

CUSTOMER CONTRACT REQUIREMENTS
AIR 5049
CUSTOMER CONTRACT C439097

CUSTOMER CONTRACT REQUIREMENTS

The following customer contract requirements apply to this contract to the extent indicated below.

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

A. Definitions

1. "Background IP" means IP, other than Third Party IP, that:
 - (a) is in existence at the effective date of this Contract or is subsequently brought into existence other than as a result of the performance of this Contract or any subcontract (or both); and
 - (b) is embodied in, or attaches to, the Goods or is otherwise necessarily related to the functioning or operation of the Goods.
2. "Commercial-in-Confidence Information" means information including trade secrets, know-how and any information comprised in Technical Data that:
 - (a) is by its nature confidential; or
 - (b) the receiving party knows or ought to know is confidential,but does not include information which:
 - (c) is or becomes public knowledge other than by breach of the Contract (C439097);
 - (d) is in the possession of a party other than the US Government without restriction in relation to disclosure before the date of receipt; or
 - (e) has been independently developed or acquired by the receiving party.
3. "Commercialisation" means:
 - (a) the sale of supplies similar to the Goods;
 - (b) the production of supplies similar to the Goods; or
 - (c) sublicensing of IP licensed by Seller to the Commonwealth under this Contract other than for Defence Purposes,and "Commercialise" has a corresponding meaning.
4. "The Commonwealth" means the Commonwealth of Australia represented by the Department of Defence A.B.N. 68 706 814 312
5. "Defence Purposes" means any purpose within the power of the Commonwealth relating to the exercise of Australian Defence policy.
6. "Existing Equipment" means equipment specified or referred to in this Contract or any other equipment used by Buyer or the Commonwealth that Seller knows, or reasonably ought to know, will be used with the Goods.
7. "Foreground IP" means IP which is created under or otherwise in connection with this Contract or any subcontract (or both), other than Third Party IP.
8. "Government Furnished Material" (GFM) is the collective name for Government Furnished Data (GFD), Government

Furnished Equipment (GFE), and Government Furnished Information (GFI).

9. "IP Plan" means the plan specified in Attachment J. (A copy of Attachment J is available in the Description column for C439097 in the index for Customer Contract Requirements.)
10. "Project Authority" means the person holding the office of AIR 5409 Project Manager or any other person appointed pursuant to the Contract (C439097) as the Project Authority.
11. "Off The Shelf Goods" means Goods that have not been specifically developed for this Contract.
12. "Technical Data" or "TD" means all technical know-how and information reduced to material form produced, acquired or used by Seller or its subcontractors in relation to the Goods and includes all data, databases, manuals, handbooks, designs, standards, specifications, reports, writings, models, sketches, plans, drawings, calculations, source code, software design data, test results, software and software updates and other items describing or providing information relating to the Goods or their operations.
13. "Third Party IP" means that IP which is owned by a party other than Buyer or Seller and is embodied in the Goods, or attaches to, the Goods or is otherwise necessarily related to the functioning or operation of the Goods, and is not limited to commercial off the shelf items.

B. Ozone Depleting Substances and Hazardous Substances

1. Seller warrants that the Goods delivered under this Contract do not contain any Ozone Depleting Substances.
2. Seller warrants that, to the best of its knowledge and belief, and to the extent consistent with their function, none of the Goods delivered under this Contract poses a risk to physical health or safety to any person, provided that the Goods are used in accordance with their intended function.

C. Fitness for Purpose

Seller shall ensure and warrants that:

1. any Off The Shelf Goods delivered under this Contract shall be in compliance with the specifications set out in this Contract; and
2. any other Goods delivered under this Contract shall be fit for the purpose or purposes detailed in this Contract.

D. Support Period

1. Seller undertakes to support the Goods delivered under this Contract for the period of 20 years (the "Support Period") commencing immediately after delivery of the Goods. Support provided during the Support Period shall involve the ability to provide sufficient quantities of spare parts, software system support, and deeper level repair facilities to maintain the Supplies in effective operation.
2. Where during the Support Period, Seller becomes aware that its ability to provide spare parts or support equipment may be adversely affected it shall provide Buyer with advance notice being not less than 120 days ahead of that event. Where there will be a final production run, Seller shall state in the notice the date by which Buyer may place final orders.
3. Seller shall be responsible for ensuring a similar commitment as addressed under clause D.1, and similar notification under clause D.2, is addressed with its key subcontractors as appropriate.
4. Buyer shall not be bound to order any, or any particular quantity of, spare parts and support equipment from Seller.

E. Negation of Employment and Agency

1. Seller shall not represent itself, and shall ensure that its officers, employees, agents and subcontractors do not represent themselves, as being employees, partners or agents of the Commonwealth of Australia.
2. Seller, its officers, employees, agents and subcontractors shall not by virtue of this Contract be, or for any purposes deemed to be, an employee, partner or agent of the Commonwealth of Australia.

F. Commonwealth Access

(This clause applies only if Seller is designated as an Approved Subcontractor.)

1. During the performance of this Contract, Seller shall permit the Project Authority or any person authorised by the Project Authority access to its premises, and access to any of its records or accounts, other than cost data, in connection with performance of work under this Contract, including the right to copy. The Commonwealth may copy any such records or accounts for the purposes of this Contract. Where access to Seller's cost records is required in order to check or audit any claim by Seller for additional payments, Seller agrees to provide access to these records to an independent audit agency or firm that is acceptable to both parties. Any access is subject to the Project Authority giving Seller prior notice and the Commonwealth taking all care not to interfere with Seller's operations.
2. Without limiting the generality of clause F.1, the purposes for which the Project Authority may require access include:
 - (a) inspecting Government Furnished Material (GFM), conducting or checking stocktakes (inventories) of GFM, or removing GFM that is no longer required for the performance of this Contract; and
 - (b) determining whether and to what extent steps should be taken to register or otherwise protect Commonwealth Intellectual Property.

G. Contractor Access

If Seller is provided access to any Commonwealth place, area, or facility, it shall comply with any relevant Commonwealth safety and security requirements, regulations, standing orders, or codes of behaviour for the Commonwealth place, area or facility.

H. Defence Security

(This clause applies only if Seller requires access to any Commonwealth place, area or facility or to any security classified information in order to perform the obligations of this Contract.)

1. Where Seller requires access to any Commonwealth place, area or facility under the control or responsibility of the Department of Defence or the Australian Defence Force, Seller shall:
 - (a) comply with any security requirements notified to Seller by the Project Authority from time to time; and
 - (b) ensure that its personnel and subcontractors are aware of and comply with the Commonwealth's security requirements.
2. Seller shall, and shall ensure that its personnel and subcontractors:
 - (a) undertake any security checks or clearances as required by the Commonwealth;
 - (b) notify the Commonwealth of any changes to circumstances which may affect Seller's capacity to provide the Goods and Services in accordance with the Commonwealth's security requirements; and
 - (c) provide a written undertaking in respect of security or access to the Commonwealth's place, area or facility in the form required by the Commonwealth.
3. The security classification of work to be performed under this Contract will be up to and including Australian Secret level. Seller shall possess a facility clearance at Secret level for storage of classified material, or equivalent, issued by the relevant government industrial security authority where Australia has a bilateral security arrangement in place, and shall comply with the relevant government industrial security policy.
4. Seller shall classify all information in its possessions relating to the performance of this Contract according to the Security Classification Grading Document in Attachment P and shall ensure that such information is safeguarded and protected according to its level of security classification. (A copy of Attachment P is available in the Description column for C439097 in the index for Customer Contract Requirements.)

5. No security classified information furnished by the Commonwealth under this Contract or Commonwealth security classified information generated under this Contract shall be released to a third party, including a representative of another country, without prior written approval of the Project Authority. The Project Authority's written approval shall be obtained through Buyer.
6. Seller shall promptly report to the Project Authority, through Buyer, any instance in which it is known or suspected that security classified information furnished or generated under this Contract has been lost or disclosed to unauthorised parties, including a representative of another country.
7. All security classified information transmitted between the Commonwealth and Seller, or between Buyer and Seller, in Australia, whether generated in Australia or overseas, shall be subject to the provisions of Defence industrial security policy as set out in Part I of the Defence Security Manual, as amended from time to time.
8. All security classified information transmitted between the Commonwealth and Seller, or between Buyer and Seller, 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.
9. Where there has been a breach by Seller, or any of its officers, employees or agents, or subcontractors, of this clause, Buyer may give Seller a notice of cancellation for default.
10. Seller shall ensure the requirements of this clause are included in all subcontracts where the subcontractor requires access to any Commonwealth place, area or facility or to any security classified information in order to perform the obligations of the subcontract.

I. Policy Requirements

1. Subject to paragraph 2, below, 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 this Contract:
 - (a) Company ScoreCard policy as detailed in the Defence Company ScoreCard Policy Statement.
 - (b) Defence Equity and Diversity policy as detailed in the Defence plain-english guide to Managing and Reporting Unacceptable Behaviour; Departmental Personnel Instruction No 1/2001 Equity and Diversity in the Department of Defence; and Defence Instruction (General) Personnel 35-3 Management and Reporting of Unacceptable Behaviour,
 - (c) Equal Opportunity for Women in the Workplace policy as detailed in the Defence Procurement Policy Manual, 1 July 2010;
 - (d) Defence Stocktaking policy as detailed in the DI (G) LOG 4-3-014;
 - (e) Freedom of Information policy as detailed in the Defence Procurement Policy Manual 1 July 2010;
 - (g) Hazardous Substances policy as detailed in the Defence Procurement Policy Manual 1 July 2010;
 - (h) Industry Capability Network policy as detailed in the Defence Procurement Policy Manual 1 July 2010;
 - (i) Maximising Employment Opportunities for Aboriginal and Torres Strait Islanders policy as detailed in the Defence Procurement Policy Manual, Version 5.0: 2004; and
 - (j) Ozone Depleting Substances Policy as detailed in the Defence Procurement Policy Manual 1 July 2010.
2. Notwithstanding the Order of Precedence clause of this Contract, where the SOW is inconsistent with a policy mentioned in paragraph 1, above, Seller shall comply with the SOW to the extent of the inconsistency.

J. Insurance

1. Before commencing work under this Contract, Seller shall:
 - (a) be fully insured or registered with the appropriate statutory authority against liability for death of or personal injury to persons employed by Seller, including liability under statute and common law; and
 - (b) have public and products liability insurance written on an occurrence basis for an amount of not less than two hundred million US dollars (\$US 200 million) each occurrence and, with respect to products liability only, also in the aggregate for all occurrences during the twelve month policy period.

2. Seller shall ensure each of its subcontractors is insured against the subcontractor's corresponding liabilities.
3. Seller shall maintain the insurance required under paragraph 1, above, for the duration of the work under this Contract and, on request, shall produce satisfactory evidence of the insurance to Buyer.
4. Seller shall on request by Buyer at any time, including after expiry or termination of this Contract, produce satisfactory evidence of the insurance or registration to Buyer.
5. The evidence required by paragraph 4, above, shall include details of:
 - (a) Name of the insurance provider;
 - (b) Type of insurance;
 - (c) Terms of the insurance including any specific exclusions;
 - (d) Limits of liability per claim or occurrence and details of any aggregate limits or relevant sublimits which apply;
 - (e) Whether any past or current claims made under the policy have been materially affected, or are likely to materially affect, the amount of cover available under the policy;
 - (f) Deductible amounts; and
 - (g) Period of insurance
6. Seller shall immediately notify Buyer if any policy or policies of insurance relevant to this Contract:
 - (a) Are cancelled by an insurer,
 - (b) Are to have their coverage reduced in any material respect, or
 - (c) If Seller reasonably believes that a policy or policies of insurance relevant to this Contract will or may be cancelled.

K. Intellectual Property

(The intellectual-property-related clauses in Buyer's contract with the Commonwealth (C439097) that apply to this Contract (articles 5, 10.4, 8.7, 8.8., 8.9. and 10.10) are included in this article with the paragraph numbering used in C439097. The clauses have been modified, as necessary, to reflect the relationship of the parties.)

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 Unless:

- a. it is created by Buyer or the Commonwealth or by an employee of or contractor to Buyer or the Commonwealth (other than Seller); or
 - b. the parties otherwise agree,
- ownership of all Foreground IP vests on its creation in Seller.

5.1.3 For any Foreground IP that vests in Buyer or the Commonwealth, Buyer or the Commonwealth, as applicable, has the exclusive right to apply for registration of that Foreground IP in all countries of the world.

5.2 Intellectual Property License

5.2.1 Seller grants to the Commonwealth a royalty-free, irrevocable, world-wide, perpetual, non-exclusive licence for Defence Purposes in respect of all Background IP and any Foreground IP that is listed in Attachment J,* subject to the limitations contained therein, including the right to authorise a person on behalf of the Commonwealth, to exercise either or both Background and Foreground IP to:

- a use, maintain and dispose of the Goods in a manner which is consistent with Seller authorised procedures

delivered under this Contract or US Department of Defense authorised procedures; and

- b. modify and develop the Goods,
- provided that Seller does not grant the Commonwealth any right to:
- c. Commercialise or authorise a third party to Commercialise the Goods or the IP licensed under this Contract;
 - d. provide the IP to a third party other than for the purposes of that third party:
 - i. maintaining the Goods on behalf of the Commonwealth; or
 - ii. modifying or developing the Goods to incorporate modifications:
 - A. developed by or on behalf of the US Government and incorporated into US Government JDAM; or
 - B. developed by the Commonwealth, a Commonwealth statutory authority or a company wholly owned by the Commonwealth other than through a contractor.

*(A copy of Attachment J is available in the Description column for C439097 in the index for Customer Contract Requirements.)

- 5.2.2 The Commonwealth through Buyer may request that Seller grant a licence in relation to IP for the purposes of modifying or developing the Goods to incorporate modifications that are not covered by the licence referred to in clause 5.2.1d(ii). Seller will not unreasonably refuse a request made under this clause 5.2.2 provided that this licence is otherwise in the terms of clause 5.2.1.
- 5.2.3 Seller shall ensure that the Commonwealth is granted a licence from each of its subcontractors on the same terms as clause 5.2.1.
- 5.2.4 Seller shall ensure that the Commonwealth is granted a licence to exercise all Third Party IP on the best available commercial terms.
- 5.2.5 The Commonwealth may, on request, grant Seller a licence to exercise Foreground IP owned by the Commonwealth.
- 5.2.6 Despite any limitations set out in the IP Plan, Seller acknowledges that the rights granted under clauses 5.2.1 and 5.2.3 include the right of the Commonwealth, or a person on behalf of the Commonwealth, to exercise either or both Background IP and Foreground IP to:
 - a. properly use and support the Goods throughout their useful life as envisaged by this Contract;
 - b. enable modification or upgrade of the Goods with Seller or US Department of Defense supplied modifications or updates; and
 - c. effect repairs and remedy defects or omissions in the Goods in accordance with Contractor or US Department of Defense authorised procedures.
- 5.2.7 Where the Commonwealth requires additional Foreground IP or Background IP beyond that referred to in Attachment J* to enable the Commonwealth to fully exercise the rights granted to it in clause 5.2.1 and Seller already has the necessary IP rights, Seller shall agree on amendments to Attachment J to identify and list such IP. Where the Commonwealth seeks a licence to IP which is not owned by or licensed to Seller (which licence includes a right to sub-licence), the parties will agree on the price payable to Seller for securing ownership of, or licence to (which licence includes a right to sub-licence) such IP. Following agreement on the price payable by the Commonwealth for such licence, Seller shall submit a contract change proposal in accordance with this Contract. Where Seller provides additional Foreground IP Buyer for provision to the Commonwealth, then unless otherwise agreed and documented in Attachment J such additional Foreground IP is licensed to the Commonwealth on the terms of clause 5.2.1 from the date it is provided to Buyer for provision to the Commonwealth.

*(A copy of Attachment J is available in the Description column for C439097 in the index for Customer Contract Requirements.)

5.3 Provision of Technical Data

- 5.3.1 Seller shall deliver:

- a. for the Off The Shelf Goods – all Technical Data (TD) listed in the SOW; and
 - b. for any Supplies developed specifically for the Contract (C439097) – all Technical Data (TD) relating to those Supplies.
- 5.3.2 Where the Commonwealth through Buyer requires additional TD in relation of any Off The Shelf Supplies beyond that referred to in clause 5.3.1 to enable the Commonwealth to fully exercise its IP rights under clause 5 and that TD is already in existence, Seller shall deliver such TD to buyer for delivery to the Commonwealth. Where the Commonwealth through Buyer seeks TD that is not already in existence, the parties will agree on the price payable to Seller for the development of that TD, and Seller shall submit a contract change proposal in accordance with the Changes clause of this Contract.
- 5.3.3 For all Foreground IP that vests in the Commonwealth, Seller shall provide with the Goods all TD in existence that relates to that Foreground IP.
- 5.3.4 In addition to the Technical Data required to be delivered under this Contract, and if requested by the Commonwealth through Buyer, Seller shall provide all Technical Data already in existence which is necessary to support the Commonwealth's certification of the Goods. For the avoidance of doubt, this clause does not require Seller to provide any data relating to the F/A-18 aircraft, nor data which is owned by the US government.
- 5.3.5 The Commonwealth may provide TD to a third party to enable the Commonwealth to fully exercise its IP rights under clause 5.
- 5.3.6 Seller will use reasonable endeavours to ensure that all TD delivered to Buyer for delivery to the Commonwealth pursuant to this clause 5.3 will enable a reasonably skilled person to efficiently and effectively do the things permitted to be done by the Commonwealth in the exercise of its IP rights under clause 5.

5.4 IP Plan

- 5.4.1 Seller shall maintain and update the IP Plan. Seller shall deliver updated versions of the IP Plan by submitting contract change proposals in accordance with this Article, to reflect changes to the IP Plan.

5.5 Release to Third Parties

- 5.5.1 Prior to the Commonwealth making available to another person (excluding US Government employees) any Foreground or Background IP owned by Seller or one of its subcontractors, the Commonwealth shall obtain from that person a deed of confidentiality and ensure that the Commonwealth complies with all export requirements.

10.4 Commercial-in-Confidence Information

- 10.4.1 Where in connection with this Contract, Commercial-in-Confidence Information is provided or produced, the relevant party shall ensure that any person receiving or producing the information protects the confidential nature of the information except:
- a. where disclosure of the information is required by law or statutory or portfolio duties; or
 - b. to the extent that the Commonwealth would be prevented from exercising its Intellectual Property rights under the Contract (C439097).
- 10.4.2 Where it is necessary to disclose Commercial-in-Confidence Information to a third party, other than a legal adviser or for a purpose set forth in this Contract, the party wishing to make the disclosure shall obtain the written consent of the other party to this Contract.
- 10.4.3 RESERVED
- 10.4.4 Buyer may require Seller to ensure that its officers, employees, agents and subcontractors engaged in the performance of this Contract are given a written undertaking in the form of a deed of confidentiality prior to the disclosure of Commercial-in-Confidence Information. Seller shall provide properly executed deeds as required by this clause.
- 10.4.5 Seller shall not, in marking information supplied to Buyer, misuse the term "Commercial-in-Confidence" or Seller's equivalent. The marking of information as "Commercial-in-Confidence" shall not affect the legal nature and character of the information.
- 10.4.6 Notwithstanding clause 10.4.2, Seller grants to the Commonwealth the right to disclose information relating to communication protocols, interface standards, message formats, or any other electrical, mechanical or optical interface or other requirements which may be required to be released by the Commonwealth so as to allow software

or equipment to connect to or communicate with any of the Goods. All such information shall be protected as the Commonwealth regards as appropriate in the circumstances.

- 10.4.7 Seller agrees to deliver, or provide notification of destruction (less one copy for Seller's record keeping purposes only), to Buyer, as required by Buyer, all documents in its possession, power or control which contain or relate to any information that is Commercial-in-Confidence Information of the Commonwealth on the earlier of:

8.7 Intellectual Property Indemnity

(The Patent, Trademark and Copyright Indemnity article in The Boeing Company General Provisions document is deleted, and the following article is substituted in lieu thereof.)

- 8.7.1 Seller shall indemnify Buyer and the Commonwealth, and the officers, employees, agents, licensees or sub-licensees of each, 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 Buyer or the Commonwealth 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 where the infringement or alleged infringement arises out of any activity permitted under any licence or assignment referred to under this Contract; or
 - b. breach or alleged breach of any duty of confidentiality owed to that third party, where the breach is caused by any act or omission on the part of Seller or any of its subcontractors, officers, employees or agents (whether or not such act or omission constitutes a breach of this Contract).
- 8.7.2 RESERVED
- 8.7.3 Seller's indemnity in clause 10.6.1 does not apply to the extent that the infringement or alleged infringement the subject of the claim, demand, suit, action or proceeding arises by reason that:
- a. all or part of the Goods are modified by or on behalf of Buyer or the Commonwealth to the extent that the infringement or alleged infringement relates to such modification;
 - b. all or part of the Goods are combined by or on behalf of Buyer or the Commonwealth with other products (hardware or software), processes or materials, other than Existing Equipment, to the extent that the infringement or alleged infringement relates to such combination; or negotiations for its settlement.
- 8.8.2 If Seller exercises its option under clause 8.8.1.c subject to clause 8.8.3, Seller shall:
- a. assume and conduct the defence of any proceedings relating to the Claim diligently using competent counsel and in such a way as not to bring the reputation of Buyer or the Commonwealth into disrepute;
 - b. where Seller acts for or on behalf of Buyer or the Commonwealth in accordance with this clause 8.8.2, Seller shall observe any relevant Legal Service Directions in accordance with the *Judiciary Act 1903*, in the conduct of the claim;
 - c. consult with Buyer and keep Buyer informed of all material matters, including formulation of any defence and cross-claims and filing of evidence from employees of Buyer or the Commonwealth;
 - d. obtain Buyer's prior written approval (which shall not be unreasonably or arbitrarily withheld) before any settlement is made in respect of the Claim; and
 - e. comply at all times with any reasonable direction given by Buyer.
- 8.8.3 With respect to a Claim, Buyer may (by notice to Seller) at any time:
- a. assume sole control of the conduct, defence or settlement of the Claim in which Buyer is a party or is involved, if Buyer reasonably considers that sole control of such Claim by Seller may materially place at risk or materially adversely affect:
 - i. national security; or
 - ii. the continued provision of the Goods; or
 - b. refuse to allow Seller to have, or continue with, the conduct, defence or settlement of a Claim where proceedings under criminal law or for breach of statutory duty by Seller are commenced by any person.

- 8.8.4 If Seller fails to comply with this Article in relation to a Claim, Buyer has the right, without prejudice to any other right or remedy it may have, to suspend any payment due under this Contract to the extent that the payment relates to the Goods the subject of that Claim, until Seller remedies the failure to comply.
- 8.8.5 Seller agrees to provide Buyer and the Commonwealth access to, and use of, any advice given by lawyers engaged by Seller under this Article except where this would cause loss of client legal privilege in relation to that advice.
- 8.8.6 Seller shall not disclose any classified or official materials of the Commonwealth without the consent in writing of Buyer, except as permitted under this Article.
- 8.8.7 If Seller receives a request or demand for access to, or production or release of any classified or official materials in the context of legal proceedings:
- a. Seller shall promptly notify Buyer in writing of the request or demand;
 - b. Seller shall consult with Buyer concerning the request or demand;
 - c. in the case of classified material, except where it is ordered to do so by a court of competent jurisdiction, and subject to this Article, Seller shall refuse the request or demand on the grounds that the material is classified; and
 - d. in the case of official materials, except where it is ordered to do so by a court of competent jurisdiction, and subject to this Article, Seller shall not accede to the request or demand unless Buyer agrees in writing that the official materials are relevant to matters at issue in those legal proceedings.
- 8.8.8 If so directed by Buyer following a request or demand of the kind described in this Article, Seller shall take all reasonable steps to contest the relevance of any official materials or classified materials to matters at issue in the legal proceedings.
- 8.8.9 If so directed by Buyer following a request or demand of the kind described in this Article, Seller shall take all reasonable steps to assert restrictions applying to disclosure of classified material.

8.9 Procedure for Intellectual Property Claims

- 8.9.1 If the Goods become, or in Buyer's reasonable opinion are likely to become, the subject of a claim, demand, proceeding, complaint of any nature or kind ("Claim") of the kind described in clause 8.7 in addition to any obligation of Seller to indemnify Buyer and the Commonwealth in relation to that Claim, but subject to clause 8.9.2 Seller shall, at its own expense, either:
- a. acting promptly, secure the right for the item to continue to be used on terms which are acceptable to Buyer; or
 - b. if Seller does not comply with clause 8.9.1a within a reasonable period, replace or modify the item to make it non-infringing, but on the basis that:
 - i. the performance and functionality of the replaced or modified item is at least equivalent to the performance and functionality of the original item;
 - ii. there is no additional cost to Buyer; and
 - iii. the terms of this Contract shall apply to the replaced or modified item.
- 8.9.2 Seller is not obliged to comply with its obligations in clauses 8.9.1a and 8.9.1b for so long as:
- a. it is taking all reasonable and expeditious steps to contest the relevant Claim; and
 - b. no court or tribunal of competent jurisdiction has given a final judgment or made a final order that recognises the Claim or otherwise interrupts or disrupts the use of the Supplies by the Commonwealth.
- 8.9.3 If Seller does not comply with its obligations in clauses 8.9.1a or 8.9.1b within a reasonable time, Buyer in its sole discretion may require Seller to remove the infringing item from the relevant Goods and substitute an alternative (at no additional cost to Buyer), provided that such substitution shall be effected on the terms of clause 5.2 and the relevant contract price shall be equitably reduced to reflect any reduction in performance or functionality.
- 8.9.4 If Seller fails to comply with its obligations in clause 8.9.1b within a reasonable period then in addition to any other liability under the indemnity in clause 8.7, Seller is liable for all reasonable costs of procuring items or services which Buyer obtains (or itself provides) in substitution for any item that is the subject of a relevant Claim.

- 8.9.5 If, due to a Claim arising from, or by reason of infringement or alleged infringement of any Intellectual Property right, the use of the Goods is disrupted or impaired and Seller has not:
- a. within a reasonable period of the commencement of such disruption or impairment commenced all appropriate and effective actions in accordance with clause 8.9.1; and
 - b. subsequently used best endeavours to pursue such actions to restore the use of the Goods,
- Buyer may, subject to clause 8.9.6 conduct negotiations and make a settlement necessary to allow continued use of the Goods.
- 8.9.6 The negotiations and settlement contemplated under clause 8.9.5 will relate solely to the continued use of the Goods, and without limiting Buyer's discretion to make a settlement, Buyer will consult Seller before making a settlement.
- 8.9.7 Buyer may, in its discretion, make a settlement contemplated under clause 8.9.5 on the basis that the settlement is without prejudice to any rights Buyer may have against Seller arising out of a breach of clause 8.8.2.
- 8.9.8 Where any Claim to which clause 8.7.1a applies is settled as a result of negotiations by Buyer under the provisions of clause 8.9.5 and compensation resulting from such settlement is paid to a third party, Seller will not be required to pay by way of indemnity an amount greater than that which would be reasonably payable in settlement having regard to the damages which might be recoverable by law.

10.10 Defence Security

- 10.10.1 Where Seller requires access to any Commonwealth place, area or facility under the control or responsibility of the Department of Defence or the Australian Defence Force, Seller shall:
- a. comply with any security requirements notified to Seller by the Commonwealth through Buyer from time to time; and
 - b. ensure that its personnel and subcontractors are aware of and comply with the Commonwealth's security requirements.
- 10.10.2 Seller shall, and shall ensure that its personnel and subcontractors:
- a. undertake any security checks or clearances as required by the Commonwealth;
 - b. notify Buyer of any changes to circumstances which may affect Seller's capacity to provide Buyer in accordance with the Commonwealth's security requirements; and
 - c. provide a written undertaking in respect of security or access to the Commonwealth's place, area or facility in the form required by the Commonwealth.
- 10.10.3 The security classification of work to be performed under this Contract will be up to and including Australian Secret level. Seller shall possess a facility clearance at Secret level for storage of classified material, or equivalent, issued by the relevant government industrial security authority where Australia has a bilateral security arrangement in place, and shall comply with the relevant government industrial security policy.
- 10.10.4 Seller shall classify all information in its possessions relating to the performance of this Contract according to the Security Classification Grading Document in Attachment P and shall ensure that such information is safeguarded and protected according to its level of security classification. (A copy of Attachment P is available in the Description column for C439097 in the index for Customer Contract Requirements.)
- 10.10.5 No security classified information furnished by the Commonwealth under this Contract or Commonwealth security classified information generated under this Contract, shall be released to a third party, including a representative of another country, without prior written approval of the Commonwealth through Buyer.
- 10.10.6 Seller shall promptly report to Buyer any instance in which it is known or suspected that security classified information furnished or generated under the Contract (C439097) has been lost or disclosed to unauthorised parties, including a representative of another country.
- 10.10.7 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 provisions of Defence industrial security policy as set out in Part I of the DSM, as amended from time to time.
- 10.10.8 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.

10.10.9 Where there has been a breach by Seller, or any of its officers, employees or agents, or subcontractors of clause 10.10, the Commonwealth through Buyer may give Seller a notice of termination for default in accordance with the Cancellation for Default clause of this Contract.

10.10.10 Seller shall ensure the requirements of clause 10.10 are included in all subcontracts where the subcontractor requires access to any Commonwealth place, area or facility or to any security classified information in order to perform the obligations of the subcontract.