

Australian Standard™

**Amended from
General conditions of contract
(AS 2124—1992) as amended**

This Australian Standard was prepared by Committee OB/3, General Conditions of Contract. It was approved on behalf of the Council of Standards Australia on 24 December 1992 and published on 31 December 1992.

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Australian Chamber of Commerce and Industry
Australian Electrical and Electronic Manufacturers Association
Australian Federation of Construction Contractors
Australian Institute of Project Management
Australian Institute of Purchasing and Supply Management
Australian Institute of Quantity Surveyors
Australian Mining Industry Council
Austroads
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Australian Standard™

General conditions of contract **as amended** (AS 2124—1992)

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PREFACE

The AS 2124 edition was prepared by the Standards Australia Committee on General Conditions of Contract. While this is the latest edition, the 1986 edition remains as current Standards, the 1981 edition remains as available superseded Standards and the 1978 edition is withdrawn.

This Standard incorporates Amendment No. 1 (October 2000). The changes required by the Amendment are indicated in the text by a marginal bar and amendment number against the clause, note, table, figure, or part thereof affected.

In the preparation of this edition of AS 2124, recommendations contained in the report by the National Public Works Conference/National Building and Construction Council Joint Working Party publication **NO DISPUTE** (May 1990) have been taken into account.

Clauses prefixed by an asterisk are optional, and may be omitted in the Contract as necessary, without making consequential amendments; but such omission should be clearly shown on the face of the Contract by striking out these clauses or indicating clearly elsewhere that they are *not to apply*.

The attention of users of this Standard is drawn to the separate document Doc 2124N, *Notes on changes in the General Conditions of Contract 4th edition (AS 2124—1992) as compared with the 3rd edition (AS 2124—1986)* which indicates the changes of major importance which have been made in the 1992 edition.

WARNING: Users of this Australian Standard are warned that Clause 17 (damage to persons and property) does not limit the liability of parties for special, indirect or consequential losses.

This unlimited liability overrides any limitations or exclusions permitted under Insurance Clauses 18 (Insurance of the Works) and 19 (Public Liability Insurance).

Parties wishing to limit their liability should seek insurance and legal advice before entering a contract under this Standard.

WARNING

Legislation has come into force in some jurisdictions dealing with security of payments. Parties intending to use this Standard should seek expert advice as to their rights and obligations under such legislation.

CONTENTS

	<i>Page</i>
1 CONSTRUCTION OF CONTRACT	55
2 DEFINITIONS AND INTERPRETATION	55
3 NATURE OF CONTRACT	1040
4 BILL OF QUANTITIES AND WARRANTIES	1144
5 SECURITY, RETENTION MONEYS AND PERFORMANCE UNDERTAKINGS	1444
6 EVIDENCE OF CONTRACT	1748
7 SERVICE OF NOTICES	1818
8 CONTRACT DOCUMENTS	1949
9 ASSIGNMENT AND SUBCONTRACTING	2222
10 SELECTED AND NOMINATED SUBCONTRACTORS	2323
11 PROVISIONAL SUMS	2525
12 LATENT CONDITIONS	2626
13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS	2727
14 STATUTORY REQUIREMENTS	2728
15 PROTECTION OF PEOPLE AND PROPERTY	3030
16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE	3034
17 INDEMNITY BY CONTRACTOR	3132
18 INSURANCE UNDER THE CONTRACT	3333
19 HOME INDEMNITY INSURANCE	3636
20 [Not used]	3737
21 INSPECTION AND PROVISIONS OF INSURANCE POLICIES	3737
22 [not used]	3939
23 SUPERINTENDENT	3939
24 SUPERINTENDENT'S REPRESENTATIVE	4040
25 CONTRACTOR'S REPRESENTATIVE	4040
26 CONTROL OF CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS	4144
27 SITE	4144
28 SETTING OUT THE WORKS	4343
29 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT	4444
30 MATERIALS AND WORK	4444
31 EXAMINATION AND TESTING	4646
32 WORKING HOURS	4748
33 PROGRESS AND PROGRAMMING OF THE WORKS	4848
34 SUSPENSION OF THE WORKS	5051
35 TIMES FOR COMMENCEMENT AND PRACTICAL COMPLETION	5151
36 DELAY OR DISRUPTION COSTS	5556
37 DEFECTS LIABILITY	5656
38 CLEANING UP	5657
39 URGENT PROTECTION	5757

40 VARIATIONS	<u>5757</u>
41 DAYWORK	<u>6061</u>
42 CERTIFICATES AND PAYMENTS	<u>6161</u>
43 PAYMENT OF WORKERS AND SUBCONTRACTORS	<u>6666</u>
44 DEFAULT OR INSOLVENCY	<u>6767</u>
45 TERMINATION BY FRUSTRATION	<u>7272</u>
46 TIME FOR NOTIFICATION OF CLAIMS	<u>7273</u>
47 DISPUTE RESOLUTION	<u>7374</u>
48 WAIVER OF CONDITIONS	<u>7575</u>
49 SECURITY OF PAYMENT	<u>7575</u>
50 PRIVITY OF SUBCONTRACT	<u>7576</u>
51 DISCLOSURE OF CONTRACT INFORMATION AND DOCUMENTS	<u>7676</u>
52 GOODS AND SERVICES TAX (GST)	<u>7676</u>
53 PERSONAL PROPERTY SECURITIES ACT	<u>7677</u>
54 CIVIL LIABILITY ACT	<u>7878</u>
55 SEVERANCE	<u>7878</u>
56 LATE CLAIMS	<u>7878</u>
57 ADVERTISEMENTS AND PROMOTIONS ON SITE	<u>7878</u>
58 CONDITIONS OF EMPLOYMENT	<u>7879</u>
59 OCCUPATIONAL SAFETY & HEALTH	<u>7979</u>
60 RELIANCE BY PRINCIPAL	<u>8181</u>
61 SECURITY	<u>8181</u>
62 RECORD KEEPING RESPONSIBILITIES	<u>8181</u>
63 CODE OF PRACTICE FOR THE CONSTRUCTION INDUSTRY	<u>8181</u>
64 TRANSPORT OF GOODS	<u>8282</u>
65 PRIORITY START POLICY	<u>8282</u>
66 APPLICATION OF PREFERENCES	<u>8585</u>
67 AUSTRALIAN GOVERNMENT BUILDING AND CONSTRUCTION WHS ACCREDITATION SCHEME	<u>8585</u>
68 OBLIGATION TO COMPLY WITH THE WESTERN AUSTRALIAN BUILDING AND CONSTRUCTION INDUSTRY CODE OF CONDUCT 2016	<u>8686</u>
69 HOUSING AUTHORITY ABORIGINAL EMPLOYMENT TARGETS IN CONSTRUCTION AND CIVIL WORKS CONTRACTS PRACTICE GUIDE KIMBERLEY AND PILBARA REGIONS	<u>8686</u>
70 HOUSING AUTHORITY ABORIGINAL EMPLOYMENT TARGETS IN CONSTRUCTION AND CIVIL WORKS CONTRACTS PRACTICE GUIDE GASCOYNE, MID WEST, WHEATBELT, PEEL, SOUTH WEST, GREAT SOUTHERN, GOLDFIELDS/ESPERANCE AND METRO REGIONS	<u>8888</u>
ANNEXURE PART A	<u>9393</u>
ANNEXURE PART B	<u>9999</u>
ANNEXURE PART C	<u>100+00</u>
ANNEXURE PART D.....	<u>101+01</u>
INDEX TO GENERAL CONDITIONS OF CONTRACT	

STANDARDS AUSTRALIA

Australian Standard

General conditions of contract

NOTE: Clauses prefixed by an asterisk can be omitted without making consequential amendments.

1 CONSTRUCTION OF CONTRACT

The law governing the Contract, its interpretation, ~~any agreement to arbitrate~~ and the conduct of ~~any arbitration or~~ litigation, is the law of the State or Territory stated in the Annexure Part A.

Unless otherwise provided, prices are in Australian currency and payments shall be made in Australian currency at the place stated in the Annexure Part A.

Communications between the Principal, the Superintendent and the Contractor shall be in the English language.

Measurements of physical quantities shall be in Australian legal units of measurement within the meaning of the National Measurement Act 1960, as amended from time to time.

Where provisions in the General Conditions of Contract are expressed to be alternatives and the Contract fails to state which alternative applies, the first alternative shall apply.

The Contract shall not be interpreted against the Principal merely by reason of the fact that the Principal prepared the Contract.

In exercising any power or discretion reserved to it under the Contract, the Principal is entitled to exercise such power or discretion in its best interests rather than the interests of the Contractor.

2 DEFINITIONS AND INTERPRETATION

2.1 Definitions

In the Contract, except where the context otherwise requires—

‘Asbestos’ has the meaning of that term in the *Occupational Safety and Health Regulations 1996* and includes any Asbestos-containing Material;

‘Asbestos-containing Material’ has the meaning of that term in the *Occupational Safety and Health Regulations 1996*;

‘Authorities’ means any government, administrative body, government body, department or agency of any government or local government authority, having jurisdiction in connection with the carrying out of WUC;

‘Bill of Quantities’ means a document named therein as a Bill of Quantities issued to tenderers by or on behalf of the Principal, stating estimated quantities of work to be carried out;

‘Business Day’ means any day other than Saturday, Sunday or a day wholly or partly observed as a statutory public holiday throughout the State of Western Australia;

‘Certificate of Practical Completion’ means the certificate referred to in Clause 42.5;

‘Construction’ Program has a meaning given to it in clause 33.2;

'Constructional Plant' means appliances and things used in the execution of the ~~work under the Contract~~WUC but not forming part of the Works;

'Contract' means the agreement between the Principal and the Contractor;

'Contract Date' means the date both parties have executed the Formal Instrument of Agreement prepared by the Principal;

'Contract Documents' means all documents forming part of the Contract as set out in the Formal Instrument of Agreement.;

'Contract Sum' means the lump sum price accepted by the Principal as set out in the Formal Instrument of Agreement;—

~~(a) where the Principal accepted a lump sum, the lump sum;~~

~~(b) where the Principal accepted rates, the sum ascertained by calculating the products of the rates and the corresponding quantities in the Bill of Quantities or Schedule of Rates;~~

~~(c) where the Principal accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (a) and (b),~~

~~including provisional sums but excluding any additions or deductions which may be required to be made under the Contract;~~

'Contractor' means the person bound to execute the ~~work under the Contract~~WUC;

~~'Date of Acceptance of Tender' means the date which appears on the notice in writing of acceptance of the tender;~~

'Corporations Act' means the Corporations Act 2001 (Cth);

'Corporations Law' means the Corporations Act;

'Date for Practical Completion' means—

(a) where the Annexure Part A provides a date for Practical Completion, the date;

(b) where the Annexure Part A provides a period of time for Practical Completion, the last day of the period,

but if any extension of time for Practical Completion is granted by the Superintendent or allowed in any ~~arbitration or~~litigation, it means the date resulting therefrom;

'Date of Practical Completion' means—

(a) the date certified by the Superintendent in a Certificate of Practical Completion issued pursuant to Clause 42.5, to be the date upon which Practical Completion was reached; or

(b) where another date is determined in ~~any arbitration or~~litigation as the date upon which Practical Completion was reached, that other date;

'day' means calendar day;

'Daywork' means work referred to in Clause 41;

'Defects Liability Period' means the period or periods referred to in Clause 37;

'Drawings' means the drawings referred to in the Contract and any modification of such drawings notified to the Contractor by the Superintendent and includes such other drawings as may from time to time be supplied to the Contractor by the Superintendent, or the use of which has been permitted by the Superintendent, for the purposes of the Contract;

'Formal Instrument of Agreement' means the document titled as such, forming part of the Contract;

'Indemnitees' means the Principal, the State of Western Australia, the Superintendent and their respective officers, agents, employees and servants;

'Latent Condition' means any of the conditions referred to in Clause 12.1;

'Legislative Requirements' includes:

- (a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the State or Territory in which WUC or any part thereof is being carried out;
- (b) standards, codes and guidelines applicable to the WUC;
- (c) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of WUC; and
- (d) fees and charges payable in connection with the foregoing;

'Liability' means any debt, obligation, cost (including legal costs, deductibles or increased premiums), expense, loss, damage, compensation, charge or liability of any kind, actual, prospective or contingent and whether or not currently ascertainable and whether arising under or for breach of contract, in tort, warranty or indemnity (including negligence), in restitution, pursuant to statute or otherwise at law;

'Loss' means any loss, cost, expense, damage or liability (including any fine or penalty) whether direct or indirect or consequential, present or future, fixed or unascertained, actual or contingent and whether arising under contract (including any breach of Contract), in equity (including breach of an equitable duty, breach of confidentiality or breach of fiduciary duty), under statute (including breach of statutory duty to the maximum extent possible), in tort (including for negligence or negligent misstatement) or otherwise (including in restitution);

'month' means calendar month;

'OHS Accreditation Scheme' means the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme established under the *Building and Construction Industry Improvement Act 2005* (Cth) and the *Building and Construction Industry Improvement (Accreditation Scheme) Regulations 2005* (Cth);

'person' includes a firm or body corporate or unincorporate or an individual;

'Personnel' means the Principal, the Government of Western Australia, all of its departments, agencies and statutory authorities including the Superintendent and all of their respective officers, employees, consultants and other contractors and subcontractors;

'Practical Completion' is that stage in the execution of the ~~work under the Contract~~WUC when—

- (a) in the opinion of the Superintendent, the Works are complete except for minor omissions and minor defects—
 - (i) which do not prevent the Works from being reasonably capable of being used for their intended purpose; and
 - (ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and
 - (iii) rectification of which will not prejudice the convenient use of the Works; and
- (b) the Contractor has completed to the satisfaction of the Superintendent, all of those tests which are required by the Contract to be carried out and passed before the Works reach Practical Completion ~~have been carried out and passed; and~~
- (c) the Contractor has provided the Superintendent with all documents and other information required under the Contract; ~~which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works have been supplied;;~~

(d) any other requirements or conditions which must be satisfied or completed before Practical Completion, as set out in this Contract, are satisfied or completed, including but without limitation all clearances required to be obtained by the Environmental Consultant.;

'Preliminary Construction Program' has the meaning set out in Clause 33.2.

'Priced Bill of Quantities' means the Bill of Quantities priced and lodged by the Contractor with the Superintendent and corrected where necessary from time to time under Clause 4.3;

'Principal' means the Principal stated in the Annexure Part A;

"Priority Start Policy" means the Department of Training and Workforce Development's Priority Start Policy, as amended from time to time;

'provisional sum' includes monetary sum, contingency sum and prime cost item;

'Schedule of Rates' means any schedule included in the Contract which, in respect of any section or item of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices;

'Separable Portion' means a portion of the ~~work under the Contract~~ WUC described in the Contract as a Separable Portion or which the Superintendent has determined pursuant to Clause 35.3 shall be a Separable Portion;

'Site' means the lands and other places to be made available and any other lands and places made available to the Contractor by the Principal for the purpose of the Contract;

'Specification' means the specification referred to in the Contract and any modification of such specification thereafter directed or the use of which has been permitted by the Superintendent pursuant to powers contained in the Contract;

'Superintendent' means the person stated in the Annexure Part A as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative;

'Superintendent's Representative' means a person appointed in writing by the Superintendent under Clause 24;

'Temporary Works' means works used in the execution of the ~~work under the Contract~~ WUC but not forming part of the Works;

'Tender Documents' means any documents issued by the Principal to the Contractor for tender purposes prior to entry into this Contract.

~~'work under the Contract' means the work which the Contractor is or may be required to execute under the Contract and includes variations, remedial work, Constructional Plant and Temporary Works;~~

'Works' means the whole of the work to be executed in accordance with the Contract, including variations provided for by the Contract, which by the Contract is to be handed over to the Principal.

'WUC' means the work which the Contractor is or may be required to execute under the Contract and includes variations, remedial work, Constructional Plant and Temporary Works, and any items of work which are usual and proper to the undertaken as part of the work under the Contract notwithstanding any such item is not specified or expressly mentioned, identified or referred to in the Contract documents;

~~NOTE: In addition to these definitions, some terms, specific to a clause, are defined in that clause. Refer to the Index.~~

2.2 Interpretation

The following rules apply in interpreting the Contract, except where the context makes it clear that a rule is not intended to apply:

- (a) The clause headings and sub-clause headings in the Contract do not form part of the Contract and must not be used in the interpretation of the Contract.
- (b) A reference to:
 - (i) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (ii) a document (including the Contract) or agreement, or a provision of a document (including the Contract) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (iii) a party to the Contract or to any other document or agreement includes a successor in title, permitted substitute or a permitted assign of that party;
 - (iv) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
 - (v) anything (including a right, obligation or concept) includes each part of it.
- (c) Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context.
- (d) Words importing a gender include every gender.
- (e) If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
- (f) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (g) A reference to a matter being to the knowledge of a person means that the matter is to the best of the knowledge and belief of that person (or a director or executive officer of the person if the person is a body corporate).
- (h) A reference to information is to information of any kind in any form or medium, whether formal or informal, written or unwritten, for example, computer software or programs, concepts, data, drawings, ideas, knowledge, procedures, source codes or object codes, technology or trade secrets.
- (i) The word 'agreement' includes an undertaking or other binding arrangement or understanding, whether or not in writing.
- (j) The words 'corporation', 'subsidiary', 'holding company' and 'related body corporate' have the same meanings as in the Corporations Act.
- (k) If the day on or by which a person must do something under the Contract is not a Business Day the person must do it on or by the next Business Day.
- (l) If a party to the Contract is made up of more than one person, or a term is used in the Contract to refer to more than one party, then unless otherwise specified in the Contract:
 - (i) an obligation of those persons is joint and several;
 - (ii) a right of those persons is held by each of them severally; and
 - (iii) any other reference to that party or that term is a reference to each of those persons separately.

(m) The word 'includes' or 'including' and similar expressions are not words of limitation.

~~The clause headings and sub-clause headings in the General Conditions of Contract shall not form part of the General Conditions of Contract and shall not be used in the interpretation of the Contract.~~

~~Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context.~~

~~Words importing a gender include every gender.~~

3 NATURE OF CONTRACT

3.1 Performance and Payment

The Contractor shall execute and complete the ~~work under the Contract~~WUC.

The Principal shall pay the Contractor on a lump sum basis as stated in the Formal Instrument of Agreement and Annexure Part A.

The Contract is not subject to an adjustment for rise and fall in costs.—

~~(a) for work for which the Principal accepted a lump sum, the lump sum;~~

~~(b) for work for which the Principal accepted rates, the sum ascertained by multiplying the measured quantity of each section or item of work actually carried out under the Contract by the rate accepted by the Principal for the section or item,~~

~~adjusted by any additions or deductions made pursuant to the Contract.~~

Without limiting any other provisions of the Contract, the Contract Sum is deemed to include the cost of complying with all of the Contractor's obligations under the Contract and all things necessary for the due and proper performance of the Contractor's obligations.±

3.2 Quantities

Quantities in a Bill of Quantities or Schedule of Rates are estimated quantities only.

A direction shall not be required to be given by the Superintendent by reason of the actual quantity of an item required to perform the Contract being greater or less than the quantity shown in the Bill of Quantities or Schedule of Rates.

3.3 Adjustment for Actual Quantities—Schedule of Rates

Where otherwise than by reason of a direction of the Superintendent to vary the ~~work under the Contract~~WUC, the actual quantity of an item required to perform the Contract is greater or less than the quantity shown in the Schedule of Rates—

(a) where the Principal accepted a lump sum for the item, the difference shall be valued under Clause 40.5 as if it were varied work directed by the Superintendent as a variation;

(b) where the Principal accepted a rate for the item the rate shall apply to the greater or lesser quantities provided that where limits of accuracy are stated in the Annexure Part A the rate shall apply to the greater or lesser quantities within the limits and quantities outside the limits shall be valued under Clause 40.5~~40.5~~ as if they were varied work directed by the Superintendent as a variation.

Where rates are identified in a Schedule of Rates or otherwise within the Contract, the rates shall be inclusive of the Contractor's profit and overhead.

If a Schedule of Rates omits an item which should have been included, the item shall be valued under Clause 40.5 as if it was extra work directed by the Superintendent as a variation.

Pursuant to the provisions of Clause 3.3, when the Superintendent directs the actual quantity to be carried out:

- (a) that direction shall be made by variation order to which the provisions of Clause 40 shall not apply; and
- (b) any change in provisional quantities shall not be deemed to be an error under Clause 3.2.

4 BILL OF QUANTITIES AND WARRANTIES

4.1 Purpose of the Bill of Quantities

Alternative 1

A Bill of Quantities forms part of the Contract only to the extent provided in the Contract.

Alternative 2

A Bill of Quantities shall not form part of the Contract.

Alternative 3

A Bill of Quantities forms part of the Specification.

4.2 Pricing and Lodgement

Where there is a Bill of Quantities:

- (a) all items included in the Bill of Quantities shall be priced and extended by the Contractor and the prices as extended shall, on addition, equal the sum accepted by the Principal for the execution of the whole of the work to which the Bill of Quantities relates;
- (b) the Contractor shall lodge the Bill of Quantities so priced and extended with the Superintendent before the expiration of the time for lodgement stated in the Annexure Part A or such further time as may be directed by the Superintendent from time to time;
- (c) notwithstanding any other provision of the Contract, the Contractor shall not be entitled to payment until the Contractor has lodged the Bill of Quantities so priced and extended.

4.3 Errors in Pricing

Any errors in extension or addition, or both, or correction of incorrect or inconsistent rates or prices (including the insertion of rates or prices wrongly omitted and the deletion of rates or prices wrongly included) discovered by the Principal or the Contractor in the Priced Bill of Quantities shall be notified to the Superintendent in writing by the party making the discovery and corrected in a manner agreed between the Contractor and the Superintendent or, in the event of failure to agree, as determined by the Superintendent so that the total of all items in the Priced Bill of Quantities continues to equal the sum accepted by the Principal for the execution of the whole of the work to which the Bill of Quantities relates.

4.4 Errors in Bills of Quantities

If the Bill of Quantities is in error in that it—

- (a) contains an incorrect quantity in relation to any item included therein; or
- (b) contains an item which should not have been included therein; or

(c) omits an item which should have been included therein;

then—

- (i) in the case of Clause 4.4(a) where the item is deficient in quantity or in the case of Clause 4.4(c)— upon application in writing to the Superintendent by the Contractor; and
- (ii) in the case of Clause 4.4(a) where the item is excessive in quantity or in the case of Clause 4.4(b)— upon notification in writing to the Contractor by the Superintendent,

the lump sum accepted by the Principal for the execution of the whole of the work to which the Bill of Quantities relates shall except when the value of the error is less than \$400, be adjusted by such amount as is required to correct the error, and shall not be treated as a variation under Clause 40 determined in the manner provided by Clause 40.5 for the valuation of variations as if the correction were a variation under Clause 40.

~~The Bill of Quantities shall be deemed to be in error as aforesaid to the extent that the items and quantities included in it differ from those required for the execution of the Works in accordance with the drawings and specification referred to in the Contract, measured in accordance with the method of measurement evidenced by the Contract.~~

4.5 Adjustment to Bills of Quantities

Pursuant to the provisions of Clause 4.4, when the Superintendent directs the actual quantity to be carried out that direction shall be made by variation orders to which the provisions of Clause 40 do not apply.

4.6 Contractor Warranties

Without limiting the generality of Clause 3.1, the Contractor warrants to the Principal that the Contractor—

- (a) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the execution and completion of the WUC;
- (b) shall engage and retain the consultants and subcontractors identified in the Contractor's tender and who are suitably qualified and experienced;
- (c) has examined carefully and to have acquired knowledge of the contents of the Tender 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 submitting a price for the Works;
- (d) has examined all information relevant to the risks, contingencies and other circumstances which could affect its price for the Works and which a competent contractor could have obtained by making detailed enquiries prior to submitting its price for the Works;
- (e) has visited and examined the Site and its surroundings and informed itself fully as to the physical conditions or obstructions upon and below the surface of the Site, and the local conditions including existing services and including but not limited to, climatic and hydrologic conditions at, near or relevant to the Site, or any other condition or characteristic of the Site affecting or which may affect its performance of the Contract and obtained all necessary information as to risks, contingencies and other circumstances which could have an effect on the performance and cost of executing the Works;
- (f) has informed itself completely of the nature and requirements of the work and materials necessary for the execution of the Works and the means of access to and facilities at the Site and transport facilities to and from the Site;

- (g) has informed itself as to the availability and cost of labour including, without limitation, the costs of complying with obligations imposed by an agreement between the relevant building industry unions and employers relating to the execution of construction and building work nationally and in the State or Territory in which the Works are situated and the materials required;
- (h) has satisfied itself as to the correctness and sufficiency of its price for the Works 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 Contract;
- (i) has informed itself of all Legislative Requirements and other requirements of Authorities in relation to the Works generally and, without limiting the generality of the foregoing in relation to measures necessary to protect the environment from any adverse effect or damage arising from execution of the Works;
- (j) has obtained all appropriate professional and technical advice that a competent contractor in the same circumstances would obtain on all matters and circumstances in respect of the matters referred to in sub-paragraphs (a)-(i) hereof prior to submitting its price for the Works;
- (k) by applying for and/or accepting the Certificate of Practical Completion, shall warrant that the Works will be or have been properly completed and every part thereof and all materials, articles and goods used or incorporated therein or supplied by the Contractor direct or through a subcontractor or supplier, whether nominated or otherwise, shall or do comply with the quality, quantity, number, nature, description and conditions as required in terms of the Contract and shall otherwise be or are fit for the purpose for which they are required in terms of the Contract;
- (l) warrants that the Contract Sum is sufficient to complete the Works according to the provisions of the Contract and in arriving at that sum the Contractor has considered and fully taken into account all the WUC, liabilities and expenses imposed upon the Contractor in the Contract including but not limited to the liabilities, costs and expenses imposed by or arising as a consequence of their need to undertake out of hours work;
- (m) expressly acknowledges that there were no representations made by or on behalf of the Principal and no conduct by or on behalf of the Principal which is not expressly included or referred to in the Contract documents which the Contractor has relied on in calculating the Contract Sum;
- (n) acknowledges and warrants that the Works, when constructed, will comply with all applicable Legislative Requirements;
- (o) shall be liable to the Principal for any breach of warranty under the Contract or otherwise, notwithstanding:

 - (i) the Principal or Superintendent may have accepted the Works or any part thereof as satisfactorily completed under the Contract, any such acceptance being deemed to be no more than prima facie evidence of completion;
 - (ii) the Principal or Superintendent's receipt, review, comment, rejection or approval of any document, information or proposal provided by the Contractor;
 - (iii) the Principal or Superintendent's failure to receive, review, comment, reject or approve any document, information or proposal provided by the Contractor;
 - (iv) any subcontracting of the Works.

Failure by the Contractor to do all or any of the things it is deemed to have done under this Clause will not relieve the Contractor of its liability to perform and complete the Contract in accordance with its terms and conditions.

4.7 Acknowledgments

The Principal and Contractor acknowledge and agree that:

- (a) the warranties in clause 4.6 are in addition to any other warranties contained in the Contract or otherwise implied by law;
- (b) the warranties in clause 4.6 are separate and independent;
- (c) the Principal has relied on the warranties in clause 4.6 when entering into this Contract;

5 SECURITY, RETENTION MONEYS AND PERFORMANCE UNDERTAKINGS

5.1 Purpose

Security, retention moneys and performance undertakings are for the purpose of ensuring the due and proper performance of the Contract.

5.2 Provision of Security

If it is provided in the Annexure Part A that a party shall provide security then the party shall provide security in the amount stated in the Annexure Part A and in accordance with this Clause.

5.3 Form of Security

The security shall be in the form of cash, ~~bonds or inscribed stock issued by the Australian Government or the Government of a State or Territory of Australia, interest bearing deposit in a trading bank carrying on business in Australia, an approved unconditional and irrevocable bank guarantee or security bond in the amount set out in the Annexure Part A, undertaking given by an approved financial institution or insurance company,~~ or other form approved by the party having the benefit of the security:-

Security provided by a financial institution or insurance company shall be:

- (a) given by a financial institution or insurance company that:
 - (i) has an office open for business in Australia;
 - (ii) is registered in Australia;
 - (iii) is regulated by the Australian Prudential Regulatory Authority (APRA); and
 - (iv) meets a credit rating not less than:
 - (A) A (where the Contract Sum is less than \$7,500,000);
 - (B) A + (where the Contract Sum is equal to or greater than \$7,500,000); or
- (b) in such other form or given by such other institution, as the Principal reasonably approves in its discretion.

The party having the benefit of the security shall have ~~a~~ the discretion to approve or disapprove ~~of~~ the form of the security an unconditional undertaking and the financial institution or insurance company giving it or other form of security offered. ~~The form of unconditional undertaking attached to these General Conditions is approved.~~

If the security is not transferable by delivery, it shall be accompanied by an executed transfer or such other documentation as is necessary to effect a transfer of the security. The costs (including all stamp duty or other taxes) of and incidental to the procuring and transfer and retransfer of the security, shall be borne by the party providing the security.

5.3A Adjustment of Security

Prior to the reduction of security in accordance with clause 5.7, where the value of security held by the Principal under clause 5.3, for any reason, falls below the amount required under clause 5.2, the Contractor shall within 10 days of a written request by the Superintendent provide to the Principal such additional security (in the form required by clause 5.3) as is necessary to ensure the Principal holds security of a value being not less than the amount required under clause 5.2.

5.4 Time for Lodgement of Security

Security shall be lodged within 28 days of the Contract ~~Date of Acceptance of Tender~~.

5.5 Recourse to Retention Moneys and Conversion of Security

Any retention of moneys shall be in accordance with Clause 42.1 and 42.3 and the Annexure Part A.

The Principal may make a demand on the retention moneys and/or other security under this Contract:

- (a) whenever the Principal reasonably believes it may be entitled under the Contract or otherwise to:
 - (i) payment of monies by the Contractor; or
 - (ii) reimbursement by the Contractor of any money paid by the Principal to others;
- (b) for any Loss or Liability incurred by the Principal which, in the reasonable opinion of the Principal, the Contractor is liable to the Principal under the Contract, whether or not such amount of Loss or Liability is disputed by the Contractor;
- (c) for any Loss or Liability which the Principal has incurred, or reasonably considers it is likely to incur in the future, as a consequence of any act or omission of the Contractor which the Principal asserts constitutes a breach of the Contract, whether or not such amount of Loss or Liability is disputed by the Contractor;
- (d) to secure the proper performance by the Contractor of its obligations under the Contract;
- (e) to satisfy the Principal's entitlements under the Contract,

and for such purpose the Principal may convert into money any security which does not consist of money.

Unless permitted at law, Principal will not be liable for any Loss or Liability incurred by the Contractor caused by conversion of the security.

The Contractor must not take any steps to hinder, obstruct, injunct or otherwise restrain:

- (i) any issuer of any security from paying the Principal pursuant to the security;
- (ii) the Principal from taking any steps for the purpose of obtaining payment pursuant to the security; or
- (iii) the Principal from applying the proceeds of any security.

The Contractor's sole remedy arising from conversion of security, which is later found to be wrongful conversion, is the repayment of such security with interest. The Contractor shall have no entitlement to any other forms of damage or compensation.

~~A party may have recourse to retention moneys and/or cash security and/or may convert into money security that does not consist of money where—~~

- ~~(b) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and~~

- ~~(c) the party has given the other party notice in writing for the period stated in the Annexure, or if no period is stated, five days of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and~~
- ~~(d) the period stated in the Annexure or if no period is stated, five days has or have elapsed since the notice was given.~~

5.6 Substitution of Security for Retention Moneys

The Contractor shall be at liberty at any time to provide in lieu of retention moneys, security in any of the forms permitted in Clause 5.3. To the extent that such security is provided, the Principal shall not deduct retention moneys and shall forthwith release retention moneys.

5.7 Reduction of Security and Retention Moneys

Upon issue of the Certificate of Practical Completion, or where there are Separable Portions upon issue of the last Certificate of Practical Completion, but subject to the Principal's right to have recourse to the security, the Principal's entitlement to security and retention moneys shall be reduced to the percentage thereof stated in the Annexure Part A or, if no percentage is stated, to 50 per cent thereof.

~~If at any time after Practical Completion Subject to the first paragraph of Clause 5.7, if in the opinion of the Superintendent~~ is of the opinion that it is reasonable to further reduce the Principal's entitlement to security and retention moneys, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.

The Principal shall, within 14 days of the Superintendent making such a determination, release security and retention moneys in excess of the entitlement.

5.8 Release of Security

If the Contractor has provided additional security pursuant to Clause 42.4, the Principal shall release that additional security within 14 days of the incorporation into the Works of the unfixed plant or materials in respect of which the additional security was furnished.

If the Principal has provided security, then when the Contractor has been paid all moneys finally due to the Contractor under the Contract or a Separable Portion, the Contractor shall release the security lodged by the Principal in respect of the Contract or the Separable Portion, as the case may be.

If the Contractor has provided security, then the Principal shall release it when required by Clause 42.8.

5.9 Interest on Security and Retention Moneys

Except to the extent provided in Clause 5.5, any interest earned on the security and retention moneys shall be retained by the Principal. The Principal shall not hold the retention moneys, security or the proceeds of the security on trust.

Alternative 1

~~A party holding retention moneys and/or cash security shall forthwith deposit the moneys in an interest bearing account in a bank. That party shall nominate the bank and the type of account. The account shall be in the joint names of the Principal and the Contractor and shall be one from which moneys can only be drawn with the signatures of two persons, one appointed by each of the Principal and the Contractor. The moneys shall be held until the Principal or the Contractor is entitled to receive them.~~

~~Interest earned on security lodged by the Contractor and on retention moneys belongs to the Contractor. Interest earned on security lodged by the Principal belongs to the Principal.~~

~~Upon the Principal or the Contractor becoming entitled to receive any moneys, including interest in the account, the other party shall forthwith have that party's appointee sign all documentation necessary to withdraw the moneys and shall give the signed documentation to the other party.~~

Alternative 2

~~A party holding retention moneys or cash security shall own any interest earned on the retention moneys or security. Except where retention moneys or cash security are held by a government department or agency or a municipal, public or statutory authority, retention moneys or cash security shall be held in trust by the party holding them for the other party until the Principal or the Contractor is entitled to receive them.~~

5.10 Deed of Guarantee and Indemnity, Undertaking and Substitution

Where—

- (a) ~~a party~~ the Contractor is a corporation that is related to or is a subsidiary of another corporation as defined in the Corporations Law as amended from time to time; and
- (b) the Principal has included in the Contract (at Annexure D) or as part of the tender documents a form of Deed of Guarantee and Indemnity, Undertaking and Substitution;

~~that party~~ the Contractor shall, ~~if requested by the other party in writing within 7 days after the Date of Acceptance of Tender provide lodge with the other party~~ Principal, within 14 days ~~of the Contract Date after that request having been made,~~ a Deed of Guarantee and Indemnity, Undertaking and Substitution in the form included in the Contract or tender documents duly executed by the ~~first party~~ Contractor and that other corporation for the performance of the obligations and the discharge of the liabilities of the ~~first party~~ Contractor under the Contract.

For the purpose of this Clause 5.10~~5-10~~, the terms 'corporation' and 'subsidiary' have the meanings defined in the Corporations Law.

5.11 Retention of Security

Notwithstanding any other Clause of this Contract, the Principal has a right to retain from the security a reasonable amount sufficient to cover any unresolved claim by the Principal against the Contractor under or in connection with the Contract (whether or not that claim has at any time been liquidated).

5.12 No charge, encumbrance or lien over Site

The Contractor and the Principal covenant and agree that neither the Contract, nor any provision hereof, shall constitute a charge, encumbrance or lien of any nature or description whatsoever in respect of the Site as and by way of security for the performance of any obligation whatsoever on the part of the Principal to be observed or performed thereunder.

6 EVIDENCE OF CONTRACT

Where the Contractor commences any WUC prior to the Contract Date, the terms of this Contract shall apply retrospectively to the extent applicable.

A Formal Instrument of Agreement must be executed by the parties. No contract shall be considered to have come into effect until the Formal Instrument of Agreement has been executed by both parties.

~~6.1 Contract in Absence of Formal Instrument of Agreement~~

~~Unless a Formal Instrument of Agreement is executed by the parties, the agreement in writing between the parties for the execution of the work under the Contract, including~~

~~documents or parts of documents to which reference may properly be made to ascertain the rights and obligations of the parties, shall evidence the Contract.~~

~~6.2 Formal Instrument of Agreement~~

~~If the conditions of tender require a Formal Instrument of Agreement, the Principal shall prepare in duplicate a Formal Instrument of Agreement and shall, within 28 days after the Date of Acceptance of Tender, forward it to the Contractor with a request that it be executed.~~

~~Within 14 days after being requested in writing by the Principal so to do, the Contractor shall execute both copies of the Formal Instrument of Agreement in the manner directed in writing by the Principal and return them to the Principal.~~

~~Within 14 days after receipt from the Contractor of the two copies of the Formal Instrument of Agreement duly executed by the Contractor, the Principal shall execute both copies, have them stamped (unless they are exempt from duty) and forward one copy to the Contractor.~~

~~The Superintendent may extend the periods under Clause 6.2 by notice in writing to the parties.~~

~~The Principal shall bear the cost of any stamp duty payable on the Contract.~~

7 SERVICE OF NOTICES

7.1 General

- (a) Any notices to the Principal under the Contract must be addressed to the Principal and copied to the Superintendent at the address of the Principal and the Superintendent specified in the Annexure Part A and any notices to the Contractor under the Contract must be addressed to the Contractor's Representative at the address of the Contractor specified in the Annexure Part A.
- (b) A notice (or other document), including a notice or document that is authorised or required under the *Construction Contracts Act 2004* to be given or served on a person, will be deemed to have been given and received:
- (i) if addressed or delivered to the relevant address in the Contract or the last address communicated in writing to the person giving the notice; and
 - (ii) on the earliest date of:
 - (A) actual receipt; or
 - (B) 3 Business Days after posting.

7.2 Notices sent by email

Except where expressly stated otherwise, any notice which may be given or made under this Contract may instead be sent by email if the notice is given by a person clearly authorised by the sender, to the email address specified in the Annexure Part A or such other address as is last notified by the intended recipient to the sender.

No party may email a notice which purports to terminate this Contract.

7.3 Receipt of notices sent by email

A notice sent under Clause 7.2 will be conclusively taken to be duly given or made on the first to occur of:

- (a) receipt by the sender of an email acknowledgement from the recipient's information system showing that the notice has been delivered to the email address;

- (b) the time that the notice enters an information system which is under the control of the recipient; and
- (c) the time that the notice is first opened or read by an employee or officer of the recipient,

but if the result is that a notice would be taken to be given or made on a day that is not a Business Day in the place to which the notice is sent or is later than 4pm (local time in the location of the recipient) it will be conclusively taken to have been duly given or made at the start of business on the next Business Day in that place.

~~A notice shall be deemed to have been given when it is received by the person to whom it is addressed or is delivered to the address of that person stated in the Contract or last communicated in writing by that person to the person giving the notice, whichever is the earlier.~~

~~The Principal, the Contractor and the Superintendent shall each notify the others of a change of address.~~

~~Without limiting the generality of 'notice', it includes a document.~~

8 CONTRACT DOCUMENTS

8.1 Discrepancies

The several documents forming the Contract are to be taken as mutually explanatory of one another. The Contractor warrants that it has and shall be deemed to have carefully examined the documents for any inconsistency, ambiguity or discrepancy. If either party discovers any inconsistency, ambiguity or discrepancy in or between any document prepared for the purpose of executing the ~~work under the Contract~~WUC, that party shall notify the Superintendent in writing of the inconsistency, ambiguity or discrepancy. In the event of an inconsistency, ambiguity or discrepancy being discovered and brought to the attention of the Superintendent, or discovered by the Superintendent, the Superintendent shall direct the Contractor as to the interpretation to be followed by the Contractor in carrying out the work.

If the direction causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.540.5.

The order of precedence between documents as set out in the Formal Instrument of Agreement shall apply in the event of any inconsistency. The Contractor bears the risk of any inconsistency, ambiguity or discrepancy in the Contract documents.

8.2 Dimensions

Subject to the other provisions of this clause 8.2, ~~Where~~where any discrepancy exists between figured and scaled dimensions, the figured dimensions shall prevail.

Dimensions are shown on the Contract Drawings, but shall be the Contractor's responsibility to check all relevant dimensions and existing conditions on or about the Site before commencement of WUC. The Contractor shall not be entitled to any payment for any discrepancies in the dimensions shown on the Contract Drawings.

8.3 Supply of Documents by Principal

The Principal shall supply to the Contractor the number of copies stated in the Annexure Part A, or if no number is stated, then 5 copies of the Drawings, Specification, Bill of Quantities (if any) and other documents required by the Contract to be supplied to the Contractor by the Principal.

Documents supplied to the Contractor by the Principal shall remain the property of the Principal and shall be returned by the Contractor to the Principal on demand in writing. The documents shall 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~~WUC.

The Contractor agrees that:

(a) The Principal does not:

(i) assume any responsibility or duty of care in respect of; or

(ii) warrant, guarantee or make any representations as to,

information supplied by the Principal (including its accuracy, completeness, correctness or adequacy for the purposes of the Contract);

(b) Information supplied by the Principal may not provide the Contractor with all the information available to the Principal in respect of, or necessary for the Contractor to perform, the WUC or in respect of the Works;

(c) Subject to clause 8.1:

(i) The Principal will not be liable to the Contractor in contract, tort, equity, under statute or otherwise arising from or in connection with the provision of information supplied by the Principal; and

(ii) The Contractor will have no claim arising from or in connection with the inaccuracy, incompleteness, inadequacy or errors of information supplied by the Principal, or the non-provision of any other information by the Principal.

8.4 Supply of Documents by Contractor

If the Contract requires the Contractor to supply documents, the Contractor shall supply the number of copies stated in the Annexure Part A or, if no number is stated, 5 copies.

The Contractor shall supply to the Superintendent all documents and information reasonably requested by the Superintendent and as required by the Contract in a form satisfactory to the Superintendent at those times applicable to the documents stated in Annexure Part A or, if no times are stated, not less than 21 days before the WUC contained in those documents is commenced.

If the Contractor submits documents to the Superintendent, then—

- (a) the Superintendent shall not be bound to check the documents for errors, omissions or compliance with the requirements of the Contract—
- (b) notwithstanding the provisions of Clause 23, the Superintendent's approval shall not relieve the Contractor from responsibility for the Contractor's errors or omissions or compliance with the requirements of the Contract;
- (c) if the Contract provides that the Contractor must obtain the Superintendent's direction whether documents are suitable or are not suitable then within the time stated in the Annexure Part A (or if no time is stated then within 14 days) after receipt of the documents, the Superintendent shall notify the Contractor that the documents are suitable or are not suitable;
- (d) if the Superintendent notifies the Contractor that the documents are not suitable, the Superintendent shall give reasons why the documents are not suitable and the Contractor shall submit new or amended documents for the Superintendent's direction under this Clause;
- (e) the Superintendent shall not reject documents which are in accordance with the requirements of the Contract; and-

(f) the Principal's or Superintendent's receipt of, or review of, comment on or failure to comment on documents provided by the Contractor shall not relieve the Contractor from responsibility for the Contractor's errors or omissions or departure from the Contractor's obligations under or other requirements of the Contract.

No direction under this clause 8.4 shall give rise to the Contractor's entitlement to claim additional costs.

Where the Superintendent fails to comply with its obligations under this clause within the time specified in this clause, the Contractor's sole remedy shall be an extension of time.

Copies of documents supplied by the Contractor shall be the property of the Principal but shall not be used or copied otherwise than for the use, maintenance or alteration of the Works.

8.5 Availability of Documents

Whilst ~~work under the Contract~~WUC is being performed, one complete set of Drawings, Specification and other written information supplied by the Principal, the Superintendent and the Contractor shall be kept by the Contractor at the Site or other location approved in writing by the Principal and shall be available at all times for reference by the Principal, the Superintendent and any persons nominated in writing by either of them.

During the manufacture or assembly of any significant part of the ~~work under the Contract~~WUC away from the part of the Site where the Works are to be constructed, a set of the drawings and written information relevant to that part of the work shall be kept by the Contractor at the place of manufacture or assembly and shall be available for reference by the Principal, the Superintendent and any person nominated in writing by either of them.

8.6 Confidential Information

Drawings, specifications and other information, samples, models, patterns and the like, supplied by either the Contractor or the Principal and marked or otherwise identified as confidential, shall be regarded as confidential and shall not be disclosed to a third party except with the prior agreement of the other party to the Contract.

If required in writing by a party, the other party shall enter into a separate agreement not to disclose to anyone else any confidential matter even after the issue of the Final Certificate pursuant to Clause 42.8 or the earlier termination of the Contract.

*** 8.7 Media Releases**

The Contractor shall not issue or permit to be issued any information, publication, document or article for publication concerning the project in any media without prior written approval of the Principal, which approval shall not be unreasonably withheld. The Contractor shall refer to the Principal any enquiries concerning the project from any media.

8.8 Specification to be treated as a whole

Where the specification is separated into titled sections it is for convenience only and not to dictate or determine the trade or craft involved. Such separations shall not operate to make the Principal an arbiter for the division of responsibility between the Contractor and Subcontractors, nor shall separation relieve the Contractor of responsibility for the satisfactory completion of the WUC.

8.9 Layout of Plant and Equipment

The layout of any plant and equipment on Drawings shall be taken as diagrammatic. All measurements and other information required to carry out the WUC shall be obtained by the Contractor on Site. The Contractor will not be entitled to any claim in respect of time or

costs arising out of or in connection with the Contractor's failure to comply with this subclause.

9 ASSIGNMENT AND SUBCONTRACTING

9.1 Assignment

Neither party shall, without the prior written approval of the other and except on such reasonable terms and conditions as are determined in writing by the other, assign the Contract or any payment or any other right or benefit or interest thereunder.

9.2 Subcontracting

The Contractor shall not without the written approval of the Superintendent, which approval shall not be unreasonably withheld:

- (a) —subcontract or allow a subcontractor to ~~assign or~~ subcontract work described in the Annexure Part A; or
- (b) allow a subcontractor to assign a subcontract or any payment or any other right, benefit or interest thereunder; or
- (c) enter into a subcontract or supplier arrangement that exceeds \$1.5 million.

The Contractor may subcontract all other work, unless otherwise directed by the Superintendent.

With a request for approval, the Contractor shall provide to the Superintendent particulars in writing of the work to be subcontracted and the name and the address of the proposed subcontractor.

The Contractor shall provide to the Superintendent other information which the Superintendent reasonably requests, including the proposed subcontract documents without prices.

When seeking approval to enter into a subcontract or supplier arrangement in excess of \$1.5 million or for works described in Annexure Part A, the Contractor shall provide a written statement to the Superintendent confirming that a financial assessment of the relevant subcontractor or supplier, deemed appropriate by the Contractor, has been undertaken and that the relevant subcontractor or supplier has the financial capacity to complete the proposed subcontract or supplier arrangement.

Within 14 days after a request by the Contractor for approval, the Superintendent shall advise the Contractor of approval or the reasons why approval is not given.

Approval may be conditional upon the subcontract including—

- (a) provision that the subcontractor shall not assign or subcontract without the consent in writing of the Contractor;
- (b) provisions which may be reasonably necessary to enable the Contractor to fulfil the Contractor's obligations to the Principal.

9.3 Contractor's Responsibility

Approval to subcontract shall not relieve the Contractor from any liability or obligation under the Contract. Except where the Contract otherwise provides, the Contractor shall be liable to the Principal for the acts and omissions of subcontractors and employees and agents of subcontractors as if they were acts or omissions of the Contractor.

10 SELECTED AND NOMINATED SUBCONTRACTORS

10.1 Definitions

If the Contract provides that certain work or the supply of certain items shall be subcontracted to a Selected or Nominated Subcontractor, the work or the supply of the items is 'Selected Subcontract Work' or 'Nominated Subcontract Work' as the case may be, and:

'Selected Subcontractor' means a subcontractor identified in the Contractor's tender from a list of subcontractors provided by the Principal in the tender documents for Selected Subcontract Work. The list may include one or more subcontractors.

'Nominated Subcontractor' means—

- (a) a subcontractor to whom the Contractor is directed by the Superintendent to subcontract Nominated Subcontract Work; or
- (b) a subcontractor named in the Contract with whom the Principal has entered into a prior contract for Nominated Subcontract Work, and in which prior contract the subcontractor has consented to the assignment by the Principal of the benefit of the prior contract, a copy of which is included in the tender documents; or
- (c) a subcontractor named in the Contract with whom the Principal has entered into a prior contract for Nominated Subcontract Work, and in which prior contract the subcontractor has consented to the novation of the prior contract by the Principal pursuant to a deed of novation, a copy of which is included in the tender documents.

'Nominated Subcontract Work' shall relate only to work or the supply of items for which a Provisional Sum has been included in the Contract.

10.2 Selected Subcontract

If the Contract includes Selected Subcontract Work, the Contractor shall subcontract the Selected Subcontract Work to a Selected Subcontractor. If the tender documents specify the terms and conditions upon which the subcontract is to be entered into, the subcontract shall include those terms and conditions.

10.3 Nominated Subcontract

If the Contract includes Nominated Subcontract Work, at such time as is necessary to avoid delay to the Contractor, the Superintendent shall direct the Contractor to subcontract the Nominated Subcontract Work to a Nominated Subcontractor.

If the Contract provides that the Principal may assign to the Contractor the benefit of a prior contract made between the Principal and a Nominated Subcontractor, the Contractor shall when directed by the Superintendent, accept the assignment of that prior contract.

If the Contract provides that the Principal may novate to the Contractor a prior contract made between the Principal and a Nominated Subcontractor in respect of Nominated Subcontract Work, the Contractor shall when directed by the Superintendent, execute a deed of novation of that prior contract in the form included in the tender documents and unless the Contract otherwise provides, the Contractor shall give the Principal credit for payments made by the Principal to the Nominated Subcontractor in respect of the Nominated Subcontract Work.

The Contractor shall ensure that the provisions of the subcontract are severally set out in the subcontract documents, so that the subcontract is fully expressed and complete in itself and includes provisions—

- (a) that in respect of the Nominated Subcontract Work, the Nominated Subcontractor will undertake towards the Contractor obligations and liabilities which will enable the

Contractor to discharge the Contractor's obligations and liabilities to the Principal under the terms of the Contract;

- (b) that the Nominated Subcontractor will indemnify the Contractor against loss resulting from any failure by the Nominated Subcontractor to perform such obligations or fulfil such liabilities;
- (c) that the Nominated Subcontractor will indemnify the Contractor against loss resulting from any negligence by the Nominated Subcontractor and the Nominated Subcontractor's servants and agents and against any misuse by them of any Constructional Plant or Temporary Works provided by the Contractor for the purposes of the Contract;
- (d) that the Nominated Subcontractor will lodge security in a form provided by Clause 5.3 and that security and retention moneys shall be calculated on the same scale and on the same basis respectively as apply in the Contract;
- (e) equivalent to those in Clause 44.

The Contractor shall not be obliged to enter into a subcontract with a Nominated Subcontractor against whom the Contractor raises reasonable objection.

If the Contractor declines to enter into a subcontract with a Nominated Subcontractor on the ground that the Nominated Subcontractor refuses to enter into a subcontract containing provisions in paragraphs (a) to (e) of Clause 10.3, the Superintendent shall nominate another Nominated Subcontractor or direct the Contractor to enter into a subcontract with the Nominated Subcontractor on such other terms as the Superintendent specifies. In the latter event—

- (i) the Contractor shall not be bound to discharge obligations and liabilities under the Contract to the extent that the subcontract terms so specified by the Superintendent are inconsistent with the discharge; and
- (ii) if the Contractor suffers loss arising out of the refusal of the Nominated Subcontractor to accept such provisions, the Principal shall pay to the Contractor the amount of loss which the Contractor could not reasonably avoid.

10.4 Provisions Applying Generally to Selected and Nominated Subcontract Work

If the Contractor is required by Clause 10 to enter into a subcontract, or to accept an assignment or to execute a deed of novation, the Contractor shall proceed promptly to do so and shall notify the Superintendent in writing as soon as the subcontract, assignment or novation has been effected.

With the consent of the Contractor, the Superintendent may direct the Contractor to perform Selected or Nominated Subcontract Work.

~~Notwithstanding Clause 16.2 if the Contractor is to be responsible to the Principal for the design or suitability of Selected or Nominated Subcontract Work, as distinct from the quality or workmanship, the responsibility shall be expressly stated in the Contract and the Contractor's liability for the design or suitability of the Selected or Nominated Subcontract Work shall only be that which is expressly stated in the Contract.~~

~~Except as herein contained; and subject to any reasonable objection made by the Contractor pursuant to this Clause—~~

- (i) the Principal shall have no liability to a Selected or Nominated Subcontractor arising from the subcontract between the Contractor and the Selected or Nominated Subcontractor; and
- (ii) the Principal shall not be liable to the Contractor for any act, default or omission or breach of contract by a Selected or Nominated Subcontractor, arising from the subcontract between the Contractor and the Selected or Nominated Subcontractor.

10.5 Direct Payment of Nominated Subcontractor

In respect of Nominated Subcontract Work performed by a Nominated Subcontractor, the Principal shall make payment directly to the Nominated Subcontractor. Except where the Contractor has accepted an assignment of the benefit of a prior contract made between the Principal and a Nominated Subcontractor—

- (a) such payment shall be made on behalf of the Contractor; and
- (b) if the Contractor reasonably requests the Principal in writing not to make a payment to the Nominated Subcontractor, the Principal shall withhold payment but under no circumstances, including bankruptcy or winding up of the Contractor, shall payment be made to the Contractor.

The Principal as stakeholder shall hold retention moneys and security provided by a Nominated Subcontractor and shall disburse or apply the retention moneys or security as jointly requested by the Contractor and the subcontractor or in accordance with the decision of an arbitrator or Court.

10.6 Termination of Nominated Subcontract

The Contractor shall not unreasonably terminate a subcontract for Nominated Subcontract Work and as early as possible the Contractor shall notify the Superintendent of the Contractor's intention to terminate and the reasons. If a Nominated Subcontractor repudiates or abandons a subcontract or it is terminated, the Contractor shall forthwith notify the Superintendent in writing and the Superintendent shall proceed under Clause 10.3 to nominate a Nominated Subcontractor to complete the subcontract work ~~and Clause 11(b) shall apply.~~

11 PROVISIONAL SUMS

A provisional sum included in the Contract shall not itself be payable by the Principal but where at the direction of the Superintendent the work or item to which the provisional sum relates is performed the work or item shall be valued by reducing the Contract Sum by the amount of the provisional sum and valuing the work under Clause 40.5 subject to the following:

- (a) where such work or item is valued up to and including the provisional sum amount:
 - (i) there shall be no adjustment for or entitlement to profit;
 - (ii) a reasonable deduction for overhead shall be applied with respect to the value of the work or item below the nominated provisional sum; and
- (b) where such work or item is valued in excess of the provisional sum amount, there shall be an additional allowance for profit and overhead applied to the value of the work or item in excess of the provisional sum amount, using the percentage stated in the Annexure Part A.

For the avoidance of doubt, the Contractor's profit and overheads on the amounts specified in the Contract as a provisional sums amount is deemed to be included in the Contract Sum.

~~or supplied by—~~

- ~~(a) the Contractor, the work or item shall be valued under Clause 40.5;~~
- ~~(b) a subcontractor to the Contractor the Principal shall pay the Contractor the amount payable by the Contractor to the subcontractor for the work or item, disregarding any damages payable by the Contractor to the subcontractor or vice versa, plus the amount or percentage thereon for profit and attendance stated in the Annexure or, where not so stated, as stated elsewhere in the Contract; and~~
- ~~(c) a Nominated Subcontractor pursuant to a prior contract made between the Principal and a Nominated Subcontractor, the benefit of which has been assigned to the Contractor, the Principal shall pay the Contractor the amount stated in the Annexure or the~~

~~percentage for profit and attendance stated in the Annexure of the amount payable by the Principal to the Nominated Subcontractor for the work or item or, where no amount or percentage is stated, as stated elsewhere in the Contract, disregarding any damages payable by the Principal to the Nominated Subcontractor or vice versa.~~

~~The amount payable to a subcontractor for materials or goods is to be taken to be the nett cost to the Contractor (disregarding any deduction of cash discount for prompt payment).~~

12 LATENT CONDITIONS

12.1 Definition

Latent Conditions are—

- (a) physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by a competent contractor ~~the Contractor~~ at the time of the Contract Date of the Contractor's tender if the ~~C~~contractor had—
 - (i) examined and made its own assessment of all information made available in writing by the Principal ~~to or otherwise obtained by~~ the Contractor ~~for the purpose of tendering~~ (“Written Information”) and made all reasonable enquiries arising out of or in connection with the Written Information, including the Tender Documents and such other information as set out in Annexure Part A.
 - (ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the ~~tender~~ Contract Sum and obtainable by the making of reasonable enquiries; and
 - (iii) inspected the Site and its surroundings and conducted all reasonable investigations and made all necessary enquiries to determine the scope of Works under this Contract; and
- (b) any other conditions which the Contract specifies to be Latent Conditions.

Except as set out in clause 12, the Principal shall not be liable to the Contractor for any loss or damage suffered due to the Contractor's interpretation of any Written Information.

12.2 Notification

If during the execution of the ~~work under the Contract~~WUC, the Contractor becomes aware of a Latent Condition, the Contractor shall forthwith and where possible before the Latent Condition is disturbed, give written notice thereof to the Superintendent.

If required by the Superintendent, the Contractor shall provide to the Superintendent a statement in writing specifying—

- (a) the Latent Condition encountered and in what respects it differs materially;
- (b) the Contractor's plan for dealing with, removing or overcoming the Latent Condition including but not limited to details of the additional work and additional resources which the Contractor estimates to be necessary to deal with the Latent Condition;
- (c) the time the Contractor anticipates will be required to deal with the Latent Condition and the expected delay in achieving Practical Completion;
- (d) the Contractor's estimate of the cost of the measures necessary to deal with the Latent Condition; and
- (e) other details reasonably required by the Superintendent.

The giving of notice under this clause 12.2 is a condition precedent to the Contractor's entitlement to an extension of time or costs under this clause 12.

12.3 Extension of Time and Cost

Provided the Contractor has provided notice in accordance with clause 12.2, dDelay caused by a Latent Condition may justify an extension of time under Clause 35.5.

If a Latent Condition causes the Contractor to—

- (a) carry out additional work;
- (b) use additional Constructional Plant; or
- (c) incur extra cost (including but not limited to the cost of delay or disruption),

which ~~the Contractor~~ a competent contractor could not reasonably have anticipated at the ~~time of tendering~~ Contract Date had it made all investigations and enquiries expected of a competent contractor, and provided the Contractor has provided a notice pursuant to clause 12.2, a valuation shall be made under Clause ~~40.5~~40.5.

The Contractor must minimise costs incurred under this clause 12 where reasonably practicable. Where the Contractor is entitled to costs under this clause, such entitlement shall not extend to costs that are caused or contributed to by the Contractor's failure to take reasonable steps to minimise and avoid costs arising out of or in connection with a Latent Condition.

12.4 Time Bar

In making a valuation pursuant to Clause 12.3, regard shall not be had to the value of additional work carried out, additional Constructional Plant used or extra cost incurred ~~more than 28 days~~ before the date on which the Contractor gives the written notice required by the first paragraph of Clause 12.2.

13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

The Principal warrants that unless otherwise provided in the Contract—

- (a) design;
- (b) materials;
- (c) documents; and
- (d) methods of working,

specified in the Contract or provided or directed by the Principal or the Superintendent will not infringe any patent, registered design, trademark or name, copyright or other protected right.

The Contractor warrants that any other design, materials, documents and methods of working provided by the Contractor will not infringe any patent, registered design, trademark or name, copyright or other protected right.

14 STATUTORY REQUIREMENTS

14.1 Complying with Statutory Requirements

The Contractor shall comply with all Legislative Requirements except those which—

- (a) are specified in the Annexure Part A; or
- (b) the Superintendent directs are to be satisfied by or on behalf of the Principal.

~~the requirements of—~~

- ~~(a) Acts of the Commonwealth;~~
- ~~(b) Acts and Ordinances of the State or Territory in which the work under the Contract or any part thereof is carried out;~~

- ~~(c) Ordinances, regulations, by laws, orders and proclamations under the Acts and Ordinances;~~
- ~~(d) persons acting in the exercise of statutory powers enabling them to give directions affecting the work under the Contract.~~

If a requirement is at variance with a provision of the Contract, as soon as the Contractor discovers the variance the Contractor shall notify the Superintendent in writing specifying the difference.

14.2 Changes in Legislative Requirements

If a Legislative Requirement:

(a) Necessitates:

- (i) a change to the Works;
- (ii) a change to so much of the Temporary Works, Constructional Plant or method of working;
- (iii) a change, being the provision or expansion of services of a municipal, public or statutory authority in connection with the Works or Temporary Works; or
- (iv) an increase or decrease in a fee or charge or payment of a new fee or charge;

(b) has effect after the 14th day prior to the Contract Date; and

(c) could not reasonably have been anticipated by an experienced and competent contractor performing work in the nature of WUC at that prior date,

then to the extent that such change causes the Contractor to incur more or less cost than otherwise would have been incurred, the difference shall be valued under Clause 40.5.

Subject to this Clause 14.2, the Contractor shall have no entitlement to claim for any costs arising out of or in connection with the cost of labour, the cost of carrying out WUC or any cost associated with a change to any industrial awards or agreements by reason of any change in Legislative Requirements.

~~If a requirement necessitates a change to the Works or so much of the Temporary Works or method of working as may be specified in the Contract, the Superintendent shall direct a variation under Clause 40.1.~~

~~Except to the extent that the Contract provides for reimbursement in respect of a requirement referred to in Clause 14.1 the Contractor shall bear the cost of complying with the requirement, whether the requirement existed at the time of tendering or not.~~

*** ~~14.2 Payment Where There is No Variation~~**

~~If a requirement does not necessitate a variation under Clause 40 but is—~~

- ~~(a) a change after the 28th day prior to the date of closing of tenders in a requirement referred to in Clause 14.1(a), (b) or (c); or~~
- ~~(b) a requirement referred to in Clause 14.1(d),~~

~~which necessitates a change in the Temporary Works or the Contractor's method of working and thereby causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5.~~

14.3 Notices and Fees

The Contractor shall give the notices necessary to comply with the requirements referred to in Clause 14.1.

The Contractor shall pay any fees or charges necessary to comply with the requirements referred to in Clause 14.1.

If a requirement necessitates the provision or expansion of services of a municipal, public or statutory authority in relation to the Works or the Temporary Works, the Contractor shall pay any fee or charge payable to the authority for the services and to the extent to which the services are not included in the work under the Contract, the fee or charge shall be reimbursed by the Principal to the Contractor.

If after the 14th day prior to the closing of tenders, there is required to be paid by the Contractor to a municipal, public or statutory authority in relation to the Works or the Temporary Works—

- (a) an increase or decrease in a fee or charge, the difference shall be valued under Clause 40.5; and
- (b) there is a new fee or charge, that fee or charge shall be reimbursed by the Principal to the Contractor.

14.4 Documents Evidencing Approvals of Authorities

The Contractor shall give the Principal copies of documents issued to the Contractor by municipal, public or other statutory authorities in respect of the work under the Contract and, in particular, any approvals of work

14.5 Permit

Alternative 1 (Principal acts as Permit Authority)

The Contractor acknowledges and agrees that:

- (a) officers of the Principal have delegated authority to perform the functions of the State as a Permit Authority and may issue a building and/or demolition permit as necessary for the Works;
- (b) unless instructed otherwise the Contractor will prepare application(s) for building and/or demolition permit(s) using the certifier nominated by the Principal and submit such application to the Principal for the issue of a building permit;
- (c) where there is a delay in issuing a building or demolition permit pursuant to this subclause and the delay is not caused or contributed to by the Contractor, the delay will be considered to be a delay by an applicable authority and not an act of delay by the Principal for the purposes of Clause 35.5;
- (d) the Principal will pay:
 - (i) the building services levy applicable to the Works; and
 - (ii) any building and demolition permit application fees.
- (e) the Contractor has included in the Contract Sum the costs of preparing all required applications for building and demolition permits; and
- (f) nothing in this clause affects the Contractor's obligations to comply with all applicable Legislative Requirements, including but without limitation the *Building Act 2012* (WA).

Alternative 2 (standard application to Permit Authority)

The Contractor will:

- (a) prepare all necessary building and demolition permit applications for the Works;
- (b) submit all building and demolition permit applications to the applicable Permit Authority;

(c) pay:

- (i) the building services levy applicable to the Works;
- (ii) any building and demolition permit application fees; and
- (iii) the cost of the certifier;

(d) include within the Contract Sum the costs involved in the preparation of and submission of all required applications for building and demolition permits.

Nothing in this clause affects the Contractor's obligations to comply with all applicable Legislative Requirements including, but without limitation, the *Building Act 2012* (WA).

15 PROTECTION OF PEOPLE AND PROPERTY

Insofar as compliance with the requirements of the Contract permits, the Contractor shall—

- (a) provide all things and take all measures that are reasonably practicable and necessary (such as temporary safety fencing and warning signage) to protect people, the public and property from hazards associated with WUC, including and not limited to any hazards associated with Asbestos
- (b) avoid unnecessary interference with the passage of people and vehicles;
- (c) prevent nuisance and unreasonable noise and disturbance.

Without limiting the generality of the Contractor's obligations, they include the provision of barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, removal of obstructions and protection of services.

The Contractor shall use all types and methods of protection (such as temporary safety fencing and warning signage) that are reasonably practicable and necessary to protect the public from hazards associated with WUC. Protection shall be consistent with the recommendations contained in the WorkSafe WA publication "Construction Work and the Public", as amended from time to time. This publication is available from WorkSafe WA and can be accessed from the WorkSafe WA website at www.safetyline.wa.gov.au. Where a safety fence is used, it shall be not less than 1.8 metres in height.

If the Contractor, the subcontractors or the consultants or the employees or agents of the Contractor damage property, including but not limited to existing property of the Principal, public utilities and services and property on or adjacent to the Site, the Contractor shall be strictly liable for and promptly make good the damage and pay any costs or damages compensation which the Principal may incur. ~~law requires the Contractor to pay.~~

If the Contractor fails to comply with an obligation under Clause 15 the Principal may, in addition to any other remedy, perform the obligation on the Contractor's behalf and the cost incurred by the Principal shall be a debt due from the Contractor to the Principal.

16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE

16.1 Care of ~~the Work Under the Contract~~WUC

From and including the earlier of the date of commencement of ~~work under the Contract~~WUC and the date on which the Contractor is given possession of the Site to 4 p.m. on the Date of Practical Completion of the Works, the Contractor shall be responsible for: ~~the care of the work under the Contract~~WUC.

- (a) the care of the whole of the WUC from and including the date of commencement of the WUC to 4 p.m. on the Date of Practical Completion, at which time the responsibility for care of the Works (except to the extent provided in Clause 16.1(b)) shall pass to the Principal; and

(b) the care of outstanding work and items to be removed from the Site by the Contractor after 4 p.m. on the Date of Practical Completion until completion of outstanding work or compliance with the Contractor's obligations under Clauses 30, 31 and 37.

Without limiting the generality of the Contractor's obligations, the Contractor shall be responsible for the care of unfixed items ~~or the value of which has been included in a payment certificate under Clause 42.1,~~ things entrusted to the Contractor by the Principal for the purpose of carrying out ~~the work under the Contract~~the WUC, things brought on the Site by subcontractors for that purpose, the Works, the Temporary Works and Constructional Plant, and the Contractor shall provide the storage and protection necessary to preserve these items and things, and the Works, the Temporary Works and Constructional Plant.

After 4 p.m. on the Date of Practical Completion the Contractor shall remain responsible for the care of outstanding work and items to be removed from the Site by the Contractor and shall be liable for damage occasioned by the Contractor in the course of completing outstanding work or complying with obligations under Clauses 30.6, 31.1 and 37.

The Contractor shall be responsible for damage caused by the Contractor in the course of completing outstanding work or complying with its obligations under this Contract.

16.2 Reinstatement

If loss or damage (except loss or damage which is a direct consequence, without fault or omission on the part of the Contractor, of an Excepted Risk defined in Clause 16.3) occurs to anything while the Contractor is responsible for its care, the Contractor shall at the Contractor's own cost promptly make good the loss or damage.

16.3 Excepted Risks

The Excepted Risks are—

- (a) any negligent act or omission of the Principal, the Superintendent or the employees, consultants or agents of the Principal;
- (b) any risk specifically excepted in the Contract;
- (c) war, invasion, act of foreign enemies, hostilities, (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;
- (d) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or the Contractor's employees or agents;
- (e) use or occupation by the Principal or the employees or agents of the Principal or other contractors to the Principal (not being employed by the Contractor) or a Nominated Subcontractor engaged by the Principal pursuant to a prior contract the benefit of which has been assigned to the Contractor pursuant to the Contract) of any part of the Works or the Temporary Works;
- (f) defects in the design of ~~the work under the Contract~~the WUC other than a design provided by the Contractor.

17 INDEMNITY BY CONTRACTOR DAMAGE TO PERSONS AND PROPERTY OTHER THAN THE WORKS

17.1 Contractor general indemnity

The Contractor indemnifies the Indemnitees against all costs, losses, expenses, claims, damages and other liabilities (including, without limitation, legal costs and expenses) as a result of, arising from or in connection with:

- (a) any breach of an obligation under the Contract by the Contractor;
- (b) any wilful, tortious or unlawful act or omission of the Contractor;
- (c) any breach of a State or Commonwealth law relevant to the Contract by the Contractor;
- (d) the carrying out by or as a consequence of the carrying out by the Contractor of the WUC.

The Contractor's liability under the indemnity in this Clause 17.1 will be reduced to the extent that any costs, losses, expenses, claims, damages or other liabilities result from the wilful misconduct of the Indemnitees.

This clause shall not be amended by and is independent of any clause in the Contract which otherwise limits the liability of the Contractor, nor shall it exclude any other right of the Principal to be indemnified by the Contractor.

The Indemnitees agree to use their best endeavours to cooperate with the Contractor, at the Contractor's cost, in respect of the conduct of any defence, or the agreement of any settlement, of any third party action, suit, claim, demand or proceeding the subject of the indemnity under paragraph (a) of this clause.

17.2 Occupational safety and health – indemnity by contractor

The Contractor shall indemnify the Principal from and against any loss, damage or injury suffered or incurred by the Principal or any claim made against the Principal by reason directly or indirectly of the Contractor failing to comply with the Contractor's Occupational Safety and Health obligations under this Contract or as required by law and the Contractor shall reimburse the Principal any fines, penalties costs and expenses which the Principal may incur as a result (directly or indirectly) of any non-compliance on the part of the Contractor with any of the provisions of the *Occupational Safety and Health Act 1984 (WA)* or with any of the Contractor's obligations under this Clause. The Contractor shall pay all fees payable under the *Occupational Safety and Health Act 1984 (WA)* which are payable in connection with the execution of the Works.

17.1 Indemnity by Contractor

~~The Contractor shall indemnify the Principal against—~~

- ~~(a) loss of or damage to property of the Principal, including existing property in or upon which the work under the Contract is being carried out; and~~
- ~~(b) claims by any person against the Principal in respect of personal injury or death or loss of or damage to any property;~~
- ~~(c) arising out of or as a consequence of the carrying out by the Contractor of the work under the Contract, but the Contractor's liability to indemnify the Principal shall be reduced proportionally to the extent that the act or omission of the Principal or employees or agents of the Principal may have contributed to the loss, damage, death or injury.~~

~~Clause 17.1 shall not apply to—~~

- ~~(i) the extent that the liability of the Contractor is limited by another provision of the Contract;~~
- ~~(ii) exclude any other right of the Principal to be indemnified by the Contractor;~~
- ~~(iii) things for the care of which the Contractor is responsible under Clause 16.1;~~
- ~~(iv) damage which is the unavoidable result of the construction of the Works in accordance with the Contract; and~~

~~(v) — claims in respect of the right of the Principal to construct the work under the Contract on the Site.~~

~~—Indemnity by the Principal~~

~~The Principal shall indemnify the Contractor in respect of damage referred to in Clause 17.1(iv) and claims referred to in Clause 17.1(v).~~

18 INSURANCE ~~OF THE WORKS~~ UNDER THE CONTRACT

18.1 Insurance Requirements

The Contractor must, before commencing WUC, take out and maintain throughout the term of this Contract and until the Contractor ceases to be responsible for performing any obligations under this Contract, at its expense, the insurances in Clauses 18.2 – 18.6 with reputable and solvent insurers reasonably acceptable to the Principal which carry on business in Australia under the authority of the Australian Prudential Regulation Authority and on terms reasonably acceptable to the Principal.

18.2 Workers Compensation And Employers' Liability

Workers compensation and employers' liability insurance covering all claims and liabilities in respect of any statute including cover for common law and statutory liability for an amount of not less than \$50,000,000 for any one occurrence for the death or injury to any person employed by or who is deemed to be a worker of Contractor under any statute relating to workers compensation arising directly or indirectly out of the performance of the Contract, including off Site. Unless prohibited by law, insurance under this subclause must extend to include a Principal's Indemnity for the Principal's liability if any, under both statute or common law with a waiver of subrogation in favour of the Principal.

If the Contractor is a private company and is required to take out insurance under the *Workers Compensation & Injury Management Act 1981 (As Amended)* WA, the Contractor must procure that its working directors are covered under its workers' compensation and employers' liability insurance.

18.3 Public Liability Insurance (including Asbestos Liability)

A public liability insurance (separate to the Contractor's Works policy) covering all claims and liabilities (including claims and liabilities arising from the use of motor vehicles which are not required to be licensed under statute, plant and equipment, cranes, blasting and land based excavation) in respect of any injury to or death of any person for any loss, damage or destruction of any property (including that of the Principal) howsoever and by whomsoever caused, arising directly or indirectly out of the performance of the Contract including off Site and arising out of or in connection with any Asbestos and abatement Works or Services as specified in the Contract (including stripping, encapsulations, removal, transport, sudden and accidental pollution and clean-up costs). The Public Liability insurance policy must be extended to cover goods in the physical or legal control of the insured, for replacement value of the goods. These insurances shall be unlimited as to the number of claims and shall provide cover in respect of each and every claim arising from any one occurrence for Public Liability in an amount of not less than the amount set out in the Annexure Part A.

The policy referred to in this clause must be extended to include liabilities arising from Asbestos as described in a form and to an extent satisfactory to the Principal. Alternatively, the Contractor shall effect an additional Asbestos Liability insurance policy covering the legal liability of the Contractor, its employees and agents arising out of or in connection with any Asbestos and abatement Works or Services as specified in the Contract (including stripping, encapsulations, removal, transport, sudden and accidental pollution and clean-up costs) for an amount not less than \$20,000,000.

If the Asbestos Liability insurance policy is on a "claims made and notified" basis, the Contractor must continue to either maintain the insurance policy until at least 6 years after termination or

expiration of the Contractor or alternatively effect a run-off cover under the insurance policy for a period of at least 6 years for an amount not less than \$20,000,000 for any one claim and \$20,000,000 for all claims in the aggregate during any one 12 monthly period of insurance.

18.4 Contractors' Work Insurance

Where this Contract is solely in relation to demolition works, this clause 18.4 does not apply.

Insurance covering all things referred to in Clause 16 against loss or damage resulting from any cause whatsoever until the Contractor ceases to be responsible for their care. Without limiting the extent of the obligation to insure, the Policy shall cover things in storage off Site and in transit to the Site. The insurance cover may exclude:

- (a) the cost of making good fair wear and tear or gradual deterioration but shall not exclude resulting loss or damage;
- (b) the cost of making good faulty design, workmanship and materials but shall not exclude resulting loss or damage;
- (c) damages for delay in completing or for the failure to complete the Works;
- (d) loss or damage resulting from ionising radiations or contamination by radio activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause; and
- (e) loss or damage resulting from Excepted Risks (b) and (c) in Clause 16.3.

The insurance cover shall be for an amount not less than the sum of –

- (f) the value of work;
- (g) the amount as provided for in the Annexure Part A for costs of demolition and removal of debris;
- (h) the amount as provided for in the Annexure Part A to cover fees of consultants;
- (i) the replacement value of any goods to be supplied by the Principal for the purposes of WUC; and
- (j) the amount as provided for in the Annexure Part A to provide for escalation costs of the items referred to in sub-paragraphs (f) to (i) of this paragraph.

18.5 Contractors' Plant and Equipment

Insurance covering all loss and damage to the Contractor's plant and equipment used in connection with the Contract for the replacement value.

18.6 Motor Vehicle Comprehensive Insurance and Third Party Liability Insurance

- (a) Statutory insurance under the Motor Vehicle Insurance Act 1943 (or its analogues in the States and Territories of Australia) required to be effected for liability for personal injury or death arising from the driving of motor vehicles used in connection with the performance of the Contract;
- (b) Comprehensive motor vehicle insurance in respect of motor vehicles used in connection with the performance of the Contract covering –
 - (i) damage to or loss of any motor vehicle;
 - (ii) damage to any property which arises out of the ownership, possession, control, use or driving of a motor vehicle;
 - (iii) gap cover for liability arising out of claims for personal injury or death arising out of the ownership, possession, control, use or driving of such motor vehicles where the statutory insurance specified in (a) does not cover the claim;

(c) The insurances in (b)(ii) and (iii) shall be unlimited as to the number of claims and shall provide cover in respect of each and every claim arising from any one occurrence for amounts representing the reasonable replacement value of each motor vehicle and in respect of liability for property damage, personal injury or death claims for an amount not less than the amount set out in the Annexure Part A.

18.7 Endorsements On Insurances

The insurances referred to in this Clause 18 must, unless prohibited by law, be endorsed to include:

- (a) each of the Indemnitees as separate insureds and as if a separate policy had been issued to each of them;
- (b) subcontractors as separate insureds under the Contract Works Insurance and which extends the benefit of sub-paragraphs (c) and (d) of this sub-clause to the subcontractors;
- (c) a cross liability clause under which insurers waive all express and implied rights of subrogation that they may have against any of the Indemnitees;
- (d) where appropriate, cover should extend to “Goods in the physical and legal control of the insured” without any sub-limit of indemnity, and
- (e) each such insurance will operate as primary insurance to any insurance held by the Indemnitees so that the latter’s insurances operate only in excess of the Contractor’s insurances. The Contractor must ensure that the insurances of each of the Indemnities are properly named and identified in the insurances which the Contractor takes out so that there is compliance with section 45 of the *Insurance Contracts Act 1984*.

For the avoidance of doubt all insurances shall be maintained until all the obligations of the Contractor including those arising in the Defects Liability Period provided for in Clause 37 have been discharged.

18.8 Deductible

The Contractor shall seek approval from the Principal for any deductibles applicable to insurances required to be effected by the Subcontract under this Contract. The Contractor shall be liable for any applicable deductible amount.

Alternative 1

~~Before the Contractor commences work, the Contractor shall take out an insurance policy covering all the things referred to in Clause 16.1 against loss or damage resulting from any cause whatsoever until the Contractor ceases to be responsible for their care.~~

~~Without limiting the generality of the obligation to insure, the policy shall cover the Contractor's liabilities under Clause 16.2 and things in storage off Site and in transit to the Site.~~

~~The insurance cover may exclude—~~

- ~~(a) the cost of making good fair wear and tear or gradual deterioration but shall not exclude the loss or damage resulting therefrom;~~
- ~~(b) the cost of making good faulty design, workmanship and materials but shall not exclude the loss or damage resulting therefrom;~~
- ~~(c) consequential loss of any kind, but shall not exclude loss of or damage to the Works;~~
- ~~(d) damages for delay in completing or for the failure to complete the Works;~~
- ~~(e) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause;~~

~~(f) — loss or damage resulting from the Excepted Risks (b) and (c) in Clause 16.3.~~

~~The insurance cover shall be for an amount not less than the sum of—~~

~~(i) — the Contract Sum;~~

~~(ii) — the amount stated in the Annexure to provide for costs of demolition and removal of debris;~~

~~(iii) — the amount stated in the Annexure to cover fees of consultants;~~

~~(iv) — the value stated in the Annexure 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 the Annexure of the total of the items referred to in sub-paragraphs (i) to (iv) of this paragraph.~~

~~The insurance policy shall be in the joint names of the Principal and the Contractor, and shall cover the Principal, the Contractor and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights, interests and liabilities and, unless otherwise specified elsewhere in the Contract, shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Contractor ceases to be responsible under Clause 16.1 for the care of anything.~~

Alternative 2

~~On or before the Date of Acceptance of Tender, the Principal shall effect a policy of insurance in relation to the work under the Contract in the terms of the policy or proposed policy included in the documents on which the Contractor tendered. The policy or proposed policy shall include the name of the insurer. The Principal shall maintain the policy while ever the Contractor has an interest therein and the Principal shall pay all premiums.~~

19 HOME INDEMNITY INSURANCE

Unless instructed otherwise, where applicable, the Contractor shall effect home indemnity insurance, as required under the *Home Building Contracts Act 1991* (WA). The Contractor shall provide a certificate to the Principal confirming evidence of such cover.

Alternative 1

~~Before the Contractor commences work, the Contractor shall take out a Public Liability Policy of insurance in the joint names of the Principal and the Contractor which covers the Principal, the Contractor, the Superintendent and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights and interests and covers their liabilities to third parties. The policy shall also cover 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) and 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).~~

~~The Public Liability Policy of insurance shall be for an amount in respect of any one occurrence not less than the sum stated in the Annexure and, unless otherwise specified elsewhere in the Contract, shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Final Certificate is issued under Clause 42.8.~~

Alternative 2

~~On or before the Date of Acceptance of Tender, the Principal shall effect in relation to the work under the Contract a policy of insurance in the terms of the policy or proposed policy included in the documents on which the Contractor tendered. The policy or proposed policy shall include the name of the insurer. The Principal shall maintain the policy while ever the Contractor has an interest therein and the Principal shall pay all premiums.~~

1920 INSURANCE OF EMPLOYEES [Not used]

~~Before commencing work the Contractor shall insure against liability for death of or injury to persons employed by the Contractor including liability by statute and at common law. The insurance cover shall be maintained until all work including remedial work is completed.~~

~~The insurance shall be extended to indemnify the Principal for the Principal's statutory liability to persons employed by the Contractor.~~

~~The Contractor shall ensure that every subcontractor is similarly insured.~~

2021 INSPECTION AND PROVISIONS OF INSURANCE POLICIES

20.121.1 Proof of Insurance

~~Within seven days of execution of the Contract and, in any event, prior to the Contractor commencing any WUC and each time the policies are renewed or varied, the Contractor must provide the Principal with such evidence, including copies of the contracts of insurance, schedule, endorsements and extensions and certificates of currency in respect of the insurance policies issued by the Contractor's insurers, as the Principal may require. The Principal may refuse to make any payments which are otherwise due to the Contractor under the Contract until the Contractor has fulfilled the Principal's requirements. The failure of the Contractor to provide evidence of insurances to the Principal does not relieve the Contractor of its obligations to effect insurance under the Contract.~~

~~Before the Contractor commences work and whenever requested in writing by the other party, a party liable to effect or maintain insurance shall produce evidence to the satisfaction and approval of the other party of the insurance effected and maintained.~~

~~The effecting of insurance shall not limit the liabilities or obligations of a party under other provisions of the Contract.~~

20.221.2 Contractor's Failure to Take Out Produce Proof of Insurance

~~If the Contractor fails to take out any of the insurances required under Clause 18, the Principal may at its sole option take out and maintain such insurances and deduct the cost from any monies due to the Contractor or treat the failure to insure by the Contractor as a default by the Contractor under the Contract.~~

~~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 shall be a debt due from the party in default to the other party. Where the defaulting party is the Contractor, the Principal may refuse payment until evidence of compliance with insurance obligations under Clauses 18, 19 and 20 is produced by the Contractor to the satisfaction and approval of the Principal. The rights given by Clause 21.2 are in addition to any other right.~~

20.321.3 Variation, Cancellation of Insurance Notices from or to the Insurer

~~No insurance arranged by the Contractor may be varied to the detriment of the Principal, be cancelled or allowed to lapse until 30 days notice of the intention to vary, cancel or lapse has been given to the Principal and the Principal consents in writing to the proposed variation, cancellation or lapsing of the insurance. The Contractor must ensure that each insurer in respect of the policies taken out by the Contractor under Clause 18 undertakes to give the Principal not less than 30 days notice in writing of the insurer's intention to cancel the policy.~~

~~The party effecting insurance under Clause 18 or 19 shall ensure that each policy of insurance contains provisions acceptable to the other party that will—~~

- ~~(a) 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;~~
- ~~(b) provide that a notice of claim given to the insurer by the Principal, the Superintendent, the Contractor or a subcontractor shall be accepted by the insurer as a notice of claim given by the Principal, the Superintendent, the Contractor and the subcontractor; and~~
- ~~(c) 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.~~

20.421.4 Notices of Potential Claims Assignment and Subcontracting

~~Where the Contractor has been permitted to assign or subcontract under this Contract, the Contractor must procure that the assignee or subcontractor obtains the insurances specified in and otherwise complies with the provisions of Clauses 18 and 21, except clause 18.4 in respect of a subcontractor only. Such assignment or subcontract will not relieve the Contractor of its own obligations to fulfil any provisions of Clause 18, 21 and 21.7.~~

~~The Contractor shall, 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 shall keep the Principal informed of subsequent developments concerning the claim. The Contractor shall ensure that subcontractors in respect of their operations similarly inform the Principal.~~

~~Where a policy of insurance required by the Contract has been effected by the Principal the Principal shall similarly inform the Contractor.~~

20.521.5 Settlement of Claims

Upon settlement of a claim under the insurance specified by Clause 18~~18~~ —

- (a) to the extent that the ~~work under the Contract~~WUC needing reinstatement has been the subject of a payment or allowance by the Principal to the Contractor, if the Contractor has not completed reinstatement of that work, moneys received shall, if requested by either party, be paid into a bank agreed upon by the parties in an account in the joint names of the Contractor and the Principal. As the Contractor proceeds to reinstate the loss or damage, the Superintendent shall certify against the joint account for the cost of reinstatement; and
- (b) to the extent that the work to be reinstated has not been the subject of a payment or allowance by the Principal to the Contractor, the Contractor shall be entitled immediately to receive from moneys received, the amount of money so paid in relation to any loss suffered by the Contractor relating to that ~~work under the Contract~~WUC (including the supply of goods and materials on site whether or not incorporated into the Works).

20.621.6 Cross Liability

Any insurance required to be effected by the Contractor in joint names in accordance with the Contract shall 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 Notice

- ~~(a) If the Principal or the Contractor becomes aware of any event or incident occurring which gives rise or is likely to give rise to a claim under any insurance required under~~

Clauses 18 and 21, the party becoming aware must give notice to the other party in writing of that event or incident as soon as reasonably practicable.

- (b) Failure to comply with paragraph (a) of this Clause 21.7 will not invalidate or otherwise affect the rights of the Principal or the obligations of the Contractor under Clause 17.
- (c) The obligations under Clauses 18, 19, 21 and 21.7 are separately enforceable to Clause 17.

21.8 Continuing Obligations

- (a) No provision in this Clause 21.8 shall limit the Contractor's liability under Clause 17.
- (b) The obligations of the Contractor under this Clause are continuing obligations and survive expiration or termination of the contract for so long as the obligations of the Contractor under Clauses 18, 21 and 21.7 continue.
- (c) The obligations under Clauses 18, 21 and 21.7 are separately enforceable to Clause 17.

21.9 No Limitation

Nothing in Clauses 18, 21 and 21.7 limits the Contractor's other liabilities under the Contract or restricts the Contractor from insuring for sums or risks greater than those required under the Contract.

~~21.22 CLERK OF WORKS AND INSPECTORS [not used]~~

~~The Superintendent shall forthwith notify the Contractor in writing of the name of any Clerk of Works or inspector appointed by the Principal or the Superintendent.~~

23 SUPERINTENDENT

23.1 Role and responsibilities

The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent—

- (a) acts honestly and fairly in the exercise of its certification and assessment obligations under the Contract;
- (b) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and
- (c) arrives at a reasonable measure or value of work, quantities or time.

If, pursuant to a provision of the Contract enabling the Superintendent to give directions, the Superintendent gives a direction, the Contractor shall comply with the direction of the Superintendent.

In this Clause 23 'direction' includes agreement, approval, authorization, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.

Except where the Contract otherwise provides, a direction may be given orally but the Superintendent shall as soon as practicable confirm it in writing.

If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent confirms it in writing.

Where any direction given to the Contractor by the Superintendent will result in a claim for cost or time, the Contractor must comply with clause 40.6.

23.2 Access

The Superintendent shall have—

- (i) access to the Site and the WUC; and
- (ii) after reasonable notice to the Contractor, access to any place other than the Site where WUC is being carried out or materials are being prepared or stored, for the purposes of discharging the functions of the Superintendent under the Contract.

23.3 Acknowledgment

The Contractor acknowledges that:

- (a) the Superintendent may be an employee of the Principal;
- (b) it was aware of this relationship prior to entering into the Contract; and
- (c) where the Superintendent is acting as an agent of the Principal then the Superintendent may act in accordance with instructions given to the Superintendent by the Principal and in performing its functions in this manner the Contractor is not entitled to allege any lack of impartiality on the part of the Superintendent.

2224 SUPERINTENDENT'S REPRESENTATIVE

The Superintendent may from time to time appoint and revoke or alter the appointment of, individuals to exercise any functions of the Superintendent under the Contract but not more than one Superintendent's Representative shall be delegated the same function at the same time. The appointment of a Superintendent's Representative shall not prevent the Superintendent from exercising any function.

The Superintendent shall forthwith notify the Contractor in writing of—

- (a) the appointment and the name of any Superintendent's Representative and the functions delegated to the Superintendent's Representative; and
- (b) the termination of the appointment of a Superintendent's Representative.

If the Contractor makes a reasonable objection to the appointment of a representative, the Superintendent shall terminate the appointment.

2325 CONTRACTOR'S REPRESENTATIVE

The Contractor shall personally superintend the execution of the ~~work under the Contract~~WUC or, at all times during which any activities relating to the execution of the ~~work under the Contract~~WUC are taking place, have a competent representative present on the Site and, if required by the Superintendent, at other places at which activities relating to the execution of the ~~work under the Contract~~WUC are taking place.

The Contractor shall ~~forthwith~~immediately notify the Superintendent in writing of the name of the representative and of any subsequent changes.

Any direction defined in Clause 23 shall—

- (a) if it relates to the execution of work on the Site and is given to the representative on the Site; or
- (b) if it relates to the execution of work at any other place and is given to the representative at the other place,

be deemed to have been given to the Contractor.

Matters within the knowledge of a representative of the Contractor shall be deemed to be within the knowledge of the Contractor.

If the Superintendent makes a reasonable objection to the appointment of a representative, the Contractor shall terminate the appointment and appoint another representative.

The Contractor's Representative shall have sufficient command of the English language and of Australian construction and technical terminology to be able to read, converse and receive instructions in English.

2426 CONTROL OF CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS

The Superintendent may direct the Contractor to have removed from the Site or from any activity connected with the ~~work under the Contract~~WUC, within such time as the Superintendent directs, any person employed in connection with the ~~work under the Contract~~WUC who, in the opinion of the Superintendent, is guilty of misconduct or is incompetent or negligent. The person shall not thereafter be employed on the Site or on activities connected with the ~~work under the Contract~~WUC without the prior written approval of the Superintendent.

2527 SITE

25.127.1 Possession of Site

The Principal shall on or before the expiration of the time stated in the Annexure Part A give the Contractor possession of the Site or sufficient of the Site to enable the Contractor to commence work. If the Principal has not given the Contractor possession of the whole Site, the Principal shall from time to time give the Contractor possession of such further parts of the Site as may be necessary to enable the Contractor to execute the ~~work under the Contract~~WUC in accordance with the requirements of the Contract. The Principal shall advise the Contractor in writing of the date upon which the Site or any part thereof will be available.

Notwithstanding the provisions of Clause 27.1, if the Contractor is in breach of Clause 21.1, the Principal may refuse to give the Contractor possession of the Site or any part of the Site until the Contractor has complied with the requirements of Clause 21.1.

Possession of the Site shall confer on the Contractor a right to only such use and control as is necessary to enable the Contractor to execute the ~~work under the Contract~~WUC.

The Contractor shall not be entitled to exclusive possession of or to have uninterrupted access to the Site and shall co-ordinate its activities with any Government or semi Government body or statutory authority or any other contractor or consultant which is carrying out any work on or in the vicinity of the Site.

Should any delay take place in giving the Contractor access to the Site or any part thereof, the delay shall be deemed not to constitute a breach of Contract but may be treated as a ground for extension of time pursuant to Clause 35.5(b)(i).

25.227.2 Access for the Principal and Others

The Principal and the Principal's employees, ~~and~~ agents, consultants or others invited by the Principal may at any time after reasonable notice to the Contractor have access to any part of the Site for any purpose.

The Contractor shall permit the execution of work on the Site by persons engaged by the Principal and shall cooperate with them and coordinate the Contractor's work with their work. The Contractor warrants that it has made allowances for the impact of:

(a) work by others; and

(b) access to the Site by others.

upon its ability to reach Practical Completion by the Date for Practical Completion.

The presence of such persons will not of itself constitute a breach of Contract by the Principal and will not entitle the Contractor to claim additional costs or extension of time.

If requested by the Contractor, the Principal shall provide to the Contractor the names of the persons so engaged.

The Contractor shall at all reasonable times give the Principal, the Superintendent, ~~the Clerk of Works and inspectors appointed under Clause 22,~~ and other persons authorized in writing by the Principal or by the Superintendent access to the ~~work under the Contract~~WUC at any place where the work is being carried out or materials are being prepared or stored.

The Principal shall take all reasonable steps to ensure that the Contractor is not impeded in the execution of the Contractor's work by any persons referred to in Clause 27.2, whilst exercising the right of access given by Clause 27.2.

25.327.3 Delivery of Materials to and Work on Site Before Possession

Until possession of the Site or part of the Site is given to the Contractor under Clause 27.1, the Contractor shall not deliver materials to or perform work on the Site or part of the Site, as the case may be, unless approval in writing is given by the Superintendent.

25.427.4 Use of Site by Contractor

Unless the Contract otherwise provides or the Superintendent gives prior written approval, the Contractor shall not use the Site or allow it to be used for—

- (a) camping;
- (b) residential purposes; or
- (c) any purpose not connected with the ~~work under the Contract~~WUC.

25.527.5 Finding of Minerals, Fossils and Relics

Valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the Site shall as between the parties be and remain the property of the Principal. Immediately upon the discovery of these things the Contractor shall take precautions to prevent their loss or removal or damage and shall notify the Superintendent of the discovery.

If compliance with obligations under Clause 27.5 causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5~~40.5~~.

27.6 Adjoining Properties Survey

- (a) Before commencing any demolition, piling, excavations, underpinning, shoring or such like WUC, the Contractor shall carry out a comprehensive survey of adjoining properties and other property, properties or items expressly identified in the Contract;
- (b) The survey shall be carried out, where possible, in the presence of the owners or representatives of the owners of such adjoining properties.
- (c) The survey shall be recorded by suitable means to accurately show the condition of the adjoining properties at the time immediately prior to the commencement of work on the Site.
- (d) The Superintendent may and shall, if requested, attend the survey. Copies of the survey documents endorsed by the owners of such adjoining properties shall be lodged with the Superintendent.
- (e) The survey shall not relieve the Contractor of its responsibilities or liabilities for damage to other properties adjacent to the site.

26.28 SETTING OUT THE WORKS

26.128.1 Setting Out

Before commencing work on the Site the Contractor shall engage a licensed surveyor to identify the Site, certify all boundaries and position necessary survey marker pegs.

Any discrepancies between the certified survey and the drawings shall be immediately reported to the Superintendent and work shall not proceed until the Superintendent's instructions have been received.

The survey drawing must include locations to all services, connection points including:

- (a) telecommunications;
- (b) sewer mains (inverts);
- (c) water;
- (d) power;
- (e) fire hydrants supply; and
- (f) general features.

On Practical Completion, the Contractor must submit to the Superintendent a certificate signed by a licensed surveyor certifying levels to the titled boundary.

~~The Superintendent shall supply to the Contractor the information and survey marks necessary to enable the Contractor to set out the Works and the survey marks specified in the Contract. Upon receipt of any necessary information and survey marks, the Contractor shall set out the Works in accordance with the Contract and shall provide all instruments and things necessary for that purpose.~~

26.228.2 Care of Survey Marks

The Contractor shall keep in their true positions all survey marks ~~supplied by the Superintendent.~~

If a survey mark is disturbed or obliterated, the Contractor shall immediately notify the Superintendent and, unless the Superintendent otherwise directs, the Contractor shall 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 shall be valued under Clause ~~40.40.55.~~

26.328.3 Errors in Setting Out

If the Contractor discovers an error in the position, level, dimensions or alignment of any ~~work under the Contract~~WUC, the Contractor shall immediately notify the Superintendent and, unless the Superintendent otherwise directs, the Contractor shall rectify the error.

If the error has been caused by incorrect information, survey marks or data supplied by the Superintendent, the cost incurred by the Contractor in rectifying the error shall be valued under Clause 40.5~~40.5.~~

26.428.4 Survey Mark Defined

'Survey mark' in Clause 27.6(e) 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 ~~work under the Contract~~WUC.

27.29 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT

27.129.1 Provision of Materials, Labour and Constructional Plant

Except to the extent that the Contract otherwise provides, the Contractor shall supply everything necessary for the proper performance of the Contractor's obligations and discharge of the Contractor's liabilities under the Contract.

27.229.2 Removal of Materials and Constructional Plant

From time to time the Superintendent may by written notice to the Contractor direct the Contractor not to remove from the Site, Constructional Plant or materials. Thereafter, the Contractor shall not remove the materials or the Constructional Plant without the prior written approval of the Superintendent, which approval shall not be unreasonably withheld.

27.329.3 Manufacture and Supply of Materials

The Superintendent may direct the Contractor to supply particulars of—

- (a) the mode and place of manufacture;
- (b) the source of supply;
- (c) the performance capacities; and
- (d) other information,

in respect of any materials, machinery or equipment to be supplied by the Contractor under or used in connection with the Contract.

28.30 MATERIALS AND WORK

28.130.1 Quality of Materials and Work

The Contractor shall use the materials and standards of workmanship required by the Contract. In the absence of any requirement to the contrary, the Contractor shall use suitable new materials.

*** 28.230.2 Quality Assurance**

The Contractor shall, if ~~requirements~~~~requirements~~ are so stated in the Contract—

- (a) plan, establish and maintain a quality system which conforms to those requirements;
and
- (b) provide the Superintendent with access to the quality system of the Contractor and each of the subcontractors of the Contractor to enable monitoring and quality auditing.

Any such quality system shall be used only as an aid to achieving compliance with the Contract and to document such compliance. Such system shall not relieve the Contractor of the responsibility to comply with the Contract.

~~NOTE: The inclusion of Quality Assurance requirements in a contract will require detailed clauses in the Specification or elsewhere in the Contract which have regard to the Quality Standard selected for the work.~~

28.330.3 Defective Materials or Work

If the Superintendent discovers material or work provided by the Contractor which is not in accordance with the Contract, the Superintendent may direct the Contractor to—

- (a) remove the material from the Site;
- (b) demolish the work;

- (c) reconstruct, replace or correct the material or work; or
- (d) not to deliver the material or work to the Site.

The Superintendent may direct the times within which the Contractor must commence and complete the removal, demolition, reconstruction, replacement or correction.

If the Contractor fails to comply with a direction issued by the Superintendent pursuant to Clause 30.3 within the time specified by the Superintendent in the direction and provided the Superintendent has given the Contractor notice in writing that after the expiry of 7 days from the date on which the Contractor receives the notice the Principal intends to have the work carried out by other persons, the Principal may have the work of removal, demolition, reconstruction, replacement or correction carried out by other persons and the cost incurred by the Principal in having the work so carried out shall be a debt due from the Contractor to the Principal.

28.430.4 Variations due to Defective Materials or Work

Instead of a direction under Clause 30.3, the Superintendent may direct a variation pursuant to Clause 40. The variation shall be valued under Clause ~~40.5~~40.5 and—

- (a) if the variation causes an increase or decrease in the value to the Principal of the Works, regard shall also be had to the increase or decrease; and
- (b) if the variation results in the Contractor incurring more or less cost than would reasonably have been incurred had the Contractor been given a direction under Clause 30.3, regard shall also be had to the difference.

28.530.5 Acceptance of Defective Material or Work

Instead of a direction under Clause 30.3 or 30.4, the Superintendent may notify the Contractor that the Principal elects to accept the material or work notwithstanding that it is not in accordance with the Contract. In that event the Contract Sum shall be decreased by the greater of the following as assessed by the Superintendent:

- (a) The cost of remedying the material or work valued under clause 40.5; or
- (b) The resulting decrease in the value to the Principal of the Works and any other Loss which the Principal is likely to suffer, including the likely decrease in operational and maintenance costs which may be incurred by the Principal if it accepts the material or work.

~~the resulting increase or decrease in the value to the Principal of the Works and any other loss suffered by the Principal shall be valued under Clause 40.5.~~

28.630.6 Generally

The Superintendent shall give either a direction under Clause 30.3 or 30.4, or a notice under Clause 30.5 as soon as practicable after the Superintendent becomes aware that material or work is not in accordance with the Contract. The Superintendent may give the direction or notice at any time before the issue of the Final Certificate under Clause 42.8.

The Superintendent may also direct the Contractor to confirm aspects of the material or work which the Superintendent is unable to determine (“Notice of Clarification/Confirmation”). Within 10 days of receipt of the Notice of Clarification / Confirmation, the Contractor shall provide the Superintendent with written notice advising of the aspects of the material or work which the Superintendent is unable to determine, as identified in the Notice of Clarification/Confirmation.

Failure by the Contractor to respond within 10 days of receipt of the notice will result in the material or works being deemed not to be in accordance with the Contract and the Superintendent, at its discretion, may make such directions as it considers reasonable to rectify the material or work.

Except to the extent that to do so would be inconsistent with a direction under Clause 30.4 or a notice under Clause 30.5 and notwithstanding that the Superintendent has not given a direction under Clause 30.3, the Contractor shall promptly remove, demolish, replace or correct material or work that is not in accordance with the Contract.

A progress payment, or a test or a failure by the Superintendent or anyone else to disapprove any material or work shall not prejudice the power of the Superintendent to subsequently give a direction under Clause 30.3 or 30.4 or a notice under Clause 30.5.

Nothing in Clause 30 shall prejudice any other right which the Principal may have against the Contractor arising out of the failure of the Contractor to provide material or work in accordance with the Contract.

The Superintendent shall not be obliged to give a direction under Clause 30.4 or a notice under Clause 30.5 to assist the Contractor.

29.31 EXAMINATION AND TESTING

29.31.1 Superintendent May Order Tests

In Clause 31 'test' includes examine and measure.

At any time ~~before the expiry of the Defects Liability Period prior to the issue of the Final Certificate~~ the Superintendent may direct that any material or ~~work under the Contract~~ WUC be tested. The Contractor shall provide such assistance and samples and make accessible such parts of the ~~work under the Contract~~ WUC as may be required by the Superintendent. On completion of the tests, the Contractor shall make good the ~~work under the Contract~~ WUC so that it fully complies with the Contract.

29.31.2 Covering Up of Work

The Superintendent may direct that any part of the ~~work under the Contract~~ WUC shall not be covered up or made inaccessible without the Superintendent's prior approval.

29.31.3 Who Conducts Tests

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

29.31.4 Notice of Tests

Before conducting a test under the Contract the party conducting the test, being the Superintendent or the Contractor, shall give reasonable notice in writing to the other of the time, date and place of the test. If the other party does not then attend, the test may nevertheless proceed.

29.31.5 Procedure if Tests Delayed

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

29.31.6 Results of Tests

Results of tests shall be promptly made available by each party to the other and to the Superintendent.

29.31.7 Costs of Testing

Costs of and incidental to testing shall be valued under Clause ~~40.5~~ 40.5 and shall be borne by the Principal or paid by the Principal to the Contractor unless—

- (a) the Contract provides that the Contractor shall bear the costs of the test if it is one which the Contractor was required to conduct other than pursuant to a direction under Clause 31.1;
- (b) the test shows that the material or work is not in accordance with the Contract;
- (c) the test is in respect of ~~work under the Contract~~WUC covered up or made inaccessible without the Superintendent's prior approval where such was required;
- (d) the test is consequent upon a failure of the Contractor to comply with a requirement of the Contract.

Where such costs are not to be borne by the Principal, they shall be borne by the Contractor or paid by the Contractor to the Principal.

29.831.8 Access for Testing

If, during the Defects Liability Period—

- (a) the Principal or the Superintendent asserts that material or work is not in accordance with the Contract; and
- (b) the Contractor requests permission to test the material or work,

the Principal shall not unreasonably refuse the Contractor access to test the material or work.

31.9 Superintendent May Request Samples

The Superintendent may direct the Contractor to provide the Superintendent with samples of material to be used in the Works to satisfy itself as to the quality of the material and to ensure it is in accordance with Contract. If the Superintendent requests samples, the Contractor must only complete those parts of the Works in respect of which the samples have been requested after the later of the approval of the Superintendent or 5 Business Days following receipt by the Superintendent of such samples.

31.10 Off Site Inspections and Tests

The Contractor must grant the Principal and the Superintendent access to the Contractor's premises and those of its subcontractors or suppliers for the purpose of inspecting work in progress and materials and components required for the Works, including all relevant documentation and certification. The Principal and the Superintendent will provide to the Contractor reasonable notice if they require access to inspect a subcontractor's or supplier's premises.

31.11 The effect of test, inspections or examinations

A test, inspection or examination of the Works is not evidence that the Works comply with the requirements of the Contract.

3032 WORKING HOURS

The working hours and ~~working days~~Business Days and any noise restrictions during the working hours and Business Days shall be as stated in the Contract and if not so stated as notified by the Contractor to the Superintendent prior to commencement of work on Site and shall not be varied without the prior approval of the Superintendent except when in the interests of safety of the ~~work under the Contract~~WUC or to protect life or property the Contractor finds it necessary to carry out work outside the working hours or on days other than the ~~working days~~Business Days stated in the Contract. In such cases the Contractor shall notify the Superintendent in writing of the circumstances as early as possible.

In any event, the Contractor must comply with all Legislative Requirements which may determine or otherwise impact working hours.

All costs attributable to the contract administration by or on behalf of the Principal of work during times approved pursuant to the previous paragraph shall be borne by the Principal.

The Contractor shall allow for whatever overtime is necessary in order to bring the Works to Practical Completion by the Date for Practical Completion. No extensions of time will be considered for delays occurring on Saturdays, Sundays, Statutory or Public Holidays or workers' rostered days off.

31.33 PROGRESS AND PROGRAMMING OF THE WORKS

31.133.1 Rate of Progress

The Contractor shall proceed with the ~~work under the Contract~~WUC with due expedition and without delay.

The Contractor shall not suspend the progress of the whole or any part of the ~~work under the Contract~~WUC except where the suspension is under Clause 44.9 or is directed or approved by the Superintendent under Clause 34.

The Contractor shall give the Superintendent reasonable advance notice of when the Contractor requires any information, materials, documents or instructions from the Superintendent or the Principal.

The Principal and the Superintendent shall not be obliged to furnish any information, materials, documents or instructions earlier than the Principal or the Superintendent, as the case may be, should reasonably have anticipated at the ~~Contract Date~~Date of Acceptance of Tender.

The Superintendent may direct in what order and at what time the various stages or parts of the ~~work under the Contract~~WUC shall be performed. If the Contractor can reasonably comply with the direction, the Contractor shall do so. If the Contractor cannot reasonably comply, the Contractor shall notify the Superintendent in writing, giving reasons.

If compliance with the direction 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 shall be valued under Clause ~~40.5~~40.5.

31.233.2 Construction Program

Under clause 33, "Contractor's Program" and "Construction Program" are used interchangeably and have the same meaning.

For the purposes of Clause 33, a 'construction program' is a statement in writing showing the dates by which, or the times within which, the various stages or parts of the ~~work under the Contract~~WUC are to be executed or completed.

A construction program shall not depart, without reasonable cause, from:

- (a) a construction program included in the Contract, if any; or
- (b) a construction program furnished to the Superintendent. ~~affect rights or obligations in Clause 33.1.~~

Preliminary Construction Program

Until any revised Construction Program is approved under this clause, then for the purpose of administering the Contract, references to "Construction Program" are deemed to be references to the Preliminary Construction Program. The Construction Program forming part of the Contract documents, if any, is the Preliminary Construction Program.

Requirements for Revised Construction Program

Within 15 Business Days of the Contract Date, the Contractor shall submit to the Superintendent for the Superintendent's approval, a Construction Program, or if a Preliminary Construction Programme has already been provided then a revised Construction Program, which includes the following:

- (a) each activity in the critical path (highlighted in colour) described with a time duration clearly shown in working days, with no time duration being longer than 10 Business Days unless for a procurement activity;
- (b) each activity indicating, where applicable, the amount of construction float in Business Days allocated to each item;
- (c) indication of earliest and latest starting and finishing dates for each activity, milestone events, logic dependencies, float times, resource levels and critical path activities;
- (d) showing all major critical off-site activities of supply, prefabrication, testing, samples, prototypes, shop drawings and required approvals;
- (e) activities of all the Contractor's consultants, subcontractors, suppliers and the like;
- (f) details having significant bearing on construction program achievement, including human resource requirements at each stage, intended productivity rates, proposed construction methods, plant and equipment required.

Where the Superintendent approves a revised Construction Program, the form of the revised Construction Program will be the "Construction Program" for the purposes of the Contract and the approved form for any subsequent updates or amendments in accordance with this Contract.

Estimated activity durations

In estimating the duration of each activity, the Contractor shall take into consideration the availability of all resources including labour, materials, equipment and available workspace. The calendar on which the Construction Program is based shall take into consideration the number of working days per week and the number of non-working days including Saturdays, Sundays, statutory or public holidays, RDOs and any non working period between Christmas and New Year.

Amending or Reviewing the Construction Program

The Contractor may at any time submit to the Superintendent an amended or varied version of the Construction Program for approval. The Superintendent may direct the Contractor to furnish to the Superintendent a Construction Program within the time and in the form directed by the Superintendent.

The Contractor shall review the Construction Program in the event that:

- (a) the Superintendent grants an extension of time in accordance with Clause 35.5 herein;
- (b) the Superintendent directs a Variation under Clause 40 herein;
- (c) the Contractor considers for any reason, that there is or will be a significant deviation between the actual or anticipated progress of the Works and the Construction Program;
- (d) the Contractor becomes aware that delays or extensions of time exceed one week.

In any event the Construction Program shall be updated at not less than 2 weekly intervals and the Superintendent and relevant consultants provided with an updated copy of the same.

Should it appear to the Superintendent at any time that there is or will be a significant deviation between the actual or anticipated progress of the Works and the Construction Program, the Superintendent shall be entitled by written instruction, to require the Contractor to produce at its cost, a revised version of the Construction Program showing such modifications to the Construction Program as may be necessary to ensure or to be

consistent with substantial completion of the Works and the achievement of all stages by the milestone dates. The Contractor shall submit such revised Construction Program within 14 days of the Superintendent's instruction or within such other time as the Superintendent shall allow in writing.

Unless and until an amended version of the Construction Program is approved by the Superintendent in writing, the Construction Program previously approved by the Superintendent shall remain as the Construction Program for all purposes of the Contract.

The furnishing of a Construction Program or of a further Construction Program shall not relieve the Contractor of any obligations under the Contract including the obligation not to depart, without reasonable cause, from an earlier Construction Program.

Where the Contractor fails to provide a Construction Program or a revised version of it in accordance with this subclause, the Superintendent may have the program prepared and the cost of doing so will be an amount due and payable by the Contractor to the Principal.

Superintendent approval of Construction Program

Approval by the Superintendent of a Construction Program in accordance with the provisions herein, shall not relieve the Contractor of any of its duties or responsibilities under the Contract nor bind or create any obligation or liability on the part of the Principal, nor, in the event that a Construction Program indicates that the milestone date has not or will not be met constitute any form of acknowledgment that the Contractor is or may be entitled to an extension of time in relation to such a milestone date.

The Principal will not be liable for any loss, damage, cost or expense or any other payment and extension of time by reason of change to the Construction Program, unless the Contractor is so entitled elsewhere under the Contract.

~~The Contractor may voluntarily furnish to the Superintendent a construction program.~~

~~The Superintendent may direct the Contractor to furnish to the Superintendent a construction program within the time and in the form directed by the Superintendent.~~

~~The Contractor shall not, without reasonable cause, depart from—~~

- ~~(a) a construction program included in the Contract; or~~
- ~~(b) a construction program furnished to the Superintendent.~~

~~The furnishing of a construction program or of a further construction program shall not relieve the Contractor of any obligations under the Contract including the obligation to not, without reasonable cause, depart from an earlier construction program.~~

32.134 SUSPENSION OF THE WORKS

32.134.1 Suspension by Superintendent

If the Superintendent considers that the suspension of the whole or part of the ~~work under the Contract~~WUC is necessary—

- (a) because of an act or omission of—
 - (i) the Principal, the Superintendent or an employee, consultant or agent of the Principal; or
 - (ii) the Contractor, a subcontractor or an employee or agent of either;
- (b) for the protection or safety of any person or property; or
- (c) to comply with an order of a court,

the Superintendent shall direct the Contractor to suspend the progress of the whole or part of the ~~work under the Contract~~WUC for such time as the Superintendent thinks fit.

32.234.2 Suspension by Contractor

If the Contractor wishes to suspend the whole or part of the ~~work under the Contract~~WUC, otherwise than under Clause 44.9, the Contractor shall obtain the prior written approval of the Superintendent. The Superintendent may approve of the suspension and may impose conditions of approval.

The Contractor will not be entitled to an extension of time in connection with a suspension approved pursuant to this clause.

32.334.3 Recommencement of Work

As soon as the Superintendent becomes aware that the reason for any suspension no longer exists, the Superintendent shall direct the Contractor to recommence work on the whole or on the relevant part of the ~~work under the Contract~~WUC.

If work is suspended pursuant to Clause 34.2 or 44.9, the Contractor may recommence work at any time after reasonable advance notice to the Superintendent.

32.434.4 Cost of Suspension

Any cost incurred by the Contractor by reason of a suspension under Clause 34.1 or Clause 34.2 shall be borne by the Contractor but if the suspension is due to an act or omission of the Principal, the Superintendent or an employee, consultant or agent of the Principal and the suspension causes the Contractor to incur more or less cost than otherwise would have been incurred but for the suspension, the difference shall be valued under Clause ~~40.5~~40.5.

32.534.5 Effect of Suspension

Suspension shall not affect the Date for Practical Completion but the cause of suspension may be a ground for extension of time under Clause 35.5.

3335 TIMES FOR COMMENCEMENT AND PRACTICAL COMPLETION

33.135.1 Time for Commencement of Work on the Site

The Contractor shall give the Superintendent 7 days' notice of the date upon which the Contractor proposes to commence work on the Site.

The Superintendent may reduce the period of notice required.

The Contractor shall commence work on the Site within 14 days after the Principal has given the Contractor possession of sufficient of the Site to enable the Contractor to commence work.

The Superintendent may extend the time for commencement of work on the Site.

33.235.2 Time for Practical Completion

The Contractor shall execute the ~~work under the Contract~~WUC to Practical Completion by the Date for Practical Completion.

Upon the Date of Practical Completion the Contractor shall give possession of the Site and the Works to the Principal.

33.335.3 Separable Portions

The interpretations of—

- (a) Date for Practical Completion;
- (b) Date of Practical Completion;

(c) Practical Completion,

and Clauses 5.2, ~~5.5, 5.7 (if applicable) 5.7, 5.8,~~ 16, 35, 37, 38, 42.3 and 42.5 shall apply separately to each Separable Portion and references therein to the Works and to ~~work under the Contract~~WUC shall mean so much of the Works and the ~~work under the Contract~~WUC as is comprised in the relevant Separable Portion.

If the Contract does not make provision for the amount of security, retention moneys, liquidated damages or bonus applicable to a Separable Portion, the respective amounts applicable shall be such proportion of the security, retention moneys, liquidated damages or bonus applicable to the whole of the ~~work under the Contract~~WUC as the value of the Separable Portion bears to the value of the whole of the ~~work under the Contract~~WUC.

33.435.4 Use of Partly Completed Works

If a part of the Works has reached a stage equivalent to that of Practical Completion but another part of the Works has not reached such a stage and the parties cannot agree upon the creation of Separable Portions, the Superintendent may determine that the respective parts shall be Separable Portions.

In using the Separable Portion that has reached Practical Completion, the Principal shall not hinder the Contractor in the performance of the ~~work under the Contract~~WUC.

33.535.5 Extension of Time for Practical Completion**Notices required under this Clause**

As soon as practicable but in any event no later than 10 days after it becomes evident to the Contractor that anything, including an act or omission of the Principal, the Superintendent or the Principal's employees, consultants, other contractors or agents, may delay WUC, the Contractor shall notify the Superintendent in writing (referred to herein as "Notice of Likely Delay") with details of the possible delay and the cause.

~~When it becomes evident to the Contractor that anything, including an act or omission of the Principal, the Superintendent or the Principal's employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall promptly notify the Superintendent in writing with details of the possible delay and the cause.~~

When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall give notice to the Superintendent who shall notify the Contractor in writing of the extent of the likely delay.

If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within ~~28-14~~ days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based and the number of Business Days claimed and with all supporting documentation reasonably required by the Superintendent (referred to herein as "Claim for Extension of Time"), the Contractor shall be entitled to an extension of time for Practical Completion.

Causes of delay

The causes are—

(a) any of the following:

~~events occurring on or before the Date for Practical Completion which are beyond the reasonable control of the Contractor including but not limited to—~~

- (i) ~~*† industrial conditions except where the industrial conditions are limited to the Site or are specifically directed at the Contractor and/or any of its subcontractors;~~
- (ii) ~~† any cessation of work resulting directly from inclement weather in excess of the allowance in the Annexure Part A;~~
- ~~occurring on or before the Date for Practical Completion and which are beyond the reasonable control of the Contractor; and~~
- (b) any of the following ~~events causes~~ whether occurring before, on or after the Date for Practical Completion—
- (i) delays caused by—
- the Principal;
 - the Superintendent;
 - the Principal's or Superintendent's employees, consultants, other contractors or agents;
- ~~(ii) actual quantities of work being greater than the quantities in the Bill of Quantities or the quantities determined by reference to the upper limit of accuracy stated in the Annexure (otherwise than by reason of a variation directed under Clause 40);~~
- ~~(iii)(ii) Latent eConditions;~~
- ~~(iv)(iii) variations directed under Clause 40;~~
- ~~(v)(iv) repudiation or abandonment by a Nominated Subcontractor;~~
- ~~(vi)(v) a changes in Legislative Requirements~~the law~~;~~
- ~~(vii)(vi) a directions by a municipal, public or statutory authority~~ies or corporation supplying goods or services of a nature formerly supplied by a public authority~~, but not where the direction arose from the failure of the Contractor to comply with a Legislative Requirement~~requirement referred to in Clause 14.1~~;~~
- ~~(viii)(vii) delays by a municipal, public or statutory authority~~ies or corporation supplying goods or services of a nature formerly supplied by a public authority~~ not caused by the Contractor;~~
- ~~claims referred to in Clause 17.1(v);~~
- ~~(ix)(viii) a ny-breach of the Contract by the Principal;~~
- ~~(x)(ix) any other cause which is expressly stated in the Contract to be a cause for extension of time for Practical Completion.~~

Concurrent delays

Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion provided that where the first cause of delay, being a delay listed in this Clause 35.5(a) or (b) to which the Contractor would otherwise be entitled to an extension of time continues uninterrupted during and after any concurrent cause of delay ends, the Contractor may, subject to the provisions of this Clause 35.5, be entitled to an extension of time for the duration of the first delay.

* † Note: Clauses 35.5 (a)(i) and 35.5(a)(ii) prefixed by '†' are optional and the Annexure should be completed appropriately. If the Annexure options are not completed, the particular Clause will apply.

Notwithstanding the preceding paragraph the Contractor shall be entitled to an extension of time if the concurrent delay occurs after the Date for Practical Completion and the cause of the delay is one or more of the events listed in Clauses 35.5(b)(i), 35.5(b)(iv), 35.5(b)(viii) and 35.5(b)(ix).

Considerations as to whether Contractor is or will be delayed

In determining whether the Contractor is or will be delayed in reaching Practical Completion regard shall not be had to—

- whether the Contractor can reach Practical Completion by the Date for Practical Completion without an extension of time;
- whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

~~With any claim for an extension of time for Practical Completion, or as soon as practicable thereafter, the Contractor shall give the Superintendent written notice of the number of days extension claimed.~~

Any claim for an Extension of Time shall show how the delay involves an activity or activities which are, on the basis of the Construction Program, critical to the progress of the Works. The Contractor shall not be entitled to an extension of time for any delay that cannot be demonstrated to affect a critical activity or activities in the Construction Program.

Compliance with Notice requirements

Strict compliance by the Contractor within the notice requirements of this Clause 35.5 being both the issue of a Notice of Likely Delay and the making of a claim for Extension of Time shall be a condition precedent to the Contractor's entitlement to an extension of time under the Contract and the Contractor shall not be entitled to an extension of time for any claim not notified to the Superintendent strictly in accordance within the provisions of and within the time limits set out in this Clause 35.5.

Superintendent grant of an extension of time

If the Contractor is entitled to an extension of time for Practical Completion the Superintendent shall, within 28 days after receipt of the ~~Claim notice for Extension of Time~~ of the number of Business Days extension claimed, grant a reasonable extension of time. If within the 28 days the Superintendent does not grant the full extension of time claimed, the Superintendent shall before the expiration of the 28 days give the Contractor notice in writing of the reason.

In determining a reasonable extension of time for an event causing delay, the Superintendent shall have regard to whether the Contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay.

~~Notwithstanding that the Contractor is not entitled to an extension of time the Superintendent may 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.~~

Notwithstanding that the Contractor is not entitled to or has not claimed or applied for an extension of time the Superintendent may 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. Under this paragraph the Superintendent is, notwithstanding the provisions of Clause 23, only obliged to exercise his discretion regarding an extension of time for the benefit of the Principal and not for the benefit of the Contractor.

A delay by the Principal or the failure of the Superintendent to grant a reasonable extension of time or to grant an extension of time within 28 days shall not cause the Date for Practical Completion to be set at large ~~but nothing in this paragraph shall prejudice any right of the Contractor to damages.~~

The Contractor warrants that it has made allowance for the inclement weather and industrial action allowances identified in Annexure Part A within the Construction Program.

33-635.6 Liquidated Damages for Delay in Reaching Practical Completion

If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in the Annexure 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 first occurs. Debts due to the Principal under this clause shall be immediately due and payable by the Contractor as those costs, losses and damages are incurred and notified by the Principal. The Principal may have recourse to security to recover all or part of the amounts due and payable under this clause 35.6.

If after the Contractor has paid or the Principal has deducted liquidated damages, the time for Practical Completion is extended, the Principal shall 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.

The provisions of this clause shall not limit the Principal's entitlement to damages at law.

* **33-735.7 Limit on Liquidated Damages**

The Contractor's liability under Clause 35.6 is limited to the amount stated in the Annexure Part A.

* **33-835.8 Bonus for Early Practical Completion**

If the Date of Practical Completion is earlier than the Date for Practical Completion the Principal shall pay the Contractor the bonus stated in the Annexure Part A for every day after the Date of Practical Completion to and including the Date for Practical Completion.

The total of the bonus shall not exceed the limit stated in the Annexure Part A.

35.9 Provisional Withholding of Delay Damages

- (a) Where the Superintendent considers, acting reasonably and by reference to the most current Construction Program, that the Contractor will not complete the Works by the Date for Practical Completion then the Superintendent may include in any payment certificate, deduction of an amount which it considers will become a debt due and repayable by the Contractor to the Principal by way of liquidated damages due under clause 35.6 above (liquidated damages for delay in reaching practical completion).
- (b) Where the amount provisionally deducted on account of liquidated damages exceeds the likely amount which will become due and payable by the Contractor to the Principal, the Superintendent shall make an adjustment in the next payment certificate.
- (c) Where the amount provisionally deducted exceeds the amount subsequently certified by the Superintendent, the Principal shall forthwith repay to the Contractor any liquidated damages deducted in excess of the certified amount.

3436 DELAY OR DISRUPTION COSTS

Where the Contractor has been granted an extension of time under Clause 35.5 for any delay or disruption caused by any of the events referred to in Clause 35.5(b)(i), the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.

~~Where the Contractor has been granted an extension of time under Clause 35.5 for any delay caused by any other event for which payment of extra costs for delay or disruption is~~

~~provided for in the Annexure or elsewhere in the Contract, the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.~~

The Contractor's entitlement to delay or disruption costs under this Clause 36 shall be the Contractor's sole remedy for delay or disruption caused by any of the events referred to in Clauses 35.5(b)(i) and the Contractor shall not be entitled to any increase in the Contract Sum, damages, costs or expenses arising out of or in connection with any delay or disruption caused by any other event whatsoever.

Nothing in Clause 36~~36~~ shall—

oblige the Principal to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Contract;~~or~~

~~limit the Principal's liability for damages for breach of contract.~~

Within 14 days of the Superintendent granting an extension of time under Clause 35.5, the Contractor shall give the Superintendent a written claim for any delay or disruption costs associated with the delay the subject of the extension of time, pursuant to this clause. Compliance with the time and notice requirements is a condition precedent to any entitlement to delay or disruption costs pursuant to this clause.

3537 DEFECTS LIABILITY

The Defects Liability Period stated in the Annexure Part A shall commence on the Date of Practical Completion.

As soon as possible after the Date of Practical Completion, the Contractor shall rectify any defects or omissions in the ~~work under the Contract~~WUC existing at Practical Completion.

At any time ~~prior to the 14th day after the expiration of the~~during the Defects Liability Period, the Superintendent may direct the Contractor to rectify any omission or defect in the ~~work under the Contract~~WUC existing at the Date of Practical Completion or which becomes apparent prior to the expiration of the Defects Liability Period. The direction shall identify the omission or defect and state a date by which the Contractor shall complete the work of rectification and may state a date by which the work of rectification shall commence. The direction may provide that in respect of the work of rectification there shall be a separate Defects Liability Period of a stated duration not exceeding the period stated in the Annexure Part A. The separate Defects Liability Period shall commence on the date the Contractor completes the work of rectification. This Clause 37 shall apply in respect of the work of rectification and the Defects Liability Period for that work of rectification.

If the work of rectification is not commenced or completed by the stated dates, the Principal may have the work of rectification carried out at the Contractor's expense, but without prejudice to any other rights that the Principal may have against the Contractor with respect to such omission or defect and the cost of the work of rectification incurred by the Principal shall be a debt immediately due from the Contractor which may be recovered through any security held by the Principal.

If it is necessary for the Contractor to carry out work of rectification, the Contractor shall do so at times and in a manner which cause as little inconvenience to the occupants or users of the Works as is reasonably possible.

3638 CLEANING UP

The Contractor shall keep the Site and the work clean and tidy. The Contractor shall regularly remove rubbish and surplus material. Without limiting any other provision of this Contract, the Contractor shall be liable for the cost of removing all demolition rubble and building material.

Within 14 days after the Date of Practical Completion the Contractor shall remove Temporary Works and Constructional Plant.

Prior to, and as a condition of Practical Completion, the Contractor shall leave the Works fit for immediate occupation or use and in a clean and safe condition. Without limiting the Contractor's obligations under this Contract, the Contractor should ensure that in clearing the Site including for occupation or use, where applicable, no Asbestos or Asbestos-containing Material is left in a state that asbestos dust may be dispersed into the atmosphere. All Asbestos or Asbestos-containing Material must be removed from Site and disposed of in accordance with all Legislative Requirements. The Contractor shall, and shall be deemed to have included, the costs of handling of disposing of Asbestos and Asbestos-containing Material in the Contract Sum.

The Superintendent may extend the time for removal of Temporary Works or Constructional Plant necessary to enable the Contractor to perform remaining obligations.

Notwithstanding the provisions of Clause 44, if the Contractor fails to comply with any obligation imposed on the Contractor by this Clause 38, the Superintendent may, after the Superintendent has given reasonable notice in writing to the Contractor, have the work of cleaning and tidying up carried out by other persons and the reasonable cost incurred by the Principal in having the work so carried out may be recovered by the Principal as a debt due from the Contractor to the Principal. The rights given by this paragraph are in addition to any other right.

3739 URGENT PROTECTION

If urgent action is necessary to protect the ~~work under the Contract~~WUC, other property or people and the Contractor fails to take the action, the Principal may 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 shall be a debt due from the Contractor.

If time permits, the Superintendent shall give the Contractor prior written notice of the Principal's intention to take action under this Clause 39.

3840 VARIATIONS

38.140.1 Variations to the Work

The Superintendent may direct the Contractor to do any one or more of the following —

- (a) increase, decrease or omit any part of the ~~work under the Contract~~WUC;
- (b) change the character or quality of any material or work;
- (c) change the levels, lines, positions or dimensions of any part of the ~~work under the Contract~~WUC;
- (d) execute additional work; ~~and/or~~
- (e) demolish or remove material or work no longer required by the Principal.

The Contractor shall not vary the ~~work under the Contract~~WUC except as directed by the Superintendent in writing or approved in writing by the Superintendent under Clause 40.

The Contractor shall not be entitled to claim the costs of any variation to the Contract without:

- (i) advising the Superintendent in writing of the cost of any variation; and
- (ii) receiving written authorisation from the Principal in respect of any cost before incurring the cost.

Strict compliance by the Contractor with the requirements of this Clause 40 shall be a condition precedent to the Contractor's entitlement to claim any costs in connection with a variation to the Works.

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

Except where otherwise provided in the Contract, the Contractor shall not be obliged to carry out any variation directed after the Date for Practical Completion. Where the Contractor agrees to, or does carry out work the subject of a variation directed after the Date for Practical Completion, the Contractor's entitlement to payment should be as set out in this Contract.

~~The Contractor shall not be bound to execute a variation directed after Practical Completion unless the variation is in respect of rectification work referred to in Clause 37.~~

38.240.2 Proposed Variations

Upon receipt of a notice in writing from the Superintendent advising the Contractor of a proposed variation under Clause 40, the Contractor shall advise the Superintendent whether the proposed variation can be effected. If the variation can be effected, the Contractor shall—

- (a) advise the Superintendent in writing of the effect which the Contractor anticipates that the variation will have on the construction program and time for Practical Completion; and
- (b) provide an estimate of the cost (including delay costs, if any) of the proposed variation.

The Principal shall reimburse the Contractor for the reasonable costs of complying with the requirements of Clause 40.2.

38.340.3 Pricing the Variation

Unless the Superintendent and the Contractor agree upon the price for a variation, the variation directed or approved by the Superintendent under Clause 40.1 shall be valued under Clause ~~40.5~~40.5.

The Superintendent may direct the Contractor to provide a detailed quotation for the work of a variation supported by measurements or other evidence of cost.

38.440.4 Variations for the Convenience of the Contractor

If the Contractor requests the Superintendent to approve a variation for the convenience of the Contractor, the Superintendent may do so in writing. The approval may be conditional.

Unless the Superintendent otherwise directs in the notice approving the variation, the Contractor shall not be entitled to—

- (a) an extension of time for Practical Completion; or
- (b) extra payment,

in respect of the variation or anything arising out of the variation which would not have arisen had the variation not been approved.

The Superintendent shall not be obliged to approve a variation for the convenience of the Contractor.

38.540.5 Valuation

Where the Contract provides that a valuation shall be made under this Clause 40.5, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount ascertained by the Superintendent as follows—

- (a) if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;
- (b) if Clause 40.5(a) does not apply, the rates or prices in a Priced Bill of Quantities or Schedule of Rates shall be used to the extent that it is reasonable to use them;
- (c) to the extent that neither Clause 40.5(a) or 40.5(b) apply, reasonable rates or prices shall be used in any valuation made by the Superintendent;
- ~~(d) in determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads;~~
- (d) to the extent that neither Clause 40.5(a), (b) nor (c) applies, as Daywork valued in accordance with Clause 41; and
- (e) if the valuation is of an increase or decrease in a fee or charge or is a new fee or charge under Clause 14.2, the value shall be the actual increase or decrease or the actual amount of the new fee or charge without regard to overheads or profit;
- ~~(f) if the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit;~~
- ~~(g) if Clause 11(b) applies, the percentage referred to in Clause 11(b) shall be used for valuing the Contractor's profit and attendance; and daywork shall be valued in accordance with Clause 41.~~

For the purposes of a valuation to be made in accordance with:

- (i) Clause 40.5(a) or (b):
 - (A) where the variation results in a net increase to the value of work, the valuation shall be based on the specific rates or prices and not include or entitle the Contractor to any additional amount for profit and overheads;
 - (B) in determining the deduction to be made for work which is taken out of the Contract, the deduction shall be based on the specific rates or prices and not include or entitle the Contractor to any additional amount for profit and overheads.
- (ii) clause 40.5(c) or (d):
 - (A) where the variation results in a net increase to the value of work, the valuation shall include an amount for profit and overhead as set out in Annexure Part A provided that where the valuation refers to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a reasonable amount for overheads but not profit;
 - (B) in determining the deduction to be made for work which is taken out of the Contract, the deduction shall include an amount for profit and overhead as set out in Annexure Part A.

When under Clause 40.3 the Superintendent directs the Contractor to support a variation with measurements and other evidence of cost, the Superintendent shall allow the Contractor the reasonable cost of preparing the measurements or other evidence of cost that has been incurred over and above the reasonable overhead cost.

40.6 Superintendent's Direction

If the Contractor considers that any direction made by the Superintendent or the Principal constitutes a variation but which is not stated by the Superintendent or Principal to be a variation then the Contractor must give notice in writing to the Superintendent detailing the extent of WUC affected by the direction prior to the commencement of the work the subject of the direction ("Contractor's Notice").

The giving of the Contractor's Notice prior to the start of the work is a condition precedent to the Contractor's entitlement to maintain any claim for a variation relating to such direction.

The Contractor must not commence the work the subject of the direction or the Contractor's Notice until:

- (a) the Superintendent gives the Contractor details of the following:
 - (i) the variation to the Works to be carried out;
 - (ii) the adjustment to the Contract Sum (if any);
 - (iii) the adjustment to the Date for Practical Completion as a consequence of the variation (if any); or
- (b) the Superintendent gives the Contractor written notice that it disputes the Contractor's claim in the Contractor's Notice that the work the subject of the direction is a variation and instructs the Contractor to proceed with the Works as directed.

If the Superintendent does not respond to the Contractor's Notice the Contractor may give notice of dispute under Clause 47. Notwithstanding the existence of a dispute the Principal and the Contractor shall continue to perform the Contract including the Work the subject of the disputed direction.

Where the Superintendent issues a notice under (b), the Contractor may give notice of a dispute under Clause 47. Notwithstanding the existence of a dispute the Principal and the Contractor shall continue to perform the Contract including the work the subject of the disputed direction.

No conduct on the part of the Superintendent or the Principal shall be construed as constituting a waiver of the notice requirements of this clause and the Contractor shall not be entitled to payment for any variation unless it has complied strictly and literally with the notice provisions of this Clause 40.

40.7 Extensions of Time on Account of Variations

Where extensions of time for Practical Completion have been granted by the Superintendent on account of authorised variations, the provisions of Clause 40.5 shall be deemed to cover all extra costs incurred by the Contractor and notwithstanding the provisions of Clause 36, no further claim for extra costs of the Contractor shall be accepted by the Principal.

3941 DAYWORK

The Superintendent may direct that quantities greater than those determined by reference to the upper limit of accuracy referred to in Clause 3.3 or variations directed by the Superintendent under Clause 40.1 shall be carried out as Daywork. The Contractor shall thereafter each day 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.

In determining the value of Daywork regard shall be had to—

- (a) 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;
- (b) 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(a);

- (c) 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;
- (d) the amounts paid for services, subcontracts and professional fees;
- (e) the actual cost to the Contractor at the Site of all materials supplied and required for the work; and
- (f) the charge stated in the Annexure Part A or, if no charge is stated, a charge agreed between the Superintendent and the Contractor to cover overheads, administrative costs, site supervision, establishment costs, ~~attendance~~ and profit, or, in the absence of agreement, a reasonable charge determined by the Superintendent.

Amounts payable for Daywork shall not be subject to adjustment for rise and fall ~~in costs notwithstanding that the Contract may provide for adjustment for rise and fall in costs.~~

4042 CERTIFICATES AND PAYMENTS

40.142.1 Payment Claims, Certificates, Calculations and Time for Payment

At the times for payment claims stated in the Annexure Part A and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract ~~or for any alleged breach thereof.~~

Where applicable, claims shall be based on prices and rates shown in the Bill of Quantities. The individual items in the Bill of Quantities shall be used for the calculation of progress payments and the determination of variations where applicable.

If the time for any payment claim under the preceding paragraph falls on a day which is not a Business Day, the Contractor shall submit the claim on the day before that date which is a Business Day. If the Contractor submits a payment claim before the time for lodgement of that payment claim described in the Contract, such early lodgement shall not require the Superintendent to issue the payment certificate in respect of that payment claim earlier than would have been the case had the Contractor submitted the payment claim in accordance with the Contract.

Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the certified amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference.

The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6:

- (a) amounts previously paid under the Contract; ~~and~~
- (b) amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal; ~~arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract.~~

- (c) the value of the work performed to the date of the payment claim;
 - (d) amounts previously deducted for retention moneys pursuant to Annexure Part A; and
 - (e) retention moneys to be deducted pursuant to Annexure Part A,
- arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.

Where the Superintendent fails to issue a payment certificate for the amount claimed by the Contractor, or fails to issue a payment certificate at all, the Contractor's payment claim, or part thereof, shall be deemed to be rejected.

If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.

The Contractor shall, upon issue of a progress certificate, issue a tax invoice that complies with the requirements in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) for the amount identified in the progress certificate. The issue of a tax certificate by the Contractor is a condition precedent to payment.

Subject to the provisions of the Contract, ~~within 28 days after receipt by the Superintendent of a claim for payment or~~ within 14 days of issue by the Superintendent of the Superintendent's payment certificate, ~~whichever is the earlier,~~ the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the ~~c~~ Certificate as due to the Contractor or to the Principal as the case may be, ~~or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim.~~

A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.

Notwithstanding the issue by the Superintendent of any payment certificate, the Contractor shall not be entitled to any payment otherwise under the Contract until it has:

- (a) provided the Principal with any security required under Clause 5.2;
- (b) provided the Principal with proof of insurances under Clause 21.1;
- (c) executed the Formal Instrument of Agreement issued by the Principal and returned it to the Principal;
- (d) provided any other information requested in writing by the Superintendent pursuant to the Contract;
- (e) where requested by the Superintendent, provide evidence of its compliance with the OHS Accreditation Scheme where compliance is required under this Contract;
- (f) if requested by the Principal, lodged a 'Recipient Created Tax Invoice Agreement' with the Superintendent;
- (g) provided the statutory declarations required under Clause 43; and-
- (h) complied with clause 5.10 if applicable.

~~Notwithstanding Clause 42.4, the Principal shall be obliged to pay for any item of unfixed plant and materials where that item is—~~

- ~~(a) to be imported into Australia, provided the Contractor has given the Principal a clean on board bill of lading or its equivalent, drawn or endorsed to the order of the Principal and, where appropriate, a custom's invoice for the item; or~~
- ~~(b) listed in the Annexure and which is not an item to be imported into Australia, provided the Contractor establishes to the satisfaction of the Superintendent that the Contractor has paid for the item, and the item is properly stored, labelled the property of the Principal and adequately protected.~~

~~Upon payment to the Contractor of the amount which includes the value of the item, the item shall be the property of the Principal free of any lien or charge.~~

Except as provided in the Contract, the Principal shall not be obliged to pay for any item of unfixed plant and materials which is not incorporated in the Works.

40.242.2 Correction of Payment Certificates

At any time and from time to time, the Superintendent may by a further certificate correct any error which has been discovered in any previous certificate, other than a Certificate of Practical Completion or Final Certificate.

40.342.3 Retention Moneys

The Principal may deduct from moneys otherwise due to the Contractor amounts up to the limit of the percentages, if any, stated in the Annexure Part A of so much of the value of the respective items stated in the Annexure Part A as is included in the calculation of a payment.

40.442.4 Unfixed Plant and Materials

Alternative 1

If the Contractor claims payment for plant or materials intended for incorporation in the Works but not incorporated, the Principal shall not be obliged to make payment for the plant or materials unless the Contractor provides additional security in one of the forms provided by Clause 5.3 in an amount equal to the payment claimed for the plant or materials.

Upon payment to the Contractor of the amount which includes the value of the item, the item shall be the property of the Principal free of any lien or charge.

Alternative 2

~~If the Contractor claims payment for plant or materials intended for incorporation in the Works but not incorporated the Principal shall not be obliged to make payment for such plant or materials but the Principal may make payment, if the Contractor establishes to the satisfaction of the Superintendent that —~~

- ~~(a) such plant or materials have reasonably but not prematurely been delivered to or adjacent to the Site;~~
- ~~(b) ownership of such plant and materials will pass to the Principal upon the making of the payment claimed; and~~
- ~~(c) such plant or materials are properly stored, labelled the property of the Principal and adequately protected.~~

~~Upon payment to the Contractor of the amount claimed, the plant or materials the subject of the claim shall be the property of the Principal free of any lien or charge.~~

Alternative 3

~~The Contractor shall not be entitled to payment for plant or materials not incorporated in the Works.~~

The ownership of goods that are –

- (a) related in any way to the Works, including works in progress; and
- (b) supplied to the site of the Works whether the site of the Works be at the Contractor's premises, the Site or elsewhere.

passes from the Contractor to the Principal when whichever of the following happens first:

- (i) when the Contractor receives a progress payment in relation to the construction work; or
- (ii) when the Contractor is paid for the goods; or
- (+)(iii) when the goods become fixtures.

40.542.5 Certificate of Practical Completion

The Contractor shall give the Superintendent at least 14 days notice of the date upon which the Contractor anticipates that Practical Completion will be reached.

When the Contractor is of the opinion that Practical Completion has been reached, the Contractor shall in writing request the Superintendent to issue a Certificate of Practical Completion. Within 14 days of the receipt of the request, the Superintendent shall give to the Contractor and to the Principal a Certificate of Practical Completion certifying the Date of Practical Completion or give the Contractor in writing the reasons for not issuing the Certificate.

When the Superintendent is of the opinion that Practical Completion has been reached, the Superintendent may issue a Certificate of Practical Completion whether or not the Contractor has made a request for its issue.

The reasonable exercise of the Superintendent's discretion under this clause shall be grounds for refusing to issue a Certificate of Practical Completion and shall not constitute a breach of the Contract.

40.642.6 Effect of Certificates

The issue of a payment certificate or a Certificate of Practical Completion shall not constitute approval of any work or other matter nor shall it prejudice any claim by the Principal or the Contractor.

Without prejudice to any provision of the Contract requiring the Contractor to comply with any earlier time provisions, the Contractor shall, within 28 days of the ~~The~~ issue of a ~~payment certificate or a~~ Certificate of Practical Completion provide the Superintendent with a summary of any act, fact, matter or thing which the Contractor intends to rely upon as a basis for any claim for payment of any amount under the Contract. The Principal shall not, in any event, be liable for any claim not notified to the Superintendent in accordance with the provisions of this Clause.~~shall not constitute approval of any work or other matter nor shall it prejudice any claim by the Principal or the Contractor.~~

40.742.7 Final Payment Claim

Within 28 days after:

- (a) the expiration of the Defects Liability Period, or where there is more than one, the last to expire; ~~;~~ or
 - (b) the completion of all defects notified to the Contractor under clause 37,
- whichever is the latter,

the Contractor shall lodge with the Superintendent a final payment claim and endorse it 'Final Payment Claim'.

The Contractor shall 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.

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 shall be barred.

40.842.8 Final Certificate

Within 14 days after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim, the expiration of the period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor and to the Principal a final payment certificate endorsed 'Final Certificate'. In the certificate the Superintendent shall 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.

~~Unless either party, either before the Final Certificate has been issued or not later than 15 days after the issue thereof, serves a notice of dispute under Clause 47, the Final Certificate shall be evidence in any proceedings of whatsoever nature and whether under the Contract or otherwise between the parties arising out of the Contract, that the Works have been completed in accordance with the terms of the Contract and that any necessary effect has been given to all the terms of the Contract which require additions or deductions to be made to the Contract Sum, except in the case of—~~

- ~~(a) fraud, dishonesty or fraudulent concealment relating to the Works or any part thereof or to any matter dealt with in the said Certificate;~~
- ~~(b) any defect (including omission) in the Works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate; or~~
- ~~(c) any accidental or erroneous inclusion or exclusion of any work, plant, materials or figures in any computation or any arithmetical error in any computation.~~

~~The issue of a Final Certificate by the Superintendent shall not constitute approval of any work or any other matter nor shall it prejudice any claim by the Principal.~~

Within 14 days after the issue of a Final Certificate which certifies a balance owing by the Principal to the Contractor, the Principal shall release to the Contractor any retention moneys or security then held by the Principal, except to the extent that it has claimed amounts due by the Contractor to the Principal.

40.942.9 Interest on Overdue Payments

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the rate stated in the Annexure Part A and if no rate is stated the rate shall be 18 percent per annum. Interest shall be compounded at six monthly intervals.

40.1042.10 Set Offs by the Principal

The Principal may deduct from moneys due to the Contractor any money due or any amount the Principal reasonably considers will become due from the Contractor to the Principal ~~otherwise than~~ under the Contract or otherwise and if those moneys are insufficient, the Principal may, subject to Clause 5.5, have recourse to retention moneys and, if they are insufficient, then to security under the Contract.

40.1142.11 Recourse for Unpaid Moneys

Where:

- (a) ~~within the time provided by the Contract, a party~~ the Contractor fails to pay the ~~other party~~ Principal an amount due and payable;
- (b) an amount is expressed as being immediately due and payable or payable forthwith;
or
- (c) an amount is otherwise due and payable by the Contractor to the Principal,

under the Contract, the ~~other party~~ Principal may, subject to Clause 5.5, have recourse to retention moneys, if any, and, if those moneys are insufficient, then to security under the Contract and any deficiency remaining may be recovered by the ~~other party~~ Principal as a debt immediately due and payable.

4143 PAYMENT OF WORKERS AND SUBCONTRACTORS

- (a) Not earlier than 14 days after the Contractor has made each claim for payment under Clause 42.1, and before the Principal makes that payment to the Contractor, or at any other time requested by the Superintendent, the Contractor shall—~~Before the Principal makes each payment to the Contractor, the Superintendent may, not less than 5 days before a Payment Certificate is due, in writing request the Contractor—~~
 - (i) ~~to~~ give the Superintendent a statutory declaration (in a form approved by the Principal) by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all workers who have at any time been employed by the Contractor on ~~work under the Contract~~ WUC have at the date of the request been paid all moneys due and payable to them in respect of their employment on the ~~work under the Contract~~ WUC; and
 - (ii) ~~to~~ if requested by the Superintendent, provide documentary evidence to the Superintendent that at the date of the declaration request all workers who have been employed by a subcontractor of the Contractor have been paid all moneys due and payable to them in respect of their employment on the ~~work under the Contract~~ WUC.
- (b) Not earlier than 14 days after the Contractor has made each claim for payment under Clause 42.1, and before the Principal makes that payment to the Contractor, or at any other time requested by the Superintendent, the Contractor shall give to the Superintendent a statutory declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all subcontractors have been paid all moneys due and payable to them in respect of ~~work under the Contract~~ the WUC and, if requested by the Superintendent, that lists the names and contact details of each subcontractor and supplier, engaged to perform the WUC.
- (c) If the Contractor fails—
 - (i) ~~to comply with Clause 43(a)(i) and (ii), if applicable; within five days after a request by the Superintendent under Clause 43(a), to provide the statutory declaration, or the documentary evidence (as the case may be) required pursuant to Clause 43;~~ or
 - (ii) to comply with Clause 43(b),

then notwithstanding Clause 42.1, the Principal may withhold payment of moneys due to the Contractor until the statutory declaration or documentary evidence (as the case may be) is received by the Superintendent.

If the Contractor provides to the Superintendent satisfactory proof of the maximum amount due and payable to workers and subcontractors by the Contractor, the Principal shall not be entitled to withhold any amount in excess of the maximum amount.

At the written request of the Contractor and out of moneys payable to the Contractor, the Principal may on behalf of the Contractor make payments directly to any worker or subcontractor.

If any worker or subcontractor obtains a court order or adjudication determination under the Construction Contracts Act 2004 (WA) in respect of moneys referred to in Clause 43(a) or (b) and produces to the Principal the court order or adjudication determination and a statutory declaration that it remains unpaid, the Principal may pay the amount of the order, and costs included in the order, to the worker or subcontractor and the amount paid shall be a debt due from the Contractor to the Principal.

After the making of a sequestration order or a winding up order in respect of the Contractor, the Principal shall not make any payment to a worker or subcontractor without the concurrence of the official receiver or trustee of the estate of the bankrupt or the liquidator as the case may be.

For the avoidance of doubt, the Contractor consents to the Superintendent and the Principal contacting the Contractor's workers, subcontractors and suppliers for the purpose of auditing a statutory declaration provided under this clause.

42.44 DEFAULT OR INSOLVENCY

42.144.1 Preservation of Other Rights

If a party breaches ~~or (including repudiates)~~ the Contract, nothing in ~~this Clause 44~~ shall prejudice the right of the other party to recover damages or exercise any other right or remedy.

42.244.2 Default by the Contractor

If the Contractor commits a substantial breach of the Contract, ~~and the Principal considers that damages may not be an adequate remedy, the Principal~~ may by hand or by certified post, give the Contractor a written notice to show cause.

Substantial breaches include, but are not limited to:

(a) failing to:

- (i) provide security where required under the Contract;
- (ii) provide evidence of insurance where required under the Contract;
- (iii) provide a Construction Program where required by Clause 33.2;
- (iv) comply with a direction of the Superintendent pursuant to subclause 30.3;
- (v) use the materials or standards of work required by the Contract;
- (vi) ensure the currency of any insurances; or
- (vii) execute and provide a Deed of Guarantee and Indemnity where requested pursuant to Clause 5.10 of the Contract;

(b) wrongful suspension of work;

(c) substantial departure from a construction program without reasonable cause or the Superintendent's approval;

(d) where there is no construction program, failing to proceed with due expedition and without delay;

- (e) breach of Clause 43 (payment of workers and subcontractors);
- (f) in respect of Clause 43, knowingly providing documentary evidence containing an untrue statement;
- (g) failing to comply with all payment obligations to workers and subcontractors in accordance with the provisions of the Contract;
- (h) the termination or dissolution of any partnership, joint venture or consortium the Contractor may have entered into for the purposes of the Contract;
- (i) any failure by the Contractor or any subcontractor or any person employed directly or indirectly by the Contractor to comply with all applicable health and safety legislation and building codes and standards;
- (j) where the Contractor uses dumped goods in the performance of the Contract without the express written consent of the Principal (for the purposes of this sub-clause, "dumped goods" means goods from overseas that are imported into Australia at less than their normal value, causing or threatening to cause material injury to an Australian industry producing like goods or materially hindering the establishment of such industry);
- (k) failure to comply with the Priority Start Policy where applicable;
- (l) failure to become accredited, maintain accreditation or comply with under the OHS Accreditation Scheme where required under this Contract;
- (m) any failure to comply with provisions of government procurement policies set out in the Tender Documents and/or the Contract documents;
- (n) any other breach expressly identified in the Contract as being a breach for the purposes of clause 44.

~~suspension of work, in breach of Clause 33.1;~~

- ~~(a) failing to proceed with due expedition and without delay, in breach of Clause 33.1;~~
- ~~(b) failing to lodge security in breach of Clause 5;~~
- ~~(c) failing to use the materials or standards of workmanship required by the Contract, in breach of Clause 30.1;~~
- ~~(d) failing to comply with a direction of the Superintendent under Clause 30.3, in breach of Clause 23;~~
- ~~(e) failing to provide evidence of insurance, in breach of Clause 21.1; and/or~~
- ~~(f) in respect of Clause 43, knowingly providing a statutory declaration or documentary evidence which contains a statement that is untrue.~~

42.344.3 Requirements of a Notice by the Principal to Show Cause

A notice under Clause 44.2 shall—

- (a) state that it is a notice under Clause 44.2 ~~44 of the General Conditions of Contract;~~
- (b) specify the alleged substantial breach;
- (c) require the Contractor to show cause in writing why the Principal should not exercise a right referred to in Clause 44.4;
- (d) specify the time and date by which the Contractor must show cause (which time shall not be less than 7 clear days after the notice is given to the Contractor); and
- (e) specify the place at which cause must be shown.

42.444.4 Rights of the Principal

If by the time specified in a notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 44.4, the Principal may by hand or by certified post, give notice in writing to the Contractor to—

- (a) take out of the hands of the Contractor the whole or part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to clause 44.6; or
- (b) terminate the Contract.

Upon giving a notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of—

- (i) the date upon which the Contractor shows reasonable cause;
- (ii) the date upon which the Principal takes action under Clause 44.4 (a) or (b); or
- (iii) the date which is 7 days after the last day for showing cause in the notice under Clause 44.2.

If the Principal exercises the right under Clause 44.4 (a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 44.6.

42.544.5 Procedure when the Principal Takes Over Work

If the Principal takes work out of the hands of the Contractor under Clause 44.4 (a) the Principal shall complete that work and the Principal may:

- (a) use materials, equipment and other things intended for WUC; and
- (b) without payment of compensation to the Contractor,
 - (i) take possession of, and use such of the Constructional Plant and other things on or in the vicinity of the Site as are owned by the Contractor; and
 - (ii) contract with such of the Contractor's subcontractors and consultants as are reasonably required by the Principal to facilitate completion of the ~~work~~WUC.

If the Principal takes possession of Constructional Plant or other things, the Principal shall maintain the ~~m~~ Constructional Plant and, subject to Clause 44.6, on completion of the work, the Principal shall return such of them to the Contractor the Constructional Plant and any things taken under this Clause which are surplus.

The Superintendent shall keep records of the cost of completing the work.

42.644.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor

When work taken out of the hands of the Contractor under Clause 44.4(a), ~~is completed~~ the Superintendent shall ~~ascertain progressively assess~~ the cost incurred by the Principal in completing the work. Where the Superintendent's progressive assessment of costs incurred by the Principal in completing the work exceeds the amount which would have been payable to the Contractor for that work, the Superintendent shall certify as moneys due and payable, the difference between the cost incurred by the Principal and the amount which would have been payable to the Contractor if the work had been completed by the Contractor, and shall issue a certificate to the Principal and the Contractor certifying:
~~the amount of that cost~~

~~If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If, on completion of the works taken out of~~

~~the hands of the Contractor under clause 44.4(a),~~ the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Principal.

The Principal shall keep records of the cost ~~in a similar manner to that prescribed in Clause 41.~~

~~In addition to any other rights under the Contract, including but not limited to rights under clause 5.5, if~~ If the Contractor is indebted to the Principal, the Principal may retain Constructional Plant or other things taken under Clause 44.5 until the debt is satisfied. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the Constructional Plant or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor.

42.744.7 Default of the Principal

If the Principal commits a substantial breach of contract ~~and the Contractor considers that damages may not be an adequate remedy,~~ the Contractor may by hand or by certified post, give the Principal a written notice to show cause.

Substantial breaches include but are not limited to—

- ~~(a) failing to make a payment, in breach of Clause 42.1 provide security (if required);
failure by the Superintendent to either issue a Certificate of Practical Completion or give the Contractor, in writing, the reasons for not issuing the Certificate within 14 days of receipt of a request by the Contractor to issue the Certificate, in breach of Clause 42.5;~~
- ~~—failing to produce evidence of insurance, in breach of Clause 21.1;~~
- ~~(a) failing to make a payment due and payable pursuant to the Contract; or~~
- ~~(b) the Superintendent not giving a Certificate of Practical Completion or reasons as referred to in subclause 42.5.~~
- ~~(b) failing to give the Contractor possession of sufficient of the Site, in breach of Clause 27.1, but only if the failure continues for longer than the period stated in the Annexure; and/or~~
- ~~(c) failing to lodge security in breach of Clause 5.~~

42.844.8 Requirements of a Notice by the Contractor to Show Cause

A notice under Clause 44.7 shall—

- (a) state that it is a notice under Clause 44.7 ~~44 of the General Conditions of Contract;~~
- (b) specify the alleged substantial breach;
- (c) require the Principal to show cause in writing why the Contractor should not exercise a right referred to in Clause 44.9;
- (d) specify the time and date by which the Principal must show cause (which shall not be less than 7 clear days after the notice is given to the Principal); and
- (e) specify the place at which cause must be shown.

42.944.9 Rights of the Contractor

If by the time specified in a notice under Clause 44.7 the Principal fails to show reasonable cause why the Contractor should not exercise a right referred to in Clause 44.9, the Contractor may by hand or certified post issue a notice in writing to the Principal suspend the whole or any part of the ~~work under the Contract~~ WUC.

The Contractor shall lift the suspension if the Principal remedies the breach but if within 28 days after the date of suspension under Clause 44.9, the Principal fails to remedy the breach or, if the breach is not capable of remedy, fails to make other arrangements to the reasonable satisfaction of the Contractor, the Contractor may by notice in writing to the Principal terminate the Contract.

The Contractor shall be entitled to recover from the Principal any damages incurred by the Contractor by reason of the suspension.

42.1044.10 Rights of the Parties on Termination

If the Contract is terminated under Clause 44.4(b) or 44.9 the rights and liabilities of the parties shall be 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.

42.1144.11 Insolvency

If—

- (a) a party informs the other party in writing or creditors generally that the party is insolvent or is financially unable to proceed with the Contract;
- (b) execution is levied against a party by a creditor;
- (c) a party is an individual person or a partnership including an individual person, and if that person:
 - (i) commits an act of bankruptcy;
 - (ii) has a bankruptcy petition is presented against a party him or her or presents his or her own petition;
 - (iii) a party is made bankrupt;
 - (iv) makes a proposal for a scheme of arrangement or a composition; or
 - (v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration order made, under Part X of the Bankruptcy Act 1966 (Cwlth) or like provision under the law governing the Contract; or
- (d) in relation to a party being a corporation:
 - (i) notice is given of a meeting of creditors of a party is called with a view to the corporation entering a deed of company arrangement;
 - (ii) the party enters a deed of company arrangement with creditors;
 - (iii) a controller or administrator is appointed;
 - (iv) an application is made to a court for its winding up and not stayed within 14 days;
 - (v) a winding up order is made in respect of the party
 - (vi) it resolves by special resolution that it be wound up voluntarily (other than for a member's voluntary winding up); or
 - (vii) a mortgagee of any of its property takes possession of that property,

then, where the other party is:

 - (A) the Principal, the Principal may, without giving a notice to show cause, exercise the right under Clause 44.4; or
 - (B) the Contractor, the Contractor may, without giving a notice to show cause, exercise the right under subclause 44.9,

except to the extent that such a right is stayed by the operation of section 415D, 434J or 451E of the *Corporations Act 2001* (Cth).

The rights and remedies given by this Clause 44.11 are additional to any other rights and remedies. They may be exercised notwithstanding that there has been no breach of Contract.

- ~~(iii) entering a scheme of arrangement or composition with creditors; or~~
- ~~(iv) placing the party under official management;~~
- ~~(b) a party enters a scheme of arrangement or composition with creditors;~~
- ~~(c) a resolution is passed at a meeting of creditors to place a party under official management;~~
- ~~(d) a party is placed under official management;~~
- ~~(e) a receiver of the property or part of the property of a party is appointed;~~
- ~~(f) an application is made to a court for the winding up of a party and not stayed within 14 days;~~
- ~~(g) a winding up order is made in respect of a party; and/or~~
- ~~(h) execution is levied against a party by creditors, debenture holders or trustees or under a floating charge—~~
 - ~~(i) where the other party is the Principal, the Principal may, without giving a notice to show cause, exercise the right under Clause 44.4(a);~~
 - ~~(ii) where the other party is the Contractor, the Contractor may, without giving a notice to show cause, exercise the right under Clause 44.9.~~

~~The rights given by Clause 44.11 are in addition to any other rights and may be exercised notwithstanding that there has been no breach of contract.~~

* **4345 TERMINATION BY FRUSTRATION**

If, under the law governing the Contract, the Contract is frustrated, the Principal shall pay the Contractor—

- (a) for work executed prior to the date of frustration, the amount which would have been payable if the Contract had not been frustrated and the Contractor had made a progress claim on the date of frustration;
- (b) the cost of materials reasonably ordered by the Contractor for the ~~work under the Contract~~WUC, which the Contractor is liable to accept, but only if the materials become the property of the Principal upon payment;
- (c) costs reasonably incurred by the Contractor in the expectation of completing the whole of the ~~work under the Contract~~WUC and not included in any payment by the Principal;
- (d) all retention moneys and security;
- (e) the reasonable cost of removal of Constructional Plant;
- (f) the reasonable cost of return to their place of recruitment of the Contractor's employees engaged in the ~~work under the Contract~~WUC at the date of frustration.

4446 TIME FOR NOTIFICATION OF CLAIMS

44.146.1 Contractor's Prescribed Notice

The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract unless within 28 days after the first day upon which the

Contractor could reasonably have been aware of the breach, the Contractor has given to the Superintendent the prescribed notice.

Compliance with the timeframes in this clause is a condition precedent to any entitlement to a claim. The Principal shall not be liable for any claim whatsoever not notified within the timeframe required under this clause.

The Principal shall not be liable upon any other claim by the Contractor for any extra cost or expense in respect of or arising out of any direction or approval by the Superintendent unless within 42 days after the first day upon which the Contractor could reasonably have been aware of the entitlement to make the claim, the Contractor has given to the Superintendent the prescribed notice.

The prescribed notice is a notice in writing which includes particulars of all of the following—

- (a) the breach, act, omission, direction, approval or circumstances on which the claim is or will be based;
- (b) the provision of the Contract or other basis for the claim or proposed claim; and
- (c) the quantum or likely quantum of the claim.

This Clause 46.1 shall not have any application to—

- (i) any claim for payment to the Contractor of an amount or amounts forming part of the Contract Sum or any part thereof;
- (ii) any claim for payment for a variation directed by the Superintendent or to be made pursuant to Clause 12.3;
- (iii) any claim for an extension of time for Practical Completion; or
- (iv) the provisions of Clause 46.2.

44.246.2 Time for Disputing Superintendent's Direction

If the Superintendent—

- (a) has given a direction (other than a decision under Clause 47.2) pursuant to the Contract; and
- (b) has served a notice in writing on each party that if a party wishes to dispute the direction then that party is required to do so under Clause 47,

the direction shall not be disputed unless a notice of dispute in accordance with Clause 47.1 is given by one party to the other party and to the Superintendent within 56 days after the date of service on that party of the notice pursuant to Clause 46.2(b).

4547 DISPUTE RESOLUTION

45.147.1 Notice of Dispute

If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, or the subject matter thereof ('dispute') including a dispute concerning:

- (a) a direction given by the Superintendent, or
- (b) a claim in equity, tort or pursuant to any statute in relation to the subject matter of the Contract,

then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract, and subject to Clause 44, the Contractor shall continue with the ~~work under the Contract~~WUC and the Principal and the Contractor shall continue to comply with Clause 42.1.

~~A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in an arbitration.~~

45.247.2 Further Steps Required Before Proceedings

A party to the Contract shall first comply with the dispute resolution mechanisms set out in clause 47.2 and shall not commence any proceedings relating to the dispute unless it has complied with the dispute resolution procedures set out in this clause 47.2 except where the party seeks urgent interlocutory relief.

Alternative 1

Within 14 days after service of a notice of dispute, the parties shall confer ~~at least once, and at the option of either party and provided the Superintendent so agrees, in the presence of the Superintendent,~~ to attempt to resolve the dispute ~~and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means.~~ At this any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. All aspects of this conference shall be privileged except the fact of occurrence.

If one party fails to attend the conference, or In the event that the dispute cannot be so resolved within 7 days following the conference of the parties as provided in this clause, then either party may by further written notice to the other refer the dispute or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation.

Alternative 2

A party served with a notice of dispute may give a written response to the notice to the other party and the Superintendent within 28 days of the receipt of the notice.

Within 42 days of the service on the Superintendent of a notice of dispute or within 14 days of the receipt by the Superintendent of the written response, whichever is the earlier, the Superintendent shall give to each party the Superintendent's written decision on the dispute, together with reasons for the decision.

If either party is dissatisfied with the decision of the Superintendent, or if the Superintendent fails to give a written decision on the dispute within the time required under Clause 47.2 the parties shall, within 14 days of the date of receipt of the decision, or within 14 days of the date upon which the decision should have been given by the Superintendent confer at least once to attempt to resolve the dispute ~~and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means.~~ At any such conference, each party shall be represented by a person having authority to agree to a resolution of the dispute. All aspects of this conference shall be privileged except the fact of occurrence.

If one party fails to attend the conference, or In the event that the dispute has not been resolved within 7 days following the conference of the parties as provided in this clause, then either party may by further written notice to the other refer the dispute to litigation. cannot be so resolved or if at any time after the Superintendent has given a decision either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may, by notice in writing delivered by hand or sent by certified mail to the other party, refer such dispute to arbitration or litigation.

~~45.347.3—Arbitration [Not used]~~

~~Arbitration shall be effected by a single arbitrator who shall be nominated by the person named in the Annexure, or if no person is named, by the Chairperson for the time being of the Chapter of the Institute of Arbitrators Australia in the State or Territory named in the Annexure. Such arbitration shall be held in the State or Territory stated in the Annexure.~~

~~Unless the parties agree in writing, any person agreed upon by the parties to resolve the dispute pursuant to Clause 47.2 shall not be appointed as an arbitrator, nor may that person be called as a witness by either party in any proceedings.~~

~~Notwithstanding Clause 42.9, the arbitrator may award whatever interest the arbitrator considers reasonable.~~

~~If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake of law or fact, the arbitrator may order repayment together with interest.~~

~~45.447.4 Summary or Urgent Relief~~

~~Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under Clause 42 or to seek urgent injunctive or declaratory relief in respect of a dispute under Clause 47 or any matter arising under the Contract.~~

~~4648 WAIVER OF CONDITIONS~~

~~Except as provided at law or in equity or elsewhere in the Contract, none of the terms of the Contract shall be varied, waived, discharged or released, except with the prior consent in writing of the Principal in each instance.~~

~~49 SECURITY OF PAYMENT~~

~~It is a fundamental term of this Contract that the Contractor comply with all payment obligations under agreements between the Contractor and its subcontractors and suppliers in respect of the carrying out of the WUC.~~

~~Failure, without good cause, to so comply with any of such payment obligations will constitute a substantial breach of contract for the purposes of Clause 44 notwithstanding the provisions of Clause 43.~~

~~The Contractor must, promptly and without delay, give the Superintendent a copy of any written communication of whatever nature in relation to the *Construction Contracts Act 2004* (WA) that the Contractor gives or receives.~~

~~Any adjudication application under this Contract shall be made to the following prescribed appointor:~~

~~- Institute of Arbitrators and Mediators Australia.~~

~~50 PRIVACY OF SUBCONTRACT~~

~~The Contractor shall inform all subcontractors, including Nominated and Selected Subcontractors, that the contractual relationship between the Contractor and the subcontractor does not impose any express or implied legal obligation of any nature whatsoever in contract or by any other means on the part of the Principal to the subcontractor.~~

51 DISCLOSURE OF CONTRACT INFORMATION AND DOCUMENTS

51.1 Public Disclosure of Contract Details

- (a) The Contract award information for all contracts above \$20,000 will be publicly available and published on the Western Australian Government Contracting Information Bulletin Board after the contract is legally established.
- (b) Documents and other information relevant to the Contract may be disclosed when required by any Legislative Requirement, including without limitation under the *Freedom of Information Act 1992 (WA)*, for tabling documents in Parliament or under a Court order.

51.2 Access by Auditor General

The Parties acknowledge and agree that, notwithstanding any provisions of this Contract to the contrary, the powers and responsibilities of the Auditor General for the state of Western Australia under the *Auditor General Act 2006 (WA)* and *Financial Management Act 2006 (WA)* are not limited or affected by the terms of the Contract.

52 GOODS AND SERVICES TAX (GST)

- (a) For the purposes of this Clause:

“GST” means goods and services tax applicable to any taxable supplies as determined under the GST Act.

“GST Act” means A New Tax System (Goods and Services Tax) Act 1999 and (where the context permits) includes the Regulations and the Commissioner of Taxation’s Goods and Services Tax Rulings and Determinations made thereunder and any other written law dealing with GST applying for the time being in the State of Western Australia.

“Supply”, “taxable supply” and “tax invoice” have the same meanings as in the GST Act.

- (b) Where the supply of the works under the Contract or any part thereof is a taxable supply under the GST Act:
- (i) The Contract Sum shall be inclusive of all applicable GST at the rate in force for the time being;
- (ii) The Principal shall issue a Recipient Created Tax Invoice (“RCTI”) in respect of GST payable on each instalment of the Contract Sum and shall provide a copy of the RCTI to the Contractor. The RCTI shall contain all information required for a tax invoice under the GST Act and shall bear the ABN of the Contractor.
- (iii) The Principal shall issue an adjustment to the Contractor in relation to any adjustment events as they occur.
- (iv) The Contractor shall not issue tax invoices in respect of WUC or any part thereof.

This provision applies notwithstanding any other provision of the Contract or any legislation or rule of law to the contrary but does not apply if the Contractor is not registered for GST, and is not required to be so registered, under the GST Act.

The Contractor shall at all times observe, perform and comply with all applicable provisions of the GST Act relative to the supply of WUC.

53 PERSONAL PROPERTY SECURITIES ACT

- (a) In this clause,

‘PPS Law’ means:

- (i) the *Personal Property Securities Act 2009 (Cth)* (PPS Act);
- (ii) any regulations made at any time under the PPS Act;
- (iii) any amendments to any of the above, made at any time; or
- (iv) any amendment made at any time to any other legislation as a consequence of a PPS Law.

'Principal Secured Property' means all personal property the subject of a security interest granted under the Contract.

- (b) If, in the opinion of the Principal, a PPS Law applies, or will in the future apply to this agreement, or any other agreement between the Principal and the Contractor ("Transaction Documents") or any of the transactions provided for or contemplated by them and that PPS Law:

- (i) adversely affects or would adversely affect the Principal's security position or the rights or obligations of the Principal under or in connection with the Transaction Documents ("Adverse Effect"); or
- (ii) enables or would enable the Principal's security position to be improved without adversely affecting the Contractor in a material respect ("Improvement"),

the Principal may by notice to the Contractor require the Contractor to do anything (including amending any Transaction Document or executing any new document) that in the Principal's opinion is necessary or desirable to ensure that, to the maximum possible extent, the Principal's security position, and its rights and obligations, are not subject to an Adverse Effect or are improved by an Improvement. The Contractor must comply with the requirements of that notice within the time stipulated in that notice.

- (c) Without limiting any other provision of this Clause, the Contractor agrees to do anything the Principal requests (such as obtaining consents, providing information and signing and producing documents) in order to perfect, preserve, maintain, protect, or otherwise give full effect, under the PPS Law, to any Transaction Document and the security interest created by any Transaction Document, including without limitation:

- (i) registering any one or more financing statements in relation to the security interest created by any Transaction Document or any register established pursuant to the PPS Law;
- (ii) notifying the Principal as soon as the Contractor becomes aware of any of the following:
 - (A) if any personal property which does not form part of the Principal Secured Property becomes an accession to the Principal Secured Property and is subject to a security interest in favour of a third party, that has attached at the time it becomes an accession;
 - (B) if any of the Principal Secured Property is located or situated outside Australia; or
 - (C) upon request by the Principal, of the present location or situation of any of the Principal Secured Property;

- (iii) not doing any of the following:

- (A) creating any security interest or lien over any of the Principal secured property (other than security interests granted in favour of the Principal);
- (B) selling, lease or dispose of its interest in the Principal Secured Property;
- (C) giving possession of the Principal Secured Property to another person except where the Principal expressly authorises it to do so;

- (D) permitting any of the Principal Secured Property becoming an accession to or commingled with any asset that is not part of the Works; or
- (E) changing its name without first giving the Principal 21 days' notice of the new name or relocating its principal place of business outside Australia or changing its place of registration of incorporation.

- (d) Everything the Contractor is required to do under this clause is at the Contractor's expense.
- (e) To the extent permitted by s.275 of the PPS Act, the Contractor agrees to keep all information of the kind mentioned in s.275(i) of the PPS Act confidential and will not authorise and will use best endeavours to ensure no other third party authorises the disclosure of such information.

54 CIVIL LIABILITY ACT

To the extent allowed at law, Part 1F of the *Civil Liability Act 2002* (WA) does not apply to this Contract.

55 SEVERANCE

- (a) If a provision of this Contract is invalid, illegal or unenforceable, then to the extent of the invalidity, illegality or unenforceability, that provision or part of the provision must be ignored in the interpretation of this Contract.
- (b) The remaining provisions of this Contract remain in full force and effect.

56 LATE CLAIMS

Notwithstanding any provision of the Contract including Clause 46 of the General Conditions the Principal shall not be liable for any claim whatsoever by the Contractor in respect of any matter arising out of this Contract unless the claim together with full particulars thereof, is lodged in writing with the Principal not later than twenty (28) days after the date of commencement of the occurrence of the event or circumstances on which the claim is based.

57 ADVERTISEMENTS AND PROMOTIONS ON SITE

The Contractor may erect on site, or permit to be erected on site, only those signs

- (a) required by law;
- (b) specified in the Contract documents; and
- (c) required to identify the Contractor's premises.

The Contractor shall not erect on site, or permit to be erected on site, any other sign, advertisement, promotion or other display without the written approval of the Superintendent.

58 CONDITIONS OF EMPLOYMENT

In this clause:

"Award" has the meaning ascribed to it in the Conciliation and Arbitration Act 1904 (as amended) or the Industrial Arbitration Act 1979-1982 (as amended).

"Employee" has the meaning ascribed to it in the Conciliation and Arbitration Act 1904 (as amended) or the Industrial Arbitration Act 1979-1982 (as amended).

Any person or employer who for the purpose of its trade or business employs a person or Employee upon or in connection with any part of the WUC, shall be required to observe all the conditions of the relevant Award applicable to that trade or business, or the provisions of a registered Enterprise or Workplace Agreement.

59 OCCUPATIONAL SAFETY & HEALTH

59.1 Definitions

For the purposes of this Clause 59, the following words have the following meanings:

'OSH Legislations' means all occupational safety and health legislation relating to the Works that are in force from time to time, including but not limited to:

- (a) the Occupational Safety and Health Act (WA) 1984 and the Occupational Safety and Health Regulations (WA) 1996 and any replacing legislation;
- (b) and any Australian Standards or Approved Codes of Practice referred to or made under OSH Legislation; and
- (c) any licences, terms or conditions imposed under any OSH legislation including but not limited to:-
 - (i) the Health (Asbestos) Regulations 1992;
 - (ii) the Environmental Protection (Controlled Waste) Regulations (2004);
 - (iii) the National Code of Practice for the Management and Control of Asbestos in Workplaces [NO HSC: 2018 (2005)];
 - (iv) the National Code of Practice for the Safe Removal of Asbestos 2nd Edition [NO HSC: 2002 (2005)]; and
 - (v) any other relevant legislation or Australian Standard for the removal of Asbestos, Asbestos-Containing Material and hazardous material.

Incident means any actual or suspected:

- (a) breach of any requirement under OSH Legislation;
- (b) incidence of personal injury or harm to health;
- (c) any event that gives rise to a risk to the health and safety of persons participating or involved in the Services, whether or not such person is employed or engaged by the Supplier;
- (d) damage to any property owned or under the control of the Contractor where the Services are being performed;
- (e) any event that is notifiable to a relevant authority under OSH Legislation; and
- (f) any event that indicates that there may have been a breach of OSH Legislation.

59.2 OSH Rights and Obligations

(a) The Contractor must, throughout the duration of this Contract, ensure that:

- (i) it takes all reasonably practicable steps to maintain a safe working environment and ensure that any person engaged by the Contractor in the performance of the Works (whether an employee or not) is not exposed to a risk to their health or safety as a result of the Contractor's actions or omissions in performing the Works, including but not limited to ensuring that all persons involved in the Works:
 - (A) are fit for work and free from the impacts of drugs or alcohol;
 - (B) are adequately trained, supervised and monitored;

- (C) hold appropriate qualifications and licences;
 - (ii) it and all persons it engages to be involved in *the Works* comply with all of their obligations under OSH Legislation;
 - (iii) it develops, implements and maintains appropriate systems, policies and procedures to ensure that the health and safety of the persons the *Contractor* engages to be involved in *the Works* and the employees or persons engaged by the *Principal* are not adversely affected by the *Contractor's* operations; and
 - (iv) it cooperates with and assists the *Principal* to comply with the *Principal's* obligations under OSH Legislation.
- (b) Where an Incident occurs, the *Contractor* must in addition to its various obligations under OSH Legislation:
- (i) notify the *Superintendent* immediately;
 - (ii) advise the *Principal* in writing of the Incident;
 - (iii) ensure that no action is taken which might jeopardise the safety of persons, property or environment;
 - (iv) do everything reasonably possible to limit damage sustained as a result of the Incident and to restore the *site* for recommencement of *work* as soon as reasonably practicable;
 - (v) provide the *Principal* with a copy of its investigation report and associated documentation regarding the Incident and access to relevant plant and equipment;
 - (vi) not disclose, to any third party or *authority* including the Police and WorkSafe, any information, documentation, reports or material that is owned or has been created by the *Principal* without the *Principal's* prior *authority*;
 - (vii) cooperate with the *Principal* in the response to the Incident, including in any investigations by the authorities;
 - (viii) at the *Principal's* request, conduct a full and proper detailed investigation, under legal professional privilege, into the *Incident* and provide the *Principal* with a copy of that report;
 - (ix) do everything possible to maintain and not to waive the *Principal's* entitlement to legal professional privilege in relation to the *Incident*;
 - (x) do everything reasonably practicable to remedy the effects of the *Incident* and to prevent a similar incident from occurring in the future; and
 - (xi) comply with any *direction* given by the *Principal* as result of the Incident.

59.3 Material Safety Data Sheets

The Contractor shall ensure that a copy of all manufacturer/supplier material safety data sheets ("Material Safety Data Sheets") are available on a register on site for each hazardous substance used in connection with the WUC. Material Safety Data Sheets shall be consistent with the format of the National Code of Practice for the Preparation of Material Safety Data Sheets [NOHSC: 2011 (1994)].

59.4 Site and Public Security

Notwithstanding the Contractor's other obligations to ensure Site and public security, the Contractor shall monitor and control, wherever practicable, the access of all persons to the Site.

The Contractor shall ensure that no persons, unrelated to the Contract, enter the Site without the express permission of the Contractor.

PPE standards shall apply at all times and a person shall only enter the Site after that person has received a safety briefing regarding hazards relevant to the Site.

60 RELIANCE BY PRINCIPAL

The Contractor acknowledges that the Principal has relied on the warranties and acknowledgements described in the Contract in entering into this Contract.

61 SECURITY

The Contractor and the Principal covenant and agree that neither the Contract, nor any provision hereof, shall constitute a charge, encumbrance or lien of any nature or description whatsoever in respect of the Site as and by way of security for the performance of any obligation whatsoever on the part of the Principal to be observed or performed thereunder.

62 RECORD KEEPING RESPONSIBILITIES

In accordance with the provisions of the *State Records Act 2000 (WA)*, records created or collected by the Contractor in the course of contractual undertakings may be deemed a government -owned asset i.e. ownership and propriety interest of said documentation shall remain vested with the Principal in perpetuity.

The Contractor will create, receive and maintain records in accordance with the *State Records Act 2000 (WA)*, in a format that satisfies the Principal's legislative, business and accountability requirements.

The Contractor shall forward all records so deemed to the Principal for retention on Practical Completion.

63 CODE OF PRACTICE FOR THE CONSTRUCTION INDUSTRY

For the purposes of this clause 63, the following words have the following meanings:

- (a) 'Code' means the National Code of Practice for the Construction Industry as published by the Australian Government from time to time in accordance with the provisions of the *Building and Construction Industry Improvement Act 2005 (Cth)* ('BCII Act') and the Office of the Australian Building and Construction Commissioner ('ABCC'); and
- (b) 'Guidelines' means the Implementation Guidelines for the Code published from time to time by ABCC and the Australian Government Department of Employment and Workplace Relations. A copy of the Guidelines can be obtained from the Commonwealth Department of Employment and Workplace Relations.

The Contractor acknowledges that the parties are required to comply with the Code and Guidelines. The Contractor must, and warrants that it will also comply with the Code and Guidelines.

Without limiting the aforementioned provision, the Contractor agrees that it will:

- (a) require compliance with the Code and Guidelines from all its subcontractors and material suppliers;
- (b) require all of its secondary subcontractors and material suppliers to comply with the Code and Guidelines;
- (c) allow a person occupying a position in the ABCC to access any sites, documents and personnel in the control of the Contractor as provided for and consistent with their role to monitor compliance with the Code and Guidelines;

- (d) establish appropriate processes to support freedom of association and ensure that union right of entry to premises in the Contractor's control is in accordance with the law;
- (e) ensure that there is an Occupational Health, Safety and Rehabilitation plan for the Works;
- (f) ensure that where threatened or actual industrial action occurs on Site, the Contractor reports such action to the Principal;
- (g) responds (with the Principal's knowledge) to requests for information concerning Code- related matters made on behalf of the ABCC or the Principal and the ABCC;
- (h) ensure that it and its own subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour (if any) when it is drawn to their attention;
- (i) ensure that the Principal is notified of any alleged breaches, remedial action taken or any other Code- related matters within 21 days of becoming aware of an alleged breach of the Code;
- (j) ensure that sanctions applied under the Code are enforced including the exclusion of identified parties from work opportunities in accordance with the decisions advised by the Principal,

in accordance with the Section 6.3 of the Guidelines.

64 TRANSPORT OF GOODS

The Contractor shall satisfy itself of its obligations under the *Transport Co-ordination Act 1966 (WA)* with respect to any transport that may be required for WUC.

65 PRIORITY START POLICY

65.1 Application

This clause 65 applies if the contract value meets the criteria prescribed by the Priority Start Policy.

65.2 Definitions

For the purposes of this clause the following words have the following meanings:

- (a) “Apprentice” means a person undertaking an approved apprenticeship that leads to a nationally recognised qualification under a registered training contract;
- (b) “Compliance and Appeals Panels” means the panels responsible for reviewing requests by Contractors to vary the Target Training Rate and appeals;
- (c) “Construction Apprentices and Trainees” means apprentices and trainees working in an in scope apprenticeship or traineeship as published at www.dtwd.wa.gov.au;
- (d) “Construction Trades Workers” means all construction trades workers, including apprentices and trainees, in-scope of the *Priority Start Policy*, working on a full time, part time or casual basis, as published at www.dtwd.wa.gov.au;
- (e) “DTWD” means the Department of Training and Workforce Development, Western Australia;
- (f) “Subcontractor” means a contractor, other than the head contractor, working on the building, construction or maintenance contract whose workforce includes Construction Trades Workers in scope of the *Priority Start Policy*. This includes all subcontractors in the supply chain working on the Contract. It does not include manufacturers and suppliers of goods;
- (g) **Reporting period** – the twelve month period ending 30 June;

- (h) “Target Training Rate” means the required percentage of Construction Trades Workers who are apprentices/trainees across the combined Western Australian construction trades workforce of:
- (i) the head contractor; and
 - (ii) all Subcontractors used for the Contractor;
- (i) “Trainee” means a person undertaking an approved traineeship that leads to a nationally recognised qualification under a registered training contract; and
- (j) “Training Rate” means the number of construction apprentices and trainees as a percentage of the construction trades workforce for the head contractor and all Subcontractors used for the Contract. It is based on the combined Western Australian construction trades workforce of the:
- (i) head contractor;
 - (ii) all Subcontractors used for the Contract;

The Training Rate is arrived at using the following formula:

$$\text{Training Rate \%} = \frac{\text{(a) number of construction apprentices/trainees in training in WA}}{\text{(b) number of construction trades workers (full time equivalents) in WA}} \times 100$$

65.3 The Contractor to comply with Priority Start Policy

It is a condition of this Contract that the Contractor complies with the *Priority Start Policy (the policy)* and the terms contained in this clause and any breach of the policy or this clause by the Contractor shall be a substantial breach of the Contract.

Without limiting the application of the policy the Contractor must:

- (a) ensure that the Target Training Rate is met in the *Priority Start Training Rate Report* submitted each annual reporting cycle and at the end of the Contract, and is calculated consistently with the *Priority Start Policy*;
- (b) obtain from all in-scope Subcontractors, a count of their:
 - (i) directly employed construction Apprentices and Trainees;
 - (ii) Apprentices and Trainees employed through group training organisations (GTOs) or skill hire companies; and
 - (iii) Construction Trades Workers;for the purposes of complying with the *Priority Start Policy* and any other information to discharge their reporting obligations below;
- (c) report the Training Rate to the Principal every twelve month reporting period ending 30 June, for the duration of the Contract in the manner required by the Principal. Reports can be submitted no later than 30 days after the end of the financial year; and
- (d) keep all supporting information, documents and evidence that was used to calculate the number of Construction Apprentices and Trainees and Construction Trades Workers by the Contractor and its relevant Subcontractors engaged for each twelve month report period during the Contract, for audit purposes for a minimum of two years following contract completion.

65.4 Meeting the Training Rate

- (a) The *Priority Start Report* submitted by the Contractor under this clause must be in a form prescribed by the Principal. The report must identify Construction Apprentices and Trainees engaged or employed by the Contractor and Subcontractors in Western Australia and the Construction Trades Workers employed by the Contractor and its Subcontractors in Western Australia in the annual reporting period.

- (b) The report should contain the following information:
- (i) contract name, number and description;
 - (ii) contract award, construction commencement and estimated completion dates;
 - (iii) business name, Australian Business Number (ABN) and Australian Company Number (ACN) for the Contractor;
 - (iv) business name and ABN for all Subcontractors used for the Contract;
 - (v) number of Construction Apprentices and Trainees working during the reporting period in Western Australia for the Contractor, and all Subcontractors used for the Contract, including those on probation;
 - (vi) for those Construction Apprentices and Trainees hosted through a group training arrangement, by the Contractor and all subcontractors, the name of GTO or skill hire company;
 - (vii) number of Construction Trades Workers (full time equivalents) working in Western Australia during the reporting period for the Contractor and all Subcontractors used for the Contract; and
 - (viii) estimated Training Rate.

65.5 Variation of Target Training Rate

The Target Training Rate may be varied, at the request of the Contractor and at the absolute discretion of the Compliance Panel, pursuant to the following conditions being met:

- (a) the Contractor submits a written request (via the approved template) to the Compliance Panel for a variation of the Target Training Rate to apply for the duration of this Contract. The request must clearly set out the:
 - (i) Contractor's proposed varied Target Training Rate;
 - (ii) grounds for the variation with sufficient evidence to establish that:
 - (A) the Contractor undertakes a significant proportion of their overall work:
 - 1) in regional and/or remote areas; or
 - 2) on projects that do not allow Apprentices or Trainees on the worksite due to occupational health and safety risks;
 - (B) there has been limited or no construction work undertaken during a particular stage/year of the Contract; or
 - (C) there are other exceptional circumstances to justify a variation to the Target Training Rate; and
 - (iii) the proposed date for the varied Target Training Rate to take effect;
- (b) the Compliance Panel is satisfied there are sufficient exceptional circumstances to justify the Contractor's request to vary the Target Training Rate; and
- (c) following approval, the Principal and the Contractor sign a written variation agreement to the Target Training Rate, including the date the variation is to take effect.

Should the request not be approved by the Compliance Panel, the Contractor can appeal the decision by lodging a written request (via the approved template) with the Principal within 10 working days of notification of the decision.

65.6 Breach

Notwithstanding clause 44 of the Contract, a failure to comply with the requirements of this clause is deemed a substantial breach of Contract. In addition to the rights of the Principal under clause 44 of the Contract, the Principal may, at its absolute discretion and notwithstanding clause 42.1 of the Contract, withhold payment of moneys due to the Contractor until the Contractor satisfies the Principal that it has complied with the requirements of the policy, or is making a bona fide attempt to comply with the policy.

66 APPLICATION OF PREFERENCES

Where a Contractor was awarded the Contract on the basis of claiming a financial preference under Aboriginal Enterprise & Employment Tendering Preference and/or the Buy Local Policy (together, the Policies) during the tender period:

- (a) Where the Contractor fails to deliver on any of the undertakings made in order to gain the financial preferences under the Policies, the Principal to the Contract may, at its discretion:
 - (i) Recover from the Contractor as a debt immediately due and payable under the Contract, the whole or any part of the difference between the Contractor's offer and the amount of the next lowest conforming Tender;
 - (ii) Direct the Contractor to use goods, materials or services that comply with the specific provisions of the Policy or the Contractor's undertakings in regard to the Policy, and where directed by the Principal, such additional costs incurred by the Contractor shall be a cost borne by the Contractor.
- (b) Where the Contractor fails to comply with a direction under (a)(ii) above, the failure to comply will be considered to be a substantial breach for the purpose of 44.2 of the Contract.

67 AUSTRALIAN GOVERNMENT BUILDING AND CONSTRUCTION WHS ACCREDITATION SCHEME

- (a) Where the Contractor is required to be accredited under the Australian Government Building and Construction WHS Accreditation Scheme (WHS Scheme), then this clause applies.
- (b) Notwithstanding clause 44 of the General Conditions, a failure to either:
 - (i) maintain accreditation under the WHS Scheme or gain accreditation under the WHS Scheme within 12 months of the date of this Contract; or
 - (ii) comply with the requirements of the WHS Scheme at all times during the term of this Contract;

is deemed a substantial breach of Contract, and in addition to the rights of the Principal under clause 44 of the Contract, the Principal may at its absolute discretion:

 - (iii) suspend the Contractor from further contracting opportunities with the Principal for a period of time determined by the Principal in its absolute discretion;
 - (iv) notwithstanding clause 42.1 of the Contract, withhold payment of moneys due to the Contractor until the Contractor satisfies the Principal that it has complied with the requirements of the WHS Scheme; or
 - (v) do both (iii) and (iv) above.
- (c) Maintenance of accreditation is a condition precedent pursuant under the Contract.

68 OBLIGATION TO COMPLY WITH THE WESTERN AUSTRALIAN BUILDING AND CONSTRUCTION INDUSTRY CODE OF CONDUCT 2016

- (a) For the purposes of this clause 68, “Code” means the Western Australian Building and Construction Industry Code of Conduct 2016. The Code can be downloaded from: <http://www.commerce.wa.gov.au/publications/wa-building-and-construction-industry-code-conduct-2016>
- (b) The Contractor is subject to the Code, and must comply with each of the obligations described in the Code, for the term of the Contract.

69 HOUSING AUTHORITY ABORIGINAL EMPLOYMENT TARGETS IN CONSTRUCTION AND CIVIL WORKS CONTRACTS PRACTICE GUIDE KIMBERLEY AND PILBARA REGIONS

69.1 Application of this clause

- (a) This clause 69 applies if:
- (i) the Practice Guide applies to the Contract; and
 - (ii) the Works are situated in the Kimberley or Pilbara Regions as defined by the Practice Guide.
- (b) To the extent of any inconsistency between the terms of this clause 69 and any of the other terms of the Contract, the terms of this clause 69 prevail.

69.2 Definitions

For the purposes of this clause 69, the following words have the following meanings:

- (a) “Aboriginal Employment Plan” means the plan submitted by the Contractor and approved by the Principal that sets out how the Contractor will meet the requirements of the Practice Guide in respect of the Contract;
- (b) “Aboriginal Employment Report” means the report to be provided by the Contractor to the Principal for each Reporting Period in accordance with the Practice Guide and clause 69.5;
- (c) “Aboriginal Employment Target” means the employment target for Aboriginal Workers specified in the Aboriginal Employment Plan or such other target as agreed by the parties to the Contract in writing;
- (d) “Aboriginal Workers” has the meaning given in the Practice Guide;
- (e) “Practice Guide” means the *Housing Authority Aboriginal Employment Targets in Construction and Civil Works Contracts Practice Guide* in effect as at the date of the Contract;
- (f) “Reporting Period” means each calendar month from the date of the Contract until the completion of the Works, or such other period specified in the Practice Guide; and
- ~~(a)~~(g) “Site” means the land and other places made available to the Contractor by the Principal for the purpose of the Contract.

69.3 The Principal

- (a) The Principal is committed to implementing the Practice Guide and adhering to the principles contained in the Practice Guide.

69.4 Contractor Obligations

- (a) The Contractor must comply with the Practice Guide and the terms contained in this clause 69. Without limiting the application of the Practice Guide the Contractor must:
- (i) do all things reasonably necessary to meet the Aboriginal Employment Target;
 - (ii) within 10 business days after the end of each Reporting Period, submit to the Principal an Aboriginal Employment Report in the manner required by the Principal;
 - (iii) keep and provide access to the Principal or its agents, all supporting information, documents and evidence used to prepare the Aboriginal Employment Report for each Reporting Period; and
 - (iv) comply with the dispute resolution process in clause 69.8.

69.5 Aboriginal Employment Report

- (a) Unless otherwise agreed by the Principal in writing, each Aboriginal Employment Report submitted by the Contractor must be in the form prescribed by the Principal and contain the following information:
- (i) the Contract name, number and description;
 - (ii) date of award and date the Works commenced on the Site;
 - (iii) full legal entity name, business name, Australian Business Number for the Contractor and each of its Relevant Subcontractors;
 - (iv) the names, dates of birth and addresses of, and total number of hours worked by, Aboriginal Workers in connection with the performance of the Works during the Reporting Period;
 - (v) the total number of employees and contractors engaged by the Contractor and its Relevant Subcontractors and the total number of hours worked by these persons in connection with the performance of the Works during the Reporting Period; and
 - (vi) any other information reasonably requested by the Principal.

69.6 Verification of Compliance

- (a) The Principal reserves the right to verify and audit compliance with the Practice Guide and this clause 69.
- (b) The Contractor must, upon reasonable notice, provide the Principal or its agents, with access at any reasonable time and from time to time to the Site, the Contractor's premises, financial records, other documents, equipment and other property for the purpose of audit and inspection by the Principal in order to verify compliance by the Contractor with the Practice Guide and this clause 69.

69.7 Breach of Contract

- (a) A failure to comply with the requirements of the Practice Guide or this clause 69 is deemed a substantial breach of the Contract.
- (b) Subject to compliance with the dispute resolution provisions in clause 69.8 with respect to the Contractor's failure to meet the Aboriginal Employment Target, but otherwise without limitation to any other right of the Principal under the Contract, the Principal may at its absolute discretion do any or all of the following:

- (i) suspend the Contractor from further contracting opportunities with the Principal for a period of time determined by the Principal;
- (ii) downgrade or suspend the Contractor's status for works contracts with the Principal; or
- (iii) withhold payment of money due to the Contractor until the Contractor satisfies the Principal that it has complied with the requirements of the Practice Guide, or is making a bona fide attempt to ensure compliance with the Practice Guide.

69.8 Dispute Resolution

- (a) If at any time the Principal or the Contractor reasonably believes that the Contractor is, or will be, unable to meet the Aboriginal Employment Target, the party holding this belief must give a notice in writing to the other party under this clause.
- (b) On receipt of a notice under clause 69.8(a), the parties agree to use reasonable commercial efforts to agree a resolution:
 - (i) by a conference to be held within 14 days of receipt of a notice under clause 69.8(a) between the Superintendent appointed under the Contract (if any) on behalf of the Principal and a representative of the Contractor; and
 - (ii) if no resolution is achieved under clause 69.8(b)(i), by a conference to be held within 28 days of receipt of a notice under clause 69.8(a) between the management representatives of each of the Principal and the Contractor.
- (c) The discussions during any conference convened in accordance with this clause will be on a without prejudice basis.
- (d) The Principal will not exercise its remedies under the Contract for failing to meet the Aboriginal Employment Target unless it has made reasonable efforts to comply with the dispute resolution procedures set out in this clause 69.8.
- (e) Notwithstanding this clause 69.8, the Principal and the Contractor shall continue to perform the Contract, and the Contractor shall continue with the Works.

70 HOUSING AUTHORITY ABORIGINAL EMPLOYMENT TARGETS IN CONSTRUCTION AND CIVIL WORKS CONTRACTS PRACTICE GUIDE GASCOYNE, MID WEST, WHEATBELT, PEEL, SOUTH WEST, GREAT SOUTHERN, GOLDFIELDS/ESPERANCE AND METRO REGIONS

70.1 Application of this clause

- (a) This clause 70 applies if:
 - (i) the Practice Guide applies to the Contract; and
 - (ii) the Works are situated in the Gascoyne, Mid West, Wheatbelt, Peel, South West, Great Southern, Goldfields/Esperance or Metro Regions as defined by the Practice Guide.
- (b) To the extent of any inconsistency between the terms of this clause 70 and any of the other terms of the Contract, the terms of this clause 70 prevail.

70.2 Definitions

For the purposes of this clause 70, the following words have the following meanings:

- (a) “Aboriginal Employment Plan” means the plan submitted by the Contractor and approved by the Principal in accordance with clause 70.4;
- (b) “Aboriginal Employment Report” means the report to be provided by the Contractor to the Principal for each Reporting Period in accordance with the Practice Guide and clause 70.5;
- (c) “Aboriginal Workers” has the meaning given in the Practice Guide;
- (d) “Practice Guide” means the *Housing Authority Aboriginal Employment Targets in Construction and Civil Works Contracts Practice Guide* in effect as at the date of the Contract;
- (e) “Reporting Period” means each calendar month from the date of the Contract until the completion of the Works, or such other period specified in the Practice Guide; and
- (f) “Site” means the land and other places made available to the Contractor by the Principal for the purpose of the Contract.

70.3 Contractor Obligations

The Contractor must comply with the Practice Guide and the terms of this clause 70. Without limiting the application of the Practice Guide the Contractor must:

- (a) submit the Aboriginal Employment Plan in accordance with clause 70.4;
- (b) within 10 business days after the end of each Reporting Period, submit to the Principal an Aboriginal Employment Report in the manner required by the Principal; and
- (c) keep and provide access to the Principal or its agents, all supporting information, documents and evidence used to prepare the Aboriginal Employment Report for each Reporting Period.

70.4 Aboriginal Employment Plan

- (a) Within 30 calendar days after entering into the Contract (or such longer period as agreed by the Principal), the Contractor must submit to the Principal for approval the Aboriginal Employment Plan which complies with the Practice Guide.
- (b) After receiving the Aboriginal Employment Plan from the Contractor, the Principal must notify the Contractor if it approves the plan or if it requires amendments to the plan.

70.5 Aboriginal Employment Report

Unless otherwise agreed by the Principal in writing, each Aboriginal Employment Report submitted by the Contractor must be in the form prescribed by the Principal and contain the following information:

- (a) the Contract name, number and description;
- (b) date of award and date the Works commenced on the Site;
- (c) full legal entity name, business name, Australian Business Number for the Contractor and each of its Relevant Subcontractors;

- (d) the names and total number of hours worked by, Aboriginal Workers in connection with the performance of the Works during the Reporting Period;
- (e) the total number of employees and contractors engaged by the Contractor and its Relevant Subcontractors and the estimated total number of hours worked by these persons in connection with the performance of the Works during the Reporting Period; and
- (f) any other information reasonably requested by the Principal.

70.6 Verification of Compliance

The Principal reserves the right to verify and audit compliance with the Practice Guide and this clause 70.

71. THE WESTERN AUSTRALIAN INDUSTRY PARTICIPATION STRATEGY (WAIPS)

71.1 Application of this Clause

- (a) This clause 71 applies if:
 - (i) the contract value of the supply under the Contract meets the criteria prescribed by the *Western Australian Jobs Act 2017* and the *Western Australian Jobs Regulations 2018*; and
 - (ii) the Contract is not exempt from WAIPS.

71.2 Definitions

In this clause 71, the following terms have the following meanings, unless the context otherwise requires:

- (a) **Annual Report** has the meaning given in clause 71.5(a)(i).
- (b) **Final Report** has the meaning given in clause 71.5(a)(ii).
- (c) **Industry Link Advisory Service or (ILAS)** means Industry Link Advisory Service of Level 6, 1 Adelaide Terrace, East Perth, Western Australia 6004. ILAS plays a key role in liaising with Agencies and bidders in WAIPS applicable projects and procurements.
- (d) **Participation Plan** means the *Western Australian Industry Participation Strategy – Participation Plan* document submitted by the Contractor with its Tender for this Contract or otherwise forming part of the Contract documents or submitted after the award of the Contract, that complies with WAIPS and being to the satisfaction of the Principal.
- (e) **Participation Plan Obligations** means the Contractor's obligations under clause 71.3(b).
- (f) **Term** means the term of the Contract.
- (g) **WAIPS** means the Western Australian Industry Participation Strategy.

71.3 The Participation Plan

- (a) The Contractor must provide or have already provided to the Principal a completed Participation Plan in compliance with WAIPS and also being to the satisfaction of the Principal within 28 days of the date of award of the Contract.

- (b) The Contractor must, in performing its obligations under the Contract, comply with the statements of intention, proposals, undertakings and commitments which are given or made by the Contractor in Section B of the Participation Plan (**Participation Plan Obligations**).
- (c) The Contractor acknowledges and agrees that its Participation Plan Obligations apply during the Term, any extensions of the Term and until all of its reporting obligations as set out in Clause 71.5 are fulfilled.
- (d) The Contractor acknowledges and agrees that the Participation Plan Obligations include the Contractor ensuring its sub-contractors (at any tier) do what is necessary to enable the Contractor to comply with clauses (b) and (c).

71.4 Variation or revision of Participation Plan

If a party wishes to vary or revise the Participation Plan, the parties must liaise in good faith with a view to agreeing and then documenting the proposed variations or revisions. If the parties cannot agree on a variation or revision of the Participation Plan, it will remain unchanged.

71.5 Participation Plan Reporting

- (a) The Contractor must submit to the Principal a report as to the matters covered by the Participation Plan:
 - (i) in every year of the Term, in respect of that year (**Annual Report**); and
 - (ii) after the end of the Term, in respect of the whole of the Term (**Final Report**), in accordance with this clause.
- (b) Each report submitted under clause (a) must use the form of, and must address the matters outlined in, the Participation Plan Report Template which is attached to the Contract.
- (c) Subject to clause (d), the Contractor must submit:
 - (i) an Annual Report the Principal on each anniversary of the commencement of the Term, or on such other date each year as is notified by the Principal to the Contractor; and
 - (ii) a Final Report no later than 2 months after the end of the Term.
- (d) Where the Term is 12 months or less, only one report from the Contractor is required, which the Contractor must lodge within 2 months after the end of the Term.
- (e) Each report required under clause (a) report must be accurate, up-to-date comprehensive, sufficiently detailed, and in no way misleading or deceptive.

71.6 Verification of Contractor's compliance with Participation Plan

- (a) The Contractor must:
 - (i) permit the Principal or its duly authorised representative, from time to time during ordinary business hours and upon notice, to inspect, verify and make copies at the Principal's expense of all records maintained by the Contractor for the purposes of this Contract;
 - (ii) permit the Principal, or its duly authorised representative, from time to time to undertake a review of the Contractor's performance of the Participation Plan Obligations; and

- (iii) ensure that its employees, agents and sub-contractors (at all tiers) give all reasonable assistance to any person authorised by the Principal to undertake such audit or inspection.
- (b) If the Principal requests from the Contractor information or access to documentation in connection with the Participation Plan or the Participation Plan Obligations, or information or documentation in connection with any report referred to in clause 71.5, the Contractor must promptly comply with such request, ensuring that the information or documentation provided, or to which access is provided, is accurate, up-to-date, comprehensive, sufficiently detailed, and in no way misleading or deceptive.
- (c) The Contractor authorises the Principal, and any duly authorised representative of the Principal, to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Contractor's compliance with the Participation Plan Obligations.
- (d) The obligations set out in this clause 71.6 are in addition to and do not derogate from any other obligation under this Contract.

71.7 Verification of Participation Plan

The Contractor must ensure that both the Participation Plan and each report referred to in clause 71.5 is endorsed and verified as being true and correct by the Contractor's Chief Executive Officer, Managing Director or equivalent.

71.8 Use of Information

Both the Principal and the State of Western Australia may use or disclose the Participation Plan, any report provided under clause 71.5, or any information or documentation referred to in clause 71.6 for the legitimate purposes of or relating to government or the business of government.

71.9 Compliance with Participation Plan

The Contractor acknowledges that if the Contractor does not comply with the Participation Plan Obligations, this may result in the State of Western Australia (including any Principal, department, authority or instrumentality of the State) not awarding a supply contract, or supply contracts, to the Contractor in the future.

71.10 Clause Survives

This clause 71 survives the termination or expiration of the Contract.

**ANNEXURE to the Australian Standard
General Conditions of Contract**

PART A

This Annexure shall be issued as part of the tender documents and is to be attached to the General Conditions of Contract and shall be read as part of the Contract.

The law applicable is that of the State or Territory of:
(Clause 1)

Payments under the Contract shall be made at:
(Clause 1)

The Principal:
(Clause 2)

The address of the Principal:

The Superintendent:
(Clause 2)

The address of the Superintendent:

Limits of accuracy applying to quantities for which the Principal accepted a rate or rates:
(Clause 3.3(b))

Bill of Quantities—the alternative applying:
(Clause 4.1)

The time for lodgement of the priced copy of the Bill of Quantities:
(Clause 4.2)

Contractor shall provide security in the amount of:
(Clause 5.2)

Principal shall provide security in the amount of:
(Clause 5.2)

The period of notice required of a party's intention to have recourse to retention moneys and/or to convert security:
(Clause 5.5)

The percentage to which the entitlement to security and retention moneys is reduced:
(Clause 5.7)

Interest on retention moneys and security—the alternative applying:
(Clause 5.9)

The number of copies to be supplied by the Principal:
(Clause 8.3)

The number of copies to be supplied by the Contractor:
(Clause 8.4)

The time within which the Superintendent must give a direction as to the suitability and return the Contractor's copies:
(Clause 8.4)

Work which cannot be subcontracted without approval:
(Clause 9.2)

The percentage for profit and attendance:
(Clause 11(b))

The amount or percentage for profit and attendance:
(Clause 11(c))

Insurance of the Works—the alternative applying:
(Clause 18)

The assessment for insurance purposes of the costs of demolition and removal of debris:
(Clause 18(ii))

The assessment for insurance purposes of consultants' fees:
(Clause 18(iii))

The value of materials to be supplied by

the Principal:
(Clause 18 (iv))

The additional amount or percentage:
(Clause 18(v))

Public Liability Insurance—the alternative
applying:
(Clause 19)

The amount of Public Liability Insurance
shall be not less than:
(Clause 19)

The time for giving possession of the Site:
(Clause 27.1)

The Date for Practical Completion:
(Clause 35.2)

Liquidated Damages per day:
(Clause 35.6)

Limit of Liquidated Damages:
(Clause 35.7)

Bonus per day for early Practical
Completion:
(Clause 35.8)

Limit of bonus:
(Clause 35.8)

Extra costs for Delay or Disruption:
(Clause 36)

Event

The Defects Liability Period:
(Clause 37)

The Charge for overheads, profit, etc. for
Daywork:
(Clause 41(f))

Times for Payment Claims:
(Clause 42.1)

Unfixed Plant and Materials for which
payment claims may be made
notwithstanding that they are not
incorporated in the Works:
(Clause 42.1(ii))

Retention Moneys on:

Where there are Separable Portions, these items shall be deleted

(Clause 42.3)

- (a) work incorporated in the Works and any work or items for which a different amount of retention is not provided,% of the value until% of the Contract Sum is held;
- (b) items on Site but not yet incorporated in the Works,%;
- (c) items off Site but in Australia%;
- (d) items not in Australia%;
- (e) disbursements incurred by the Contractor for customs duties, freight, marine insurance, primage, landing and transport in respect of the work under the Contract%;

Unfixed Plant or Materials—the alternative applying:
(Clause 42.4)

The rate of interest on overdue payments:
(Clause 42.9)

The delay in giving possession of the Site which shall be a substantial breach:
(Clause 44.7)

The alternative required in proceeding with dispute resolution:
(Clause 47.2)

The person to nominate an arbitrator:
(Clause 47.3)

Location of arbitration:
(Clause 47.3)

¶ Separable Portions

1. Separable Portion:

2. Contractor shall provide security in the amount of:
(Clause 5.2)

- Principal shall provide security in the amount of:
(Clause 5.2)

- The period of notice required of a party's intention to have recourse to retention moneys and/or to convert security:
(Clause 5.5)

3. The Date for Practical Completion:
(Clause 35.2)

4. Liquidated Damages per day:
(Clause 35.6)

5. Limit of Liquidated Damages:
(Clause 35.7)

6. Bonus per day for early Practical Completion:
(Clause 35.8)

7. Limit of bonus:
(Clause 35.8)

8. Extra costs for Delay or Disruption:
(Clause 36)

9. Defects Liability Period:
(Clause 37)

Event

¶ Use this part of the Annexure where there are Separable Portions and ensure that the description of the Separable Portions covers all the work under the Contract. Make a separate column for each Separable Portion.

APPROVED FORM OF UNCONDITIONAL UNDERTAKING
(Clause 5.3)

At the request of ('the Contractor') and in consideration of ('the Principal') accepting this undertaking in respect of the contract for.....

. ('the Financial Institution') unconditionally undertakes to pay on demand any sum or sums which may from time to time be demanded by the Principal to a maximum aggregate sum of \$
()

The undertaking is to continue until notification has been received from the Principal that the sum is no longer required by the Principal or until this undertaking is returned to the Financial Institution or until payment to the Principal by the Financial Institution of the whole of the sum or such part as the Principal may require.

Should the Financial Institution be notified in writing, purporting to be signed by for and on behalf of the Principal that the Principal desires payment to be made of the whole or any part or parts of the sum, it is unconditionally agreed that the Financial Institution will make the payment or payments to the Principal forthwith without reference to the Contractor and notwithstanding any notice given by the Contractor not to pay same.

Provided always that the Financial Institution may at any time without being required so to do pay to the Principal the sum of \$
()

less any amount or amounts it may previously have paid under this undertaking or such lesser sum as may be required and specified by the Principal and thereupon the liability of the Financial Institution hereunder shall immediately cease.

DATED at.....this.....day of.....19.....

**ANNEXURE to the Australian Standard
General Conditions of Contract**

PART B

NOTE: This table is intended for easy reference to clauses that may have been deleted, amended or added to Australian Standard 2124—1992

- 1. The following Clauses have been deleted from the General Conditions in AS 2124—1992:

Refer to body of General Conditions of Contract.....

- 2. The following Clauses have been amended and differ from the corresponding Clauses in AS 2124—1992:

Refer to body of General Conditions of Contract.....

- 3. The following Clauses have been added to those of AS 2124—1992:

Refer to body of General Conditions of Contract.....

**ANNEXURE to the Australian Standard
General Conditions of Contract**

PART C

| NOT USED

ANNEXURE to the Australian Standard
General Conditions of Contract

PART D

DEED OF GUARANTEE AND INDEMNITY

Deed of Guarantee and Indemnity

Date: _____ 20

(Principal)

(Guarantor)

Deed of Guarantee and Indemnity

Date: 20

Parties

(Principal)

(Guarantor)

Background

A. The Guarantor has requested the Principal to enter into contractual arrangements with the Builder.

B. The Principal has agreed to enter into contractual arrangements with the Builder if the Guarantor gives this guarantee and indemnity.

Agreement

72. Definitions and Interpretation

72.1 In this Guarantee and Indemnity the headings to clauses are not to affect its construction and, unless such an interpretation is excluded by or contrary to the context:

(a) the following terms are defined:

“Principal” means the party to this Guarantee and Indemnity so described above and that party's personal representatives (or, in the case of a corporate party, its successors), transferees and assigns.

“Guarantor” (a) means the party to this Guarantee and Indemnity so described above and that party's personal representatives (or, in the case of a corporate party, its successors), transferees and assigns;

(b) if there is more than one person described as the Guarantor then “the Guarantor” means each of them and includes each of their respective personal representatives (or successors), transferees and assigns.

“Builder” means the party to this Guarantee and Indemnity so described in the Schedule and that party's personal representatives (or, in the case of a

	<u>corporate party, its successors), transferees and assigns.</u>
<u>“Collateral Security”</u>	<u>means the security specified in the schedule.</u>
<u>“Corporations Act”</u>	<u>means the Corporations Act 2001 (Commonwealth).</u>
<u>“Insolvency”</u>	<p><u>means any form of insolvency recognised by law, including (without limitation):</u></p> <p>(i) <u>an individual becoming an insolvent under administration, as defined in section 9 of the Corporations Act;</u></p> <p>(ii) <u>a corporation having a liquidator or provisional liquidator or administrator appointed; and</u></p> <p>(iii) <u>any person:</u></p> <p style="padding-left: 40px;">A. <u>having a receiver or receiver and manager appointed,</u></p> <p style="padding-left: 40px;">B. <u>entering into any arrangement, assignment or composition that is protected from creditors by any statute, or</u></p> <p style="padding-left: 40px;">C. <u>undergoing any other form of insolvency administration,</u></p> <p>and “Insolvent” has a corresponding meaning.</p>
<u>“Officer of the Principal”</u>	<u>means any “Director” or “Managing Director” of the Principal or any other or other person nominated by the Principal.</u>
<u>“person”</u>	<u>includes a corporation;</u>
<u>“Primary Instrument”</u>	<u>means the instrument so described in the Schedule.</u>
<u>“Secured Money”</u>	<u>means all money payable by the Builder under the Primary Instrument including by way of interest, fees, costs, indemnities, charges, duties or expenses or payment of damages, which may be actual, prospective, contingent or otherwise, under or arising out of or in connection with any breach or default under the Primary Instrument or by reason of termination of the Primary Instrument.</u>
<u>“Specified Rate”</u>	<u>means the rate so described in the Schedule.</u>
<u>“State”</u>	<u>means the State of Western Australia.</u>
<u>“Surety”</u>	<u>means any person who at any time guarantees</u>

or gives any indemnity for payment to the Principal of any of the Secured Money (including the Guarantor) and, if more than one, then each of them.

“Working Day”

means any Monday, Tuesday, Wednesday, Thursday or Friday which is not gazetted as a public holiday in the State.

(b) A word importing:

- (i) the singular number includes the plural;
- (ii) the plural number includes the singular; and
- (iii) any gender includes every other gender.

(c) A reference to:

- (i) this Guarantee and Indemnity includes a reference to any schedule to this Guarantee and indemnity;
- (ii) a schedule, clause or paragraph refers to a schedule, clause or paragraph of this Guarantee and Indemnity.

(d) A reference to an Act, Law, Regulation or By-law includes any amendment or re-enactment of it that is for the time being in force.

(e) A reference to “writing” or “written” includes facsimile transmission.

(f) Each of the powers conferred by this Guarantee and Indemnity is to be construed as a separate power that is not in any way limited or restricted by reference to or inference from the any other powers conferred by this Guarantee and Indemnity.

(g) Where the day or last day on which anything is to be done is not a Working Day, then that thing must be done on the next Working Day.

(h) “Including” and similar expressions are not words of limitation.

73. Guarantee

73.1 In consideration of the Principal having at the request of the Guarantor agreed to enter into the transaction secured by this Guarantee and Indemnity, the Guarantor:

(a) guarantees to the Principal:

- (i) due payment to the Principal of all of the Secured Money, and
- (ii) proper performance of all of the Builder's obligations under the Primary Instrument, and;

(b) agrees to the terms contained in this Guarantee and Indemnity.

74. Guarantor's Undertakings

74.1 The Guarantor undertakes to the Principal that:

- (a) whenever the Builder fails to pay any of the Secured Money when it is due, the Guarantor will pay it on demand; and
- (b) whenever the Builder fails to properly perform any of the Builder's other obligations, as required by the Primary Instrument, the Guarantor will:
- (i) indemnify the Principal against; and
 - (ii) pay to the Principal on demand the amount of,
- all losses, damages, costs and expenses (including all legal costs on a full indemnity basis) that may be incurred by the Principal by reason of that failure.

75. Acknowledgment

75.1 The Guarantor acknowledges that the Guarantor does not execute this Guarantee and Indemnity as a result of or in reliance on any promise by or statement of the Principal or any other person acting on behalf of the Principal.

76. Continuing Irrevocable Guarantee

- (a) The guarantee and indemnity contained in this Guarantee and Indemnity:
- (b) is a continuing guarantee;
 - (c) is irrevocable; and
 - (d) the Guarantor's liability under it will remain in full force until:
 - (i) all of the Secured Money has been paid; and
 - (ii) all the other obligations of the Builder to the Principal under the Primary Instrument have been satisfied.

77. Joint and several liability

If two or more persons are named in this Guarantee and Indemnity as Guarantor:

- (a) they will be bound jointly and severally;
- (b) the Principal may proceed against any one or more person named as Guarantor without having to make a claim against any other of them;
- (c) the Principal may release any one or more person named as Guarantor from any obligations imposed by this Guarantee and Indemnity without thereby releasing any other of them; and
- (d) each person who has signed this Guarantee and Indemnity as Guarantor is and will remain bound by it even though any other person who is also named as Guarantor:
 - (i) has not signed this Guarantee and Indemnity, or
 - (ii) for any other reason is not bound by it.

78. No Pre-Requisite to Demand on Guarantor

78.1 The Principal need not:

- (a) give notice to the Guarantor of any default by the Builder or any Surety;
- (b) include in any demand made on the Guarantor any particulars of the default which gives rise to the demand;
- (c) proceed against the Builder or any Surety;
- (d) exhaust any remedies the Principal may have against the Builder or any Surety; or
- (e) enforce any security available to the Principal,
before being entitled to demand and receive any payment from the Guarantor under this Guarantee and Indemnity.

79. Waivers and Compromises

79.1 The Principal may at any time:

- (a) waive any breach by the Builder or any Surety of any obligation or undertaking imposed by the Primary Instrument or any other instrument or transaction; and
- (b) make any arrangement or compromise with or undertake or agree not to sue the Builder or any Surety;
without thereby discharging or affecting the liability of the Guarantor.

80. Guarantor's Obligations Absolute

80.1 The Guarantor's obligations under this Guarantee and Indemnity are principal obligations (not ancillary) and are absolute and unconditional. Therefore, the Guarantor's liability under this Guarantee and Indemnity will not be discharged or affected:

- (a) if the Principal, with or without the consent or knowledge of the Guarantor:
 - (i) grants time, credit or any other concession to the Builder, or any Surety;
 - (ii) partly or wholly gives up, releases, replaces, transfers, varies or renews any of the Builder's obligations, or agrees to do so;
 - (iii) compounds or compromises with the Builder;
 - (iv) gives up, discharges, exchanges or varies any security, guarantee or indemnity or amends or agrees to the amendment of any of its terms or agrees to any change in the priority ranking of any security;
 - (v) amends or agrees to the amendment of any of the terms of the Primary Instrument;
 - (vi) amends or agrees to the amendment of any of the terms of this Guarantee and Indemnity;

- (vii) obtains a judgment against the Builder or any Surety; or
- (viii) receives any dividend out of the estate or assets of the Builder or any Surety;

(b) if the Principal fails or delays:

- (i) to enforce its rights under this Guarantee and Indemnity;
- (ii) to obtain, perfect or register any security, guarantee or indemnity for any obligations of the Builder or any Surety;
- (iii) to recover any money that may be owing to the Principal at any time by the Builder or any Surety or to enforce any security, guarantee or indemnity securing that money; or
- (iv) to take any action in relation to any negotiable instrument;

(c) if the Builder:

- (i) enters into any transactions with the Principal; or
- (ii) incurs any obligations to the Principal,
without the knowledge or consent of the Guarantor;

(d) if any of the obligations of the Builder or any Surety are or become void, defective or informal;

(e) if any other person who was intended to be bound as a surety for the Builder's obligations is not or ceases to be so bound;

(f) if any negotiable instrument held by the Principal is still in circulation or outstanding;

(g) if any security, guarantee or indemnity in favour of the Principal:

- (i) is void, defective or informal;
- (ii) does not or ceases to rank first in priority; or
- (iii) was entered into after this Guarantee and Indemnity was signed;

(h) if the Guarantor is a trustee of any trust, by:

- (i) any breach of trust by the Guarantor;
- (ii) any amendment or variation of the terms of any trust instrument under which the Guarantor acts as trustee; or
- (iii) the determination of the trust;

(i) if the Builder or any Surety is a member of any partnership, by:

- (i) the Builder or Surety ceasing to be a member of the partnership;
- (ii) any change in the partnership; or
- (iii) the partnership ceasing business or being dissolved;

- (j) if there is any change in the legal capacity, rights or obligations of the Builder or any Surety for any reason, including Insolvency, mental or physical incapacity or death;
- (k) by any claim or right to set-off or counterclaim which the Builder may have or claim to have against the Principal; or
- (l) by anything else which, but for this clause, could discharge or in any way affect the Guarantor's liability under this Guarantee and Indemnity.

81. Delays and Omissions

81.1 If the Principal delays or omits to exercise a right given by this Guarantee and Indemnity, that right will not be waived by the delay or omission.

82. Exercising Rights

82.1 If the Principal exercises a right, that exercise will not preclude:

- (a) another exercise of that right; or
- (b) the exercise of another right,

under this Guarantee and Indemnity.

83. Waivers and Variations

83.1 Any waiver or variation of a provision of this Guarantee and Indemnity, or consent to a departure by the Guarantor from a provision of this Guarantee and Indemnity, must be in writing and signed by the Principal.

84. Treatment of Payments Received

84.1 All payments received by the Principal on account of the Builder:

- (a) from the Builder or any other person; or
- (b) from any other source, including:
 - (i) any dividends in the Insolvency of the Builder or of any other person;
or
 - (ii) the realization or enforcement of any security,

may be treated by the Principal as relating to the whole of the Secured Money, or as relating to and reducing any particular part of it.

85. Payment Avoided or Recouped

85.1 The guarantee and indemnity contained in this instrument will continue to be effective, or will be re-instated, as required, if at any time any payment of any money or any other act by the Builder in satisfaction of any of the Builder's obligations under this Guarantee and Indemnity:

- (a) is avoided by the operation of any law; or

(b) must be repaid or restored by the Principal or any other person to the Builder,
for any reason (including the Insolvency of the Builder).

85.2 If any event described in clause 14.1(a) or 14.1(b) occurs:

- (a) the payment of money or other act is ineffective (as from the date it was made) to discharge the obligations of the Builder or of the Guarantor under this Guarantee and Indemnity; and
- (b) the Principal will have the same rights against the Guarantor as if that payment or other act had not occurred.

86. Guarantor's Security

86.1 The Principal:

- (a) may resort to any security given by the Guarantor to the Principal to cover the liability of the Guarantor under this Guarantee and Indemnity; and
- (b) may retain any security given by the Guarantor to the Principal for 6 months after the obligations of the Builder and Guarantor to the Principal have been fully satisfied, or for no longer if the Principal thinks it necessary to ensure that the Guarantor is under no further liability to the Principal.

87. Waiver of Guarantor's Rights

87.1 The Guarantor waives any rights to which the Guarantor may at any time be entitled:

- (a) which could restrict the Principal's rights under this Guarantee and Indemnity; or
- (b) which are inconsistent with the provisions of this Guarantee and Indemnity.

87.2 So long as the Builder or the Guarantor remain liable to the Principal, the Guarantor will not:

(a) in any circumstances (including the Insolvency of the Builder):

- (i) claim or take the benefit of any set-off; or
- (ii) make any counterclaim,

which the Builder may have or claim to have against the Principal;

(b) claim, prove for or recover any money in competition with the Principal against the Builder, any Surety or any other person:

- (i) under any security or guarantee;
- (ii) in any Insolvency;
- (iii) under any right of contribution or indemnity; or
- (iv) in any other manner;

(c) claim the benefit or obtain the transfer of any security, guarantee or indemnity at any time held by the Principal for the Secured Money;

(d) assert any right:

(i) to subrogation in respect of any right or security held by the Principal;
or

(ii) to contribution or indemnity against any Surety; or

(e) require the Principal to resort to any other security, guarantee, indemnity or other right before resorting to the Guarantor under this Guarantee and Indemnity or under any security given by the Guarantor to the Principal.

88. Insolvency

88.1 The Guarantor agrees that, in the event of the Builder's Insolvency, the Guarantor:

(a) will not exercise any right of proof or claim against the Builder that may be available to the Guarantor:

(i) unless the Principal so directs the Guarantor in writing to do so; and

(ii) then only strictly in accordance with Principal's directions; and

(b) will pay to the Principal any money received by the Guarantor arising out of the exercise of that right or any related right of contribution;

until the Principal has received 100 cents in the dollar of all money which the Builder owes to the Principal as well as any money payable by the Guarantor under this Guarantee and Indemnity.

88.2 The Guarantor irrevocably authorises the Principal, in the event of the Builder's Insolvency:

(a) (as the Guarantor's attorney or otherwise) to prove for and recover against the Builder and the Builder's estate any money paid by the Guarantor under this Guarantee and Indemnity; and

(b) to place any money received by the Principal in the Insolvency in a suspense account and appropriate it at the Principal's discretion.

88.3 The Guarantor will hold in trust for and pay to the Principal any money:

(a) received by the Guarantor from the Builder in breach of clause 17.1; and

(b) that may be received by the Guarantor in the Builder's Insolvency until all the obligations of the Builder and the Guarantor have been fully satisfied.

89. Indemnity

89.1 If, for any reason (whether known to the Principal or not), any provision of the Primary Instrument or any other instrument that secures payment of any of the Secured Money or the performance by the Builder of any obligation is or may be unenforceable by the Principal against the Builder, then the Guarantor, as a separate and additional liability:

(a) indemnifies the Principal against any losses, damages, costs and expenses that the Principal may sustain as a result of any of the Secured Money being irrecoverable; and

(b) undertakes:

(i) that any money that may be irrecoverable from the Builder will, nevertheless, be recoverable by the Principal from the Guarantor as though the Guarantor were the sole or principal debtor for it; and

(ii) accordingly, to pay it on demand.

90. Judgments

90.1 If any liability under this Guarantee to pay any money to the Principal becomes merged in any judgment or order, the Principal will be entitled:

(a) to charge simple interest on that money;

(b) at the Specified Rate; and

(c) from the date of the merger until payment in full.

91. Non-Merger

91.1 If the liability of the Guarantor becomes merged in any judgment or order, the Guarantor agrees to pay interest on the amount owing under that judgment or order at the Specified Rate.

92. Interest on Default

92.1 The Guarantor will pay interest on all money payable under this Guarantee and Indemnity which is unpaid, at the Specified Rate. Interest will be calculated on daily balances from the earlier of:

(a) any date specified for that purpose in this Guarantee and Indemnity; or

(b) the date demand for that money is made,

until the date on which it is paid to the Principal.

93. Warranties

93.1 The Guarantor warrants:

(a) that the Guarantor has full power to sign and do all things required by the guarantee and indemnity contained in this Guarantee and Indemnity and that:

(i) any necessary consents have been obtained;

(ii) any necessary meetings have been held; and

(iii) any necessary resolutions have been passed;

in order to render the obligations and agreements of the Guarantor under the guarantee and indemnity contained in this Guarantee and Indemnity fully valid and binding;

(b) that the Guarantor has disclosed to the Principal in writing everything which might affect the judgment of the Principal in deciding to rely on this Guarantee and Indemnity as security for the Secured Money;

(c) that the Guarantor:

(i) holds no security; and

(ii) will not, without the consent in writing of the Principal, in the future take or accept any security;

from the Builder or any Surety to secure the Guarantor's liabilities under this Guarantee and Indemnity or otherwise in respect of any of the Secured Money;

(d) except as may be otherwise stipulated in this Guarantee and Indemnity, the Guarantor does not hold any property subject to any trust;

(e) if the Guarantor becomes the holder of any property subject to any trust, the Guarantor will:

(i) give written notice of that fact to Principal;

(ii) produce to Principal the instrument creating the trust; and

(iii) produce to Principal such information about the trust, its assets and the circumstances of its creation as Principal may require.

The Guarantor acknowledges that the Principal has relied on the correctness of the warranties contained in this Guarantee and Indemnity in entering into the transaction the subject of the Primary Instrument and this Guarantee and Indemnity and will continue to do so in dealing with the Builder.

94. Warranty and Undertaking as to Security

94.1 The Guarantor:

(a) warrants that the Guarantor holds no security; and

(b) undertakes not, without the consent in writing of the Principal, in the future to take or accept any security;

from the Builder or any Surety to secure the Guarantor's liabilities under this Guarantee or otherwise in respect of any of the Secured Money.

95. Assignment

95.1 The Principal may assign the benefit of the Primary Instrument and this Guarantee and Indemnity without releasing the Guarantor and after the assignment:

(a) the assignee will have the same rights against the Guarantor as the Principal had under this Guarantee and Indemnity; and

(b) the Guarantor will execute whatever instruments the Principal reasonably requires in order to give effect to the transfer of those rights to the assignee.

95.2 For the purpose of or in the course of negotiations for the assignment, the Principal may disclose to any person any information available to the Principal about the Guarantor.

96. Trusts

96.1 The Guarantor warrants and undertakes that:

(a) no property of the Guarantor is subject to any trust; and

(b) that if in the future any property of the Guarantor is subject to any trust, the Guarantor—

(i) will give notice of the circumstance to the Principal; and

(ii) will produce to the Principal the original of any deed creating the trust and such information relating to the trust and its assets as the Principal may require.

97. Certificate as Evidence

97.1 A certificate signed by or on behalf of the Principal:

(a) as to the amount of the Secured Money due or owing as at the date mentioned in the certificate; or

(b) as to anything else in relation to this Guarantee and Indemnity,

will be conclusive evidence of the facts certified in the certificate.

98. Notices and Demands

98.1 Any demand, notice, certificate, consent or other communication may be given or made under this Guarantee and Indemnity in writing by the Principal or by any other person authorised to do so on the Principal's behalf:

(a) by facsimile transmission;

(b) by pre-paid mail; or

(c) by hand delivery,

and

(d) may be addressed, delivered or transmitted to the party to receive it at the address or facsimile number:

(i) shown in this Guarantee and Indemnity; or

(ii) later notified to the Principal.

98.2 Any instrument sent or communication made in accordance with clause 17.70 will be deemed to have been effectively received:

- (a) if hand delivered or transmitted by facsimile, on the day of its delivery or transmission;
or
- (b) if sent by mail, on the second day after the day of its posting (or, if sent to an address outside Australia, on the date when it could be expected to have been received in the ordinary course of airmail post).

even though the person to whom it is addressed may have died or be under any disability.

99. Collateral Security

99.1 This Guarantee and Indemnity is collateral to and secures the same money as the Collateral Security.

99.2 For the purpose of further and better securing the Guarantor's obligations under this Guarantee and Indemnity, the Guarantor must execute, or procure to be executed, and deliver to the Principal in proper and registrable form the Collateral Security.

100. Statutory Provisions

100.1 So far as permitted by law:

- (a) any term implied in this Guarantee and Indemnity by any law; and
- (b) the application to this Guarantee and Indemnity of any law,

that has the effect of reducing or postponing the payment of any money or otherwise affecting the operation of this Guarantee and Indemnity or its application to any party is excluded.

101. Severance

101.1(a) If any provision of this Guarantee and Indemnity:

- (i) is or becomes void, voidable, illegal or unenforceable in its terms;
- (ii) would not be void, voidable, illegal or unenforceable if it were read down; and
- (iii) it is capable of being read down,

then that provision will be read down accordingly.

(b) If notwithstanding sub-clause (a), a provision of this Guarantee and Indemnity is still void, voidable, illegal or unenforceable:

- (i) if the provision would not be void, voidable, illegal or unenforceable if some words were omitted, those words are severed; and
- (ii) otherwise, the whole provision is severed,

and the rest of this Guarantee and Indemnity will be of full force and effect.

102. Governing Law and Jurisdiction

102.1 This Guarantee and Indemnity will be governed by, take effect and be construed in accordance with the laws in force in the State and the parties submit to the jurisdiction of the Courts of the State.

103. Costs

103.1 All solicitors' costs of the instructions for and preparation of this Guarantee and Indemnity must be paid by the Guarantor.

Schedule

<u>1.</u>	<u>Builder</u>	<u>[insert]</u>
<u>2.</u>	<u>Primary Instrument</u>	<u>Building Contract between the Builder and the Principal dated [_____].</u>
<u>3.</u>	<u>Specified Rate</u>	<u>As provided for in Building Contract.</u>
<u>4.</u>	<u>Collateral Security</u>	<u>As provided for in Building Contract.</u>

Executed by the Guarantor as a Deed

Executed by
[insert]

pursuant to Section 127
of the Corporations Act



.....
Sole Director/Secretary

Full Name (please print)

Executed by
[insert]
pursuant to Section 127
of the Corporations Act



.....
Director Director/Secretary

.....
Full Name (please print) Full Name (please print)

INDEX TO GENERAL CONDITIONS OF CONTRACT

<i>Clause</i>	<i>Clause</i>
Acceptance of Tender	cost of suspension..... 34.4
Date of, defined.....2	cost of tests 31.7
Formal Instrument of Agreement6.2, AS 2127	damages under the general law 35.5, 34.4
information documents or instructions,	36, 44.1
to be furnished by the Principal 33.1	Daywork 41
security 5.4	defective materials and work 30.3, 30.4
service of 7	delay costs 36
Specification2	Directions on order of work 33.1
Acceleration of work 33.1, 35.5	errors in documents 8.1
Access (see also Possession of Site)	errors in setting out..... 28.3
during Defects Liability Period..... 31.8	fees paid to statutory authority..... 14.2, 40.5
for Contractor 27.1	fossils 27.5
approval by Superintendent for	interest 5.9, 42.9, 47.3
delivery before possession 27.3	liquidated damages 35.6, 35.7
use of partly completed works 35.4	Nominated Subcontract..... 10.3, 10.6
for Principal and others..... 27.2	omitted items 3.3, 4.4
for Principal for testing..... 31.1, 31.8	on completion of work taken out of the hands of
for Principal for urgent protection..... 39	the Contractor..... 44.6
partly completed works..... 35.4	protection of people and property 15
to carry out rectification 37	Provisional sums..... 11, 40.5
Accident (see also Insurance, Urgent	quantities 3.2, 4.4, 40.5
protection, Protection of people	set-offs by the Principal 42.10
and property)	urgent protection 39
reinstatement of damage 16.2	valuation of 40.5
to employees..... 20	Agreement
to third parties 19	contract in absence of formal
to work under the contract 16.1	instrument 6.1, 45, 47.1
Actions	formal instrument 6.2, AS 2127
arbitration 47	interpretation 1, 2, 8.1
indemnification of Contractor 13, 17.2, 19	rectification 47.1
indemnification of Principal 13, 17.1, 18, 19, 20	Alterations of work, due to inaccurate
time limits 42.7, 46	information 3.3, 8.1, 12, 40.5
Acts, Ordinances, Regulations 1, Annexure Part A	Alternatives 8.1, 12, 40.5
Contractor to comply with 14.1	Ambiguity in documents 8.1
delay caused by 35.5(b)	Approval
Address for service (see also Service) 7,	effect of certificates..... 42.6
Annexure Part A	examination and testing 31
change of 7	extension of time 6.2, 35.1, 35.5, 38
Contractor 7, Annexure Part A	of defective material or work 30.5
Principal 7, Annexure Part A	of form of security 5.3
Superintendent..... 7, Annexure Part A	of insurance policies 21.1
Adjustment (for)	of media releases 8.7
actual quantities..... 3.3	of municipal and statutory authorities 14.4
bonus 35.8	of subcontracting 9.2
calculation of payment..... 42.2, 42.3	of Superintendent 23
changes in the Law 14	of variations 40.1
Arbitration 47.3, Annexure Part A	to suspension by Contractor 34.2
Assignment	working hours..... 32
of contract 9.1	Claims (see also Adjustment)
	arbitration 47.3
	compensation to third party 15
	for damages 42.1
	for progress payment 42.1

of subcontract	10.1	for extension of time for Practical Completion	35.5
Asterisk clauses 5.7, 8.7, 10.5, 14.2, 30.2, 35.7 35.8, 45		for Final Payment	42.7
Australian currency	1	indemnity by Contractor	17.1
Bank guarantee (see Unconditional Undertaking)	5.3	indemnity by Principal	10.4, 17.2
Bankruptcy		notice of dispute to the Superintendent	47.1
of Contractor	10.5, 44.11	notice of potential claims on insurance policies	21.4
of Nominated Subcontractors	10.6	settlement of claims under policy of insurance	21.5
of Principal	44.11	settlement of disputes	47
Barring of claims	12.4, 42.7, 46.1	valuation of	40.5
Basis of payment	3.1, 3.2, Annexure Part A	Clause headings	2
Bench mark (see also Survey mark)	28.4	Cleaning up	38
Bill of lading	42.1	Clerk of Works	22
Bill of Quantities	4	Commencement of work, insurance	18, 19, 20
definition of	2	proof of	21.1
errors in	4.4	notice before	35.1
lodgement	4.2	production of policies	21
omission of items in	3.3	Commencement of work, within 14 days	35.1
pricing	4.2	Completion	
pricing, errors in	4.3	of Work by Principal	44.4, 44.5, 44.6
purpose of	4.1	Final	42.7, 42.8
quantities in	3.2	Practical (see Practical Completion)	
valuation of	40.5	urgent protection	39
Bonus	35.8	Compliance	
Breach of contract		with statutory requirements	14
claims for	42.1	with Superintendent's directions	23
default by the Contractor	44.2	with Superintendent's interpretation	8.1
default of the Principal	44.7	Conditions, Waiver of	48
failure to lodge security	44.2(c), 44.7(e)	Confidential information	8.6
liquidated damages	35.6, 35.7	Construction of Contract	1, 2, 8.1, Annexure Part A
preservation of other rights	44.1	Constructional Plant	
substantial breaches	44.2, 44.7	care of	16.1
Care of the Work	16	Contractor to supply	29.1
cleaning up	38	Daywork	41
Contractor's obligations for	16.1	defined	2
excepted risks	16.3	insurance of	18
reinstatement of loss or damage	16.2	removal of	29.2, 45
urgent protection	39	use by Principal	44.5, 44.6
Certificate(s) (see also Payments)	42	work under the Contract <u>WUC</u> includes	2
correction of	42.2	Construction Program	33.2
effect of	42.6	Contingency sum (see Provisional sum)	2
Final Certificate	42.8		
of municipal and statutory authorities	14.4		
Payment Certificate	42.1		
Practical Completion	42.5		
Contract		Daywork	41
assignment	9.1	delay	36
breach of (see Breach of Contract)		examination and testing	31.7
construction of	1, Annexure Part A	nett cost	11
defined	2	protection of people and property	15
documents	8	provisional sums	11
disputes under	47	reinstatement	16.2

evidence of 6	set-offs by Principal 42.10
Formal Instrument of 6.2	setting out the Works 28.3
frustration of 45, 47.1	urgent protection 39
interpretation of 1, 2	variations 40.5
nature of 3	
proper law of 1, Annexure Part A	Covering up of work 31.2, 31.7
rectification of 47.1	Cross-liability Clause 21.6
subcontracting 9.2	Currency, Australian 1
Termination of	Damage (see also Care of the Works and Insurance)
by Principal 44.4, 44.10	prevention of 15
by Contractor 44.9, 44.10	reinstatement of 16.2
work under the 2	to persons and property other than Works 15, 17
	to the Works 16
Contract Sum	urgent protection 39
defined 2	
insurance of Works 18	Damages (see also Adjustment and Claims)
Contractor	for delay by Contractor 35.6, 35.7,
defined 2	Annexure Part A
Annexure Part A	for delay by Principal 35.5, 35.6, 36, 44.1
default by 44.2	liquidated 35.6, 35.7, Annexure Part A
rights of 44.9, 44.10	on termination of the Contract 44.10
service on 7	Principal's right to set off 42.10
to enter Nominated Subcontract 10.4	under the general law 35.5, 36, 44.1
to insure 18, 19, 20	
use of site 27.4	Date
Contractor's employees	for Practical Completion 2, 35.2, 35.3, 35.5
accident or injury 20	of Acceptance of Tender 2
control of 26	of Practical Completion 2, 35.2, 35.3, 42.5
insurance of 20	of specification 2
payment of 43	Separable Portions 35.3,
Contractor's Representative 25	Annexure Part A
Contractor's responsibility (see also	Day, defined 2
Contractor and Care of the Work) 3.1	work (see Daywork) 41
for design 10.4, 16.3(f)	working 32
for employees (see Contractor's employees)	Daywork 41
for Nominated Subcontractors 9.3, 10.3,	valuation of 40.5
10.4, 10.5, 10.6,	Debt due to the Principal 15, 35.6, 39, 42.1,
for payment of Workers and	42.10, 44.6
Subcontractors 41	Deductions by the Principal 42.10, 42.11, 44.6
for Selected Subcontractors 9.3, 10.2, 10.4	Deed of Guarantee 5.10
for subcontractors 9.3	Default by the Contractor 44.1, 44.2
Copyright 8.3, 8.4, 13	adjustment of costs 44.6
Corporation (also see Person) 2, 5.10, 43	failing to comply with a direction of the
Corporations Law 5.10	Superintendent 23
Cost(s) (see also Adjustment)	failing to proceed with due expedition 33.1
completion of work taken out of	failing to provide evidence of insurance 21.1
the hands of the Contractor 44.6	failing to use materials or standards of
complying with statutory requirements 14.1, 14.3	workmanship 30.1
	Design 10.4, 16.3(f)
in lodging security 5.4	Deposit (see Security)
procedure on 44	Determination of Contract (see Termination of
set off by Principal 42.10	Contract)
when the Principal takes over the work 44.5	
Default of Nominated Subcontractor 9.3, 10.6	

Default of subcontractor	9.3	Determination of the Superintendent	
Default of the Principal	44.7	definition 23	
rights of the Contractor	44.9, 44.10	disputes 47.2	
Superintendent's act or omissions	23	dissatisfaction with	47.1
Defective materials or work	30.3, 30.6	extension of time	35.5
acceptance of	30.5	generally 23	
cost of rectification	42.2	interpretation of discrepancy	8.1
examination and testing	31	value of Daywork	41
quality assurance	30.2	value of variation	40.5
variations due to	30.4	value of work	42.1
Defects		Dimensions 8.2	
costs of rectification	42.2	Direct payment to subcontractor	10.5, 43
examination and testing	31	Discrepancies	
materials and work	30.3, 30.4, 30.5, 30.6	contract documents	8.1
minor, Practical Completion	2	dimensions 8.2	
remedying 37		Directions of the Superintendent (see also	
removal and replacement	30.3	Determination of the Superintendent)	
Defects Liability Period	37, Annexure Part A	construction program	33.2
Definitions 2		covering up of work	31.2
Certificate of Practical Completion	42.5	Daywork 41	
construction program	33.2	defective materials or work	30.3, 30.4, 30.5
Daywork 41		definition 23	
Defects Liability Period	37	dissatisfaction with decision	47.2
Direction 23		examination and testing	31
Final Payment Claim	42.7	generally 23	
Latent Conditions	12.1	oral 23	
Nominated Subcontract Work	10.1	order of work	33.1
Nominated Subcontractor	10.1	notice of tests	31.4
Selected Subcontract Work	10.2	relating to Contractor's employees	26
Selected Subcontractor	10.1	relating to Subcontractors	26
Substantial Breach	44.2, 44.7	service of 7, 25	
Survey Mark	28.4	suspension of the Work	34.1
Test 31.1		time for disputing	46.2
Variation 40.1		written 23	
Delay		Disputes 47	
by the Superintendent	23, 35.5	arbitration 47.3	
construction program	33.2	notices to the Superintendent	47.1
costs 36		Documents 8	
extension of time for in relation to		approval of the Superintendent	8.4
Practical Completion	35.5	availability of	8.5
in lodgement of security	5.4	confidential information	8.6
in giving notice of latent conditions	12.4	confirmation of oral direction	23
liquidated damages in relation to Practical		discrepancies in	8.1, 8.2
Completion	35.6	evidencing approval of authorities	14.4
rate of progress	33.1	interpretation of	8.1
time at large	35.5	property in 8.3, 8.4	
Delivery of materials to and work on Site before		results of tests	31.6
possession	27.3	service of 7	
Drawings (see also Documents)		supply by Contractor	8.4
definition 2		supply by Principal	8.3
Emergency work	39	Final Certificate	42.8
Employees		effect of 42.6	
of Contractor (see Contractor's employees)		Final Payment Claim for	42.7
of subcontractor	26, 43	insurance 19	
control of 26		payment of workers and subcontractors before	
insurance of	20, 21	Final Payment Certificate	43
		rectification of defective work	30.6
		release of security and retention money	42.8

responsibility for	9.3	Final Payment Certificate.....	42.8
English language.....	1	Finding of minerals, fossils and relics.....	27.5
Equipment to be provided by Contractor (see Constructional Plant).....	29.1, 29.3	Formal Instrument of Agreement.....	6.2, AS 2127
Errors in Bill of Quantities or Schedule of Rates 3.2, 3.3, 4.3, 4.4 35.5 contract documents.....	8.1, 8.2	Form of Unconditional Undertaking.....	5.3
design 10.4, 16.3(f)		Fossils 27.5	
setting out 28.3		Foundations, covering up	31.2
Examination and testing.....	31	Frustration 45, 47.1	
Excepted risks 16.2, 16.3		Gender 2	
Extension of time (see also Delay and Separable Portion)		Giving of notices and fees to authorities	14.3
for commencement of work	35.1	Guarantee (see 'unconditional undertaking').....	5.3
for latent conditions.....	12.3, 35.5	Guarantee, Deed of	5.10
for lodgement of Bill of Quantities	4.2	Headings of clauses	2
for lodgement of security	5.4	Hours of work 32	
for Practical Completion.....	35.5	Imported items 42.2	
Extra Costs (see also Adjustment).....	36	Indemnity by Contractor	17.1
Failure of Contractor (see also Delay and Default of Contractor)		care of work	16
to arrange urgent protection.....	39	damage to persons and property	17.1
to make claims.....	42.1, 42.7	infringement of patent, design, trademark or copyright.....	13
to lodge security	5.4	Indemnity by Principal.....	16.3, 17.2, 35.5
to produce proof of insurance	21.2	Information to be supplied	
to show cause	44.3, 44.4	advance notice.....	33.1
Failure of Principal (see also Default of Principal).....	44.7	by Principal 8.3, 28.1, 33.1	
notice of dispute	47	confidential information	8.6
rights of the Contractor.....	44.9, 44.10	contract documents	8
to give possession of Site.....	27.1	examination of information made available for tendering	12.1
to insure 21.2		examination of information relevant to risks, contingencies, etc	12.1
to make progress payment.....	42.1	for setting out the works	28.1
Failure of Superintendent.....	23	latent conditions	12
Faulty work (see Defective materials or work)		particulars of materials and plant	29.3
Fees to be paid by the Contractor.....	14.3	results of tests.....	31.6
Fencing 15		to media 8.7	
Figured dimensions.....	8.2	working hours.....	32
Injury to persons.....	15	Lighting 15	
indemnity by Contractor	17.1	Limits of accuracy	3.3(b), 35.5(b), Annexure Part A
insurance 19, 20		Liquidated damages (see also Separable Portions).....	35.6, Annexure Part A
measures to prevent	15	Limit on 35.7, Annexure Part A	
Insolvency 44.11		Litigation 1, 47	
Inspection		Local authorities	14
access for testing	31.1, 31.8		
access to Principal and others	27.2		
insurance policies	21		

testing	31	Loss or damage to the Works	16, 18
Inspectors	22, 27.2	care of the work	16.1
Instructions of the Superintendent (see also Directions of the Superintendent)	23	excepted risks	16.3
Insurance		protection	15
imported items	42.2	reinstatement	16.2
inspection of policies	21	urgent protection	39
of employees	20	Lump sum	3.1, 3.2, 4.4
of works	18	Contract Sum	2
notice of claims	21.4	Making good (see also Reinstatement)	16.2, 30.3, 37
provisions of policies	21	Materials	29, 30
public liability	19	Constructional Plant	2, 29
settlement of claims	21.5	defective	30.3, 30.4, 30.5
unfixed items	42.4	delivery of	27.3
Workers' compensation	20	examination and testing	31
Interest on security and retention moneys	5.9	failure to use proper materials	44.2
overdue payments	42.9	manufacture and supply of	29.3
powers of arbitrator	47.3	particulars of	29.3
Interpretation of documents	1, 2, 8.1	possession on default	44.5
Issue of		provision of by Contractor	29.1
certificate of Practical Completion	42.5	quality of	30.1
Final Certificate	42.8	unfixed	42.4
payment certificate	42.1	upon frustration of contract	45
Labour, provision by Contractor	29.1	use of new materials	30.1
Daywork	41	Measurement	
Language	1	Daywork	41
Latent condition	12, 35.5(b)(iii), 46.1(ii)	generally	42
Law		units of	1
governing the Contract	1, 45, Annexure Part A	Media releases	8.7
compliance with statutory requirements	14.1	Monetary sum (see Provisional sum)	2
Corporations	5.10	Month, defined	2
giving of notices and fees	14.3	Minor omissions and minor defects	37
mistake of	47.3	calculation of payment	42.1
Liability of the Contractor		Practical Completion, definition of	2
for care of work	16	remedying	16.2, 37
for compliance with statutory requirements	14	Nature of Contract	3
for Nominated Subcontract	9.3, 10.3, 10.4	Nominated Subcontractor	10
for Selected Subcontract	9.3, 10.2, 10.4	Contractor's responsibility	9.3
for subcontractor	9.3	defined	10.1
Notice(s)		direct payment of	10.5
for testing	31.4	extension of time	35.5
for urgent protection	39	Nominated Subcontract	10.3, 10.4, 10.6
from or to insurer	21.3	provisional sums	11
of availability of site	27.1	Daywork	41
of claim for extension of time	35.5	Deductions	42.1, 42.3 42.10
of default by the Contractor	44.2, 44.3	for defective materials and work	30.4, 30.5, 40.1, 40.2, 42.2, 42.10
of default by the Principal	44.7, 44.8	for progress payments	42.1, 42.3
of discovery of minerals or fossils	27.5	retention moneys	5.6, 5.7, 42.3
of dispute	47.1	liquidated damages	35.6, 35.7
of errors in setting out	28.2	Nominated Subcontractor	10.5
of latent conditions	12.2	urgent protection	39
or names of persons entitled to access	27.2	default by Contractor	44.2, 44.5, 44.6
		during arbitration	42.1, 47.1, 47.3
		for unfixed plant and materials	42.4
		insurance premiums, proof of	21.1

of potential claims	21.4	of security and retention	5.7, 5.8, 42.8
of working hours	32	of workers and subcontractors	43
oral or written	23	on Completion by Principal	44.6
prescribed 46.1		on Final Certificate	42.8
to commence work on the Site	35.1	on Payment Certificate	42.1
to statutory authorities	14.3	on Practical Completion	42.1, 42.5
to suspend work	34.1	overpayment	42.2, 47.3
relating to arbitration/litigation	47.2	place of 1,	
service of 7, 25		Annexure Part A	
Ocean freight 42.2, 42.3,		provisional sums	10.1, 11, 40.5, 42.1
Annexure Part A		set-offs by Principal	42.10
Omissions (see also Minor omissions and minor		suspension of by Principal	4.2, 21.2, 43, 44.4
defects)		to Nominated Subcontractor	10.5
Bill of Quantities	4.4	to subcontractor	43
calculation of payment	42.2	to workers 43	
rectification of variations for	37, 40.1, 40.5	variations 40.5	
reinstatement	16.2	within 14 days	42.1
Schedule of Rates	3.3	within 28 days	42.7
Opening up for examination and testing	31.1, 31.7	Permission of the Superintendent	23
Oral direction 23		Permits of authorities	14.1, 14.3
Order of Work 33.1		Person, defined 2	
Ordinary working days	32	Plans (see Drawings)	2, 8
Ordinary working hours	32	Plant (see Constructional Plant)	2, 29.1, 29.2, 44.5
Ownership of documents		Possession of Site (see also Access)	27.1
supplied by Contractor	8.4	Practical Completion	2
supplied by Principal	8.3	Certificate of	42.5
Patents, Copyright and other intellectual property		Date for 2, 35.3, 35.5, 35.6	
rights	13	Date of 2, 35.3, 42.5	
Payment(s) (see also Adjustments and Retention		defined 2	
Moneys)	42	extension of time for	35.5
adjustment for errors in the Bill of Quantities		Separable Portions	35.3
3.2, 3.3, 4.3, 4.4, 40.5		Prescribed notice	46.1
adjustment for fees to statutory		Priced Bill of Quantities	2, 4
authorities	14.3, 40.5	Prime cost items (see Provisional sums)	
adjustment for rise and fall (omitted)	41	Principal 2,	
basis of 3.1		Annexure Part A	
calculation of	23, 42.1, 42.4	default of 44.7, 44.10	
certificates 42, 42.8		dispute with the Contractor	47
claims for 42.1, 42.2, 42.4, 42.7		rights of 44.4, 44.10	
currency of 1		Reinstatement of Damage	16.2
Profit and attendance		excepted risks	16.3
in Daywork 41		Rejection of materials or work	30.3
on delay costs	40.5	Release of security and retention	5.7, 5.8, 42.8
on provisional sums	11, 40.5,	Remedial work 30.3, 31, 37	
Annexure Part A		Removal of Contractor's employees, and	
Programming of the works	33	Subcontractors	26
Progress claims (see payment claims)	42.1	Removal of	
Progress, rate of	33.1	Constructional Plant	29.2
Prompt payment discount	11		

Protection		materials	29.2
of persons and property	15	Repairs, urgent (see Urgent Protection)	39
of Works	16	Replacement (see Reinstatement)	
Urgent, by Principal	39	Replacement of defective materials or work	30.3
Provisional Sum	2, 10.1, 11	Representative of Contractor	25
Public authorities	14, 15, 35.5	Superintendent	24
Public Liability Insurance	19	Requirements of statutory authorities	14
Public utilities	15	Responsibility of Contractor	9.3
Quality Assurance	30.2	for performance and payment	3.1
Quality System	30.2	Retention moneys	42.3
Quality of materials and workmanship	30.1, 30.2, 30.6	Final Payment Certificate	42.8
defective materials and work	30.3, 30.4, 30.5	Interest on	5.9
examination and testing	31	progress payments	42.3
Quantities, Bill of	4	recourse to	42.11
defined	2	reduction upon Certificate of Practical Completion	5.7
lodgement	4.2	release of	42.8
omitted items in	4.4	set-offs by the Principal	42.10
pricing	4.2, 4.3	substitution of security for	5.6
purpose of	4.1	upon frustration of the Contract	45
quantities in	3.2	Rise and fall (omission of)	41
Quantities, errors in	3.2, 4.4	Risks, excepted	16.3
Rate of progress	33.1	Roads, temporary, responsibility of the Contractor	15
Rates (see Schedule of Rates)		Royalties (see patents, copyright and other Intellectual property rights)	13
adjustment of	3.3, 4.4	Safety	15, 34.1
payment of	3.1	Schedule of Rates	
provisional sums	11	definition	1
valuation of Daywork	41	omitted items in	3.3
valuation of variations	40.5	payment of	3.1
Receiver	10.5, 43, 44.11	quantities in	3.2
Rectification	16.2, 30.3, 30.6, 37	variations	40.5
Reference marks (see also Survey Marks)	28	Specification	
defined	28.4	availability of	8.5
Regulations	14.1	confidential information	8.6
Security	5	definition	2
conversion of	5.5	discrepancies in	8.1
form of	5.3	supply of, by Principal	8.3
purpose of	5.1	Statutory declaration	43
provision of	5.2, Annexure Part A	Statutory requirements	14
recourse to	42.11	Strikes	35.5(a)
reduction of	5.7	Subcontract	
release of	5.8, 42.8	Contractor's responsibility	9.3
set-off by the Principal	42.10	Selected Subcontract	10.1, 10.2
substitution of	5.6	Separable Portion(s)	35.3 Annexure
time of lodgement	5.4		
upon frustration of the Contract	45(d)		

certificate of Practical Completion.....	42.5	Nominated	10.1, 10.3, 10.6
defects liability.....	37	permission to	9.2
definition	2	Selected	10.2, 10.4
reduction of security.....	5.7, Annexure Part A	Subcontractors' Employees (see also Employees)	26, 43
retention moneys	42.3, Annexure Part A	control of	26
time for commencement.....	35	insurance of.....	20, 21
time for Practical completion.....	35	responsibility for	9.3
Service of notice(s) (see also Notices).....	7, 25	Substantial breach.....	44.2, 44.7, Annexure Part A
before commencing work.....	35.1	Superintendent (see also Directions of	
by the Contractor on the Principal.....	44.7, 44.9	Superintendent)	23
by the Principal on the Contractor.....	44.2, 44.3, 44.4	defined	2, Annexure Part A
by the Superintendent	23	Notice to in relation to dispute.....	47.1
from or to the insurer.....	21.3	Superintendent's Representative	24
notification of latent conditions	12.2	Survey marks	
of appointment of Superintendent	2, Annexure Part A	care of	28.2
of appointment of Superintendent's		definition of.....	28.4
Representative	24	supply of	28.1
of claims to the Superintendent.....	46.1	Suspension of payment by Principal.....	4.2, 21.2, 43, 44.4
of dispute	47.1	Suspension of the Works.....	34
of finding of minerals, fossils and relics	27.5	by the Superintendent	34.1
of potential (insurance) claims	21.4	by the Contractor	33.1, 34.2, 44.9
of taking the work out of the hands		cost of	34.4, 44.9, 40.5
of contractor.....	44.4	effect of	34.5, 35.5
of terminating the contract.....	44.4(b), 44.9	Taking over of work by Principal.....	35.2, 35.4, 37, 38, 39, 44
time for	46.1	Temporary Works	
to commence work on the site.....	35.1	definition	2
Set-off	42.10	care of	15, 16.1
Setting out the works	28	insurance of.....	18
errors in	28.3	removal of	38
Settlement of disputes.....	47	Tender (see Acceptance of Tender)	
arbitration	47.3	date of acceptance, defined.....	2
notice of dispute	47.1	General conditions of and form of.....	AS 2125
Site		time of	8.1, 12.3
cleaning up	38	Trademark	13
definition	2	Unpaid moneys	42.11
delay in making available	44.7	Urgent protection.....	39
generally	27	Urgent relief	47.4
latent conditions	12	Use of partly completed works.....	35.4
materials, delivery to	27.3	Valuation	
Termination of the Contract		of Daywork	41
by Frustration	45	of final payment claims	42.7, 42.8
by the Contractor.....	44.7, 44.8, 44.9	of progress payment claims.....	42.1
by the Principal	44.3, 44.4	of variations	40.5
Insolvency	44.11	Variations	
Rights of parties	44.10	Daywork	40.1, 41
Testing	31	due to defective work	30.4
costs of	31.7	generally	40
notice of	31.4		
procedure if delayed	31.5		
results of	31.6		
Superintendent may order	31.1		
who conducts.....	31.3		
Third Party Insurance			
(see Public Liability Insurance)	19		
Time (also Extension of time)			
acceleration of work	35.5		
at large	35.5		

bar 12.4, 42.7, 46.1	
construction program	33.2
Contractor's float	35.5
Defects Liability Period.....	37,
Annexure Part A	
for disputing Superintendent's direction	46.2
delay costs 36	
for approval of Contractor's drawings	8.4
for arbitration	47.2
for claiming extensions of time.....	35.5
for cleaning up	38
for commencement of work	35.1
for effecting insurance.....	18, 19, 20, 21, 27.1
for final payment	42.8
for Formal Instrument of Agreement.....	6.2
for granting an extension of time	35.5
for handing over the Works	35.1
for lodging Bill of Quantities.....	4.2,
Annexure Part A	
for lodging security	5.4
for making claims	42.7, 46.1
for nomination of Nominated Subcontractor.....	10.3
for notice of latent condition.....	12.2, 12.4
for notice of tests.....	31.4
for notice to show cause	44.3, 44.8
for notification of claims	46.1
for possession of Site.....	27.1,
Annexure, Part A	
for Practical Completion.....	35.2, 35.5
for progress payment claims	42.1
for release of security or retention	5.7, 5.8,
42.3, 42.8	
for service of notices	7
for Superintendent to act.....	23
for Superintendent to confirm oral direction	23
for supply of construction program	33.2
for testing 31.1	
for Urgent Protection.....	39
Suspension of Work.....	34.1
variations after Practical Completion	40.1
proposed 40.2	
to assist the Contractor	30.4, 30.6, 40.4
valuation 40.5	
working hours.....	32
Wages	
Daywork 41	
particulars of wages paid for Daywork.....	41
of workers 43	
Waiver (of conditions)	48
Weather 12.1, 35.5(a)	
Winding up 43, 44.11	
Words 2	
Work	
not complying with the Contract.....	30.3
outside working hours.....	32
remedial 16.2, 37	
under the Contract, defined.....	2
care of 16.1	
variations (see Variations)	40
Work under the Contract, defined	2
Works (see also Care of the Works)	
defined 2	
handing over.....	35.1
Insurance of.....	18, 21.1
Workers, payment of.....	43
Workers' Compensation	20, 21
Working days 32	
Working hours 32	
Written instructions	23

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