



APCC–Austroads Joint Publication

General Conditions of Contract for Construction

National Capital Works: NCW4

Preface

These General Conditions of Contract for Construction NCW4 have been developed in consultation with Australian state government building and road transport agencies. NCW4 is only intended for use on contracts where the principal is an Australian government or semi-government agency.

Readers should note the following:

- Apart for minor and incidental design, it is intended for construct only and is not considered suitable for a major design and construct contract.
- It does not include any provisions regarding the limitation of liability.
- There are no provisions for the Principal to provide security.

Most government agencies using NCW4 will have their own policies and procedures in regard to commercial matters, the use of subcontracts and dispute resolution. To allow agencies to have flexibility, NCW4 uses frameworks (which are included the Annexures) to address these issues. The frameworks do not have a fixed format and may be tailored to suit a principal's policies and the risk profile of the contract. Additional Special Conditions of Contract to address each agency's policies and procedures and state legislation will also be required.

APCC and Austroads make no warranty or representation as to its suitability for use by a non-government Principal and does not assume a duty of care in this regard.

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1 CONSTRUCTION OF CONTRACT

- a) The *Contractor* must:
- i) carry out and complete the *work under the Contract* in accordance with the *Contract*; and
 - ii) perform and observe all its other obligations under the *Contract*.
- b) The *Principal* must:
- i) pay the *Contractor* the *contract sum* for its performance, in accordance with and subject to the *Contract*; and
 - ii) perform and observe all its other obligations under the *Contract*.
 - iii) The *contract sum* must be determined in accordance with the Commercial Framework, which is included in the *Contract* as Annexure Part B.

2 DEFINED TERMS AND INTERPRETATION

2.1 Defined terms

- a) In the *Contract*, except where the context otherwise requires, the following words and expressions have the meanings set out in this clause 2.1. Defined terms are identified in the *Contract* by the use of italics.

business day means:

for the purposes of clause 42 of these General conditions, where the relevant *SOP Act* defines a *business day*, a day defined as a *business day* in that *SOP Act*; or otherwise:

a day that is not:

- a) a Saturday or a Sunday;
- b) 27, 28, 29, 30 or 31 December; or
- c) a day that is wholly or partly observed in the jurisdiction of the state or territory applicable to *the Works*, as a public or statutory holiday.

certificate of practical completion means a certificate issued by the *Superintendent* stating the *date of practical completion*.

claim means a claimed entitlement in regard to any matter arising out of or in connection with the *Contract*, including under a specific provision of the *Contract*, in respect of or arising out of any *direction* or approval by the *Superintendent*, in tort, in equity, under any statute and for breach of *Contract* by the other party, but excluding a claim made under an insurance policy.

construction plant means appliances, plant and equipment used in carrying out and completing the *work under the Contract*, but not forming part of *the Works*.

Contract means the agreement between the *Principal* and the *Contractor* constituted by the *Contract documents*.

Contract documents Means all the documents listed or referred to in clause 6.

Contract program means a program complying with clause 33.1.

contract sum means the amount determined described as such in the Commercial Framework included as Annexure B, subject to adjustment in accordance with the *Contract*.

Contractor means the person bound to carry out and complete the *work under the Contract*; stated in *Item 2*.

Contractor's default means a substantial breach of the *Contract* by the *Contractor*, including any of the following:

- a) abandoning the carrying out of the *work under the Contract*;
- b) suspending progress of the carrying out of the *work under the Contract* in whole or part without the written approval or *direction* from the *Superintendent*, except for suspension under clause 34;
- c) significantly failing to carry out the *work under the Contract* as required under clause 33.2;
- d) failing to comply with an instruction in writing or confirmed in writing by the *Superintendent*;
- e) failing to maintain any registration or licence required by law to carry on activities required under the *Contract*;
- f) failing to provide *security* as required under clause 5;
- g) failing to effect and maintain insurance policies as required under the *Contract*;
- h) in respect of clause 42, knowingly providing documentary evidence containing an untrue statement; or
- i) The *Contractor* becoming liable to pay, or having paid, *liquidated damages* in the aggregate equal to the amount or percentage specified in *Item 25* (if any).

date of acceptance of tender means the earlier of:

- a) the date of execution of the Formal Instrument of Agreement (if any) by the last of the parties to execute that document; or
- b) the date which appears on the notice in writing of acceptance of the tender (if any);

date for practical completion means:

- a) where *Item 5* provides a *date for practical completion*, the date;
- b) where *Item 5* provides a period of time for *practical completion*, the last day of the period,

as adjusted under the *Contract*.

date of practical completion means:

- a) the date stated in a *certificate of practical completion* as the date upon which *practical completion* was reached; or
- b) where another date is determined in any *dispute resolution* procedure as the date upon which *practical completion* was reached, that other date.

daywork means work carried out by the *Contractor* for which payment is made on the basis of:

- a) time or quantities applied to rates submitted by the *Contractor* in a schedule of *daywork* rates; or
- b) supported by evidence of actual costs incurred and resources used in respect of the *daywork*,

as the case may be.

- defect** means work that does not comply with a requirement specified in the *Contract* and includes omissions.
- defects liability period** means the period specified in *Item 26*.
- delay costs** means the payment to the *Contractor* if an entitlement for *delay costs* arises under clause 36 in respect of the *Contractor's* recurrent overhead costs.
- direction** includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.
- dispute** means a disagreement between the parties arising out of or in connection with the *Contract*, including one concerning:
- a) any aspect of a *Superintendent's direction*;
 - b) a *claim*:
 - (i) in tort;
 - (ii) under statute;
 - (iii) for restitution based on unjust enrichment or other quantum meruit;
 - (iv) for rectification or whether the *Contract* is frustrated,
 - c) or like *claim* available under the law governing the *Contract*.
- final certificate** means the certificate issued and delivered pursuant to clause 42.
- frustration** means *frustration* as defined in any applicable legislation or where the parties agree that the *Contract* is frustrated.
- GST** has the meaning given to it in the *GST Act*.
- GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth) as amended from time to time.
- insolvency event** includes any of the following:
- where the party is a natural person or a partnership including an individual person and that person:
- a) commits an act of bankruptcy;
 - b) has a bankruptcy petition presented against him or her or presents his or her own petition;
 - c) is made bankrupt; or
 - d) 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),
- where the party is a corporation:
- a) a winding up order is made in respect of the party; or

- b) it resolves by special resolution that it be wound up voluntarily (other than for a members' voluntary winding-up).
- intellectual property right** means any patent, registered design, trademark or name, copyright or other protected right.
- Item** means an Item specified in Annexure Part A – Contract Particulars.
- latent condition** means physical conditions on or below the *site* and its near surrounds, including artificial things (but excluding weather conditions or physical conditions which are a consequence of 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 had a competent contractor inspected:
- a) all written information made available by the *Principal* to the *Contractor* for the purpose of tendering;
- b) all information influencing the risk allocation in the *Contractor's* tender and reasonably obtainable by the making of reasonable enquiries; and
- c) the *site* and its near surrounds, made available prior to or at the time of tender.
- non-reliance information** means information provided by the *Principal* which is not guaranteed for accuracy, quality or completeness. It excludes *reliance information*.
- payment schedule** means a schedule setting out the amounts valued or assessed by the *Superintendent* as being due from one party to the other.
- practical completion** means that stage in the carrying out and completion of the *work under the Contract* when the *Superintendent* (acting as a certifier) determines that:
- a) *the Works* are complete except for minor *defects*:
- (i) which do not prevent *the Works* from being reasonably capable of being used for their stated purpose;
- (ii) the *Contractor* has reasonable grounds for not promptly rectifying; and
- (iii) the rectification of which will not prejudice the convenient use of *the Works*;
- b) those *tests* which are required by the *Contract* to be conducted and passed before *the Works* reach *practical completion*, have been conducted and passed;
- c) documents and other information required under the *Contract* which are essential for the use, operation and maintenance of *the Works* have been supplied; and
- d) any other condition precedent for *practical completion* specified in the *Contract* has been satisfied.
- prescribed notice** means a notice in writing with respect to a *claim* which is identified as '*Prescribed notice* Under Clause 46' and includes particulars of:

- a) the breach, act, omission, *direction*, approval or circumstances on which the *claim* is or will be based and the date(s) of occurrence;
- b) the provision of the *Contract* relied upon by that party or other basis for the *claim*; and
- c) detailed quantification of the *claim* and the effect of the *claim* on the *contract sum* and / or *date for practical completion*.

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

Principal's risk means any of the following:

- a) any negligent act or omission of the *Superintendent* or the *Principal* or the consultants, agents, employees or other contractors of the *Principal*;
- b) any risk specifically allocated to the *Principal* elsewhere in the *Contract*;
- c) war, invasion, acts of foreign enemies, acts of terrorism, 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;
- d) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- e) use or occupation of any part of the *work under the Contract* by the *Principal* or the consultants, agents, employees or other contractors of the *Principal*; or
- f) *defects* in the design of the *work under the Contract*, other than design provided by the *Contractor*.

provisional quantity means a quantity of work specified in the *Contract* for which at the *date of acceptance of tender* it is not known whether such work will be required or what the quantity will be.

provisional sum means a sum included in the *contract sum* and identified as a provisional, monetary, prime cost, contingency or other sum or allowance for the work specified in the *Contract* against that sum.

reliance information means information provided by the *Principal* which is not guaranteed for completeness, but may be relied upon for factual accuracy.

security means:

- a) cash;
- b) retention money;
- c) an interest bearing deposit in a bank (which has a consent under the *Banking Act 1959 (Cwlth)*) and is carrying on *business* at the place stated in *Item 4*;
- d) an approved performance undertaking given by an approved financial institution or insurance company; or
- e) other form approved by the *Principal*.

<i>security interest</i>	has the meaning given to it in the <i>Personal Property Securities Act 2009</i> (Cwlth) as amended.
<i>selected subcontractor</i>	means a <i>subcontractor</i> engaged by the <i>Contractor</i> pursuant to clause 10.
<i>separable portions</i>	means portions of <i>the Works</i> which are: <ul style="list-style-type: none">a) identified as such in the <i>Contract</i>; orb) created pursuant to clause 22.
<i>site</i>	means the lands and other places to be made available by the <i>Principal</i> to the <i>Contractor</i> for the purpose of executing <i>the Works</i> .
<i>SOP Act</i>	means the <i>security</i> of payment legislation, applicable in the jurisdiction where the <i>work under the Contract</i> is being carried out, which applies to a <i>payment claim</i> made in connection with the <i>work under the Contract</i> .
<i>statutory requirement</i>	includes: <ul style="list-style-type: none">a) acts, ordinances, regulations, by-laws, orders, awards and proclamations which apply in the jurisdiction where the <i>work under the Contract</i> is being carried out;b) certificates, licences, consents, permits, approvals, <i>directions</i> and requirements of organisations having jurisdiction in connection with the carrying out of the <i>work under the Contract</i>; andc) fees and charges payable in connection with the foregoing.
<i>subcontractor</i>	includes the <i>Contractor's</i> suppliers and consultants.
<i>Superintendent</i>	means the person stated in <i>Item 3</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> .
<i>Superintendent's Representative</i>	means the natural person appointed in writing by the <i>Superintendent</i> under clause 24.1.
<i>survey mark</i>	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 the <i>work under the Contract</i> .
<i>temporary works</i>	means temporary structures, amenities, physical services, materials, plant, machinery, equipment and other work used in carrying out and completing the <i>work under the Contract</i> , but not forming part of <i>the Works</i> .
<i>test</i>	includes examine, inspect, observation, surveillance, audit, measure, test, prove and trial.
<i>the Works</i>	means the whole of the work to be carried out and completed in accordance with the <i>Contract</i> , including <i>variations</i> , but excluding <i>temporary work</i> which is to be handed over to the <i>Principal</i> .
<i>variation</i>	means a change to the <i>work under the Contract</i> , including: <ul style="list-style-type: none">a) additions, increases, omissions and reductions to and from <i>the Works</i>;b) changes to the character, quality, positions or dimensions of <i>the Works</i>; and

- c) changes in the method, timing and/or sequence of construction.

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, construction plant, temporary works, remedial work, subcontract work and supply of materials (including plant and equipment) and labour.*

working day means:

- a) a working day specified in *Item 21* or elsewhere in the *Contract* (if any); otherwise
- b) if not specified in the *Contract*, as notified by the *Contractor* to the *Superintendent* before the commencement of work on the *site*.

2.2 Interpretation

- a) The law governing the *Contract*, its interpretation, any agreement to arbitrate and the conduct of any arbitration or litigation, is the law applicable in the state or territory stated in *Item 4*, or if nothing is stated, the state or territory where the *site* is located.
- b) Unless otherwise provided, prices are in Australian currency.
- c) Where provisions in Annexure Part A to this General Conditions of Contract are expressed to be alternatives and the *Contract* fails to state which alternative applies, the first alternative applies.
- d) Reference to:
 - i) the singular includes the plural and the plural includes the singular;
 - ii) a person includes an individual, a firm, a body corporate or an unincorporated body;
 - iii) a party includes the party's executors, administrators, successors and permitted assigns; and
 - iv) a *statutory requirement* includes that *statutory requirement* as amended or re-enacted from time to time and a *statutory requirement* enacted in replacement of that *statutory requirement*
- e) Measurements of physical quantities must be in legal units of measurement of Australia within the meaning of the *National Measurement Act 1960* (Cwlth).
- f) Communications between the *Principal*, the *Superintendent* and the *Contractor* must be in the English language.
- g) 'Including' and similar expressions are not words of limitation.
- h) 'Shall' and 'must' denote a mandatory requirement.
- i) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- j) Headings are for convenience only and do not form part of the *Contract* or affect its interpretation.
- k) A provision of the *Contract* must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the *Contract* or the inclusion of the provision in the *Contract*.

- l) If an act must be done on a specified day which is not a *business* day, it must be done instead on the next *business* day, except as otherwise expressly contemplated by the *Contract*.
- m) All indemnities and warranties given by the *Contractor* in the *Contract* survive the termination or otherwise merging of the *Contract*.
- n) Without limiting Clause 2.2(m), the provisions of the *Contract* which, by their nature, are intended to survive the termination, cancellation, completion or expiration of the *Contract* must continue as valid and enforceable obligations of the parties notwithstanding any such termination, cancellation, completing or expiration.

3 CONTRACTOR'S WARRANTIES

3.1 General

- a) The *Contractor* warrants that it:
 - i) is both experienced and skilled in work of the type, complexity and scale of the *work under the Contract*;
 - ii) has satisfied itself as to the correctness and sufficiency of the *contract sum* and that the *contract sum* covers the cost 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 *work under the Contract*;
 - iii) has examined carefully and has acquired actual knowledge of the contents of the documents and any other information made available in writing by the *Principal* or any other person on the *Principal's* behalf to the *Contractor* for the purpose of preparing and submitting the *Contractor's* tender;
 - iv) examined all information relevant to the risks, contingencies and other circumstances which could affect the *Contractor's* tender and which was obtainable by the making of detailed enquiries;
 - v) informed itself of the nature of the work and materials necessary for the execution of the *work under the Contract* and the means of access to and facilities at the *site* and transport facilities for deliveries to or from the *site*; and
 - vi) has visited and examined the *site* and its surroundings and done everything a competent and experienced contractor would have done to inform itself fully as to the physical conditions or obstructions upon and below the surface of the *site*, and the local conditions, including climatic and hydrologic conditions at, near or relevant to the *site*, or any other condition or characteristic of the *site* which may affect its performance of the *Contract*.

3.2 Joint and several liability

- a) The obligations of the *Contractor*, if more than one person, under the *Contract*, are joint and several and each person constituting the *Contractor* acknowledges and agrees that it will be causally responsible for the acts and omissions (including breach of the *Contract*) of the other as if those acts or omissions were its own.

3.3 Collusive arrangements

- a) If the *Principal* had called or invited tenders for the construction of *the Works*, the *Contractor* warrants and represents to the *Principal* that:
 - i) it had no knowledge of the tender price of any other tenderer for the *work under the Contract* at the time of submission of its tender; and
 - ii) except as disclosed in its tender, it has not entered into any *Contract*, arrangement or understanding to pay or allow to be paid any money directly or indirectly to a trade or industry association (above the published standard membership fee) or to or on behalf of any other tenderer in relation to its tender or the *Contract*, nor paid or allowed to be paid any money on that account.

4 COOPERATION

- a) The parties must do all they reasonably can to co-operate in all matters relating to the *Contract*, but their rights and responsibilities under the *Contract* (or otherwise) remain unchanged unless the parties agree in writing to change them.
- b) Each party must do all it reasonably can to avoid hindering the performance of the other under the *Contract*.

5 SECURITY AND RETENTION MONEYS

5.1 Provision of Security

- a) *Security* is for the purpose of ensuring the due and proper performance of the *Contract*.
- b) The *Contractor* must provide the amount of *security* specified in *Item 6* (if any) within 10 *business days* of the *date of acceptance of tender*.
- c) The *security* must be in the form specified in *Item 6*.
- d) The *Principal* may, in its sole and absolute discretion, approve or disapprove of:
 - i) the form of unconditional undertaking;
 - ii) the financial institution or insurance company giving the unconditional undertaking; or
 - iii) any other form of *security* offered by the *Contractor*.
- e) Any unconditional undertaking must not include an expiry date.
- f) The *Contractor* bears the costs of, and incidental to, providing *security*.
- g) Any interest earned on *security* belongs to the *Principal*.
- h) If approved in writing by the *Principal*, the *Contractor* may substitute another form of *security* to that specified in *Item 6*.
- i) The *Contractor* must not take any steps to prevent the *Principal* making a demand against the *security*, or to prevent the provider of a *security* from complying with the *security* or any demand by the *Principal*.

5.2 Reduction and release of security

- a) Unless the *Principal* has made or intends to make a demand against the *security*, the *Principal* must return the percentage or amount specified in *Item 6* (or, if applicable, the balance remaining after a demand on the *security*) to the *Contractor* within 10 *business days* after the *date of practical completion*.
- b) The *Principal* must return the remaining *security* (or, if applicable, the balance remaining after a demand on the *security*) by the latest of:
 - i) the end of the period(s) stated in *Item 6* after the *date of practical completion* for the whole of *the Works* (or if no period is stated, 10 *business days* after the issue of the *final certificate*);
 - ii) the resolution of any outstanding *defects* or unresolved *claims*; and
 - iii) the payment of any moneys due and payable by the *Contractor* to the *Principal*, including debts, damages and indemnity *claims*.

5.3 Deed of guarantee, undertaking and substitution

- a) Where:

- i) the *Contractor* is a related or subsidiary body corporate (as defined in the Corporations Act 2001 (Cwlth)); and
- ii) the *Principal* has specified in the tender documents or *Contract documents* that the *Contractor* must provide a deed of guarantee, undertaking and substitution,

the *Contractor* must, within 10 *business* days after receiving a written request from the *Principal*, provide a deed of guarantee, undertaking and substitution which is duly executed and enforceable. The deed of guarantee, undertaking and substitution must be in the form specified by the *Principal*.

6 EVIDENCE OF CONTRACT

6.1 Contract documents

- a) The *Contract* is made up solely of the *Contract documents*, which supersede all understandings, representations and communications made between the parties before the *date of acceptance of tender* in relation to the subject matter of the *Contract*. The *Contract documents* are:
 - i) these General Conditions of Contract NCW4 and attached Annexures; and
 - ii) the other documents listed in *Item 7*.

6.2 Formal Instrument of Agreement

- a) If *Item 7* specifies that a formal instrument of agreement is required, or the parties agree to execute a formal instrument of agreement, the *Principal* must prepare at least two copies of a formal instrument of agreement and must, within 20 *business* days after the *date of acceptance of tender*, forward it to the *Contractor* with a request that it be executed.
- b) Within 10 *business* days after being requested in writing by the *Principal* so to do, the *Contractor* must execute all copies of the formal instrument of agreement in the manner directed in writing by the *Principal* and return them to the *Principal*.
- c) Within 10 *business* days after receipt from the *Contractor* of the copies of the formal instrument of agreement duly executed by the *Contractor*, the *Principal* must execute all copies and forward at least one copy to the *Contractor*.
- d) The *Superintendent* may extend the periods under Clause 6.2 by notice in writing to the parties.

7 SERVICE OF NOTICES

7.1 Notice requirements

- a) Subject to Clause 7.1(b), a notice, request, consent, approval, *direction*, notification or other communication under or for the purposes of the *Contract* must be:
 - i) in writing and addressed to the receiving party; and
 - ii) either:
 - A) sent by registered post to or left at the postal address specified in *Items 1, 2 or 3* (as the case may be);
 - B) handed to the other party and/or the *Superintendent* (as the case may be);
 - C) sent by email to the email address specified in *Items 1, 2 or 3* (as the case may be); or
 - D) sent via a proprietary document management system which the parties have agreed in writing may be used for the purpose of giving a notice under the *Contract*.

- b) Service of a notice under Clauses 44 or 47 will only be valid if effected in accordance with Clause 7.1 a) ii) A) or 7.1 a) ii) B).

7.2 Time of receipt

- a) A notice is deemed to have been received:
 - i) if sent by registered post, on the date which is 3 *business* days (or 10 *business* days if posted to or from a place outside Australia) after posting;
 - ii) if delivered personally, upon delivery;
 - iii) if sent by email:
 - A) on a *business* day, on dispatch of the transmission; or
 - B) on a day other than a *business* day, on the next *business* day;
 - C) unless the sender's server indicates a malfunction or error in transmission or the recipient immediately notifies the sender of an incomplete transmission; or
- b) if sent via any proprietary document management system, upon notification from that system to the recipient of the notice having been delivered on the proprietary document management system.

7.3 Notice details

- a) A party may specify another address or email address for the purposes of this clause 7, by notice to the other party.

7.4 Service of payment claims

- a) The *Contractor* must ensure that within 24 hours after any notice under the *SOP Act* (other than a payment *claim* or *payment schedule*) is given or received by the *Contractor* or any *subcontractor*, a copy of that notice is given to both the *Principal* and the *Superintendent*.

8 CONTRACT DOCUMENTS

8.1 General

- a) The several documents forming the *Contract* are to be taken as mutually explanatory of one another and anything included in, or reasonably to be inferred from, one or more documents must be read as included in all other documents, unless the context requires otherwise.
- b) Unless specified otherwise, all documentation provided under the *Contract* must be in the English language.
- c) If the *Contract* requires the use of a proprietary document management system for the transmission of documents, the parties must transmit all documents in connection with the *Contract* by the proprietary document management system.

8.2 Errors, ambiguities and discrepancies

- a) If either party discovers or is made aware of any error, ambiguity or discrepancy in any document prepared for the purpose of executing the *work under the Contract*:
 - i) that party must notify the *Superintendent* and the other party in writing of the error, ambiguity or discrepancy as soon as possible and in any case not later than the earlier of:
 - A) the commencement or continuation of any *work under the Contract* affected by the error, ambiguity or discrepancy; and
 - B) 5 *business days* of first becoming aware of the error, ambiguity or discrepancy;

- ii) the *Superintendent* must within 5 *business* days (or such other time reasonably determined by the *Superintendent*) of receiving such advice or discovering the discrepancy, direct the *Contractor* as to the interpretation to be followed by the *Contractor* in carrying out the work; and
 - iii) if the inconsistency, ambiguity or discrepancy is in a *Principal*-supplied document and compliance with any such *direction* given under clause 8 a) ii) causes the *Contractor* to incur more or less cost than otherwise would have been incurred had the *direction* not been given, the difference must be valued pursuant to clause 40.5.
- b) Where any discrepancy exists between figured and scaled dimensions, the figured dimensions prevail.

8.3 Principal's documents

- a) Unless the *Contract* specifies otherwise, the *Principal* must supply the *Contractor* with one electronic copy of the drawings, specifications and other documents required to be supplied to the *Contractor*.
- b) The documents must not, without the prior written approval of the *Principal*, be used, copied or reproduced for any purpose other than the execution of the *work under the Contract*.

8.4 Contractor's documents

- a) Unless the *Contract* specifies otherwise, the *Contractor* must supply the *Principal* with one electronic copy of the documents required to be supplied to the *Principal*.
- b) Copies of documents supplied by the *Contractor* are the property of the *Principal* but must not be used or copied otherwise than for the use, maintenance or alteration of the *Works*.
- c) If the *Contract* specifies that the *Contractor* must obtain the *Superintendent's direction* whether documents are suitable or are not suitable:
 - i) within 10 *business* days after receipt of the documents, the *Superintendent* (acting as a certifier) must notify the *Contractor* that the documents are suitable or are not suitable;
 - ii) if the *Superintendent* notifies the *Contractor* that the documents are not suitable, the *Superintendent* must give reasons why the documents are not suitable and the *Contractor* must submit new or amended documents for the *Superintendent direction* under this Clause 8.4 within 5 *business* days after receipt of the *Superintendent's* notice; and
 - iii) the *Superintendent* must not reject documents which are in accordance with the requirements of the *Contract*.

8.5 Availability

- a) The *Contractor* must keep available to the *Superintendent* and the *Principal*:
 - i) on *site*, one complete set of documents affecting the *work under the Contract* and supplied by a party or the *Superintendent*; and
 - ii) at the place of manufacture or assembly of any significant part of the *work under the Contract* off *site*, a set of the documents concerning that part.

8.6 Confidential information

- a) The parties must ensure that documents, samples, models, patterns and other information as are supplied and clearly identified as confidential, are kept confidential.
- b) 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 the *final certificate* is issued and delivered 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

- a) The *Contractor* must refer any enquiries from any media concerning the project to the *Principal*.
- b) The *Contractor* must not disclose any information concerning the project for distribution through any communications media without the *Principal's* prior written approval, which approval may be conditional.

8.8 Contractor's Obligations Unaffected

- a) Where the *Contractor* submits a document to the *Principal* or *Superintendent*, the following applies:
 - i) the *Principal* or *Superintendent* owes no duty to the *Contractor* to review or check the documents for errors, omissions or compliance with the requirements of the *Contract*;
 - ii) the *Superintendent's* approval or *direction* as to suitability does not relieve the *Contractor* from responsibility for the *Contractor's* errors or omissions or compliance with the requirements of the *Contract*; and
 - iii) no comment, review, representation, vetting, inspection, *testing* or approval by the *Principal* or the *Superintendent* in respect of the *Contractor's* obligations under the *Contract* will lessen or otherwise affect the *Contractor's* obligations under the *Contract*.

8.9 Design by Contractor

- a) The *Contractor* acknowledges that the documents provided by the *Principal* for construction of *the Works* may not be fully complete in every respect. The *Contractor* must complete any minor or incidental design and detailing, including the preparation of shop drawings and the design of *temporary works*, which is necessary to enable the *work under the Contract* to be executed, notwithstanding any description of the *Contract* which may infer that it is limited to construction only.

9 ASSIGNMENT AND SUBCONTRACTING

- a) A party must not, without the other's prior written approval (including terms), assign the *Contract* or any payment or any other right, benefit or interest under the *Contract*.
- b) The *Contractor* must not subcontract the whole of the *work under the Contract*.
- c) The *Contractor* is liable to the *Principal* for the acts, defaults and omissions of *subcontractors* (including *selected subcontractors*) and employees and agents of *subcontractors* as if they were acts, defaults or omissions of the *Contractor*.
- d) The *Contractor* must comply with the requirements specified in the Subcontracting Framework (if any), included in the *Contract* as Annexure Part C.
- e) Any approval to subcontract does not relieve the *Contractor* from any liability or obligation under the *Contract*.
- f) The *Contractor* indemnifies the *Principal* against:
 - i) all *claims*, actions, loss or damage and all other liability arising out of any acts or omissions of *subcontractors*; and
 - ii) any *claim* by a *subcontractor* against the *Principal* in respect of a breach of this clause 9 by the *Contractor*.
- g) If stated in *Item 8* and if directed by the *Principal*, the *Contractor*, without being entitled to compensation, must promptly execute a deed of novation in the form included in the invitation to tender or on the terms specified in the *Contract*. The novation will be for the work stated in *Item 8* and be between the *Principal*, the *Contractor* and the *subcontractor* stated in *Item 8*.

10 SELECTED SUBCONTRACTORS

- a) If the *Principal* has included in the invitation to tender or *Contract* a list of one or more *selected subcontractors* for particular work, the *Contractor* must subcontract that work to a *selected subcontractor* and immediately give the *Superintendent* written notice of that *selected subcontractor's* name.
- b) If no *subcontractor* on the *Principal's* list will subcontract to carry out the selected subcontract work, the *Contractor* must as soon as practicable, provide a list of proposed *subcontractors* for the prompt written approval of the *Superintendent*.
- c) If a *selected subcontractor* is unable to complete the particular selected subcontract work, repudiates the subcontract or that subcontract is terminated, the *Contractor* must promptly provide a further list of proposed *subcontractors* to complete the selected subcontract work for the prompt written approval of the *Superintendent*.

11 PROVISIONAL SUMS AND PROVISIONAL QUANTITIES

- a) If the *Contract* includes a *provisional sum* or *provisional quantity*, the *Contractor* must not carry out the work to which a *provisional sum* or *provisional quantity* relates unless directed to do so by the *Superintendent*. The *Contractor* acknowledges that the *Superintendent* has no obligation to direct any work to be carried out in relation to a *provisional sum* or *provisional quantity*.
- b) If the *Contract* includes a *provisional sum*, the *contract sum* must be adjusted as follows:
 - i) the *provisional sum* for that work is deducted from the *contract sum*; and
 - ii) the cost of the work actually carried out (if any) is calculated pursuant to clause 40.5 and added to the *contract sum*.
- c) The *Contractor* is entitled to payment for profit and overheads for work carried out in respect of a *provisional sum*.
- d) If the *Contract* includes a *provisional quantity*, the *contract sum* must be adjusted by the amount calculated by multiplying the rate applicable to the *provisional quantity* work by the difference between the *provisional quantity* and the quantity of work actually carried out.

12 SITE CONDITIONS

12.1 General

- a) *Reliance information* and *non-reliance information* comprise of those documents listed in *Items* 9 and 10 respectively.
- b) With respect to *reliance information*:
 - i) the *Contractor* may rely on the factual accuracy of *reliance information*, but
 - ii) the *Principal* does not warrant or make any representation with respect to the completeness of the *reliance information*.
- c) With respect to *non-reliance information*:
 - i) if the *Contractor* relies on *non-reliance information*, it does so entirely at its own risk;
 - ii) the *Principal* does not warrant or make any representation with respect to the accuracy, quality or completeness of the *non-reliance information*; and
 - iii) the *Principal* is not liable to the *Contractor* for any *claim* arising out of, or in relation to, *non-reliance information*.
- d) Notwithstanding clause 12.1 a), any interpretations, deductions, opinions or conclusions set out in any document provided by the *Principal* in connection with *site* conditions are deemed to be *non-reliance information* and the use of such information is entirely at the *Contractor's* risk.

12.2 Notification of a latent condition

- a) If the *Contractor* becomes aware of a *latent condition* and the *Contractor* either intends to make a *claim* or believes that it has an entitlement to make a *claim* for an extension of time or additional costs, the *Contractor* must, as soon as possible (and in any event not more than 1 *business day*) and, where possible, before the *latent condition* is disturbed, give written notice to the *Superintendent* of that *latent condition* endorsed 'Contractor's Notice Under Clause 12.2'.
- b) If required by the *Superintendent*, the *Contractor* must provide to the *Superintendent* a statement in writing, specifying:
 - i) the *latent condition* encountered and in what respects it differs materially
 - ii) the additional work and additional resources which the *Contractor* estimates to be necessary to deal with the *latent condition*;
 - iii) the time the *Contractor* anticipates will be required to deal with the *latent condition* and the expected delay in achieving *practical completion*;
 - iv) the *Contractor's* estimate of the cost of the measures necessary to deal with the *latent condition*; and
 - v) other details reasonably required by the *Superintendent*.

12.3 Additional costs

- a) The *Contractor* is solely responsible for dealing with any *latent condition* so as to minimise delay and to minimise increased costs.
- b) Subject to clause 12.3 c), if a *latent condition* causes the *Contractor* to incur extra costs, which would not have been incurred if the *latent condition* did not exist, a valuation of those extra costs must be made pursuant to clause 40.5.
- c) The *Contractor* has no entitlement to adjustment to the *contract sum* as a consequence of *latent conditions* from any cause which:
 - i) the *Contract* expressly states is at the *Contractor's* risk; or
 - ii) is specified in *Item 11*.

12.4 Extension of time

- a) The *Contractor's* entitlement to an extension of time from a *latent condition* is subject to clause 35.5 and notification of the existence of the *latent condition* within 5 *business days*.

12.5 Time bar

- a) Where pursuant to clause 12.3, a valuation is to be made pursuant to clause 40.5, regard must not be had to the value of additional work carried out, additional constructional plant used or extra cost incurred more than 5 *business days* before the date on which the *Contractor* gives the written notice required by clause 12.2.

13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

- a) The *Principal* warrants that, unless specified otherwise in the *Contract*, design, materials, documents and methods of working specified in the *Contract* or provided or directed by the *Principal*, do not infringe any *intellectual property right*.
- b) 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*.
- c) Each party indemnifies the other party against any such liability arising from an infringement of any *intellectual property right*.
- d) The *Principal* grants to the *Contractor* an irrevocable royalty-free licence to use the design, materials and documents provided by the *Principal* to use only for the construction of the *Works*.

- e) The *Contractor* grants to the *Principal* an irrevocable royalty-free licence to use the design, materials, documents and methods of working, provided by the *Contractor* to use only for the use, repair, maintenance, addition, alteration or extension of *the Works*.
- f) Where the *Contractor* is not the holder of *intellectual property rights* referred to in clause 13 e), the *Contractor* must take all steps necessary to ensure that the holder of the *intellectual property rights* grants to the *Principal* an irrevocable royalty-free licence to use those things for the occupation, use, repair, maintenance, addition, alteration or extension of *the Works*.

14 STATUTORY REQUIREMENTS

14.1 Complying with statutory requirements

- a) The *Contractor* must comply with all *statutory requirements* except those stated in *Item 12* or those notified by the *Superintendent* to be satisfied by or on behalf of the *Principal*.
- b) The *Contractor* must immediately notify the *Superintendent* in writing if it becomes aware of a *statutory requirement* which is at variance with the *Contract*.

14.2 Changes in statutory requirements

- a) If there is a change to a *statutory requirement* that:
 - i) is enacted after the date of submission of tenders;
 - ii) could not have been reasonably anticipated by a competent *Contractor*; and
 - iii) requires the *Contractor* to change the *work under the Contract* or changes the costs incurred by the *Contractor*,the difference in costs must be valued pursuant to clause 40.5.
- b) The *Contractor* must immediately notify the *Superintendent* in writing if it becomes aware of a change to a *statutory requirement*.

14.3 Licences, registrations, permits, approvals and certificates

- a) The *Contractor* must obtain and hold, and ensure that its *subcontractors*, agents and employees obtain and hold, all of the licences, registrations, permits, approvals and certificates that they are required to obtain and hold under all *statutory requirements* in order to carry out the *work under the Contract* and in respect of the use and occupation of *the Works*.
- b) The *Contractor* must pay all necessary fees and charges in connection with the *work under the Contract*, other than those listed in *Item 12*.
- c) The *Contractor* must provide the *Principal* with a copy of any licences, authorisations, notices, approvals, consents and other documents issued to the *Contractor* by any Authority in respect of the *work under the Contract*.

15 PROTECTION OF PEOPLE AND PROPERTY

- a) In so far as compliance with the *Contract* permits or requires, the *Contractor* must:
 - i) take measures necessary to protect people and property;
 - ii) avoid unnecessary interference with the passage of people and vehicles; and
 - iii) prevent nuisance and unreasonable noise and disturbance.
- b) If the *Contractor* damages property, the *Contractor* must:
 - i) immediately notify the *Superintendent*;
 - ii) promptly rectify the damage; and
 - iii) pay any compensation which the law requires the *Contractor* to pay.

- c) If the *Contractor* fails to comply with an obligation under this clause 15, 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 so incurred by the *Principal* must be assessed by the *Superintendent* and certified as a debt due and payable by the *Contractor* to the *Principal*.
- d) If, pursuant to a *statutory requirement* of the state or territory where the *work under the Contract* is being carried out, workplace health and safety on the *site* must be managed by a principal contractor, the *Principal*:
 - i) appoints the *Contractor* to be the principal contractor; and
 - ii) authorises the *Contractor* to have management and control of the workplace and to discharge the duties of a principal contractor,unless the *Contract* specifies that another person will be the principal contractor.

16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE

- a) The *Contractor* is responsible for the prevention of damage to, and for the care of:
 - i) the whole of the *work under the Contract* from and including the date of commencement of the *work under the Contract* to 4:00 pm on the *date of practical completion*;
 - ii) unfixated materials, plant or equipment accounted for in a *payment schedule*;
 - iii) materials, plant or equipment entrusted to the *Contractor* by the *Principal*; and
 - iv) after 4:00 pm on the *date of practical completion*, those parts of the *work under the Contract* affected by the repair of *defects* or the cleaning up of the *site*.
- b) If loss or damage, other than that caused by a *Principal's risk*, occurs to the *work under the Contract* while under the *Contractor's* care (including loss or damage caused by inclement weather or a failure to take adequate protective measures), the *Contractor* must rectify such loss or damage at its own cost so that *the Works* comply with the requirements specified in the *Contract*.
- c) In the event of loss or damage being caused by a *Principal's risk*, even though the *Contractor* has implemented reasonable measures to protect *the Works* in accordance with clause 16 a):
 - i) to the extent directed by the *Superintendent*, the *Contractor* must rectify the loss or damage; and
 - ii) the cost of rectification is to be valued pursuant to clause 40.5.
- d) If the loss or damage is caused by a combination of *Principal's risk* and other risks, the valuation pursuant to clause 16 c ii) of the rectification work is to be reduced in proportion to the contribution made by risks that are not the *Principal's risk*.

17 DAMAGE TO PERSONS AND PROPERTY

17.1 Contractor's indemnity

- a) The *Contractor* indemnifies the *Principal* against:
 - i) *claims* in respect of personal injury or death;
 - ii) loss of, or damage to, the *Principal's* property; and
 - iii) loss of, or damage to, any other property,arising out of or as a consequence of carrying out and completing the *work under the Contract*, but the indemnity is to be reduced proportionally to the extent that the act or omission of the *Superintendent* or the *Principal* or the consultants, agents, employees or other *Contractors* of the *Principal* have contributed to the injury, death, loss or damage.
- b) Clause 17.a) does not apply to:

- i) the extent that the *Contractor's* liability is limited by another provision of the *Contract*;
- ii) exclude any other right of the *Principal* to be indemnified by the *Contractor*;
- iii) materials, plant or equipment entrusted to the *Contractor* by the *Principal* under clause 16 a);
- iv) damage which is the unavoidable result of the construction of *the Works* in accordance with a construction methodology specified by the *Principal*; and
- v) *claims* in respect of the *Principal's* right to have the *work under the Contract* carried out on the *site*.

17.2 Principal's indemnity

- a) The *Principal* indemnifies the *Contractor* against *claims* in respect of the *Principal's* right to have the *work under the Contract* carried out on the *site*.

18 INSURANCE OF THE WORKS

- a) The alternative applying for Insurance of *the Works* for the *Contract* is given in *Item 13*.

18.1 Alternative 1 – Contractor arranged insurance

- a) Before the *Contractor* commences work, the *Contractor* must take out an insurance policy covering all the things referred to in Clause 16 a) against loss or damage resulting from any cause whatsoever until the *Contractor* ceases to be responsible for their care.
- b) Without limiting the generality of the obligation to insure, the policy must cover the *Contractor's* liabilities under Clause 16 a) and things in storage off *site* and in transit to the *site*.
- c) The insurance cover may exclude any of the following:
 - i) the cost of making good fair wear and tear or gradual deterioration, but must not exclude the loss or damage resulting therefrom;
 - ii) the cost of making good faulty design, workmanship and materials, but must not exclude the loss or damage resulting therefrom;
 - iii) consequential loss of any kind, but must not exclude loss of or damage to *the Works*;
 - iv) damages for delay in completing or for the failure to complete *the Works*; and
 - v) loss or damage resulting from the *Principal's* risks.
- d) The insurance cover must be for an amount not less than the sum of:
 - i) the contract sum;
 - ii) the amount stated in *Item 14* to provide for costs of demolition and removal of debris;
 - iii) the amount stated in *Item 14* to cover fees of consultants;
 - iv) the value stated in *Item 14* of any materials or things to be supplied by the *Principal* for the purposes of the work under the *Contract*; and
 - v) the additional amount or percentage stated in *Item 14* of the total of the *Items* referred to in Clause 18 d) i) to iv).
- e) The insurance policy must:
 - i) name or otherwise identify the *Principal* and the *Contractor* as persons covered by the policy or to whom the insurance cover provided by the policy extends;
 - ii) include a cross-liability clause under which the insurer agrees that the term "insured" applies to each of the persons covered as if a separate policy of insurance had been issued to each of them, and a waiver of subrogation clause,

under which the insurer agrees to waive all rights of subrogation or action against any of the persons covered;

- iii) unless otherwise specified elsewhere in the *Contract*, be effected with an insurer and in terms both approved in writing by the *Principal*, which may be given or withheld in its absolute discretion; and
- iv) be maintained while the *Contractor* is responsible for any *work under the Contract* pursuant to clause 16.1.

18.2 Alternative 2 – Principal arranged insurance

- a) On or before the *date of acceptance of tender*, the *Principal* must:
 - i) effect a policy of insurance in relation to the *work under the Contract* in the terms of the policy or proposed policy referenced in *Item 15*;
 - ii) maintain the policy while ever the *Contractor* has an interest in it;
 - iii) pay all premiums; and
 - iv) ensure that the policy includes the *Principal*, the *Contractor* and *subcontractors* on the *site* as insured parties.

19 PUBLIC LIABILITY INSURANCE

- a) The alternative applying for public liability insurance for the *Contract* is given in *Item 16*.

19.1 Alternative 1– Contractor arranged insurance

- b) Before the *Contractor* commences work, the *Contractor* must take out a public liability policy of insurance which:
 - i) notes the interests of the parties;
 - ii) covers the *Principal*, the *Contractor*, the *Superintendent* and all *subcontractors* on *site* for their respective rights and interests and covers their liabilities to third parties;
 - iii) covers the *Contractor's* liability to the *Principal* and *Principal's* liability to the *Contractor* for loss of or damage to property (other than property required to be insured by Clause 18)
 - iv) covers the death of or injury to any person (other than liability which is required by law to be insured under a workers compensation policy of insurance);
 - v) is for an amount in respect of any one occurrence not less than the sum stated in *Item 16*;
 - vi) unless otherwise specified elsewhere in the *Contract*, is effected with an insurer and in terms both approved in writing by the *Principal*, which may be given or withheld in its absolute discretion; and
 - vii) is maintained until the issue of the *final certificate*.

19.2 Alternative 2 – Principal arranged insurance

- a) On or before the *date of acceptance of tender*, the *Principal* must:
 - i) effect a policy of insurance in relation to public liability in the terms of the policy or proposed policy referenced in *Item 17*;
 - ii) maintain the policy while ever the *Contractor* has an interest in it;
 - iii) pay all premiums; and
 - iv) ensure that the policy includes the *Principal*, the *Contractor* and *subcontractors* on the *site* as insured parties.

20 OTHER INSURANCE

- a) Unless clause 20 b) applies, before the *Contractor* commences work, the *Contractor* must:
 - i) insure against liability for death of or injury to persons employed by the *Contractor* including liability by statute and at common law;
 - ii) maintain the insurance cover until all work, including remedial work, is completed;
 - iii) where permitted by law, extend the insurance to indemnify the *Principal* for the *Principal's* statutory liability to persons employed by the *Contractor*; and
 - iv) ensure that every *subcontractor* working on the *site* is similarly insured.
- b) If, in the jurisdiction where the *work under the Contract* is being carried out, insurance of employees is covered by a statutory scheme of insurance, the *Contractor* must comply with its obligations under that scheme and if requested by the *Superintendent*, provide evidence demonstrating compliance with this clause 20 b).
- c) If stated in *Item 18*, the *Contractor* must ensure that a professional indemnity insurance policy is in place which covers the design of *temporary works*. The policy must be in place prior to the commencement of the design and maintained until the expiry of the *defects liability period*. The amount of cover must not be less than the amount specified in *Item 18*, or if no amount is specified, an amount which is sufficient to cover the costs of demolition, removal of debris and reconstruction of that part of *the Works* which is dependent upon the *temporary works*.

21 INSURANCE POLICIES

21.1 Proof of insurance

- a) Before the *Contractor* commences work and whenever requested in writing by the other party, a party liable to effect or maintain insurance must produce evidence to the other party that the insurance is current, being maintained and fully complies with clauses 18, 19 and 20 (as the case may be). The evidence must be a copy of the insurance policies that the party is required to effect and maintain, unless the other party advises that form of evidence is acceptable.
- b) The effecting of insurance must not limit the liabilities or obligations of a party under other provisions of the *Contract*.

21.2 Failure to produce proof of insurance

- a) If, after being requested in writing by the other party so to do, a party fails to produce evidence of compliance with insurance obligations under clauses 18, 19 or 20 to the satisfaction and approval of the other party, the other party may effect and maintain the insurance and pay the premiums. The amount paid must be a debt due from the party in default to the other party.
- b) Where the defaulting party is the *Contractor*, the *Contractor* is not entitled to any payment until such evidence is produced. The rights given by clause 21.2 are in addition to any other right.

21.3 Notices from or to the insurer

- a) The party effecting insurance under Clause 18 or 19 must ensure that each policy of insurance contains provisions acceptable to the other party that will:
 - i) require the insurer, whenever the insurer gives the *Principal*, the *Contractor* or a *subcontractor* a notice of cancellation or other notice concerning the policy at the same time to inform the other party in writing that the notice has been given;
 - ii) provide that a notice of claim given to the insurer by the *Principal*, the *Superintendent*, the *Contractor* or a *subcontractor* must be accepted by the insurer as a notice of claim given by the *Principal*, the *Superintendent*, the *Contractor* and the *subcontractor* and that a failure by one insured to discharge

its obligations of disclosure and good faith or to observe the terms of the policy will not prejudice the cover of the other insureds; and

- iii) require the insurer, whenever the party fails to renew the policy or to pay a premium, to give notice in writing thereof forthwith to the *Principal* and the *Contractor* and prior to the insurer giving any notice of cancellation.

21.4 Notices of potential claims

- a) The *Contractor* must, as soon as practicable, inform the *Principal* in writing of any occurrence that may give rise to a claim under a policy of insurance required by Clause 18 or 19 and must keep the *Principal* informed of subsequent developments concerning the claim. The *Contractor* must ensure that *subcontractors* in respect of their operations similarly inform the *Principal*.
- b) Where a policy of insurance required by the *Contract* has been effected by the *Principal*, the *Principal* must similarly inform the *Contractor*.
- c) The *Contractor* must comply with the terms of the policies of insurance effected under Clauses 18, 19 or 20 (including the notification requirements under those policies).
- d) Where the potential claim would be under the insurance specified by clause 18, without creating any default by the *Principal*, the *Principal* may decide to not have *the Works* which are the subject of the claim reinstated by the *Contractor*.

21.5 Settlement of claims

- a) This clause 21.5 applies a where a settlement has been made under the insurance specified by clause 18.
- b) Unless the parties agree otherwise, the proceeds of the settlement must be paid to the *Principal*.
- c) The *Superintendent* (acting as a certifier) must assess the amount due to the *Contractor* for reimbursement of the cost reasonably and necessarily incurred by the *Contractor* to rectify the loss or damage.
- d) The *Principal* must pay the *Contractor* the lessor of the amount assessed under clause 21.5 c) and the amount of insurance settlement.

21.6 Cross liability

- a) Any insurance required to be effected by the *Contractor* 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 comprising the insured and for the purpose of which the insurer accepts the term 'insured' as applying to each of the persons comprising 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 Excess/deductible

- a) To the extent that a claim under a policy of insurance effected under Clauses 18, 19 or 20 is not a direct consequence of a *Principal's risk* (without fault or omission on the part of the *Contractor*), the *Contractor* is responsible for the payment of any excess deductibles under the policy and the administration associated with making the claim.
- b) The *Contractor* acknowledges that it has considered the extent of insurance cover provided by the *Principal* (if any) and made its own determination whether it needs further insurance to cover difference in conditions. The *Contractor* bears the cost of taking out any difference in conditions insurance that it considers to be necessary.

22 SEPARABLE PORTIONS

- a) In addition to *separable portions* identified in the *Contract documents* (if any), if either party at any time proposes that *the Works* be divided into *separable portions*, that party must at first seek agreement from the other party.

- b) If a part of *the Works* has or will reach a stage equivalent to that of *practical completion*, but another part of *the Works* has not reached such a stage, the *Superintendent* may direct that the respective parts are to be *separable portions*.
- c) If new *separable portions* have been created, the *Superintendent* (acting as a certifier) must clearly identify in writing for each separable portion:
 - i) the portion of *the Works*;
 - ii) the *date for practical completion*; and
 - iii) the respective amounts for *security*, liquidated damages and bonus (all calculated pro-rata according to the ratio of the *Superintendent's* valuation of the separable portion to the *contract sum*).
- d) The interpretations of *date for practical completion* and *date of practical completion* apply separately to each separable portion.
- e) In using a separable portion that has reached *practical completion*, the *Principal* must not impede the *Contractor* in the performance of the *work under the Contract*.

23 SUPERINTENDENT

- a) The *Principal* must ensure that at all times there is a *Superintendent*.
- b) Where it is stated in the *Contract* that the *Superintendent* is acting as a certifier, the *Principal* must ensure that the *Superintendent*:
 - i) acts honestly and impartially;
 - ii) acts within the time prescribed under the *Contract* or where no time is prescribed, within a reasonable time; and
 - iii) arrives at a reasonable measure or value of work, quantities or time.
- c) In the exercise of all other functions of the *Superintendent* under the *Contract*, the *Superintendent* acts as the agent of the *Principal* and does not act as an independent certifier.
- d) If pursuant to a provision of the *Contract* enabling the *Superintendent* to give *directions*, the *Superintendent* gives a *direction*, the *Contractor* must comply with the *direction*.
- e) Except where the *Contract* otherwise provides, a *direction* may be given orally, but the *Superintendent* must as soon as practicable confirm it in writing.
- f) If the *Contractor* in writing requests the *Superintendent* to confirm an oral *direction*, the *Contractor* is not bound to comply with the *direction* until the *Superintendent* confirms it in writing.
- g) The *Principal* may, in writing, authorise the *Superintendent* to act on its behalf in respect of matters relating to the *Contract*.

24 SUPERINTENDENT'S REPRESENTATIVE

- a) The *Superintendent* may from time to time appoint individuals to exercise any functions of the *Superintendent* under the *Contract*. The appointment of a *Superintendent's Representative* does not prevent the *Superintendent* from exercising any function.
- b) The *Superintendent* must not authorise more than one *Superintendent's Representative* to exercise the same function at the same time.
- c) The *Superintendent* must promptly notify the *Contractor* in writing of:
 - i) the appointment and the name of any *Superintendent's Representative* and the functions delegated to the *Superintendent's Representative*; and
 - ii) any termination of the appointment of a *Superintendent's Representative*.

25 CONTRACTOR'S REPRESENTATIVE

- a) Whenever any activity relating to the execution of the *work under the Contract* is taking place, the *Contractor* must ensure that a competent representative is present.
- b) Prior to the commencement of work, the *Contractor* must notify the *Superintendent* in writing of the name of the representative(s) and of any subsequent changes.
- c) Any *direction* which is given to the representative of the *Contractor* is deemed to have been given to the *Contractor*.
- d) Matters within the knowledge of a representative of the *Contractor* are deemed to be within the knowledge of the *Contractor*.
- e) If a representative does not meet the skills, experience required in the *Contract* (if specified) or in the reasonable opinion of the *Superintendent* is not competent to undertake the role, the *Superintendent* may object to the appointment of that representative, and the *Contractor* must terminate the appointment and appoint another representative.

26 CONTROL OF CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS

- a) If an employee of the *Contractor* or a *subcontractor* or a sole trader engaged by the *Contractor* or a *subcontractor*:
 - i) does not possess the skills, experience or qualifications reasonably necessary for the role which is being undertaken by that person; or
 - ii) in the reasonable opinion of the *Superintendent*, is guilty of misconduct or is incompetent or negligent,

the *Superintendent* may direct the *Contractor* to ensure that the person is not present at any place where the *work under the Contract* is being undertaken.

27 SITE

27.1 Possession of *site*

- a) The *Principal* must give the *Contractor* possession of sufficient of the *site* to allow the *Contractor* to start work by the date which is the *latest* of:
 - i) the date the *Contractor* provides *security* (if any) pursuant to clause 5;
 - ii) the date the *Contractor* provides proof of insurance (if required) pursuant to Clause 21;
 - iii) the date the *Contractor* satisfies any other condition precedent for possession of the *site* specified in the *Contract*; and
 - iv) the period, stated in *Item 19*, after the *date of acceptance of tender*.
- b) If the *Principal* has not given the *Contractor* possession of the whole *site*, the *Principal* must give the *Contractor* sufficient possession of such further portions of the *site* as may, from time to time, be necessary for the *Contractor* to carry out and complete the *work under the Contract*. As soon as practicable, *Principal* must advise the *Contractor* in writing of the date upon which the *site* or any part thereof will be available.
- c) Possession of the *site*:
 - i) confers on the *Contractor* a right only to such use and control as is necessary to enable the *Contractor* to carry out and complete the *work under the Contract*; and
 - ii) unless permitted in the *Contract* or approved otherwise in writing by *Superintendent*, excludes any purpose not connected with the performance of the *work under the Contract*.

- d) Unless the delay in giving the *Contractor* sufficient possession of the *site* continues for longer than the time stated in *Item 19*, delay by the *Principal* in giving possession is not a breach of the *Contract*.

27.2 Access to the site for the Principal and others

- a) At any time, the *Superintendent*, *Principal* and their consultants, agents and employees may have access to any place and where the *work under the Contract* is being undertaken for *testing* or any other reasonable purpose in connection with the *Contract*.
- b) When accessing any place where the *work under the Contract* is being undertaken, the *Superintendent*, *Principal* and their consultants, employees and agents must:
 - i) comply with the *Contractor's* workplace health and safety requirements; and
 - ii) except to the extent reasonably necessary to conduct the *test* or otherwise permitted in the *Contract*, not impede the *Contractor*.
- c) The *Contractor*:
 - i) must permit the execution of work on the *site* by other contractors or employees of the *Principal*;
 - ii) must cooperate with them and coordinate the *Contractor's* work with the other contractors' work; and
 - iii) if specified in the *Contract*, not impede other contractors or employees of the *Principal* undertaking work on the *site*.

27.3 Delivery of materials

- a) Until possession of the *site* or part of the *site* is given to the *Contractor* pursuant under Clause 27.1, the *Contractor* must not deliver materials to or perform work on the *site*, unless the *Superintendent* gives prior written approval.

27.4 Discovery of items of value

- a) The *Principal* owns any items of value found on the *site*, such as minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove and coins. If any such item is discovered, the *Contractor* must immediately take precautions to prevent their removal or damage and notify the *Superintendent* of the discovery.

28 SETTING OUT THE WORKS

- a) The *Contractor* must set out *the Works* in accordance with the *Contract*.
- b) The *Principal* may provide *survey marks*. The *Contractor* may request from the *Principal* any additional information that is necessary for setting out *the Works* and is not included in the *Principal* supplied documents. Such a request must be made at least 10 *business* days before the information is planned to be used for setting out. As soon as practicable, the *Principal* must provide any additional information which it has or can reasonably obtain.
- c) The *Contractor* must keep in their true positions any *survey marks* specified in the *Contract* or as supplied by the *Principal*.
- d) If a *survey mark* is disturbed or obliterated, the *Contractor* must immediately notify the *Superintendent* and, unless the *Superintendent* otherwise directs, the *Contractor* must reinstate the *survey mark*. If the disturbance or obliteration is caused by a person referred to in clause 27.2, other than the *Contractor*, the cost incurred by the *Contractor* in reinstating the *survey mark* must be valued pursuant to clause 40.5.

29 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT

- a) Unless specified otherwise in the *Contract*, the *Contractor* must supply everything necessary for the proper performance of the *Contractor's* obligations and discharge of the *Contractor's* liabilities.
- b) The rates, items and lump sums included in the Commercial Framework are deemed to be full and complete payment for all materials, labour, *construction plant* and incidentals (including fees, charges, minor items and *testing*) necessary for the *Contractor* to fulfil its obligations under the *Contract*, notwithstanding that the description of the rate or lump sum may not fully describe all of the *work under the Contract*.
- c) The *Superintendent* may direct the *Contractor* to:
 - i) supply particulars of the mode and place of manufacture, the source of supply, the performance capacities and other related information; and
 - ii) arrange reasonable inspection at such place or sources by the *Superintendent*, in respect of any materials, plant, machinery or equipment to be supplied by the *Contractor* and intended to be incorporated in to *the Works*.
- d) The *Superintendent* may give the *Contractor* a written *direction* not to remove from the *site*:
 - i) materials, plant, or equipment intended to be incorporated in to *the Works*; or
 - ii) *temporary works* or *construction plant* necessary to complete *the Works*.
- e) If compliance with any such *direction* given under clause 29 d) causes the *Contractor* to incur additional cost, the cost is to be valued pursuant to clause 40.5.

30 MATERIALS AND WORK

30.1 Quality of materials and work

- a) Unless otherwise stated in the *Contract*, the *Contractor* must:
 - i) use suitable new materials; and
 - ii) carry out and complete the *work under the Contract* in accordance with accepted trade practices.

30.2 Non-compliant work

- a) If any work carried out by the *Contractor* (including the provision of materials, plant, or equipment and the compliance with specified processes) does not comply with a requirement specified in the *Contract*, the *Contractor* must rectify (including repair, rework, reconstruct or replace) the work so that it complies with the specified requirement. The rectification must be carried out at the *Contractor's* own expense and as soon as practicable after the *Contractor* becomes aware of the non-conformance.
- b) The *Contractor* warrants that the rectification will:
 - i) not adversely affect the durability, integrity or performance of *the Works*; and
 - ii) be carried out to minimise disruption and inconvenience to the *Principal*.
- c) If requested by the *Superintendent*, the *Contractor* must provide full details of the proposed method of rectification and the time by which the work will be rectified.
- d) The *Principal* may have non-conforming work rectified by others if:
 - i) the *Contractor* is aware of non-conforming work;
 - ii) the *Contractor* fails to rectify the work as soon as practicable;
 - iii) the *Superintendent* has provided written notice the *Contractor* that *Principal* intends to have the subject work rectified by others if the work is not rectified

within 10 *business* days of receipt of the written notice or such longer time as the *Superintendent* reasonably directs; and

- iv) the *Contractor* does not rectify the non-conforming work within the time specified in the written notice referred to in clause 30.2 d) iii).
- e) The cost so incurred by the *Principal* pursuant to clause 30.2 d) must be assessed by the *Superintendent* and certified as a debt due and payable by the *Contractor* to the *Principal*.

30.3 Acceptance of non-compliant work

- a) At any time prior to issuance of a *final certificate*, the *Principal* may accept *defective* work and request the *Superintendent* (acting as certifier) to adjust the *contract sum* by an amount commensurate with the increase or decrease in the value of *the Works* to the *Principal*.
- b) The *Contractor* may request the *Superintendent* to accept the non-compliant work and adjust the *contract sum* by an amount commensurate with the increase or decrease in the value of *the Works* to the *Principal*. The *Superintendent* is under no obligation to accept such a proposal.

30.4 Generally

- a) This clause 30 survives the issue of the *certificate of practical completion*.
- b) Nothing in clause 30 prejudices any other right which the *Principal* may have against the *Contractor* arising out of the failure of the *Contractor* to comply with a requirement specified in the *Contract*.

30.5 Suppliers' and manufacturers' warranties

- a) The *Contractor* must ensure that the *Principal* is assigned the benefit of any manufacturer's warranty that is provided by the manufacturer or supplier of any goods or materials incorporated into *the Works*.
- b) The provision of a warranty pursuant to this Clause 30.5 does not relieve, limit or exclude any of the *Contractor's* liabilities or obligations under the *Contract*.

30.6 Quality assurance

- a) Unless specified otherwise in *Item 20*, the *Contractor* must:
 - i) plan, establish, implement and maintain a quality system which conforms to the requirements of the *Contract*; and
 - ii) provide the *Superintendent* with access to the quality system of the *Contractor* and each of the *subcontractors* to enable monitoring and quality auditing.
- b) The quality system:
 - i) is to only be used only as an aid to achieving compliance with the *Contract* and to document such compliance, and
 - ii) will not relieve the *Contractor* of any responsibilities or obligations in respect of the *work under the Contract*.

31 TESTING

31.1 Responsibility for testing

- a) Unless specified otherwise, the *Contractor* is responsible for undertaking all *testing* necessary to demonstrate that the *work under the Contract* complies with the requirements specified in the *Contract*.
- b) At any time prior to the issue of the *final certificate*, the *Superintendent* may undertake *testing* or direct that any material or *work under the Contract* be *tested*. The *Contractor* must provide such assistance and samples and make accessible such parts of the *work under the Contract* as

may be required by the *Superintendent*. On completion of the *tests*, the *Contractor* must make good the *work under the Contract* so that it fully complies with the *Contract*.

- c) Before conducting a *test* under the *Contract*, reasonable notice must be given to the other party (and *Superintendent* if appropriate) in writing to the other of the time, date and place of the *test*.
- d) The *Superintendent* may direct that any part of the *work under the Contract* is not to be covered up or made inaccessible without the *Superintendent's* prior written *direction*.

31.2 Results of tests

- a) Results of *tests* must be promptly made available to the other party and to the *Superintendent*.

31.3 Costs of testing

- a) Unless specified otherwise, where the *Contract* specifies that a *test* must be undertaken, the *Contractor* bears the cost of, and incidental to, that *test*.
- b) If further *testing* is carried out by the *Superintendent* or as result of a *direction* by the *Superintendent*, costs of and incidental to *testing* must be borne by the *Principal* or be valued pursuant to Clause 40.5 and paid by the *Principal* to the *Contractor* unless:
 - i) the *test* shows that the material or work is not in accordance with the *Contract*;
 - ii) the *test* is in respect of *work under the Contract* covered up or made inaccessible without the *Superintendent's* prior approval where such was required; or
 - iii) the *test* is consequent upon a failure of the *Contractor* to comply with a requirement of the *Contract*.

31.4 Testing during the defects liability period

- a) If, during the *Defects liability period*:
 - i) the *Principal* or the *Superintendent* asserts that material or work is not in accordance with the *Contract*, and
 - ii) the *Contractor* requests permission to *test* the material or work,the *Principal* must not unreasonably refuse the *Contractor* access to *test* the material or work.
- b) The costs of and incidental to *testing* under this clause 31.4 must be borne by the *Contractor* unless the *test* shows that the material or work is in accordance with the *Contract*.

32 WORKING DAYS AND WORKING HOURS

- a) The *Contractor* is only permitted to perform *work under the Contract* on the *site* in accordance with the following:
 - i) at times permitted by law;
 - ii) on *working days*; and
 - iii) during the working hours specified in *Item 21* or elsewhere in the *Contract* (if any) or if not specified in the *Contract*, as notified by the *Contractor* to the *Superintendent* before the commencement of work on the *site*.
- b) The *Contractor* may carry out work at other times if it is necessary for safety or for the protection of property. The *Contractor* must, as soon as practicable, give the *Superintendent* written notice of such circumstances.
- c) The *working days* and working hours must not subsequently be varied by the *Contractor* without the *Superintendent's* prior written approval, which may be conditional.
- d) The cost of administration of the *Contract* incurred by the *Principal* is to be borne by the following party:
 - i) during the *working days* and working hours specified in the *Contract*: *Principal*

- ii) outside of these *working days* and working hours: *Contractor*.

33 PROGRESS AND PROGRAMMING OF THE WORKS

33.1 Program

- a) If the *Contractor* has submitted a program complying with clause 33.1 c) with its tender, this program is the *Contract program* until the *Contractor* submits a further *Contract program* in accordance with this clause 33.1.
- b) If the *Contractor* has not submitted a *Contract program* with its tender, the *Contractor* must submit a *Contract program* to the *Superintendent* within the timeframe specified in the *Contract* or if no timeframe is specified, within 10 *business days* of the *date of acceptance of tender*.
- c) The *Contract program* must:
 - i) demonstrate how the *Contractor* is to achieve practical completion by the date for practical completion;
 - ii) show, and be consistent with, all constraints on access, performance and coordination;
 - iii) show the start and finish dates or, in the case of future activities, the intended start and finish dates, of all activities and other significant events;
 - iv) show the activities of the work under the *Contract*;
 - v) show the logical relationship between activities and events, the sequence of activities which constitute the critical path or paths, time leads and lags, and resource and other constraints;
 - vi) show the dates when the *Contractor* will require information, documents, instructions or materials from the *Principal* and the dates when the *Contractor* will provide information or documents to the *Principal*; and
 - vii) comply with any other specific requirements of the *Contract*, including any specified format or software.
- d) During the execution of the *work under the Contract*, the *Contractor* must revise the *Contract program* to account for actual progress or whenever there is any material change to the scope of work, sequence of activities, resources allocated, methodology employed or completion dates that and provide a copy to the *Superintendent*. In addition, revised *Contract programs* must be provided to the *Superintendent* at the times or stages stated in *Item 22* (if specified).
- e) The *Superintendent* may request the *Contractor* to provide further information, details or explanation of a *Contract program* and the *Contractor* must comply with that request within 5 *business days* or such other time reasonably determined by the *Superintendent*.
- f) The *Contractor* bears all costs associated with complying with the provision of *Contract programs* pursuant to this clause 33.
- g) Unless provided for elsewhere under the *Contract*, the *Contractor* is not entitled to any amendment of the *contract sum* in the event that the actual time or resources vary from those stated in the *Contract program*.

33.2 Progress of the work

- a) The *Contractor* must carry out all work in connection with the *Contract* expeditiously and without undue delay, so that *the Works* will achieve *practical completion* by the *date for practical completion*.
- b) If the *Contractor* is unable to demonstrate that it will achieve *practical completion* by the *date for practical completion*, the *Superintendent* may direct the *Contractor* to take all reasonable steps to achieve the necessary progress. A *direction* under this clause is not an acceleration notice pursuant to clause 33.4.

33.3 Acceleration

- a) The *Superintendent* may direct that the *work under the Contract* is accelerated:
 - i) in order to bring forward the *date for practical completion* to a proposed new date stated in the *direction*; or
 - ii) as an alternative to the *Contractor* being granted an extension of time, in which case the *Contractor's* entitlement to the extension of time is reduced by a time commensurate with the acceleration.
- b) If the *Contractor* can reasonably comply with the *direction* to accelerate, the *Contractor* must do so. If the *Contractor* cannot reasonably comply, the *Contractor* must give the *Superintendent* written notice within 3 *business* days of receiving the *direction* of the reasons why it cannot reasonably comply.
- c) If compliance with a *direction* to accelerate (except those required to address 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 is to be valued pursuant to clause 40.5.
- d) Notwithstanding clause 23, a *direction* to accelerate must be in writing and expressly identified as a *direction* pursuant to this clause 33.3.

34 SUSPENSION OF THE WORKS

34.1 Superintendent's Suspension

- a) The *Superintendent* may direct the *Contractor* to suspend the carrying out of the whole or part of the *work under the Contract* for such stated period of time as the *Superintendent* thinks appropriate, if the *Superintendent* (acting as a certifier) is of the opinion that it is necessary:
 - i) because of an act or omission of:
 - A) the *Principal* or an employee, consultant or agent of the *Principal*;
 - B) the *Contractor*, a *subcontractor* or an employee or agent of either;
 - C) the *Superintendent*;
 - ii) for the protection or safety of any person or property; or
 - iii) to comply with an order of a court.

34.2 Contractor's Suspension

- a) If the *Contractor* wishes to suspend the whole or part of the *work under the Contract*, otherwise than pursuant to Clause 44.9, the *Contractor* must obtain the prior written approval of the *Superintendent*. The *Superintendent* may approve of the suspension and may impose conditions of approval or reject the suspension in its absolute discretion.

34.3 Recommencement of work

- a) As soon as the *Superintendent* becomes aware that the reason for any suspension no longer exists, the *Superintendent* must direct the *Contractor* to recommence the suspended *work under the Contract* as soon as reasonably practicable.
- b) The *Contractor* may recommence the *work under the Contract* suspended pursuant to clause 34.2 at any time after reasonable prior written notice to the *Superintendent*.

34.4 Cost of suspension

- a) If the suspension is due to an act or omission of the *Principal*, the *Superintendent* or an employee, consultant or agent of the *Principal* in breach of the *Contract* and the *Contractor* incurs more or less cost than otherwise would have been incurred, the difference is to be valued pursuant to clause 40.5. Otherwise the *Contractor* bears the cost of suspension.

35 TIME

35.1 Commencement of work

- a) The *Contractor* must give the *Superintendent* 5 *business* days notice of the date upon which the *Contractor* proposes to commence work on the *site*.
- b) The *Superintendent* may reduce the period of notice required.
- c) The *Contractor* must commence work on the *site* within 10 *business* days after the *Principal* has given the *Contractor* possession of sufficient of the *site* to enable the *Contractor* to commence work.
- d) The *Superintendent* may extend the time for commencement of work on the *site*.

35.2 Practical completion

- a) The *Contractor* must execute the *work under the Contract* to *practical completion* by the *date for practical completion*.
- b) Upon the *date of practical completion*, the *Contractor* must give possession of the *site* and the *Works* to the *Principal*.

35.3 Extension of time

- a) The *Contractor* is entitled to an extension of time for *practical completion* only if:
 - i) the *Contractor* is, or will be, delayed in achieving *practical completion* by a cause reasonably beyond the control of the *Contractor*, but not including:
 - A) any cause which the *Contract* expressly states is at the *Contractor's* risk;
 - B) any cause, specified in *Item 23*, which expressly precludes an entitlement for extension of time; and
 - C) inclement weather or industrial conditions after the *date for practical completion*;
 - ii) the *Contractor* has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay;
 - iii) the delay is to an activity or activities on the critical path of the then current *Contract program* and work is proceeding in accordance with this *Contract program*; and
 - iv) the *Contractor* has notified the *Superintendent* of the delay and submitted a *claim* in accordance with the requirements of the *Contract*.
- b) As soon as possible (and in no case more than 1 *business* day) of it becoming evident to a party that a cause specified in clause 35.5 a) may delay the *work under the Contract*, the party must notify the *Superintendent* and the other party in writing with details (to the extent reasonable) of the possible delay and the cause. The notice must be endorsed 'Notice of Possible Delay Under Clause 35.5'. The party must also provide any additional information in regard to the delay reasonably requested by the *Superintendent*.
 - i) If the *Contractor* wishes to make a *claim* for an extension of time, it must submit a *claim* which:
 - ii) identifies the extension of time *claimed*;
 - iii) includes information sufficient for the *Superintendent* to assess the *claim*, including all relevant facts, a copy of the *Contract program*, current at the start of the delay, which demonstrates how the delay affects the critical path and shows the expected effects of the delay;
 - iv) is submitted within 20 *business* days of the start of the delay; and
 - v) is updated every subsequent 20 *business* days if the delay continues.

- c) Within 20 *business* days after receiving the *Contractor's claim* for an extension of time, the *Superintendent* (acting as a certifier) must give the *Contractor* and the *Principal*, either:
- i) a written *direction* evidencing the extension of time so assessed; or
 - ii) a written *direction* that the *Contractor* and/or *Principal* provide, within 20 *business* days, further information which is reasonably necessary to assess the *claim*.
- d) If the *Superintendent* has requested further information to assess the *claim* under clause 35.5 d):
- i) within 20 *business* days of the receipt of the information from the *Contractor* and *Principal*; or
 - ii) if the *Contractor* or *Principal* fails to provide further information, within 40 *business* days of the request for the information,

the *Superintendent* (acting as a certifier) must provide a written *direction* evidencing the extension of time so assessed, including reasons if the assessment is less than the amount *claimed*.

- e) The *Contractor* is only entitled to an extension of time for delays occurring on days on which the *Contractor* usually carries out work for the *Contract*.
- f) If:
- i) two or more events are causing delay simultaneously; and
 - ii) the cause of at least one of those events is not a cause which entitles the *Contractor* to an extension of time,

then to the extent that the delays are concurrent, the *Contractor* is not entitled to an extension of time for *practical completion*.

- g) In determining whether the *Contractor* is, or will be, delayed in reaching *practical completion* regard must not be had to whether the *Contractor*:
- i) can reach *practical completion* by the *date for practical completion* without an extension of time; or
 - ii) can, by committing extra resources or incurring extra expenditure, make up the time lost.
- h) Notwithstanding that the *Contractor* is not entitled to, or has not *claimed* an extension of time, the *Principal* may, in its absolute discretion, at any time and from time to time before the issue of the *final certificate*, by notice in writing to the *Contractor*, extend the time for *practical completion* for any reason.

35.4 Liquidated damages

- a) If the *Contractor* fails to reach *practical completion* by the *date for practical completion*, the *Contractor* is indebted to the *Principal* for liquidated damages at the rate stated in *Item 24* for every day after the *date for practical completion* to, and including, the *date of practical completion* or the date that the *Contract* is terminated under Clause 44, whichever occurs first.
- b) If *Item 24* states that liquidated damages do not apply, the *Principal* may *claim* general damages if the *Contractor* fails to reach *practical completion* by the *date for practical completion*.
- c) If after the *Contractor* has paid, or the *Principal* has deducted liquidated damages, the time for *practical completion* is extended, the *Principal* must forthwith repay to the *Contractor* any liquidated damages paid or deducted in respect of the period up to and including the new *Date for practical completion*.

- d) The *Contractor* acknowledges that the rates for liquidated damages in *Item 24* are a genuine pre-estimate of the *Principal's* loss and agrees that it will not challenge any rate for liquidated damages as being in the nature of a penalty.
- e) If a limiting amount or percentage of the *contract sum* is included in *Item 25*, the *Contractor's* liability under this clause 35.4 is limited to that amount or percentage.

36 DELAY COSTS

- a) Subject to clause 36 b), the *Contractor* is entitled to the payment of *delay costs* only if the *Contractor* is granted an extension of time pursuant to clause 35.5 as a consequence of any of the following causes:
 - i) a *variation* (other than a *variation* for the *Contractor's* convenience or for the *Contractor's* non-compliance with the *Contract*);
 - ii) failure to give the *Contractor* possession of the *site* within the time stated in *Item 19*;
 - iii) a *latent condition* (unless the *latent condition* is at the *Contractor's* risk or the cause is specified in *Item 11*);
 - iv) resolution of an inconsistency, ambiguity or discrepancy in a *Principal-supplied* document in accordance with clause 8.2;
 - v) a suspension instruction under clause 53 if the need for the suspension arises from the *Principal's* act or omission;
 - vi) a *Principal's risk*; or
 - vii) a breach of the *Contract* by the *Principal*.
- b) The *Contractor* is not entitled to *delay costs* for any day which it would have been delayed anyway by a cause for which it has no entitlement to *delay costs*.
- c) *Delay costs* are determined in accordance with the Commercial Schedule in Annexure Part B or if not included in the Commercial Schedule, an amount valued by the *Superintendent* to cover the reasonable costs of recurrent overheads (but not profit or loss of profit) which were necessarily incurred by the *Contractor* due to delay.
- d) The *Contractor* has no remedy or entitlement for additional payment in connection with delay other than *delay costs*.
- e) Nothing in this Clause 36 obliges the *Principal* to pay extra costs for delay which have already been included in the value of a *variation* or any other payment under the *Contract*.

37 DEFECTS LIABILITY

- a) The *defects liability period* is stated in *Item 26* and commences at 4.00 pm on the *date of practical completion*.
- b) During the *defects liability period*, if the *Contractor* becomes aware of a *defect*, it must rectify the *defect* as soon as possible.
- c) The *Contractor* must carry out such rectification at times and in a manner causing as little inconvenience to the occupants or users of *the Works* as is reasonably possible.
- d) During the *defects liability period*, the *Superintendent* (acting as a certifier) may give the *Contractor* a *direction* to rectify a *defect*, which:
 - i) must identify the *defect*;
 - ii) may state the date for commencement of its rectification;
 - iii) may state a date for completion of its rectification; and

- iv) may state that there is to be a separate *defects liability period* for the rectified work (not exceeding that stated in *Item 26*), commencing at 4:00 pm on the date the rectification is completed and governed by this clause 38.
- e) If the rectification 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 by the *Principal* must be assessed by the *Superintendent* and certified as a debt due and payable by the *Contractor* to the *Principal*.

38 CLEANING UP

- a) The *Contractor* must keep the *site* and the *work under the Contract* clean and tidy and regularly remove rubbish and surplus material.
- b) Within 10 *business days* after the *date of practical completion*, the *Contractor* must remove *temporary works* and *construction plant*. The *Superintendent* may extend the time for removal to enable the *Contractor* to perform any remaining obligations.
- c) If the *Contractor* fails to comply with an obligation in this clause 38, the *Superintendent* may take action pursuant to clause 30.2 d).

39 URGENT PROTECTION

- a) If urgent action is necessary to protect the *work under the Contract*, other property or people and the *Contractor* fails to take the action, the *Principal* may, in its absolute discretion, take the necessary action. If the action was action which the *Contractor* should have taken at the *Contractor's* cost, the cost incurred by the *Principal* is a debt due and payable from the *Contractor*.
- b) If time permits, the *Superintendent* must give the *Contractor* prior written notice of the *Principal's* intention to take action under this clause 39.

40 VARIATIONS AND VALUATION OF WORK

40.1 Variations to the work under the Contract

- a) The *Superintendent* may, in writing, direct the *Contractor* to undertake a *variation* and the *Contractor* must comply:
 - i) at any time before the *date of practical completion*; and
 - ii) after the *date of practical completion* if the *variation* is in respect of rectification work referred to in clause 37.
- b) The *Contractor* is bound only to execute a *variation* which is within the general scope of the *Contract*.
- c) If the *Contractor* considers that a *direction* by the *Superintendent* in whole or in part constitutes a *variation*, within 5 *business days* of receipt of the *direction* and before commencing work in response to that *direction*, it must notify the *Superintendent* in writing, giving reasons why it considers the *direction* to be a *variation*.
- d) The *Superintendent* (acting as a certifier), within 5 *business days* after receipt of the *Contractor's* notice, must notify the *Contractor* in writing whether the *direction* constitutes a *variation*.
- e) If the *Superintendent* notifies the *Contractor* that the *direction* does not constitute a *variation*, the *Superintendent* must give reasons.

40.2 Proposed variations

- a) The *Superintendent* may give the *Contractor* written notice of a proposed *variation* and the *Contractor*, as soon as practicable after receiving the notice, must notify the *Superintendent*

whether the proposed *variation* can be effected, together with, if it can be effected, the *Contractor's* estimate of the:

- i) effect on the *Contract program* (including the *date for practical completion*); and
 - ii) cost (including all time-related costs, if any) of the proposed *variation*.
- b) The *Superintendent* may direct the *Contractor* to give a detailed quotation for the proposed *variation*, supported by measurements or other evidence of cost.
- c) If the *Contractor* incurs additional costs in complying with the requirements of this clause 40.2, a valuation must be made pursuant to clause 40.5.

40.3 Valuation of the variation

- a) If compliance with the *direction* to execute a *variation* (except a *direction* required to address the *Contractor's* non-compliance with the *Contract*) 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 is to be valued pursuant to clause 40.5.
- b) The *Superintendent* may, in its absolute discretion, direct the *Contractor* to provide a detailed quotation for the work of a *variation* supported by measurements or other evidence of cost.
- c) The *Contractor* is entitled to the reasonable cost of preparing the measurements or other evidence of cost that has been incurred over and above the reasonable overhead cost.

40.4 Variations for the Contractor's convenience

- a) If the *Contractor* requests the *Superintendent* to approve a *variation* for the convenience of the *Contractor*, the *Superintendent* may, in its absolute discretion, do so in writing. The approval may be conditional. The *Contractor* must provide the following, in writing, with the request:
- i) a statement confirming that the proposed *variation* is for the convenience of the *Contractor*;
 - ii) the effect of the proposed *variation* on the *work under the Contract*;
 - iii) the effect of the proposed *variation* on the *Contract program*;
 - iv) the cost effect to the *Principal* of the proposed *variation*;
 - v) a statement confirming that the proposed *variation* will not adversely affect the functional integrity, performance standards or quality standards of *the Works*; and
 - vi) any other information that the *Superintendent* reasonably requests.
- b) Notwithstanding clause 40.3, unless the *Superintendent* directs otherwise, the *Contractor* is not entitled to:
- i) an extension of time; or
 - ii) extra payment,
- in respect of the *variation* for the convenience of the *Contractor* or anything arising out of that *variation* which would not have arisen had that *variation* not been approved.
- c) The *Superintendent* is not obliged to approve a *variation* for the convenience of the *Contractor*.
- d) The *Contractor* bears all costs:
- i) associated with proposing a *variation* for its convenience;
 - ii) reasonably incurred by the *Principal* in assessing the proposal (such costs to be a debt due from the *Contractor* to the *Principal*); and

- iii) associated with carrying out the *variation* if it is approved by the *Superintendent*.

40.5 Valuation

- a) Where the *Contract* provides that a valuation must be made pursuant to clause 40.5 or the *Superintendent* has assessed a *claim* pursuant to clause 46 h), the change in work or additional costs must be valued by the *Superintendent* (acting as a certifier) in accordance with clause 40.5 d) and the *contract sum* must be adjusted by the amount of the valuation.
- b) The *Contractor* must use reasonable endeavours to minimise the additional costs of any change to the *work under the Contract*, which may include obtaining multiple quotations for subcontract work.
- c) A valuation under clause 40.5 d) must not include:
 - i) any costs, losses or expenses attributable to any default or negligence of the *Contractor*;
 - ii) costs incurred as a result of the failure of the *Contractor* to minimise its additional costs; and
 - iii) any amount for costs that the *Contractor* would have incurred anyway or should reasonably have allowed for at the *date of acceptance of tender*.
- d) The valuation must be determined by application of the one of the following methods which is applicable to the work and has the highest order of precedence:
 - i) prior agreement between the *Contractor* and the *Principal*;
 - ii) any specific rates or prices included in the *Contract* which are applicable to the work;
 - iii) rates or prices to the extent that it is reasonable to use them, even if such rates or prices are not within the *Contract documents*;
 - iv) an amount determined as follows:
 - A) the reasonable direct cost to the *Contractor* including labour, Materials and plant (not including profit and overheads);
 - B) the reasonable costs to the *Contractor* of subcontract work (not including profit and overheads); and
 - C) an additional amount for profit and overheads, calculated as the percentages stated in the Commercial Framework and applied to the direct costs and subcontract costs;
- e) The valuation of *delay costs* (if any) is determined in accordance with clause 36.
- f) If the valuation is in respect of additional work, the valuation must include an amount for profit and overheads. Rates and prices are deemed to include an amount for profit and overheads unless specified otherwise.
- g) If the valuation is in respect of work which is taken out of the *Contract*, the *contract sum* must be reduced by the amount of profit that would have been payable if not for the deduction of work, but the *contract sum* will not be reduced by the amount for overheads applicable to the work which is taken out of the *Contract*.
- h) The *Contractor* must provide all information reasonably requested by the *Superintendent* to assist the valuation.

41 DAYWORK

- a) The *Superintendent* (acting as a certifier in this clause 41) may, in its absolute discretion, direct that the following be carried out as *daywork*:
- i) quantities greater than those determined by reference to the upper limit of accuracy referred to in the Commercial Schedule (if any); or
 - ii) *variations*.
- b) The *Contractor* must record particulars of all resources used by the *Contractor* for the execution of the *daywork* and each day furnish to the *Superintendent* the particulars and copies of time sheets, wages sheets, invoices, receipts and other documents evidencing the cost of the *daywork*. The *Superintendent* may direct the manner in which matters are to be recorded.
- c) In determining the value of *daywork*, the *Superintendent* must have regard to:
- i) the quantities of materials and the time that the *construction plant* and labour is reasonably and necessarily used on the *daywork*; and
 - ii) applicable rates and prices in the *daywork* schedules (if any) contained in Commercial Schedule.
- d) To the extent that the *daywork* schedules do not apply, the value of *daywork* must be determined from:
- i) the amount of wages and allowances paid or payable by the *Contractor* at the rates obtaining on the *site* at the time as established by the *Contractor* to the satisfaction of the *Superintendent* or at such other rates as may be approved by the *Superintendent* in its absolute discretion;
 - ii) the amount paid or payable by the *Contractor* in accordance with any statute or award applicable to day labour additional to the wages paid or payable under Clause 41 b) i);
 - iii) the amount of hire charges in respect of constructional plant approved by the *Superintendent* for use on the work in accordance with such hiring rates and conditions as may be agreed between the *Superintendent* and the *Contractor* or, in the absence of agreement, in accordance with such rates and conditions as may be determined by the *Superintendent* in its absolute discretion;
 - iv) the amounts paid for services, subcontracts and professional fees; and
 - v) the actual cost to the *Contractor* of all materials supplied and required for the work.
- e) The *Contractor* is entitled to payment for overheads (including administrative costs, *site* supervision, establishment costs, attendance) and profit on *daywork*. If the rates and amounts used to determine payment for *daywork* are not inclusive of overheads and profit, the valuation must include an amount determined from:
- i) the applicable percentage stated in the Commercial Framework (if any) applied to the costs determined under clause 14 c) and 14d);
 - ii) if there is no applicable percentage included in the Commercial Framework, a percentage agreed between the *Superintendent* and the *Contractor*; or
 - iii) in the absence of agreement, a reasonable percentage determined by the *Superintendent*.
- f) The costs of supervisory, technical and administrative personnel who would be engaged on the *Works* regardless of the *daywork* are not to be included in the valuation of the *daywork*.
- g) Notwithstanding that the *Contract* may provide for adjustment for rise and fall in costs, rates payable for *daywork* are not subject to adjustment for rise and fall in costs.

42 CERTIFICATES AND PAYMENTS

42.1 Payment claims and payment schedules

- a) If the relevant *SOP Act* applies to the *Contractor's* payment claim or final payment claim:
 - i) the date or the stage ascertained in accordance with *Item 27* are each a reference date for the purposes of that *SOP Act*; and
 - ii) a *payment schedule* or final *payment schedule* issued and delivered pursuant to the Contract is a *payment schedule* or notice of *dispute*, as the case may be, for the purposes of that *SOP Act* (without limiting the requirements of the relevant *SOP Act* in respect of such a *payment schedule* or such notice of *dispute*) unless that *payment schedule* or notice of *dispute* expressly states that it is not a *payment schedule* or notice of *dispute* for the purposes of the *SOP Act*.
- b) For the purposes of the *SOP Act*, the *Superintendent* acts as the agent of the *Principal* in regard to:
 - i) receipt of the *Contractor's* payment claim or a final payment claim;
 - ii) the issue of a *payment schedule*; and
 - iii) the issue of a notice of *dispute*.
- c) The *Contractor* is to claim payment progressively at the times or stages stated in *Item 27*.
- d) Except to the extent prohibited by the relevant *SOP Act*, an early payment claim is to be treated for the purposes of the *Contract* as having been made on the due date for making that claim.
- e) Each payment claim:
 - i) is to be delivered in writing to the *Superintendent*;
 - ii) must include details (which may be specified elsewhere in the *Contract* or reasonably requested by the *Superintendent*) justifying the amount claimed;
 - iii) may include a request for payment for a matter which has been assessed by the *Superintendent* pursuant to clause 46 g); and
 - iv) may include details of other amounts then due to the *Contractor* under the *Contract*.
- f) The *Superintendent* (acting as a certifier) must, within 10 *business* days after receiving a payment claim which complies with this clause 42, issue and deliver to the *Principal* and the *Contractor* a *payment schedule*:
 - i) evidencing the *Superintendent's* valuation of amounts due from the *Principal* to the *Contractor* pursuant to the payment claim with reasons for any difference; and
 - ii) including the *Superintendent's* assessment of retention money and amounts due (if any) from the *Contractor* to the *Principal* pursuant to the *Contract*.
- g) The *Principal* or the *Contractor* (as the case may be) must pay to the other party the amount of the *payment schedule* within the time specified in the *SOP Act* or if there is no mandatory time specified in the *SOP Act*, then:
 - i) 5 *business* days after receiving the *payment schedule*, or
 - ii) within 15 *business* days after the *Superintendent* receives the *Contractor's* payment claim.
- h) If an amount is certified as retention money under clause 42 f) ii), the *Principal* must hold that retention money pursuant to clause 8 until the *Contractor* is entitled to the return of the retention money (if any).

- i) If the *Contractor* does not deliver a payment *claim* which complies with this clause 42, the *Superintendent* (acting as a certifier) may still issue and deliver a *payment schedule* with details of the calculations in the *Superintendent's* assessment.
- j) If the *Superintendent* does not issue and deliver the *payment schedule* within 10 *business days* after receiving a payment *claim* which complies with this clause 42, then the amount *claimed* in that payment *claim* is to be due and payable by the *Principal* to the *Contractor* by the date calculated in accordance with clause 42.1 g), as though the *Superintendent* had duly valued and certified the amount *claimed* in the payment *claim*.
- k) Neither a *payment schedule* nor a payment of any amount is evidence that the subject work has been carried out satisfactorily. Payments under the *Contract* other than the final payment, including payments made in accordance with the relevant *SOP Act*, are payments on account only and, as such, are reviewable.
- l) Unless stated otherwise in the *Contract*, all payments to the *Contractor* must be made in Australian currency by electronic funds transfer to the *Contractor's* account notified to the *Principal* for that purpose. Changes to the *Contractor's* account details must be notified in accordance with protocols established by the *Principal*. If electronic funds transfer is not used, payments must be made at the *Principal's* address or another location advised by the *Principal*.
- m) If payment is not made in accordance with clause 42.1 g), interest, applied at the rate in *Item 27* is due and payable on the amount outstanding after the date of default in payment.

42.2 Correction of *payment schedules*

- a) At any time, the *Superintendent* may correct any error which has been discovered in a *payment schedule* by issue of a further *payment schedule*.
- b) Any correction must also correct the amount of *GST* in accordance with the *GST Act*.
- c) A *certificate of practical completion* or *final certificate* cannot be reissued.

42.3 Retention Moneys

- a) The *Principal* may deduct retention moneys from moneys otherwise due to the *Contractor* up to the amount or percentage specified in *Item 6*.

42.4 Unfixed plant and materials

- a) The alternative applying for unfixed plant and materials is given in *Item 28*.

Alternative 1

- b) The *Contractor* may not *claim* payment for, and the *Principal* is not obliged to pay for, any unfixed materials, plant or equipment that have not been incorporated in *the Works* unless:
 - i) the materials, plant or equipment:
 - A) have been manufactured solely for the purpose of incorporation in *the Works* and have not been manufactured before the date required by the *Contract*;
 - B) are of the type stated in *Item 28*;
 - C) are properly stored, clearly marked the property of the *Principal* and adequately protected and insured;
 - D) are stored on the *site*, and
 - E) have been paid for in full by the *Contractor* and are the unencumbered property of the *Contractor*, free of any *security interest* upon the making of the payment *claimed* and proof of such payment and ownership is provided to the satisfaction of the *Superintendent*;

- ii) the *Contractor* provides additional *security* in one of the forms provided by clause 5.4 in an amount equal to the payment *claimed* for the materials, plant or equipment, and
- c) If pursuant to a *payment schedule*, the *Principal* pays the *Contractor* an amount which includes the value of any unfixed materials, plant or equipment that have not been incorporated in *the Works*, the materials, plant or equipment will become the property of the *Principal*, free of any lien, charge, *security interest* or any other encumbrance, at the time the payment is made.

Alternative 2

- d) The *Contractor* is not entitled to payment for materials, plant or equipment not incorporated in *the Works*.

42.5 Certificate of practical completion

- a) The *Contractor* must give the *Superintendent* at least 10 *business days* notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached.
- b) 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*.
- c) Within 10 *business days* of the receipt of the request, the *Superintendent* (acting as a certifier) must:
 - i) give to the *Contractor* and to the *Principal* a *certificate of practical completion* certifying the *Date of practical completion*; or
 - ii) give the *Contractor* in writing the reasons for not issuing the *certificate of practical completion*.
- d) Notwithstanding that *Contractor* may not have requested for its issue of the *certificate of practical completion*, if the *Superintendent* is of the opinion that *practical completion* has been reached, the *Superintendent* may issue a *certificate of practical completion*.

42.6 Effect of certificates

- a) The issue of a *payment schedule* or a *certificate of practical completion* does not constitute approval of any work or other matter, nor does it prejudice any *claim* by the *Principal* or the *Contractor*.

42.7 Contractor's final payment claim

- a) Within 65 *business days* after the *date of practical completion* for the whole of *the Works*, the *Contractor* must lodge with the *Superintendent* a final payment *claim* and endorse it 'Final Payment Claim'.
- b) The *Contractor* must include in that *claim* all moneys which the *Contractor* considers to be due from the *Principal* under or arising out of the *Contract* or any alleged breach thereof.
- c) After the expiration of the period for lodging a final payment *claim*, any *claim* which the *Contractor* could have made against the *Principal* and has not been made is barred.

42.8 Final Payment schedule

- a) The *Superintendent* must issue to the *Contractor* and to the *Principal* a final *payment schedule* endorsed 'Final Payment schedule' within 10 *business days* after receiving the final payment *claim* or, if the *Contractor* has not submitted a final payment *claim* in accordance with clause 42.7a), within 75 *business days* the *date of practical completion*.
- b) In the final *payment schedule*, the *Superintendent* (acting as a certifier) must certify the amount which in the *Superintendent's* opinion is finally due from the *Principal* to the *Contractor* or from the *Contractor* to the *Principal* under or arising out of the *Contract* or any alleged breach thereof.

- c) The issue of the final *payment schedule* is conclusive evidence that all necessary adjustments to the *contract sum* have been made and all entitlements of the *Contractor* have been met, except for those required by:
- i) arithmetical error; or
 - ii) resolution of:
 - A) any *claim* made in accordance with clause 46;
 - B) any *dispute* properly notified under clause 47 prior to the final *payment claim*; or
 - C) any *dispute* arising solely out of the final *payment schedule*, but only if it is notified to the *Superintendent* and *Principal* within 20 *business days* after the date of the final *payment schedule*.
- d) Final payment must be made in accordance with clause 42.1 g).
- e) The *Contractor's* liability under the *Contract* or otherwise is not affected by the issue of the final *payment schedule*.

42.9 Issue of Final certificate

- a) Subject to clause 42.9 b), within 10 *business days* after the expiry of the last *defects liability period* the *Superintendent* (acting as a certifier) must issue and deliver to both the *Contractor* and the *Principal* a *final certificate*.
- b) The *Superintendent* is not obliged to issue and deliver the *final certificate* until the *Superintendent* is satisfied that the *Contractor* has met all of its obligations under the *Contract*.
- c) Unless a matter is the subject of a *dispute* which has been notified in accordance with the timeframe in clause 42.8 c), the *final certificate* is conclusive evidence of accord and satisfaction, and in discharge of each party's obligations whatsoever arising out of or in connection with the subject matter of the *Contract*, except for:
- i) fraud or dishonesty;
 - ii) any *defect* or omission in *the Works* or any part of *the Works* 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 issue and delivery of the *final certificate*;
 - iii) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation.

42.10 Set off

- a) If the *Principal* claims a sum, including a debt due, in connection with the *Contract* or any other contract between the *Principal* and the *Contractor*, the *Principal* may:
- i) withhold, deduct or set-off the *claimed* sum against any amount to which the *Contractor* is otherwise entitled in connection with the *Contract*; and
 - ii) make a demand against the *security* provided under the *Contract* for any amount of the *claimed* sum in excess of the amount to which the *Contractor* is otherwise entitled.

43 PAYMENT OF WORKERS AND SUBCONTRACTORS

43.1 Subcontractors and workers

- a) With each *payment claim*, the *Contractor* must provide documentary evidence of the payment of any amount which is due and payable to:
- i) *subcontractors*; and

ii) workers of the *Contractor* and workers of *subcontractors*,
in respect of the *work under the Contract*.

b) Documentary evidence must be as specified in *Item 29*.

43.2 Withholding payment

a) If the *Contractor* has not complied with clause 43.1 for any part of the work which is the subject of the payment certificate, the *Principal* may withhold the corresponding amount of payment.

43.3 Direct payment

a) Notwithstanding clause 43.2, before final payment, the *Principal*, if not aware of a relevant relation-back day (as defined in the Corporations Act 2001 (Cwlth)) may pay unpaid amounts which are the subject of clause 43.1 directly to a *subcontractor* or a worker if:

- i) permitted by law;
- ii) given a court order in favour of the *subcontractor* or worker; or
- iii) requested in writing by the *Contractor*.

b) Such payment made to a *subcontractor* or worker in is deemed to be satisfaction of the *Principal's* obligation to pay pursuant to clause 42 for *work under the Contract* which is the subject of clause 43.a).

44 DEFAULT OR INSOLVENCY

44.1 Preservation of other rights

a) If a party breaches the *Contract*, nothing in this clause 44 affects or negates the other party's common law rights to terminate or for damages.

44.2 Termination for *Contractor's* default or Insolvency

a) The *Principal* may terminate the *Contractor's* employment under the *Contract* for the *Contractor's* default or if the *Contractor* is the subject of an *insolvency event* by giving notice in accordance with this clause 44.

b) In the case of *Contractor's* default, the *Principal* must first give the *Contractor* notice that it has 5 *business* days (or such longer period specified by the *Principal*) after receipt of that notice to remedy the *Contractor's* default.

c) If the *Contractor* fails to:

- i) give the *Principal* a notice containing clear evidence that it has remedied a *Contractor's* default; or
- ii) propose steps reasonably acceptable to the *Principal* to remedy the *Contractor's* default,

the *Principal* may give the *Contractor* a notice terminating its employment under the *Contract*.

d) If a right to terminate exists at common law, a notice to terminate at common law may be given without first giving notice to remedy a *Contractor's* default.

e) In the case of *Contractor's* insolvency, the *Principal* may give the *Contractor* a notice terminating its employment under the *Contract*.

f) If the *Principal* terminates the *Contractor's* employment under this clause 44 it may, at its sole discretion, engage others to complete *the Works* and all the following will then apply:

- i) The *Contractor* must leave the *site* as soon as reasonably practicable and remove all *temporary works* and materials it has brought onto the *site*, apart

from any *temporary works* and materials identified by the *Principal* as being necessary to have *the Works* completed.

- ii) The *Contractor* must assign to the *Principal* the *Contractor's* rights and benefits in all its contracts and agreements in connection with *the Works*, warranties and unconditional undertakings, bank guarantees, insurance bonds, other *security* of a similar nature or purpose and retention held by the *Contractor*, with effect from the date of termination of its engagement under the *Contract*.
- iii) The *Contractor* must consent to a novation to the *Principal* or its nominee of all subcontracts and its other contracts concerning *the Works*, as required by the *Principal*. The *Principal* may at any time make payments and may deduct, withhold or set-off any amounts to be paid under the novated contracts from amounts otherwise payable to the *Contractor* or from any *security* given on the *Contractor's* behalf.
- iv) The *Contractor* must do everything and sign all documents necessary to give effect to this clause 44, and it irrevocably appoints the *Principal* as its attorney to do this in its name if it fails to do so.
- v) If, on *practical completion*, the cost to the *Principal* of completing *the Works* exceeds the amount that would have been paid to the *Contractor* to complete *the Works*, then the difference will be valued by the *Superintendent* and the amount certified as debt due from the *Contractor* to the *Principal*.
- vi) The *Superintendent* may make provisional assessments of the amounts payable to the *Principal* under clause 44 f) v) and without limiting any other right of recourse, the *Principal* may demand them against the *security*.

44.3 Termination for Principal's default

- a) If the *Principal*:
 - i) fails to pay the *Contractor* any amount in accordance with the *Contract* which is not in *dispute*;
 - ii) commits any fundamental breach of the *Contract*; or
 - iii) fails to give the *Contractor* access to the *Site* sufficient to start work required by the *Contract* within 3 months after the *date of acceptance of tender* (or longer period specified in the *Contract* or agreed by the parties),the *Contractor* may give a notice requiring the *Principal* to remedy the default within 20 *business days* after receiving the notice.
- b) If the *Principal* fails to remedy the default, or to propose steps reasonably acceptable to the *Contractor* to do so, the *Contractor* may issue a notice terminating the *Contract*.
- c) If the *Principal* is the subject of an *insolvency event*, the *Contractor* may, without giving a notice to show cause, issue a notice terminating the *Contract*

44.4 Termination notices

- a) A notice issued under this clause 44 must comply with clause 7.

44.5 Rights of the parties on termination

- a) If the *Contract* is terminated under this clause 44, the rights and liabilities of the parties are the same as they would have been at common law had the defaulting party repudiated the *Contract* and the other party elected to treat the *Contract* as at an end and recover damages.

44.6 Survival

- a) Without limiting the survival of any clause by operation of law, this clause 44 and all indemnities in the *Contract* survive termination.

45 TERMINATION BY FRUSTRATION

- a) This clause 45 only applies if the *Contract* is *frustrated*.
- b) The *Superintendent* must issue and deliver a payment certificate for the *work under the Contract* satisfactorily carried out up to the date of *frustration* and the following additional costs:
 - i) the cost of materials, plant, machinery and equipment reasonably ordered by the *Contractor* for the *Works* and which the *Contractor* is liable to accept, but only if they will become the *Principal's* property upon payment;
 - ii) the costs reasonably and necessarily incurred by the *Contractor* in:
 - A) removing *temporary works* and *construction plant*;
 - B) returning to their place of engagement the *Contractor*, *subcontractors* and their respective employees engaged in the *work under the Contract* at the date of *frustration*; and
 - C) expectation of completing the *work under the Contract* and not included in any other payment.
- c) Each party must promptly release and return all *security* (or, if applicable, the balance remaining after a demand on the *security*) that would have been returned at the *date of practical completion* had the *Contract* not been *frustrated*.

46 CLAIMS

- a) The *Superintendent* acts as a certifier in this clause 46.
- b) Unless determination of the *claim* is regulated by a separate procedure under any applicable legislation, all *claims* must be given to the *Superintendent* and the other party in accordance with the following:
 - i) where there is a specific provision for that *claim* in this *Contract*, the *claim* must comply with that provision; otherwise
 - ii) if there is no specific provision for the *claim*, the party making the *claim* must give to the other party and to the *Superintendent* the *prescribed notice* within 20 *business days* after the first day upon which the party could reasonably have been aware of the entitlement to make the *claim*.
- c) A party is not liable to the other party in respect of any *claim* for costs incurred 20 *business days* before the date on which the party gives the *prescribed notice* pursuant to clause 46 b).
- d) A *claim* must contain sufficient information to enable the *Superintendent* to assess the *claim*.
- e) If the *Superintendent*, within 10 *business days* of receipt of the *prescribed notice*, requests the *claimant* to provide further particulars of the *claim* to which the *prescribed notice* relates, the *claimant* must comply within 10 *business days* of receipt of such request by giving the other party and the *Superintendent* such further particulars in writing.
- f) Within 25 *business days* of receipt by the other party of the *prescribed notice*, that party may respond to the *claim* referenced in the *prescribed notice* by written notice to the *claimant* and the *Superintendent*.
- g) The *Superintendent*, acting reasonably, may by written notice to the parties, extend the time by which a party is to comply with clause 45.c) or clause 45.d).
- h) If the *claimant* does not give the other party and the *Superintendent* further particulars of the *claim* within 20 *business days* of giving the *prescribed notice*, the *prescribed notice* constitutes the *claim*.

- i) The *Superintendent* must assess the *claim* within 40 *business* days of receipt of the *prescribed notice* and notify the parties in writing of the decision.
- j) Unless a party, within a further 20 *business* days of such notification given under clause 46 g), gives a notice of *dispute* under clause 47 which includes the *Superintendent*'s decision pursuant to clause 46 g), the *Superintendent* must certify the amount of the assessment given under clause 45 g) to be the amount due and payable.

47 DISPUTE RESOLUTION

47.1 Notice of *dispute*

- a) A party is not entitled to issue a notice of *dispute* unless the *Superintendent* has assessed a *claim* pursuant to clause 46 h) in regard to the subject matter of the *dispute*.
- b) If a party wishes to *dispute* any matter, it must deliver by hand or send by registered post to the other party and to the *Superintendent* a notice of *dispute* in writing adequately identifying and providing details of the *dispute* (notice of *dispute*).
- c) The parties must continue to perform their obligations under the *Contract*, subject to clauses 44 and 45, despite the existence of a *dispute*.
- d) By mutual agreement, the parties may extend the timeframes in this clause.

47.2 Meeting of representatives

- a) Within 10 *business* days of service of a notice of *dispute*, the parties and the *Superintendent* (acting as a certifier) must confer at least once to attempt to resolve the *dispute* in good faith or to agree to a procedure for resolution of the *dispute*. Unless the parties agree otherwise, the conference must be held in the state or territory stated in *Item 4*. The parties may agree to invite a mediator to attend the conference.
- b) At the conference each party must be represented by a person having authority to agree to the resolution of the *dispute*.
- c) All aspects of every such conference, except the fact of its occurrence, are privileged.
- d) If with 30 *business* days of the service of a notice of *dispute*, the *dispute* remains unresolved, a party may refer the *dispute* to the resolution process specified in *Item 30*.
- e) Subject to clause 47.6, a *dispute* for which notice has not been given in accordance with clause 47.2 d) is barred from the resolution process specified in *Item 30*, litigation or any similar action.

47.3 Alternative 1 - Expert Determination

- a) If Alternative 1 - Expert Determination is specified in *Item 30*, the expert determination must be conducted in accordance with the provisions of the Dispute Resolution Framework (if any) attached as Annexure D.
- b) The parties must endeavour to agree on the expert to be engaged. If they cannot agree within 30 *business* days of the service of a notice of *dispute*, the expert will be nominated (on the application of either party) by the person named in *Item 31*. That person must not nominate:
 - i) an employee of the *Principal* or the *Contractor*;
 - ii) a person who has been connected with *the Works* or the *Contract*; or
 - iii) a person who the *Principal* and the *Contractor* have already considered and not been able to agree on.
- c) Neither party may commence litigation in respect of the matters determined by the Expert unless the determination:
 - i) does not involve paying a sum of money; or

- ii) requires one party to pay the other an amount in excess of the amount stated in *Item 31*, calculated without having regard to:
 - A) any interest that may be payable; and
 - B) any amount that has been paid pursuant to the *SOP Act*.
- d) Neither party may commence litigation in respect of the matters determined by the Expert unless they do so within 40 *business day* after receiving the determination. Otherwise:
 - i) the parties are deemed to have accepted that the expert determination is final and binding; and
 - ii) any amount due and payable under the expert determination must be paid by the debtor to the other party within a further period of 10 *business days*.

47.4 Alternative 2 - Arbitration

- a) If Alternative 2 - Arbitration is specified in *Item 30*, the arbitration must be:
 - i) carried out in accordance with, and subject to, the Resolution Institute Arbitration Rules, current at the *date of acceptance of tender*; and
 - ii) held in the state or territory stated in *Item 4*.
- b) The parties must endeavour to agree on the arbitrator to be engaged. If they cannot agree within 30 *business days* of the service of a notice of *dispute*, the arbitrator (who must be accredited) will be nominated (on the application of either party) by the person named in *Item 32*. That person must not nominate:
 - i) an employee of the *Principal* or the *Contractor*;
 - ii) a person who has been connected with *the Works* or the *Contract*; or
 - iii) a person who the *Principal* and the *Contractor* have already considered and not been able to agree on.

47.5 Alternative 3 - Alternative Dispute Resolution

- a) If an Alternative 3 - Alternative Dispute Resolution is specified in *Item 30*, that *dispute* is to be conducted in accordance with the provisions of the Society of Construction Law Australia - Dispute Resolution Framework or other *dispute* resolution process (if any) attached as Annexure D (which may include *Contract Facilitation* or a *Dispute Avoidance Board*).

47.6 Alternative 4 - Litigation

- a) If an Alternative 4 – Litigation is specified in *Item 30*, the litigation must be conducted state or territory stated in *Item 4*.

47.7 Summary Relief

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

48 GOODS AND SERVICES TAX

- a) For the purposes of this clause 48, words or expressions used which are defined in the *GST Act* have the meaning given to them in the *GST Act*.
- b) The *Contractor* warrants to the *Principal* that:
 - i) the *Contractor* is registered for *GST*; and
 - ii) the *Contractor*'s ABN stated in the *Contract* (or otherwise notified by the *Contractor* to the *Principal*) is correct.
- c) The *Contractor* must notify the *Principal* immediately if it ceases to be registered for *GST* at any time.

- d) The Commercial Schedule defines whether prices, rates or other sums payable in accordance with the *Contract* are inclusive or exclusive of *GST*.
- e) If the *Contract* requires a party 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 must be the sum of:
 - i) the amount of the reimbursable expense net of input tax credits (if any) to which the other party is entitled in respect of the reimbursable expense; and
 - ii) to the extent that the other party’s recovery from the first party is consideration for a taxable supply to the first party, any *GST* payable in respect of that supply.
- f) Unless the *Principal* notifies the *Contractor* that it does not intend issuing recipient created tax invoices for taxable supplies provided by the *Contractor*, the following applies:
 - i) the *Principal* will issue tax invoices and adjustment notes in respect of those supplies;
 - ii) the *Contractor* must not issue tax invoices or adjustment notes in respect of those supplies;
 - iii) the *Principal* acknowledges that it was registered for *GST* when it entered into the *Contract* and that it will notify the *Contractor* if it ceases to be registered; and
 - iv) the *Contractor* must notify the *Principal* immediately it becomes aware of an adjustment event occurring in respect of those supplies.

49 NO WAIVER

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