



Australian Standard<sup>TM</sup>

## **General conditions of contract for design and construct, Based upon AS 4902 – 2000**

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Client / Coucil / Government Entity (ABN ) (Principal)

**Engineering Building & Infrastructure (EBNI) PTY LTD**  
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## Preface

This Standard was prepared by the Joint Standards Australia/Standards New Zealand Committee OB/3, General Conditions of Contract.

*This Standard incorporates Amendment No. 1 (March 2005). The changes required by the Amendment are indicated in the text by a marginal bar and amendment number against the clause, note, table, figure or part thereof affected.*

This Standard is the result of a consensus among Australian and New Zealand representatives on the Joint Committee to produce it as an Australian Standard.

AS 4902—2000 *General conditions of contract for design and construct*, is a part of the suite of conditions of contract based on AS 4000—1997 *General conditions of contract*.

This Standard covers the following types of project procurement methods:

- (1) design and construct;
- (2) design development and construct; and
- (3) design, novate and construct.

If the project procurement method chosen by the Principal is:

- (1) **design and construct**—the Principal would provide the Principal's project requirements, would not normally provide a detailed preliminary design and would not require novation;
- (2) **design development and construct**—the Principal would provide the Principal's project requirements, would always provide a preliminary design and accordingly would complete Annexure Part A Items 10 and 11;
- (3) **design, novate and construct**—the Principal would provide the Principal's project requirements, would always provide a preliminary design, would complete Annexure Part A Items 10 and 11 and would complete Annexure Part A Item 20 stating which subcontract (including consultant's agreement) or selected subcontract is to be novated to the Contractor.

Clauses 8.6 and 29.2, prefixed by \*, are optional, and may be omitted in the Contract, where necessary, without making consequential amendments but such omission should be clearly shown on the face of the document by striking out these clauses or indicating clearly in clause 1 of Annexure Part E or elsewhere that they are *not to apply*. See paragraph (i) of clause 1 for the effect of stating deletions in Annexure Part E.

### Warnings

- (1) Users of this Australian Standard are warned that clause 15 (Damage to persons and property other than WUC) does not limit the liability of parties for special, indirect or consequential losses.  
This unlimited liability applies notwithstanding any limitations or exclusions permitted under insurance clauses 16A (Insurance of the Works), 16B (Professional indemnity insurance) and 17 (Public liability insurance).  
Parties wishing to limit their liability should seek insurance and legal advice before entering a contract under this Standard.
  - (2) Principals should ensure that their specific requirements are fully and completely incorporated in the Principal's project requirements obtaining specialist advice if necessary. Where a Contractor provides a proposed design as part of its tender, the parties should consider whether that design should form part of the preliminary design.
  - (3) The risk allocation, drafting, interpretation and construction of this Standard are interrelated. Users who alter the Standard do so at their own risk and should obtain specialist advice as to whether it is suitable for a particular project.
  - (4) Contractors should ensure that they satisfy the requirements of payment for unfixed plant and materials.
  - (5) Legislation has come into force in some jurisdictions dealing with security of payments. Parties intending to use this Standard should seek expert advice as to their rights and obligations under such legislation.
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# Australian Standard

## General conditions of contract for design and construct

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### 1 Interpretation and construction of Contract

#### 1.1 Definitions

In the *Contract*, except where the context otherwise requires:

- adjoining site** means any property adjoining the site.
- Approvals** means any approvals, consents, certificates, permits, endorsements, licences conditions or requirements (and any variations to them) which may be required by law for the *Contractor* to carry out the *WUC* and which may be imposed on *the Works* by any *Authority*.
- Authority** means any governmental or non-governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, Minister, statutory corporation or instrumentality and any private electricity, telecommunications or other utility company having statutory rights in relation to *the Works* or the *WUC*
- Business day** means any day which is not:
- (1) a Saturday, Sunday or public holiday in New South Wales; or
  - (2) 27, 28, 29, 30 and 31 December.
- Consent Authority** means Engineering Building & Infrastructure Pty Ltd acting in its capacity as planning authority, consent authority or regulatory authority under the *Environmental Planning and Assessment Act 1979* (NSW), the *Local Government Act 1993* (NSW) or other applicable legislation.
- Certificate of practical completion** means a certificate issued under clause 36.8 certifying that practical completion has been achieved.
- compensable cause** means:
- (1) any act, default or omission of the Superintendent, the *Principal* or its consultants, agents or other contractors (not being employed by the *Contractor*); or
  - (2) those listed in *Item* 31, but does not include:
- (3) an act or omission permitted under the *Contract*;
  - (4) *inclement weather* and/or its effects; and
  - (5) any *direction* (including the *direction* of a *variation*) given by the *Principal* or the *Superintendent* arising as a direct result of government mandates or orders pertaining to a pandemic.
- construction program** has the meaning in clause 34.3.

***construction plant***

means appliances and things used in the carrying out of *WUC* but not forming part of *the Works*.

|  |   |
|--|---|
| <b>Consultant</b>                      | means any person engaged by the <i>Contractor</i> to perform consultancy services in connection with the <i>WUC</i> from time to time;  |
| <b>Contamination</b>                   | means the presence in, on or under land (including both surface and ground water and air) of a substance (whether solid, liquid, gas odour, heat, sound, vibration or radiation) at a concentration above the concentration at which the substance is normally or naturally present in, on or under (respectively) land (including both surface and ground water) or waters in the same locality, being a presence that presents a risk of harm to human health or any aspect of the environment. The terms 'contaminant' and 'contaminated' have corresponding meanings.   |
| <b>Contract</b>                        | has the meaning in clause 6.  |
| <b>Contract Documents</b>              | means <ul style="list-style-type: none"> <li>(1) the <i>Contract</i>;</li> <li>(2) the <i>Tender Documents</i>;</li> <li>(3) any drawings, specifications, shop drawings, calculations and other documents and information, meeting the requirements of clause 8.4, which the <i>Contractor</i> must use to perform <i>the Works</i> in accordance with the <i>Contract</i>.</li> </ul>   |
| <b>contract sum</b>                    | means: <ul style="list-style-type: none"> <li>(1) where the <i>Principal</i> accepted a lump sum, the lump sum;</li> <li>(2) where the <i>Principal</i> accepted rates, the sum of the products ascertained by multiplying the rates in the priced <i>schedule of rates</i>; or</li> <li>(3) where the <i>Principal</i> accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (1) and (2),</li> </ul> including <i>provisional sums</i> but excluding any additions or deductions which may be required to be made under the <i>Contract</i> . |
| <b>Contractor</b>                      | means the <i>Contractor</i> stated in <i>Item 3</i> .   |
| <b>Contractor's design obligations</b> | means all tasks necessary to design and specify <i>the Works</i> required by the <i>Contract</i> , including preparation of the <i>design documents</i> and, if the documents stated in <i>Item 10</i> as describing the <i>Principal's project requirements</i> include a <i>preliminary design</i> , developing the <i>preliminary design</i> ;   |
| <b>Date for practical completion</b>   | means: <ul style="list-style-type: none"> <li>(1) where <i>Item 7(a)</i> provides a date for <i>practical completion</i>, the date;</li> <li>(2) where <i>Item 7(b)</i> provides a period of time for <i>practical completion</i>, the last day of the period,</li> </ul> but if any <i>EOT</i> for <i>practical completion</i> is directed by the <i>Superintendent</i> or allowed in any arbitration or litigation, it means the date resulting from that direction.  |

**date of acceptance of tender** means the date which appears on the written notice of acceptance of the tender.

**date of practical completion** means:

- (1) the date certified by the *Superintendent* in a *certificate of practical completion* to be the date upon which *practical completion* was reached; or
- (2) where another date is determined in any arbitration or litigation as the date upon which *practical completion* was reached, that other date.

**deed of guarantee, undertaking and substitution** has the meaning in clause 5.6.

**defects** includes:

- (1) any defect or deficiency in *the Works*;
- (2) any defect, shrinkage, fault or omission in *WUC* or *the Works*;
- (3) any aspect of *the Works* that is not in accordance with the *Contract*;
- (4) any loss or diminishing of functionality or capability; and
- (5) any damage to *WUC* or *the Works* resulting from any such defect.

**defects liability period** has the meaning in clause 37.

**design documents** means drawings, specifications and other representations in graphic, textual or other form, information, samples, models, patterns and the like required by the *Contract* for the *WUC*.

**Development Consent Conditions** means the conditions of consent for the *WUC* imposed by the *Consent Authority*.

**dispute** has the meaning in clause 44.

**direction** includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.

**Environment** includes any aspects of the site and the surroundings of the site including:

- (1) the physical characteristics of those surroundings such as the land, the waters and the atmosphere;
- (2) the biological characteristics of those surroundings such as the animals, plants and other forms of life; and
- (3) the aesthetic characteristics of those surroundings such as their appearance, sounds, smells, tastes and textures;

***EOT (from 'extension of time')***

has the meaning in clause 36.6.

***excepted risk***

has the meaning in clause 14

|   |  |
|---|--|
| <b><i>final certificate</i></b>           | has the meaning in clause 39.6.  |
| <b><i>final payment</i></b>               | has the meaning in clause 39.6.  |
| <b><i>final payment claim</i></b>         | means the final payment claim referred to in clause 39.6.  |
| <b><i>GST</i></b>                         | has the meaning given in s195-1 of the GST Act.  |
| <b><i>GST Act</i></b>                     | means <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).   |
| <b><i>hazardous materials</i></b>         | means any material that is or is potentially damaging to the environment and includes all Dangerous Goods (as that term is defined by the <i>Occupational Health and Safety Amendment (Dangerous Goods) Act 2003</i> as amended from time to time) and any waste, <i>contamination</i> or pollution referred to in the <i>Environmentally Hazardous Chemicals Act 1985</i> , <i>Contaminated Land Management Act 1997</i> or the <i>Protection of the Environment Operations Act 1997</i> as amended from time to time.          |
| <b><i>Heavy Vehicle Legislation</i></b>   | means the: <ul style="list-style-type: none"> <li>(1) Heavy Vehicle National Law (NSW);</li> <li>(2) Heavy Vehicle (Fatigue Management) National Regulation (NSW);</li> <li>(3) Heavy Vehicle (General) National Regulation (NSW);</li> <li>(4) Heavy Vehicle (Mass, Dimension and Loading) National Regulation (NSW);</li> <li>(5) Heavy Vehicle (Vehicle Standards) National Regulation (NSW); and</li> <li>(6) Heavy Vehicle (Registration) National Regulation (NSW).</li> </ul>   |
| <b><i>inclement weather</i></b>           | means rain and/or hail or other extreme weather conditions at the <i>site</i> (excluding the effects thereof) which has, in the opinion of the <i>Superintendent</i> , been sufficient in intensity to delay (and has in fact delayed) an activity on the critical path of <i>the Works</i> ;  |
| <b><i>Intellectual property right</i></b> | means any patent, registered design, trademark or name, copyright or other protected right.  |
| <b><i>Item</i></b>                        | means an <i>Item</i> in Annexure Part A.   |
| <b><i>latent condition</i></b>            | has the meaning in clause 27.  |
| <b><i>legislative requirement</i></b>     | includes: <ul style="list-style-type: none"> <li>(1) (Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where <i>WUC</i> or the particular part thereof is being carried out;</li> <li>(2) (the requirements of any <i>Consent Authority</i> or other <i>Authority</i> with jurisdiction with respect to the <i>WUC</i>;</li> <li>(3) <i>Approvals</i>;</li> <li>(4) Australian Standards and the Building Code of Australia and any other relevant standards, as amended,</li> </ul> |

replaced or updated from time to time; and

- (5) (fees and charges payable in connection with the foregoing,

including but not limited to development consents issued by any *Consent Authority* relating to the performance of *WUC*.

**Modern Slavery**

means:

- (1) any offence under Division 270 or Division 271 of the *Criminal Code Act 1995* (Cth) as amended from time to time;
- (2) the holding (or the arranging or facilitating of the holding) of another person in slavery or servitude, or forcing another person to undertake compulsory labour, where a person knows or ought to know that the other person is being forced to perform compulsory labour;
- (3) the arranging or facilitating (or aiding the arranging or facilitating) of the travel of another person with a view to that person being exploited;
- (4) trafficking (or the arranging or facilitating of the trafficking) in persons, within the meaning of any international protocol or international convention on that subject binding on Australia from time to time; or
- (5) the arranging or facilitating (or aiding the arranging or facilitating) of work conditions contravening the principles and objectives of International Labour Organisation conventions C029, C105, C138 and/or C182.

**Modern Slavery Legislation**

means any law of the Commonwealth of Australia or any State or Territory of Australia (including any applicable common law, law of equity, any written law, statute or regulation or other instrument made under statute by any *Authority*) pertaining to Modern Slavery, including the *Modern Slavery Act 2018* (NSW).

**PPSA**

means the *Personal Property Securities Act 2009* (Cth);

**No Claim**

means no claim for any monies or for any adjustment to the *contract sum* or for any *EOT* for *practical completion* or for costs, expense, loss or damage on any basis whatsoever including, no claim:

- (1) pursuant to contract;
- (2) in tort (including negligence);
- (3) on a quantum meruit;
- (4) pursuant to quasi contract;
- (5) for unjust enrichment; or

without limitation pursuant to any other principle of law or equity;

**payment schedule**

has the meaning in clause 39.3.

**practical completion**

is that stage in the carrying out and completion of *WUC* when:

- (1) *the Works* concerned have been substantially completed in accordance with the requirements for those works under the *Contract*, save for insignificant omissions and



*defects:*

- (a) which do not prevent *the Works* from being used for their stated purpose;
  - (b) which the *Superintendent* determines the *Contractor* has reasonable grounds for not promptly rectifying;
  - (c) the rectification of which will not prejudice the use of *the Works*; and
  - (d) all debris, rubbish, building materials and construction plant has been removed from the site and the site has been cleaned, and
- (2) the *Superintendent* is satisfied as to such of the following matters (in accordance with the requirements for those works under the *Contract*):
- (a) there is no physical or legal impediment to the ongoing use of the *site*;
  - (b) all documents and reports (including but not limited to final Work as Executed drawings, progress reports and monitoring data) have been supplied to the *Superintendent*;
  - (c) all fittings, mechanical and electrical equipment are in fully operational condition;
  - (d) all planting, restoration and rehabilitation works have been completed (where applicable);
  - (e) all keys issued for the *site* have been returned;
  - (f) all constructed works and facilities required by the *Contract* function properly under all weather conditions;
  - (g) *the Works* are compliant with all *legislative requirements*;
  - (h) a defects inspection has been carried out by the *Superintendent* and the *Contractor* and, in respect of all defects identified at the date of the inspection, a program for rectification of the defects has been approved by the *Superintendent*; and
  - (i) In relation to Engineering Works, the *Superintendent* has received written evidence from the *Contractor* that those tests that have been specified and are required by the *Contract* to be carried out and passed, have been carried out and passed and that *the Works* are deemed by the PCA or Certifier to be complete and acceptable;
  - (j) In relation to Potable Water Reticulation Works, the *Superintendent* has received written evidence from the *Contractor* that those tests that have been specified and are required by the *Contract* to be carried out and passed, have been carried out and passed and that *the Works* have been connected to the reticulated water supply and are operational;
  - (k) In relation to Waste Water Reticulation Works, the

*Superintendent* has received written evidence from the *Contractor* that those tests that have been specified and are required by the *Contract* to be carried out and passed, have been carried out and passed and that *the Works* have been connected to the reticulated sewerage system and are operational;

- (l) In relation to Electrical Works, the *Superintendent* has received written evidence from the *Contractor* that those tests that have been specified and are required by the *Contract* to be carried out and passed, have been carried out and passed and that *the Works* have been connected to the reticulated electrical supply, are energised and are operational;

***preliminary design***

means the documents stated in *Item 11*;

***Principal***

means the *Principal* stated in *Item 1*.

***Principal's project requirements***

means the *Principal's* written requirements for *the Works* described in the documents stated in *Item 10* which:

- (1) must include the stated purpose for which the Works are intended;
- (2) may include the *Principal's* design, timing and cost objectives for the Works; and
- (3) where stated in *Item 10*, must include a preliminary design;

***program***

has the meaning in clause 34;

***public liability policy***

has the meaning in clause 17.

***qualifying cause of delay***

means:

- (1) (delay or disruption caused by the *Superintendent*, the *Principal* (including as a direct result of government mandates or orders pertaining to a pandemic) or its consultants, agents or other contractors (not being employed by the *Contractor*);
- (2) *inclement weather*;
- (3) state-wide industrial conditions, being a dispute in the building industry which is not restricted to the site;
- (4) an *excepted risk*; or
- (5) any delay arising directly as a result of material supply, a government direction, regulation, or change in law enacted to address a pandemic (so long as it could not have been mitigated),

other than:

- (6) (a breach or omission by the *Contractor*;
- (7) (state-wide industrial conditions or *inclement weather* occurring after the *date for practical completion*; and
- (8) stated in *Item 28*;

***recipient-created tax invoice***

means the document issued in accordance with the *Goods and Services Tax Ruling 2000/10*, which reflects the amount on the *payment schedule* issued, and owing, by the *Principal* to the

*Contractor.*

|   |   |
|---|---|
| <b><i>schedule of rates</i></b>               | means any schedule included in the <i>Contract</i> which, in respect of any section or item of <i>work</i> to be carried out, shows the proportion, percentage, rate or respective rates of payment for the execution of that <i>work</i> and which may also include lump sums, <i>provisional sums</i> , other sums, quantities and prices.  |
| <b><i>security</i></b>                        | means the security in the form and amount or percentage of the <i>contract sum</i> stated in <i>Item 14(b)</i> (the form in Annexure Part B is approved).   |
| <b><i>security interest</i></b>               | means any bill of sale (as defined in any statute), mortgage, charge, lien, pledge, title retention arrangement, trust or power as, or in effect as, security for the payment of a monetary obligation or the observance of any other obligation or any security interest under the <i>PPSA</i> .   |
| <b><i>Security of Payment Act</i></b>         | means the <i>Building and Construction Industry Security of Payment Act 1999</i> (NSW) and its regulations.   |
| <b><i>selected subcontract work</i></b>       | has the meaning in clause 9.3.  |
| <b><i>selected subcontractor</i></b>          | has the meaning in clause 9.3.  |
| <b><i>separable portion</i></b>               | means a portion of <i>the Works</i> identified as such in the <i>Contract</i> or by the <i>Superintendent</i> pursuant to clause 4 or as otherwise set out in the <i>Contract</i> .   |
| <b><i>separate contractor</i></b>             | has the meaning it has in clause 56.1.  |
| <b><i>separate contractor works</i></b>       | has the meaning it has in clause 56.1.  |
| <b><i>site</i></b>                            | means the lands and other places to be made available and any other lands and places made available to the <i>Contractor</i> by the <i>Principal</i> for the purpose of the <i>Contract</i> .   |
| <b><i>Subcontractor</i></b>                   | means a subcontractor engaged in the conduct of the <i>WUC</i> and includes a <i>consultant</i> .   |
| <b><i>Superintendent</i></b>                  | means the person stated in <i>Item 5</i> as the <i>Superintendent</i> or other person from time to time appointed in writing by the <i>Principal</i> to be the <i>Superintendent</i> and notified as such in writing to the <i>Contractor</i> by the <i>Principal</i> and, so far as concerns the functions exercisable by a <i>Superintendent's Representative</i> , includes a <i>Superintendent's Representative</i> . |
| <b><i>Superintendent's Representative</i></b> | means an individual appointed in writing by the <i>Superintendent</i> under clause 23.  |
| <b><i>Survey mark</i></b>                     | in clause 28 means a survey peg, bench mark, reference mark, signal, alignment, level mark or any other mark for the purpose of setting out, checking or measuring <i>WUC</i> .   |
| <b><i>Temporary works</i></b>                 | means <i>work</i> used in carrying out and completing <i>WUC</i> , but not forming part of <i>the Works</i> .   |

**Tender Documents**

means:

- (1) the *Principal's* Request for Tender;
- (2) any addendums or clarifications to the Request for Tender;
- (3) the Tender lodged by the *Contractor* in response to the Request for Tender; and
- (4) the letter of acceptance of the Tender issued by the *Principal*.

**Test**

has the meaning in clause 32.1 and includes examine and measure.

**The Works**

Means the whole of the *work* to be carried out and completed in accordance with the *Contract*, including *variations* provided for by the *Contract*, which is to be handed over to the *Principal*.

**variation**

has the meaning in clause 38.

**work**

includes the provision of materials.

**WUC (from 'work under the Contract')**

means the *work* which the *Contractor* is or may be required to carry out and complete under the *Contract* and includes *variations*, remedial *work*, *construction plant* and *temporary works*, and like words have a corresponding meaning.

**1.2 Interpretation**

In the *Contract*:

- (1) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or un-incorporate;
- (2) time for doing any act or thing under the *Contract*, if it ends on a Saturday, Sunday or Statutory or Public Holiday, is to be deemed to end on the day next following which is not a Saturday, Sunday or Statutory or Public Holiday;
- (3) clause headings and subclause headings in these General Conditions of Contract do not form part of these General Conditions and are not be used in the interpretation of the *Contract*;
- (4) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender;
- (5) communications between the *Principal*, the *Superintendent* and the *Contractor* must be in the English language;
- (6) measurements of physical quantities must be in legal units of measurement of the jurisdiction in *Item 8*;
- (7) unless otherwise provided, prices are in the currency in *Item 9(a)* and payments must be made in that currency at the place in *Item 9(b)*; and
- (8) the law governing the *Contract*, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in *Item 8*.

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**2 Nature of Contract****2.1 Performance and Payment**

- (1) The *Contractor* must carry out and complete the *WUC* in accordance with the *Contract* and directions authorised by the *Contract*.

- (2) The *Principal* must pay the *Contractor*:
  - (a) for work for which the *Principal* accepted a lump sum, the lump sum; and
  - (b) for work for which the *Principal* accepted rates, the sum of the products ascertained by multiplying the measured quantity of each section or item of work actually carried out under the *Contract* by the rate accepted by the *Principal* for the section or item,
  - (3) adjusted by any additions or deductions made pursuant to the *Contract*.
- (3) Notwithstanding any other provision of the *Contract*, the *Contractor* will have *No Claim* in connection with or arising out of any work or service not known or described in the *Contract* which is included in one, or some only, but not all of the *Contract Documents* where such work or service is reasonably incidental to properly carrying out of *the Works* or which ought to have been allowed for by a competent contractor.
- (4) Items not expressly stated in the *Contract* but which are necessary for the due and proper completion and performance of the *Contract* will be taken to be included as part of the *WUC*.

## 2.2 Contract Sum is a Lump Sum

- (1) The *Contractor* acknowledges and agrees that the *contract sum*, adjusted by any additions or deductions made pursuant to the *Contract*:
  - (a) is the fixed lump sum price for the *WUC*; and
  - (b) is not subject to any adjustment in respect of site allowances or because of fluctuations in changes in the costs of labour and materials or otherwise.
- (2) The *Contractor* further acknowledges and agrees that will have *No Claim* in respect of any payments which the *Contractor* may be obliged to make on behalf of its employees in respect of any superannuation fund, scheme or arrangement for the benefit of workers or otherwise which is in existence at the date of the *Contract* or which comes into existence after the date of the *Contract*.

## 2.3 Contractor to Inform Itself

- (1) Without limiting any other provisions in the *Contract*, the *Contractor* warrants to the *Principal* that it has fully informed itself with respect to all matters that are relevant to the completion of the *WUC*, including but not limited to:
  - (a) the nature and requirements of the work and materials necessary for the execution of *the Works* and the means of access to and facilities at the site and transport facilities for deliveries to or from the site;
  - (b) the availability and cost of labour including, without limitation, the costs of complying with obligations imposed by an agreement between the relevant building industry unions and employers relating to the execution of construction and building work nationally and in the State or Territory in which *the Works* are situated and the materials required;
  - (c) the correctness and sufficiency of the *contract sum* and that the *contract sum* covers all costs of complying with all its obligations under the *Contract* and of all matters and things necessary for the due and proper performance and completion of *the Works*, taking account of all exigencies or risk inherent in the performance of the *WUC* or assumed by the *Contractor* under the *Contract*;
  - (d) all legislative requirements in relation to *the Works*;
  - (e) that it will at all times be suitably qualified and experienced, and will exercise due skill, care and diligence in the execution and completion of the *WUC*;

- (f) *has examined the preliminary design included in the Principal's project requirements and that such preliminary design is suitable, appropriate and adequate for the purpose stated in the Principal's project requirements;*
  - (g) *must carry out and complete the Contractor's design obligations to accord with the Principal's project requirements and, if clause 9.4 applies, accept the novation and retain the Principal's consultants for any work the subject of a prior contract with the Principal; and*
  - (h) *that construction plant and any goods and materials to be supplied in connection with WUC not otherwise specified will be new and will be fit for the purposes for which they are intended as set out in this Contract;*
  - (i) *it has the resources, commitment and appropriate and experienced personnel available to carry out the WUC;*
  - (j) *it has examined all information obtainable by the making of reasonable enquiries and relevant to the risks, contingencies and other circumstances having an effect on the WUC;*
  - (k) *the Works are capable of being constructed in accordance with the design documents; and*
  - (l) *will execute and complete the Works:*
    - (i) *in accordance with the design documents; and*
    - (ii) *when completed, the Works comply with all the requirements of the Contract and all legislative requirements.*
- (2) The *Contractor* further warrants and represents that it has thoroughly and comprehensively:
- (a) *examined all the information made available to it by the Principal for the purpose of tendering including the drawings, specification, schedules, conditions of tendering, reports, diagrams, contract conditions, Development Consent Conditions and the like;*
  - (b) *examined all information relevant to the risks, contingencies and other circumstances which could affect its tender and the contract sum, which is obtainable by the making of reasonable enquiries;*
  - (c) *carefully examined the site, existing works, services, utilities and their surroundings;*
  - (d) *informed itself of the extent and nature of existing work and all relevant above ground physical conditions of the site and at or near the site; and*
  - (e) *informed itself of the extent and nature of:*
    - (i) *the WUC;*
    - (ii) *the temporary works required or necessary for the execution of the WUC;*
    - (iii) *the means of access to, egress from, and facilities at the site and transport facilities for deliveries to the site;*
    - (iv) *the means of access to, egress from properties adjoining the site;*
    - (v) *the requirements for maintaining pedestrian access to adjacent properties and adjoining sites in accordance with any relevant Traffic and Pedestrian Management Plan, noise restrictions, and maintaining existing services and utilities; and*
  - (f) *informed itself of all issues concerning the existence of potentially hazardous materials (including asbestos) and work health and safety issues that may arise in connection with the WUC and the performance by the Contractor of its obligations under the Contract;*

- (3) The *Contractor* acknowledges and agrees that any breach of a warranty provided by the *Contractor* under paragraphs (1) or (2) will not relieve the *Contractor* of its liability to perform and complete the *WUC* in accordance with the *Contract*.

## **2.4 Implied Work**

- (1) The *Contractor* warrants that:
- (a) it is experienced in the development of design and construction of projects of a nature and complexity which is similar to the *WUC* as depicted in the concept plans through to completion; and
  - (b) it has the competence and experience to understand the nature and complexity of the *WUC* even though the details of the *WUC* are not fully documented.
- (2) The *Contractor* must perform all work and procure all such materials not specifically referred to but which:
- (a) would be required by normal construction practice; and
  - (b) could reasonably be inferred from this *Contract* by a competent and experienced contractor as being required to be performed or procured in undertaking work of the nature and complexity of the *Works*,

for the proper performance of the *WUC*, as if that work or material was specifically referred to in this *Contract*.

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## **3 Provisional sums**

### **3.1 Effect of inclusion in Contract**

- (1) A *provisional sum* included in the *Contract* is not itself payable by the *Principal* and will only become due and payable by the *Principal* in accordance with this clause 3.
- (2) Where, pursuant to a *direction* of the *Superintendent*, the *work* or item to which a *provisional sum* relates is carried out or supplied by the *Contractor*:
- (a) the *Contractor* must submit the price for the *work* or item in accordance with clause 38.4 as if the *Superintendent's direction* was a *direction* to submit a price for the *work* as a *variation*;
  - (b) the *Superintendent* may exercise any of the rights conferred on him in clause 38.4 in respect of the price submitted by the *Contractor*; and
  - (c) if the *work* or item is carried out or supplied by the *Contractor*, that the *work* or item will be priced by the *Superintendent* in accordance with clause 38.6, and the difference will be added to or deducted from the *contract sum*.
- (3) No time related costs will be claimable by the *Contractor* with respect to any *provisional sum*.

### **3.2 Carried out by a subcontractor**

- (1) Where any part of such *work* or item referred to in clause 3.1 is carried out or supplied by a *subcontractor*, the *Superintendent* will allow the amount payable by the *Contractor* to the *subcontractor* for the *work* or item, disregarding:
- (a) any damages payable by the *Contractor* to the *subcontractor* or vice versa; and
  - (b) any deduction of cash discount for prompt payment,
- plus, subject to paragraph (3), an amount for profit and attendance calculated by using the percentage thereon stated in *Item 13* or elsewhere in the *Contract*, or, if not so stated, as assessed by the *Superintendent*.

- (2) The *Superintendent* must only include an allowance for profit or attendance for *work* or an item in the price payable to the *Contractor* under paragraph (1) if the aggregate total of all *provisional sums* approved by the *Superintendent* at any point in time has exceeded the aggregate total allowed for *provisional sums* under the *Contract*.
- (3) If the *Superintendent* is required to make such an allowance, the allowance must only be applied to the amount by which the aggregate total of all approved *provisional sums* at any point in time exceeds the total amount allowed for *provisional sums* under the *Contract*.

### 3.3 Contractor's Warranties

Without limiting the generality of clause , the *Contractor* represents and warrants to the *Principal* that the *Contractor*:

- (1) will engage and retain Consultants who are suitably qualified (including with all necessary licences, certificates and registration) and experienced;
- (2) has examined and carefully checked the concept plans in **Annexure, produced engineering specifications** and satisfied itself that they are suitable, appropriate and adequate for the purpose of the Works;
- (3) must complete the Contractor's design obligations and produce the Design Documents;
- (4) must execute and complete the structural component of the Works;
- (5) will rectify any Defects occurring or becoming apparent during the Defects Liability Period; and
- (6) has inspected the site and its surrounds, and warrants that the site and its ground conditions are suitable for the performance of the WUC prior to the formation of the Contract.

## 4 Separable portions

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*Separable portions* may be directed by the *Superintendent*, who will clearly identify for each, the:

- (1) portion of *the Works*;
- (2) *date for practical completion*;
- (3) conditions precedent for *practical completion* of the relevant *separable portion*; and
- (4) respective amounts for *security*, bonus (if applicable), liquidated damages and delay damages (all calculated pro-rata according to the ratio of the *Superintendent's* valuation of the *separable portion* to the *contract sum*).

## 5 Security

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### 5.1 Provision of Security

- (1) *Security* must be provided in accordance with *Item 14* or *15*.
- (2) The *Contractor* must provide the *security* to the *Principal* within ten (10) *business days* of the date the *Contract* is formed.
- (3) If the *Contractor* fails to provide the *security* to the *Principal* under paragraph (1) or in the time required under paragraph (2), the *Principal* may terminate this *Contract* immediately by notice in writing to that effect to the *Contractor*.
- (4) Unless and until the *Contractor* has provided the *security* in accordance with this clause 5.1:



- (a) the *Principal* is not required to make the *site* available to the *Contractor*, however may do so at its discretion without waiving any of its other rights under the *Contract*; and
- (b) the *Contractor* is not entitled to payment from the *Principal* under this *Contract*.

## 5.2 Maintenance of Security

- (1) It is an essential term of this *Contract* that the *Contractor* ensure that the *security* remains effective until the *Principal* is obliged to return the *security* to the *Contractor*.
- (2) If the *security* has an expiry date, the *Contractor* must ensure that a replacement of the *security* is provided to the *Principal* no later than fifteen (15) *business days* before that expiry date.
- (3) If the *Contractor* fails to comply with paragraph (2), the *Principal* may:
  - (a) terminate this *Contract* immediately by notice in writing to that effect to the *Contractor*; or
  - (b) call on the *security* in which case:
    - (i) the money received by the *Principal* in doing so will be held as cash security under the *Contract* in lieu of the *security*; and
    - (ii) a reference in the *Contract* to the *security* will be deemed to be a reference to such cash security.
- (4) If the *Principal* holds cash security at any time under the *Contract*, the *Principal* is under no obligation to invest that cash, or if it chooses to do so, to pay any interest earned on it to the *Contractor*.

## 5.3 Recourse

- (1) The *Contractor* acknowledges and agrees that:
  - (a) the *security* is provided as security for the performance of the obligations of the *Contractor* under the *Contract*; and
  - (b) the *Principal* may call on the *security* without notice to the *Contractor* to:
    - (i) satisfy any debt owed to the *Principal* by the *Contractor* under the *Contract*; or
    - (ii) compensate the *Principal* for any loss or damage suffered by the *Principal* as a result of a breach of the *Contract* by, or negligence of, the *Contractor*; and
  - (c) the *Principal* may convert the *security* into cash where the *Principal* believes (acting reasonably):
    - (i) the *Contractor* is in breach of any of its obligations under the *Contract*; or
    - (ii) it is entitled to terminate the *Contract*.
- (2) If the *Principal* has recourse to the *security* in accordance with the terms of the *Contract*, the *Contractor*, within ten (10) *business days* of being requested to do so, must provide the *Principal* with additional security so that the value of the *security* which the *Principal* holds under the *Contract* equals the relevant amount specified in *Item 14(b)*.

## 5.4 Reduction and Release

- (1) Upon:
  - (a) the issue of the certificate of practical completion for the last separable portion to reach practical completion (where there are separable portions); or
  - (b) if there are no separable portions, upon the issue of the certificate of practical completion,

the *Principal's* entitlement to *security* (other than in *Item 14(e)*) will be reduced by the percentage or amount in *Item 14(f)* ).

- (2) The reduction of the *security* in paragraphs (1)(a) and (1)(b) will apply subject to an entitlement of the *Superintendent*, acting reasonably, to retain from the *security* an amount commensurate to the value assessed by the *Superintendent* as being the cost for rectifying outstanding *defects*.
- (3) The reduction in *security* in paragraphs (1)(a) and (1)(b) will be released and returned within 10 *business days* to the *Contractor*.
- (4) The *Principal's* entitlement to *security* in *Item 14(e)* will cease 10 *business days* after incorporation into *the Works* of the plant and materials for which that *security* was provided.
- (5) The *Principal's* entitlement otherwise to *security* will cease 10 *business days* after *final certificate*.
- (6) Upon the *Principal's* entitlement to *security* ceasing, the *Principal* will release and return forthwith the *security* to the *Contractor*.

## **5.5 No Injunction**

The *Contractor* acknowledges that it will not at any time take steps to injunct or otherwise restrain:

- (1) any issuer of any *security* contemplated in this clause 5 from paying the *Principal* pursuant to any *security*; or
- (2) the *Principal* from:
  - (a) taking any steps to obtain payment under any *security*;
  - (b) using the moneys received under any *security*; or
  - (c) using any retention moneys held by the *Principal*.

## **5.6 Deed of guarantee, undertaking and substitution**

Where the *Contractor* is a related or subsidiary corporation (as defined in the *Corporations Act 2001* (Cth)) the *Contractor* must, within ten (10) *business days* after receiving a written request from the *Principal* provide a *deed of guarantee, undertaking and substitution* duly executed, enforceable and in a form satisfactory to the *Principal*.

## **5.7 Change of security**

The *Principal* may, at its absolute and sole discretion, agree to the substitution of the then current form of the *security* with another form of *security*. To the extent that another form of *security* is provided, the *Principal* will promptly release and return the then current form of the *security*.

## **5.8 Trusts and interest**

- (1) Except where held by a government department or agency or a municipal, public or statutory authority, any portion of *security* (and interest earned thereon) which is cash or retention moneys, will be held in trust for the party providing them until the *Principal* or the *Contractor* is entitled to receive them.
- (2) Interest earned on *security* not required to be held in trust will belong to the party holding that *security*.

## **5.9 Consultation Fee Structure and Payment Entitlement**

- (1) **Fee Basis** :The Consultant shall receive a fee for the professional services provided under this Agreement, determined by the total construction cost of the project ("Project Value") in accordance with the progressive rates specified below.
- (2) Pre-construction planning is a critical phase that requires meticulous attention to detail and strategic foresight. It involves a comprehensive assessment of all factors that may influence the successful execution of a project. Engaging in thorough analysis and preparation during this stage is essential to mitigate risks and ensure a seamless transition into the construction phase

- (3) The fee structure for consultation, which is to be remitted to the principal contractor, shall be established in accordance with the outlined tiered framework and is to be settled upon the award of the award of the contract.

| Project Value Range<br>(AUD) | Consultation Fee<br>Rate | Applicable Rate                                     |
|------------------------------|--------------------------|---|
| \$500,000 – \$1,000,000      | 7.50%                    | \$45,000 + 7.50c for every \$1 over \$500,000       |
| \$1,000,001 – \$5,000,000    | 7.50%                    | \$120,000 + 7.50c for every \$1 over \$1,000,000    |
| \$5,000,001 – \$10,000,000   | 7.00%                    | \$340,000 + 7.00c for every \$1 over \$5,000,000    |
| \$10,000,001 – \$15,000,000  | 5.50%                    | \$590,000 + 5.50c for every \$1 over \$10,000,000   |
| \$15,000,001 – \$30,000,000  | 5.25%                    | \$880,000 + 5.25c for every \$1 over \$15,000,000   |
| \$30,000,001 – \$50,000,000  | 4.50%                    | \$1,515,000 + 4.50c for every \$1 over \$30,000,000 |
| \$50,000,001 and over        | 4.00%                    | \$3,215,000 + 4.00c for every \$1 over \$50,000,000 |

- (4) Payment claims for the consultant will submit payment claims progressively or at agreed milestones on a monthly basis in accordance with the Building and Construction Industry Security of Payment Act 1999 (NSW) (or applicable legislation in the relevant jurisdiction), reflecting the value of services performed to date.
- (5) Each claim shall include a breakdown of the estimated Project Value and the corresponding consultation fee calculated under clause [5.9].
- (6) Amendment for Variations in Project Expenditure In the event that the Project Value necessitates revision during the duration of this Agreement—whether due to alterations in scope, variations, or updated estimates—the consultation fee shall be modified in accordance with the aforementioned fee structure. The adjusted amount will be duly noted in future payment claims.
- (7) The entitlements associated with Payment Rights in relation to this Agreement does not impose any restrictions on the Consultant's entitlement to pursue payment or seek adjudication in accordance with the Security of Payment legislation pertinent to the applicable State or Territory.
- (8) In regards to the assessment of fees:
- (a) The Project Value shall be determined in alignment with the final approved construction cost, referencing the Rawlinsons Estimate guide. In the event that such finality is not achieved, it will be based on a reasonable forecast that is mutually agreeable to both the Principal awarding and the Consultant.
  - (b) In instances where the project scope exhibits variation, the fee shall be adjusted accordingly, in proportion to the aforementioned rates.
  - (c) The Consultant is obliged to submit payment claims in accordance with Clause 5 and may invoke the Security of Payment legislation pertinent to the applicable jurisdiction.
  - (d) The adjustment of the Fee shall be contingent upon the Project Value, which shall be reasonably estimated at the outset of the services rendered. The Fee shall be subject to adjustment in the event that the Project Value is altered as a result of approved variations, changes in scope, or revised cost estimates. Furthermore, the Consultant shall have the right to issue a variation in accordance with Clause 15 of AS 4122 (or its equivalent).

#### **5.10 Preliminary Fees and Administrative Charges**

The Principal acknowledges and agrees that the following fixed fees are payable to the Consultant in relation to project establishment and administrative services, and are not contingent upon the

award or progression of any construction contract:

- (a) A fixed fee of \$4,000 AUD, exclusive of GST, shall be charged for the preparation of a project-specific estimate, scoping review, or feasibility advice for projects valued under \$50,000,000 AUD.
- (b) An administration fee amounting to \$1,877.37 AUD, exclusive of GST, which encompasses the establishment of files, the processing of compliance matters, and the management of internal documentation.

These fees shall be invoiced upon engagement of the Consultant to prepare an estimate or commence pre-contract services and are payable within the time stated in Clause 5.6 of this Agreement or as otherwise agreed in writing. These charges are **non-refundable** and **payable irrespective of whether the Principal proceeds with the Consultant for the full scope of services or awards the construction contract to another party.**

#### 5.11 Structural And Other Engineering Fees

- (1) The remuneration due to the Consultant for structural engineering services pursuant to this Agreement shall be determined at a rate of 3.5% of the total estimated construction cost, as mutually agreed in writing by the Principal and the Consultant.
- (2) The overall planned cost of construction will be established at the initiation of services and may be subject to modification through mutual written consent should there be alterations in the project scope, budget, or prevailing market rates.
- (3) Invoices will be generated following the conclusion of each phase or in line with the payment timetable established in Schedule 2. All fees are exclusive of GST unless explicitly stated otherwise.
- (4) In the event of a revision to the estimated construction cost, the structural engineering fee shall be adjusted proportionally at the agreed rate of 3.5%.
- (5) The structural engineering fee shall be payable progressively, based on the following project milestones:

| Stage                                 | % of Structural and other Engineering services Fee |
|---------------------------------------|--|
| Concept & Mathematical Design         | 50%  |
| Detailed Design Plans & Documentation | 30%  |
| Construction Phase Services           | 20%  |

#### 5.12 Project Management Fee

- (1) The Consultant shall receive a predetermined project management fee, as mutually agreed upon in writing by the parties, distinct from any other design or consultancy fees stipulated in this Agreement.
- (2) The project management fee is not subject to retention and shall be excluded from any retention money withheld by the Principal under this Agreement or any related security or holdback provision.
- (3) The fee shall be remitted in its entirety through a series of progressive milestone payments, which shall be established in alignment with the defined scope of works and the aggregate sum of the construction endeavours. It is imperative that such milestones be established in writing before the

initiation of project management services, and may encompass, though not be restricted to, the following:

- (a) The process of acquiring and engaging contractors
- (b) The initiation of construction activities on the premises
- (c) Progress evaluations
- (d) Practical completion occurs upon the release of the retention money that has been withheld.

## **6 Evidence of Contract**

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### **6.1 Formation of the Contract**

The *Contractor* acknowledges and agrees that the *Contract* is formed in accordance with, and subject to, the terms contained in the *Tender Documents* issued by the *Principal* in respect to *the Works and engineering standards*.

## **6.2 Execution of a Formal Instrument of Agreement**

- (1) *he Contractor must* complied with clause execute a Formal Instrument of Agreement evidencing the terms of the *Contract* in accordance with the *Tender Documents* issued by *Principal* with respect to *the Works*.
- (2) If the *Contractor* fails to comply with paragraph (1):
  - (a) the *Principal* is not required to make the *site* available to the *Contractor*, however may do so at its discretion without waiving any of its other rights under the *Contract*;
  - (b) the *Contractor* is not entitled to payment f rom the *Principal* under the *Contract*; and
  - (c) the *Principal* may terminate the *Contract* immediately by notice in writing to that effect to the *Contractor*.
- (3) *Any failure by the Contractor to comply with paragraph (1) does not affect the validity of the Contract formed in accordance with clause*

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## **7 Service of notices**

### **7.1 AService**

Excluding notices given under clauses 41, 43 and 44 a notice is (and other documents are) deemed to have been given and received:

- (1) if addressed or delivered to the relevant party using any web-based system in accordance with clause 7.2;
- (2) if hand delivered, on the date of delivery but, if delivery occurs after 4.00pm New South Wales time or on a day which is not a *business day*, it is taken to be received on the next *business day*;
- (3) if sent by prepaid ordinary mail within Australia, on the date that is 3 *business days* after posting; and
- (4) on the earliest date of:
  - (a) actual receipt; or
  - (b) *onfirmation of correct transmission, provided that if transmitted after 4.00pm (at the place of three (receipt) it is deemed to have been received on the next business day.*

### **7.2 Email Transmission**

Excluding notices given under clauses 41, 43 and 44 (which must be served by registered post), notices under the *Contract* may be sent by email or via a web-based Contract Management system in response to a prior written *direction* of the *Superintendent* and will be deemed to have been received once sent unless:

- (1) the sender receives notice that the email transmission has been unsuccessful or could not be delivered;
- (2) an out of office notice indicates that the recipient is unavailable; or
- (3) the email is sent on a day which is not a *business day* in which case it will be deemed to have been received on the next *business day*.

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## **8 Contract documents**

### **8.1 Discrepancies**

- (1) Figures will prevail over scaled dimensions in a discrepancy. Otherwise, if either party discovers any error, omission, inconsistency, ambiguity or discrepancy in or in between any document prepared for the purpose of carrying out *WUC* or forming part of the *Contract* that party will give the *Superintendent* written notice of it and if that party is the *Contractor* must give that notice before commencing the relevant *WUC*. The *Superintendent*, thereupon, and upon otherwise becoming aware, will direct the *Contractor* as to the interpretation and construction to be followed.
- (2) TWhen construing the documents which form the *Contract* the following rules of construction apply:
  - (a) in the event of any inconsistency between the documents which form the *Contract*, the documents comprising the *Contract* must be construed in the order of precedence they are listed in the Formal Instrument of Agreement, or if there is no such Agreement formed, in the order of precedence listed in the *Tender Documents*;
  - (b) notwithstanding paragraph (a):
    - (i) where inconsistent levels of quality are required, the higher level of quality applies;
    - (ii) figured dimensions take precedence over scaled dimensions;
    - (iii) drawings made to larger scales take precedence over drawings made to smaller scales;
    - (iv) *requirements* If compliance with of quality or any aspect of *WUC* are not expressly specified or depicted, the quality will be consistent with the intended purpose of *the Works*; and
    - (v) drawings showing particular parts of *WUC* take precedence over drawings for more general purposes.

## 8.2 Clarification

- (1) Where the *Contractor* considers that there is an ambiguity or discrepancy between the documents comprising the *Contract*, it may advise the *Superintendent* in writing, who must give the *Contractor* a *direction* as to the interpretation to be followed.
- (2) The *Contractor* will have *No Claim* as a consequence of a *direction* given by the *Superintendent* under this clause which is consistent with the rules of construction set out in clause 8.1.
- (3) The If a *direction* given by the *Superintendent* under this clause is not consistent with the rules of construction set out in clause 8.1 the *direction* of the *Superintendent* under this clause will be deemed to be a *direction* for a *variation* to which clause 38.1 applies.
- (4) The *Superintendent* may direct that any request by the *Contractor* for information or clarification concerning the works or anything related to them is unreasonable.
- (5) If the *Superintendent* makes a determination under paragraph (4):
  - (a) neither the *Superintendent* nor the *Principal* are obliged to respond to the request;
  - (b) the *Contractor* may not make the same request of either the *Superintendent* or the *Principal*; and
  - (c) the *Contractor* is not entitled to any additional money or time on account of the request or anything arising f rom it.

## 8.3 Principal Supplied Documents

- (1) The *Principal* must supply to the *Contractor* the documents and number of copies thereof, both stated in *Item 16*.
- (2) Those *Items* will:
  - (a) remain the *Principal's* property and be returned to the *Principal* on written demand; and

- (b) must not be used, copied nor reproduced for any purpose other than *WUC*.
- (3) The *Principal* does not warrant, guarantee or make any representation about the accuracy of any information data and documents made available to the *Contractor* by the *Principal* or anyone on behalf of the *Principal* before the date of commencement of the *WUC* and to the extent permitted by law, the *Principal* will not be liable upon any claim by the *Contractor* arising out of, or in any way connected with, such information, data and documents.
- (4) Without limiting clause 27.1, the *Contractor*:
  - (a) warrants that it did not in any way rely upon:
    - (i) any information, data, representation, statement or document made available to the *Contractor* by the *Principal* or anyone on the behalf of the *Principal*; or
    - (ii) the accuracy or adequacy of any such information, data, representation, statement or document for the purposes of entering into the *Contract*; and
  - (b) warrants to the *Principal* that it enters into the *Contract* based on its own investigations, interpretations, deductions, information and determinations.

#### **8.4 Contractor Supplied Documents**

- (1) The *Contractor* must supply to the *Superintendent* the documents and number of copies thereof, both stated elsewhere in the *Contract*.
- (2) Other documents and information required by the *Contract*, unless elsewhere stated in the *Contract*, must be supplied not less than 10 *business days* before the *work* described in the documents is commenced and must be in a form satisfactory to the *Superintendent*.
- (3) If the *Contractor* submits documents to the *Superintendent*, then except where the *Contract* otherwise provides:
  - (a) the *Superintendent* is not required to check such documents for errors, omissions, inconsistencies, ambiguities, discrepancies or compliance with the *Contract*;
  - (b) notwithstanding clause 22, any *Superintendent's* acknowledgment or approval does not prejudice the *Contractor's* obligations; and
  - (c) if the *Contract* requires the *Contractor* to obtain the *Superintendent's direction* about such documents, the *Superintendent* will give, within the time stated in *Item 18*, the appropriate *direction*, including reasons if the documents are not suitable.
- (4) A direction by the *Superintendent* to vary anything in the design documents is to be a variation to *WUC* only to the extent that the design documents, before such variation, complied, or would have complied, with the *Principal's* project requirements.
- (5) Copies of documents supplied by the *Contractor* are the *Principal's* property but will not be used or copied otherwise than for the use, repair, maintenance or alteration of the *Works*.

#### **8.5 Availability**

The *Contractor* must keep available to the *Superintendent* and the *Principal*:

- (1) on *site*, one complete set of documents affecting *WUC* and supplied by a party or the *Superintendent*; and
- (2) at the place of manufacture or assembly of any significant part of *WUC* off *site*, a set of the documents affecting that part.

#### **8.6 Confidential information**

- (1) The parties must ensure that there are kept confidential such documents, samples, models, patterns and other information as are supplied and clearly identified as confidential.



- (2) If required in writing by a party, the other party must enter into a separate agreement not to disclose to anyone else any confidential matter even after *final certificate* or earlier termination of the *Contract*. If so required by the *Contractor*, the *Principal* must ensure that the *Superintendent* also enters into such an agreement.

#### **8.7 Media**

The *Contractor* must not disclose any information concerning the project for distribution through any communications media without the *Principal's* prior written approval (which will not be unreasonably withheld). The *Contractor* must refer to the *Principal* any enquiries from any media concerning the project.

#### **8.8 As-Built Drawings**

- (1) The *Contractor* must submit to the *Principal* a draft set of 'as-built' drawings of the *WUC* not less than one month prior to *practical completion*.
- (2) Reviewed documents will be returned to the *Contractor* for correction as necessary and 2 final and complete sets must be issued to the *Superintendent* as a precondition to *practical completion*.
- (3) Failing provision of final and complete sets of 'as-built' drawings on *practical completion*, the *Principal* may, at its discretion, withhold the release of the *security* which would otherwise be released under clause 5.4 on achieving *practical completion* until such time as the *Contractor* does provide the 'as-built' drawings to the *Superintendent's* reasonable satisfaction.
- (4) Should the *Contractor* fail to provide the required documents within a reasonable period of time after *practical completion*, the *Principal* may engage others to provide the documents and any costs incurred by the *Principal* will become a debt due from the *Contractor* to the *Principal* under the *Contract*, which can be recovered by the *Principal* from the *security*.

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### **9 Assignment and subcontracting**

#### **9.1 Assignment**

The *Contractor* must not assign the *Contract* or any payment or any other right, benefit or interest under the *Contract* without the *Principal's* prior written approval (including terms).

#### **9.2 Subcontracting generally**

- (1) The *Contractor* must engage and retain the consultants identified in the *Contractor's* tender.
- (2) The *Contractor* must not without the *Superintendent's* prior written approval (which will not be unreasonably withheld):
  - (a) subcontract or allow a *subcontractor* to subcontract any *work* described in *Item 19*; or
  - (b) allow a *subcontractor* to assign a subcontract or any payment or any other right, benefit or interest under the relevant subcontract.
- (3) With a request for approval, the *Contractor* must give the *Superintendent* written particulars of the *work* to be subcontracted and the name and address of the proposed subcontractor. The *Contractor* must give the *Superintendent* other information which the *Superintendent* reasonably requests, including the proposed subcontract documents without prices.
- (4) Within ten (10) *business days* of the *Contractor's* request for approval, the *Superintendent* will give the *Contractor* written notice of approval or of the reasons why approval is not given.
- (5) Approval may be conditional upon the subcontract including:
  - (a) provision that the *subcontractor* must not assign nor subcontract without the *Contractor's* written consent;

- (b) provisions which may be reasonably necessary to enable the *Contractor* to fulfil the *Contractor's* obligations to the *Principal*;
  - (c) where the *subcontractor* is a *consultant*, provision that the *subcontractor* must effect and maintain professional indemnity insurance on the same terms as are required under *Items 24(c) and 24(d)*; and
  - (d) provision that if the *Contract* is terminated and upon the *subcontractor* being paid the sum certified by the *Superintendent* as owing to the *subcontractor*, the *Contractor* and the *subcontractor* must, after the *Principal* has done so, promptly execute a deed of novation in the form approved by the *Principal*.
- (6) For the purpose of effecting such novation only, the *Contractor* hereby irrevocably appoints the *Superintendent* to be the *Contractor's* attorney with authority to execute such documents as are necessary to give effect to the novation and to bind the *Contractor* accordingly.
- (7) The *Contractor* agrees that:
- (a) all *subcontractors* engaged in connection with carrying out the *WUC* are engaged as independent contractors to the *Contractor*;
  - (b) it will not hold itself out, or purport to hold itself out, as being the agent of the *Principal* in connection with the execution of any subcontract or any subcontract works; and
  - (c) it has no authority to contract or otherwise deal with any tenderer, or any *subcontractor* or any person, as agent for, or on behalf of, the *Principal* and will not purport to have any such authority.

### 9.3 Selected Subcontract Work

- (1) If the *Principal* has included in the *Tender Documents* a list of one or more *selected subcontractors* for particular work, the *Contractor* must subcontract that work to a *selected subcontractor* and thereupon give the *Superintendent* written notice of that *selected subcontractor's* name.
- (2) If no *subcontractor* on the *Principal's* list will subcontract to carry out the *selected subcontract work*, the *Contractor* must provide a list for the written approval of the *Superintendent*.
- (3) The *Contractor* must provide, at no cost to any *selected subcontractors*, the normal facilities for the proper performance of the nominated subcontract works concerned, including the following:
  - (a) storage areas,
  - (b) messing, changing, and sanitary accommodation, and
  - (c) water, power, lighting and other services necessary for the performance of the work.

### 9.4 Novation

When directed by the *Principal*, the *Contractor*, without being entitled to compensation, must promptly execute a deed of novation in a form required by the *Principal*, acting reasonably, such deed being between the *Principal*, the *Contractor* and the subcontractor or *selected subcontractor* stated in *Item 20* for the particular part of the *preliminary design* or *selected subcontract work*.

### 9.5 Contractor's responsibility

- (1) Except where the *Contract* otherwise provides, the *Contractor (EBNI)* is liable to the *Principal* for the acts, defaults and omissions of *subcontractors* (including *selected subcontractors* and *consultants*) and employees and agents of *subcontractors* as if they were those of the *Contractor*.

- (2) Approval to subcontract does not relieve the *Contractor* from any liability or obligation under the *Contract*.

#### **9.6 Subcontractor warranties**

- (1) The *Contractor* must procure a warranty in favour and for the benefit of the *Principal* from all *subcontractors*, *consultants*, manufacturers and suppliers providing the *work*, material or goods forming part of *the Works* as listed in the *Tender Documents* specification (or whose trades or areas of work are listed) and for the periods set out in the specification.
- (2) The warranties in paragraph (1) must be a deed in a form approved by the *Principal*, acting reasonably.
- (3) Where any such warranty is not procurable from a *subcontractor*, *consultant* or supplier:
  - (a) the *Contractor* must itself provide an equivalent warranty; and
  - (b) the *Contractor* holds the benefit of any such warranty to which it is entitled from the relevant *subcontractor* or supplier on trust for the benefit of the *Principal*.
- (4) The *Contractor* must hand over to the *Principal* a list of items which are warranted, the applicable warranty periods of those items, and the warranties in paragraph (1) prior to and as a precondition to *practical completion*.

### **10 Intellectual property rights**

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#### **10.1 Warranties and indemnities**

The *Principal* warrants that, unless otherwise provided in the *Contract*, the *Principal's* project requirements, design, materials, documents and methods of working, each specified in the *Contract* or provided or directed by the *Principal* or the *Superintendent* do not infringe any intellectual property right.

The *Contractor* warrants that any other design, materials, documents and methods of working, each provided by the *Contractor*, do not infringe any intellectual property right.

Each party indemnifies the other against such respective infringements.

#### **10.2 Intellectual property rights granted to *Principal***

The Alternative in Item 21 applies.

##### **Alternative 1**

The *Contractor* grants to the *Principal* an irrevocable licence to use the design documents for WUC. Such licence will also include any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the *Works* and the copying of the documents for such purposes.

##### **Alternative 2**

- (1) Copyright and property in the design documents (and, as between the *Principal* and the *Contractor*, any part of the preliminary design produced under a prior contract between the *Principal* and a *Principal's* consultant novated under clause 9.4) hereby vest in the *Principal*, and the *Principal* grants to the *Contractor* an irrevocable licence to use the design documents for WUC. Such vesting does not extend to components of the design which have been developed by the *Contractor* for general use in the *Contractor's* work and have not been specially developed for incorporation in the design documents.
- (2) The *Contractor* will do everything necessary to perfect such vesting.
- (3) The *Contractor* must ensure that the design documents are used, copied and supplied only for the purpose of WUC.

### **11 Legislative requirements**

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#### **11.1 Compliance**

- (1) The *Contractor* must satisfy all *legislative requirements* except those in *Item 22(a)* or directed by the *Superintendent* to be satisfied by or on behalf of the *Principal*.

- (2) The *Contractor*, upon finding that a *legislative requirement* is at variance with the *Contract* or the Principal's project requirements, must promptly give the *Superintendent* written notice thereof.

## 11.2 Changes

If a *legislative requirement*:

- (1) necessitates a change:
  - (a) to the Principal's project *requirements*;
  - (b) to *the Works*;
  - (c) to so much of *WUC* as is identified in *Item 22(b)*;
  - (d) being the provision of services by an *Authority* in connection with *WUC*; or
  - (e) in a fee or charge or payment of a new fee or charge;
- (2) comes into effect after the 14th day before the closing of tenders but could not reasonably then have been anticipated by a competent contractor; and
- (3) causes the *Contractor* to incur more or less cost than otherwise would have been incurred, the difference will be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

## 11.3 Development Consent Conditions

The *Contractor* must:

- (1) comply with *Development Consent Conditions* and all requirements of the *Consent Authority* except those in *Item 22(a)* or directed by the *Superintendent* to be satisfied by or on behalf of the *Principal*; and
- (2) familiarise itself, and must ensure that all of its *subcontractors* and/or *consultants* familiarise themselves, (and is deemed to have done so), with the requirements of the *Development Consent Conditions*.

## 11.4 Australian Standards

The *Contractor* must do all acts, matters and things necessary on its part to be done to ensure that the *WUC* is executed in accordance with the appropriate Australian Standards current at the time when the *WUC* is being executed.

# 12 Protection of people and property

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## 12.1 Obligations of the Contractor

- (1) Insofar as compliance with the *Contract* permits, the *Contractor* must:
  - (a) provide all things and take all measures necessary to protect people and property;
  - (b) avoid unnecessary interference with the passage of people and vehicles; and
  - (c) prevent nuisance and unreasonable noise and disturbance.
- (2) Without limiting the generality of the *Contractor's* obligations under this clause, this includes responsibility for:
  - (a) maintaining the roads and footpaths surrounding the *site* in a safe and trafficable condition at all times;
  - (b) co-ordinating the *WUC* in such a manner that all weather access is maintained onto the *site* and to surrounding residences and roads at all times; and
  - (c) complying with all other obligations detailed within the *WUC*.
- (3) The *Contractor* must ensure that:

- (a) all *work* is performed in accordance with clause 46 and relevant health and safety legislation including the *Work Health & Safety Act 2011* (NSW) and its regulations; and
  - (b) all the workers engaged in the performance of the WUC wear approved safety vests at all times; and
  - (c) all traffic controllers hold a current Roads and Maritime Services Traffic Controllers Certificate.
- (4) The *Superintendent* may inspect the *site* at any time to ascertain whether the *Contractor* is complying with this clause 12. If the *work* is not being carried out in accordance with this clause 12, the *Superintendent* may direct the *Contractor* to stop the *work* until that non-compliance is rectified. The *Contractor* must immediately comply with any such *direction* given by the *Superintendent* and has *No Claim* arising from that direction.

## 12.2 Risk Management System

- (1) The *Contractor* must demonstrate for the duration of the WUC, its specific understanding of the risk management requirements of *the Works* to be undertaken.
- (2) The risk management policies and procedures, the *Contractor's* safe working policies and procedures and all other relevant documents prepared by the *Contractor* in accordance with the *Contract* must demonstrate that:
  - (a) *Contractor* has a good understanding of the hazards and risk associated with the activities being undertaken;
  - (b) the *Contractor* has established systems and procedures for managing risks;
  - (c) the *Contractor* has secured all required licenses for relevant activities to be undertaken as part of *the Works*, including all required employee competencies and licences;
  - (d) all *construction plant* and equipment to be used in the performance of *the Works* are appropriately licensed or registered, maintained and inspected on a regular basis; and
  - (e) the *Contractor* has carried out or caused to be carried out contract specific risk assessments to ensure that all risk associated with the performance of the *Works* have been identified and are being controlled.

## 12.3 Traffic and Pedestrian Management Plan

- (1) For the purpose of this clause 12.3 a Traffic and Pedestrian Management Plan is a fully detailed engineering plan which includes specifications of:
  - (a) all works, line marking, signage and assessment of pedestrian and vehicle access in and around the *site* for each separable portion or stage of the WUC;
  - (b) any engineering works required in adjoining roads
  - (c) all internal driveways, car parking areas, delivery areas, accesses (including installation of signage) to appropriately control vehicles entering the *site*;
  - (d) stipulates the date that it was prepared; and
  - (e) is signed by the nominated *Contractor's* representative.
- (2) The *Contractor* must prepare and provide to the *Principal* a Traffic and Pedestrian Management Plan before commencing any of the WUC on the *site*.
- (3) After review of the Traffic and Pedestrian Management Plan the *Superintendent* may issue a *direction* that additional items be added that are otherwise missing or inaccurately detailed.
- (4) The *Contractor*, at its cost, must promptly comply with any *direction* issued under paragraph (3).

- (5) The *Contractor* must include in its *contract sum* an amount being a percentage of the total cost for all of the items for the provision of traffic (vehicular and pedestrian) management (including miscellaneous items ).
- (6) The Contractor acknowledges that the WUC will be undertaken in an existing commercial and residential precinct.

#### **12.4 Maintenance of Access**

- (1) *he Contractor must* ensure that its activities do not interfere with the access to and the normal operation of :
  - (a) *adjoining sites*; and/or
  - (b) *and* will provide suitable public access (temporary access for vehicles and pedestrians). This access must be maintained in good condition at all times, and any disturbances or damage to any roads or footpaths must be rectified immediately.
- (2) The *Contractor* must:
  - (a) co-ordinate any *works* carried out by any relevant services authorities as required under the *Contract*; and
    - (b) co-ordinate and agree its programs of *work* with the *Superintendent* and the *Principal* to minimise the impact of *WUC* on the amenity of the locality of the *site*;
- (3) Excavations in public access ways must be properly protected by barricades and lights, promptly backfilled and the surface reinstated on the completion of the *work* and its testing and acceptance (if applicable), to minimise the disruption of the free movement of the public.

#### **12.5 Car Parking**

- (1) No Contractor or subcontractor is permitted to park their vehicles outside the site boundaries, or in any location likely to damage existing trees and/or their root systems.
- (2) All vehicle parking must be undertaken in an orderly fashion, on existing hard stand areas within the site wherever possible.

#### **12.6 Notification to Residents**

- (1) The *Contractor* is required to provide the *Superintendent* with a draft letter outlining how *the Works* will affect residents, organisations and *Authorities* located in adjoining sites and/or within the vicinity of the *site* who may be affected and/or have their access interrupted by the *WUC*.
- (2) The draft letter prepared by the *Contractor* must be approved by the *Superintendent* prior to being distributed.
- (3) The *Contractor* must ensure that the letter is delivered to all affected residents, organisations and *Authorities* a minimum of forty-eight (48) hours prior to the commencement of *the Works* or that stage of *the Works* affecting those properties.

#### **12.7 Protection of the Environment**

The *Contractor* must:

- (1) carry out all *WUC* in such a manner as to avoid nuisance to any persons or any interference with or damage to the *Environment*;
- (2) carry out all *WUC* in accordance with all applicable environmental *legislative requirements*;
- (3) include in its *contract sum* an amount, being a percentage of the total cost for all the items for the protection of the environment from the *WUC* (up to and including miscellaneous items). The amount set aside for protection of the *Environment* is to include an amount to cover all equipment footage and *site* facilities; and

- (4) ensure that in carrying out *WUC* it does not pollute, contaminate or otherwise damage the *Environment* and must immediately make good any pollution, contamination or damage to the *Environment* arising out of or in connection with *WUC*.

#### 12.8 Environmental Management Plan

- (1) Prior to the commencement of the *WUC*, the *Contractor* must submit an Environmental Management Plan (**EMP**) to the *Principal*. The EMP must include:
  - (a) a statement of commitment - overall objectives of the EMP;
  - (b) worksheets completed by the *Contractor* and a list of likely environmental issues and impacts associated with *WUC*;
  - (c) any environmental requirements deriving from the project *Approvals* for the *WUC*;
  - (d) any additional environmental requirements imposed by any *Authority* or required under the *WUC* (for example, sampling and the like);
  - (e) an environmental emergency response plan and incident reporting procedures;
  - (f) monitoring requirements including a site environmental logbook comprising weekly log sheets; and
  - (g) a quality management system for the identified environmental issues and impacts associated with *WUC*, including:
    - (i) the *Contractor's* statement of responsibilities and duties as to environmental management;
    - (ii) a clear indication and communication of the environmental responsibilities on the site; and
    - (iii) environmental awareness and training for site personnel and *subcontractors*.
- (2) All *WUC* must be conducted in compliance with the EMP at all times.

#### 12.9 Vibration Management Plan

- (1) In consideration of the proximity of the *WUC* to adjoining sites, the *Contractor* must prepare and provide to the *Principal* a Vibration Management Plan (**VMP**) before commencement of any demolition or excavation on the site.
- (2) A VMP must:
  - (a) be prepared by an appropriately experienced geotechnical engineer or engineering geologist;
  - (b) be submitted to the Consent Authority for approval;
  - (c) include recommendations for:
    - (i) performance standards to be met during the *WUC* (in terms of acceptable ground vibration); and
    - (ii) strategies for the management of ground vibration and monitoring requirements for vibration through the *WUC*;
  - (d) be promptly lodged with the Superintendent; and
  - (e) be kept on the site at all times.
- (3) After review of the VMP the Superintendent may issue a direction that additional items be added that are otherwise missing or inaccurately detailed.
- (4) The *Contractor* must promptly comply with any direction issued under paragraph (3) and keep a copy of the VMP on the site at all times.
- (5) When conducting the *WUC* the *Contractor* must:
  - (a) select appropriate demolition methods and equipment to minimise the effect of vibration and concussion on buildings in the vicinity of the Works; and

- (b) comply with all legislative requirements relating to noise and its suppression.
- (6) All construction plant and/or equipment must be fitted with noise suppressors, so that noise is minimised. Jackhammers and other noise generating tools used in the performance of the work must be fitted with effective silencers of a type recommended by the relevant jackhammer manufacturer. Tools and silencers must be kept in good working condition.
- (7) Compressor sets used in the performance of the Works must be fitted with effective acoustic canopies and engine exhaust silencers of a type recommended by the relevant compressor manufacturer, or purpose built machines for quiet operation. Compressor sets and canopies must be kept in good working condition. Access panels in acoustic canopies must be kept closed while sets are running.
- (8) The Superintendent may instruct that noise generating activities be suspended at certain additional times during the course of the WUC.

#### **12.10 Dust Control During Demolition and Generally**

- (1) The *Contractor* must in the course of any demolition works adopt techniques which will minimise the release of dust into the Environment.
- (2) Before commencing demolition work, any existing accumulations of dust are to be collected, placed in suitable containers and removed from the site by the *Contractor*. Selection of appropriate collection techniques, such as vacuuming or hosing down, will take account of the nature of the dust and the type of hazard it presents (e.g. explosive, respiratory, etc.).
- (3) Dust which is generated during stripping or during the breaking down of any or all building fabric to removable sized pieces must be kept damp until it is removed from the site or can be otherwise contained.

#### **12.11 Conservation and Protection of Trees**

- (1) The *Contractor* must conserve and maintain established streetscape and other canopy trees in and around the site by establishing Tree Protection Zones (**TPZ**) around all trees to be retained on the site in a manner consistent with the Australian Standard 4970-2009 for the Protection of Trees on Development Sites.
- (2) The TPZ must encompass the maximum possible area around the drip line of the canopy, but must be located at a distance of no less than 2.5 metres from the base of the trees.
- (3) An inspection of the structures associated with the TPZ must be arranged with the Consent Authority or a qualified arborist to verify that the TPZ have been correctly installed prior to the commencement of the Works.
- (4) The *Contractor* must ensure TPZ are maintained in good order during the WUC by ensuring that there is:
  - (a) no excavation, trenching or soil removal carried beyond those works indicated on approved plans, without the prior written consent of the *Principal*; and
  - (b) no:
    - (i) storage of goods or materials;
    - (ii) no parking or operation of vehicles;
    - (iii) no dumping of refuse or stockpiling of waste; and
    - (iv) no chemical run-off (including concrete wash, paint wash etc.), in the TPZ.
- (5) Should an encroachment into the TPZ become necessary as the Works progress the *Contractor* must arrange for the TPZ to be reviewed by a qualified arborist and obtain the written consent of the Consent Authority before carrying out any such works.



- (6) The *Contractor* must ensure any pruning (and subsequent aftercare) of tree canopy and roots which are required in the course of the WUC are undertaken by an appropriately qualified arborist and in accordance with the Australian Standard 4970-2009 for the Protection of Trees on Development Sites.
- (7) If , in the course of the WUC, any tree proposed for retention suffers accidental damage to the primary root zone, trunk, crown or major branching, the *Contractor* must ensure that the tree(s) is treated as soon as it is practicable and in any event within 48 hours by an Arborist or a qualified horticulturalist.
- (8) If repair work is attempted and fails, or is impracticable, additional vegetation removal may be undertaken only after the *Contractor* has notified the *Principal* and the *Principal* approves.
- (9) The *Contractor* must replace any tree damaged by planting advanced to super-advanced species, characteristic of the locality, or of the same species as the tree which was the subject of the damage. Where an alternative species is proposed by the *Contractor* the selection must be approved by the Consent Authority.

## 12.12 Heavy Vehicle Safety

- (1) The *Contractor* is responsible for ensuring the safety in its use of heavy vehicle transport and cartage activities in the provision of the Services, with a primary duty to ensure that its actions or inactions do not result in, reward, provide an incentive or encourage its subcontractors, agents or employees to breach Heavy Vehicle Legislation.
- (2) Where the *Contractor* must ensure that:
  - (a) it has no arrangements, contracts, policies or business practices in place, including under any industrial instrument or award, which would require or encourage non-compliance with Heavy Vehicle Legislation;
  - (b) compliance with Heavy Vehicle Legislation are included as part of meeting its obligation to:
    - (i) prepare and implement a Work Health & Safety Management Plan in accordance with clause 46; and
    - (ii) include as part of its Risk Management System in clause 12.2, the identification, assessment and implementation of control risks associated with heavy vehicle operations,
  - (c) before commencement of any WUC where heavy vehicles (as that term is defined in the Heavy Vehicle Legislation) are employed, the *Contractor* must provide the *Principal* with:
    - (i) a Chain of Responsibility Management Plan (CoRMP) which meets the requirements of the *Heavy Vehicle Legislation*; and
    - (ii) a Fatigue Risk Management System (**FRMS**).
- (3) A CoRMP must as a minimum, address:
  - (a) the title and name(s) of the persons who a party to the heavy vehicle transport supply chain in respect to the WUC;
  - (b) title and names of all subcontractors or employees of the *Contractor* involved in managing or controlling compliance with Heavy Vehicle Legislation;
  - (c) the procedure for ensuring all persons who are a party to the heavy vehicle transport supply chain comply with speed, fatigue, mass, dimension, loading and vehicle standards under the Heavy Vehicle Legislation;
  - (d) the procedures for incident reporting to all relevant persons, subcontractors and the *Principal*;
  - (e) the procedures for internal safety investigations in respect to compliance or non-compliance with the Heavy Vehicle Legislation; and

- (f) the procedures for ensuring adequate safety training and education to ensure heavy vehicle safety is provided to any or all employees (and employees of subcontractors) who are involved in the heavy vehicle supply chain.
- (4) A FRMS must as a minimum, address
  - (a) the allocation of resources (including staff responsibility) for managing driver fatigue;
  - (b) the implementation of policies and procedures to ensure against and reduce the risks of driver fatigue;
  - (c) identify fatigue risks in any heavy vehicle transport which occurs as part of the performance of the WUC; and
  - (d) the continual monitoring and review of the performance of the FRMS.
- (5) The *Contractor* must notify the *Principal* of any fines, charges or notices issued to the *Contractor* under the Heavy Vehicle Legislation which are issued during and/or in connection with or as a result of the WUC.
- (6) If requested by the *Principal*, the *Contractor* must, within 3 business days after the imposition of any such fine, the laying of any charge or the service of any notice or request by the *Principal* provide the *Principal* with details of or a copy of or a written report relating to such fine, charge or notice.
- (7) The *Contractor* indemnifies the *Principal* from and against all fines, charges, claims, demands, writs, summonses, actions, suits, proceedings, judgments, orders, decrees, costs, losses and expenses of any nature whatsoever which the *Principal* may suffer or incur in connection with a breach of the Heavy Vehicle Legislation by the *Contractor* or its subcontractors, servants, agents or employees in the performance of the WUC.

#### **12.13 Liability of the Contractor**

- (1) If the *Contractor* or employees or agents of the *Contractor* damages property, including but not limited to public utilities and property on or adjacent to the site, the *Contractor* must promptly rectify the damage and pay any compensation which the law requires the *Contractor* to pay.
- (2) If the *Contractor* fails to comply with an obligation under this clause 12.13, in addition to any other remedies of the *Principal*, after the Superintendent has given reasonable written notice to the *Contractor* and in addition to the *Principal's* other rights and remedies, may have the obligation performed by others. The cost thereby incurred may be certified by the Superintendent as moneys due from the *Contractor* to the *Principal*.

### **13 Urgent protection**

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#### **13.1 If urgent action required**

If urgent action is necessary to protect WUC, other property or people and the *Contractor* fails to take the action, in addition to any other remedies of the *Principal*, the Superintendent may take the necessary action. If the action was action which the *Contractor* should have taken at the *Contractor's* cost, the Superintendent will certify the cost incurred as moneys due from the *Contractor* to the *Principal*.

#### **13.2 Notice by Superintendent**

If time permits, the Superintendent will give the *Contractor* prior written notice of the intention to take action pursuant to this clause 13.

### **14 Care of the work and reinstatement of damage**

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#### **14.1 Care of Works Under the Contract (WUC)**

- (1) Except as provided in clause 14.3, the *Contractor* is responsible for care of:

- (a) the whole of WUC from and including the date of commencement of WUC to 4:00 pm on the date of practical completion, at which time responsibility for the care of the Works (except to the extent provided in paragraph (b)) passes to the *Principal*;
- (b) outstanding work and items to be removed from the site by the *Contractor* after 4:00 pm on the date of practical completion until completion of outstanding work or compliance with clauses 31, 32 and 37; and
- (c) from the date of commencement of WUC, any property belonging to a third party which:
  - (i) forms part of the WUC, or
  - (ii) is directly or indirectly impacted or damaged by the *Contractor*.
- (2) Without limiting the generality of paragraph (1), the *Contractor* is responsible for the care of unfixed items accounted for in a payment schedule and the care and preservation of things entrusted to the *Contractor* by the *Principal* or brought onto the site by subcontractors or transported or delivered to the site for carrying out WUC.

#### **14.2 Reinstatement**

- (1) If loss or damage, other than that caused by an excepted risk, occurs to WUC, or to any third party property referred to in clause 14.1(1)(c), during the period of the *Contractor's* care, the *Contractor*, at its cost, must rectify such loss or damage.
- (2) In the event of loss or damage being caused by any of the excepted risks (whether or not in combination with other risks), the *Contractor* will to the extent directed by the Superintendent, rectify the loss or damage and such rectification will be a deemed variation. If loss or damage is caused by a combination of excepted risks and other risks, the Superintendent in pricing the variation will assess the proportional responsibility of the parties.
- (3) If the *Contractor* fails to comply with its obligations to make good under this clause 14.2, the *Principal* may, in addition to any other right or remedy, perform the obligation on the *Contractor's* behalf and the cost incurred or to be incurred by the *Principal* will be a debt due from the *Contractor* to the *Principal*.

#### **14.3 Excepted risks**

The excepted risks causing loss or damage, for which the *Principal* is liable, are:

- (1) any negligent act or omission of the Superintendent, the *Principal* or its consultants, agents, employees or other contractors (not being employed by the *Contractor*) but, for the avoidance of doubt, does not include any mistakes, errors or omissions in the drawings, specification or other documents supplied by the *Principal* or its consultants;
- (2) any risk specifically excepted elsewhere in the Contract;
- (3) war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;
- (4) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the *Contractor* or its subcontractors or either's employees or agents;
- (5) use or occupation of any part of WUC by the *Principal* or its consultants, agents or other contractors (not being employed by the *Contractor*); and
- (6) defects in such part of the design of WUC, other than design provided by the *Contractor* and/or its consultants.

### **15 Damage to persons and property other than WUC**

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#### **15.1 Indemnity by Contractor**

- (1) Insofar as this clause 15.1 applies to property, it applies to property other than WUC.

- (2) The *Contractor* indemnifies the *Principal* against any cost, expense, loss, damage or other liability suffered or incurred by the *Principal* resulting from:
- (a) loss of or damage to the *Principal's* property arising out of or as a consequence of the carrying out of or failure to carry out *WUC*; and
  - (b) personal injury, death, disease or illness (including mental illness) or loss of, or damage to, any other property or the Environment arising out of or as a consequence of the carrying out of or failure to carry out *WUC*;
  - (c) a breach of the *Contract* by the *Contractor*; or
  - (d) any wilful or negligent act or wilful or negligent omission of the *Contractor*, a *subcontractor* or the employees or agents of any of them,
- but any liability under that indemnity will be reduced proportionally to the extent that any breach of the *Contract* by the *Principal* or any negligent act or negligent omission of the Superintendent, the *Principal* or its consultants or agents or any other contractor of the *Principal* contributed to the cost, expense, loss, damage or liability.
- (3) This clause does not apply to:
- (a) the extent that the *Contractor's* liability is limited by another provision of the *Contract*;
  - (b) exclude any other right of the *Principal* to be indemnified by the *Contractor*;
  - (c) things for the care of which the *Contractor* is responsible under clause 14.1;
  - (d) damage which is the unavoidable result of the construction of the Works in accordance with the *Contract*; and
  - (e) claims in respect of the *Principal's* right to have *WUC* carried out.

## 15.2 Indemnity by Principal

The *Principal* indemnifies the *Contractor* in respect of damage referred to in clause 15.1(3)(d) and claims referred to in paragraph 15.1(3)(e), namely claims in respect of the *Principal's* right to have *WUC* carried out.

## 16 Insurance of the Works

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The Alternative in *Item 23(a)* applies.

Alternative 1: *Contractor* to insure

- (1) Before commencing *WUC*, the *Contractor* must insure until the expiration of the last defects liability period all the things referred to in clause 14.1 against loss or damage resulting from any cause until the *Contractor* ceases to be responsible for their care.
- (2) Without limiting the generality of the obligation to insure, such insurance must cover the *Contractor's* liability under clause 14.2 and things in storage off site and in transit to the site (within and outside of Australia for each storage and transit) but may exclude:
  - (a) the cost of making good fair wear and tear or gradual deterioration, but will not exclude the loss or damage resulting therefrom;
  - (b) the cost of making good faulty design, workmanship and materials, but will not exclude the loss or damage resulting therefrom;
  - (c) consequential loss of any kind, but will not exclude loss of or damage to *the Works*;
  - (d) damages for delay in completing or for the failure to complete *the Works*;
  - (e) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause; and
  - (f) loss or damage resulting from the *excepted risks* referred to in clause 14.3.

- (3) The insurance cover must be for an amount not less than the aggregate of the:
  - (a) contract sum;
  - (b) provision in *Item 23(b)* to provide for costs of demolition and removal of debris;
  - (c) provision in *Item 23(c)* for *consultants'* fees and *Principal's* consultants' fees;
  - (d) value in *Item 23(d)* of any materials or things to be supplied by the *Principal* for the purposes of WUC;
  - (e) the minimum value required by law in respect of asbestos liability; and
  - (f) additional amount or percentage in *Item 23(e)* of the total of the items referred to in sub-paragraphs(a) to (d) of this paragraph.
- (4) Insurance must be in the joint names of the parties, must cover the parties, *consultants* and all *subcontractors* whenever engaged in *WUC* for their respective rights, interests and liabilities and, except where the *Contract* otherwise provides, must be with an insurer and on terms approved in writing by the *Principal* (which approval will not be unreasonably withheld).
- (5) The insurance must be maintained until the *Contractor* ceases to be responsible under clause 14.1 for the care of anything.

**Alternative 2: Principal to insure**

Before the *date of acceptance of tender*, the *Principal* will insure *WUC* in the terms of the policy included in the *Tender Documents* and nominating or stating the insurer. The *Principal* will maintain such insurance while ever the *Contractor* has an interest in *WUC*.

## **17 Public Liability Insurance**

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The Alternative in *Item 25(a)* applies.

**Alternative 1: Contractor to insure**

- (1) WUC, the Contractor **must effect and maintain until the expiry of the last defects liability** Before commencing period, a public liability policy.
- (2) The policy must:
  - (a) be either be an occurrence based policy in the joint names of the parties or define both parties as an insured party under the relevant policy of insurance;
  - (b) cover the:
    - (i) respective rights and interests; and
    - (ii) liabilities to third parties,  
of the parties, the *Superintendent*, *consultants* and *subcontractors* from time to time, whenever engaged in *WUC*;
  - (c) cover the parties' respective liability to each other for loss or damage to property (other than property required to be insured by clause 16 and the death of or injury to any person, including mental illness, or liability which the law requires to be covered under a workers compensation insurance policy);
  - (d) be endorsed to cover the use of any construction plant not covered under a comprehensive or third party motor vehicle insurance policy;
  - (e) provide insurance cover for an amount in respect of any one occurrence of not less than the sum in *Item 25(b)*; and
  - (f) be with an insurer and otherwise on terms approved in writing by the *Principal* (which approval must not be unreasonably withheld).

**Alternative 2: Principal to insure**

Before the *date of acceptance of tender*, the *Principal* will effect in relation to *WUC*, a *public liability policy* in the terms of the policy included in the *Tender Documents* and nominating or stating the insurer. The *Principal* will maintain such insurance while ever the *Contractor* has an interest in *WUC*.

## **18 Professional Indemnity Insurance**

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- (1) Before the *Contractor* commences *WUC*, the *Contractor* must effect a professional indemnity insurance policy with a limit of liability per claim and in aggregate of not less than the sum stated in Item 24.
- (2) The policy and such level of cover must be maintained for the duration of the *WUC*.
- (3) The *Contractor* must ensure that every *Consultant* (and any consultant engaged by other subcontractors) is insured for professional indemnity with a cover not less than the sum stated in *Item 24*.

## **19 Other Insurances**

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### **19.1 Construction Plant Insurance**

Before commencing *WUC*, the *Contractor* must effect and maintain plant and equipment insurance until the expiry of the last *defects liability period*:

- (1) with insurers and on terms satisfactory to the *Principal*: and
- (2) covering all *construction plant* which the *Contractor* may use in connection with *WUC* either at the *site*, in storage off site or in transit to the *site*; and
- (3) for the full replacement value of the relevant *construction plant*.

### **19.2 Motor Vehicle Insurance**

- (1) Before commencing *WUC*, the *Contractor* must effect and maintain until the expiry of the last *defects liability period*:
  - (a) compulsory third party motor vehicle insurance as required by law; and
  - (b) motor vehicle insurance covering the *Contractor's* liability to third parties (including the *Principal* and the *Superintendent*) arising out of the use of any motor vehicle registered or required to be registered in accordance with any law and used in connection with *WUC* for injury, death, disease or illness (including mental illness) and loss of or damage to property.
- (2) The *Contractor* will ensure that every *subcontractor* will effect and maintain for the duration of the *subcontractor's* involvement in *WUC* the insurances in subclause (1).

## **20 Insurance of Employees**

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### **20.1 Contractor must Insure**

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Before commencing *WUC*, the *Contractor* must insure against statutory and common law liability for death of or injury to persons employed by the *Contractor*. The insurance cover must be maintained until completion of all *WUC*.

### **20.2 Terms of the policies**

Where permitted by law, the insurance policy or policies must be extended to provide indemnity for the *Principal's* statutory liability to the *Contractor's* employees.

### **20.3 Subcontractor's insurance**

The *Contractor* must ensure that all *consultants* and *subcontractors* have similarly insured their employees.

## **21 Inspection and provisions of insurance policies**

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### **21.1 Proof of insurance**

- (1) Before the *Contractor* commences WUC and whenever requested in writing by the other party, a party liable to insure must provide satisfactory evidence of such insurance effected and maintained.
- (2) Insurance must not limit liabilities or obligations under other provisions of the Contract.
- (3) The *Contractor* must provide such evidence as the *Principal* may nominate to confirm that the insurance policies referred to in clauses 16, 17, 18, 19 and 20 have been effected and will, if so requested, provide to the *Principal* a copy of those policies upon request.
- (4) The *Contractor* must ensure that all insurance policies which the *Contractor* must effect in accordance with the Contract:
  - (a) remain valid and in full force and effect during the period in which the *Contractor* undertakes the WUC and for the duration of the defects liability period or periods under the Contract;
  - (b) be made available for inspection by the Superintendent upon request; and
  - (c) must ensure that the *Principal* is noted as an interested party and/or an insured under the policies.

### **21.2 Failure to produce proof of insurance**

If after being so requested, the *Contractor* fails promptly to provide satisfactory evidence of compliance with clauses 16, 17, 18, 19 and 20, then without prejudice to other rights or remedies, the *Principal* may insure and the cost thereof will be certified by the *Superintendent* as moneys due and payable from the *Contractor* to the *Principal*. The *Principal* may refuse payment until such evidence is produced by the *Contractor*.

### **21.3 Notices from or to insurer**

The *Contractor* must ensure that each insurance policy contains provisions acceptable to the *Principal* which:

- (1) requires the insurer to inform both parties, whenever the insurer gives a party or a subcontractor a notice in connection with the policy;
- (2) provides that a notice of claim given to the insurer by the *Contractor* or a subcontractor must be accepted by the insurer as a notice of claim given by both parties, the Superintendent and the subcontractor; and
- (3) requires the insurer, whenever the *Contractor* fails to maintain the policy, promptly to give written notice thereof to both parties and prior to cancellation of the policy.

### **21.4 Notices of potential claims**

A party must, as soon as practicable, inform the other party in writing of any occurrence that may give rise to a claim under an insurance policy required by clauses 16, 17, 18, 19 and 20 and must keep the other party informed of subsequent developments concerning the claim. The *Contractor* must ensure that *consultants* and *subcontractors* in respect of their operations similarly inform the parties.

### **21.5 Settlement of claims**

Upon settlement of a claim under the insurance required by clause 16:

- (1) to the extent that reinstatement has been the subject of a payment or allowance by the *Principal* to the *Contractor*, if the *Contractor* has not completed such reinstatement, insurance moneys received must, if requested by either party, be paid into an agreed bank account in the joint names of the parties. As the *Contractor* reinstates the loss or damage, the Superintendent will certify against the joint account for the cost of reinstatement; and

- (2) to the extent that reinstatement has not been the subject of a payment or allowance by the *Principal* to the *Contractor*, the *Contractor* is entitled immediately to receive from insurance moneys received, the amount of such moneys so paid in relation to any loss suffered by the *Contractor*.

#### **21.6 Cross liability**

Any insurance required to be effected in joint names in accordance with the *Contract* must include a cross liability clause in which the insurer agrees to waive all rights of subrogation or action against any of the persons constituting the insured and for the purpose of which the insurer accepts the term 'insured' as applying to each of the persons constituting the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

#### **21.7 The Payment of Excesses**

- (1) The excess, as quoted in the insurance policies required to be taken out by the *Contractor*, is the responsibility of, and must be paid by, the *Contractor* on demand unless the claim for which the excess applies relates to the acts or omissions of the *Principal*, or employees or agents of the *Principal*.
- (2) Any excess payable but unpaid by the *Contractor* will be treated as a debt due and payable from the *Contractor* to the *Principal* or may be deducted by the *Principal* from any monies which may be payable by the *Principal* to the *Contractor* or from any security provided under the *Contract*.

#### **21.8 General Insurance Obligations**

The *Contractor* must ensure that, in relation to each of the insurances required to be maintained under the *Contract* it:

- (1) does not do anything which prejudices any insurance;
- (2) if necessary, rectifies anything which might prejudice any insurance;
- (3) reinstates an insurance policy if it lapses;
- (4) does not cancel, vary or allow an insurance policy to lapse without the prior written consent of the *Principal*;
- (5) gives full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any way prejudice or affect any such policy or the payment of all or any benefits under the insurance policy;
- (6) takes all reasonable steps to avoid and mitigate any losses or liabilities otherwise insured under any insurance policy; and
- (7) ensures the insurances are each effected with reputable insurers which have a credit rating of at least A- or better with Standard & Poor's (or an equivalent rating with another reputable ratings agency).

## **22 Superintendent**

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#### **22.1 Obligations of the Principal**

- (1) The *Principal* must ensure that at all times there is a *Superintendent*, and that the *Superintendent* fulfils all aspects of the role and functions reasonably and in good faith.
- (2) The *Contractor* acknowledges and agrees that the *Superintendent* may be an employee of, or a consultant engaged by, the *Principal*.

#### **22.2 Form of directions**

- (1) Subject to paragraph (2) and except where the *Contract* otherwise provides, the *Superintendent* may give a direction orally but, as soon as practicable, will confirm any such oral direction in writing.



- (2) If the *Contractor* requests in writing for the Superintendent to confirm an oral direction, the *Contractor* is not bound (unless the urgency of the situation so demands) to comply with the oral direction until the Superintendent does so.

### **22.3 Power of the Superintendent**

- (1) The Superintendent is empowered to issue any direction of whatsoever nature relating to any act, matter or thing arising out of or in connection with the Works as the Superintendent considers appropriate, provided that such direction is in compliance with the Contract.
- (2) The *Contractor* must comply with all such directions.
- (3) When exercising any role or function under the Contract, the Superintendent:
  - (a) is not limited in discussing with or receiving submissions or representations from either the *Principal* or the *Contractor*; and
  - (b) is not under any obligation to seek any response from a party to, or otherwise raise with that party, any such discussion with or submission or representation received from the other party.

### **22.4 Manner of the exercise of discretion by the Superintendent**

- (1) The *Contractor* agrees that except to the extent expressly provided otherwise in the Contract:
  - (a) the Superintendent may exercise its discretion and rights under the Contract in whatever way the Superintendent decides in its absolute discretion; and
  - (b) the Superintendent may grant, refuse or grant subject to conditions any consent required from the Superintendent in its absolute discretion.
- (2) The Superintendent may (to the extent the Superintendent considers it reasonable to do so) refer to the information contained in the *Tender Documents* for the purposes of the assessment of any request for approval or any claim by the *Contractor* or any other purpose under or in connection with the Contract.

## **23 Superintendent's Representative**

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- (1) The *Superintendent* may from time to time appoint individuals to exercise delegated *Superintendent's* functions, provided that:
  - (a) no aspect of any function will at any one time be the subject of delegation to more than one *Superintendent's Representative*;
  - (b) delegation does not prevent the *Superintendent* exercising any function;
  - (c) the *Superintendent* forthwith gives the *Contractor* written notice of respectively:
    - (i) the appointment, including the *Superintendent's Representative's* name and delegated functions; and
    - (ii) the termination of each appointment; and

if the *Contractor* makes a reasonable objection to the appointment of a *Superintendent's Representative*, the *Superintendent* will, in its absolute discretion, terminate the appointment.
- (2) The *Superintendent* does not act as an independent certifier, assessor or valuer.
- (3) The *Superintendent* acts only as an agent of the *Principal*.

## **24 Contractor's representative**

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### **24.1 Obligations of the Contractor**

- (1) The *Contractor* must superintend WUC personally or by a competent representative. Matters within a *Contractor's* representative's knowledge (including directions received) is deemed to be within the *Contractor's* knowledge.

- (2) The *Contractor* must forthwith give the Superintendent written notice of the representative's name and any subsequent changes.
- (3) The *Contractor's* representative identified in the written notice must be on site and at all other places where WUC are being carried out at all times while WUC are being carried out.
- (4) The *Contractor's* representative must be a qualified engineer, or a person with equivalent qualifications, who has experience in executing works of a similar nature and scope to the WUC.

#### **24.2 Superintendent may object**

If the *Superintendent* makes a reasonable objection to the appointment of a *Contractor's representative*, the *Contractor* must terminate the appointment and appoint another representative.

#### **24.3 Alleged errors in a direction**

- (1) If the Contractor considers that any direction is given in error or, although not stated to involve a variation for which the Contractor is entitled to payment and/or an EOT, in fact involves a variation for which the Contractor is entitled to payment and/or an EOT, then the Contractor may serve notice (**error notice**) on the Superintendent in writing of the matters which the Contractor alleges involve an error or a variation, as the case may be:
  - (a) within two (2) business days following receipt of the direction; and
  - (b) before complying with the direction.
- (2) If the Contractor fails to serve an error notice by the time required under paragraph (1), then the Contractor is deemed to have accepted the correctness of the direction and may not claim with respect to the alleged error, variation and/or EOT.
- (3) Any error notice which alleges that a direction contained a variation must:
  - (a) clearly demonstrate to the Superintendent why the Superintendent's direction involves a variation for which the Contractor is entitled to payment; and
  - (b) include all details required to be included in a variation proposal under clause 38.4.
- (4) The provisions of clause 38 apply to an error notice to the extent that the error notice claims a variation, including a variation that involves an EOT.
- (5) The Superintendent will consider any other form of error notice and will notify the Contractor of his decision with respect to the error notice.

### **25 Contractor's employees and subcontractors**

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#### **25.1 Demand**

The Superintendent may direct the *Contractor* to have removed, within a stated time, from the site or from any activity of WUC, any person employed on WUC who, in the Superintendent's opinion, is incompetent, negligent or guilty of misconduct.

#### **25.2 Conduct Generally**

The *Contractor* and any subcontractors must ensure that their employees when at the *Principal's* premises and/or undertaking the *Works*, conduct themselves in the following manner at all times:

- (1) wear identification cards and/or a uniform for easy identification whilst on company business and at all of the *Principal's* premises;
- (2) refrain from using indecent language;

- (3) act in a sober, civil, obliging and inoffensive manner when undertaking the Works under this Contract;
- (4) perform the Works in a careful and clean manner with as little noise or disturbance as possible;
- (5) refrain from interfering or handling anything at the *Principal's* premises except as may be necessary to effect a service;
- (6) not seek, demand or accept any fee, reward or gratuity in respect of the performance of the Works (other than their remuneration as paid to them by the *Contractor*);
- (7) refrain from causing any property damage;
- (8) wear appropriate Personal Protective Equipment;
- (9) comply with and observe all legislative requirements;
- (10) comply with all road rules; and
- (11) comply with the *Principal's* Code of Conduct.

## **26 Site**

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### **26.1 Possession**

- (1) SProvided the *Contractor* has complied any requirement of the *Contract* which must be satisfied before the *Contractor* takes possession of the *Site*, and in particular the following clauses:
  - (a) 5.1 *Provision of Security*,
  - (b) 5.6 *Deed of guarantee, undertaking and substitution*, if applicable,
  - (c) 6.2 *Execution of a Formal Instrument of Agreement*,
  - (d) 16 *Insurance of the Works*,
  - (e) 17 *Public Liability Insurance*, 18 *Professional Indemnity Insurance* and 19 *Other Insurances*,
  - (f) 46 *Safety Management on Site*,

the *Principal* must before the expiry of the time in *Item 26(a)*., give the *Contractor* possession of sufficient parts of the site for commencement of *WUC* on site. If the *Principal* has not given the *Contractor* possession of the whole site, the *Principal* must give the *Contractor* possession of such further portions of the site as may, from time to time, be necessary for carrying out *WUC*.
- (2) Subject to clause 41.7, delay by the *Principal* in giving possession must not be a breach of the *Contract*.
- (3) Possession of the site confers on the *Contractor* a right to only such use and control as is necessary to enable the *Contractor* to carry out *WUC* and excludes camping, residential purposes and any purpose not connected with *WUC*, unless approved by the *Superintendent*.

### **26.2 Access for Principal and Others**

- (1) The *Principal* and the *Principal's* employees, consultants and agents may at any time after reasonable written notice to the *Contractor*, have access to any part of the *site* for any purpose. The *Contractor* will permit persons engaged by the *Principal* to carry out *work* on the *site* other than *WUC* and must cooperate with them. The *Principal* will give to the *Contractor* the names and roles of the persons so engaged.
- (2) The *Contractor* must at all reasonable times give the *Principal* and the *Principal's* employees, consultants and agents and the *Superintendent* access to *WUC* at any place where the *WUC* is being carried out or materials are being prepared or stored .

- (3) Without limiting the generality of the above paragraphs, the *Contractor* must provide to any person or persons authorised by the *Superintendent* or any representative or agent as may reasonably be required so as to allow any such person or person:
  - (a) to record by whatever means (including by video recording, audio recording, drawing or the other taking of notes and photographs) the progress and/or the carrying out of the WUC; and
  - (b) to properly inform him/herself or themselves in connection with any aspect of the WUC.
- (4) Until the *Contractor* is provided with access to the *site* under clause 26.1 the *Contractor* must not deliver materials to or perform *work* on the *site* or part of the *site*, as the case may be, unless approval in writing is given by the *Superintendent*.

### 26.3 Site Conditions

- (1) The *Contractor* is deemed to have examined the site and its surroundings and to have taken all necessary tests and made all necessary enquiries to satisfy itself as to:
  - (a) the nature of the physical conditions and characteristics of the site;
  - (b) any existing structures or improvements, including the condition and position of and possible affectation to adjacent buildings and adjacent sites; and
  - (c) the surface and sub-surface conditions and characteristics of both the site and those adjacent buildings and adjacent sites.
- (2) The *Contractor* acknowledges that it has:
  - (a) been allowed adequate access to the site;
  - (b) had sufficient time to thoroughly review the *Principal* supplied documents; and
  - (c) been allowed to do its own investigations of the site and its surroundings, before the date of the *Contract* to reach its own conclusions about site conditions .

### 26.4 Minerals, fossils and relics

- (1) Valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the site are as between the parties be and remain the property of the *Principal*. Immediately upon the discovery of these things the *Contractor* must:
  - (a) take precautions to prevent their loss, removal or damage; and
  - (b) give the Superintendent written notice of the discovery.
- (2) All costs so incurred by the *Contractor* will be assessed by the Superintendent and added to the contract sum.

### 26.5 Establishment

- (1) The *Contractor* must include in the contract sum an amount being a percentage of the total cost for all the items (up to and including miscellaneous items) for the *Contractor*'s establishment on the site.
- (2) The establishment figure is to include an amount to cover the costs of:
  - (a) all equipment floatage;
  - (b) site facilities for the use of the *Contractor* and the Superintendents Representative including:
    - (i) potable water supply;
    - (ii) telephone and electricity supply;
    - (iii) portable amenities; and

- (iv) a *site* office; and
- (c) safety fencing of the site.

## **26.6 Entry to Private Property**

- (1) Any negotiations to secure agreement for the *Contractor* to enter onto private property for the purpose of accessing the site or necessary for the performance of the WUC will not be the *Contractor's* responsibility but will be conducted by the *Principal*.
- (2) The Superintendent will provide written authorisation to the *Contractor* to enter private property, where any such authorisation is necessary for the performance of the WUC.
- (3) The *Contractor* must cause minimum disturbance to private property and, as far as practicable, must reinstate all surfaces to the satisfaction of the Superintendent.
- (4) Any fences that must be removed in order to allow the WUC to be carried out must be reinstated to the satisfaction of the Superintendent. If any private land on which a fence must be removed holds stock, temporary stock-proof fencing must be erected by the *Contractor* clear of the WUC to prevent stock from straying.

## **26.7 Payment for Services**

The *Contractor* must pay:

- (1) charges for all electricity, gas, oil, water and sewerage metered and consumed in or on the site;
- (2) all charges in respect of telephone or internet and/or other communication services connected to the site; and
- (3) all other charges and impositions imposed by any public utility or Authority for the supply of any service required by the *Contractor* separately supplied to the site,

on or before the due date for payment to the relevant persons, utility or Authority or if those charges are charged to the *Principal*, by way of reimbursement to the *Principal* within 30 days after the *Contractor* receives a notice from the *Principal* of the relevant amount payable.

## **27 Latent Conditions**

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### **27.1 Scope**

- (1) Latent conditions are physical conditions on the site and its near surrounds, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by a competent contractor at the time of the *Contractor's* tender if the *Contractor* had inspected:
  - (a) all written information made available by the *Principal* to the *Contractor* with respect to the site and the WUC;
  - (b) all information with respect to the *site* and the WUC known to the *Contractor* or reasonably obtainable by the making of reasonable enquiries; and
  - (c) the site and its near surrounds.
- (2) The *Contractor* must visit the site, determine the site levels and appraise for itself all work required to satisfy the requirements of the Contract. The Superintendent will reject claims by the *Contractor* for variations which arise from the *Contractor's* failure to comply with this clause 27.
- (3) Survey information, levels, and the results of site tests included in the drawings, *Tender Documents* and associated documents provided by the *Principal* are given without prejudice to the *Principal* and for the assistance of the *Contractor* which must make its own assessment of the nature, complexity and extent of the Works.
- (4) The *Contractor*, at its own expense, must arrange any tests required to accurately determine the sub-surface condition of the site.
- (5) Subject to clause 27.3, the *Contractor* agrees that it bears the risk of *latent conditions*.

- (6) The effect of a *latent condition* encountered under clause 27.3 will be a deemed *variation*, priced having no regard to additional cost incurred before the date on which the *Contractor* gave the notice required by the first paragraph of clause 27.4 or that the *Contractor* could reasonably have avoided.

## **27.2 Earthworks**

- (1) For the purposes of the Contract “Rock” is defined as:
  - (a) Reduced level excavation – Material which cannot be ripped using a Class 6 Bulldozer or equivalent.
  - (b) Trench excavation – Material such as hard Hawkesbury Sandstone, including Ironstone Bands occurring therein, igneous rock and concrete which occurs in solid masses, but does not include Sandstone which can be crushed in the hand after excavation.
- (2) The cost of excavating Rock and/or materials of all classes encountered in excavation as part of the WUC is / is included in the contract sum.
- (3) Unless otherwise specified the cost of excavating Rock is included in the contract sum.
- (4) Should any dispute or difference arise with regard to the proper classification of excavation, the decision of the Superintendent as to the classification of the material is final and binding on the *Contractor*.
- (5) It will be necessary for all subgrade material to undergo a roller test. The *Contractor* will be required to cooperate with the Superintendent and to supply, without charge, such assistance as may be required for the purpose of performing this test.
- (6) To avoid undue delays, the *Contractor* is required to provide the Superintendent with twenty-four (24) hours’ notice as to when such tests will be required.

## **27.3 Naturally Occurring Asbestos**

The *Contractor* acknowledges that naturally occurring asbestos (NOA) could be encountered in the Blue Mountains Local Government Area.

- (1) Unless identified within the *Tender Documents*, Scope of works, geotechnical reports or other information made available to the *Contractor* prior to the close of tenders any NOA encountered by the *Contractor* in the course of any excavation will be treated as a latent condition under the Contract for which the *Principal* accepts liability for the following associated costs of remediation (and control) only:
  - (a) The development of a Site Specific Asbestos Management Plan and associated monitoring as required under Council’s Asbestos Management Plan and approved by the Superintendent.
  - (b) Provision of a vehicle wash down Facility.
  - (c) Provision of decontamination showers.
  - (d) The *Contractors* costs of remediating the NOA on site (if necessary) plus an allowance by the Superintendent for profit and attendance.
  - (e) Where the scope and/or extent of WUC does not change but is slowed due to the need for the *Contractors* employees to wear protective clothing and decontaminate; a twenty percent (20%) allowance on labour costs for those employees and the site supervisor will be claimable by the *Contractor*. This 20% allowance is to account for the *Contractor’s* labour costs and the additional management and supervision associated with the NOA.

- (2) The *Contractor* is to fully comply with Council's Asbestos Management Plan current at the time of encountering any NOA and the Site Specific Asbestos Management Plan. Should the Superintendent deem that the *Contractor* is not taking adequate measures to comply with the Site Specific Asbestos Management Plan the Superintendent may suspend the Works at the *Contractors* full cost until corrective measures have been taken to the reasonable satisfaction of the Superintendent.
- (3) The *Contractor* agrees that it is not entitled to make a claim for an amount or item which exceeds that for which the *Principal* accepts liability in paragraph (1).

#### **27.4 Notification**

- (1) Upon becoming aware of a latent condition while carrying out WUC, the *Contractor* must promptly, and where possible before the latent condition is disturbed, give the Superintendent written notice of the general nature of the condition.
- (2) If required by the Superintendent promptly after receiving that notice, the *Contractor*, as soon as practicable, must give the Superintendent a written statement of:
  - (a) the latent condition encountered and the respects in which it differs materially;
  - (b) the additional work, resources, time and cost which the *Contractor* estimates to be necessary to deal with the latent condition; and
  - (c) other details reasonably required by the Superintendent.

#### **27.5 Extent of Entitlement**

- (1) The *Contractor* will have no entitlements as a consequence of any *latent condition* in relation to which the *Contractor* has not:
  - (a) given the *Principal* written notice strictly in accordance with clause 27.4; and
  - (b) taken such steps as may be necessary to avoid, overcome or minimise the costs associated with the *latent condition*.
- (2) If the *Contractor* has given the *Principal* a written notice strictly in accordance with clause 27.4, the *work* associated with the *latent condition* is to be priced under clause 38.6 as a *variation* and may be subject to an *EOT* under clause 36.

#### **27.6 Time Bar**

Where under clause 27.5 a valuation is to be made under clause 38, regard will not be had to the value of more work carried out or more costs incurred earlier than 7 days before the date on which the *Contractor* gives the written notice required under clause 27.4.

### **28 Setting out**

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#### **28.1 Setting out**

- (1) The *Principal* will ensure that the *Superintendent* gives the *Contractor* the data, *survey marks* and like information necessary for the *Contractor* to set out *the Works*, together with those *survey marks* specified in the *Contract*. The *Contractor* must then set out *the Works* in accordance with the *Contract*.
- (2) The Superintendent will provide the location and level of at least two (2) reference points.
- (3) Should the Contractor require survey services, the Survey Section of the Principal (namely Blue Mountain City Services (02) 4780 5000) may be approached to undertake surveying services on a sub contract basis. The Contractor must include the cost of these services in the contract sum.
- (4) Spot levels will take precedence over contour lines and ground profile lines.

#### **28.2 Errors in setting out**

- (1) The *Contractor* must rectify every error in the position, level, dimensions or alignment of any *WUC* after promptly notifying the *Superintendent* and unless the *Superintendent* directs otherwise within 3 *business days* of receiving any such notice.

- (2) If the error was caused by incorrect data, *survey marks* or information given by the *Superintendent*, the cost incurred by the *Contractor* in rectifying the error must be assessed by the *Superintendent* and added to the *contract sum*.

### 28.3 Care of survey marks

- (1) The *Contractor* must keep in their true positions all *survey marks* supplied by the *Superintendent*.
- (2) The *Contractor* must reinstate any *survey mark* disturbed during the conduct of the *WUC* after promptly notifying the *Superintendent* and unless the *Superintendent* within three *business days* directs otherwise.
- (3) If the disturbance was caused by the *Superintendent* or a representative of the *Principal*, the cost incurred by the *Contractor* in reinstating the *survey mark* will be assessed by the *Superintendent* and added to the *contract sum*.

### 28.4 Indemnity

The *Contractor* indemnifies the *Principal* against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by the *Principal* arising out of or in connection with any encroachments by *the Works* on any *adjoining site*, including adjoining footpaths, roads and public utilities.

## 29 Cleaning up

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### 29.1 Site to be kept clean and tidy

The *Contractor* must:

- (1) keep the *site* and *WUC* clean and tidy, regularly remove rubbish and surplus material, dispose of all rubbish to an authorised waste disposal facility and pay any waste disposal fees that are payable for the disposal of that rubbish;
- (2) keep all pavements and areas adjacent to the *WUC* free of rubbish, debris and other deleterious matter at all times to the satisfaction of the *Superintendent*; and
- (3) clean and repair damage caused by the installation or use of *temporary work* and facilities and restore existing facilities used during the performance of *the Works* to their original condition.

### 29.2 Removal after practical completion

Within ten (10) *business days* after the *date of practical completion*, the *Contractor* must remove *temporary works* and *construction plant*. The *Superintendent* may extend the time to enable the *Contractor* to perform remaining obligations.

### 29.3 Contractor's failure

- (1) If the *Contractor* fails to comply with the preceding obligations in this clause 29, the *Superintendent* may direct the *Contractor* to rectify the non-compliance and the time for rectification.
- (2) If:
  - (a) the *Contractor* fails to comply with such a *direction*; and
  - (b) that failure has not been made good within five (5) *business days* after the *Contractor* receives written notice from the *Superintendent* that the *Principal* intends to have the subject *work* carried out by others,

the *Principal* may have that *work* so carried out and the cost incurred will be a debt due from the *Contractor* to the *Principal*. The rights given by this paragraph are additional to any other rights and remedies.



## **30 Materials, labour and construction plant**

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### **30.1 Contractor to supply**

- (1) Except where the *Contract* otherwise provides, the *Contractor* must supply everything necessary for the proper performance of the *Contractor's* obligations and discharge of the *Contractor's* liabilities.
- (2) Without limiting the above, the *Contractor's* obligations extend to all *work* specifically referred to in the *Contract*, all *variations* to such *work*, instructed, sanctioned or required under the terms of the *Contract* and all minor items of *work* to be inferred for the proper execution and completion of *the Works* to the reasonable satisfaction of the *Superintendent*.
- (3) Notwithstanding any other provision of the *Contract*, the *Contractor* will have *No Claim* in connection with or arising of any work or service not known or described in the *Contract* or which is included in one or some only but not all of the *Contract Documents* where such work or service is reasonably incidental to the proper execution and completion of *the Works* or which ought to have been allowed for by a competent contractor.
- (4) In respect of any materials, machinery, *construction plant* or equipment to be supplied by the *Contractor* in connection with the *Contract*, the *Superintendent* may direct the *Contractor* to:
  - (a) supply particulars of the mode and place of manufacture, the source of supply, the performance capacities and other related information; and
  - (b) arrange reasonable inspection at such place or sources by the *Superintendent*, the *Principal* and persons authorised by the *Principal*.

### **30.2 Superintendent's direction**

The *Superintendent* may give the *Contractor* a written *direction* not to remove materials or *construction plant* from the *site*. Thereafter the *Contractor* must not remove them without the *Superintendent's* prior written approval (which must not be unreasonably withheld).

## **31 Quality**

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### **31.1 Quality of material and work**

- (1) Unless otherwise provided in the *Tender Documents*, the *Contractor* must use suitable new materials and proper and tradesmanlike workmanship.
- (2) The *Contractor* must perform and undertake the *WUC*:
  - (a) using its best endeavours;
  - (b) in a competent and professional manner;
  - (c) in accordance with the *Tender Documents*; and
  - (d) to the satisfaction of the *Principal's* representative.
- (3) Any unsatisfactory performance with respect to the quality of material and work, must be promptly rectified by the *Contractor* at the *Contractor's* expense.
- (4) The *Contractor* must use the materials and standards of workmanship required by the *Contract*. In the absence of any requirement to the contrary, the *Contractor* must use suitable new materials which are fit for their proper purpose and carry out the *WUC* in a proper and tradesmanlike manner.

### **31.2 Quality assurance\***

- (1) If the *Contract* elsewhere requires further quality assurance, the *Contractor* must:
  - (a) plan, establish and maintain a conforming quality system; and
  - (b) ensure that the *Superintendent* has access to the quality system of the *Contractor*, *consultants* and *subcontractors* so as to enable monitoring and quality auditing.

- (2) Any such quality system must be used only as an aid to achieving compliance with the *Contract* and to document such compliance. Such system does not discharge the *Contractor's* other obligations under the *Contract*.

### 31.3 Defective work

- (1) If the *Superintendent* becomes aware of *work* done (including material provided) by the *Contractor* which does not comply with the *Contract*, the *Superintendent* will, as soon as practicable, give the *Contractor* written details thereof. If the subject *work* has not been rectified, the *Superintendent* may direct the *Contractor* to do any one or more of the following (including times for commencement and completion):

- (a) remove the material from the *site*;
- (b) demolish the *work*;
- (c) redesign, reconstruct, replace or correct the *work*; and
- (d) not deliver it to the *site*.

- (2) If :

- (a) the *Contractor* fails to comply with such a *direction*; and
- (b) that failure has not been made good within 10 *business days* after the *Contractor* receives written notice from the *Superintendent* that the *Principal* intends to have the subject *work* rectified by others,

the *Principal* may have that *work* so rectified and the *Superintendent* will certify the cost incurred as moneys due from the *Contractor* to the *Principal*. The rights given by this paragraph are additional to any other rights and remedies.

### 31.4 Acceptance of defective work

- (1) Instead of a *direction* pursuant to clause 31.3, the *Superintendent* may direct the *Contractor* that the *Principal* elects to accept the subject *work*, whereupon there will be a deemed *variation* to which the balance of this clause 31.4 applies.
- (2) The price for any *variation* deemed to have occurred under paragraph (1) will be a decrease in the *contract sum* in an amount equal to the greater of the following as assessed by the *Superintendent*:
- (a) the cost of remedying the material or *work* priced in accordance with clause 38.6; and
  - (b) the resulting decrease in the value to the *Principal* of the *Works* and any other loss which the *Principal* is likely to suffer, including the likely increase in operational and maintenance costs which may be incurred by the *Principal* if it accepts the material or *work*.
- (3) The decrease in the *contract sum* may be:
- (a) recovered by the *Principal* as a debt due to the *Principal* by the *Contractor*;
  - (b) set-off or deducted by the *Principal* from any monies which may then be or thereafter become payable to the *Contractor* by the *Principal*; and/or
  - (c) paid by recourse to the *security*.

### 31.5 Timing

The *Superintendent* may give a *direction* pursuant to this clause 31 at any time before the expiry of the last *defects liability period*.

### 31.6 Warranty

- (1) The *Contractor* warrants that the completed *works* (and every part of them) and all materials, articles and goods used or incorporated in the *WUC* or supplied by the *Contractor* and/or its *subcontractors* and suppliers in performance or purported performance of the *WUC*, whether purchased by the *Contractor* under any patent or trade name or otherwise, will comply with the quality, quantity number, nature, description and condition specified or will otherwise be fit for the purpose for which they are required.
- (2) The *Contractor* is liable for breach of this warranty notwithstanding that the *Superintendent* may have accepted *the Works* or any part of them as satisfactorily executed or completed.

## **32 Examination and testing**

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### **32.1 Tests**

- (1) At any time before the expiry of the last *defects liability period*, the *Superintendent* may direct that any material or *WUC* be tested. The *Contractor* must give such assistance and samples and make accessible such parts of *WUC* as may be directed by the *Superintendent*.
- (2) On completion of the tests, the *Contractor* must promptly make good the work tested so that it fully complies with the Contract.

### **32.2 Covering up**

The *Superintendent* may direct that any part of the *WUC* must not be covered up or made inaccessible without the *Superintendent's* prior written *direction*.

### **32.3 Who conducts**

*Tests* must be conducted as provided elsewhere in the *Contract* or by the *Superintendent* or a person (which may include the *Contractor*) nominated by the *Superintendent*.

### **32.4 Notice**

The *Superintendent* or the *Contractor* (whichever is to conduct the *test*) must give reasonable written notice to the other of the date, time and place of the *test*. If the other does not attend, the *test* may nevertheless proceed.

### **32.5 Delay**

Without prejudice to any other right, if the *Contractor* or the *Superintendent* delays in conducting a *test*, the other, after giving reasonable written notice of intention to do so, may conduct the *test*.

### **32.6 Completion and results**

- (1) On completion of the *tests*, the *Contractor* must make good *WUC* so that it fully complies with the *Contract*.
- (2) Results of *tests* must be promptly made available by each party to the other and to the *Superintendent*.

### **32.7 Costs**

Costs in connection with *testing* pursuant to this clause 32 must be borne by the *Principal* except where the *Contract* otherwise provides or the *test* is consequent upon, or reveals a failure of the *Contractor* to comply with the *Contract* (including this clause 32).

### 33 Working hours

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- (1) If the working hours and working days on the *site* are not stated elsewhere in the *Contract*, they will be as notified by the *Contractor* to the *Superintendent* before commencement of work on *site*. They will not be varied without the *Superintendent's* prior written approval, except when, in the interests of safety of persons or property, the *Contractor* finds it necessary to carry out *WUC* otherwise, whereupon the *Contractor* must give the *Superintendent* written notice of those circumstances as early as possible.
- (2) Working Hours are between 7.00 am and 5.00 pm, and "*Working Days*" are Monday to Friday (inclusive) but exclusive of proclaimed public holidays.
- (3) When *WUC* is carried out on public holidays or outside Work Hours on Monday to Friday (inclusive), or when more than thirty-eight (38) hours are worked in any one (1) week:
  - (a) the *Contractor* must not claim:
    - (i) an *EOT*; or
    - (ii) delay damages pursuant to clause 36.10, if it is unable to undertake that *WUC* and would otherwise have been entitled to claim an *EOT* or *delay damages*;
  - (b) the *Contractor* must meet all consequent costs incurred by the *Principal* in supervision of the *WUC*; and
  - (c) the costs referred to in paragraph (b) will be deducted from any monies due, to or that may become due, to the *Contractor* under the *Contract*.
- (4) Paragraphs (1) to (3) inclusive will be applied by the *Superintendent* in assessing and determining claims for:
  - (a) *Variations*; or
  - (b) *EOT*,  
made by the *Contractor* under the *Contract*.

### 34 Programming

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#### 34.1 Provision of information

- (1) The *Contractor* must give the *Superintendent* reasonable advance notice of when the *Contractor* needs information, materials, documents or instructions from the *Superintendent* or the *Principal*.
- (2) The *Principal* and the *Superintendent* are not obliged to give any information, materials, documents or instructions earlier than the *Principal* or the *Superintendent*, as the case may be, should reasonably have anticipated at the *date of acceptance of tender*.

#### 34.2 Superintendent may direct

The *Superintendent* may direct in what order and at what time the various stages or portions of *WUC* must be carried out (including a power to direct the *Contractor* to accelerate the progress of *WUC* and to bring forward the *date for practical completion* by a reasonable period). If the *Contractor* can reasonably comply with the *direction*, the *Contractor* must do so. If the *Contractor* cannot reasonably comply, the *Contractor* must give the *Superintendent* written notice of the reasons.

#### 34.3 Construction program

- (1) AA *construction program* is a written statement showing the dates by which, or the times within which, the various stages or portions of *WUC* are to be carried out or completed.
- (2) The *Contractor* will maintain a *construction program* (in the format of a Gantt Chart MS Project) for the *WUC* which reflects the day to day status of each component of the *WUC*.

- (3) In preparing the construction program, the Contractor must acknowledge where there is an existing residential and commercial precinct and that therefore it is required to finish areas as the Works proceeds. This includes grassing of footpaths, tree planting, path paving etc.
- (4) The construction program must:
  - (a) be submitted to, and be approved by, the *Superintendent* before *WUC* are allowed to commence;
  - (b) account for any *EOT* that has been granted;
  - (c) allow for the completion and compilation of all *Approvals*, data, *test* results and reports that are required by the *Contract* to be provided to the nominated parties;
  - (d) allow twenty (20) *business days* for inclement weather in the *construction program*; and;
  - (e) make allowance for all public holidays and industry approved Rostered Days Off. These will not be included for the purpose of calculating *EOT* allowances; and (f ) include:
    - (i) major project milestones, construction and commissioning activities, *consent authority* inspections;
    - (ii) critical path activities;
    - (iii) all activity dependencies;
    - (iv) *defects* inspection by *Principal*; and
    - (v) *defects* rectification and final clean by the *Contractor*.
- (5) The *Contractor* must:
  - (a) promptly notify the *Superintendent* of any departure from a *construction program*;
  - (b) submit a revised *construction program* to the *Superintendent* for approval;
  - (c) where applicable to the *WUC*, give the *Superintendent* twenty-four (24) hours' notice for an inspection when:
    - (i) conduits are laid and jointed (prior to backfilling);
    - (ii) gully pits are formed (prior to pouring);
    - (iii) drainage lines are laid (prior to backfilling);
    - (iv) excavations are complete (prior to backfilling);
    - (v) formwork is placed and completed (prior to pouring concrete);
    - (vi) reinforcing steel is in place (prior to pouring concrete); and
    - (vii) retaining wall footings are complete (prior to erecting retaining wall), and
  - (d) not place any backfill or any piping without the prior approval of the *Superintendent*.
- (6) When the *Principal* is required to provide materials, the Contractor must provide a minimum of forty-eight (48) hours written notice. The *Principal* will supply suitable material request forms for the purpose

#### **34.4 Directions in relation to construction program**

- (1) Any response or communication by the *Superintendent* in relation to a *construction program* or draft *construction program* is not a *direction* to accelerate.
- (2) The power of the *Superintendent* to require the *Contractor* to provide a *construction program* includes a power to *direct*.

- (a) the *Contractor* to provide an updated *construction program* where there has been a change in the *date for practical completion* or where there have occurred any circumstances which have affected the progress of *WUC*;
  - (b) what form the *construction program* must take, what information must be contained in it and the level of detail required of that information; and
  - (c) that the *Contractor* furnish the *Superintendent* with 'as built' *construction programs* (in the same form as the *construction program*) with each progress payment (or at such other time as the *Superintendent* may require) which show the 'as built' progress of *WUC* in sufficient detail to enable a comparison to be made between the 'as-built' progress of *WUC* and the progress of *work* contemplated under the *construction program*.
- (3) Notwithstanding the provisions of clause 34.1 and review or approval by the *Superintendent* of any documents submitted to the *Superintendent*, the *Contractor* will have *No Claim* and remains responsible for all construction methods, means, techniques, sequences and procedures employed in and about the conduct of the *WUC*.

#### **34.5 Alteration of cost**

If compliance with any such *directions* under clause 34.3, except those pursuant to the *Contractor's* default, causes the *Contractor* to incur more or less cost than otherwise would have been incurred had the *Contractor* not been given the *direction*, the difference will be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

#### **34.6 Departure Notice**

- (1) If the *Superintendent* considers that:
- (a) the *Contractor* has departed from any *construction program*; and
  - (b) that departure may cause a delay in the *date of practical completion*, or have adversely affected the progress of *WUC*,
- the *Superintendent* may serve a notice on the *Contractor*:
- (c) advising of the concerns of the *Superintendent*; and
  - (d) requesting an explanation of the reasons for the departure from the *construction program*; and/or
  - (e) directing an updated *construction program* be provided; and/or
  - (f) directing the *Contractor* to provide any other information required by the *Superintendent* in order satisfy the *Superintendent* that *practical completion* will be reached by the *date for practical completion* notwithstanding the departure from the *construction program*, and
  - (g) stipulating the time by which the *Contractor* must respond to that notice, which must be a reasonable time,
- (Departure Notice).**
- (2) The *Contractor* must comply with a Departure Notice.
- (3) After having considered the *Contractor's* response to a Departure Notice, if the *Superintendent* believes that *practical completion* will not be reached by the *date for practical completion* on account of the departure from the *construction program*, the *Superintendent* may:
- (a) direct the *Contractor* to accelerate the *WUC* and provide an updated construction program pursuant to which practical completion will be reached by the date for practical completion; and/or
  - (b) direct that the *Contractor* only depart from the then current, or any revised, *construction program* in accordance with a *direction* to that effect by the *Superintendent*.

- (4) The *Contractor* may not make any claim, and is not entitled to any additional payment (including a *direction* for acceleration of the progress of the *WUC*), as a result of a *direction* under this clause 34.6.

## **35 Suspension**

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### **35.1 Superintendent's suspension**

The *Superintendent* may direct the *Contractor* to suspend the carrying out of the whole or part of *WUC* for such time as the *Superintendent* thinks fit, if the *Superintendent* is of the opinion that it is necessary:

- (1) because of an act, default or omission of:
  - (a) the *Superintendent*, the *Principal* or its employees, consultants, agents or other contractors (not being employed by the *Contractor*); or
  - (b) the *Contractor*, a *consultant*, a *subcontractor* or either's employees or agents of any of them,
- (2) for the protection or safety of any person or property; or
- (3) to comply with a court order.

### **35.2 Contractor's suspension**

If the *Contractor* wishes to suspend the carrying out of the whole or part of *WUC*, otherwise than pursuant to clause 41.9, the *Contractor* must obtain the *Superintendent's* prior written approval. The *Superintendent* may approve the suspension and may impose conditions of approval.

### **35.3 Recommencement**

- (1) As soon as the *Superintendent* becomes aware that the reason for any suspension no longer exists, the *Superintendent* will direct the *Contractor* to recommence suspended *WUC* as soon as reasonably practicable.
- (2) The *Contractor* may recommence *WUC* suspended pursuant to clause 35.2 or 41.9 at any time after reasonable notice to the *Superintendent*.

### **35.4 Cost**

The *Contractor* must bear the cost of suspension pursuant to clause 35.1(1)(b) and clause 35.2. If the *Contractor* made the protection, safety or court order or suspension of work necessary, the *Contractor* must bear the cost of suspension pursuant to clause 35.1(2) or 35.1(3). If the *Contractor* otherwise incurs more or less cost than otherwise would have been incurred, the difference will be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

## **36 Time and progress**

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### **36.1 Progress**

The *Contractor* must ensure that *WUC* reaches *practical completion* by the *date for practical completion* in accordance with the *construction program*.

### **36.2 Notice of Delay**

- (1) *WUC must promptly give the Superintendent and the other party written notice of that cause and the estimated delay.*
- (2) On becoming aware of anything which may or will probably cause delay to *WUC* (**Delay**) the *Contractor* must promptly, and in any event within 5 *business days* of becoming aware, give the *Superintendent* written notice which contains:
  - (a) full details of the cause of Delay;

- (b) the date the Delay might commence (or, if the Delay has already commenced, the date the Delay commenced);
  - (c) the estimated period of the Delay; and
  - (d) where the Delay results from a *qualifying cause of delay*, whether the *Contractor* intends to make a claim for an *EOT* in relation to that Delay.
- (3) If the Delay continues for a period of 5 *business days* or more, then the *Contractor* must give the *Superintendent* written notice of continuing Delay in accordance with paragraph (2) each 5 *business days* that the Delay continues.
- (4) Notwithstanding anything to the contrary, if the *Contractor* fails to give the *Superintendent* notice in accordance with paragraph (2) and/or (3), the *Contractor* will have *No Claim* arising out of or in connection with the Delay that should have been subject to the relevant notice.

### 36.3 Claim

- (1) *At any time prior to the date for practical completion a civil commotion, when it becomes evident to the Contractor that anything may delay the WUC, the Contractor must promptly and in any event not later than 20 business days after the Contractor first became aware or ought reasonably to have become aware of the cause of the delay, notify the Superintendent in writing with details of the delay and the cause.*
- (2) *if the Contractor fails to give notice within the said period of 20 business days then the Contractor will have No Claim arising out of or connected with or in any way brought about by any any other delay associated with the cause.*
- (3) *he Contractor Notwithstanding clause will only be entitled to claim an extension to the date for practical completion when:*
- (a) *it the Contractor can demonstrate that it is or will be delayed in reaching practical completion by the date for practical completion by a qualifying cause of delay which is on the critical path and where the delay occurs prior to the date for practical completion; and*
  - (b) *the Contractor gives the Superintendent, within 20 business days of when the Contractor became aware or ought reasonably have become aware of the causation for the delay occurring, a written claim for an EOT evidencing:*
    - (i) *the facts of causation and of the delay to WUC (including extent);*
    - (ii) *the number of days EOT claimed in relation to the date for practical completion;*
    - (iii) *the steps taken by the Contractor to mitigate, minimise the consequences of the delay and prevent the occurrence of the delay;*
    - (iv) *to the Superintendent's reasonable satisfaction that the delay affects a critical path activity by reference to the activities in the detailed breakdown shown in the construction program; and*
    - (v) *the Contractor has taken and can provide evidence to the satisfaction of the Superintendent that it continues to take all reasonable steps to mitigate and reduce the delay caused by the qualifying cause of delay.*

### 36.4 Inclement Weather

- (1) A claim by the *Contractor* for an *EOT* based on *inclement weather* must state:
- (a) the date;
  - (b) the type of weather;
  - (c) number of hours during the period claimed; and
  - (d) working hours.



- (2) The nearer of a rainfall gauge administered by the Australian Bureau of Meteorology or a rainfall report issued by the local weather station will be taken by the *Superintendent* as conclusive evidence of the statements contained in any claim referred to in paragraph (1).
- (3) The *Contractor* must allow in its *construction program* for each individual component of the Works, ten (10) working days for *inclement weather*.
- (4) No claim for delay caused by *inclement weather* will be granted until each allowance of twenty (20) working days has been taken up and used by the *Contractor*. Thereafter the formula detailed in paragraph (5) may be used to determine the duration of delay caused by inclement weather.
- (5) Any claim for EOT referred to in paragraph (4) will be calculated in accordance with the following formulae:
  - (a) For each half day of inclement weather, one (1) day is granted.
  - (b) For each one (1) day inclement weather, two (2) days are granted.
  - (c) For each two (2) or more consecutive days, the actual number of days plus one (1) additional day (except when the day following the last day of inclement weather is a non-working day, the additional day will not be granted).

### 36.5 Assessment

- (1) When both non-qualifying and *qualifying causes of delay* overlap, and the cause of at least one of the delays, but not all of them, is not a *qualifying cause of delay*, then to the extent that the delays overlap, the *Contractor* will not be entitled to an *EOT*.
- (2) The *Superintendent* will consider the impacts on the *Contractors* critical path in its *construction program*.
- (3) It will be at the full discretion of the *Superintendent* whether an *EOT* will be granted after the *date for practical completion* has passed.
- (4) In assessing each *EOT* the *Superintendent* will disregard questions of whether:
  - (a) *WUC* can nevertheless reach *practical completion* without an *EOT*; or
  - (b) the *Contractor* can accelerate,
 but will have regard to what prevention and mitigation of the delay has not been effected by the *Contractor*.

### 36.6 Extension of Time

- (1) Within 20 *business days* after receiving a valid Claim for an *EOT* the *Superintendent* will give to the *Contractor* a written notice as to what *EOT* is allowed, if any. The *date for practical completion* is extended in accordance with any such notice.
- (2) The *Superintendent* may, at any time and from time to time in their absolute discretion, by written notice to the *Contractor* grant an *EOT* notwithstanding that the *Contractor* is not otherwise entitled to an *EOT*.
- (3) If the *Superintendent* fails to respond to, a valid *EOT* claim within 20 *business days* after receipt it will be deemed as having been approved by the *Superintendent* and will cause the *date for practical completion* to be changed by the period stipulated in the *EOT* claim.

### 36.7 Acceleration of the Works

- (1) The *Principal*, at any time and from time to time, may by notice in writing to the *Contractor* direct the *Contractor* that the *WUC* (or any part of it) be accelerated by means of overtime, additional crews, additional shifts or otherwise, and the *Contractor* must comply with such *direction* to the extent reasonably practicable.

- (2) Before the issue of a *direction* under paragraph (1), the *Principal* may require the *Contractor* to submit, within five (5) *business days* of being requested to do so, reasonably detailed information regarding a proposed acceleration, including:
  - (a) if applicable, the additional work that will be required to achieve *practical completion* by the *date for practical completion*; and
  - (b) the likely additional actual costs to be incurred by the *Contractor* in complying with the proposed *direction*.
- (3) Subject to paragraph (4), the *Contractor* is entitled to be compensated by the *Principal* for the additional actual necessary costs incurred by it to the extent to which it has complied with a *direction* under paragraph (1).
- (4) If a *direction* is issued under paragraph (1) as a consequence of a breach of the *Contract* by the *Contractor*, the *Contractor* will have *No Claim* arising out of or in connection with the *direction*.

### 36.8 Preconditions to Practical Completion

- (1) The *Contractor* acknowledges and agrees that notwithstanding anything to the contrary in the *Contract*, any damage caused by it to the *site* and surrounding areas (including all disturbed areas, damage to *adjoining sites*, public areas and all or any damage or disturbance in a road reserve), must be rectified and/or reconstructed by the *Contractor* as a precondition to achieving *practical completion*.
- (2) The *Contractor* must give the *Superintendent* at least 10 *business days* written notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached.
- (3) When the *Contractor* is of the opinion that *practical completion* has been reached, the *Contractor* must in writing request the *Superintendent* to issue a *certificate of practical completion*. Within 10 *business days* after receiving the request, the *Superintendent* will give the *Contractor* and the *Principal* either:
  - (a) a *certificate of practical completion* evidencing the *date of practical completion*; or
  - (b) a written notice which specifies why the *Superintendent* considers that *practical completion* has not been reached.
- (4) If the *Superintendent* provides a notice under paragraph (3)(b), the *Contractor*, forthwith upon receipt of such reasons, must attend to the matters identified in that notice and such other matters required to bring *the Works* to *practical completion*. Upon the completion of those *works*, the relevant parties must again undertake the procedure set out in paragraphs (2) and (3) until *practical completion* has been reached.

### 36.9 Liquidated Damages

- (1) If *WUC* does not reach *practical completion* by the *date for practical completion*, the *Superintendent* will certify, as due and payable by the *Contractor* to the *Principal*, liquidated damages in *Item 29* for every day after the *date for practical completion* to and including the earliest of the *date of practical completion* or termination of the *Contract* or the *Principal* taking *WUC* out of the hands of the *Contractor*.
- (2) If an *EOT* is directed after the *Contractor* has paid or the *Principal* has set off liquidated damages, the *Principal* must forthwith repay to the *Contractor* such of those liquidated damages as represent the days the subject of the *EOT* up to the capped amount specified in *Item Error! Reference source not found.*
- (3) The *Contractor* acknowledges that the liquidated damages in *Item 29* are a genuine pre-estimate of the *Principal's* loss that will arise as a result of any delay in *practical completion*.
- (4) Notwithstanding anything in the *Contract* to the contrary, the *Principal* may have recourse to the security in relation to any *liquidated damages* for which the *Contractor* may be indebted.

- (5) The *Contractor* acknowledges and agrees that if *Item 29* is completed by words which indicate that liquidated damages do not apply to the *Contract* (whether by the use of the words "nil", "not applicable" or otherwise), the *Principal* does not waive its entitlement to claim against the *Contractor* at law on account of any delay in *practical completion*.

### **36.10 Delay Damages**

- (1) or every day the subject of an *EOT* for a *compensable cause* and for which the *Contractor* gives the *Superintendent* a claim for delay damages pursuant to clause 43, delay costs that the *Contractor* has incurred or will incur due to the *compensable cause* the subject of the *EOT* as certified by the *Superintendent* under clause 43 will be due and payable to the *Contractor* by the *Principal*.
- (2) The *Contractor* will not be entitled to recover (whether pursuant to this clause or otherwise in the *Contract* or on any other basis):
- (a) any amount representing:
    - (i) loss of profit;
    - (ii) contribution to head office overheads;
    - (iii) loss of contracts; or
    - (iv) any indirect or consequential loss and damage, or
  - (b) for the aggregate of all *EOTs*, an amount greater than the amount specified in *Item 29A*.
- (3) The amounts payable under this clause will be the *Contractor's* sole entitlement to compensation for any delay or disruption, whether in breach of contract or otherwise and will be in substitution for and will exclude the rights and remedies, if any, of the *Contractor* at common law (including the right to recover damages for breach of contract or otherwise).

Damages caused by delays which are claimable and payable by the *Principal* under this *Contract* will be NIL.

## **37 Defects Liability**

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### **37.1 Period**

The *defects liability period* stated in *Item 32* commences at 4.00pm from the date indicated in the *certificate of practical completion* as the *date of practical completion*.

### **37.2 Obligations of the Contractor**

- (1) The *Contractor* will carry out rectification of all *defects* identified in the *defects liability period* at times and in a manner causing as little inconvenience to the occupants or users of the *Works* as is reasonably possible.
- (2) As soon as possible after the *date of practical completion*, the *Contractor* must rectify all *defects* existing at the *date of practical completion*.
- (3) The *Contractor* must hand over the *Works* in good order and condition at the completion of the *defects liability period*, including but not limited to the following as applicable to the *WUC*:
- (a) flushing out all stormwater pits & pipes;
  - (b) flushing out all roof water drainage lines;
  - (c) mowing grass;
  - (d) ensuring all hydro mulched/turfed/seeded areas have an acceptable strike rate;
  - (e) cleaning out all sedimentation control devices;

- (f) topping up subsided excavation, or fill;
- (g) relaying grass where mortality has occurred;
- (h) re-planting trees where damage has occurred;
- (i) repairs to footpaths, kerbs and/or roads where damage has occurred; and
- (j) repairs to fences and retaining walls.

### 37.3 Superintendent May Give Direction

At any time prior to the expiry of the *defects liability period*, the *Superintendent* may give the *Contractor* a *direction* to rectify a *defect* which:

- (1) must identify the *defect* and the date for completion of its rectification; and
- (2) may state a date for commencement of the rectification and whether there will be a separate *defects liability period* therefore (not exceeding that in *Item 32*, commencing at 4:00 pm on the date the rectification is completed and governed by this clause).

### 37.4 Failure to Rectify

- (1) If the rectification in accordance with a *direction* issued under clause 37.3 is not commenced or completed by the stated dates, the *Principal* may have the rectification carried out by others but without prejudice to any other rights and remedies the *Principal* may have. The cost thereby incurred will be a debt due from the *Contractor* to the *Principal* which may be deducted from or paid out of the proceeds of any *security* provided by the *Contractor* or from any sum otherwise due or to become due to the *Contractor*.
- (2) For the purposes of this clause, the word "cost" will be deemed to include the estimated cost of doing the required work and the word "incurred" will be deemed to mean incurred or to be incurred.

## 38 Variations

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### 38.1 Directing Variations

- (1) The *Contractor* must not vary *WUC* except as *directed* in writing by the *Superintendent* or the *Principal*.
- (2) The *Superintendent*, before the *date of practical completion*, may direct the *Contractor* to vary *WUC* by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the *Contract*:
  - (a) increase, decrease or omit any part including omitting any part of *WUC* with a view to retaining a third party to perform that part either prior to or after the *date of practical completion* (with no liability to compensate the *Contractor* for any loss of profit);
  - (b) change the character or quality;
  - (c) change the levels, lines, positions or dimensions;
  - (d) carry out additional *work*; and/or
  - (e) demolish or remove material or *work* no longer required by the *Principal*.
- (3) Variations will not be authorised for unnecessary or additional work due to disputes between trades or *subcontractors* and the *Contractor*. Delays by third parties such as service authorities are not a reason for granting an *EOT* or a *variation*. The *Contractor* will remain responsible for the co-ordination of service authority works within the construction period.

- (4) All *work*, whether documented by shop drawings or not, must fully comply with the requirements of the *Contract*. The *Superintendent's* inspection of shop drawings may note obvious deficiencies or errors but does not constitute approval of the drawings.

### 38.2 Variation to be within Scope of Contract

The *Contractor* is bound only to execute a *variation* that is within the general scope of the *Contract*.

### 38.3 Site Instructions not a Variation

- (1) Written site instructions issued by the *Superintendent* will not authorise *work* to be carried out as a *variation*. Should the *Contractor* consider that compliance with an instruction does involve a *variation* as to cost or time, the *Contractor* must inform the *Superintendent*, in writing, of the amount of the *variation* that it requires, together with details of the amounts claimed in respect of that *variation* within seven (7) days of the *Superintendent* issuing the relevant site instruction.
- (2) The *Contractor* must not carry out any *work* in respect of a site instruction which the *Contractor* seeks a *variation* under paragraph (1) without the *Superintendent's* prior written approval.

### 38.4 Variations Proposals

- (1) The *Superintendent* may *direct* the *Contractor* to submit a proposal for a *variation* (**Variation Proposal**).
  - (2) The *Contractor* must provide the following information in response to such a *direction* within the time specified in that *direction*, or if there is no such time specified, within five (5) *business days* of the *direction*:
    - (a) detailed breakdown of the price for the proposed *variation* (including any delay or disruption costs which may be incurred by the *Contractor* as a consequence of the proposed *variation*);
    - (b) a detailed scope of the proposed *variation* (including any drawings or technical details);
    - (c) the effect (if any) of the proposed *variation* on the *date for practical completion*; and
    - (d) the expiry period for acceptance of the Variation Proposal which must not be less than 5 *business days* (or, for urgent *work*, such shorter time as the *Superintendent* may in writing allow), from the date of receipt by the *Superintendent* of the Variation Proposal.
- (3) Upon receipt of a Variation Proposal, the *Superintendent* may in the sole discretion of the *Superintendent* do any one of the following:
  - (a) *direct* the *Contractor* to provide further information;
  - (b) accept the Variation Proposal and give the *Contractor* a *direction* to carry out the *variation* on the terms contained in the Variation Proposal in which case the *variation* will not be priced under clause 38.6 and the *contract sum* will only be varied in the manner set out in the Variation Proposal (if any); or
  - (c) not accept the Variation Proposal.
- (4) If the *Superintendent* and the *Contractor* do not agree on the price for the *variation* in a variation proposal, then the price will be determined in accordance with clause 44 (dispute resolution).

### 38.5 Variations for Convenience of Contractor

- (1) If the *Contractor* requests the *Superintendent* to direct a *variation* for the convenience of the *Contractor*, the *Superintendent* may do so. The *direction* must be written and may be conditional.

- (2) Unless the *direction* provides otherwise, the *Contractor* is not entitled to an *EOT* or an increase in the *contract sum* on account of the *variation*.

### **38.6 Pricing**

- (1) The *Superintendent* will, as soon as possible, price each *variation* using the following order of precedence:
- (a) prior agreement;
  - (b) applicable rates or prices in the *Contract*;
  - (c) rates or prices in a *schedule of rates*, even if they are not *Contract Documents*, to the extent that it is reasonable to use them;
  - (d) to the extent it is not reasonable to use the schedule of prices, the trade cost of the work comprising the variation (including warranties and certificates costs, if any) as assessed by the Superintendent; and
  - (e) the amount determined by applying the percentage specified in *Item 38* for preliminaries, profit and on-site and off-site overheads to the amount assessed under paragraph (1)(d),
- and any deductions will include a reasonable amount for profit but not overheads.
- (2) That price will be added to or deducted from the *contract sum*.
- (3) here no applicable rate is provided in the *Contract* and the *Contractor* does not agree with the reasonable rate or prices applied by the *Superintendent*, the *Contractor* may refer the matter for dispute resolution in accordance with clause 44.

## **39 Payment**

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### **39.1 Payment Claims**

- (1) The *Contractor* may claim payment progressively in accordance with *Item 33*.
- (2) An early payment claim is deemed to have been made on the date for making that claim.

### **39.2 Claims for Payment**

- (1) Each payment claim must be given in writing to the *Superintendent* and must include:
- (a) *Contractor's* business name, address and ABN number;
  - (b) the words "Tax Invoice" prominently displayed;
  - (c) the date of issue;
  - (d) the *Principal's* name and address, ABN number and purchase order number;
  - (e) details of the *WUC* to which the payment claim relates and a brief description of any item(s) and quantity supplied;
  - (f) the price of the goods or services without GST;
  - (g) the amount of GST payable;
  - (h) the total amount payable including GST (where the payment claim includes items that are GST-taxable and GST free details of both must be shown separately); and
  - (i) be accompanied by a Supporting Statement that complies with the requirements of the Security of Payment Act;
  - (j) satisfactory evidence that the insurances which the *Contract* requires the *Contractor* to hold are being maintained;
  - (k) satisfactory evidence or information which demonstrates the infrastructure created in accordance with the *Contract* up to the date of making that claim has been positioned correctly within the *site*;

- (l) Deed(s) of Warranty from *subcontractors* and/or manufacturers or suppliers whose *WUC* and/or goods or materials forming part of the *WUC* are included in the claim in accordance with clause 40;
- (m) Inspection and Test Plans;
- (n) must be based on units of completed *work*, or on the percentage of the *work* completed and may include details of other moneys then due to the *Contractor* pursuant to provisions of the *Contract*; and
- (o) include any other information reasonably requested by the *Superintendent*.
- (2) Claims for payment must be accompanied with detailed breakdown of all additional claims, and, if applicable supported by copies of:
  - (a) written directions issued by the *Superintendent*; and
  - (b) joint measurement sheets for any extra *work* carried out by the *Contractor*.
- (3) These terms apply in all instances irrespective of any condition applied by a *subcontractor* and/or third party supplier and may only be varied by prior arrangement with the *Principal*.
- (4) Nothing in the *Contract* will affect, restrict or limit the *Contractor's* right to:
  - (a) refer for adjudication any dispute falling within section 17 of the *Security of Payment Act*; and/or
  - (b) suspend the *WUC* under section 27 of the *Security of Payment Act*.

### 39.3 Payment Schedules

- (1) The *Superintendent* will, within 10 *business days* after receiving such a payment claim, issue to the *Principal* and the *Contractor* a certificate evidencing the *Superintendent's* opinion of the moneys due from the *Principal* to the *Contractor* pursuant to the payment claim and reasons for any difference ('*payment schedule*').
- (2) If the *Contractor* does not make a payment claim in accordance with *Item Error! Reference source not found.*, the *Superintendent* may issue the *payment schedule* with details of the calculations.
- (3) If the *Superintendent* does not issue the *payment schedule* within 10 *business days* of receiving a payment claim in accordance with clause 39.1, that payment claim is deemed to be the relevant *payment schedule*.
- (4) The progress payment to which the *payment claim* relates becomes due and payable by the *Principal* on the date that is 15 *business days* after a *payment claim* is made, regardless of when, or if, a *payment schedule* is issued.
- (5) Subject to paragraph (4), if a *payment schedule* is issued in response to a *payment claim*, the *Principal* must pay to the *Contractor* the balance of the payment schedule or if the *payment schedule* produces a negative balance, the *Contractor* must pay that balance to the *Principal* within 15 *Business Days* of receiving written notice thereof.
- (6) Neither a *payment schedule* nor a payment of moneys will be evidence that the subject *WUC* has been carried out satisfactorily. Payment other than *final payment* will be payment on account only. If the *Contractor* does not provide a tax invoice reflecting the *payment schedule* by the time required by the *Principal* in order to allow it to process the payment, then the *Principal* will also issue an accompanying *recipient-created tax invoice* reflecting the amount required to be paid to the *Contractor*.
- (7) The *Contractor* acknowledges that the *Principal* may issue a *recipient-created tax invoice* should the situation in paragraph (6) arise and in such a circumstance, the *Contractor* agrees that it will not issue a tax invoice in respect of the relevant *WUC* to which the *recipient-created tax invoice* pertains.

### 39.4 Payment Not Proof or Admission

- (1) Payment to the *Contractor* of any monies is not be taken as proof or admission that all or any of *the Works* for which payment has been claimed have been duly rendered or properly performed or completed or that other services not included in the *Contractor's* claims have been duly rendered.
- (2) The *Principal*, at any time after the expiration of the *Contract*, may demand repayment of monies paid to the *Contractor* for services that were not, in fact, rendered by it and the *Contractor* must repay such monies forthwith upon service of the *Principal's* demand.

### **39.5 Unfixed Plant and Materials**

- (1) The *Principal* is not liable to pay for unfixed plant and materials unless they are listed in *Item 34* and the *Contractor*.
  - (a) provides the additional *security* in *Item 14(e)*; and
  - (b) satisfies the *Superintendent* that the subject plant and materials have been paid for, properly stored and protected, and labelled the property of the *Principal*.
- (2) Upon payment to the *Contractor* and the release of any additional *security* in paragraph (1)(a), the subject plant and materials are the unencumbered property of the *Principal* and, if not yet on the *site*, must be available for immediate delivery to the *site*.

### **39.6 Final Payment Claim and Certificate**

- (1) Within 20 *business days* after the expiry of the last *defects liability period*, the *Contractor* must give the *Superintendent* a written *final payment claim* endorsed 'Final Payment Claim' being a payment claim together with all other claims whatsoever in connection with the subject matter of the *Contract*.
- (2) Within 10 *business days* after receiving the *final payment claim* the *Superintendent* will issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.
- (3) Those moneys certified as due and payable on the date that is 15 *business days* after the debtor receives the *final certificate*.
- (4) The *final certificate* is conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:
  - (a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;
  - (b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate* in accordance with paragraph 39.6(2);
  - (c) any accidental or erroneous inclusion or exclusion of *any work* or figures in any computation or an arithmetical error in any computation; and
  - (d) unresolved issues the subject of any notice of *dispute* pursuant to clause 44, served before the 7<sup>th</sup> day after the issue of the *final certificate*.

### **39.7 Interest**

Interest in *Item 35* is due and payable after the date of default in payment.

### **39.8 Other Moneys Due**

The *Principal* may elect that moneys due and owing otherwise than in connection with the subject matter of the *Contract* also be due to the *Principal* pursuant to the *Contract*.

### **39.9 Set Off**



The *Principal* may deduct from moneys due from the *Principal* to the *Contractor* under the *Contract* or in connection with the subject matter of the *Contract* any money due from the *Contractor* to the *Principal* under the *Contract* including any money due under clause 39.8.

#### **39.10 Profits**

The *Contractor* acknowledges that the *Principal* has not made any representations to it, either express or implied, with respect to the amount of profits that it may make as a result of undertaking the *WUC*.

### **40 Payment of Workers, Consultants and Subcontractors**

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#### **40.1 Payment of Subcontractors and/or Suppliers of Materials**

- (1) The *Contractor* must give in respect of if requested by the a payment claim, documentary evidence of the payment of moneys due and payable to:
  - (a) workers of the *Contractor* and of the *subcontractors*;
  - (b) *consultants*;
  - (c) *subcontractors*;
  - (d) suppliers and manufacturers,in respect of *WUC* the subject of that claim together with its Supporting Statement in accordance with requirements of clause 39.2.
- (2) If the *Contractor* is unable to give such documentary evidence, the *Contractor* will give other documentary evidence of the moneys so due and payable to workers, *consultants*, *subcontractors*, suppliers and manufacturers.
- (3) Documentary evidence, except where the *Contract* otherwise provides, must be to the *Superintendent's* satisfaction.

#### **40.2 Withholding Payment**

- (1) STo the extent permitted by law and subject to the next paragraph, the *Principal* may withhold payment to the *Contractor* in accordance with this clause 40.2.
- (2) The *Principal* may withhold payment to the *Contractor*:
  - (a) if the *Contractor* fails to comply with clause 40.1;
  - (b) if any information or documentation provided by the *Contractor* under clause 39.2 is false and misleading in a material way;
  - (c) in accordance with the following, as applicable:
    - (i) section 127(5) of the *Industrial Relations Act 1996* (NSW);
    - (ii) clause 18(6) of Schedule 2 of the *Payroll Tax Act 2007* (NSW); or
    - (iii) section 175B of the *Workers Compensation Act 1987* (NSW).
- (3) If a *subcontractor* serves a Payment Withholding Request on the *Principal* in accordance with the *Security of Payment Act*, the *Principal* will be entitled to withhold from money due and payable to the *Contractor* under the *Contract* an amount equivalent to the amount claimed in that request (**Retained Money**).
- (4) The *Principal* will be entitled to withhold any Retained Money until the first of the following occurs:
  - (a) the adjudication application for the subcontractor's payment claim ('Adjudication Application') is withdrawn;
  - (b) the *Contractor* can demonstrate to the *Principal's* satisfaction that it has paid the subcontractor the amount claimed to be due under the payment claim;

- (c) the subcontractor serves a notice of claim on the *Principal* for the purposes of section 6 of the *Contractors Debts Act 1997* (NSW) in respect of the payment claim; or
  - (d) a period of 20 business days elapses after a copy of the adjudicator's determination of the Adjudication Application is served on the *Principal* by the subcontractor.
- (5) If the *Principal*, in making a payment to the *Contractor* under the *Contract*, fails to comply with a Payment Withholding Request served on the *Principal* by a *subcontractor*, such that under the *Security of Payment Act* the *Principal* becomes jointly and severally liable with the *Contractor* in respect of the whole or any part of a debt owed by the *Contractor* to the *subcontractor*, the debt so incurred by the *Principal* will be a debt due and payable from the *Contractor* to the *Principal*.
- (6) For the purposes of this clause 40.2, terms such as 'Payment Withholding Request', 'payment claim', 'adjudication application' and 'adjudicator' have the meaning ascribed to them in the *Security of Payment Act*.

#### **40.3 Direct Payment**

- (1) Before *final payment*, the *Principal*, if not aware of a relevant relation-back day (as defined in the Corporations Law) may pay unpaid moneys the subject of clause 40.1 directly to a worker, *consultant* or *subcontractor* where:
- (a) permitted by law;
  - (b) given a court order in favour of the worker, *consultant* or *subcontractor*;
  - (c) requested in writing by the *Contractor*; or
  - (d) the *Superintendent* determines that the worker, *consultant* or *subcontractor* remains unpaid after the due date for payment.
- (2) Such payment and a payment made to a worker, consultant or subcontractor in compliance with a *legislative requirement* is deemed to be part-satisfaction of the *Principal's* obligation to pay pursuant to clauses 39.3 or 39.6, as the case may be, irrespective of whether, in the case of a payment to a *subcontractor*, the amount paid by the *Principal* to the *subcontractor* is greater than the amount which the *Contractor* is ultimately required to pay the *subcontractor*.
- (3) Within four (4) months of the 30The *Contractor* acknowledges that the *Principal* and the *Superintendent* have the right to contact employees of the *Contractor*, *any subcontractor* and employees of any *subcontractor* to determine whether any such employee or *subcontractor* remains unpaid after the due date for payment.

#### **40.4 Subcontractors and suspension under Security of Payment Act**

Where a *subcontractor* has made a payment claim on the *Contractor* under the *Security of Payment Act*:

- (1) *Security of Payment Act*, the *Contractor* must without delay give the *Superintendent* and the *Principal* a copy of any notice that the *Contractor* receives from, or issues to, the *subcontractor*, the adjudicator or court; or
- (2) if the *Principal* becomes aware that the *subcontractor* is entitled to suspend work under the *Security of Payment Act* in relation to that payment claim, the *Principal* may (in its absolute discretion) pay the *subcontractor* in respect of work forming part of *WUC*, and any amount paid by the *Principal* will be deemed to be part satisfaction of the *Principal's* obligation to pay pursuant to clause 39.3 or 39.6, as the case may be, even if the amount paid by the *Principal* to the *subcontractor* is greater than the amount which the *Contractor* is ultimately required to pay the *subcontractor*.

## **41 Default or Insolvency**

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### **41.1 Preservation of Other Rights**

If a party breaches (including repudiates) the *Contract*, nothing in this clause prejudices the right of the other party to recover damages or exercise any other right or remedy.

#### **41.2 Contractor's Default**

- (1) If the *Contractor* commits a substantial breach of the *Contract*, the *Principal* may, by hand or by registered post, give the *Contractor* a written notice to show cause.
- (2) Substantial breaches include, but are not limited to:
  - (a) failing to:
    - (i) perform properly the *Contractor's design obligations*;
    - (ii) provide *security*;
    - (iii) provide evidence of insurance;
    - (iv) comply with a *direction* of the *Superintendent*;
    - (v) comply with a request for information from the *Principal* pursuant to clause 53.2; or
    - (vi) use the materials or standards of *work* required by the *Contract*;
  - (b) wrongful suspension of *work*;
  - (c) substantial departure from a *construction program* without reasonable cause or the *Superintendent's* approval;
  - (d) where there is no *construction program*, failing to proceed with due expedition and without delay; and
  - (e) in respect of clause 39, knowingly providing documentary evidence containing an untrue statement.

#### **41.3 Principal's Notice to Show Cause**

A notice under clause 41.2 must state:

- (1) that it is a notice under clause 41;
- (2) the alleged substantial breach;
- (3) that the *Contractor* is required to show cause in writing why the *Principal* should not exercise a right referred to in clause 41.4;
- (4) the date and time by which the *Contractor* must show cause (which must not be less than seven (7) clear days after the notice is received by the *Contractor*); and
- (5) the place at which cause must be shown.

#### **41.4 Principal's Rights**

- (1) If the *Contractor* fails to show reasonable cause by the stated date and time, the *Principal* may by written notice to the *Contractor*:
  - (a) suspend payment under this *Contract* for all or any *WUC* performed by the *Contractor* on or after the date of a notice issued under clause 41.2; or
  - (b) take out of the *Contractor's* hands the whole or part of the *work* remaining to be completed and suspend payment until it becomes due and payable pursuant to clause 39.6; or
  - (c) terminate the *Contract*.
- (2) The suspension of payment under paragraph (1) will not in any way affect the continuing obligations of the *Contractor* under the *Contract*.
- (3) Upon either event, the *Principal* may require the *Contractor* to answer any questions and provide any information that the *Principal* may require in relation to any *subcontractors* of the *Contractor* including:

- (a) the amount of *work* the *subcontractors* have completed;
  - (b) the amount of money the *Contractor* has paid the *subcontractor* with regard to *the Works*;
  - (c) any monies that have been claimed by the *subcontractor* but not yet paid and whether the *Contractor* considers that money to be due and owing or about to become due and owing;
  - (d) whether the *subcontractor* has caused delay; and
  - (e) whether the *subcontractor* has carried out *the Works* in a good and workmanlike manner and/or whether there are defects in *the Works* undertaken by the *subcontractor*.
- (4) This clause 41.4 survives any termination of the *Contract*.

#### **41.5 Take Out**

- (1) The *Principal* may complete *work* taken out of the *Contractor's* hands and may:
  - (a) use materials, equipment and other things intended for *WUC* which are located on or in the vicinity of the *site*; and
  - (b) without payment of compensation to the *Contractor*:
    - (i) take possession of, and use such of the *construction plant* and other things on or in the vicinity of the *site* as were used by the *Contractor*;
    - (ii) contract with such of the *Contractor's* subcontractors and consultants; and as are reasonably required by the *Principal* to facilitate completion of *WUC* taken out.
- (2) If the *Principal* takes possession of *construction plant* or other things, the *Principal* must maintain them and, subject to clause 41.6 on completion of the *work taken out*, must return such of them as are surplus.
- (3) The *Superintendent* will keep records of the cost of completing the *work* taken out.
- (4) Any reasonable cost incurred by the *Principal* arising out of the *Principal* taking the *work* out of the hands of the *Contractor* must be paid as a debt due from the *Contractor* to the *Principal*.

#### **41.6 Adjustment on Completion of Work Taken Out**

- (1) When *work* taken out of the *Contractor's* hands has been completed, the *Superintendent* will assess the cost thereby incurred and will certify as moneys due and payable accordingly the difference between that cost (showing the calculations of that difference) and the amount which would otherwise have been paid to the *Contractor* if the *work* had been completed by the *Contractor*.
- (2) If the *Contractor* is indebted to the *Principal*, the *Principal* may retain *construction plant* or other things taken under clause 41.5 until the debt is satisfied. If after reasonable notice, the *Contractor* fails to pay the debt, the *Principal* may sell the *construction plant* or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess must be paid to the *Contractor*.

#### **41.7 Principal's Default**

- (1) If the *Principal* commits a substantial breach of the *Contract*, the *Contractor* may, by hand or by registered post, give the *Principal* a written notice to show cause.
- (2) Substantial breaches include, but are not limited to:
  - (a) failing to:
    - (i) produce evidence of insurance;
    - (ii) rectify inadequate *Contractor's* access to the *site* if that failure continues for longer than the time stated in *Item 36(a)*;

- (iii) rectify inadequate *Contractor's* possession of the *site* if that failure continues for longer than the time stated in *Item 36(b)*; or
- (iv) make a payment due and payable pursuant to the *Contract*; and
- (b) the *Superintendent* not giving a *certificate of practical completion* or reasons as referred to in clause 36.8.

#### **41.8 Contractor's Notice to Show Cause**

A notice given under clause 41.7 must state:

- (1) that it is a notice under clause 41.7;
- (2) the alleged substantial breach;
- (3) that the *Principal* is required to show cause in writing why the *Contractor* should not exercise a right referred to in clause 41.9;
- (4) the date and time by which the *Principal* must show cause (which must not be less than seven (7) clear days after the notice is received by the *Principal*); and
- (5) the place at which cause must be shown.

#### **41.9 Contractor's Rights**

- (1) If the *Principal* fails to show reasonable cause by the stated date and time, the *Contractor* may, by written notice to the *Principal*, suspend the whole or any part of *WUC*.
- (2) The *Contractor* must remove the suspension if the *Principal* remedies the breach.
- (3) The *Contractor* may, by written notice to the *Principal*, terminate the *Contract*, if within twenty eight (28) days of the date of suspension under this clause, the *Principal* fails:
  - (a) to remedy the breach; or
  - (b) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the *Contractor*.
- (4) Damages suffered by the *Contractor* by reason of the suspension will be assessed by the *Superintendent*, who will certify them as moneys due and payable to the *Contractor*.

#### **41.10 Termination**

- (1) If the *Contract* is terminated pursuant to clause 41.4(1)(c) or clause 41.9, the parties' remedies, rights and liabilities are the same as they would have been under the law governing the *Contract* had the defaulting party repudiated the *Contract* and the other party elected to treat the *Contract* as at an end and recover damages.
- (2) If the *Principal* has terminated the *Contract*, the *Principal* may also, without payment of compensation, take possession of the *design documents*.

#### **41.11 Insolvency**

- (1) A party commits an ***act of insolvency*** if :
  - (a) the party informs the other in writing, or creditors generally, that the party is insolvent or is financially unable to proceed with the *Contract*;
  - (b) execution is levied against the party by a creditor;
  - (c) the party is an individual person or a partnership including an individual person, and that person:
    - (i) commits an act of bankruptcy;
    - (ii) has a bankruptcy petition presented against him or her or presents his or her own petition;
    - (iii) is made bankrupt;

- (iv) makes a proposal for a scheme of arrangement or a composition; or
- (v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration order made, under Part X of the *Bankruptcy Act 1966* (Cth) or like provision under the law governing the *Contract*; or
- (d) the party is a corporation and:
  - (i) notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;
  - (ii) it enters a deed of company arrangement with creditors;
  - (iii) a controller or administrator is appointed;
  - (iv) an application is made to a court for its winding up and not stayed within fourteen (14) days;
  - (v) a winding up order is made in respect of it;
  - (vi) it resolves by special resolution that it be wound up voluntarily (other than for a member's voluntary winding up); or
  - (vii) a mortgagee of any of its property takes possession of that property,
- (2) If the *Contractor* commits an *act of insolvency* then, the *Principal* without giving a notice to show cause, may exercise either of the rights conferred on it under subclause 41.4(1).
- (3) If the *Principal* commits an *act of insolvency* then the *Contractor*, without giving a notice to show cause, may exercise the right under clause 41.9.
- (4) The rights and remedies given by this clause 41.11 are additional to any other rights and remedies. They may be exercised notwithstanding that there has been no breach of *Contract*.

## **42 Termination by Frustration**

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If the *Contract* is frustrated:

- (1) the *Superintendent* will issue a *payment schedule* for *WUC* carried out to the date of frustration, evidencing the amount which would have been payable had the *Contract* not been frustrated and had the *Contractor* been entitled to and made a payment claim on the date of frustration;
- (2) after taking into account amounts previously paid under the *Contract*, the *Principal* must pay the *Contractor*:
  - (a) the amount due to the *Contractor* evidenced by all unpaid *payment schedules*;
  - (b) the cost of materials and equipment reasonably ordered by the *Contractor* for *WUC* and which the *Contractor* is liable to accept, but only if they will become *Principal's* property upon payment; and
  - (c) the costs reasonably incurred:
    - (i) removing temporary works and construction plant;
    - (ii) returning to their place of engagement the *Contractor*, *consultants*, *subcontractors* and their respective employees engaged in *WUC* at the date of frustration; and
    - (iii) by the *Contractor* in expectation of completing *WUC* and not included in any other payment; and
- (3) subject to any right to have recourse to the *security* the *Principal* will promptly release and return all *security* provided by the *Contractor*.

## **43 Notification of Claims**

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### **43.1 Applies to all Claims**

Except for those for an *EOT*, a *variation* and payment claims under clause 39, this clause 43 applies to all claims by the *Contractor* in relation to any matter or thing arising under the *Contract* or out of the performance of *WUC*.

#### 43.2 Prescribed Notice

- (1) For any claim to which this clause 43 applies to be validly made, the *Contractor* must by hand or by registered post, provide the *Principal* and the *Superintendent* with written notice (**Prescribed Notice**) of its claim.
- (2) To be valid, a Prescribed Notice must:
  - (a) be provided to the *Principal* within 20 *business days* of the date upon which the *Contractor* became aware or should reasonably have become aware that there would be an adverse impact on the *Contractor* as a consequence of the events or circumstances on which the claim is based; and
  - (b) contain detailed particulars of the claim sufficient to identify the matter at issue and to enable the *Principal* and the *Superintendent* to understand the precise nature and content of the claim including at least the following information:
    - (i) Each item of claim and the basis for it.
    - (ii) The clauses in the Contract and the documents upon which each item of claim is based.
    - (iii) If a *direction* of the *Superintendent* or any other person is relied upon, the date of the *direction*, who gave it, whether it was given orally or in writing, and the terms of the *direction*.
    - (iv) If an act or omission of the *Superintendent*, the *Principal* or any employee or agent of the *Superintendent* or the *Principal* is relied upon, the nature of the act or omission, the date of the act or omission, whether it was oral or in writing, and the terms of the act or omission.
    - (v) The amounts (including particulars of those amounts) claimed in respect of each item of claim or if no amount is claimed, a statement to that effect.
    - (vi) Any other decision sought in respect of the claim.
- (3) A Prescribed Notice must be given regardless of whether or not:
  - (a) the event or circumstance upon which the claim is based are continuing; and/or
  - (b) the loss, expense or damage has crystallised or can be fully particularised.
- (4) If details of the claim cannot be provided in a Prescribed Notice (for example on account of the matters referred to in paragraphs (3)(a) and (3)(b), any such details must be provided in a further Prescribed Notice within 5 *business days* of the day that they do crystallise or can be fully particularised.
- (5) If the *Contractor* fails to provide such a further Prescribed Notice by the time required, its claim will be limited to those matters set out in any Prescribed Notice provided within the time required under the *Contract*, as assessed and certified by the *Superintendent*.

#### 43.3 Response

- (1) Either the *Principal* or the *Superintendent* may respond to a Prescribed Notice.
- (2) If neither the *Principal* nor the *Superintendent* respond to a Prescribed Notice:
  - (a) within 20 *business days* of receiving it; or
  - (b) if clause 43.2(4) applies, within 20 *business days* of receiving the further Prescribed Notice required under that clause,the parties are deemed to be in dispute.

### 44 Dispute Resolution

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#### 44.1 Notice of Dispute

- (1) If a difference or dispute (together called a '*dispute*') between the parties arises in connection with the subject matter of the *Contract*, including a *dispute* concerning:
  - (a) a *Superintendent's direction*; or
  - (b) a claim:
    - (i) in tort;
    - (ii) under statute;
    - (iii) for restitution based on unjust enrichment or other quantum meruit; or
    - (iv) for rectification or frustration,
    - (v) or like claim available under the law governing the *Contract*,then either party may, by hand or by registered post, give the other and the *Superintendent* a written notice of *dispute* adequately identifying and providing details of the *dispute*.
- (2) Notwithstanding the existence of a *dispute*, the parties must, subject to clauses 41, 42 and 44.4, continue to perform the *Contract*.

#### **44.2 Conference**

- (1) Within 10 *business days* after receiving a notice of *dispute*, the parties must confer at least once to resolve the *dispute* or to agree on methods of doing so. At every such conference each party must be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence is privileged.
- (2) If the *dispute* has not been resolved within 20 *business days* of service of the notice of *dispute*, that *dispute* must be and is hereby referred to arbitration.

#### **44.3 Arbitration**

If within a further 10 *business days* the parties have not agreed upon an arbitrator, the arbitrator will be nominated by the person in *Item 37(a)*. The arbitration will be conducted in accordance with the rules in *Item 37(b)*.

#### **44.4 Summary Relief**

Nothing in the *Contract* prejudices the right of a party to institute proceedings to enforce payment due under the *Contract* or to seek injunctive or urgent declaratory relief.

### **45 General conditions**

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#### **45.1 Waiver of Conditions**

Except as provided at law or in equity or elsewhere in the *Contract*, none of the provisions of the *Contract* may be varied, waived, discharged or released, except with the prior written consent of the parties.

#### **45.2 Amendment of Contract**

- (1) The *Principal* and the *Contractor* may from time to time agree to amend the *Contract* by:
  - (a) deleting or amending anything the *Contract*; and/or
  - (b) adding a new clause or clauses to the *Contract*.
- (2) To be valid and binding on the parties, any amendment to the *Contract* must be recorded in a formal instrument of amendment signed by the parties.

### **46 Safety Management on Site**

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#### **46.1 Engagement as Principal Contractor**



- (1) On the formation of the *Contract*:
  - (a) the *Contractor* is engaged by the *Principal* as the “*principal contractor*” for the *WUC* for the purposes of Chapter 6 of the *Work Health & Safety Regulation 2017* (NSW) (**WH&S Regulation**); and
  - (b) the *Contractor* is authorised by the *Principal* to have management and control of the *site* and to discharge the duties of a *principal contractor* under Chapter 6 of the WH&S Regulation.
- (2) The *Contractor* must perform the duties of:
  - (a) a principal contractor, as specified in the WHS Regulation 2017; and
  - (b) a person with management or control of a workplace as specified in the WHS Act 2011 & WHS Regulation 2017.
- (3) The *Contractor* must notify the *Principal* promptly of any matter affecting WHS where consultation with the *Principal* is necessary.

## 46.2 Obligations of the Contractor

Except as provided in the *Contract*, the *Contractor*, at its cost, must:

- (1) comply with all relevant *legislative requirements, Approvals, Australian and international standards, codes of practice and guidelines*, including but not limited to:
  - (a) *Work Health and Safety Act 2011* (NSW) (**WH&S Act**) and the WH&S Regulation 2017;
  - (b) SafeWork NSW requirements including but not limited to accident notification requirements, improvement notices and prohibition notices;
  - (c) *Environmentally Hazardous Chemicals Act 1985* (NSW); and
  - (d) the Heavy Vehicle Legislation;
- (2) ensure that a site specific Work Health & Safety Management Plan (WHSMP) is prepared in accordance with Part 6.4 of Chapter 6 of the WH&S Regulation;
- (3) ensure that site specific SWMS have been prepared in accordance with Part 6.3 of Chapter 6 of the WHS Regulation;
- (4) *SWMS & WH&S Plan to the Superintendent* ensure that if requested by the *Contractor* or the Superintendent for verification. Any verification undertaken by the Superintendent of the *Contractor* cannot be taken as approval or acceptance of the relevant documentation;
- (5) ensure that the SWMS & WH&S Plan is updated when and if necessary so as to ensure compliance with the WH&S Act;
- (6) promptly provide any updated WH&S Plan to the *Superintendent*;
- (7) carry out and complete *the Works* in such a way as to ensure that all its *subcontractors & workers* comply with the WH&S Plan and that there is no breach of obligations by any party under the WH&S Act and the WH&S Regulation;
- (8) prior to engaging a *subcontractor*:
  - (a) obtain a written safe work method statement from that *subcontractor*; and
  - (b) review the subcontractors safe work method statement (SWMS) in accordance with the requirements of the WHS Regulation, & provide the completed SWMS review document to the *Principal* prior to works being undertaken on site.
- (9) during the course of *the Works*:
  - (a) ensure that all *subcontractors & workers* comply with their respective safe work method statements and the requirements of the WH&S Act and the WH&S Regulation; and
  - (b) maintain and update the work health & safety management plan with respect to the *WUC*,

- (10) immediately inform SafeWork NSW and the *Principal* in accordance with section 38 of the WH&S Act of:
  - (a) any notifiable incident (as defined by the WH&S Act and the WH&S Regulation); and
  - (b) any accident or other matter as prescribed by Part 3 of the WH&S Regulation, and
  - (c) within 1 *business day* of any notifiable incident or accident occurring, provide to the *Superintendent* and the *Principal* a copy of an accident report if the accident is such which a *legislative requirement* or the law generally requires the *Contractor* to make a report to any statutory or government authority.
- (11) ensure all persons engaged in the conduct of the Works have received the appropriate level of training in the area of safe worksite practices;
- (12) ensure no person may enter upon the site unless the Contractor has provided the Superintendent with written evidence of that person's current work health and safety general induction training certification and the person has been inducted to the site by the Contractor;

#### **46.3 Specific Matters Concerning the Work Health & Safety Plan**

- (1) It is a condition precedent to the *Contractor's* right to possession of the *site* that the *Superintendent* has confirmed in writing to the *Contractor* that the *Contractor's* WH&S Plan (which for the purpose of this clause must include relevant sub components such as Safe Work Method Statements etc.) is acceptable to the *Superintendent*.
- (2) If the *Superintendent* notifies the *Contractor* that the WH&S Plan is not satisfactory in the opinion of the *Superintendent*, then the *Contractor* must:
  - (a) make appropriate modifications to the WH&S Plan; and
  - (b) resubmit the amended WH&S Plan for the approval of the *Superintendent*.
- (3) The *Contractor* will have *No Claim* should there be any delay in obtaining the approval of the *Superintendent* for the *Contractor's* WH&S Plan.
- (4) If the *Superintendent* fails to issue a notice in accordance with paragraph (2) the WHS Plan will be deemed to have been accepted.
- (5) The *Contractor* must make provision for the submission and approval of its WHS Plan in any *construction program* and is not entitled to an *EOT* or costs should there be any delay in obtaining the *Superintendent's* approval of the *Contractors* WHS Plan.
- (6) The risk of obtaining the approval of the WHS Plan is the *Contractors*.

#### **46.4 Principal's Safety Policy**

- (1) The *Contractor* must provide relevant certification that all persons engaged in the conduct of the *WUC* have received the appropriate level of training in the area of safe worksite practices.
- (2) No person may enter upon the *site* unless:
  - (a) the *Contractor* has provided the *Superintendent* with written evidence of that person's current SafeWork NSW Work Health and Safety General Induction Training certification; and
  - (b) the person has been inducted in relation to the *site* by the *Contractor*.
- (3) All vehicle entrances into the site must be appropriately signposted as being a Construction Site, with access permitted only with the approval of the *Contractor*. The same signage must be erected at regular intervals around the perimeter of the *site*, where pedestrian access might be possible.

#### **46.5 The Failure to comply**

- (1) *Contractor fails to comply with its obligations referred to in this clause 46.5, the Principal may immediately suspend the Works, and the Contractor will have No Claim arising out of or connected with any suspension under this clause.*
- (2) **The risk management** policies and procedures ~~the implementation of~~, the Contractor's safe working policies and procedures and all other relevant documents prepared by the Contractor in accordance with the Contract must demonstrate that:
  - (a) the Contractor has a good understanding of the hazards and risk associated with the activities being undertaken;
  - (b) the Contractor has established systems and procedures for managing risks;
  - (c) the Contractor has secured all required licenses for relevant activities to be undertaken as part of the Works, including all required employee competencies and licences;
  - (d) all plant and equipment to be used in the performance of the Works are appropriately licensed or registered, maintained and inspected on a regular basis; and
  - (e) have the *Contractor's* obligations carried out by the *Principal* or by others and the cost incurred by the *Principal* will be a debt due from the *Contractor* to the *Principal*.
- (3) If the *Superintendent* considers there is a risk of injury to people or damage to property arising from *the Works*:
  - (a) the *Superintendent* may direct the *Contractor* to change its manner of working or to cease working; and
  - (b) the *Contractor* must, at its cost, comply with any *direction* by the *Superintendent* under this clause.
- (4) *Contractor* indemnifies the *Principal* against any loss, expense, or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by the *Principal* arising out of or in connection with a breach by the *Contractor* of its obligations under this clause 46.5.

## 47 Goods and Services Tax

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### 47.1 Definitions

In this clause 47 terms used have the meaning given to them and as defined in Section 195-1 of the *GST Act*.

### 47.2 Liability to pay GST

- (1) If either the *Principal* or the *Contractor* (for the purposes of this clause the **Supplier**) makes a supply under or in connection with the *Contract* and is liable by law to pay *GST* on that supply, the consideration otherwise payable by the recipient of the supply will be increased by an amount equal to the *GST* paid or payable by the Supplier.
- (2) If the *Contract* requires either the *Principal* or the *Contractor* to pay for, reimburse or contribute to any expense, loss or outgoing (**reimbursable expense**) suffered or incurred by the other party, the amount required to be paid, reimbursed or contributed by the first party is the amount of the reimbursable expense net of any input tax credit or reduced input tax credit to which the other party is entitled in respect of the reimbursable expense.
- (3) If either the *Principal* or the *Contractor* has the benefit of an indemnity for a cost, expense, loss or outgoing (**indemnified cost**) under the *Contract*, the indemnity is for the indemnified cost net of any input tax credit or reduced input tax credit to which that party is entitled in respect of the indemnified cost.
- (4) Each party agrees to do all things, including providing invoices or other documentation containing stipulated information that may be necessary or desirable to enable or assist the other party to claim any set off, rebate or refund in relation to any *GST* included in any payment made under the *Contract*.

- (5) Unless the *Contract* states otherwise, the *contract sum* excludes GST on taxable supplies to be made under the *Contract*.
- (6) Each party warrants to the other party that:
  - (a) it is registered for GST as at the *date of acceptance of tender* and will maintain that registration until the issue of a *final certificate* under the *Contract*;
  - (b) its ABN notified to that other party is correct; and
  - (c) they must immediately notify that other party if they cease to be registered for GST.

## **48 Security of Payment Legislation**

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### **48.1 Definitions**

For the purpose of this clause 48 terms used in this clause have the meaning ascribed to them in the *Security of Payment Act*.

### **48.2 Limits on Application**

This clause 48 Security of Payment Legislation only applies to the extent that it is permitted to do so under the *Security of Payment Act*.

### **48.3 Security of Payment Act provisions**

For the purposes of contractually defining the rights of the parties to the *Contract* under the *Security of Payment Act*, the *Contractor* acknowledges and agrees as follows:

- (1) Without limiting the *Principal's* right itself to issue a *payment schedule*, the *Superintendent* does so (and is authorised by the *Principal* to do so) as the agent of the *Principal*.
- (2) The amount of each progress payment to which the *Contractor* is entitled, and the valuation of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the *Contract*, is to be determined strictly in accordance with the *Contract*.
- (3) The due date for payment of any progress payments is the date for payment of payment claims under clause 39.3 or in respect of any *final payment claim* it is the date for payment of the final payment claim under clause 39.6, subject to any rights of the *Principal* under the *Contract* to withhold payment.

### **48.4 Notices**

The *Contractor* must:

- (1) promptly give the *Principal* a copy of any notice received by the *Contractor* under section 15, 16 or 24 of the *Security of Payment Act*; and
- (2) promptly notify the *Principal* if it becomes aware that any *subcontractor* intends to exercise a statutory lien under section 11(3) of the *Security of Payment Act* over unfixed plant and materials supplied by the *subcontractor* for use in carrying out work forming part of the *WUC*.

### **48.5 Indemnity**

The *Contractor* continually indemnifies the *Principal* against any claim, action, damage, loss, liability, cost, charge, expense, outgoing or payment (including legal costs on a full indemnity basis) which the *Principal* pays, suffers, incurs or is liable for arising out of or in connection with:

- (1) the *Contractor's* failure to comply with a provision of the *Contract* in respect of the *Security of Payment Act*;
- (2) any lawful suspension of work by the *Contractor's subcontractors*; and

- (3) any other right or remedy lawfully exercised by the *Contractor's subcontractors or Consultants*,

pursuant to the *Security of Payment Act*.

## **49 Civil Liability Act**

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- (1) It is agreed that, to the extent permitted by law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to all and any rights, obligations and liabilities arising under or in relation to the *Contract* howsoever such rights, obligations or liabilities are sought to be enforced.
- (2) The Contractor further agrees that in each subcontract into which it enters for the carrying out of the WUC, it will include provisions that, to the extent permitted by law, effectively excludes the operation of Part 4 of the *Civil Liability Act 2002* (NSW) in relation to all rights, obligations or liabilities arising under or in relation to each subcontract howsoever such rights, obligations or liabilities are sought to be enforced.

## **50 Pricing**

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### **50.1 Provision of competitive pricing**

- (1) The Contractor must secure prices for each of the components of the WUC, and will make full details of the competitive pricing process available to the Principal for review.
- (2) Within twenty (20) business days of the Contractor submitting those details to the Principal, the Principal may seek any clarification or further information that it requires from the Contractor in relation to the competitive pricing.

### **50.2 Principal to be satisfied of pricing**

If the Principal is satisfied with the pricing secured by the Contractor in relation to the WUC then the Principal will instruct the Contractor to proceed with the relevant component.

### **50.3 EBNI's action if not satisfied**

- (1) If the Principal is not satisfied with the pricing obtained by the Contractor in relation to any component of the WUC, then the Principal must advise the Contractor, within twenty (20) days of receiving the competitive pricing details.
- (2) After giving notice pursuant to paragraph (1) to the Contractor, the Principal will be entitled to seek alternative pricing from independent third parties and will be free to commission any such third parties undertake the relevant components of the WUC.

## **51 Personal Property Securities Act 2009 (Cth) (PPSA)**

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### **51.1 Definitions**

For the purpose of this clause:

- (1) the terms, "purchase money security interest", "security interest", "financing statement" and "financing change statement" have the meaning ascribed to those terms in the PPS Law;
- (2) **PPSA** means the *Personal Property Securities Act 2009* (Cth);
- (3) **PPS Law** means the PPSA and any regulation made at any time under the PPSA, including any incidental regulations; and
- (4) **Relevant Equipment** means those materials, equipment *construction plant* and other things intended for the WUC and which the *Principal* is entitled to take possession under clause 41.5.

### **51.2 PPSA (Personal Property Securities Act)**

- (1) The *Contractor* must not create, attempt to create or permit to exist any *security interest* in relation to the Relevant Equipment.

- (2) The retention of title terms applicable to the Relevant Equipment in this *Contract* give rise to a purchase money security interest under the PPS Law in favour of the *Principal* over the Relevant Equipment immediately and irrevocably:
  - (a) on delivery and/or acceptance on to the *site* regardless of payment by the *Principal* or otherwise; or
  - (b) on payment for the *Principal* whether on site or off -site.
- (3) If in the opinion of the *Principal*, the *PPSA* applies, or will in the future apply to the *Principal's* rights pursuant to clause 41.5 and that the *PPSA*:
  - (a) affects or could affect the *Principal's* security position or the rights and obligations of the *Principal* under or in connection with the *Contract*; and
  - (b) enables or would enable the *Principal's* security position to be improved,

the *Contractor* must do all such things and sign all such documents and/or provide any further information as are necessary and reasonably required to enable the *Principal* to acquire a perfected security interest in the Relevant Equipment in the event it exercises its rights under clause 41.5 including:

  - (c) registering a financing statement or financing change statement in relation to a security interest;
  - (d) registering any other document required to be registered by the PPS Law; or
  - (e) correcting a defect in a statement registered under the PPS Law.

### **51.3 Further Assurance**

The *Contractor* agrees:

- (1) that the *Principal* need not comply with s95, 118, 121(4), 125, 130, 132(3)(d) and 132(4) of the PPSA if enforcing its security interests under Chapter 4 of the PPSA;
- (2) not to exercise its rights under s142 and 143 of the PPSA if the *Principal* enforces its security interests under Chapter 4 of the PPSA;
- (3) to waive its right to receive Notice of Verification Statements (as that term is used in the PPSA) from the *Principal*;
- (4) to do, at its own expense, all things which the *Principal* asks to ensure the *Principal's* security interests are enforceable, perfected and otherwise effective and have the priority the *Principal* requires; and
- (5) if and to the extent the arrangements contemplated by this Contract give rise to a "security interest" within the meaning of the PPSA which has or will be granted by the *Principal* in favour of the *Contractor*, the *Contractor* irrevocably and unconditionally agrees that it will not itself, or allow another person to, perfect or take any steps to perfect that security interest in any manner whatsoever.

## **52 Utility Services**

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### **52.1 Contractor's Responsibility**

- (1) Notwithstanding anything to the contrary prior to commencing any excavation, the *Contractor* must determine and verify the position of all underground and other utility services and must also consult with the relevant Authorities.
- (2) The *Contractor* acknowledges and agrees that it must observe any legislative requirements with respect to underground pipes and cables when undertaking excavation work.

### **52.2 Cost included in Contract Sum**

The parties acknowledge and agree that investigation and subsequent liaison with public utilities is included in the contract sum. The *Principal* will not consider any claim for additional payment for the WUC.

## **53 Government Information (Public Access) Act 2009 (NSW)**

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### **53.1 Contractor to Provide Information on Request**

- (1) Subject to paragraph (2), within seven (7) days of receiving a written request from the *Principal*, the *Contractor* must provide the *Principal* with access to the following information contained in records held by the *Contractor*:
  - (a) information that relates directly to the WUC;
  - (b) any information collected by the *Contractor* from members of the public to whom it provides, or offers to provide, in relation to the WUC; and
  - (c) information received by the *Contractor* from the *Principal* in relation to the WUC.

**(Information).**
- (2) For the purposes of paragraph (1), Information does not include:
  - (a) information that discloses or would tend to disclose the *Contractor's* financing arrangements, financial modelling, cost structure or profit margin;
  - (b) information that the *Contractor* is prohibited from disclosing to the *Principal* by provision made by or under any law; or
  - (c) information that, if disclosed to the *Principal*, could reasonably be expected to place the *Contractor* at a substantial commercial disadvantage in relation to the *Principal*, whether at present or in the future.
- (3) If requested to do so by the *Principal*, the *Contractor* will provide copies of any Information at the *Contractor's* own expense.

### **53.2 Compliance with GIPA**

- (1) The *Contractor* acknowledges that the *Principal* is required to comply with the provisions of the *Government Information (Public Access) Act 2009* (NSW) (GIPA) with respect to any information.
- (2) the *Principal* receives an access application under GIPA for Information, the *Principal* will take reasonably practicable steps to consult with the *Contractor* before providing any person with access to information if it appears that the information:
  - (a) includes personal information about the *Contractor* or its employees;
  - (b) concerns the *Contractor's* business, commercial, professional or financial interests;
  - (c) concerns research that has been, is being or is intended to be carried out by or on behalf of the *Contractor*; or
  - (d) where the *Contractor* is the government of the Commonwealth or a State or Territory, the information concerns the affairs of that government;
    - (i) the *Contractor* may reasonably be expected to have concerns about the disclosure of the information; and
    - (ii) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.
- (3) If , following consultation in accordance with paragraph (2), the *Contractor* objects to disclosure of some or all information, the *Contractor* must provide details of any such objection (including the information objected to and the reasons for the objection) within five (5) days of the conclusion of the consultation process.

- (4) In determining whether there is an overriding public interest against disclosure of government information, the *Principal* will take into account any objection received from the Contractor.
- (5) If the Contractor objects to the disclosure of some or all of the information but the Principal nevertheless decides to release the information, the Principal must not disclose the information until it has given the Contractor notice of its decision and notice of the Contractor's right to have that decision reviewed.
- (6) Where the Principal has given notice to the Contractor in accordance with paragraph (5), the Principal must not provide access to/disclose the information:
  - (a) before the period for applying for review of the decision under Part 5 of GIPA (excluding any extension of that period) has expired; or
  - (b) while any review of the decision duly applied for is pending.

## 54 Demolition and Construction Management

- (1) All demolition work is to be carried out in accordance with the Australian Standard 2601 - 1991.
- (2) In consideration of the need to minimise the impact of the demolition and construction works on *adjoining sites*, surrounding properties, car parking areas and roads, the *Contractor* must prepare and provide to the *Principal* a Demolition and Construction Management Plan (**DCMP**) before commencement of any demolition or excavation on the *site*.
- (3) A DCMP must address (but is not limited to) the following:
  - (a) working hours;
  - (b) appropriate staging of the Works to minimise impacts on adjoining sites;
  - (c) maintenance of pedestrian and vehicle access in accordance with the Traffic and Pedestrian Management Plan;
  - (d) proposed delivery/loading/storage and *Contractor* parking locations (to be contained wholly within the *site*);
  - (e) construction vehicle access;
  - (f) location of site office, toilets and other construction amenities;
  - (g) how the structure(s) to be demolished and all its components will be maintained in a stable and safe condition at all stages of the demolition, the temporary bracing, shoring or any combination of these, which are to be added for stability where necessary;
  - (h) the precautions which will be taken to ensure that the stability of all parts of the structure and the safety of persons on and outside the *site* are maintained, particularly in the event of sudden and severe weather changes. Severe weather changes refer primarily to the localised high winds; and
  - (i) the security of the *site* all times against the unauthorised entry of persons or vehicles.
- (4) After a review of the DCMP the *Superintendent* may issue a *direction* that additional items be added that are otherwise missing or inaccurately detailed.
- (5) The *Contractor* must promptly comply with any *direction* issued under paragraph (4).

### 54.2 Demolition of Buildings Containing Asbestos Cement



- (1) The *Contractor* is to notify the *Principal* and owners or tenants of *adjoining sites* in writing at least ten (10) *business days* prior to the date scheduled for the demolition of buildings known to contain asbestos cement. Such notification is to be on at least size A4 paper, include the date demolition work is scheduled to commence and be placed by hand in the letterbox of every premises (including every residential flat or unit) either side and immediately to the rear of the *site*.
- (2) All asbestos material, including asbestos cement is to be disposed of by the *Contractor* to an approved waste management facility which is licensed to receive asbestos.
- (3) The *Contractor* must display appropriate asbestos/demolition warning signage prior to and during demolition works.

## **55 Dilapidation Survey**

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### **55.1 Content**

- (1) For the purpose of this clause a Dilapidation Survey is a dilapidation survey which:
  - (a) consists of a written and photographic record of the then condition of the works and the site and the surrounding areas (including adjoining sites and public areas;
  - (b) stipulates the date that it was prepared; and
  - (c) is signed by the nominated *Contractor's* representative.
- (2) That *Contractor* must ensure that each Dilapidation Survey is signed by any persons reasonably nominated by the Superintendent, so as to evidence that parties' agreement with the content of the Dilapidation Survey.

### **55.2 Timing**

The *Contractor* must carry out a Dilapidation Survey:

- (1) before commencing any of the WUC on the site and prior to the issue of a construction certificate by the Consent Authority;
- (2) on the date of practical completion; and
- (3) prior to the expiration of the last defects liability period.

### **55.3 Provision**

- (1) The *Contractor* must:
  - (a) promptly lodge a copy of each Dilapidation Survey with the Superintendent;
  - (b) keep a copy of the then current Dilapidation Survey on the site at all times; and
  - (c) provide a copy of the relevant parts of the Dilapidation Survey to any owners of adjoining properties that sign the Dilapidation Survey.
- (2) Upon each Dilapidation Survey being provided to the Superintendent, the *Contractor* is deemed to have warranted that the Dilapidation Survey is true and correct. The *Contractor* is responsible for any discrepancy between the conditions described in a Dilapidation Survey and the actual conditions of the site, adjoining sites and public areas.
- (3) Prior to *practical completion*, the *Contractor* must reinstate any property identified in a Dilapidation Survey which has been damaged arising out of or as a consequence of the *Contractor* undertaking WUC to the condition detailed in the earlier Dilapidation Survey prepared for that property.
- (4) If the *Contractor* fails to comply with any obligation in this clause 55, the *Superintendent* may direct the *Contractor* to rectify the non-compliance and the time for rectification.
- (5) If :
  - (a) the *Contractor* fails to comply with a direction under paragraph (4); and

- (b) that failure has not been made good within 5 *business days* after the *Contractor* receives notice from the *Superintendent* notifying the *Contractor* of its failure to comply with the *direction* under paragraph (4),

the *Principal* may have carried out by others what was required by the *direction* under paragraph (4), but without prejudice to any other rights and remedies the *Principal* may have, to the extent not carried out by the *Contractor* at the time of the *Superintendent's* notice under paragraph 5(b), and the *Superintendent* will certify the cost incurred as moneys due and payable from the *Contractor* to the *Principal*.

#### **55.4 Superintendent may require changes**

- (1) After review of a Dilapidation Survey the Superintendent may issue a direction that additional items to be added to that Dilapidation Survey that are otherwise missing or inaccurately detailed.
- (2) The *Contractor* must promptly comply with any direction issued under paragraph (1).

### **56 Separate contractors**

---

#### **56.1 Content**

For the purpose of this clause:

- (1) separate contractor works are works which are not WUC but which the Principal requires to be undertaken on the site during the conduct of the WUC; and
- (2) a separate contractor is a contractor engaged to undertake separate contractor works.

#### **56.2 Acknowledgement**

The *Contractor* acknowledges that the *Principal* may engage separate contractors to undertake separate contractor works prior to practical completion.

#### **56.3 Co-ordination with Separate Contractors**

- (1) Without limiting its other obligations under the *Contract*, the *Contractor* must:
  - (a) Co-operate with all *separate contractors*;
  - (b) use its best endeavours to work co-operatively with all *separate contractors*; and
  - (c) if and when required, provide access to the *separate contractors* to the *site* and the *WUC* (wherever they may be executed) to execute *separate contractor works*.
- (2) At all times prior to the *date of practical completion* the *Contractor* will provide all *separate contractors* with the same amenities (such as access to car parking on *site* and toilets) as the *Contractor* will provide to its *subcontractors* pursuant to the requirements of the SafeWork NSW.

#### **56.4 Conflict or Dispute in respect of Separate Contractors**

If the *Contractor* identifies any actual or potential conflict that may arise or which has arisen between the *Contractor's* activities in respect of the *WUC* and the activities of *separate contractors* in respect of the *separate contractor works*, the *Contractor* must promptly notify the *Superintendent* in writing, which notice must include:

- (1) details of the alleged dispute or conflict;
- (2) an explanation of why it has not been possible for the *Contractor* to resolve the conflict; and
- (3) the *Contractor's* proposal as to how to resolve the conflict.

#### **56.5 Superintendent may Issue a Direction**

- (1) After review of a notice issued by the *Contractor* pursuant to clause 56.4, the *Superintendent* may issue a *direction* with respect to the conduct of the relevant *separate contractor work*.
- (2) The *Contractor* must promptly comply with any *direction* issued under paragraph (1).

#### **56.6 No claim by Contractor**

Except as expressly contemplated as a *qualifying cause of delay*, the *Contractor* is not entitled to any claim or any other payment, remuneration, damages, *EOT* or any other benefit or advantage as a result of:

- (1) any act or omission of a *separate contractor*;
- (2) the co-ordination of *the Works* with any *separate contractor works*;
- (3) a *direction* under this clause; or
- (4) the impact of the *separate contractor works* on the *Contractor's* other obligations under the *Contract*.

### **57 Existing Improvements**

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#### **57.1 Protection of existing improvements**

In addition to clauses 12, 13 and 14:

The *Contractor* must ensure that all existing improvements and/or structures and finishes that remain on site during the performance of the *WUC* are protected. Where the existing improvements, structures and finishes are damaged as a consequence of a failure by the *Contractor* to protect them, or as a consequence of any act or omission of the *Contractor*, its agents or employees, then the *Contractor* must notify the *Superintendent* of the resultant damage and immediately restore, at its sole expense, the existing improvements, structures and finishes to their condition at the commencement of this *Contract* or as directed by the *Superintendent*.

#### **57.2 Damage to existing improvements**

- (1) Any damage to existing improvements including landscaping, either publicly or privately owned, and either within or outside the area of the *Works*, caused by the *Contractor* must be repaired, removed or reinstated by the *Contractor* and that work must be undertaken immediately upon the occurrence of the damage under the *Superintendent's* direction and without any additional payment by the *Principal* to the *Contractor*.
- (2) Should the *Contractor* fail to effect such repairs within two (2) business days of notice being given then the *Superintendent* will have the right to make alternative arrangements for the repairs to be carried out, at the sole cost of the *Contractor* and the *Superintendent* is entitled to recover the costs incurred in doing so as a debt due from the *Contractor*.

### **58 Project Control Groups**

---

#### **58.1 Attendance**

During the execution by the *Contractor* of the *WUC*, the *Contractor* must attend project control group ("PCG") meetings at the intervals or times directed by the *Superintendent*.

#### **58.2 PCG Agenda**

The PCG will be a forum for discussion of:

- (1) the performance and progress by the *Contractor* of the *WUC*;
- (2) any issues arising out of the *WUC*;

- (3) identifying problems and outstanding issues and allocating responsibility and tasks to resolve those issues, including WHS matters; and
- (4) any other items required by the *Superintendent* and/or *Principal*.

### 58.3 Meeting Delegates

The *Contractor* must ensure that PCG meetings which it is requested to attend are attended by its representatives who have the knowledge and authority to respond to queries raised by the attendees and to propose solutions to those queries.

### 58.4 Monthly Reports

- (1) The *Contractor* will prepare, update and submit to the *Superintendent* on a monthly basis and in any event not less than 3 *Business Days* prior to the date scheduled for Project Control Group Meetings up until *practical completion* a report to include the following:
  - (a) A copy of the *construction program* marked up to show actual progress achieved and any expediting arrangements implemented or proposed where work is behind schedule.
  - (b) Work As Constructed documentation showing the infrastructure created in accordance with the *Contract* up to the date of making the report.
  - (c) Inspection Test Plans.
  - (d) Actual start and completion dates of all activities during the month.
  - (e) Any change to the critical path.
  - (f) Comment on forward planning based on the *Contractor's* current progress.
  - (g) List of all *subcontractors* on *site* during the report period.
  - (h) Cash flow chart which includes details of:
    - (i) the value of progress payments made to date;
    - (ii) variations to date (approved and unapproved);
  - (i) Number of lost time injuries.
  - (j) Number of medical treatment injuries.
  - (k) Number and comment on any safety incidents.
  - (l) Number and comment on any environmental incidents.
  - (m) Industrial relations or Industrial Actions issues.
  - (n) *Approvals* from *Authorities*.
  - (o) Value of variations approved.
  - (p) Value of variations claimed but not approved.
  - (q) *EOTs* approved.
  - (r) *EOTs* claimed but not approved.
  - (s) Comment on general progress.
  - (t) Number of hazards reported.
- (2) This report will be a reporting medium only and will not represent amended completion dates for the *WUC*.

## 59 Adjoining property

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- (1) Where *WUC* requires the *Contractor* to execute *WUC* on, in or over any property adjoining or in the vicinity of the *site*, the *Contractor* must:

- (a) prepare a notice addressed to the owner or occupier of that property requesting the appropriate permission from the owner;
- (b) provide its draft notice to the *Superintendent* for approval and issue to the affected owners and/or occupiers;
- (c) comply with all conditions attaching to such permission; and
- (d) be responsible for:
  - (i) all matters relating to the execution of *WUC* outside the boundaries of the *site*; and
  - (ii) any cost, expense, loss, damage or other liability to the extent it arises from the execution of *WUC* outside the boundaries of the *site*.
- (2) The *Contractor* indemnifies the *Principal* against any cost, expense, loss, damage or other liability suffered or incurred by the *Principal* to the extent it arises from the execution of *WUC* outside the boundaries of the *site*.

## **60 Bonus for early practical completion**

---

- (1) If the *date of practical completion* is earlier than the *date for practical completion* the *Superintendent* will certify as due and payable to the *Contractor* the bonus in *Item 30(a)* for every day after the *date of practical completion* to and including the *date for practical completion*.
- (2) The *Contractor* hereby waives that part of a bonus exceeding the *Item 30(b)* amount.

## **61 Modern Slavery**

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- (1) The *Contractor* warrants that it does not, and covenants that it will not engage in any form of *Modern Slavery* or in any activity that would constitute *Modern Slavery* if it took place in Australia.
- (2) The *Contractor* undertakes to the *Principal* that, insofar as the *Modern Slavery Legislation* is applicable to the *Contractor*, it has and will maintain and implement:
  - (a) procedures to ensure compliance with *Modern Slavery Legislation*; and
  - (b) adequate procedures designed to prevent conduct that would give rise to an offence under *Modern Slavery Legislation*,
 including with respect to its subcontractors and other contractors.
- (3) In the event the *Contractor* identifies an occurrence or risk of *Modern Slavery* in its own operations or in the operation of any of its subcontractors and other contractors, it will immediately:
  - (a) take reasonable and appropriate steps to rectify that occurrence or mitigate that risk (including provision of an appropriate remedy for the victim of that occurrence); and
  - (b) notify the *Principal* of that occurrence or risk and the steps taken by it to rectify that occurrence or mitigate that risk.
- (4) Any breach of this clause 61 will entitle the *Principal* to:
  - (a) suspend performance of this agreement until it is satisfied (acting in good faith and reasonably) that the breach has been adequately addressed and rectified; or
  - (b) terminate this *Contract* for breach.
- (5) The *Contractor* will indemnify the *Principal* against any losses, liabilities, damages, costs and expenses incurred by, or awarded against, the *Principal* as a result of any breach of this clause 61 by the *Contractor*.

## **62 Completion of Design**

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### **62.1 Contractor's design obligations**

- (1) The Contractor will undertake all necessary design works and will seek and obtain all necessary Approvals.
- (2) The Contractor must:
  - (a) allow the Superintendent, the Principal or any person nominated by the Principal access to partially completed design documents at any time;
  - (b) keep the Superintendent informed of the progress of the design documents;
  - (c) conduct sufficient investigations and tests to ascertain the existence and extent of any latent conditions which may have an effect on the Works;
  - (d) design the Works so that the Works, when constructed, will be structurally and aesthetically sound despite any latent conditions;
  - (e) ensure that an appropriately skilled, experienced and qualified person acceptable to the Superintendent, at all times supervises and co-ordinates:
    - (i) the design and specification of the Works and the preparation of the design documents; and
    - (ii) the construction of the Works in accordance with the design documents.

## **62.2 Design Documents**

- (1) The Contractor must:
  - (a) produce design documents in full consultation with the Principal which meet the requirements of all of the following:
    - (i) the Contract;
    - (ii) any relevant legislative requirements and Approvals;
    - (iii) the Building Code of Australia and any relevant Australian Standards;
    - (iv) if no other standard is specified in the Contract, then good industry standards applicable to the WUC, and
  - (b) development of the preliminary design provided by the Principal and subject to clause 62.3 must not depart from the design provided by the Principal unless instructed in writing by the Principal; and
  - (c) submit the design documents to the Superintendent for approval not later than the time prescribed under the construction program and in any event before commencing the WUC to which the design documents relate.
- (2) Completion of the Contractor's design obligations is to be in accordance with the approved construction program.

## **62.3 Departure from the design provided by the Principal**

- (1) If the Contractor considers that some departure from the design provided by the Principal is desirable to ensure the effectiveness and efficiency of the Works, then the Contractor may propose a variation under clause 38. Where a departure is necessary for the Works to be fit for the purposes required by the contract, the Contractor must notify the Principal in accordance with paragraph (2)(b).
- (2) In carrying out the Contractor's design obligations, the Contractor may depart from the design provided by the Principal but only:
  - (a) to the extent that any such departure does not adversely affect the construction, operation or maintenance of the Works or their performance or fitness for the purpose required by the contract; and
  - (b) provided that the Contractor has notified the Principal in writing of the proposed departures and the Principal has not notified the Contractor of any objection within 5 business days after receiving the notification.

#### **62.4 Approval of Design Documents by Superintendent**

- (1) Within 20 business days of receipt by the Superintendent of the design documents, the Superintendent must provide the Contractor with:
  - (a) a Notice of Acceptance of design documents; or
  - (b) a written notice indicating non-acceptance of the design documents and requesting modification and resubmission of the design documents (Design Notice) in which case the Contractor must amend and resubmit the design documents to the Superintendent for approval.
- (2) The Contractor must comply with a Design Notice at its cost.
- (3) The Contractor is not entitled to any additional payment or time as a result of its compliance with a Design Notice issued under paragraph (1)(b).
- (4) The issue of a Notice of Acceptance under paragraph (1)(a):
  - (a) does not constitute acceptance by the Principal of any defects or errors in the design documents, in which event the indemnity in subclause 62.6(3) applies; and
  - (b) will not effect the Contractors obligations in respect of the defects liability period.
- (5) If the Superintendent fails to issue a notice in accordance with paragraph (1) the design documents will be deemed to have been accepted within 20 business days of receipt by the Superintendent.

#### **62.5 Design Work Health and Safety Regulations**

- (1) The Contractor must ensure that all reasonably foreseeable hazards and risks to health and safety (both in the execution of and in the subsequent use, maintenance and repair of the work forming part of the Contractor's design obligations) are identified, assessed, and where practicable, eliminated. Where it is not practicable to eliminate risks, the Contractor must, to the degree practicable, effectively control the risks by design or by identifying operational requirements.
- (2) The Contractor must as a minimum consider safety in design and undertake a "CHAIR" study of their design and specification in accordance with the WorkCover "CHAIR-Safety in design Tool" in consultation with the Principal prior to finalisation of the design documents.
- (3) In any review or assessment of risks that it is required to make in paragraph (1), the Contractor must take into account, but not rely alone on, any hazard identification or risk assessment, elimination or control information provided to the Contractor by the Principal. The Contractor must not rely on the omission of any mention or detail of any hazard in the information provided by the Principal as evidence of the absence or limitation of any hazard.

#### **62.6 Contractor's warranties of Design Documents**

The Contractor warrants that:

- (1) any or all design documents provided by it and any related design, materials, documents and methods of working will not infringe any intellectual property rights;
- (2) it will keep the Superintendent informed of the progress of the Contractor's design obligations; and
- (3) where there is an error or omission in the design documents, the Contractor will indemnify the Principal for any costs, losses and expenses which are incurred by the Principal as a consequence of the error or omission.

#### **62.7 Licence of Design Documents**

Upon payment being made to the Contractor on account of the Contractor's design obligations, the Contractor grants to the Principal an irrevocable, perpetual, exclusive, fee free licence of all intellectual property rights in the design documents.





## Part A

Item

2 *Principal's address*

Fax

TBA

TBA

Phone (xx) xxxx xxxx

Mob:xxxx xxx xxx

Director - Economy, Place and Infrastructure  
Services

..... ABN

Same as Principals (see above) .....

Phone ..... Fax .....

In accordance with Notice of Acceptance

OR

---

† If applicable, delete and instead complete equivalent *Item* in the *separable portions* section of the Annexure Part A

(b) Period of time for *practical completion* (clause 1)

.....  
.....

8      Governing law (clause 1)

New South Wales  
.....  
.....  
If nothing stated, that of the jurisdiction where the *site* is located

9      (a) Currency (clause 1)

Australian Dollar  
.....  
If nothing stated, that of the jurisdiction where the *site* is located

(b) Place for payments (clause 1)

(c) Place of business of bank (clause 1)

Principal's address  
.....  
If nothing stated, the *Principal's* address

The place nearest to where the site is located  
.....  
If nothing stated, the place nearest to where the *site* is located

10      The *Principal's project requirements* are described in the following documents (clause 1)

1   *Preliminary design* (if included in *Item 11*)

2   Tender Documentation  
.....

3   .....  
.....

4   .....  
.....

5   .....  
.....

|      |   |   |
|------|---|---|
| 11   | <i>Preliminary design</i><br>(clause 1)   | <p>(a) A <i>preliminary design</i><br/>* is included<br/>in the <i>Principal's project requirements</i>.<br/>If neither deleted, a <i>preliminary design</i> is not included</p> <p>(b) The <i>preliminary design</i> documents are:</p> <p>1 .....</p> <p>2 .....</p> <p>3 .....</p> <p>4 .....</p> <p>5 .....</p>         |
| 12   | Quantities in <i>schedule of rates</i> , limits of accuracy<br>(clause 2.5)                           | <p>Upper Limit Not applicable<br/>.....</p> <p>Lower Limit Not applicable<br/>.....</p>   |
| 13   | <i>Provisional sum</i> ,<br>percentage for profit and attendance (clause 3.2)                         | 10%   |
| † 14 | <i>Contractor's security</i>  |   |
|      | (a) Form<br>(clause 5)  | <p>(1) unconditional, irrevocable consulting fee<br/>for an amount equivalent to % (each) of<br/><i>contract sum</i>, drawn in terms acceptable<br/>to the Principal; and</p> <p>(2) Retention monies totalling 2.5% of the contract sum, calculated<br/>and payable by the Contractor as per 14.c).<br/>.....<br/>....</p> |
|      | (b) Amount or maximum percentage of 5% of the contract sum .....<br><i>contract sum</i><br>(clause 5) |   |
|      | (c) If retention moneys, percentage of each<br><i>payment schedule</i><br>(clause 5 and clause 39.2)  | 10%, until the limit in <i>Item 14(b)</i>   |
|      | (d) Time for provision (except for retention<br>moneys)<br>(clause 5)                                 | Ten (10) business days after the Letter of Acceptance is issued   |
|      | (e) Additional <i>security</i> for unfixed plant and<br>materials (subclauses 5.4 and 39.5)           | <p>An unconditional bank guarantee for an amount equivalent to<br/>100% of the value of the plant and materials<br/>.....<br/>..... \$<br/>.....</p>  |

---

\* Delete one

† If applicable, delete and instead complete equivalent *Item* in the *separable portions* section of the Annexure Part A

|  |  |
|--|--|
| (f) <i>Contractor's security upon certificate of practical completion</i> is reduced by (clause 5.4) | 50 % of the Contractor's security as specified in 13(c) and held by the Principal, in accordance with 13.a)(2) |
|--|--|

|      |                             |                |
|------|-----------------------------|----------------|
| † 15 | <i>Principal's security</i> | Not applicable |
|------|-----------------------------|----------------|

(a) Form  
(clause 5)

(b) Amount or maximum percentage of ..... If nothing stated, nil  
*contract sum*  
 (clause 5)

(c) Time for provision (clause 5)

(d) *Principal's security upon certificate of practical completion is reduced by*  
(clause 5.4)

\_\_\_\_\_ % of \_\_\_\_\_  
amount held  
If nothing stated, 50% of amount held

16 *Principal-supplied documents (clause 8.3)*

## 1 Principal's project requirements

## 2 Drawings

### 3 Specifications

#### 4 Contract Documents

[illegible][illegible]

If nothing stated, 5  
copies

17 Documents, numbers of copies, and the  
times or stages at which they are to be

supplied by the *Contractor*  
(clause 8.4)

|   | Document | No. of copies | Time/stage |
|---|----------|---------------|------------|
| 1 | .....    | .....         | .....      |
| 2 | .....    | .....         | .....      |
| 3 | .....    | .....         | .....      |
| 4 | .....    | .....         | .....      |
| 5 | .....    | .....         | .....      |

|    |  |   |
|----|--|---|
| 18 | Time for <i>Superintendent's direction</i> about documents (clause 8.4)                                      | <div> <div></div> <div>days</div> </div> <div>If nothing stated, 14 days</div>  |
| 19 | Subcontracting (clause 9.2)  | <div> <div> <div>Work by <i>consultants</i></div> <div>others</div> </div> <div>Work by</div> </div> <div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> </div>   |
| 20 | Novation (clause 9.4)  | <div> <div> <div><i>Subcontractor</i> or <i>selected subcontractor</i>, as the case may be</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> </div> <div>Particular part of the <i>preliminary design</i> or <i>selected subcontract work</i>, as the case may be</div> </div> |
| 21 | <i>Intellectual property rights</i> granted to the <i>Principal</i> , the Alternative applying (clause 10.2) | <div> <div>.....</div> <div>.....</div> <div>If nothing stated, Alternative 1 applies</div> </div>  |
| 22 | <i>Legislative requirements</i><br>(a) Those excepted (clause 11.1)  | <div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> </div>  |
|    | (b) Identified <i>WUC</i> (clause 11.2(1)(c))  | <div> <div>.....</div> <div>.....</div> <div>.....</div> <div>.....</div> </div>  |



23 Insurance of *the Works*  
(clause 16)

(a) Alternative applying

Alternative 1

.....

If nothing stated, Alternative 1 applies

If Alternative 1 applies

- (b) Provision for demolition and removal of debris

.....  
.....  
..... \$

..... OR

Ten (10)% of the *contract sum*

- (c) Provision for *consultants'* fees and *Principal's* consultants' fees

.....  
.....  
..... \$

..... OR

..... Five (5)% of the *contract sum*

- (d) Value of materials or things to be supplied by the *Principal*

.....  
.....  
..... \$

- (e) Additional amount or percentage

.....  
..... \$

..... OR

..... % of the total of (a) to (d) in clause 16(3)

- 24 Professional indemnity insurance (clause 18 and clause 9.2(5)©)

- (a) Levels of cover of *Contractor's* professional indemnity insurance must be not less than

.....  
.....  
..... \$  
.....  
If nothing stated, \$5 000 000

- (b) Period for which *Contractor's* professional indemnity insurance must be maintained after issue of the *final certificate*

.....  
.....  
If nothing stated, 6 years

- (c) Categories of *consultants* and levels of cover of *consultants'* professional indemnity insurance

| Category of cover | Levels                         |
|-------------------|--------------------------------|
| .....             | \$                             |
| .....             |                                |
| .....             | \$                             |
| .....             |                                |
| .....             | \$                             |
| .....             |                                |
| .....             | \$                             |
| .....             |                                |
|                   | If nothing stated, \$1 000 000 |

(d) Period for which each *consultant's* professional indemnity insurance must be maintained after issue of the *final certificate*

.....  
.....  
If nothing stated, 6 years

25

Public liability insurance  
(clause 17)

(a) Alternative applying Alternative 1  
.....  
If nothing stated, Alternative 1 applies

If Alternative 1 applies

(b) Amount per occurrence must be not Twenty (20 ) million dolla rs ..... \$  
less than 20,000,000 .....  
If nothing stated, \$10 000 000

26 (a) Time for giving access (clause 26.1) Within fourteen (14)..... days of *date of acceptance of tender*

(b) Time for giving possession (clause 26.1) Within fourteen (14)..... days of *date of acceptance of tender*

or

The date indicated in the Letter/Notice of Acceptance (whichever is the later).

|    |   | Documents or instructions | Times/Periods |
|----|---|---------------------------|---------------|
| 27 | The information, materials, documents or instructions and the times by, or periods within which they are to be given to the <i>Contractor</i> (clause 34) | 1 .....                   |               |
|    |   | 2 .....                   |               |
|    |   | 3 .....                   |               |
|    |   | 4 .....                   |               |
|    |   | 5 .....                   |               |

28 *Qualifying causes of delay*, causes of delay for which *EOTs* will not be granted (clause 1 and clause 36.3)

- (1) Contractor's failure to adhere to the agreed project commencement date;
- (2) Nationwide or state-wide strikes, lockouts or other industry disputes which are not specific to the Contractor or it's employees, agents or sub-contractors;
- (3) anything required to be done by the Contractor to secure the environmental protection of WUC or to avoid damage to the environment while the WUC are being carried out;
- (4) Any claim for an EOT made by the Contractor on the basis of inclement weather, prior to the Contractor fully using the allowance of seven (7) working days included in the critical path construction program

.....  
.....  
.....  
.....

.....

† 29 Liquidated damages, rate (clause 36.9)

Nil

.....  
.....

.....per day\$  
per day

---

† If applicable, delete and instead complete equivalent *Item* in the *separable portions* section of the Annexure Part A

† 29A Delay damages, \$ per day .....  
.....  
.....  
.....

† 30 Bonus for early *practical completion*  
(clause 60) Not applicable

(a) Rate  
.....  
.....per day\$ per day

(b) Limit  
.....  
.....\$  
..... OR  
..... % of *contract sum*  
If nothing stated, there is no waiver

† 31 Other *compensable causes*  
(clause 1 and clause 36.10) .....  
.....  
.....  
.....  
.....  
.....  
.....

32 *Defects Liability period*  
(clause 37) Fifty-two (52 ) weeks  
.....  
.....

33 Progress Claims  
(clause 39.1)

(a) Times for progress claims Calendar monthly (date by agreement)  
OR

(b) Stages of *WUC* for progress claims .....  
.....  
.....  
.....  
.....  
.....

.....

.....

34      Unfixed plant and materials for which payment  
         claims may be  
         made (clause 39.5)

The Contractor is not entitled to any payment before the plant  
or materials are incorporated into the works.

.....

.....

.....

.....

.....

|    |  |   |
|----|--|---|
| 35 | Interest rate on overdue payments (clause 39.7)  | One (1)% above Commonwealth Bond Rate per annum   |
| 36 | (a) Time for <i>Principal</i> to rectify inadequate access<br>(clause 41.7(2)(a)(ii))                                | Fourteen (14)days   |
|    | (b) Time for <i>Principal</i> to rectify inadequate possession (clause 41.7(2)(a)(iii))                              | Fourteen (14)days   |
| 37 | Arbitration<br>(clause 44.3)   | President of the Institute of Arbitrators & Mediators Australia   |
|    | (a) Person to nominate an arbitrator   |   |
|    | (b) Rules for arbitration  | Rules 5–18 of the Rules of The Institute of Arbitrators & Mediators Australia for the Conduct of Commercial Arbitrations; |
| A1 | (c) Appointing Authority under   | Not applicable  |
| A  | UNCITRAL Arbitration Rules   |   |
| 38 | Percentage amount for preliminaries, profit and on-site and off-site overheads for variations (subclause 38.6(1)(e)) | .....   |



## Separable Portions

- (f) *Contractor's security upon certificate of practical*

..... \$  
.....

amount held  
If nothing stated, 50% of amount  
held

. % of

15     *Principal's security*

- (a) Form .....  
(clause 5) .....
- (b) Amount or maximum percentage of .....  
value of this *separable portion* .....  
(clause 5) .....  
If nothing stated, nil
- (c) Time for provision (clause 5)
- (d) *Principal's security upon certificate of practical completion* is reduced by .....  
(clause 5.4) .....  
within ..... days after *date of acceptance of tender*  
If nothing stated, 28 days  
..... % of  
..... amount held  
If nothing stated, 50% of amount held

29 Liquidated damages, rate (clause 36.9) .....  
.....  
..... per day\$  
per day

† 29A Delay damages, \$ per day .....  
.....  
.....  
.....

30 Bonus for early *practical completion* (clause 60)

(a) Rate .....  
..... per day\$ per day

(b) Limit .....  
.....\$  
..... OR  
.....  
..... % of value of this *separable portion*  
If nothing stated, there is no waiver

31 Other *compensable causes* .....  
(clause 1 and clause 36.10) .....  
.....  
.....  
.....  
.....  
.....

## **Deletions, amendments and additions**

- 1 The following clauses have been deleted from the General Conditions in AS 4902 – 2000

As shown in a comparison document of the amended General Conditions against the standard  
AS 4902-2000 General Conditions of Contract .....

.....

- 2 The following clauses have been amended and differ from the corresponding clauses in AS 4000 –  
1997

As shown in a comparison document of the amended General Conditions against the standard AS  
4902-2000 General Conditions of Contract

**Note:** Usually the *continuing party* is the subcontractor, selected subcontractor or consultant, as the case may be.

---

## Deed of novation

(clause 9.4)

This Deed made this ..... day of ..... 20 .....

between ..... (the *outgoing party*)

of ..... ACN ..... ABN .....

and ..... (the *incoming party*)

of ..... ACN ..... ABN .....

and ..... (the *continuing party*)

of ..... ACN ..... ABN .....

witness that:

- 1 Upon receipt by the *continuing party* of all moneys owing under the prior contract:
  - (a) the *incoming party* shall punctually perform the obligations of the *outgoing party* under the prior contract described in the Schedule hereto as far as they are not performed. The *incoming party* acknowledges itself bound by the provisions of the prior contract as if the *incoming party* had been named as the *outgoing party* in the prior contract;
  - (b) the *continuing party* punctually perform like obligations and be bound to the *incoming party* as if the provisions of the prior contract were incorporated herein; and
  - (c) the *outgoing party* and *continuing party* shall each release and forever discharge the other from the further performance of the prior contract and from all claims and demands in connection with the prior contract.
- 2 The *outgoing party* and *continuing party* each warrant to the *incoming party* that *preliminary design* or *selected subcontract work*, as the case may be, carried out to the date hereof, is in accordance with the provisions of the prior contract.
- 3 This Deed shall be governed by the governing law of the prior contract between the *outgoing party* and *continuing party*.

## Schedule

.....  
.....  
.....  
.....  
.....

.....

.....  
.....

In witness whereof the parties have executed this DEED OF NOVATION by affixing their seals.

THE COMMON SEAL of the *outgoing party*  
was affixed to this document in the presence of

.....  
Secretary/Director

.....  
Name (please print)

THE COMMON SEAL of the *incoming party*  
was affixed to this document in the presence of:

.....  
Secretary/Director

.....  
Name (please print)

THE COMMON SEAL of the *continuing party*  
was affixed to this document in the presence of:

.....  
Secretary/Director

.....  
Name (please print)

.....  
Director

.....  
Name (please print)

.....  
Director

.....  
Name (please print)

.....  
Director

.....  
Name (please print)



## Part D

Annexure to the  
Australian Standard General Conditions of Contract

# SUBCONTRACTOR'S STATEMENT

## REGARDING WORKERS COMPENSATION, PAY-ROLL TAX AND REMUNERATION (Note 1)

☐ Workers Compensation

S175B *Workers Compensation Act*  
1987

☐ Pay-roll tax

Part 5B s31G-31J *Pay-roll Tax Act 1971*

☐ Remuneration

Ss127, 127A *Industrial Relations Act 1996*

Sub Contractor: \_\_\_\_\_ ABN: \_\_\_\_\_  
(Business Name)

of: \_\_\_\_\_  
(Address of subcontractor)

Has entered into a contract with: \_\_\_\_\_ (Note 2)

(Business name of principal contractor)

ABN: \_\_\_\_\_ For work between: \_\_\_\_\_ (Note 3)

Date

Date

and/or Payment Claim Details: \_\_\_\_\_ (Note 4)

Nature of Contract work: \_\_\_\_\_ (Note 5)

### DECLARATION

I, \_\_\_\_\_ a Director of \_\_\_\_\_ on whose behalf this declaration  
is made, hereby state that the abovementioned subcontractor:

Is either: \_\_\_\_\_  
☐ A sole trader or partnership without workers or subcontractors (Note 6)

OR

☐ Has and will maintain in force valid workers compensation insurance, Policy No:  
\_\_\_\_\_ held with \_\_\_\_\_ as indicated on  
the attached Certificate of Currency which expires  
on the \_\_\_\_\_ in respect of work done in connection with the contractor, during any  
period of the contract and has paid all workers compensation insurance premiums payable in connection with the  
contract (Note 7)

☐ Is ☐ Is Not Also a principal contractor in connection with the work under Contract (Note 8)

☐ Has ☐ Has Not Been given a written statement by subcontractors in connection with the work

☐ Is ☐ Is Not Required to be registered as an employer under the Pay-roll Tax Act 1971.

☐ Has paid all pay-roll tax due in respect of employees who performed the works for the principal  
contractor, as required at the date of this statement (Note 9)

☐ Has paid all remuneration payable to relevant employees, for work done under the contract during the  
period outlined above (Note 10)

Signature: \_\_\_\_\_ Full Name: \_\_\_\_\_

\_\_\_\_\_ Position/Title: \_\_\_\_\_

Dated: \_\_\_\_\_



# Part D

## Annexure to the Australian Standard General Conditions of Contract

1. This form is prepared for the purpose of section 175B of the *Workers Compensation Act 1987*, Part 5B section 31G-31J of the *Pay-roll Tax Act 1971* and section 127 of the *Industrial Relations Act 1996*. If this form is completed in accordance with these provisions, a principal contractor is relieved of liability for workers compensation premiums, pay-roll tax and remuneration payable by the subcontractor.
2. For the purpose of this statement, a principal contractor is a person (or other legal entity), who has entered into a contract with another person (or other legal entity), referred to as the subcontractor, and employees/workers of that subcontractor will perform the work under contract. The work must be connected to the business undertaking of the principal.
3. In order to meet the requirements of s127 *Industrial Relations Act 1996*, a statement in relation to remuneration must state the period to which the statement relates.  
*Section 127(6) Industrial Relations Act 1996 defines remuneration as 'remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.'*  
*Section 127(11) of the Industrial Relations Act 1996 states 'to avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.'*
4. Payment claim details – Where a subcontractor has entered into a payment schedule with a principal contractor they must identify the period or payment to which the statement applies.
5. An accurate description of the work covered by the contract must be included.
6. In completing the statement, a subcontractor declares that they are a sole trader or partnership without workers or subcontractors and is not required to hold workers compensation insurance.
7. In completing the statement, a subcontractor declares that workers compensation premiums payable up to and including the date(s) on the statement have been paid, and all premiums owing during the term of the contract will be paid.
8. It is important to note that a business could be both a subcontractor and a principal contractor, if a business 'in turn' engages subcontractors to carry out work. If your business falls within this category you should also obtain statements from your subcontractors.
9. In completing the statement, a subcontractor declares that all pay-roll tax payable relating to work undertaken as part of the contract has been paid.
10. *In completing the statement, a subcontractor declares that all remuneration payable has been paid.*  
It is noted that definitions of employer, employee, remuneration, and specific provisions for employers of outworkers in the clothing trades are as defined in s127A of the *Industrial Relations Act 1996*.
11. Failure to complete this statement may result in the principal contractor withholding any payment due to the subcontractor. Any penalty for late payment under the contract does not apply to any payment withheld under this subsection. Subcontractors may wish to keep a copy of the statement for their own records.

For more information, please visit the WorkCover website [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au), Office of State Revenue website [www.osr.nsw.gov.au](http://www.osr.nsw.gov.au), or Office of Industrial Relations, Department of Commerce website [www.commerce.nsw.gov.au](http://www.commerce.nsw.gov.au). Copies of the *Workers Compensation Act 1987*, the *Pay-roll Tax Act 1971* and the *Industrial Relations Act 1996* can be found at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

### WARNING

Any subcontractor, who knowingly provides a principal contractor with a written statement that is false, is guilty of an offence (Maximum Penalty 100 units or \$11,000).

- Any written statement will not relieve the principal contractor of liability if, at the time the written statement was provided, the principal contractor believed the written statement to be false.
- The principal contractor must retain a copy of any written statement for a period of not less than five years (Pay-roll tax), six years (Remuneration) or seven years (Workers compensation).

**This statement must be accompanied by the relevant Certificate of Currency to comply with Section 175B of the *Workers Compensation Act***