

## DEED OF CONFIDENTIALITY AND FIDELITY

This Deed of Confidentiality and Fidelity is dated the { dd mmm cyy }

between

THE COMMONWEALTH OF AUSTRALIA represented by the Department of Defence A.B.N 68 706 814 312 ("the Commonwealth")

and

{ person's name } having his registered office at { address of registered office } ("the Confidant").

### RECITALS:

- A. The Commonwealth has entered into a contract with { Service Provider's name } ("the Contractor") and dated { dd mmm cyy } ("the Contract") for the supply of services for { name of project }.
- B. In order to assist the performance of the Contract, the Contractor and the Confidant have entered into a subcontract, employment or agency arrangement for the supply of { position to be occupied by the person on the project } on the project. ("the Agreement").
- C. In performance of the Agreement, the Confidant may become aware of information belonging to the Commonwealth or a third party that is the subject matter of the Contract. The Confidant agrees to keep the information confidential pursuant to the following terms and conditions.

### THE PARTIES AGREE AS FOLLOWS:

**1. DEFINITIONS**

1.1 In the interpretation of this Deed, unless the contrary intention appears:

“Background IP” means IP, other than Third Party IP, that:

- a. is in existence at the Effective Date or is subsequently brought into existence other than as a result of the performance of the Approved Subcontract; and
- b. is embodied in, or attaches to, the Supplies or is otherwise necessarily related to the functioning or operation of the Supplies.

“Classified Information” means any information classified as Restricted or above by the Department of Defence.

“Commercial-in-Confidence Information” means information (whether or not owned by the Commonwealth) that:

- c. is by its nature confidential;
- d. the Confidant knows or ought to know is confidential,

but does not include information which:

- e. is or becomes public knowledge other than by breach of this Deed;
- f. is in the possession of the receiving party without restriction in relation to disclosure before the date of receipt from the disclosing party; or
- g. has been independently developed or acquired by the receiving party.

“Documents” includes:

- a. any paper or other materials on which there are writing, marks, figures, symbols or perforations having meaning for persons qualified to interpret them; and
- b. any article or material from which sound, images or writings are capable of being reproduced with or without the aid of any other article or device.

“Foreground IP” means IP which is created under or otherwise in connection with the Approved Subcontract, other than Third Party IP.

“Information” includes Classified information, any information headed with a caveat, Commercial-in-Confidence information and Intellectual Property.

“Intellectual Property” or “IP” includes all copyright and all rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), registered and unregistered designs, and circuit layouts, and any other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields recognised in domestic law anywhere in the world.

“Permitted Purposes” mean the planning, development, supply and implementation of the outcomes and deliverables as specified in the Contract.

“Third Party IP” means that IP which is owned by a party other than the Commonwealth, Contractor or Approved Subcontractors and is embodied in the Supplies, or attaches to, the Supplies or is otherwise necessarily related to the functioning or operation of the Supplies, and is not limited to Commercial-Off-The-Shelf items.

“Working Day” in relation to the doing of an action in a place means any day other than a Saturday, Sunday or public holiday in that place.

## **2. INTERPRETATION**

2.1 In this Deed, unless the contrary intention appears:

- a. headings are for the purpose of convenient reference only and do not form part of the Deed;
- b. the singular includes the plural and vice versa;
- c. a reference to one gender includes the other;
- d. a reference to a person includes a body politic, body corporate or a partnership;
- e. a reference to a clause includes a reference to a subclause of that clause;
- 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. the word "includes" in any form is not a word of limitation; and
- h. 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.

## **3. CONFIDENTIALITY UNDERTAKINGS**

3.1 The Confidant:

- a. acknowledges and agrees that improper use, or disclosure of any Information provided to the Confidant pursuant to or in connection with the Agreement would be detrimental to the Commonwealth in the performance of its functions and would cause harm to any third parties with an interest in the Information;
- b. shall take all reasonable steps to ensure that such Information is kept confidential in accordance with this Deed;
- c. shall only use the Information for the Permitted Purposes; and
- d. shall not without the prior written consent of the Commonwealth, disclose or permit any person to disclose any of the Information to any person other than to any of its officers, employees, agents, advisers or independent contractors who:
  - (i) have a need to know the Information in order for the Confidant to carry out the Permitted Purposes; and
  - (ii) when required by the Commonwealth, have executed a similar undertaking to this Deed in favour of the Commonwealth,and the Commonwealth may grant or withhold its consent in its absolute and unfettered discretion.

## **4. RETURN OF INFORMATION**

4.1 The Confidant agrees to deliver to the Commonwealth, as required by the Commonwealth, all Documents in its possession, power or control which contain or relate to any Information on the earlier of:

- a. demand by the Commonwealth, and
- b. the time the documents and other material are no longer required for the Permitted Purposes.

4.2 If the Commonwealth makes a demand under clause 4, and the Confidant has placed or is aware that Documents containing the Information are beyond its possession or control, then the Confidant must provide full particulars of the whereabouts of the Documents containing the Information, and the identity of the person in whose custody or control they lie.

4.3 The Confidant, when directed by the Commonwealth in writing, agrees to destroy any hard or soft copies of Information in its possession, power or control that contain or relate to any Classified information, Caveat Information, Commercial-in-Confidence Information, or

Intellectual Property.

- 4.4 Return or destruction of the Information referred to in this clause does not release the Confidant from its obligations under this Deed.

## **5. SURVIVAL**

- 5.1 This Deed shall survive the termination or expiry of the Contract and the Agreement.

## **6. CONFLICT OF INTEREST**

- 6.1 The Confidant warrants that before entering into this Deed it has disclosed to the Commonwealth all the past, current and anticipated interests of the Confidant which may conflict with or restrict the Confidant in performing the obligations under this Deed for the Commonwealth fairly and independently.

- 6.2 The Confidant shall not during the course of this Deed engage in any activity or obtain any interest likely to conflict with or restrict the Confidant in providing the obligations under this Deed to the Commonwealth fairly and independently.

## **7. INDEMNITY**

- 7.1 The Confidant indemnifies the Commonwealth, its officers, employees and agents against all liability or loss (including loss of profits) arising directly or indirectly from, and any costs, charges and expenses incurred in connection with:

- a. any breach by the Confidant of this Deed; or
- b. any act or omission by any of the Confidant's officers, employees, agents, advisers or independent contractors which, if done or omitted to be done by the Confidant, would breach of the Confidant's obligations under this Deed.

## **8. INJUNCTIVE RELIEF**

- 8.1 The Confidant acknowledges that damages may not be a sufficient remedy for the Commonwealth for any breach of this Deed and that the Commonwealth is entitled to injunctive relief (as appropriate) as a remedy for any breach or suspected or threatened breach by the Confidant, in addition to any other remedies available at law or in equity.

## **9. NO EXCLUSION OF LAW OR EQUITY**

- 9.1 This Deed shall not be construed to exclude the operation of any principle of law or equity intended to protect and preserve the confidentiality of the Information.

## **10. WAIVER**

- 10.1 Failure by either party to enforce a provision of the Deed shall not be construed as in any way affecting the enforceability of that provision or the Deed as a whole.

## **11. REMEDIES CUMULATIVE**

- 11.1 The rights and remedies provided under this Deed are cumulative and not exclusive of any rights or remedies provided by law or any other such right or remedy.

## **12. OTHER INSTRUMENTS**

- 12.1 Subject to the other covenants of this Deed, the rights and obligations of the parties pursuant to this Deed are in addition to and not in derogation of any other right or obligation between the parties under any other deed or agreement to which they are parties.

## **13. VARIATIONS AND AMENDMENTS**

- 13.1 No term or provision of this Deed shall be amended or varied unless such amendment or variation is reduced to writing and signed by the parties hereto in the same manner as this instrument.

**14. APPLICABLE LAW**

15.1 The laws of {Please Select Option (PSO): Australian Capital Territory, New South Wales, Queensland, Tasmania, Northern Territory, South Australia, Victoria, Western Australia} shall apply to the Deed. The courts of {PSO: Australian Capital Territory, New South Wales, Queensland, Tasmania, Northern Territory, South Australia, Victoria, Western Australia} shall have non-exclusive jurisdiction to decide any matter arising out of the Deed.

SIGNED AS AN AGREEMENT

SIGNED for and on behalf of

THE COMMONWEALTH OF AUSTRALIA:

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(signature) (print name and position) (date)

In the presence of:

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(signature) (print name) (date)

SIGNED for and on behalf of

THE CONFIDANT:

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(signature) (print name) (date)