliverables; and

e. subject to the limitations (if any) specified in the IP Plan in respect of sub-licensing of specified items of Background IP, to conduct processes for the procurement of services that are similar to or the same as some or all of the Services performed under this Contract.

5.2.2 The Seller shall ensure that the Commonwealth is granted a license from each Approved Sub-contractor on the same terms as clause 5.2.1 and that each Approved Sub-contractor gives an acknowledgement to equivalent effect of clause 5.2.5. The Seller shall arrange for an Approved Sub-contractor to execute a deed and provide the executed deed to the Commonwealth Representative, before the Approved Sub-contractor commences work in relation to the Services.

5.2.3 The Seller shall ensure that the Commonwealth is granted a license to use Third Party IP on the best commercial terms available to the Commonwealth,

5.2.4 The Commonwealth may, on request, grant the Seller a license to use Foreground IP owned by the Commonwealth on terms acceptable to the Commonwealth, including an appropriate license fee.

5.2.5 If, during the period of the Contract or after the Contract expires, the Commonwealth requests a license of Seller owned Background IP in Deliverables, to modify and develop the Deliverables for the purposes of supporting the Australian Super Hornet and its Support System after the period of the Contract ends, the Seller shall negotiate in good faith with the Commonwealth for the grant to the Commonwealth of a license to that IP. For avoidance of doubt, agreement to negotiate does not mean agreement to license.

5.2.6 If negotiations pursuant to clause 5.2.5 do not result in agreement of license terms within 40 Working Days of the Commonwealth's request, the Seller shall negotiate in good faith to assist the Commonwealth to implement a services type contract, on reasonable commercial terms, that enables the Commonwealth to continue supporting the Super Hornet capability whilst subjecting the majority of the services under this Contract to open competition.

## **8. INSURANCE AND LIABILITY**

### **8.1 Contractor's Employees**

8.1.1 The Seller shall indemnify the Commonwealth and Buyer against liability of the Commonwealth for death of, or personal injury to, any person employed by the Seller on work under the Contract, except to the extent that such death or injury results from any unlawful or negligent act or omission on the part of the Commonwealth, or any person through whom the Commonwealth is acting (but not including the Seller or any of the Seller's Personnel).

### **8.2 Property Damage and Public Risk**

8.2.1 The Seller shall indemnify the Commonwealth and Buyer, their officers, employees and agents against:

a. claims by any person in respect of personal injury or death, except to the extent that the Seller's indemnity under clause 8.1.1 applies;

b. loss of, or damage to, any Commonwealth Property that is not Defense Property (including Aircraft, GFM and GFF), and claims by any person in respect of loss of, or damage to, any third party property; and

c. reasonable costs and expenses including the costs (on a solicitor and own client basis) of defending or settling any claim referred to in

clauses 8.2.1a or 8.2.1b, to the extent arising out of or as a consequence of a default or unlawful or negligent act or omission or wilful misconduct on the part of the Seller or any of the Seller's Personnel, except to the extent that such claims, losses, damages, costs or expenses result from any unlawful or negligent act or omission on the part of the Commonwealth, or any person through whom the Commonwealth is acting (but not including the Seller or any of the Seller's Personnel).

### **8.3 Liability for Defense Property**

8.3.1 The Seller shall make good any loss of, or damage caused to, Defense Property, other than Aircraft but including data, while the Property is in the care, custody or control of the Seller or any of the Seller's Personnel, or while the risk in any Property to be delivered to the Commonwealth as part of the Services resides with the Seller, except to the extent that the loss or damage was a direct consequence of an Excepted Risk.

8.3.2 The Seller shall be responsible to the Commonwealth and Buyer, their officers, employees and agents:

a. for physical loss of or damage to Aircraft to the extent such loss or damage is caused by the willful misconduct, negligence, or breach of contract of the Seller or any of the Seller's Personnel, when such Aircraft is lost or damaged while in the care, custody and control of the Seller or any of the Seller's Personnel; and

b. for physical loss of or damage to other Defense Property including data to the extent such loss or damage is caused by the willful misconduct, negligence or breach of contract of the Seller or any of the Seller's Personnel in connection with the performance of the Contract in circumstances where clauses 8.3.1 or 8.3.2a do not apply.

8.3.3 Nothing in clause 8.3 limits the Seller's obligations under clauses 3.5 (Liability for GFM), 3.7 (GFF) or 8.2.1 (Property Damage and Public Risk).

8.3.4 Notwithstanding any other provision of the Contract, the Seller shall have no liability (whether before or after Acceptance of Services) to the Commonwealth or Buyer:

a. under the Contract or otherwise;

b. in tort (other than fraud) for negligence or otherwise;

c. otherwise at law (including by statute to the extent it is possible to exclude liability); or

d. in equity generally, for loss or damage to any Aircraft or any other Defence Property except as provided for in clauses 8.3. 3.5 and 3.7.

### **8.4 Intellectual Property Indemnity**

8.4.1 The Seller shall indemnify the Commonwealth and Buyer, their officers, employees, agents, licensees and sub-licensees against any liability, loss, damage, cost (including the cost of any settlement and legal costs and expenses on a solicitor and own client basis), compensation or expense sustained or incurred by the Commonwealth and Buyer which arises out of any action, claim, dispute, suit or proceeding brought by any third party in respect of any:

a. infringement or alleged infringement of that third party's IP if the infringement or alleged infringement arises out of any activity permitted under any licence or assignment referred to in clause 5 or otherwise under the Contract; or

b. breach or alleged breach of any duty of confidentiality owed to that third party, when the breach is caused by any act or omission on the part of the Seller or any of the Seller's Personnel (whether or not such act or omission constitutes a breach of the Contract), (each a 'Third Party IP Claim') to the extent that such liability, loss, damage, cost, compensation or expense has been finally determined by a properly constituted independent tribunal or is incurred or sustained by the Commonwealth pursuant to a settlement that has received the prior written approval of the Seller.

8.4.2 The indemnity in clause 8.4.1 does not apply to the extent (if any) that a properly constituted independent tribunal determines, or the Commonwealth by notice in writing to the Seller, through Buyer, acknowledges, that the infringement of the third party's IP arose by reason of:

a. use by or on behalf of the Commonwealth of the Deliverables or Services in combination with any other items not supplied by the Seller (unless this Contract specifies that the Deliverables or Services would be so combined or the Seller gave prior written approval for the combination); or

b. the Seller's compliance with an express instruction from the Commonwealth Representative (unless the Seller was obliged to obtain IP rights for the Commonwealth to authorise the otherwise infringing conduct).

## **8.5 Limitation of Liability**

8.5.1 Subject to clause 8.5.2, the liability of the Seller to the Commonwealth and Buyer arising out of the Seller's performance of the Contract shall be limited as follows:

- a. for liability for obligations and warranties under clause 9, in aggregate to AUD2,000,000.00;
- b. for loss or damage arising from a failure or partial failure to provide the Services, in aggregate to AUD2,000,000.00;
- c. for loss of or damage to Aircraft in aggregate to USD65,000,000.00;
- d. reserved
- e. for a breach of contract, breach of statute or negligent act or omission not mentioned in clauses 8.5.1a to 8.5.1d, in aggregate to AUD78,000,000.00.

8.5.2 The limitations in clause 8.5.1 do not apply to liability of the Seller, including under an indemnity whether or not expressly referred to in this clause, for:

- a. personal injury and death;
- b. loss of, or damage to, third party property
- c. loss of, or damage to, Commonwealth Property that is not Defense Property;
- d. the IP indemnity provided by the Seller under clause 8.4; or
- e. physical loss of, or damage to, Defense Property (other than Aircraft), the liability for which is provided for in clauses 8.3, 3.5 and 3.7.

8.5.3 To avoid doubt, if more than one limitation mentioned in clause 8.5.1 is capable of applying to a particular liability, and the cap under one limitation is reached, the Commonwealth and Buyer may recover from the Seller for the remainder of that liability under the other limitation up to the cap applicable to the other limitation.

8.5.4 If a change to the Contract is proposed by either party that:

- a. by itself or cumulatively with previous changes to the Contract, represents an increase in the original Contract Price of more than 15% of the Target Cost at ED; or
- b. varies the SOW, including by exercise of an option, the parties shall negotiate in good faith to make appropriate amendments to:
- c. the liability caps specified in clause 8.5.1; and
- d. reserved

8.5.5 Notwithstanding any other provision of this Contract, except for any liability under the indemnities in clauses 8.1.1 and 8.2.1 and subject to any provision for payment of liquidated damages under the Contract, the Seller shall have no obligation or liability to the Commonwealth whether arising:

- a. under the Contract or otherwise;
- b. in tort (other than fraud) for negligence or otherwise;
- c. otherwise at law (including by statute to the extent it is possible to exclude such liability); and
- d. in equity generally, for any Consequential Loss suffered by the Commonwealth in connection with or arising out of:

- e. any non-conformance or defect in any Services; or
- f. any loss, damage or destruction of any Defence property (including property to be delivered as part of the Services and GFM).

## **8.6 Insurance**

8.6.1 Before commencing work under the Contract, the Seller shall be fully insured or registered with the appropriate statutory authority against liability for death of or injury to persons employed by the Seller, including liability under statute and common law. The insurance or registration shall be maintained until all work under the Contract is completed.

8.6.2 The Seller shall ensure each Subcontractor is insured against the Subcontractor's corresponding liabilities.

8.6.3 Before commencing work under the Contract, the Seller shall be insured in respect of the requirements set out herein.

8.6.4 The Seller shall maintain the insurance or registration required under clause 8.6 for the duration of the work under the Contract and to provide reasonable cover for obligations that survive expiration or termination of the Contract, or as otherwise specified by the Commonwealth.

8.6.5 The Contractor shall:

- a. on the Effective Date;
- b. on each anniversary of the Effective Date; and
- c. on request by the Commonwealth, through Buyer, at any time, including after expiry or termination of the Contract, produce an industry standard certificate of the insurance or registration to the Commonwealth Representative.

8.6.6 The evidence required by clause 8.6.5 shall include details of:

- a. name of the insurance provider;
- b. type of insurance;
- c. a listing of all exclusions under the policy relevant to the Contract;
- d. limits of liability per claim or occurrence and details of any aggregate limits or relevant sublimits which apply;
- e. deductible amounts;
- f. period of insurance;
- g. the territory where the insurance coverage applies; and
- h. any special provisions under the policy which are relevant to the Contract.

8.6.7 The Seller shall immediately notify the Commonwealth, through Buyer, if the Seller becomes aware or reasonably believes that, in relation to any policy of insurance relevant to the Contract:

- a. the policy:
  - (i) is or will be cancelled;
  - (ii) has not been or will not be renewed; or
  - (iii) has had or will have its coverage reduced in any material respect;
- b. there has been non-compliance with any conditions to which the policy is subject; or
- c. the available limit under the policy has fallen or will fall below US\$10,000,000.

## **8.7 Privacy Indemnity**



8.7.1 The Seller shall indemnify the Commonwealth and Buyer against any loss, liability or expense suffered or incurred by the Commonwealth or Buyer which arises directly or indirectly from a breach of any of the Seller's or Subcontractor's obligations referred to in clause 11.7.

## **8.8 Obligations in relation to IP Indemnity**

8.8.1 The Commonwealth shall notify the Seller, through Buyer, in writing as soon as practicable of any Third Party IP Claim (within the meaning of clause 8.4) threatened, made or brought, against the Commonwealth and shall keep the Seller apprised of progress in settling the Claim.

8.8.2 If the Seller agrees to comply at all times with Commonwealth policy relevant to the conduct of the Third Party IP Claim Proceedings, including the Legal Services Directions in force from time to time issued in accordance with the *Judiciary Act 1903* (Cth) ('**Legal Services Directions**'), and the Commonwealth is granted leave to withdraw from the Proceedings:

- a. the Commonwealth shall withdraw from the Proceedings; and
- b. the Seller shall, in its own name and at its own expense, conduct the Proceedings.

8.8.3 If the Commonwealth is not granted leave to withdraw from Third Party IP Claim Proceedings and the Seller has not denied liability under the indemnity in clause 8.4, the Commonwealth shall, subject to compliance with Commonwealth policy including the Legal Services Directions:

- a. continue to keep the Seller informed of all developments; and
- b. defend, arbitrate, appeal, settle or otherwise conduct the Proceedings as the Seller may from time to time reasonably direct.

8.8.4 If a final judgment or award is made against the Commonwealth as a result of a Third Party IP Claim or if a settlement which has received prior written approval from the Seller is agreed with the plaintiff, the Seller shall, pursuant to the indemnity in clause 8.4 and without necessarily being in full satisfaction of its obligations under that indemnity, pay to the Commonwealth by bank cheque a sum equivalent to the amount referred to in the judgment, award or settlement:

- a. not less than five Working Days before the date on which the Commonwealth is obliged to pay, or within ten Working Days of receipt by the Seller of notice in writing of the date on which the Commonwealth is obliged to pay (whichever is the later); or
- b. if no date for payment is fixed by that judgment, award or settlement, within thirty days of receipt of a notice in writing from the Commonwealth that it intends to pay the amount referred to in that judgment, award or settlement.

8.8.5 The Seller shall pay to the Commonwealth all other sums required to be paid under the indemnity provided under clause 8.4 within thirty days of receipt of a written notice from the Commonwealth requiring payment of those sums.

8.8.6 The Commonwealth shall, subject to compliance with Commonwealth policy including the Legal Services Directions, consult with the Seller and obtain the written approval of the Seller (which approval shall not be unreasonably withheld or delayed) prior to agreeing to a settlement referred to in clause 8.4.

8.8.7 If any Third Party IP Claim affecting the Commonwealth's right to use or possess the whole, or part, of a Deliverable (or Deliverables) or Services, the Seller shall at its own expense, use its best endeavours to:

- a. procure for the Commonwealth, the right to retain possession of, and to continue to use the whole, or the relevant part of the Deliverables or Services (including in accordance with clause 5.2.1); or
- b. replace or modify the Deliverables in a manner acceptable to the Commonwealth and which ensures that the quality, performance or usefulness of the Deliverables or Services is not degraded and so that the infringement or alleged infringement ceases.

8.8.8 Without prejudice to any other claim the Commonwealth may have against the Seller for loss relating to Intellectual Property infringement or to breach of a duty of confidentiality, if any part of the Deliverables or Services is found by a court or other body or person with jurisdiction over the issue to infringe the IP of a third party such that the Commonwealth's use of the Deliverables or Services is prevented or substantially restricted and the Seller is unable to procure the right described in clause 8.8.7a, or replace or modify the Deliverables or Services as described in clause 8.8.7b, the Contractor shall, if so requested in writing by the Commonwealth, through Buyer, repurchase the Deliverables or Services and such repurchase will not necessarily be in full satisfaction of the Seller's obligations under clause 8.4.

8.8.9 If a Third Party IP Claim is made affecting the Commonwealth's right to use, or possess, the whole, or part, of a Deliverable (or Deliverables) or Services, the Commonwealth may, if it has the power to do so under the legislation referred to in clause 8.8.10 and has previously advised the Seller as to the terms of the agreement, reach agreement with the owner of the Intellectual Property affected by Commonwealth possession and use of the Deliverables or Services, and pursuant to clause 8.4, the Seller shall pay to the Commonwealth an amount equal to the sum of:

- a. the payments made by the Commonwealth to that owner under the relevant legislation; and
- b. the reasonable costs incurred by the Commonwealth in reaching that agreement, provided always that such payment by the Seller will not necessarily be in full satisfaction of its obligations under the indemnity in clause 8.4.

8.8.10 For the purposes of clause 8.8 'infringement' includes (without limiting the generality of the foregoing) unauthorised acts which would, but for the operation of section 163 of the *Patents Act 1990*, section 100 of the *Designs Act 2003*, section 183 of the *Copyright Act 1968* and section 25 of the *Circuit Layouts Act 1989* (or any sections that replace those sections from time to time), constitute an infringement.

## **10.7 Commonwealth Access**

**10.7.1 During the performance of the Contract, the Seller shall permit the Commonwealth Representative or any person authorised by the Commonwealth Representative access to its premises, and access to any of its records or accounts relevant to or impacting on performance of work under the Contract. The Commonwealth may copy any records or accounts for the purposes of the Contract, and may retain the copy. For audit and access purposes the Commonwealth shall use the Defense Contract Audit Agency or other approved US Government Agency for any access to the Seller's records or accounts with the exception of those related to the Approved Subcontractor.**

**10.7.2 Without limiting the generality of clause 10.7.1, the purposes for which the Commonwealth Representative may require access include:**

**a. inspecting Commonwealth property including GFM and CMCA, conducting or checking stocktakes of Commonwealth property including GFM and CMCA, or removing Commonwealth property including GFM and 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 the SOW;**

**c. validating the Seller's progress in meeting the AIC Plan;**

**d. investigating the reasonableness (given the parties' objectives of the Contract) of:**

- (i) proposed prices or costs in any CCP;
- (ii) prices quoted or claimed for Ad Hoc Services in accordance with clauses 3.13 to 3.16; and
- (iii) \* the At-Risk Amount.

For the purpose of this investigation, the Seller shall permit the Commonwealth to, or take all necessary steps to enable the Commonwealth to exercise its rights in this clause including 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 Seller and the Related Bodies Corporate to the extent that such records relate to the CCP, Ad Hoc Services or At-Risk Amount;

e. determining whether and to what extent steps should be taken to register or otherwise protect Commonwealth IP;

f. validating the Seller's progress in meeting the IP Plan;

g. conducting audits under the *Auditor-General Act 1997*;

h. investigating the reasonableness of any claims made by the Seller under the Contract, including any claims for postponement costs submitted in accordance with clause 6.3 and schedule recovery costs submitted.

i. auditing raw data, Software Design Data, software, and Source Code for the purpose of validating the Seller's performance under the Contract;

j. accessing and inspecting the Seller's systems (including relevant ICT systems) in order to capture data in relation to, analyse and interrogate, the Seller's claimed Achieved Performance in relation to KPIs; and

k. validating the accuracy of Actual Costs invoiced by the Seller.

10.7.3 The Seller shall ensure that the terms of Approved Subcontracts provide the Commonwealth Representative with similar 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 and retain the copy.

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

### **11.3 Policy Requirements**

11.3.1 Subject to clause 11.3.2, the Seller shall comply with and require its officers, employees, agents and Subcontractors to comply with the following Commonwealth policies of general application relevant or applicable to the Contract:

a. Company Score Card policy as detailed in the Defense Company Score Card Policy Statement;

b. Conflict of Interest policy as detailed in the DPPM;

c. Defense Equity and Diversity policy as detailed in the Defense Plain English Guide to Managing and Reporting Unacceptable Behavior; DPI 1/2001; and DI(G)PERS 35-3;

d. Defense Stocktaking policy as detailed in the DI(G) LOG 07-15;

e. Environment policy as detailed in Defense Environmental Policy;

f. Equal Opportunity for Women in the Workplace policy as detailed in the DPPM;

g. Fraud Control policy as detailed in DI(G) FIN 12-1;

h. Freedom of Information policy as detailed in the DPPM;

i. Hazardous Substance policy as detailed in the DPPM;

j. Information Management policy as detailed in DIMPI 4/2001 and DIMPI 5/2001;

k. Information Privacy Principles of the *Privacy Act 1988*;

l. Maximizing Employment Opportunities for Aboriginal and Torres Strait Islanders policy as detailed in the DPPM;

m. SAFEBASE policy as detailed in DSI 6/2003 and DI(G) OPS 13-10; and

n. Ozone Depleting Substances policy as detailed in the DPPM.

### **11.7 Privacy**

11.7.1 The Seller shall:

a. use or disclose Personal Information obtained during the course of providing Services under this Contract, only for the purposes of the Contract;

b. not do any act, or engage in any practice during the course of providing Services

under this Contract that would breach an Information Privacy Principle contained in section 14 of the *Privacy Act 1988*, which if done or engaged in by an agency, would be a breach of that Information Privacy Principle;

c. not use or disclose Personal Information, or engage in an act or practice, during the course of providing Services under this Contract, that would breach section 16F of the Act, or an National Privacy Principle, particularly National Privacy Principles 7 through 10 or an Approved Privacy Code, unless:

(i) in the case of section 16F, the use or disclosure is necessary, directly or indirectly, to discharge an obligation under this Contract; or

(ii) in the case of a National Privacy Principle or an Approved Privacy Code, if the activity or practice is engaged in for the purpose of discharging, directly or indirectly, an obligation under this Contract, and the activity or practice is inconsistent with the National Privacy Principle or Approved Privacy Code,

d. notify individuals whose Personal Information is held by the Seller or Subcontractor, as the case may be, of the complaints mechanism outlined in the Act that may apply to the Seller;

e. disclose in writing to any person who asks, the content of the provisions of this Contract (if any) that are inconsistent with a National Privacy Principle or an Approved Privacy Code binding a party to the Contract;

f. carry out and discharge the obligations contained in the Information Privacy Principles as if it were an agency under the Act; and

g. ensure that any officer, employee or agent of the Seller who is required to deal with Personal Information for the purposes of this Contract, is made aware of the obligations of the Contractor as set out in this clause 11.7.

11.7.2 The Seller shall promptly notify the Commonwealth Representative, through Buyer, if the Seller:

a. becomes aware of a breach or possible breach of any of the obligations contained in, or referred to in, clause 11.7, whether by the Seller or a Subcontractor;

b. becomes aware that a disclosure of Personal Information may be required by law; or

c. receives a request or inquiry from the Privacy Commissioner, or by any individual to whom any Personal Information held by the Seller or Subcontractors relates, in respect of Personal Information.

11.7.3 The Seller shall ensure that any Subcontract entered into for the purposes of fulfilling its obligations under this Contract, contains provisions to ensure that the Subcontractor has the same awareness and obligations as the Seller has under clause 11.7, including the requirement in relation to Subcontracts.