

- g. Claims for payment under this Condition shall be submitted in accordance with the Authority's direction.

#### **42. Material Breach**

- a. In addition to any other rights and remedies, the Authority shall have the right to terminate the Contract (in whole or in part) with immediate effect by giving written Notice to the Contractor where the Contractor is in material breach of their obligations under the Contract.
- b. Where the Authority has terminated the Contract under clause 42.a the Authority shall have the right to claim such damages as may have been sustained as a result of the Contractor's material breach of the Contract, including but not limited to any costs and expenses incurred by the Authority in:
- (1) carrying out any work that may be required to make the Contractor Deliverables comply with the Contract; or
  - (2) obtaining the Contractor Deliverable in substitution from another supplier.

#### **43. Consequences of Termination**

The termination of the Contract, however arising, shall be without prejudice to the rights and duties of either Party accrued prior to termination. The Conditions that expressly or by implication have effect after termination shall continue to be enforceable even after termination.

#### **Additional Conditions**

#### **44. The Project specific DEFCONs and DEFCON SC variants that apply to this contract are:**

DEFCON 127 (Edn. 08/21) - Price Fixing Condition for Contracts of Lesser Value

DEFCON 532A (SC2) (Edn. 05/22) – Protection of Personal Data (Where Personal Data is not being processed on behalf of the Authority)

DEFCON 624 (SC2) (Edn. 08/22) - Use of Asbestos

DEFCON 637 (Edn. 05/17) - Defect Investigation and Liability

DEFCON 658 (SC2) (Edn. 09/21) – Cyber

Note: Further to DEFCON 658 the Cyber Risk Profile of the Contract is Very Low, as defined in Def Stan 05-138.

#### **45. The special conditions that apply to this Contract are:**

##### **45a. Limitations on Liability**

##### **Definitions**

- a. In this Condition 45a the following words and expressions shall have the meanings given to them, except where the context requires a different meaning:

"Charges" means any of the charges for the provision of the Services, Contractor Deliverables and the performance of any of the Contractor's other obligations under this Contract, as determined in accordance with this Contract;

"Data Protection Legislation" means all applicable Law in force from time to time in the UK relating to the processing of personal data and privacy, including but not limited to:

- (1) UK GDPR;
- (2) DPA 2018; and
- (3) the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) as amended, each to the extent that it relates to the processing of personal data and privacy;

“Default” means any breach of the obligations of the relevant Party (including fundamental breach or breach of a fundamental term) or any other default, act, omission, negligence or statement of the relevant Party, its employees, servants, agents or sub-contractors in connection with or in relation to the subject matter of this Contract and in respect of which such Party is liable to the other. In no event shall a failure or delay in the delivery of an Authority responsibility or an activity to be carried out by the Authority or its representatives in accordance with the Contract be considered a Default;

‘DPA 2018’ means the Data Protection Act 2018;

“Law” means any applicable law, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, regulation, order, regulatory policy, mandatory guidance or code of practice judgment of a relevant court of law, or directives or requirements of any regulatory body, delegated or subordinate legislation or notice of any regulatory body.

“Term” means the period commencing on **the date on which this Contract takes effect and ending [on the expiry of x years /on x date]** or on earlier termination of this Contract.

‘UK GDPR’ means the General Data Protection Regulation (Regulation (EU) 2016/679) as retained in UK law by the EU (Withdrawal) Act 2018 and the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019;

#### Unlimited liabilities

b. Neither Party limits its liability for:

- (1) death or personal injury caused by its negligence, or that of its employees, agents or sub-contractors (as applicable);
- (2) fraud or fraudulent misrepresentation by it or its employees;
- (3) breach of any obligation as to title implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982; or
- (4) any liability to the extent it cannot be limited or excluded by law.

c. The financial caps on liability set out in Clauses 45a.d and 45a.e below shall not apply to the following:

- (1) for any indemnity given by the Contractor to the Authority under this Contract, including but not limited to:
  - a. the Contractor's indemnity in relation to DEFCON 91 (Intellectual Property in Software) and Condition 33 (Third Party IP – Rights and Restrictions);
- (2) for any indemnity given by the Authority to the Contractor under this Contract, including but not limited to:
  - a. the Authority's indemnity under DEFCON 514A (Failure of Performance under Research and Development Contracts);
- (3) breach by the Contractor of DEFCON 532A (SC2) joint controller provisions set out at Clause 4 and Data Protection Legislation; and
- (4) to the extent it arises as a result of a Default by either Party, any fine or penalty incurred by the other Party pursuant to Law and any costs incurred by such other Party in defending any proceedings which result in such fine or penalty.
- (5) For the avoidance of doubt any payments due from either of the Parties to the other in accordance with DEFCON 811 (SC2) or the Defence Reform Act 2014 and/or the Single Source Contract Regulations 2014, as amended from time to time, shall not be excluded or limited under the provisions of Clauses 45a.d and/or 45a.e below.

**Financial limits**

- d. Subject to Clauses 45a.b and 45a.c and to the maximum extent permitted by Law:
- (1) throughout the Term the Contractor's total liability in respect of losses that are caused by Defaults of the Contractor shall in no event exceed:
    - a. in respect of Condition 42b [REDACTED] pounds in aggregate;
    - b. in respect of condition 27d [REDACTED] pounds in aggregate;
  - (2) on the exercise of any and, where more than one, each option period or agreed extension to the Term, the limitation of the Contractor's total liability (in aggregate) set out in Clauses 45a.d(1) and 45a.d(2) above shall be fully replenished such that on and from each such exercise or extension of the Term, the Authority shall be able to claim up to the full value of the limitation set out in Clauses 45a.d(1) and 45a.d(2) of this Contract.
- e. Subject to Clauses 45a.b, 45a.c and 45a.f, and to the maximum extent permitted by Law the Authority's total liability (in aggregate) whether in contract, in tort (including negligence), under warranty, under statute or otherwise under or in connection with this Contract shall in respect of all liabilities (taken together) be limited to the Charges paid by the Authority in the relevant Contract Year in respect of any and all claims in that Contract Year.
- f. Clause 45a.e shall not exclude or limit the Contractor's right under this Contract to claim for the Charges.

**Consequential loss**

- g. Subject to Clauses 45a.b, 45a.c and 45a.h, neither Party shall be liable to the other Party or to any third party, whether in contract (including under any warranty), in tort (including negligence), under statute or otherwise for or in respect of:
- (1) indirect loss or damage;
  - (2) special loss or damage;
  - (3) consequential loss or damage;
  - (4) loss of profits (whether direct or indirect);
  - (5) loss of turnover (whether direct or indirect);
  - (6) loss of business opportunities (whether direct or indirect); or
  - (7) damage to goodwill (whether direct or indirect),
- even if that Party was aware of the possibility of such loss or damage to the other Party.
- h. The provisions of Clause 45a.g shall not restrict the Authority's ability to recover any of the following losses incurred by the Authority to the extent that they arise as a result of a Default by the Contractor:
- (1) any additional operational and administrative costs and expenses arising from the Contractor's Default, including any costs paid or payable by the Authority:
    - a. to any third party;
    - b. for putting in place workarounds for the Contractor Deliverables and other deliverables that are reliant on the Contractor Deliverables; and
    - c. relating to time spent by or on behalf of the Authority in dealing with the consequences of the Default;
  - (2) any or all wasted expenditure and losses incurred by the Authority arising from the Contractor's Default, including wasted management time;
  - (3) the additional cost of procuring and maintaining in place transitional assistance and replacement deliverables for the remainder of the Term and any option period or agreed extension to the Term (including legal and other consultants' fees, re-procurement project costs, other expenses associated with such exercise and any increase in the fees for the replacement services over and above the Contract Price that would have been payable for the relevant

Contractor Deliverables);

(4) any losses arising in connection with the loss, destruction, corruption, inaccuracy or degradation of Authority data, or other data or software, including, to the extent the Authority data, other data or software can be recovered or reconstituted, the fees, costs and expenses of reconstituting such Authority data, data or software;

(5) damage to the Authority's physical property and tangible assets, including damage under DEFCONs 76 (SC2) and 611 (SC2);

(6) costs, expenses and charges arising from, or any damages, account of profits or other award made for, infringement of any third-party Intellectual Property Rights or breach of any obligations of confidence;

(7) any additional costs incurred by the Authority in relation to the Authority's contracts with a third party (including any compensation or interest paid to a third party by the Authority) as a result of the Default (including the extension or replacement of such contracts);

(8) any fine or penalty incurred by the Authority pursuant to Law and any costs incurred by the Authority in defending any proceedings which result in such fine or penalty; or

(9) any savings, discounts or price reductions during the Term and any option period or agreed extension to the Term committed to by the Contractor pursuant to this Contract.

#### **Invalidity**

i. If any limitation or provision contained or expressly referred to in this Condition 45a is held to be invalid under any Law, it will be deemed to be omitted to that extent, and if any Party becomes liable for loss or damage to which that limitation or provision applied, that liability will be subject to the remaining limitations and provisions set out in this Condition 45a.

#### **Third party claims or losses**

j. Without prejudice to any other rights or remedies the Authority may have under this Contract (including but not limited to any indemnity claim under DEFCONs 91 and Condition 33 or at Law), the Authority shall be entitled to make a claim under this Contract against the Contractor in respect of any losses incurred by the Authority which arise out of a claim made against the Authority by a third party under any contract with that third party provided that such third party claim:

- (1) arises naturally and ordinarily as a result of the Contractor's failure to provide the Contractor Deliverables or failure to perform any of its obligations under this Contract; and
- (2) is a type of claim or loss that would have been recoverable under this Contract if the third party were a party to this Contract (whether as the Authority or the Contractor), such claim to be construed as direct losses for the purpose of this Contract.

#### **No double recovery**

k. Neither Party shall be entitled to employ such rights and remedies available to it so as to seek to recover more than once in respect of the same loss, but the Authority shall be entitled to use (singly or together) such rights and remedies available to the Authority so as to recover the full extent of any recoverable losses suffered or incurred, including any remedies the Authority may have against any guarantor.

#### **45b. Authority's Authorised Representative**

a. The Authority may appoint an Authority's Authorised Representative to:

- (1) inspect the work being done under the Contract and/or any part thereof, including materials and articles used or to be used therein;
- (2) provide the Contractor with information and advice as required;
- (3) monitor the progress of work
- (4) co-ordinate all visits by Authority personnel in connection with this Contract to the Contractor's premises and/or Sub-contractor premises;

- (5) arrange for the attendance of Authority inspection, tests and teams as required.
- b. The Authority's Authorised Representative will have the right to inspect all work being carried out under the Contract and to conduct inspections and/or audits at any reasonable time. Any deficiencies or defects found during these inspections and/or audits shall be rectified by the Contractor at no additional cost to the Authority.
- c. To enable the Authority's Authorised Representative to carry out his duties, the Contractor shall:
- (1) permit full access at all times to the work in progress and to all drawings, models, samples and articles or things of any kind pertaining to the Contract;
  - (2) maintain full co-operation and provide all such drawings, information and assistance as may reasonably be required;
  - (3) provide office and equipment including but not limited to desk, chair, telephone and internet facilities at the location where the work is being carried out;
  - (4) submit all condition survey reports, dimension reports and readings from machinery in a timely manner;
- d. The Authority's Authorised Representative will have the right to:
- (1) reject any workmanship, article or material, which does not conform with the requirements of the Contract;
  - (2) stop any test or trial or any other activity being carried out by the Contractor on TV Tristram at any time if, in his opinion, the safety of TV Tristram, its equipment or personnel on board is compromised.
- In respect of Clauses 45b.d(1) and 45b.d(2) above, the Contractor shall have a right of appeal to the Authority whose decision will be final and conclusive.
- e. In the event of appeal by the Contractor against an Authority rejection of any workmanship, article or material;
- (1) notice of appeal shall be given to the Authority within 2 (two) working days of receipt by the Contractor of notification of rejection;
  - (2) workmanship shall not be made good nor the article or material removed until directed by the Authority.
- f. Successful Appeal - Should an appeal by the Contractor prove successful then the Contractor will be entitled to claim an extension of time, which is directly attributable to the successful claim. Any such extension of time shall be agreed between the Parties.
- g. Unsuccessful or no Appeal - The Contractor shall make good or replace at his own expense and to the satisfaction of Authority's Authorised Representative, any workmanship, article or material rejected by the Authority. The Contractor shall also, if so required by the Authority, mark any rejected article or material, in a manner acceptable to the Authority's Authorised Representative.
- h. The Contractor shall not use surplus or used stores without the Authority's prior written approval. Where the Contractor proposes to use surplus or used stores in relation to the Specification (Schedule 2A), they shall submit their detailed proposals, including the effects on prices or programme, to the Authority's Authorised Representative for consideration and, if appropriate, approval.

#### **45c. Health and Safety**

- a. Notwithstanding and without prejudice to the provisions detailed elsewhere in the Contract, the Contractor shall be entirely responsible for the safety, whilst on his premises, of all personnel in connection with the Contract, whether or not in his employ.
- b. Save as may otherwise be specifically defined in the Contract, the Contractor shall be in

charge of, and entirely responsible for, the care, protection and security of the TV Tristram and all Authority property whilst in their possession.

c. Where the Authority engages an Independent Safety Advisor/Auditor/Assessor the Contractor shall provide access to records, including Sub-Contractor records to enable the Authority to carry out safety audits and other assessment activities. This shall include the provision of access to the Contractor and Sub-Contractors premises if required.

**45d. Attendance by Makers', Classification Society, Maritime and Coastguard Agency Representatives**

a. The Contractor shall be responsible for co-ordinating and arranging all attendance to execute or oversee work in connection with delivery, installation on board, setting to work, acceptance, maintenance, trials and repair or examination of machinery, systems and equipment's, under the Contract.

b. The Contractor shall make all arrangements for, and provide all necessary drawings, access and facilities for any work in connection with registration, classification, certification, surveys or trials.

c. The Contractor shall be responsible for co-ordinating and arranging attendance by all surveyors necessary for any certification required by the Contract.

**45e. Incidents**

a. If there is an incident which causes damage to any part of TV Tristram or which leads to a breach of security or safety, the Contractor shall inform the Authority immediately. If the Authority deems the incident to be sufficiently serious as to require investigation, the Contractor, if so requested, shall conduct such an investigation to establish the cause of the incident as soon as possible. In any event the Contractor shall identify the remedial action which they shall undertake to rectify the situation.

b. If the incident is such that the UK Health and Safety Executive sets up an enquiry to investigate the cause then the Contractor shall be required only to establish recommendations for remedial action.

c. Where an investigation is to be conducted by the Contractor, the Authority will have the right to appoint representatives to participate in the investigation in any of the following capacities:

- (1) as members of the investigating team;
- (2) in an advisory capacity;
- (3) to question witnesses.

d. The presence of such representatives of the Authority will be without prejudice to the Authority's right to accept or reject the findings and recommendations of the investigation.

e. If the Contractor wishes to call the Authority's personnel to an enquiry, either to give evidence or for any other purpose, prior approval to do so shall be sought from the Authority who will advise on the procedure to be followed.

f. A full report of the inquiry signed by all members of the investigating team shall be forwarded to the Authority and shall include:

- (1) a summary of the proceedings;
- (2) evidence of any witnesses, together with copies of any sketches or diagrams which may have been produced;
- (3) details of any difference of opinion between the investigating team members on any material point;
- (4) the conclusions and recommendations of the investigating team.

g. The report shall not deliberate on any possible consequential adjustments to the Contract and shall be without prejudice to the rights of the Authority under the Contract, or otherwise, in respect of