

General Conditions of Contract for Construction

National Capital Works: NCW4

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Version 1.1 includes:

- Clause 2: correction in the definition of a *selected subcontractor*
- Clause 16(a)(iv): revised text for clarification
- Clause 47.1(a): additional text to address the situation if the Superintendent fails deliver its decision on time.

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Preface

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

Readers should note the following:

- Apart for minor and incidental design, NCW4 is intended for construct only and is not considered suitable for a major design and construct contract.
- NCW4 should not be used as a contract for services or professional services.
- It does not include any provisions regarding the limitation of liability.
- There are no provisions for the Principal to provide security.

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

The Australian Procurement and Construction Council (APCC) and Austroads make no warranty or representation as to the suitability of NCW4 for use by a non-government principal and do not assume a duty of care in this regard.

APCC and Austroads acknowledge the following documents as reference sources to NCW4:

- National Public Works Contract, General Condition of Contract 3 (a publication of Australian Procurement and Construction Council Limited);
- AS 4000-1997 General Conditions of Contract (a publication of Standards Australia Limited);
- AS 2124-1992 General Conditions of Contract (a publication of Standards Australia Limited);
and
- DR AS 11000 General Conditions of Contract (a draft publication of Standards Australia Limited).

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1 CONSTRUCTION OF CONTRACT

- a) The *Contractor* must:
- i) carry out and complete the *work under the Contract* in accordance with the *Contract*; and
 - ii) perform and observe all its other obligations under the *Contract*.
- b) The *Principal* must:
- i) pay the *Contractor* the *contract sum* for its performance, in accordance with, and subject to, the *Contract*; and
 - ii) perform and observe all its other obligations under the *Contract*.

2 DEFINED TERMS AND INTERPRETATION

2.1 Defined terms

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

business day means:

for the purposes of clause 42, a day defined as a *business day* in any *SOP Act* applicable to the *work under the Contract*; or

for the purpose of clauses other than clause 42, a day that is not:

- a) a Saturday or a Sunday;
- b) 27, 28, 29, 30 or 31 December; or
- c) a day that is wholly or partly observed as a public or statutory holiday in the state or territory specified in clause 2.2 a).

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

claim means any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) made:

- a) under or arising in connection with this *Contract*; or
- b) under any law,

but excluding the following:

- a) a claim made under an insurance policy;
- b) a demand against *security*; or
- c) a claim under clause 42.9.

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

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

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

Contract program means a program complying with clause 33.1.

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

- Contractor** means the person bound to carry out and complete the *work under the Contract*; stated in *Item 2*.
- Contractor's default** means a substantial breach of the *Contract* by the *Contractor*, including any of the following:
- a) abandoning the carrying out of the *work under the Contract*;
 - b) suspending the carrying out of the *work under the Contract* in whole or part without the written approval or *direction* from the *Superintendent*, except for suspension under clause 34;
 - c) failing to carry out the *work under the Contract* as required under clause 33.2;
 - d) failing to comply with a *direction* in writing or confirmed in writing by the *Superintendent*;
 - e) failing to maintain any registration or licence required by law to carry on activities required under the *Contract*;
 - f) failing to provide *security* as required under clause 5;
 - g) failing to effect and maintain insurance policies as required under the *Contract*;
 - h) in respect of clause 42, knowingly providing documentary evidence containing an untrue statement; or
 - i) the *Contractor* becoming liable to pay, or having paid, liquidated damages in the aggregate equal to the amount or percentage specified in *Item 25* (if any).
- date of acceptance of tender** means the earlier of:
- a) the date of execution of the formal instrument of agreement (if any) by the last of the parties to execute that document; or
 - b) the date which appears on the notice in writing of acceptance of the tender (if any);
- date for practical completion** means:
- a) where *Item 5* provides a *date for practical completion*, the date;
 - b) where *Item 5* provides a period of time for *practical completion*, the last day of the period,
- as adjusted under the *Contract*.
- date of practical completion** means:
- a) the date stated in a *certificate of practical completion* as the date upon which *practical completion* was reached; or
 - b) where another date is determined in any *dispute* resolution procedure as the date upon which *practical completion* was reached, that other date.
- daywork** means work carried out by the *Contractor* for which payment is made on the basis of daily time and cost records for labour, plant, materials, services and other items as provided in clause 41.
- defect** means work that does not comply with a requirement specified in the *Contract* and includes omissions.
- defects liability period** means the period specified in *Item 26* or the extended period referred to in clause 37 f).

- delay costs** means the payment made to the *Contractor* in respect of costs incurred as a result of a delay and not included in any other payment in connection with the cause of the delay.
- direction** includes authorisation, decision, demand, determination, instruction, notice, order, permission, rejection or requirement.
- dispute** means a disagreement between the parties arising out of, or in connection with, the *Contract*, including one concerning any aspect of a *Superintendent's direction*.
- frustration** means frustration at law or where the parties agree that the *Contract* is frustrated.
- GST** has the meaning given to it in the *GST Act*.
- GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth).
- insolvency event** means any of the following applying to the *Contractor*:
- a) the *Contractor* is insolvent;
 - b) the *Contractor* indicates it does not have the resources to perform the *Contract*;
 - c) an application for winding up is made which is not stayed within 14 days;
 - d) a winding-up order is made;
 - e) a controller, administrator, receiver, receiver and manager, provisional liquidator or liquidator is appointed;
 - f) a mortgagee enters into possession of any property of the *Contractor*;
 - g) notice is given of a meeting of creditors for the purposes of a deed of arrangement; or
 - h) any actions having a similar effect are taken.
- intellectual property right** means any patent, registered design, trademark or name, copyright or other protected right. Subsisting anywhere in the world.
- item** means an item specified in Annexure A – Contract Particulars.
- latent condition** means physical conditions on or below the *site* and its near surrounds, including artificial things (but excluding weather conditions or physical conditions which are a consequence of weather conditions), which differ materially from the physical conditions which should reasonably have been anticipated by a competent contractor (having regard to the warranty in clause 3), at the time of the *Contractor's* tender had a competent contractor inspected:
- a) all written information made available by the *Principal* to the *Contractor* for the purpose of tendering;
 - b) all information influencing the risk allocation in the *Contractor's* tender and reasonably obtainable by the making of reasonable enquiries; and
 - c) the *site* and its near surrounds, made available prior to, or at, the time of tender.
- non-reliance information** means the documents listed in *Item 10*.
- payment schedule** means a schedule setting out the amounts valued or assessed by the *Superintendent* as being due from one party to the other.

practical completion means that stage in the carrying out and completion of the *work under the Contract* when the *Superintendent* (acting as a certifier) determines that:

- a) the *Works* are complete except for minor *defects*:
 - (i) which do not prevent the *Works* from being reasonably capable of being used for their stated purpose;
 - (i) the *Contractor* has reasonable grounds for not promptly rectifying; and
 - (ii) the rectification of which will not prejudice the convenient use of the *Works*;
- b) those *tests* which are required by the *Contract* to be conducted and passed before the *Works* reach *practical completion*, have been conducted and passed;
- c) documents and other information required under the *Contract* which are essential for the use, operation and maintenance of the *Works* have been supplied; and
- d) any other condition precedent for *practical completion* specified in the *Contract* has been satisfied.

prescribed notice means a notice with respect to a *claim* which is identified as a prescribed notice under clause 46 and includes particulars of:

- a) the event, act or omission on which the *claim* is or will be based;
- b) the date(s) of occurrence of the event, act or omission;
- c) the provision of the *Contract* or other legal right that the *claim* is based upon;
- d) detailed quantification of the *claim* and the effect of the *claim* on the *contract sum*; and
- e) the effect of the *claim* on the *date for practical completion*.

Principal means the entity stated in *Item 1*, including its successors and assignees.

Principal's risk means any of the following:

- a) a breach of the *Contract* by the *Principal*;
- b) any risk specifically allocated to the *Principal* elsewhere in the *Contract*;
- c) use or occupation of any part of the *work under the Contract* by the *Principal*, its agents, or other contractors of the *Principal*; and
- d) an error, ambiguity or discrepancy in a design provided by the *Principal*.

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

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

reliance information means the documents listed in *Item 9*.

- security** means:
- a) cash;
 - b) retention money;
 - c) an interest bearing deposit in a bank (which has a consent under section 66 of the *Banking Act 1959* (Cwlth)) and is carrying on business at the place stated in *Item 4*;
 - d) an approved unconditional undertaking or an approved performance undertaking given by an approved financial institution or insurance company; or
 - e) other form approved by the *Principal*.
- security interest** has the meaning given to it in the *Personal Property Securities Act 2009* (Cwlth) as amended.
- selected subcontractor** means a contractor included on a list (provided by the *Principal*) of one or more contractors that the *Principal* has approved to undertake a specified part of the *work under the Contract* pursuant to clause 10.
- separable portions** means portions of the *Works* which are:
- a) identified as such in the *Contract*; or
 - b) created pursuant to clause 22.
- site** means the lands and other places to be made available by the *Principal* to the *Contractor* for the purpose of executing the *Works*.
- SOP Act** means the security of payment legislation, applicable in the jurisdiction where the *work under the Contract* is being carried out.
- statutory requirement** includes:
- a) acts, ordinances, regulations, by-laws, orders, awards and proclamations which apply in the jurisdiction where the *work under the Contract* is being carried out;
 - b) certificates, licences, consents, permits, approvals, *directions* and requirements of organisations having jurisdiction in connection with the carrying out of the *work under the Contract*; and
 - c) fees and charges payable in connection with the foregoing.
- subcontractor** includes the *Contractor's* suppliers and consultants.
- Superintendent** means the person appointed by the *Principal* to be the *Superintendent* pursuant to clause 23.
- Superintendent's Representative** means the natural person appointed in writing by the *Superintendent* under clause 24.
- survey mark** means anything provided by the *Principal* to be used by the *Contractor* for setting out, verifying or measuring the *work under the Contract*.
- temporary works** means temporary structures, amenities, physical services, materials, plant, machinery, equipment and other work used in carrying out and completing the *work under the Contract*, but not forming part of the *Works*.
- test** includes examination, inspection, observation, surveillance, audit, measurement, test, prove and trial.

variation means a change to the *work under the Contract*, including:

- a) additions, increases, omissions and reductions to and from the *Works*;
- b) changes to the character, quality, positions or dimensions of the *Works*; and
- c) changes in the method, timing and/or sequence of construction.

work under the Contract means the work which the *Contractor* is, or may be, required to carry out and complete under the *Contract* and includes *variations*, *construction plant*, *temporary works*, remedial work, subcontract work and supply of materials (including plant and equipment) and labour.

working day means:

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

Works means the whole of the work to be carried out and completed in accordance with the *Contract*, including *variations*, which is to be handed over to the *Principal*, but excluding *temporary work*.

2.2 Interpretation

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

- k) A provision of the *Contract* must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the *Contract* or the inclusion of the provision in the *Contract*.
- l) If an act must be done on a specified day which is not a *business day*, it must be done instead on the next *business day*, except as otherwise expressly contemplated by the *Contract*.
- m) All indemnities and warranties given by the *Contractor* in the *Contract* survive the termination or otherwise merging of the *Contract*.
- n) Without limiting clause 2.2 m), the provisions of the *Contract* which, by their nature, are intended to survive the termination, cancellation, completion or expiration of the *Contract* must continue as valid and enforceable obligations of the parties notwithstanding any such termination, cancellation, completing or expiration.

3 CONTRACTOR'S WARRANTIES

3.1 General

- a) The *Contractor* warrants that it:
 - i) is both experienced and skilled in work of the type, complexity and scale of the *work under the Contract*;
 - ii) has satisfied itself as to the correctness and sufficiency of the *contract sum* and that the *contract sum* covers the cost of complying with all its obligations under the *Contract* and of all matters and things necessary for the due and proper performance and completion of the *work under the Contract*;
 - iii) has examined carefully and has acquired actual knowledge of the contents of the documents and any other information made available in writing by the *Principal* or any other person on the *Principal's* behalf to the *Contractor* for the purpose of preparing and submitting the *Contractor's* tender;
 - iv) examined all information relevant to the risks, contingencies and other circumstances which could affect the *Contractor's* tender and which was obtainable by the making of detailed enquiries;
 - v) informed itself of the nature of the work and materials necessary for the execution of the *work under the Contract* and the means of access to, and facilities at, the *site* and transport facilities for deliveries to or from the *site*; and
 - vi) has visited and examined the *site* and its surroundings.

3.2 Joint and several liability

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

3.3 Collusive arrangements

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

4 COOPERATION

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

5 SECURITY

5.1 Provision of security

- a) The *Contractor* must provide the amount of *security* specified in *Item 6* (if any) within 10 *business days* of the *date of acceptance of tender*.
- b) The *security* must be in a form approved by the *Principal*. The form specified in *Item 6* is approved by the *Principal*.
- c) The *Principal* may, in its sole and absolute discretion, approve or disapprove of the financial institution or insurance company giving the unconditional undertaking.
- d) Any unconditional undertaking must not include an expiry date and must be irrevocable.
- e) The *Contractor* bears the costs of, and incidental to, providing *security*.
- f) Any interest earned on *security* belongs to the *Principal*.
- g) The *Contractor* may request the *Principal* to approve the substitution of another form of *security* to that specified in *Item 6*. The *Principal* is under no obligation to approve another form of *security*.
- h) The *Contractor* must not take any steps to prevent the *Principal* making a demand against the *security*, or to prevent the provider of a *security* from complying with the *security* or any demand by the *Principal*.

5.2 Reduction and release of security

- a) Unless the *Principal* has made, or intends to make, a demand against the *security*, the *Principal* must return the percentage or amount specified in *Item 6* (or, if applicable, the balance remaining after a demand on the *security*) to the *Contractor* within 10 *business days* after the *date of practical completion*.
- b) The *Principal* must return the remaining *security* (or, if applicable, the balance remaining after a demand on the *security*) by the latest of:
 - i) the end of the period(s) stated in *Item 6* after the *date of practical completion* for the whole of the *Works*;
 - ii) the resolution of any outstanding *defects* or unresolved *claims*; and
 - iii) the payment of any moneys due and payable by the *Contractor* to the *Principal*, including debts, damages and indemnity claims.

5.3 Deed of guarantee, undertaking and substitution

- a) The definitions in the *Corporations Act 2001* (Cwlth) apply to this clause 5.3.
- b) Where:
 - i) the *Contractor* is a *subsidiary*; and
 - ii) the *Principal* has specified in the tender documents or *Contract documents* that the *Contractor* must provide a deed of guarantee, undertaking and substitution,

the *Contractor* must, within 10 *business days* after receiving a written request from the *Principal*, provide a deed of guarantee, undertaking and substitution which is duly executed and enforceable against a *holding company* for the *Contractor*.

- c) The *Principal* may approve or disapprove of the *holding company* in its sole and absolute discretion.
- d) The deed of guarantee, undertaking and substitution must be in the form specified by the *Principal*.

6 THE CONTRACT

6.1 Evidence of contract

- a) The *Contract* is made up solely of the *Contract documents*, which supersede all understandings, representations and communications made between the parties before the *date of acceptance of tender* in relation to the subject matter of the *Contract*.

The *Contract documents* are:

- i) these General Conditions of Contract NCW4 and attached Annexures; and
 - ii) the other documents listed in *Item 7*.
- b) The several documents forming the *Contract* are to be taken as mutually explanatory of one another and anything included in, or reasonably to be inferred from, one or more documents must be read as included in all other documents, unless the context requires otherwise.
 - c) Except to the extent otherwise expressly provided for in the *Contract*, the *Contract* can only be amended or varied with the prior written agreement of the parties.

6.2 Formal instrument of agreement

- a) If *Item 7* specifies that a formal instrument of agreement is required, or the parties agree to execute a formal instrument of agreement:
 - i) the *Principal* must prepare at least two copies of the formal instrument of agreement and forward them to the *Contractor* no later than 20 *business days* after the *date of acceptance of tender*;
 - ii) the *Contractor* must execute all copies and return them to the *Principal* no later than within 10 *business days* of receipt of the formal instrument of agreement; and
 - iii) the *Principal* must return at least one executed copy to the *Contractor* no later than 10 *business days* after receipt of the executed copies of the formal instrument of agreement.
- b) The times specified in this clause 6.2 may be increased by the *Superintendent*.

6.3 No waiver

- a) Unless both parties agree in writing, the terms of the *Contract* cannot be waived, amended, released at law or in equity.

7 SERVICE OF NOTICES

7.1 Notice requirements

- a) Subject to clause 7.1 b) and 7.1 c), a notice, document transmittal, request, consent, approval, *direction* or other communication under or for the purposes of the *Contract* must be:
 - i) in writing and addressed to the receiving entity; and
 - ii) either:
 - A) sent by post to, or left at the postal address for, the receiving entity specified in *Items 1, 2 or 3* (as the case may be);

- B) handed to the receiving entity;
 - C) sent by email to the email address for the receiving entity specified in *Items 1, 2 or 3* (as the case may be); or
 - D) if the *Contract* requires, or if the parties have agreed in writing, that a proprietary document management system may be used for the purpose of giving a notice under the *Contract*, sent via that system.
- b) Service of a notice under clauses 44 or 47 will only be valid if:
- i) sent by registered post to, or left at the postal address for, the receiving entity specified in *Items 1, 2 or 3* (as the case may be); or
 - ii) handed to the receiving entity.
- c) The Superintendent may give a *direction* orally, but the *Superintendent* must confirm it in writing as soon as practicable.

7.2 Time of receipt

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

7.3 Notice details

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

7.4 Service of claims under a SOP Act

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

8 CONTRACT DOCUMENTATION AND INFORMATION

8.1 General

- a) Subject to clause 7.1 b), if the *Contract* requires the use of a proprietary document management system for the transmission of documents, the parties must transmit all documents in connection with the *Contract* by the proprietary document management system.

8.2 Errors, ambiguities and discrepancies

- a) If either party discovers or is made aware of any error, ambiguity or discrepancy in a *Contract document* that party must notify the *Superintendent* and the other party of the error, ambiguity or discrepancy as soon as possible and in any case not later than the earlier of:
- i) the commencement or continuation of any *work under the Contract* affected by the error, ambiguity or discrepancy; and

- ii) 5 *business days* of first becoming aware of the error, ambiguity or discrepancy.
- b) If the *Superintendent* becomes aware of an error, ambiguity or discrepancy in a *Contract document*, the *Superintendent* must notify the *Contractor* of the interpretation to be followed within 5 *business days* (or such other time reasonably determined by the *Superintendent*).
- c) If:
 - i) the *Superintendent* issues a direction pursuant to clause 8.2 b) as a consequence of an error, ambiguity or discrepancy in a *Principal*-supplied document, and
 - ii) the *Contractor* incurs costs which are less or more than it would have incurred if the direction was not given,the change in costs must be valued pursuant to clause 40.5.
- d) Figured dimensions take precedence over scaled dimensions in the event of a discrepancy.

8.3 Principal's documents

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

8.4 Contractor's documents

- a) Unless the *Contract* specifies otherwise, the *Contractor* must supply the *Principal* and *Superintendent* with one electronic copy of the documents required to be supplied to the *Principal*. Electronic documents must be in a format acceptable to the *Principal*.
- b) Unless specified otherwise, all documents supplied by the *Contractor* to the *Principal* or *Superintendent* must be in the English language.
- c) Copies of documents supplied by the *Contractor* are the property of the *Principal*, but must not be used or copied otherwise than for the use, maintenance or alteration of the *Works*.
- d) If the *Contract* requires the *Contractor* to submit documents to the *Superintendent* for comment, determination of suitability, endorsement, review or approval, the *Superintendent* must respond within 10 *business days* (or such other time specified in the *Contract*) after receipt of the documents. The *Superintendent* must not reject documents which are in accordance with the requirements of the *Contract*.

8.5 Availability

- a) If *directed* by the *Superintendent*, the *Contractor* must ensure that the *Superintendent* has access to:
 - i) one complete set of the *Contract documents* and the documents referred to in clauses 8.3 and 8.4 on the *site*; and
 - ii) for any part of the *Works* being manufactured off-site, a set of documents in respect of that part at the place of manufacture of the part.

8.6 Confidential information

- a) Except to the extent required by law or elsewhere in this *Contract*, each party must ensure that anything supplied by the other party and clearly identified as confidential is kept confidential.
- b) Either party may require the other party or the *Superintendent* to enter into a perpetual confidentiality agreement in respect of the information referred to in clause 8.6 a).

8.7 Contractor's obligations unaffected

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

8.8 Design by Contractor

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

9 ASSIGNMENT AND SUBCONTRACTING

9.1 General

- a) The *Contractor* must not, without the *Principal's* prior written approval, assign the *Contract* or any payment or any other right, benefit or interest under the *Contract*.
- b) The *Contractor* must not subcontract the whole of the *work under the Contract*.
- c) The *Contractor* is liable for the acts and omissions of *subcontractors* (including *subcontractors* engaged in accordance with clause 10) as if such acts or omissions were those of the *Contractor*.
- d) Subcontracting of any obligation under the *Contract* or any approval to subcontract does not affect the *Contractor's* obligations or liability under the *Contract*.
- e) The *Contractor* must comply with the requirements specified in the Subcontracting Framework (if any), included in the *Contract* as Annexure C.
- f) The *Contractor* indemnifies the *Principal* against:
 - i) all *claims*, actions, loss or damage and all other liability arising out of any acts or omissions of *subcontractors*; and
 - ii) any claim by a *subcontractor* against the *Principal* in respect of a breach of this clause 9 by the *Contractor*.

9.2 Novation

- a) If stated in *Item 8*, the *Contractor* must execute a deed of novation between the *Principal*, *Subcontractor* and *Contractor* for the work specified in *Item 8*.
- b) The deed of novation must be in the form specified in the invitation to tender or in the *Contract*.
- c) The *Contractor* is not entitled to any adjustment to the *contract sum* as a consequence of the novation.

10 SELECTED SUBCONTRACTORS

- a) This clause 10 applies if the *Principal* has specified in the invitation to tender or in the *Contract* that part of the *work under the Contract* must be undertaken by a *selected subcontractor*.

- b) Before commencing the *work under the Contract* referred to in clause 10 a), the *Contractor* must advise the *Superintendent* of the names of those *selected subcontractors* that the *Contractor* proposes to use and provide any other information concerning the *selected subcontractors* reasonably requested by the *Superintendent*.
- c) In respect of the *work under the Contract* referred to in clause 10 a), if:
 - i) no *selected subcontractor* is willing to undertake that *work under the Contract*;
 - ii) a *selected subcontractor* is unable to complete that *work under the Contract*;
 - iii) a *selected subcontractor* repudiates the subcontract; or
 - iv) that subcontract is terminated,the *Contractor* must provide the *Superintendent* with a list of one or more subcontractors that it proposes to use for that *work under the Contract* and obtain the *Superintendent's* approval of the subcontractor prior to engaging the subcontractor.

11 PROVISIONAL SUMS AND PROVISIONAL QUANTITIES

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

12 SITE CONDITIONS

12.1 General

- a) *Reliance information* and *non-reliance information* comprise of those documents listed in *Items* 9 and 10 respectively.
- b) With respect to *reliance information*:
 - i) the *Contractor* may rely on the factual accuracy of *reliance information*, but
 - ii) the *Principal* does not warrant or make any representation with respect to the completeness of the *reliance information*.
- c) With respect to *non-reliance information*:
 - i) if the *Contractor* relies on *non-reliance information*, it does so at its own risk;
 - ii) the *Principal* does not warrant or make any representation with respect to the accuracy, quality or completeness of the *non-reliance information*; and
 - iii) the *Principal* is not liable to the *Contractor* for any *claim* arising out of, or in relation to, *non-reliance information*.

- d) Notwithstanding clause 12.1 a), any interpretations, deductions, opinions or conclusions set out in any document provided by the *Principal* in connection with *site* conditions are deemed to be *non-reliance information* and the use of such information is entirely at the *Contractor's* risk.
- e) The *Contractor* is solely responsible for dealing with any *latent condition* so as to minimise delay and to minimise increased costs.

12.2 Notification of a latent condition

- a) If the *Contractor*:
 - i) becomes aware of a possible *latent condition*; and
 - ii) either intends to make a *claim* or believes that it has an entitlement to make a *claim* for an extension of time or additional costs,the *Contractor* must notify the *Superintendent* of the existence of the possible *latent condition*.
- b) The notice of the possible *latent condition* must:
 - i) be identified as 'Early Warning Under clause 12.2';
 - ii) be given as soon as possible (and in any event not more than 1 *business day* of the *Contractor* becoming aware of the potential *latent condition*); and
 - iii) where possible, be given before the *latent condition* is disturbed.
- c) If required by the *Superintendent* (acting as a certifier), the *Contractor* must promptly provide to the *Superintendent* a statement specifying:
 - i) the conditions on the *site* that the *Contractor* claims to be *latent conditions*;
 - ii) the manner in which the *Contractor* contends they differ materially from the conditions on the *site* the *Contractor* should reasonably have expected at close of tenders, including any information supporting this contention;
 - iii) the effect on the *work under the Contract*;
 - iv) the effect on the *Contract program*;
 - v) the additional work and resources involved and the *Contractor's* estimate of its entitlement to any adjustment to the *contract sum*;
 - vi) any other matters the *Contractor* considers relevant; and
 - vii) any other details reasonably requested by the *Superintendent*.

12.3 Valuation of additional costs

- a) Subject to clauses 12.3 b) and 12.3 c), if a *latent condition* causes the *Contractor* to incur extra costs, which would not have been incurred if the *latent condition* did not exist, a valuation of those extra costs must be made pursuant to clause 40.5.
- b) The *Contractor* has no entitlement to adjustment to the *contract sum* as a consequence of *latent conditions* from any cause which:
 - i) the *Contract* expressly states is at the *Contractor's* risk; or
 - ii) is specified in *Item 11*.
- c) The valuation of extra costs in clause 12.3 a) must not include any costs incurred more than 5 *business days* before the date on which the *Contractor* gives the written notice required by clause 12.2 a).

12.4 Extension of time

- a) The *Contractor's* entitlement to an extension of time from a *latent condition* is subject to clause 35.3.

13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

- a) The *Principal* warrants that, unless specified otherwise in the *Contract*, design, materials, documents and methods of working specified by the *Principal* in the *Contract* or provided or *directed* by the *Principal*, do not infringe any *intellectual property right* if used in accordance with the *Contract*.
- b) The *Contractor* warrants that any other design, materials, documents and methods of working provided by the *Contractor* to the *Principal*, or included in this *Contract* by the *Contractor*, do not infringe any *intellectual property right* if used in accordance with the *Contract*.
- c) Each party indemnifies the other party against any liability arising from an infringement of any *intellectual property right* contrary to a warranty provided under this clause 13.
- d) The *Principal* grants to the *Contractor* an irrevocable royalty-free licence to use the design, materials and documents provided by the *Principal*, but only for the purpose of construction of the *Works*.
- e) The *Contractor* grants to the *Principal* an irrevocable royalty-free licence to use the design, materials, documents and methods of working, provided by the *Contractor*, but only for the purpose of the occupation, use, operation, repair, maintenance, addition, alteration or extension of the *Works*.
- f) Where the *Contractor* is not the holder of *intellectual property rights* referred to in clause 13 e), the *Contractor* must take all steps reasonably necessary to ensure that the holder of the *intellectual property rights* grants to the *Principal* an irrevocable royalty-free licence to use those things for the occupation, use, operation, repair, maintenance, addition, alteration or extension of the *Works*.

14 STATUTORY REQUIREMENTS

14.1 Complying with statutory requirements

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

14.2 Changes in statutory requirements

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

14.3 Licences, registrations, permits, approvals and certificates

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

- c) The *Contractor* must provide the *Principal* with a copy of any licences, authorisations, notices, approvals, consents and other documents issued to the *Contractor* by any authority in respect of the *work under the Contract*.

15 SAFETY

- a) The *Contractor* must:
- i) carry out the *work under the Contract* safely and in a manner that does not put the health and safety of persons at risk;
 - ii) comply with all *statutory requirements* and other requirements of the *Contract* in respect of work health and safety; and
 - iii) comply with its duty under any applicable *statutory requirements* to consult, cooperate and coordinate activities with all other persons who have a work health and safety duty in relation to the same matter.
- b) If, pursuant to a *statutory requirement* of the state or territory where the *work under the Contract* is being carried out, workplace health and safety on the *site* must be managed by a principal contractor, the *Principal*:
- i) appoints the *Contractor* to be the principal contractor; and
 - ii) authorises the *Contractor* to have management and control of the workplace and to discharge the duties of a principal contractor,
- unless specified in *Item 13* that another person will be the principal contractor.

16 PREVENTION AND REINSTATEMENT OF DAMAGE

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

- f) Without affecting the *Principal's* other rights and remedies, the *Principal* may have an obligation under clause 16 e) carried out by others if:
 - i) the *Contractor* fails to comply with an obligation under clause 16 e); and
 - ii) the *Superintendent* has given reasonable written notice to the *Contractor* that it intends to have the obligation carried out by others.
- g) The cost incurred by the *Principal* pursuant to clause 16 f) must be assessed by the *Superintendent* and is a debt due and payable by the *Contractor* to the *Principal*.

17 INDEMNITIES

17.1 Contractor's indemnity

- a) The *Contractor* indemnifies the *Principal* against:
 - i) *claims* in respect of personal injury or death;
 - ii) loss of, or damage to, the *Principal's* property; and
 - iii) loss of, or damage to, any other property,arising out of, or as a consequence of carrying out, the *work under the Contract*.
- b) The indemnity provided under clause 17.1 a) is to be reduced proportionally to the extent that any act or omission of the *Principal*, its consultants, agents, employees, other contractors engaged by the *Principal* or the *Superintendent*, has contributed to the injury, death, loss or damage.
- c) Clause 17.1 a) does not apply to:
 - i) the extent that the *Contractor's* liability is limited by another provision of the *Contract*;
 - ii) exclude any other right of the *Principal* to be indemnified by the *Contractor*;
 - iii) materials, plant or equipment entrusted to the *Contractor* by the *Principal* under clause 16 a);
 - iv) damage which is the unavoidable result of the construction of the *Works* in accordance with a construction methodology specified by the *Principal*;
 - v) war, invasion, act of foreign enemies, hostilities, (whether war be declared or not), act of terrorism, civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority; and
 - vi) 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*.

17.2 Principal's indemnity

- a) The *Principal* indemnifies the *Contractor* against any claim in connection with the *Principal's* right to have the *work under the Contract* carried out on the *site*.

18 PRINCIPAL ARRANGED INSURANCE

- a) This clause 18 applies if the *Principal* is responsible to effect insurance.
- b) Not later than the *date of acceptance of tender*, the *Principal* must:
 - i) if specified in *Item 14*, effect a Works policy of insurance to cover physical loss or damage to the *temporary works and Works*; and
 - ii) if specified in *Item 15*, effect a public liability policy of insurance to cover physical loss or damage to property or injury or death to persons arising out of, or in connection with, carrying out the *work under the Contract*.
- c) The insurance must be on terms not less beneficial to the *Contractor* than those described in the insurance policy or proposed insurance policy referenced in *Item 16*.

- d) The *Principal* must:
 - i) pay all necessary premiums;
 - ii) maintain the insurance until the expiry of the *defects liability period* or any other period specified in the *Contract*; and
 - iii) provide or make available to the *Contractor* a copy of the relevant insurance policy.
- e) The *Contractor*:
 - i) acknowledges that it has considered the extent of insurance cover provided by the *Principal* and made its own determination whether it needs further insurance to cover difference in conditions; and
 - ii) bears the cost of taking out any difference in conditions insurance that it considers to be necessary.

19 CONTRACTOR ARRANGED INSURANCE

- a) This clause 19 applies if the *Contractor* is responsible to effect insurance.
- b) Before starting the *work under the Contract*, the *Contractor* must:
 - i) if specified in *Item 14*, effect a Works policy of insurance to cover physical loss or damage to the *temporary works and Works*; and
 - ii) if specified in *Item 15*, effect a public liability policy of insurance to cover physical loss or damage to property or injury or death to persons arising out of, or in connection with, carrying out the *work under the Contract* and covers the *Contractor, Principal, Superintendent* and *subcontractors*.
- c) Unless another amount is specified in the *Contract*, the Works insurance must be for an amount which is not less than the *contract sum* (at the *date of acceptance of tender*) plus 15%, and the public liability insurance must not be less than the amount specified in *Item 17*.
- d) The *Contractor* must:
 - i) pay all necessary premiums and maintain the insurance in accordance with the requirements of the *Contract*;
 - ii) unless specified otherwise in the *Contract*, maintain the insurance until expiry of the *defects liability period*;
 - iii) give the *Principal* proof that all insurance policies required to be effected by the *Contractor* under the *Contract* are current:
 - A) before starting the *work under the Contract*; and
 - B) whenever requested by the *Principal*; and
 - iv) give the *Principal* a copy of all insurance policies it is required to effect and maintain whenever requested by the *Principal*.
- e) All policies must:
 - i) be in the joint names of the *Principal* and *Contractor*;
 - ii) require the insurer to notify the *Principal* at the same time as the insurer receives or gives any notice concerning the policy, and at least 7 days before any proposed cancellation of a policy; and
 - iii) provide that a notice of claim given to the insurer by the *Principal*, the *Contractor*, or a *subcontractor* will be accepted by the insurer as a notice of claim given by all of the insured.

- f) If the *Contractor* is not the only insured under a policy of insurance, the *Contractor* must ensure, where legally possible, that the policy:
- i) includes a cross-liability clause providing that all insuring agreements and endorsements operate in the same manner as if there were a separate policy of insurance covering each insured;
 - ii) provides that the insurer waives all rights, remedies or relief which it might become entitled to by subrogation against any of the insureds, and that failure by any insured to observe and fulfil the terms of the policy does not prejudice the insurance in regard to any other insured; and
 - iii) contains a non-imputation clause providing that any non-disclosure or misrepresentation (whether fraudulent or otherwise), any breach of a term or condition of the policy, or any fraud or other act, omission or default by one insured, will not affect another insured, unless those acts or omissions were made with the connivance or actual knowledge of the other insured.
- g) The *Contractor* must ensure that, in respect of each policy of insurance required to be effected or taken out as required by this clause 19 by the *Contractor*, it:
- i) does not do anything which prejudices any insurance;
 - ii) if necessary, rectifies anything which might prejudice any insurance;
 - iii) reinstates an insurance policy if it lapses;
 - iv) does not cancel, vary or allow an insurance policy to lapse without the prior written consent of the *Principal*;
 - v) immediately notifies the *Principal* of any event which may result in an insurance policy lapsing or being cancelled; and
 - vi) gives full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any way prejudice or affect any such policy or the payment of all or any benefits under the insurance.
- h) If the *Principal* has a reasonable objection to an insurer or to any conditions of an insurance policy, and notifies the *Contractor* of the objection and the reasons for the objection, the *Contractor* must, within 5 *business days* after receiving the notification, either obtain insurance from another insurer or arrange changes to the insurance policy, so that the *Principal* has no objections.
- i) If the *Contractor* fails to comply with clauses 19 c), 19 d) or 19 h), the *Principal* may effect and maintain the relevant insurance policy and pay the necessary premiums. The *Principal* may recover from the *Contractor* the cost of the premiums and the *Principal's* reasonable costs of effecting and maintaining the insurance, as a debt due from the *Contractor* to the *Principal*.

20 OTHER INSURANCE

- a) Unless clause 20 b) applies, before the *Contractor* commences work, the *Contractor* must:
- i) insure against liability for death of, or injury to, persons employed by the *Contractor* including liability by statute and at common law;
 - ii) maintain the insurance cover until all *work under the Contract* is completed;
 - iii) where permitted by law, extend the insurance to indemnify the *Principal* for the *Principal's* statutory liability to persons employed by the *Contractor*; and
 - iv) ensure that every *subcontractor* working on the *site* is similarly insured.
- b) If, in the jurisdiction where the *work under the Contract* is being carried out, insurance of employees is covered by a statutory scheme of insurance, the *Contractor* must comply with its obligations under that scheme and if requested by the *Superintendent*, provide evidence demonstrating compliance with this clause 20 b).

- c) If stated in *Item 18*, the *Contractor* must ensure that a professional indemnity insurance policy is in place which covers the design of *temporary works*. The policy must be in place prior to the commencement of the design and maintained until the expiry of the *defects liability period*. The amount of cover must not be less than the amount specified in *Item 18*, or if no amount is specified, an amount which is sufficient to cover the costs of demolition, removal of debris and reconstruction of that part of the *Works* which is dependent upon the *temporary works*.

21 INSURANCE CLAIMS

21.1 Management of insurance claims

- a) The *Contractor* must:
- i) make and manage all insurance claims;
 - ii) as soon as practicable, notify the *Principal* of any occurrence that may give rise to an insurance claim under a policy of insurance required by clause 18, 19 or 20 and keep the *Principal* informed of subsequent developments concerning the insurance claim; and
 - iii) ensure that *subcontractors* in respect of their operations similarly inform the *Principal*.

21.2 Settlement of insurance claims

- a) Where a settlement has been made under the *Works* insurance:
- i) unless the parties agree otherwise, the proceeds of the settlement must be paid to the *Principal*;
 - ii) the *Superintendent* (acting as a certifier) must assess the amount due to the *Contractor* for reimbursement of the cost reasonably and necessarily incurred by the *Contractor* to rectify the loss or damage; and
 - iii) the *Principal* must pay the *Contractor* the lesser of the amount assessed under clause 21.2 a) ii) and the amount of insurance settlement.

21.3 Excesses or deductibles

- a) To the extent that an insurance claim under a policy of insurance effected under clauses 18, 19 or 20 is not a direct consequence of a *Principal's risk* (without fault or omission on the part of the *Contractor*), the *Contractor* is responsible for the payment of any excesses or deductibles.

22 SEPARABLE PORTIONS

- a) The *Superintendent* may direct that the respective parts of the *Works* are to be *separable portions*, if:
- i) a part of the *Works* has reached, or will reach, a stage equivalent to that of *practical completion*, but another part of the *Works* has not reached such a stage, or
 - ii) the parties agree for the *Works* be divided into *separable portions*.
- b) If new *separable portions* have been created, for each *separable portion*, the *Superintendent* (acting as a certifier) must notify each party of the following:
- iii) the portion of the *Works*;
 - iv) the *date for practical completion*; and
 - v) the respective amounts for *security* and liquidated damages.
- c) The respective amounts for *security* and liquidated damages must be calculated pro-rata according to the ratio of the *Superintendent's* valuation of the separable portion to the *contract sum*.
- d) A provision of this *Contract* in respect of *defects liability period*, *site*, *work under the Contract*, *Works*, *date for practical completion*, *date of practical completion*, *security* and liquidated damages applies separately to each *separable portion*.

- e) In using a separable portion that has reached *practical completion*, the *Principal* must not impede the *Contractor* in the performance of the *work under the Contract*.

23 SUPERINTENDENT

- a) The *Principal* must ensure that, at all times, there is a person appointed to act as the *Superintendent*.
- b) The *Superintendent* is the person stated in *Item 3* or other person that the *Principal* appoints from time to time. The *Principal* must notify the *Contractor* of any change in the person appointed to be *Superintendent*.
- c) Where it is stated in the *Contract* that the *Superintendent* is acting as a certifier, the *Principal* must ensure that the *Superintendent*:
 - i) acts honestly and impartially;
 - ii) acts within the time prescribed under the *Contract* or where no time is prescribed, within a reasonable time; and
 - iii) arrives at a reasonable measure or value of work, quantities or time.
- d) In the exercise of all other functions of the *Superintendent* under the *Contract*, the *Superintendent* acts as the agent of the *Principal* and does not act as an independent certifier.
- e) If pursuant to a provision of the *Contract* enabling the *Superintendent* to give a *direction*, the *Superintendent* gives a *direction*, the *Contractor* must comply with the *direction*.
- f) The *Principal* may authorise the *Superintendent* to act on its behalf in respect of matters relating to the *Contract*.

24 SUPERINTENDENT'S REPRESENTATIVE

- a) The *Superintendent* may:
 - i) appoint other persons to be a *Superintendent's Representative*; and
 - ii) delegate any of its functions under the *Contract* to a *Superintendent's Representative*.
- b) Not more than one *Superintendent's Representative* may exercise the same function at the same time.
- c) Notwithstanding the appointment of a *Superintendent's Representative*, the *Superintendent* may continue to exercise any of its functions under the *Contract*.
- d) The *Superintendent* must ensure that, at all times, the *Contractor* is provided with the names of any *Superintendent's Representative* and the functions delegated to the *Superintendent's Representative*.

25 CONTRACTOR'S REPRESENTATIVE

- a) Whenever any activity in connection with the *work under the Contract* is taking place, the *Contractor* must ensure that a competent representative is present.
- b) Prior to the commencement of the *work under the Contract*, the *Contractor* must notify the *Superintendent* of the name of the representative(s) and their responsibilities.
- c) The *Contractor* must notify the *Superintendent* if there is a change of representative(s).
- d) Any *direction* which is given to the representative of the *Contractor* is deemed to have been given to the *Contractor*.
- e) The *Contractor* is deemed to have knowledge of any matter which is known to a representative of the *Contractor*.

- f) If a representative does not possess the skills, experience or qualifications required in the *Contract* (if specified) or in the reasonable opinion of the *Superintendent* is not competent to undertake the role, the *Superintendent* may object to the appointment of that representative, in which case the *Contractor* must appoint another representative.

26 CONTROL OF CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS

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

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

27 SITE

27.1 Possession of site

- a) The *Principal* must give the *Contractor* sufficient possession of the *site* to allow the *Contractor* to start the *work under the Contract* by the date which is the latest of:
- i) the date the *Contractor* provides *security* (other than retention money) if required pursuant to clause 5;
 - ii) the date the *Contractor* provides proof of insurance (if required) pursuant to clause 21;
 - iii) the date the *Contractor* satisfies any other condition precedent for possession of the *site* specified in the *Contract*; and
 - iv) the last *business day* of the period, stated in *Item 19*, after the *date of acceptance of tender*.
- b) If the *Principal* is unable to provide the *Contractor* with possession of the *site* (or part thereof) in accordance with the *Contract*, the *Principal* must notify the *Contractor* of the date upon which the *site* or any part thereof will be available to the *Contractor*.
- c) Possession of the *site*:
- i) confers on the *Contractor* a right only to such use and control as is necessary to enable the *Contractor* to carry out and complete the *work under the Contract*; and
 - ii) unless permitted in the *Contract* or approved otherwise by the *Superintendent*, excludes any purpose not connected with the performance of the *work under the Contract*.
- d) Subject to the *Contractor* satisfying any applicable requirements in clause 27.1 a), unless the delay in giving the *Contractor* sufficient possession of the *site* continues for longer than the time stated in *Item 19*, delay by the *Principal* in giving possession is not a breach of the *Contract*.

27.2 Access to the site for the Principal and others

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

- c) The *Contractor*:
 - i) must permit the execution of work on the *site* by other contractors or employees of the *Principal*;
 - ii) must cooperate with them and coordinate the *work under the Contract* with the work of the other contractors or employees of the *Principal*; and
 - iii) if specified in the *Contract*, must not impede other contractors or employees of the *Principal* undertaking work on the *site*.

27.3 Delivery of materials

- a) Unless the *Superintendent* gives prior written approval otherwise, the *Contractor* must not deliver materials to, or perform work on, the *site* until possession of the *site* (or part thereof) is given to the *Contractor* pursuant to clause 27.1.

27.4 Discovery of items of value

- a) The *Contractor* does not own any items of value found on the *site*, such as minerals, fossils, objects of antiquity or of anthropological / archaeological interest and coins. If any such item is discovered, the *Contractor* must immediately:
 - i) take precautions to prevent its removal or damage; and
 - ii) notify the *Superintendent* of the discovery.

28 CARRYING OUT THE WORKS

28.1 Setting out the works

- a) The *Contractor* must set out the *Works* in accordance with the *Contract*.
- b) The *Principal* must:
 - i) supply the information reasonably necessary to enable the *Contractor* to set out the *Works*; and
 - ii) provide the *Contractor* with any *survey marks* that are specified in the *Contract*.
- c) The *Contractor* must keep in their true positions any *survey marks* specified in the *Contract* or as supplied by the *Principal*.
- d) If a *survey mark* is disturbed, the *Contractor* must:
 - i) immediately notify the *Superintendent*; and,
 - ii) reinstate the *survey mark*, unless *directed* otherwise by the *Superintendent*.

28.2 Interference, nuisance and disturbance

- a) Unless the *Contract* permits otherwise, the *Contractor* must not:
 - i) unnecessarily interfere with the passage of people and vehicles;
 - ii) create unnecessary nuisance; or
 - iii) create unreasonable noise and disturbance.

28.3 Publicity

- a) Unless approved otherwise by the *Superintendent*, the *Contractor* must:
 - i) refer any enquiries from external parties regarding the *Contract* to the *Superintendent*;
 - ii) not publicise the *Contract*; or
 - iii) not release any information in connection with the *Contract* for publication in any media.

29 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT

- a) Unless specified otherwise in the *Contract*, the *Contractor* must supply everything necessary to meet its obligations under the *Contract*.
- b) Payment of the rates, items and lump sums included in the Commercial Framework is deemed to be full and complete payment for all materials, labour, *construction plant* and incidentals (including fees, charges, minor items and *testing*) necessary for the *Contractor* to fulfil its obligations under the *Contract*, notwithstanding that the description of the rate or lump sum may not fully describe all of the *work under the Contract*.
- c) The *Superintendent* may *direct* the *Contractor* to:
 - i) supply reasonable particulars; and
 - ii) provide reasonable access for an inspection by the *Superintendent*,in respect of any anything supplied by the *Contractor* which is to be included in the *Works*.
- d) The *Superintendent* may *direct* the *Contractor* to not remove any of the following from the *site*:
 - i) *construction plant* necessary to complete the *Works*;
 - ii) *temporary works*; or
 - iii) equipment or materials intended to be incorporated in to the *Works*.
- e) If compliance with a *direction* given under clause 29 d) causes the *Contractor* to incur additional cost, the cost is to be valued pursuant to clause 40.5.

30 MATERIALS AND WORK

30.1 Quality of materials and work

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

30.2 Defective work

- a) If any work carried out by the *Contractor* (including the provision of materials, plant, or equipment and the compliance with specified processes) is *defective*, the *Contractor* must rectify (including repair, rework, reconstruct or replace) the work so that it complies with the specified requirement.
- b) The rectification must:
 - i) be carried out at the *Contractor*'s own expense;
 - ii) be carried out as soon as practicable after the *Contractor* becomes aware of the *defect*;
 - iii) not adversely affect the durability, integrity or performance of the *Works*; and
 - iv) be carried out to minimise disruption and inconvenience to the *Principal*.
- c) If requested by the *Superintendent*, the *Contractor* must provide full details of the proposed method of rectification and the time by which the work will be rectified.
- d) The *Principal* may have *defective* work rectified by others if:
 - i) the *Contractor* is aware of the *defective* work;
 - ii) the *Contractor* fails to rectify the work as soon as practicable;
 - iii) the *Superintendent* has provided written notice to the *Contractor* that the *Principal* intends to have the subject work rectified by others if the work is not rectified within 10 *business days*

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

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

30.3 Acceptance of defective work

- a) At any time prior to the issue of a final payment *claim*, the *Contractor* may request the *Principal* to accept the *defective* work, but the *Principal* is under no obligation to accept such a proposal.
- b) If the *Principal* elects to accept the *defective* work, the *Superintendent* (acting as certifier) must adjust the *contract sum* by an amount which is commensurate with the increase or decrease in the value of the *Works* to the *Principal* and includes any other loss suffered by the *Principal* consequent upon such acceptance.

30.4 Other rights of the Principal

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

30.5 Suppliers' and manufacturers' warranties

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

30.6 Quality assurance

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

31 TESTING

31.1 Responsibility for testing

- a) Unless specified otherwise, the *Contractor* is responsible for undertaking all *testing* necessary to demonstrate that the *work under the Contract* complies with the requirements specified in the *Contract*.
- b) Before the *Contractor* conducts a *test*, reasonable notice must be given to the *Superintendent* of the time, date and place of the *test*.

- c) The *Superintendent* may *direct* that any part of the *work under the Contract* is not covered up or made inaccessible for *testing*.
- d) At any time prior to the expiry of the *defects liability period*, the *Superintendent* may undertake *testing* of the *work under the Contract* or *direct* that any material or *work under the Contract* be *tested*. The *Contractor* must provide reasonable access for the *testing* if required by the *Superintendent*. On completion of the *tests*, the *Contractor* must make good the *work under the Contract* so that it fully complies with the *Contract*.

31.2 Results of tests

- a) As soon as practical, the other party and the *Superintendent* must be provided with the results of the *tests*.

31.3 Costs of testing

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

31.4 Testing during the defects liability period

- a) If, during the *defects liability period*, the *Principal* or the *Superintendent* asserts that part of the *Works* does not comply with the *Contract*, the *Contractor* must be given reasonable access to *test* that part of the *Works*.
- b) The costs of, and incidental to, *testing* under this clause 31.4 must be borne by the *Contractor* unless the *test* shows that the material or work is in accordance with the *Contract*.

32 WORKING DAYS AND WORKING HOURS

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

33 PROGRESS AND PROGRAMMING OF THE WORKS

33.1 Contract program

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

33.2 Progress of the work

- a) The *Contractor* must carry out all work in connection with the *Contract* expeditiously and without undue delay, so that the *Works* will achieve *practical completion* by the *date for practical completion*.
- b) If the *Contractor* is unable to demonstrate that it will achieve *practical completion* by the *date for practical completion*, the *Superintendent* may direct the *Contractor* to take all reasonable steps to achieve the necessary progress. A *direction* under this clause is not an acceleration notice pursuant to clause 33.3.

33.3 Acceleration

- a) The *Superintendent* may notify the *Contractor* of a proposal to accelerate the *work under the Contract*. Unless the *Contractor* notifies the *Superintendent* that the acceleration cannot be effected, as soon as practicable after receipt of the notice, the *Contractor* must provide the *Superintendent* with the information specified in clause 40.2 a) in regard to the proposal.
- b) The *Superintendent* may direct that the *work under the Contract* is accelerated:
 - i) in order to bring forward the *date for practical completion*; or
 - ii) as an alternative to the *Contractor* being granted an extension of time, in which case the *Contractor's* entitlement to the extension of time is reduced by a time commensurate with the acceleration.
- c) If compliance with a *direction* to accelerate (except those required to address the *Contractor's* default) causes the *Contractor* to incur costs which are less or more than it would have incurred if the *direction* was not given, the difference must be valued pursuant to clause 40.5.
- d) Notwithstanding clause 7.1 c), A *direction* to accelerate must be in writing and expressly identified as a *direction* pursuant to this clause 33.3.

34 SUSPENSION OF THE WORKS

34.1 Superintendent's suspension

- a) The *Superintendent* may direct the *Contractor* to suspend the carrying out of the whole or part of the *work under the Contract*.
- b) The *Contractor* must resume carrying out the *work under the Contract* when directed by the *Superintendent*.

34.2 Contractor's suspension

- a) If the *Contractor* wishes to suspend the whole or part of the *work under the Contract*, the *Contractor* must obtain the prior written approval of the *Superintendent*. The *Superintendent* may approve of the suspension and may impose conditions of approval or reject the suspension in its absolute discretion.
- b) Clause 34.2 does not apply if the *Contractor* suspends work because of a cause listed in clause 44.3 a).

34.3 Cost of suspension

- a) If:
 - i) the suspension is due to an act or omission of the *Principal*, the *Superintendent* or an employee, consultant or agent of the *Principal*; and
 - ii) the *Contractor* incurs more or less cost than it would have if the suspension was not directed,the difference in costs is to be valued pursuant to clause 40.5. Otherwise the *Contractor* bears the cost of suspension.

35 TIME

35.1 Commencement of work

- a) The *Contractor* must:
 - i) advise the *Superintendent* of the date upon which the *Contractor* proposes to commence work on the *site* at least 5 *business days* (or such reduced time advised by the *Superintendent*) before work commences; and

- ii) commence work on the *site* within 10 *business days* (or such extended time advised by the *Superintendent*) after the *Principal* has given the *Contractor* possession of the *site* pursuant to clause 27.1 a).

35.2 Practical completion

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

35.3 Extension of time

- a) The *Contractor* is entitled to an extension of time for *practical completion* only if:
 - i) the *Contractor* is, or will be, delayed in achieving *practical completion* by a cause reasonably beyond the control of the *Contractor*, but not including:
 - A) any cause which the *Contract* expressly states is at the *Contractor's* risk;
 - B) any cause, specified in *Item 23*, which expressly precludes an entitlement for extension of time; and
 - C) inclement weather or industrial conditions after the *date for practical completion*;
 - ii) the *Contractor* has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay;
 - iii) the delay is to an activity or activities on the critical path of the then current *Contract program* and work is proceeding in accordance with this *Contract program*; and
 - iv) the *Contractor* has notified the *Superintendent* of the delay in accordance with clause 35.3 b) and submitted a *claim* in accordance with the requirements of the *Contract*.
- b) If it becomes evident to a party that:
 - i) a cause may delay the *work under the Contract*; and
 - ii) the *Contractor* may have an entitlement to an extension of time in clause 35.3 a) i) from that cause,

the party must notify the *Superintendent* and the other party as soon as possible (and in no case more than 1 *business day* of becoming aware of the cause).
- c) Unless notification is provided under another provision of the *Contract*, the notice must be endorsed 'Early Warning of Possible Delay Under clause 35.3'. The party must also provide any additional information in regard to the delay reasonably requested by the *Superintendent*.
- d) If the *Contractor* wishes to make a *claim* for an extension of time, it must submit a *claim* which:
 - i) identifies the extension of time *claimed*;
 - ii) includes information sufficient for the *Superintendent* to assess the *claim*, including all relevant facts, a copy of the *Contract program*, current at the start of the delay, which demonstrates how the delay affects the critical path and shows the expected effects of the delay;
 - iii) is submitted within 20 *business days* after the first day that the *Contractor* could reasonably have been aware of the start of the delay; and
 - iv) is updated every subsequent 20 *business days* if the delay continues.
- e) Within 10 *business days* after receiving the *Contractor's claim* for an extension of time, the *Superintendent* (acting as a certifier) must give the *Contractor* and the *Principal*, either:
 - i) a written statement advising of the extension of time so assessed; or
 - ii) a written *direction* that the *Contractor* and/or *Principal* provide, within 20 *business days*, further information which is reasonably necessary to assess the *claim*.

- f) If the *Superintendent* has requested further information to assess the *claim* under clause 35.3 e):
- i) within 20 *business days* of the receipt of the information from the *Contractor* and / or *Principal*; or
 - ii) if the *Contractor* or *Principal* fails to provide further information, within 40 *business days* of the request for the information,
- the *Superintendent* (acting as a certifier) must provide a written statement advising of the extension of time so assessed, including reasons if the assessment is less than the amount *claimed*.
- g) The *Contractor* is only entitled to an extension of time for delays occurring on *working days*.
- h) If:
- i) two or more events are causing delay simultaneously; and
 - ii) the cause of at least one of those events is not a cause which entitles the *Contractor* to an extension of time,
- then to the extent that the delays are concurrent, the *Contractor* is not entitled to an extension of time for *practical completion*.
- i) Whether the *Contractor* can:
- i) reach *practical completion* by the *date for practical completion* without an extension of time; or
 - ii) make up the time lost by committing extra resources or incurring extra expenditure, must be disregarded in the assessment of a *claim* for an extension of time.
- j) At any time before the issue of the final *payment schedule*, the *Principal* may extend the time for *practical completion* in its absolute discretion and for any reason.

35.4 Liquidated damages

- a) If:
- i) *Item 24* states that liquidated damages apply; and
 - ii) the *Contractor* fails to achieve *practical completion* by the *date for practical completion*, the *Contractor* will be liable to pay the *Principal* liquidated damages at the rate stated in *Item 24*, (or if applicable, the rate notified by the *Superintendent* in accordance with clause 22) for every calendar day after the *date for practical completion*, up to and including the *date of practical completion*.
- b) However, if the *Contract* is terminated before the *Contractor* achieves *practical completion*, any liquidated damages will apply only up to the date of termination of the *Contract*.
- c) If *Item 24* states that liquidated damages do not apply, the *Principal* may *claim* general damages if the *Contractor* fails to reach *practical completion* by the *date for practical completion*.
- d) If any *date for practical completion* is extended after the *Contractor* has paid or the *Principal* has deducted liquidated damages, the *Principal* must re-pay any excess liquidated damages to the *Contractor*, subject to any right of set-off.
- e) The *Contractor* acknowledges that the rates for liquidated damages in *Item 24* are a genuine pre-estimate of the *Principal's* loss and agrees that it will not challenge any rate for liquidated damages as being in the nature of a penalty.
- f) If a limiting amount or percentage of the *contract sum* is included in *Item 25*, the *Contractor's* liability under this clause 35.4 is limited to that amount or percentage.

36 DELAY COSTS

- a) Subject to clause 36 b), the *Contractor* is entitled to the payment of *delay costs* only if the *Contractor* is granted an extension of time pursuant to clause 35.3 as a consequence of any of the following causes:
- i) a *variation* (other than a *variation* for the *Contractor's* convenience or for the *Contractor's* non-compliance with the *Contract*);
 - ii) failure to give the *Contractor* possession of the *site* in breach of clause 27.1;
 - iii) a *latent condition* (unless the *latent condition* is at the *Contractor's* risk or the cause is specified in *Item 11*);
 - iv) resolution of an inconsistency, ambiguity or discrepancy in a *Principal*-supplied document in accordance with clause 8.2;
 - v) a suspension under clause 34 unless the *Contractor* bears the cost of suspension under clause 34.4; or
 - vi) a *Principal's risk*.
- b) The *Contractor* is not entitled to *delay costs* for any day which it would have been delayed anyway by a cause for which it has no entitlement to *delay costs*.
- c) *Delay costs* are determined in accordance with the Commercial Framework or, if not included in the Commercial Framework, an amount valued by the *Superintendent* to cover the reasonable additional costs (but not profit, loss of profit or loss of opportunity) which were necessarily incurred by the *Contractor* due to delay that have not been included in any other payment in connection with the cause of the delay.
- d) The *Contractor* has no remedy or entitlement for additional payment in connection with delay other than *delay costs*.
- e) Nothing in this clause 36 obliges the *Principal* to pay extra costs for delay which have already been included in the value of a *variation* or any other payment under the *Contract*.

37 DEFECTS LIABILITY

- a) The *Superintendent* acts as a certifier in this clause 37.
- b) The *defects liability period* commences at 4.00 pm on the *date of practical completion* and continues for the period stated in *Item 26*.
- c) During the *defects liability period*, if:
- i) the *Principal* wishes to have a *defect* rectified, it must not unreasonably delay notifying the *Contractor* of the existence of the *defect*; and
 - ii) the *Contractor* becomes aware of a *defect*, it must rectify the *defect* as soon as possible.
- d) To the extent that is reasonably possible, rectification of a *defect* must be carried out so as to minimise any inconvenience to the users or occupants or of the *Works*.
- e) The *Superintendent* may direct the *Contractor* to commence and complete the rectification of a *defect* by specified dates.
- f) The *Superintendent* may extend the *defects liability period* applicable to the rectified part of the *Works*. The extended *defects liability period* commences at 4.00 pm on the date that the rectification is completed and must not exceed the period stated in *Item 26*.
- g) If the *Contractor* does not comply with a *direction* to rectify a *defect* within a timeframe specified in the *direction*, the *Principal* may have the rectification carried out by others. The cost of doing so will be assessed by the *Superintendent* and is a debt due and payable by the *Contractor* to the *Principal*.

- h) Nothing in this clause 37 reduces the *Contractor's* warranties and other liabilities and obligations under the *Contract*, or affects the *Principal's* common law right to damages or any other right or remedy.

38 CLEANING UP

- a) The *Contractor* must:
 - i) keep the *site* and the *work under the Contract* clean and tidy;
 - i) regularly remove rubbish and surplus material; and
 - ii) remove any *temporary works* and *construction* plant within 10 *business days* (or such extended time reasonably *directed* by the *Superintendent*) after the *date of practical completion*.
- b) If the *Contractor* fails to comply with an obligation in this clause 38, the *Superintendent* may take action pursuant to clause 30.2 d).

39 URGENT PROTECTION

- a) If, in the reasonable opinion of the *Superintendent*:
 - i) urgent action is required to avoid death, injury, loss or damage; and
 - ii) the *Contractor* does not take the necessary action immediately when the *Superintendent* requests it,the *Superintendent* may take the action (without relieving the *Contractor* of its obligations), and the *Principal's* costs of doing so is a debt due and payable from the *Contractor*.
- b) If time permits, the *Superintendent* must give the *Contractor* prior written notice of the *Principal's* intention to take action under this clause 39.

40 VARIATIONS AND VALUATION OF WORK

40.1 Variations to the work under the Contract

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

40.2 Proposed variations

- a) The *Superintendent* may notify the *Contractor* of a proposed *variation*. Unless the *Contractor* notifies the *Superintendent* that the *variation* cannot be effected, as soon as practicable after receipt of the notice, the *Contractor* must advise the *Superintendent* of:

- i) the effect on the *contract sum* (including any detailed supporting calculations or other evidence of cost) or the basis upon which the *variation* will be valued;
 - ii) any *delay costs*; and
 - iii) any effect on the *Contract program* (including the *date for practical completion*).
- b) If the *Contractor* reasonably incurs additional costs in complying with the requirements of this clause 40.2, a valuation must be made pursuant to clause 40.5.

40.3 Valuation of variations

- a) If compliance with the *direction* to execute a *variation* (except a *direction* required to address the *Contractor's* non-compliance with the *Contract*) causes the *Contractor* to incur costs which are less or more than it would have incurred if the *direction* was not given, the change in costs must be valued pursuant to clause 40.5.
- b) The *Superintendent* may, in its absolute discretion, *direct* the *Contractor* to provide a detailed quotation for the work of a *variation* supported by measurements or other evidence of cost.
- c) The *Contractor* is entitled to the reasonable cost of preparing the measurements or other evidence of cost that has been incurred over and above the reasonable overhead cost.

40.4 Variations for the Contractor's convenience

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

40.5 Valuation

- a) Where the *Contract* provides that a valuation must be made pursuant to clause 40.5 or the *Superintendent* has assessed a *claim* pursuant to clause 46, the change in work or additional costs must be valued by the *Superintendent* (acting as a certifier) in accordance with clause 40.5 d) and the *contract sum* must be adjusted by the amount of the valuation.

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

41 DAYWORK

- a) The *Superintendent* (acting as a certifier in this clause 41) may, in its absolute discretion, *direct* that the following be carried out as *daywork*:
 - i) quantities greater than those determined by reference to the upper limit of accuracy (if any) referred to in the Commercial Framework; or
 - ii) a *variation*.
- b) For work that is carried out as *daywork*, the *Contractor* must:
 - i) record details of all resources used by the *Contractor* for the execution of the *daywork*, including copies of time sheets, wages sheets, invoices, receipts and other documents evidencing the cost of the *daywork*;
 - ii) provide the details and each day to the *Superintendent*; and

- iii) comply with any direction from the *Superintendent* in regard to the details included in the records.
- c) The *Superintendent* must determine the value of *daywork* from:
 - i) the quantities of materials and the time that the *construction plant* and labour is reasonably and necessarily used on the *daywork*; and
 - ii) applicable rates and prices in the *daywork* schedules (if any) contained in the Commercial Framework.
- d) To the extent that the *daywork* schedules do not apply, the *Superintendent* must determine the value of *daywork* from:
 - i) the amount of wages and allowances (inclusive of direct wage overheads) payable by the *Contractor*;
 - ii) the amount of hire charges in respect of *constructional plant*;
 - iii) the amounts paid for services, subcontracts and professional fees; and
 - iv) the actual cost to the *Contractor* of materials supplied and required for the work.
- e) The *Contractor* is entitled to payment for overheads (including administrative costs, *site* supervision, establishment costs, attendance) and profit on *daywork*. If the rates and amounts used to determine payment for *daywork* are not inclusive of overheads and profit, the valuation must include an amount determined from:
 - i) the applicable percentage (if any) stated in the Commercial Framework applied to the costs determined under clause 41 c) and 41 d);
 - ii) if there is no applicable percentage included in the Commercial Framework, a percentage agreed between the *Superintendent* and the *Contractor*; or
 - iii) in the absence of agreement, a reasonable percentage determined by the *Superintendent*.
- f) The costs of supervisory, technical and administrative personnel who would be engaged on the *Works* regardless of the *daywork* are not to be included in the valuation of the *daywork*.

42 CERTIFICATES AND PAYMENTS

42.1 Payment claims and payment schedules

- a) If the *SOP Act* applies:
 - i) a reference date (as defined in the *SOP Act*) is the date, or the stage of the *work under the Contract*, specified in *Item 27*; and
 - ii) unless expressly stated otherwise, a *payment schedule* or final *payment schedule* which is:
 - A) issued and delivered pursuant to the *Contract*; and
 - B) is compliant with the *SOP Act*,
 is a *payment schedule* or notice of dispute (as the case may be) for the purposes of the *SOP Act*.
- b) For the purposes of the *SOP Act*, the *Superintendent* acts as the agent of the *Principal* in regard to:
 - i) receipt of the *Contractor's* payment *claim* or a final payment *claim*;
 - ii) the issue of a *payment schedule*; and
 - iii) the issue of a notice of *dispute*.
- c) The *Contractor* is to *claim* payment progressively at the date in the month or stages of *work under the Contract* stated in *Item 27*.
- d) Unless prohibited by the *SOP Act*, a payment *claim* is deemed to have been made on the due date for making that payment *claim*, even if it is submitted prior to that date.

- e) Each payment *claim*:
 - i) is to be delivered in writing to the *Superintendent*;
 - ii) must include details (which may be specified elsewhere in the *Contract* or reasonably requested by the *Superintendent*) justifying the amount *claimed*;
 - iii) may include a request for payment for a matter which has been assessed by the *Superintendent* pursuant to clause 46; and
 - iv) may include details of other amounts then due to the *Contractor* under the *Contract*.
- f) The *Superintendent* (acting as a certifier) must, within 10 *business days* after receiving a payment *claim* which complies with this clause 42, issue and deliver to the *Principal* and the *Contractor*, a *payment schedule*:
 - i) stating the *Superintendent's* valuation of amounts due from the *Principal* to the *Contractor* pursuant to the payment *claim* with reasons for any difference; and
 - ii) including the *Superintendent's* assessment of retention money and amounts due (if any) from the *Contractor* to the *Principal* pursuant to the *Contract*.
- g) The *Principal* or the *Contractor* (as the case may be) must pay to the other party the amount of the *payment schedule* within the time specified in *Item 27*, which commences when the payment *claim* is served.
- h) If an amount is certified as retention money under clause 42.1 f) ii), the *Principal* must hold that retention money pursuant to clause 5 until the *Contractor* is entitled to the return of the retention money (if any).
- i) The *Superintendent* (acting as a certifier) may issue and deliver a *payment schedule* without the submission of a payment *claim* by the *Contractor*.
- j) If:
 - i) the *Superintendent* fails to deliver a payment schedule within 10 business days after receiving a payment *claim*; and
 - ii) that payment *claim* complies with this clause 42,the amount claimed in that payment *claim* is due and payable by the *Principal* to the *Contractor*.
- k) Payment by the *Principal*, or the issue of a *payment schedule*, is payment on account only. It is not evidence that the *Contractor* has complied with the *Contract* and is subject to clause 42.2.
- l) Unless stated otherwise in the *Contract*, all payments to the *Contractor* must be made in Australian currency by electronic funds transfer to the *Contractor's* account notified to the *Principal* for that purpose. Changes to the *Contractor's* account details must be notified in accordance with protocols established by the *Principal*. If electronic funds transfer is not used, payments must be made at the *Principal's* address or another location advised by the *Principal*.
- m) If payment is not made in accordance with clause 42.1 g), interest, applied at the rate in *Item 27* is due and payable on the amount outstanding after the date of default in payment.

42.2 Correction of payment schedules

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

42.3 Retention moneys

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

42.4 Unfixed plant and materials

- a) The alternative applying for payment for unfixed materials, plant or equipment is given in *Item 28*.

Alternative 1

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

Alternative 2

- c) The *Contractor* may not *claim* payment for, and the *Principal* is not obliged to pay for, any unfixed materials, plant or equipment that have not been incorporated in the *Works* unless:
- i) the materials, plant or equipment:
 - A) have been manufactured solely for the purpose of incorporation in the *Works* and have not been manufactured before the date required by the *Contract*;
 - B) are of the type stated in *Item 28*;
 - C) are properly stored, clearly marked the property of the *Principal* and adequately protected and insured;
 - D) are stored on the *site*; and
 - E) have been paid for in full by the *Contractor* and are the unencumbered property of the *Contractor*, free of any *security interest* upon the making of the payment *claimed*, and proof of such payment and ownership is provided to the satisfaction of the *Superintendent*;
 - ii) the *Contractor* provides additional *security* in a form approved by the *Principal* for an amount equal to the payment *claimed* for the materials, plant or equipment; and
- d) If pursuant to a *payment schedule*, the *Principal* pays the *Contractor* an amount which includes the value of any unfixed materials, plant or equipment that have not been incorporated in the *Works*, the materials, plant or equipment will become the property of the *Principal*, free of any lien, charge, *security interest* or any other encumbrance, at the time the payment is made.

42.5 Certificate of practical completion

- a) The *Contractor* must:
- i) give the *Superintendent* at least 10 *business days*' notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached; and
 - ii) request the *Superintendent* to issue a *certificate of practical completion* when the *Contractor* is of the opinion that *practical completion* has been reached.
- b) Within 10 *business days* of the receipt of the request, the *Superintendent* (acting as a certifier) must:
- i) give to the *Contractor* and to the *Principal* a *certificate of practical completion* certifying the *date of practical completion*; or
 - ii) notify the *Contractor* of the reasons for not issuing the *certificate of practical completion*.
- c) Notwithstanding that the *Contractor* may not have requested the issue of a *certificate of practical completion*, if the *Superintendent* is of the opinion that *practical completion* has been reached, the *Superintendent* may issue a *certificate of practical completion*.
- d) The issue of a *certificate of practical completion* does not:
- i) constitute approval of any work or other matter; or
 - ii) prejudice any *claim* by the *Principal* or the *Contractor*.

42.6 Contractor's final payment claim

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

42.7 Final payment schedule

- a) The *Superintendent* must issue to the *Contractor* and to the *Principal* a final *payment schedule* endorsed 'Final Payment Schedule' within 10 *business days* after receiving the final payment *claim* or, if the *Contractor* has not submitted a final payment *claim* in accordance with clause 42.7 a), within 75 *business days* after the *date of practical completion*.
- b) In the final *payment schedule*, the *Superintendent* (acting as a certifier) must certify the amount which in the *Superintendent's* opinion is finally due from the *Principal* to the *Contractor* or from the *Contractor* to the *Principal* under, or arising out of, the *Contract* or any alleged breach thereof.
- c) The issue of the final *payment schedule* is conclusive evidence that all necessary adjustments to the *contract sum* have been made and all entitlements of the *Contractor* have been met, except for those required by:
 - i) arithmetical error; or
 - ii) resolution of:
 - A) any *claim* made in accordance with clause 46;
 - B) any *dispute* properly notified under clause 47 prior to the final payment *claim*; or
 - C) any *dispute* arising solely out of the final *payment schedule*, but only if it is notified to the *Superintendent* and *Principal* within 20 *business days* after the date of the final *payment schedule*.
- d) Final payment must be made in accordance with clause 42.1 g).
- e) The *Contractor's* liability under the *Contract* or otherwise is not affected by the issue of the final *payment schedule*.

42.9 Set-off

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

43 PAYMENT OF WORKERS AND SUBCONTRACTORS

43.1 Subcontractors and workers

- a) With each payment *claim*, the *Contractor* must provide documentary evidence of the payment of any amount which is due and payable to:
 - i) *subcontractors*; and
 - ii) workers of the *Contractor* and workers of *subcontractors*,in respect of the *work under the Contract*.

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

43.2 Entitlement to payment

- a) If the *Contractor* has not complied with clause 43.1 for any part of the *work under the Contract* which is the subject of the payment *claim* (whether or not included in a *payment schedule* issued by the *Superintendent*), the *Contractor* is not entitled to payment for that *work under the Contract*.

43.3 Direct payment

- a) Notwithstanding clause 43.2, before issue of the final *payment schedule*, the *Principal* may pay amounts which are the subject of clause 43.1 and are unpaid directly to a *subcontractor* or a worker if:
- i) permitted by law;
 - ii) given a court order in favour of the worker or *subcontractor*; or
 - iii) requested by the *Contractor*.
- b) Clause 43.3 a) does not apply if the *Principal* is aware of a relevant relation-back day (as defined in the *Corporations Act 2001* (Cwlth)).
- c) A payment made to a *subcontractor* or worker under clause 43.3 a) is deemed to be satisfaction of the *Principal's* obligation to the *Contractor* to pay pursuant to clause 42 for *work under the Contract* which is the subject of clause 43.3 a).

44 DEFAULT OR INSOLVENCY

44.1 Preservation of other rights

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

44.2 Termination for Contractor's default or insolvency

- a) The *Principal* may terminate the *Contract* for the *Contractor's default* or if the *Contractor* is the subject of an *insolvency event* by giving notice in accordance with this clause 44, but the rights given by this clause 44 are subject to any restrictions on their enforcement under Part 5.1, Part 5.2, or Division 17 of Part 5.3A *Corporations Act 2001* (Cth).
- b) Subject to clause 44.2 d), in the case of *Contractor's default*, the *Principal* must first give the *Contractor* notice that it has 5 *business days* (or such longer period specified by the *Principal*) after receipt of that notice to remedy the *Contractor's default*.
- c) If the *Contractor* fails to:
- i) give the *Principal* a notice containing clear evidence that it has remedied a *Contractor's default*;
 - ii) propose steps reasonably acceptable to the *Principal* to remedy the *Contractor's default*; or
 - iii) commence and complete the steps referred in clause 44.2 c ii) within the time proposed,
- the *Principal* may give the *Contractor* a notice terminating the *Contract*.
- d) If a right to terminate exists at common law, a notice to terminate may be given without first giving notice to remedy a *Contractor's default*.
- e) In the case of the *Contractor's* insolvency, the *Principal* may give the *Contractor* a notice terminating the *Contract*.
- f) If the *Principal* terminates the *Contract* under this clause 44, it may, at its sole discretion, engage others to complete the *Works* and all the following will then apply:

- i) The *Contractor* must leave the *site* as soon as reasonably practicable and remove all *temporary works* and materials it has brought onto the *site*, apart from any *temporary works* and materials identified by the *Principal* as being necessary to have the *Works* completed.
- ii) The *Contractor* must assign to the *Principal* the *Contractor's* rights and benefits in all its contracts and agreements in connection with the *Works*, warranties and unconditional undertakings, bank guarantees, insurance bonds, other *security* of a similar nature or purpose and retention held by the *Contractor*, with effect from the date of termination of its engagement under the *Contract*.
- iii) The *Contractor* must consent to a novation to the *Principal* or its nominee of all subcontracts and its other contracts concerning the *Works*, as required by the *Principal*. The *Principal* may at any time make payments and may deduct, withhold or set-off any amounts to be paid under the novated contracts from amounts otherwise payable to the *Contractor* or from any *security* given on the *Contractor's* behalf.
- iv) The *Contractor* must do everything and sign all documents necessary to give effect to this clause 44, and it irrevocably appoints the *Principal* as its attorney to do this in its name if it fails to do so.
- v) If, on *practical completion*, the cost to the *Principal* of completing the *Works* exceeds the amount that would have been paid to the *Contractor* to complete the *Works*, then the difference will be valued by the *Superintendent* and the amount certified as a debt due from the *Contractor* to the *Principal*.
- vi) The *Superintendent* may make provisional assessments of the amounts payable to the *Principal* under clause 44.2 f) v) and without limiting any other right of recourse, the *Principal* may demand them against the *security*.

44.3 Termination for Principal's default

- a) If the *Principal*:
 - i) fails to pay the *Contractor* any amount in accordance with the *Contract* which is not in *dispute*;
 - ii) commits any fundamental breach of the *Contract*; or
 - iii) fails to give the *Contractor* access to the *site* sufficient to start work required by the *Contract* within 3 months after the *date of acceptance of tender* (or longer period specified in the *Contract* or agreed by the parties),

the *Contractor* may give a notice requiring the *Principal* to remedy the default within 20 *business days* after receiving the notice.

- b) If the *Principal* fails to remedy the default, or to propose steps reasonably acceptable to the *Contractor* to do so, the *Contractor* may issue a notice terminating the *Contract*.
- c) If the *Principal* is the subject of an *insolvency event*, the *Contractor* may, without giving a notice to show cause, issue a notice terminating the *Contract*

44.4 Termination notices

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

44.5 Rights of the parties on termination

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

44.6 Survival

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

45 TERMINATION BY FRUSTRATION

- a) This clause 45 only applies if the *Contract* is *frustrated*.
- b) Clause 42.1 will apply for the *work under the Contract* satisfactorily carried out up to the date of *frustration*.
- c) In addition to the payment for work satisfactorily carried out up to the date of *frustration*, the *Contractor* is entitled to additional payment for the costs reasonably and necessarily incurred for demobilising *temporary works, construction plant, subcontractors* and workers.
- d) The *Contractor* must use reasonable endeavours to mitigate the additional costs referred to in clause 45 c).
- e) If the *Contractor* has ordered materials and equipment for incorporation into the *Works* which cannot be returned to the supplier and ownership is transferred to the *Principal*, the *Contractor* is entitled for payment for that materials and equipment.
- f) The *Principal* must promptly release and return all *security* (or, if applicable, the balance remaining after a demand on the *security*) that would have been returned at the *date of practical completion* had the *Contract* not been *frustrated*.

46 CLAIMS

- a) The *Superintendent* acts as a certifier in this clause 46.
- b) This clause 46 does not apply if:
 - i) the determination of the *claim* is regulated by a separate procedure under any applicable legislation; or
 - ii) there is a specific provision for the submission and assessment of the *claim* in the *Contract*.
- c) Any notice or response provided by a party to the *Superintendent* pursuant to this clause 46 must also be provided to the other party at the same time.
- d) If a party wishes to make a *claim*, it must give to the *Superintendent* the *prescribed notice* within 20 *business days* after the first day upon which the party could reasonably have been aware of the entitlement to make the *claim*.
- e) Subject to clause 42.6 c), if the claimant fails to make a *claim* within the time specified in clause 46 d), the other party is not liable to the claimant in respect of any *claim* for costs incurred more than 20 *business days* before the date on which the party gives the *prescribed notice* pursuant to clause 46 d).
- f) Within 20 *business days* of receipt of the *prescribed notice*:
 - i) the other party may provide a response to the *prescribed notice* to the *Superintendent*; and
 - ii) the *Superintendent* may request the claimant to provide further particulars in connection with the *claim* to the *Superintendent*.
- g) If the claimant wishes to respond to a *Superintendent's* request to provide further particulars, it must do so within 10 *business days* of the request.
- h) If the claimant provides further particulars pursuant to clause 46 g), the other party may provide a response to the *Superintendent* in regard to the further particulars within 10 *business days* of receipt of the further particulars.
- i) The times to submit a response in clauses 46 g) and 46 h) may be extended by the *Superintendent*, acting reasonably.
- j) Within 40 *business days* of the expiry of all applicable timeframes for a party to provide a response pursuant to this clause 46, the *Superintendent* must assess the *claim* and notify the parties of the decision.

- k) Unless a party gives a notice of *dispute* under clause 47 in respect of the *Superintendent's* assessment of the *claim* under clause 46 j), within 20 *business days* of the notification of that assessment, the amount of the assessment is due and payable.

47 DISPUTE RESOLUTION

47.1 Notice of dispute

- a) A party is not entitled to issue a notice of *dispute* unless the *Superintendent* has assessed a *claim* in regard to the subject matter of the *dispute* and notified the parties of the decision or the time for the *Superintendent* to notify the parties of the decision has elapsed.
- b) If a party wishes to *dispute* any matter, it must deliver by hand or send by registered post to the other party a notice which provides adequate details of the *dispute* (notice of *dispute*) within 20 *business days* of the notification of the *Superintendent's* decision in regard to the subject matter of the *dispute*. A copy of the notice of *dispute* must also be provided to the *Superintendent*.
- c) The parties must continue to perform their obligations under the *Contract*, subject to clauses 44 and 45, despite the existence of a *dispute*.
- d) By mutual agreement, the parties may extend the timeframes in this clause 47.

47.2 Meeting of representatives

- a) Within 10 *business days* of service of a notice of *dispute*, the parties and the *Superintendent* (acting as a certifier) must confer at least once to attempt to resolve the *dispute* in good faith or attempt to agree to a procedure for resolution of the *dispute*. Unless the parties agree otherwise, the conference must be held in the state or territory stated in *Item 4*. The parties may agree to invite a mediator to attend the conference.
- b) At the conference, each party must be represented by a person having authority to agree to the resolution of the *dispute*.
- c) All aspects of every such conference, except the fact of its occurrence, are privileged and without prejudice.
- d) If within 30 *business days* of the service of a notice of *dispute*, the *dispute* remains unresolved, a party may refer the *dispute* to the resolution process specified in *Item 30*.
- e) A *dispute* for which notice has not been given in accordance with clause 47.2 d) is barred from the resolution process specified in *Item 30*, litigation or any similar action.

47.3 Alternative 1 – Arbitration

- a) If Alternative 1 – Arbitration is specified in *Item 30*, the arbitration must be:
- i) carried out in accordance with, and subject to, the rules stated in *Item 31*; and
 - ii) held in the state or territory stated in *Item 4*.
- b) The parties must endeavour to agree on the arbitrator to be engaged. If they cannot agree within 30 *business days* of the service of a notice of *dispute*, the arbitrator (who must be accredited) will be nominated (on the application of either party) by the person named in *Item 31*. That person must not nominate:
- i) an employee of the *Principal* or the *Contractor*;
 - ii) a person who has been connected with the *Works* or the *Contract*; or
 - iii) a person who the *Principal* and the *Contractor* have already considered and not been able to agree on.

47.4 Alternative 2 – Expert Determination

- a) If Alternative 2 – Expert Determination is specified in *Item 30*, the expert determination must be conducted in accordance with the provisions of the Dispute Resolution Framework attached as Annexure D.
- b) The parties must endeavour to agree on the expert to be engaged. If they cannot agree within 30 *business days* of the service of a notice of *dispute*, the expert will be nominated (on the application of either party) by the person named in *Item 32*. That person must not nominate:
 - i) an employee of the *Principal* or the *Contractor*;
 - ii) a person who has been connected with the *Works* or the *Contract*; or
 - iii) a person who the *Principal* and the *Contractor* have already considered and not been able to agree on.
- c) Neither party may commence litigation in respect of the matters determined by the expert unless the determination:
 - i) does not involve paying a sum of money; or
 - ii) requires one party to pay the other an amount in excess of the amount stated in *Item 32*, calculated without having regard to:
 - A) any interest that may be payable; and
 - B) any amount that has been paid pursuant to the *SOP Act*.
- d) Neither party may commence litigation in respect of the matters determined by the expert unless they do so within 40 *business days* after receiving the determination. Otherwise:
 - i) the parties are deemed to have accepted that the expert determination is final and binding; and
 - ii) any amount due and payable under the expert determination must be paid by the debtor to the other party within a further period of 10 *business days*.

47.5 Alternative 3 – Alternative Dispute Resolution

- a) If an Alternative 3 – Alternative Dispute Resolution is specified in *Item 30*, the parties agree to avoid, manage and resolve disputes in accordance with the provisions of the Dispute Resolution Framework attached as Annexure D.

47.6 Alternative 4 – Litigation

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

47.7 Summary relief

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

48 GOODS AND SERVICES TAX

- a) A word or expression which is defined in the *GST Act* has the same meaning in this clause 48.
- b) The *Contractor* warrants to the *Principal* that:
 - i) the *Contractor* is registered for *GST*; and
 - ii) the *Contractor's* ABN stated in the *Contract* (or otherwise notified by the *Contractor* to the *Principal*) is correct.
- c) The *Contractor* must notify the *Principal* immediately if it ceases to be registered for *GST* at any time.

- d) The Commercial Schedule defines whether prices, rates or other sums payable in accordance with the *Contract* are inclusive or exclusive of *GST*.
- e) If the *Contract* requires a party to pay for, reimburse or contribute to any expense, loss or outgoing (“reimbursable expense”) suffered or incurred by the other party, the amount required to be paid, reimbursed or contributed by the first party must be the sum of:
 - i) the amount of the reimbursable expense net of input tax credits (if any) to which the other party is entitled in respect of the reimbursable expense; and
 - ii) to the extent that the other party’s recovery from the first party is consideration for a taxable supply to the first party, any *GST* payable in respect of that supply.
- f) If stated in *Item 33* that the *Principal* will issue recipient created tax invoices for taxable supplies provided by the *Contractor*, the following will apply:
 - i) the *Principal* will issue tax invoices and adjustment notes in respect of those supplies;
 - ii) the *Contractor* must not issue tax invoices or adjustment notes in respect of those supplies;
 - iii) the *Principal* acknowledges that it was registered for *GST* when it entered into the *Contract* and that it will notify the *Contractor* if it ceases to be registered; and
 - iv) the *Contractor* must notify the *Principal* immediately it becomes aware of an adjustment event occurring in respect of those supplies.