

General Conditions of Contract for Construction

National Capital Works: NCW4

Explanatory Notes

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- 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

The General Conditions of Contract for Construction NCW4 have been developed in consultation with Australian state government building and road transport agencies (“Agencies”) for use on construct only contracts.

These Explanatory Notes are intended to assist contract administrators and contract managers understand the intent of the clauses in NCW4. They are not designed for general contract management training. If a clause is self-explanatory, no further comment is included in this document.

It is expected that the reader has a sound understanding of contract management principles and is familiar with either Australian Standards General Conditions of Contract or NSW Government GC21. NCW4 includes many of the concepts that would be familiar to users of the Australian Standards General Conditions of Contract (such as provision for a Superintendent, Practical Completion, Separable Portions and Defects Liability Periods).

Readers should note the following points.

- Apart from minor or incidental design, NCW4 is intended for construct only contracts and it is not considered suitable for a major design and construct contract. It should not be used as a contract for services or professional services.
- It does not include any provisions regarding the limitation of liability. Parties wishing to limit their liability under this contract will need to draft additional clauses to address this issue.
- It is only intended for use on contracts where the Principal is an Australian government or semi-government agency and, consequently, there are no provisions for the Principal to provide security or address insolvency of the Principal.
- Most Agencies will add their own clauses or Special Conditions of Contract to NCW4 to address their policies / procedures and state legislation. There is no termination for convenience clause on NCW4, but Agencies may add such a clause if required.
- NCW4 uses frameworks (which are included the Annexures) to allow Agencies to have flexibility in regard to commercial matters, the use of subcontracts and dispute resolution. The frameworks do not have a fixed format and may be tailored to suit an Agency’s policies and the risk profile of the contract.
- NCW4 does not specify any details regarding how the Works are to be delivered. Agencies will need to add their own requirements for matters such as environmental management, industrial relations management, quality management and building information modeling.

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.

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NCW4 CLAUSE	EXPLANATORY NOTES
<p>1 CONSTRUCTION OF CONTRACT</p> <p>a) The <i>Contractor</i> must:</p> <p>i) carry out and complete the <i>work under the Contract</i> in accordance with the <i>Contract</i>; and</p> <p>ii) perform and observe all its other obligations under the <i>Contract</i>.</p> <p>b) The <i>Principal</i> must:</p> <p>i) pay the <i>Contractor</i> the <i>contract sum</i> for its performance, in accordance with, and subject to, the <i>Contract</i>; and</p> <p>ii) perform and observe all its other obligations under the <i>Contract</i>.</p>	<p>Clause 1</p> <p>This clause sets out the fundamental obligations of the parties under the <i>Contract</i>.</p>
<p>2 DEFINED TERMS AND INTERPRETATION</p> <p>2.1 Defined terms</p> <p>a) In the <i>Contract</i>, 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 <i>Contract</i> by the use of italics.</p> <p>[the definitions have been omitted from these Explanatory Notes for clarity]</p> <p>2.2 Interpretation</p> <p>a) The law governing the <i>Contract</i>, 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 <i>Item 4</i>, or if nothing is stated, the state or territory where the <i>site</i> is located.</p> <p>b) Unless otherwise provided, prices are in Australian currency.</p> <p>c) Where provisions in Annexure A are expressed to be alternatives and the <i>Contract</i> fails to state which alternative applies, the first alternative applies.</p> <p>d) Reference to:</p> <p>i) the singular includes the plural and the plural includes the singular;</p> <p>ii) a person includes an individual, a firm, a body corporate or an unincorporated body;</p> <p>iii) a party includes the party's executors, administrators, successors and permitted assigns; and</p>	<p>Clause 2.1</p> <p>For an explanation of some of the defined terms, refer to the Explanatory Note for the applicable clause.</p> <p>Generally:</p> <ul style="list-style-type: none"> • Defined terms are shown by the use of italics and are only capitalised if they are a proper noun or appear at the start of a sentence. • A reference to "<i>Item</i>" is a reference to an Item in Annexure A – Contract Particulars. • There is a distinction between <i>business days</i> (which are normally used for communication between the parties and the <i>Superintendent</i>) and <i>working days</i> (which are normally used for surveillance, auditing, calculation of delay costs and calculation of extensions of time). • The <i>contract sum</i> is determined in accordance with the Commercial Framework. It deals with all payment and commercial matters not covered in the base document, such as schedules of rates, schedule of prices, bill of quantities, whether rates and prices are inclusive or exclusive of GST, profit / overheads, rise and fall and currency fluctuations. • The <i>contract sum</i> is subject to adjustment during the <i>Contract</i>. • The <i>Works</i> are the physical asset or product that the <i>Contractor</i> is required to provide to the <i>Principal</i> and includes all associated documentation such as "As Built" drawings. • The <i>work under the Contract</i> includes those activities, including supply of materials, that the <i>Contractor</i> must undertake to deliver the <i>Works</i>.

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<p>iv) a <i>statutory requirement</i> includes that <i>statutory requirement</i> as amended or re-enacted from time to time and a <i>statutory requirement</i> enacted in replacement of that <i>statutory requirement</i></p> <p>e) Measurements of physical quantities must be in legal units of measurement of Australia within the meaning of the <i>National Measurement Act 1960</i> (Cwth).</p> <p>f) Communications between the <i>Principal</i>, the <i>Superintendent</i> and the <i>Contractor</i> must be in the English language.</p> <p>g) ‘Including’ and similar expressions are not words of limitation.</p> <p>h) ‘Shall’ and ‘must’ denote a mandatory requirement.</p> <p>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.</p> <p>j) Headings are for convenience only and do not form part of the <i>Contract</i> or affect its interpretation.</p> <p>k) A provision of the <i>Contract</i> must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the <i>Contract</i> or the inclusion of the provision in the <i>Contract</i>.</p> <p>l) If an act must be done on a specified day which is not a <i>business day</i>, it must be done instead on the next <i>business day</i>, except as otherwise expressly contemplated by the <i>Contract</i>.</p> <p>m) All indemnities and warranties given by the <i>Contractor</i> in the <i>Contract</i> survive the termination or otherwise merging of the <i>Contract</i>.</p> <p>n) Without limiting clause 2.2 m), the provisions of the <i>Contract</i> which, by their nature, are intended to survive the termination, cancellation, completion or expiration of the <i>Contract</i> must continue as valid and enforceable obligations of the parties notwithstanding any such termination, cancellation, completing or expiration.</p>	

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<p>3 CONTRACTOR'S WARRANTIES</p> <p>3.1 General</p> <p>a) The <i>Contractor</i> warrants that it:</p> <p>i) is both experienced and skilled in work of the type, complexity and scale of the <i>work under the Contract</i>;</p> <p>ii) has satisfied itself as to the correctness and sufficiency of the <i>contract sum</i> and that the <i>contract sum</i> covers the cost of complying with all its obligations under the <i>Contract</i> and of all matters and things necessary for the due and proper performance and completion of the <i>work under the Contract</i>;</p> <p>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 <i>Principal</i> or any other person on the <i>Principal's</i> behalf to the <i>Contractor</i> for the purpose of preparing and submitting the <i>Contractor's</i> tender;</p> <p>iv) examined all information relevant to the risks, contingencies and other circumstances which could affect the <i>Contractor's</i> tender and which was obtainable by the making of detailed enquiries;</p> <p>v) informed itself of the nature of the work and materials necessary for the execution of the <i>work under the Contract</i> and the means of access to, and facilities at, the <i>site</i> and transport facilities for deliveries to or from the <i>site</i>; and</p> <p>vi) has visited and examined the <i>site</i> and its surroundings.</p> <p>3.2 Joint and several liability</p> <p>a) The obligations of the <i>Contractor</i>, if more than one person, under the <i>Contract</i>, are joint and several and each person constituting the <i>Contractor</i> acknowledges and agrees that it will be responsible for the acts and omissions (including breach of the <i>Contract</i>) of the other as if those acts or omissions were its own.</p> <p>3.3 Collusive arrangements</p> <p>a) If the <i>Principal</i> had called or invited tenders for the construction of the <i>Works</i>, the <i>Contractor</i> warrants and represents to the <i>Principal</i> that:</p> <p>i) it had no knowledge of the tender price of any other tenderer for the <i>Contract</i> at the time of submission of its tender; and</p>	<p>Clause 3.1</p> <p>NCW4 is intended to encourage contractors, when preparing their tender, to carefully consider all matters that may affect their price and how they go about the work. It prevents the <i>Contractor</i> from complaining that it did not understand the degree of difficulty involved in delivering the <i>Works</i> once the <i>Contract</i> is underway.</p> <p>In summary, clause 3.1 requires the <i>Contractor</i> to:</p> <ul style="list-style-type: none"> • be competent in the type of work that is to be constructed under the <i>Contract</i>; • diligently determine its <i>contract sum</i>; • carefully examine all relevant documents; • consider the risks associated with the <i>Contract</i>; • consider the work and materials necessary for the <i>Contract</i>, as well as access to the <i>site</i>; and • visit the <i>site</i> (acknowledging that, in many cases, a <i>site</i> will not be fully accessible prior to award of the <i>Contract</i>). <p>Note that this is expressed as a contractual warranty, rather than a condition. This means that if the <i>Contractor</i> breaches this clause, the <i>Principal</i> can claim damages, but cannot terminate the <i>Contract</i>. If the <i>Principal</i> intended to take action against the <i>Contractor</i> for negligence, this clause helps to establish the standard of care that the <i>Contractor</i> owes to the <i>Principal</i> under common law.</p> <p>Clause 3.2</p> <p>If two or more companies form a joint venture, each member shares liability for the other joint venture members, including finishing the <i>Works</i> if a member becomes insolvent. This gives the <i>Principal</i> the right to take action against any or all of the separate entities making up the <i>Contractor</i>. However, in some jurisdictions, proportional liability legislation may override this clause and because of the complexity of this issue, legal advice should be sought if it becomes necessary to rely on this clause.</p> <p>Clause 3.3</p> <p>This clause deals with collusive arrangements amongst tenderers and applies if a competitive tendering process has been used. By agreeing to be bound by this clause, the <i>Contractor</i> is giving a formal assurance (warranting) that it did not engage in collusive or anti-competitive conduct prior to award of tender.</p>

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<p>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.</p>	
<p>4 COOPERATION</p> <p>a) The parties must do all they reasonably can to cooperate in all matters relating to the <i>Contract</i>, but their rights and responsibilities under the <i>Contract</i> (or otherwise) remain unchanged unless the parties agree in writing to change them.</p> <p>b) Each party must do all it reasonably can to avoid hindering the performance of the other under the <i>Contract</i></p>	<p>Clause 4</p> <p>This clause reflects, and is consistent with, terms that have been implied in commercial contracts in several leading Australian court decisions. (For example, see <i>Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234</i>; R McDougall; <i>The Implied Duty of Good Faith in Australian Contract Law</i>. http://classic.austlii.edu.au/au/journals/MurUEJL/2004/22.html) The same requirement is included in GC21.</p>
<p>5 SECURITY</p> <p>5.1 Provision of security</p> <p>a) The provision of <i>security</i> by the Contractor is for the purpose of ensuring the due and proper performance of the <i>Contract</i>.</p> <p>b) The <i>Contractor</i> must provide the amount of <i>security</i> specified in <i>Item 6</i> (if any) within 10 <i>business days</i> of the <i>date of acceptance of tender</i>.</p> <p>c) The <i>security</i> must be in a form approved by the <i>Principal</i>. The form specified in <i>Item 6</i> is approved by the <i>Principal</i>.</p> <p>d) The <i>Principal</i> may, in its sole and absolute discretion, approve or disapprove of the financial institution or insurance company giving the unconditional undertaking.</p> <p>e) Any unconditional undertaking must not include an expiry date and must be irrevocable.</p> <p>f) The <i>Contractor</i> bears the costs of, and incidental to, providing <i>security</i>.</p> <p>g) Any interest earned on <i>security</i> belongs to the <i>Principal</i>.</p> <p>h) The <i>Contractor</i> may request the <i>Principal</i> to approve the substitution of another form of <i>security</i> to that specified in <i>Item 6</i>. The <i>Principal</i> is under no obligation to approve another form of <i>security</i>.</p> <p>i) The <i>Contractor</i> must not take any steps to prevent the <i>Principal</i> making a demand against the <i>security</i>, or to prevent the provider of a <i>security</i> from complying with the <i>security</i> or any demand by the <i>Principal</i>.</p>	<p>Clause 5.1</p> <p><i>Security</i> is defined to mean:</p> <p>a) cash;</p> <p>b) retention money;</p> <p>c) an interest bearing deposit in a bank (which has a consent under the <i>Banking Act 1959</i> (Cwth)) and is carrying on business at the place stated in <i>Item 4</i>;</p> <p>d) an approved unconditional undertaking or an approved performance undertaking given by an approved financial institution or insurance company; or</p> <p>e) other form approved by the <i>Principal</i>.</p> <p>If the <i>Contractor</i> is in fundamental breach of the <i>Contract</i> or becomes insolvent, the <i>Principal</i> may call upon <i>security</i> to cover the costs that it incurs in rectifying the breach or recommencing the work with a new contractor.</p> <p>Agencies may restrict the form of <i>security</i> that they will accept by specifying this in <i>Item 6</i>.</p> <p>Note that unconditional undertakings must not contain an expiry date.</p> <p>If approved by the <i>Principal</i>, changing the form of the <i>security</i> (e.g. changing an unconditional undertaking for retention) is permitted.</p> <p>The <i>Principal</i> may call upon <i>security</i> without any reference or notice to the <i>Contractor</i> and is not required to give reasons to a financial institution.</p> <p>By not prescribing the circumstances or conditions upon which the <i>Principal</i> may make a claim upon <i>security</i>, the <i>Contractor</i> cannot seek an injunction preventing payment on the basis that a condition for making a claim upon <i>security</i> has not been satisfied.</p>

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<p>5.2 Reduction and release of security</p> <p>a) Unless the <i>Principal</i> has made, or intends to make, a demand against the <i>security</i>, the <i>Principal</i> must return the percentage or amount specified in <i>Item 6</i> (or, if applicable, the balance remaining after a demand on the <i>security</i>) to the <i>Contractor</i> within 10 <i>business days</i> after the <i>date of practical completion</i>.</p> <p>b) The <i>Principal</i> must return the remaining <i>security</i> (or, if applicable, the balance remaining after a demand on the <i>security</i>) by the latest of:</p> <ul style="list-style-type: none"> i) the end of the period(s) stated in <i>Item 6</i> after the <i>date of practical completion</i> for the whole of the <i>Works</i>; ii) the resolution of any outstanding <i>defects</i> or unresolved <i>claims</i>; and iii) the payment of any moneys due and payable by the <i>Contractor</i> to the <i>Principal</i>, including debts, damages and indemnity <i>claims</i>. <p>5.3 Deed of guarantee, undertaking and substitution</p> <p>a) The definitions in the <i>Corporations Act 2001</i> (Cwlth) apply to this clause 5.3.</p> <p>b) Where:</p> <ul style="list-style-type: none"> i) the <i>Contractor</i> is a <i>subsidiary</i>; and ii) the <i>Principal</i> has specified in the tender documents or <i>Contract documents</i> that the <i>Contractor</i> must provide a deed of guarantee, undertaking and substitution, the <i>Contractor</i> must, within 10 <i>business days</i> after receiving a written request from the <i>Principal</i>, provide a deed of guarantee, undertaking and substitution which is duly executed and enforceable against a <i>holding company</i> for the <i>Contractor</i>. <p>c) The <i>Principal</i> may approve or disapprove of the <i>holding company</i> in its sole and absolute discretion.</p> <p>d) The deed of guarantee, undertaking and substitution must be in the form specified by the <i>Principal</i>.</p>	<p>Clause 5.2</p> <p>Usually 50% of the <i>security</i> is returned at practical completion.</p> <p>NCW4 has the option of staged return of the outstanding <i>security</i> (which may be appropriate for very large contracts).</p> <p>Note that the period for returning the remainder of the <i>security</i> is not linked to the expiry of the <i>defects liability period</i>. For commercial reasons, this period may be shorter than the <i>defects liability period</i>. If no period is stated, the default period in Annexure A is 12 months after the expiry of the <i>date of practical completion</i></p> <p>Clause 5.3</p> <p>A deed of guarantee, undertaking and substitution is often required when the <i>Contractor</i> is a subsidiary company which does not meet the Agency's specified financial stability criteria in its own right, but its holding company does.</p> <p>Under the guarantee, the holding company promises to stand behind the <i>Contractor</i> and to be responsible if the <i>Contractor</i> is in default or to step in and perform the <i>Contractor's</i> obligations.</p> <p>Most Agencies will have undertaken a financial assessment of the <i>Contractor's</i> financial standing prior to awarding the <i>Contract</i> and determined whether the deed is required.</p>

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<p>6 THE CONTRACT</p> <p>6.1 Evidence of contract</p> <p>a) The <i>Contract</i> is made up solely of the <i>Contract documents</i>, which supersede all understandings, representations and communications made between the parties before the <i>date of acceptance of tender</i> in relation to the subject matter of the <i>Contract</i>. The <i>Contract documents</i> are:</p> <ul style="list-style-type: none"> i) these General Conditions of Contract NCW4 and attached Annexures; and ii) the other documents listed in <i>Item 7</i>. <p>b) The several documents forming the <i>Contract</i> 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.</p> <p>c) Except to the extent otherwise expressly provided for in the <i>Contract</i>, the <i>Contract</i> can only be amended or varied with the prior written agreement of the parties.</p> <p>6.2 Formal instrument of agreement</p> <p>a) If <i>Item 7</i> specifies that a formal instrument of agreement is required, or the parties agree to execute a formal instrument of agreement:</p> <ul style="list-style-type: none"> i) the <i>Principal</i> must prepare at least two copies of the formal instrument of agreement and forward them to the <i>Contractor</i> no later than 20 <i>business days</i> after the <i>date of acceptance of tender</i>; ii) the <i>Contractor</i> must execute all copies and return them to the <i>Principal</i> no later than within 10 <i>business days</i> of receipt of the formal instrument of agreement; and iii) the <i>Principal</i> must return at least one executed copy to the <i>Contractor</i> no later than 10 <i>business days</i> after receipt of the executed copies of the formal instrument of agreement. <p>b) The times specified in this clause 6.2 may be increased by the <i>Superintendent</i>.</p> <p>6.3 No waiver</p> <p>a) Unless both parties agree in writing, the terms of the <i>Contract</i> cannot be waived, amended, released at law or in equity.</p>	<p>Clause 6.1</p> <p>This is an “entire agreement” clause so that representations made during negotiations and discussions prior to the <i>date of acceptance of tender</i> do not form part of the <i>Contract</i> unless they are expressly included in the <i>Contract documents</i>. The <i>Contract documents</i> must be listed or referenced in <i>Item 7</i>.</p> <p>Because the order of precedence of <i>Contract documents</i> will vary according to each Agency’s requirements, a precedence of documents clause is not included in NCW4. Agencies will need to insert their own order of precedence of documents elsewhere in the <i>Contract</i>.</p> <p>Clause 6.1 b) confirms that provisions contained in one <i>Contract document</i> apply as if those provisions were contained in all <i>Contract documents</i>. Therefore, it is not necessary to repeat wording contained in one part of the <i>Contract</i> in another part (e.g. it is not necessary to repeat definitions contained within NCW4 in a specification).</p> <p>Clause 6.2</p> <p>While many contracts using NCW4 will come into existence through a letter of acceptance (which many or may not be followed by a formal instrument of agreement), there is an option to have a formal instrument of agreement only and to not use a letter of acceptance.</p> <p>As most Agencies will have their own template for the formal instrument of agreement, it is not included in NCW4.</p> <p>Clause 6.3</p> <p>Unless both parties agree in writing, the provisions of the <i>Contract</i> cannot be changed.</p> <p>However, this is subject to the legal doctrine of estoppel, where a party’s conduct may make a provision of the <i>Contract</i> unenforceable. For example, suppose the <i>Superintendent</i> repeatedly advised the <i>Contractor</i> that it could continue working without undertaking testing, even though the written <i>Contract</i> does not permit work to continue until conforming test results have been provided. The <i>Superintendent</i> may then be prevented (“estopped”) at a later stage from halting work because of the lack of test results, even though there has been no waiver issued in writing.</p>

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<p>7 SERVICE OF NOTICES</p> <p>7.1 Notice requirements</p> <p>a) Subject to Clause 7.1 b) and 7.1 c), a notice, request, consent, approval, <i>direction</i>, notification or other communication under or for the purposes of the <i>Contract</i> must be:</p> <p>i) in writing and addressed to the receiving entity; and</p> <p>ii) either:</p> <p>A) sent by post to, or left at the postal address for, the receiving entity specified in <i>Items 1, 2 or 3</i> (as the case may be);</p> <p>B) handed to the receiving entity;</p> <p>C) sent by email to the email address for the receiving entity specified in <i>Items 1, 2 or 3</i> (as the case may be); or</p> <p>D) if the <i>Contract</i> 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 <i>Contract</i>, sent via that system.</p> <p>b) Service of a notice under clauses 44 or 47 will only be valid if:</p> <p>i) sent by registered post to or left at the postal address for the receiving entity specified in <i>Items 1, 2 or 3</i> (as the case may be); or</p> <p>ii) handed to the receiving entity.</p> <p>c) The Superintendent may give a <i>direction</i> orally, but the <i>Superintendent</i> must confirm it in writing as soon as practicable.</p> <p>7.2 Time of receipt</p> <p>a) A notice is deemed to have been received:</p> <p>i) if sent by registered post, 3 <i>business days</i> (or 10 <i>business days</i> if posted to or from a place outside Australia) after posting;</p> <p>ii) if delivered personally, upon delivery;</p> <p>iii) if sent by email:</p> <p>A) on a <i>business day</i>, on dispatch of the transmission; or</p> <p>B) on a day other than a <i>business day</i>, on the next <i>business day</i>,</p> <p>unless the sender’s server indicates a malfunction or error in transmission or the recipient immediately notifies the sender of an incomplete transmission; or</p>	<p>Clause 7.1</p> <p>It is important to clarify how notices are transmitted between the parties. Clause 7 allows the use of email and proprietary electronic document management systems, in addition to delivery by hand or mail. Note that faxes are no longer an approved method for communication between the parties.</p> <p>The clause is consistent with the electronic transaction acts which have been proclaimed in each jurisdiction and the Commonwealth.</p>

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<p>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.</p> <p>7.3 Notice details</p> <p>a) A party may specify other address details for the purposes of this clause 7, by notice to the other party.</p> <p>7.4 Service of claims under a SOP Act</p> <p>a) The <i>Contractor</i> must ensure that within 24 hours after any notice under the <i>SOP Act</i> (other than a <i>payment claim</i> or <i>payment schedule</i>) is given or received by the <i>Contractor</i> or any <i>subcontractor</i>, a copy of that notice is given to both the <i>Principal</i> and the <i>Superintendent</i>.</p>	
<p>8 CONTRACT DOCUMENTATION AND INFORMATION</p> <p>8.1 General</p> <p>a) Subject to clause 7.1 b), if the <i>Contract</i> requires the use of a proprietary document management system for the transmission of documents, the parties must transmit all documents in connection with the <i>Contract</i> by the proprietary document management system.</p> <p>8.2 Errors, ambiguities and discrepancies</p> <p>a) If either party discovers or is made aware of any error, ambiguity or discrepancy in a <i>Contract document</i>:</p> <p>i) that party must notify the <i>Superintendent</i> and the other party in writing of the error, ambiguity or discrepancy as soon as possible and in any case not later than the earlier of:</p> <p>A) the commencement or continuation of any <i>work under the Contract</i> affected by the error, ambiguity or discrepancy; and</p> <p>B) 5 <i>business days</i> of first becoming aware of the error, ambiguity or discrepancy;</p> <p>ii) within 5 <i>business days</i> (or such other time reasonably determined by the <i>Superintendent</i>) of receiving such advice or discovering the error, ambiguity or discrepancy, the <i>Superintendent</i> must notify the <i>Contractor</i> of the interpretation to be followed; and</p> <p>iii) if the error, ambiguity or discrepancy is in a <i>Principal</i>-supplied document and compliance with any such <i>direction</i> given under clause 8.2 a) ii) causes the <i>Contractor</i> to incur more or less cost than otherwise would have been incurred had the <i>direction</i> not been given, the difference must be valued pursuant to clause 40.5.</p> <p>b) Figured dimensions take precedence over scaled dimensions in the event of a discrepancy.</p>	<p>Clause 8.2</p> <p>The <i>Principal</i> bears the risk of any extra costs that come about from a document supplied by the <i>Principal</i> containing errors, ambiguities or discrepancies. However, the <i>Contractor</i> has an obligation to minimise any extra costs that might result from the errors, ambiguities or discrepancies by advising the <i>Principal</i> and <i>Superintendent</i> within the timeframe specified.</p> <p>Note that any valuation of extra costs flowing from an error, ambiguity or discrepancy in a <i>Principal</i>-supplied document is made by reference to the costs if the <i>direction</i> had not been given (ie as if the error, ambiguity or discrepancy had not existed), rather than what the <i>Contractor</i> may have anticipated at the time of tender.</p>

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<p>8.7 Contractor's obligations unaffected</p> <p>a) Where the <i>Contractor</i> submits a document to the <i>Principal</i> or <i>Superintendent</i>, the following applies:</p> <p>i) the <i>Principal</i> or <i>Superintendent</i> owes no duty to the <i>Contractor</i> to review or check the documents for errors, omissions or compliance with the requirements of the <i>Contract</i>;</p> <p>ii) the <i>Superintendent's</i> approval or <i>direction</i> as to suitability does not relieve the <i>Contractor</i> from responsibility for the <i>Contractor's</i> errors or omissions or compliance with the requirements of the <i>Contract</i>; and</p> <p>iii) no comment, review, representation, vetting, inspection, <i>testing</i> or approval by the <i>Principal</i> or the <i>Superintendent</i> in respect of the <i>Contractor's</i> obligations under the <i>Contract</i> will lessen or otherwise affect the <i>Contractor's</i> obligations under the <i>Contract</i>.</p> <p>8.8 Design by Contractor</p> <p>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.</p>	<p>Clause 8.7</p> <p>Even if the <i>Principal</i> or <i>Superintendent</i> approves, checks, reviews or endorses any document prepared by the <i>Contractor</i> (which, in addition to construction drawings / specifications, may include management plans such as safety plans, quality plans and programs), it does not relieve the <i>Contractor</i> of its obligation to prepare documentation which conforms to the <i>Contract</i> and are free of errors and omissions.</p> <p>Clause 8.8</p> <p>Drawings provided by the <i>Principal</i> may not show every detail necessary to complete the <i>Works</i>. The <i>contract sum</i> is deemed to allow for any minor or incidental design or detailing required to enable the <i>Works</i> to be built. Therefore, when preparing its tender, the <i>Contractor</i> must check for these minor details, determine the need for any further design (e.g. shop drawings) and make allowance for this in their price.</p>
<p>9 ASSIGNMENT AND SUBCONTRACTING</p> <p>9.1 General</p> <p>a) The <i>Contractor</i> must not, without the <i>Principal's</i> prior written approval, assign the <i>Contract</i> or any payment or any other right, benefit or interest under the <i>Contract</i>.</p> <p>b) The <i>Contractor</i> must not subcontract the whole of the <i>work under the Contract</i>.</p> <p>c) The <i>Contractor</i> is liable for the acts and omissions of <i>subcontractors</i> (including <i>subcontractors</i> engaged in accordance with clause 10) as if such acts or omissions were those of the <i>Contractor</i>.</p> <p>d) Subcontracting of any obligation under the <i>Contract</i> or any approval to subcontract does not affect the <i>Contractor's</i> obligations or liability under the <i>Contract</i>.</p> <p>e) The <i>Contractor</i> must comply with the requirements specified in the Subcontracting Framework (if any), included in the <i>Contract</i> as Annexure C.</p> <p>f) The <i>Contractor</i> indemnifies the <i>Principal</i> against:</p> <p>i) all <i>claims</i>, actions, loss or damage and all other liability arising out of any acts or omissions of <i>subcontractors</i>; and</p>	<p>Clause 9.1</p> <p>The <i>Contractor</i> cannot assign the <i>Contract</i> or any other right, benefit or other interest under the <i>Contract</i> unless the <i>Principal's</i> written approval is obtained. The <i>Principal</i> is not bound to agree to an assignment or be reasonable in negotiating any terms in connection with the assignment.</p> <p>Note that the <i>Principal</i> may assign the <i>Contract</i> to another government entity.</p> <p>The <i>Contractor</i> is responsible for the delivery of the <i>Works</i> in accordance with the <i>Contract</i>, regardless of whether it carries out the work itself or by the use of <i>subcontractors</i>.</p> <p>As most Agencies will have their own policies regarding <i>subcontract</i> documents and approval of <i>subcontractors</i>, these details will be incorporated into the Subcontracting Framework in Annexure C rather than the main text of NCW4.</p> <p>Issues that may be covered in this framework include:</p> <ul style="list-style-type: none"> • The <i>Superintendent's</i> approval of <i>subcontracts</i> above a certain value or for a particular class of work. • Requirements for “back to back” conditions of subcontract or “back to back” clauses above a certain value.

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<p>ii) any claim by a <i>subcontractor</i> against the <i>Principal</i> in respect of a breach of this clause 9 by the <i>Contractor</i>.</p> <p>9.2 Novation</p> <p>a) If stated in <i>Item 8</i>, the <i>Contractor</i> must execute a deed of novation between the <i>Principal</i>, <i>subcontractor</i> and <i>Contractor</i> for the work specified in <i>Item 8</i>.</p> <p>b) The deed of novation must be in the form specified in the invitation to tender or in the <i>Contract</i>.</p> <p>c) The <i>Contractor</i> is not entitled to any adjustment to the <i>Contract sum</i> as a consequence of the novation.</p>	<ul style="list-style-type: none"> • Provision of unpriced copies of conditions of subcontract to the <i>Superintendent</i>. <p>Note the indemnities provided by the <i>Contractor</i>, which protect the <i>Principal</i> from any act or omission by a <i>subcontractor</i> or any breach of this clause by the <i>Contractor</i>.</p> <p>Clause 9.2</p> <p>Novation is an agreement made between two contracting parties which allows for the substitution of a new party for an existing party. Clause 9.2 would usually apply if the <i>Principal</i> has entered into a contract with a supplier, consultant or specialist contractor before the award of the main <i>Contract</i> and wants the <i>Contractor</i> to continue to use the supplier, consultant or specialist contractor on the same terms and conditions.</p> <p>As the <i>Contractor</i> will need to price the novated work, the <i>Principal</i> will need to provide details of the current contract and the proposed deed of novation during the tender process. The deed will be a tripartite agreement. The <i>Contractor</i> cannot refuse to execute the deed of novation.</p>
<p>10 SELECTED SUBCONTRACTORS</p> <p>a) This clause 10 applies if the <i>Principal</i> has specified in the invitation to tender or in the <i>Contract</i> that part of the <i>work under the Contract</i> must be undertaken by a <i>selected subcontractor</i>.</p> <p>b) Before commencing the <i>work under the Contract</i> referred to in clause 10 a), the <i>Contractor</i> must advise the <i>Superintendent</i> of the names of those <i>selected subcontractors</i> that the <i>Contractor</i> proposes to use and provide any other information concerning the <i>selected subcontractors</i> reasonably requested by the <i>Superintendent</i>.</p> <p>c) In respect of the <i>work under the Contract</i> referred to in clause 10 a), if:</p> <ul style="list-style-type: none"> i) no <i>selected subcontractor</i> is willing to undertake that <i>work under the Contract</i>; ii) a <i>selected subcontractor</i> is unable to complete that <i>work under the Contract</i>; iii) a <i>selected subcontractor</i> repudiates the subcontract; or iv) that subcontract is terminated, <p>the <i>Contractor</i> must provide the <i>Superintendent</i> with a list of one or more subcontractors that it proposes to use for that <i>work under the Contract</i> and obtain the <i>Superintendent's</i> approval of the subcontractor prior to engaging the subcontractor.</p>	<p>Clause 10</p> <p><i>Selected subcontractors</i> are used where the <i>Principal</i> wishes to ensure that certain subcontract work is only undertaken by companies that meet its selection criteria or are suitably experienced. . A <i>Principal's</i> prequalification lists, approved suppliers or registered suppliers may be used under this clause.</p> <p>Contractors bidding for the <i>Contract</i> must be advised of the list of <i>selected subcontractors</i> during the tender process. The <i>Principal</i> cannot nominate the <i>selected subcontractor(s)</i> after award of the <i>Contract</i>. If a <i>Contractor</i> does not wish to work with any of the <i>selected subcontractor(s)</i>, it would need to negotiate an alternative or qualify its tender.</p> <p>In common with most contemporary contracts, NCW4 does not have a clause for “nominated sub-contractors”, which is effectively replaced in clause 10 by the option of the <i>Principal</i> naming only one <i>selected subcontractor</i>.</p> <p>However, if none of the <i>selected subcontractor(s)</i> will carry out the selected subcontract work with the <i>Contractor</i>, then the <i>Contractor</i> is required to provide an alternative list of potential <i>subcontractors</i> for the <i>Superintendent's</i> approval.</p> <p>The <i>Contractor</i> remains solely responsible for the work carried out by <i>selected subcontractors</i> in the same way as the <i>Contractor</i> is responsible for other <i>subcontractors</i> under clause 9.1 c).</p>

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<p>11 PROVISIONAL SUMS AND PROVISIONAL QUANTITIES</p> <p>a) If the <i>Contract</i> includes a <i>provisional sum</i> or <i>provisional quantity</i>, the <i>Contractor</i> must not carry out the work to which a <i>provisional sum</i> or <i>provisional quantity</i> relates unless directed to do so by the <i>Superintendent</i>.</p> <p>b) The <i>Superintendent</i> is under no obligation to <i>direct</i> that any work is carried out in relation to a <i>provisional sum</i> or <i>provisional quantity</i>.</p> <p>c) If the <i>Contract</i> includes a <i>provisional sum</i>, the <i>contract sum</i> must be adjusted as follows:</p> <p style="margin-left: 20px;">i) the <i>provisional sum</i> for that work is deducted from the <i>contract sum</i>; and</p> <p style="margin-left: 20px;">ii) the cost of the work actually carried out (if any) is calculated pursuant to clause 40.5 and added to the <i>contract sum</i>.</p> <p>d) The <i>Contractor</i> is entitled to payment for profit and overheads for work carried out in respect of a <i>provisional sum</i>.</p> <p>e) If the <i>Contract</i> includes a <i>provisional quantity</i>, the <i>contract sum</i> must be adjusted by the amount calculated by multiplying the rate applicable to the <i>provisional quantity</i> work by the difference between the <i>provisional quantity</i> and the quantity of work actually carried out.</p>	<p>Clause 11</p> <p>A <i>provisional sum</i> is an amount included in the <i>Contract</i> for work which is undefined or may not go ahead at all. It includes “prime cost” or “PC” Items, which are often used for the supply of equipment, fittings or treatments which have not been defined at the <i>date of acceptance of tender</i>. Work carried out under a <i>provisional sum</i> is valued in accordance with clause 40.5.</p> <p>A <i>provisional quantity</i> is used where the nature of the work, but not the quantity, has been defined. It may not be needed at all.</p> <p>If the work pursuant to the <i>provisional sum</i> or <i>provisional quantity</i> is not carried out at all, the <i>contract sum</i> must be adjusted by deducting the <i>provisional sum</i> or the amount calculated by reference to the unused <i>provisional quantity</i> respectively.</p>

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<p>12 SITE CONDITIONS</p> <p>12.1 General</p> <p>a) <i>Reliance information</i> and <i>non-reliance information</i> comprise of those documents listed in <i>Items 9</i> and <i>10</i> respectively.</p> <p>b) With respect to <i>reliance information</i>:</p> <p>i) the <i>Contractor</i> may rely on the factual accuracy of <i>reliance information</i>, but</p> <p>ii) the <i>Principal</i> does not warrant or make any representation with respect to the completeness of the <i>reliance information</i>.</p> <p>c) With respect to <i>non-reliance information</i>:</p> <p>i) if the <i>Contractor</i> relies on <i>non-reliance information</i>, it does so at its own risk;</p> <p>ii) the <i>Principal</i> does not warrant or make any representation with respect to the accuracy, quality or completeness of the <i>non-reliance information</i>; and</p> <p>iii) the <i>Principal</i> is not liable to the <i>Contractor</i> for any <i>claim</i> arising out of, or in relation to, <i>non-reliance information</i>.</p> <p>d) Notwithstanding clause 12.1 a), any interpretations, deductions, opinions or conclusions set out in any document provided by the <i>Principal</i> in connection with <i>site</i> conditions are deemed to be <i>non-reliance information</i> and the use of such information is entirely at the <i>Contractor's</i> risk.</p> <p>e) The <i>Contractor</i> is solely responsible for dealing with any <i>latent condition</i> so as to minimise delay and to minimise increased costs.</p>	<p>Clause 12.1</p> <p><i>Latent conditions</i> are defined as physical conditions on or below the <i>site</i> 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 <i>Contractor's</i> tender had a competent contractor inspected:</p> <p>a) all written information made available by the <i>Principal</i> to the <i>Contractor</i> for the purpose of tendering;</p> <p>b) all information influencing the risk allocation in the <i>Contractor's</i> tender and reasonably obtainable by the making of reasonable enquiries; and</p> <p>c) the <i>site</i> and its near surrounds, made available prior to or at the time of tender.</p> <p>Note that the definition of <i>latent conditions</i> excludes weather conditions and physical conditions which are a consequence of weather conditions. Therefore, events such as seepage, flood or material becoming saturated by inundation are not <i>latent conditions</i>. As the definition does not refer to weather conditions at the <i>site</i>, even if the weather event occurs away from the <i>site</i>, it cannot cause a <i>latent condition</i>. Also note that the definition of <i>latent conditions</i> refers to an assessment of conditions by a <u>competent</u> contractor at the time of submitting tenders.</p> <p>For the avoidance of doubt, an Agency may specify that if a particular physical condition is encountered, it will be a <i>latent condition</i>. As this will provide tenderers with greater certainty, it may result in lower tender prices.</p> <p>The <i>Principal</i> should always provide the tenderers with all of the information in its possession regarding the <i>site</i>, such as geotechnical investigations, planning studies and "as built" drawings of existing infrastructure. A failure to provide this information may expose the <i>Principal</i> to a claim for misleading or deceptive conduct under Section 18 of the Australian Consumer Law. However, if the <i>Principal</i> is not certain of how reliable the information is, it can categorise the information as either <i>reliance information</i> or <i>non-reliance information</i>. A similar approach is used in GC21.</p> <p>This approach clearly establishes the risk that each party assumes. If the <i>reliance information</i> was found to be inaccurate, it could form the basis of a <i>claim</i> for extra cost from the <i>Contractor</i>. However, if the <i>Principal</i> classifies information as <i>non-reliance information</i> to avoid the potential for a claim, the <i>contract sum</i> is likely to be higher because of the higher risk taken on by the <i>Contractor</i>.</p> <p>Interpretations, deductions, opinions or conclusions should be clearly identified as <i>non-reliance information</i>.</p> <p>Under clause 12.1 c), the <i>Contractor</i> is obliged to take any reasonable action to minimise the additional costs and delay associated with a <i>latent condition</i>. A similar clause is included in GC21.</p>

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<p>12.2 Notification of a latent condition</p> <p>a) If the Contractor:</p> <ul style="list-style-type: none"> i) becomes aware of a possible <i>latent condition</i>; and ii) either intends to make a <i>claim</i> or believes that it has an entitlement to make a <i>claim</i> for an extension of time or additional costs, <p>the <i>Contractor</i> must notify the <i>Superintendent</i> of the existence of the possible <i>latent condition</i>.</p> <p>b) The notice of the possible <i>latent condition</i> must:</p> <ul style="list-style-type: none"> 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 <i>business day</i> of the <i>Contractor</i> becoming aware of the potential <i>latent condition</i>); and iii) where possible, be given before the <i>latent condition</i> is disturbed. <p>c) If required by the <i>Superintendent</i> (acting as a certifier), the <i>Contractor</i> must promptly provide to the <i>Superintendent</i> a statement in writing, specifying:</p> <ul style="list-style-type: none"> i) the conditions on the <i>site</i> that the <i>Contractor</i> claims to be <i>latent conditions</i>; ii) the manner in which the <i>Contractor</i> contends they differ materially from the conditions on the <i>site</i> the <i>Contractor</i> should reasonably have expected at close of tenders, including any information supporting this contention; iii) the effect on the <i>work under the Contract</i>; iv) the effect on the <i>Contract program</i>; v) the additional work and resources involved and the <i>Contractor’s</i> estimate of its entitlement to any adjustment to the <i>contract sum</i>; vi) any other matters the <i>Contractor</i> considers relevant; and vii) any other details reasonably requested by the <i>Superintendent</i>. 	<p>Clause 12.2</p> <p>Clause 12.2 requires the <i>Contractor</i> to quickly notify the <i>Superintendent</i> of a potential <i>latent condition</i> (“early warning”) because there may be remedial action that the <i>Superintendent</i> can direct which would lessen the consequences of the <i>latent condition</i>. The Early Warning Notification provided by the <i>Contractor</i> does not need to include complete details of the potential claim, only that a likely <i>latent condition</i> has been encountered.</p>

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<p>12.3 Valuation of additional costs</p> <p>a) Subject to clauses 12.3 b) and 12.3 c), if a <i>latent condition</i> causes the <i>Contractor</i> to incur extra costs, which would not have been incurred if the <i>latent condition</i> did not exist, a valuation of those extra costs must be made pursuant to clause 40.5.</p> <p>b) The <i>Contractor</i> has no entitlement to adjustment to the <i>contract sum</i> as a consequence of <i>latent conditions</i> from any cause which:</p> <ul style="list-style-type: none"> i) the <i>Contract</i> expressly states is at the <i>Contractor</i>'s risk; or ii) is specified in <i>Item 11</i>. <p>c) The valuation of extra costs in clause 12.3 a) must not include any costs incurred more than <i>5 business days</i> before the date on which the <i>Contractor</i> gives the written notice required by clause 12.2 a).</p>	<p>Clause 12.3</p> <p>Where the <i>Contractor</i> is entitled to extra payment under clause 12, this extra payment will be included in the payment <i>claim</i>. Note that the valuation of extra costs flowing from a <i>latent condition</i> is made by comparison to the costs incurred if the <i>latent condition</i> did not exist, rather than what the <i>Contractor</i> may have anticipated at the time of tender.</p> <p>NCW4 defaults to the <i>Contractor</i> being entitled for payment of any additional costs that it incurs as a result of a <i>latent condition</i>. However, there is now an option for the risk of all or some <i>latent conditions</i> to be allocated to the <i>Contractor</i> so that the <i>Contractor</i> then has no entitlement to extra costs incurred from those <i>latent conditions</i>. Note that where the <i>Contractor</i> bears the risk of a <i>latent condition</i>, it is likely to result in a higher <i>contract sum</i> and a comprehensive <i>site</i> investigation is recommended if this approach is adopted.</p> <p>It is possible to transfer the risk of just some particular categories of <i>latent condition</i> to the <i>Contractor</i> and for the <i>Principal</i> to retain the remainder. For example, the <i>Contractor</i> might bear the risk of hard rock being encountered, but the risk of other sub-surface conditions such as contaminated soil might be retained by the <i>Principal</i>.</p> <p>It is not necessary for a <i>variation</i> to be directed in response to a <i>latent condition</i>. For example, if the excavated material is harder than anticipated, there is no change to the <i>Works</i>, but the <i>Contractor</i> incurs extra costs because of a lower rate of productivity.</p> <p>Clause 12.3 c) provides an incentive for the <i>Contractor</i> to promptly advise the <i>Superintendent</i> of the <i>latent condition</i>. If the <i>Contractor</i> does not provide the Early Warning Notification until more than <i>5 business days</i> after it should have been aware of the <i>latent condition</i>, it can only claim for costs incurred as a result of the <i>latent condition</i> in the <i>5 business days</i> immediately prior to giving the notification. If the <i>Contractor</i> gave the Early Warning Notification between 1 and <i>5 business days</i> after it should have been aware of the <i>latent condition</i>, it can <i>claim</i> for the extra costs, but would also be liable for damages to the <i>Principal</i> if the <i>Principal</i> could have taken steps to reduce its costs that result from the <i>latent condition</i>.</p>
<p>12.4 Extension of time</p> <p>a) The <i>Contractor</i>'s entitlement to an extension of time from a <i>latent condition</i> is subject to clause 35.3.</p>	<p>Clause 12.4</p> <p>This refers to clause 35.3 to avoid dealing with the issue of an entitlement to an extension of time in two different clauses.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS</p> <p>a) The <i>Principal</i> warrants that, unless specified otherwise in the <i>Contract</i>, design, materials, documents and methods of working specified by the <i>Principal</i> in the <i>Contract</i> or provided or <i>directed</i> by the <i>Principal</i>, do not infringe any <i>intellectual property right</i> if used in accordance with the <i>Contract</i>.</p> <p>b) The <i>Contractor</i> warrants that any other design, materials, documents and methods of working provided by the <i>Contractor</i> to the <i>Principal</i>, or included in this <i>Contract</i> by the <i>Contractor</i>, do not infringe any <i>intellectual property right</i> if used in accordance with the <i>Contract</i>.</p> <p>c) Each party indemnifies the other party against any liability arising from an infringement of any <i>intellectual property right</i> contrary to a warranty provided under this clause 13.</p> <p>d) The <i>Principal</i> grants to the <i>Contractor</i> an irrevocable royalty-free licence to use the design, materials and documents provided by the <i>Principal</i>, but only for the purpose of construction of the <i>Works</i>.</p> <p>e) The <i>Contractor</i> grants to the <i>Principal</i> an irrevocable royalty-free licence to use the design, materials, documents and methods of working, provided by the <i>Contractor</i>, but only for the purpose of the occupation, use, operation, repair, maintenance, addition, alteration or extension of the <i>Works</i>.</p> <p>f) Where the <i>Contractor</i> is not the holder of <i>intellectual property rights</i> referred to in clause 13 e), the <i>Contractor</i> must take all steps reasonably necessary to ensure that the holder of the <i>intellectual property rights</i> grants to the <i>Principal</i> an irrevocable royalty-free licence to use those things for the occupation, use, operation, repair, maintenance, addition, alteration or extension of the <i>Works</i>.</p>	<p>Clause 13</p> <p>In summary, each party:</p> <ul style="list-style-type: none"> • warrants that it is not infringing any <i>intellectual property right</i>; • indemnifies the other against such an infringement; and • grants the other party a royalty-free licence for the construction or operation (as appropriate) of the <i>Works</i>. <p>The <i>Contractor</i> retains ownership of any intellectual property rights developed specifically for the <i>Contract</i>, such as a construction procedure.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>14 STATUTORY REQUIREMENTS</p> <p>14.1 Complying with statutory requirements</p> <p>a) The <i>Contractor</i> must comply with all <i>statutory requirements</i> except those stated in <i>Item 12</i> or those notified by the <i>Superintendent</i> to be satisfied by or on behalf of the <i>Principal</i>.</p> <p>b) The <i>Contractor</i> must immediately notify the <i>Superintendent</i> in writing if it becomes aware of a <i>statutory requirement</i> which is at variance with the <i>Contract</i>.</p> <p>14.2 Changes in statutory requirements</p> <p>a) If there is a change to a <i>statutory requirement</i> that:</p> <ul style="list-style-type: none"> 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 <i>Contractor</i> to change the <i>work under the Contract</i>, <p>the difference in costs must be valued pursuant to clause 40.5.</p> <p>b) The <i>Contractor</i> must immediately notify the <i>Superintendent</i> if it becomes aware of a change to a <i>statutory requirement</i> that was enacted after the date of submission of tenders that requires the <i>Contractor</i> to change the <i>work under the Contract</i>.</p> <p>14.3 Licences, registrations, permits, approvals and certificates</p> <p>a) The <i>Contractor</i> must obtain and hold, and ensure that its <i>subcontractors</i>, 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 <i>statutory requirements</i> in order to carry out the <i>work under the Contract</i> and in respect of the use and occupation of the <i>Works</i>.</p> <p>b) The <i>Contractor</i> must pay all necessary fees and charges in connection with the <i>work under the Contract</i>, other than those listed in <i>Item 12</i>.</p> <p>c) The <i>Contractor</i> must provide the <i>Principal</i> with a copy of any licences, authorisations, notices, approvals, consents and other documents issued to the <i>Contractor</i> by any Authority in respect of the <i>work under the Contract</i>.</p>	<p>Clause 14.1</p> <p><i>Statutory requirement</i> is very broadly defined to include all applicable laws, consents, approvals, permits etc. relevant to the <i>work under the Contract</i>. The <i>Contractor</i> must comply with all <i>statutory requirements</i> relative to the <i>work under the Contract</i>, unless it is stated in <i>Item 12</i> that the <i>Principal</i> will satisfy the requirement.</p> <p>Compliance with a <i>statutory requirement</i> may require the payment of fees and charges and the <i>Contractor</i> must pay all necessary fees and charges in connection with the <i>work under the Contract</i>, unless specified otherwise. As Agencies often pay fees and charges associated with the planning approval and consents required for the project, these should be listed in <i>Item 12</i> to avoid confusion.</p> <p>Clause 14.2</p> <p>The <i>Contractor</i> has an entitlement to payment for additional costs (but not <i>delay costs</i>) if there is a change in a <i>statutory requirement</i>, but only if it meets the criteria in clause 14.2. With the long parliamentary processes involved in changing legislation, it is likely that at the time of tender, the <i>Contractor</i> would be aware of any significant changes to acts or regulations that are proposed to be proclaimed during the term of the <i>Contract</i>. Note that a change to fees and charges by itself does not give an entitlement to additional costs.</p> <p>Clause 14.3</p> <p>The <i>Contractor</i> must obtain and hold and all of the necessary licences, approvals etc. while undertaking the <i>work under the Contract</i>. A failure to hold a necessary licence (e.g. a builder's licence) is a substantial breach of contract, giving the <i>Principal</i> the right to commence the process to terminate the <i>Contract</i>.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>15 SAFETY</p> <p>a) The <i>Contractor</i> must:</p> <ul style="list-style-type: none"> i) carry out the <i>work under the Contract</i> safely and in a manner that does not put the health and safety of persons at risk; ii) comply with all <i>statutory requirements</i> and other requirements of the <i>Contract</i> in respect of work health and safety; and iii) comply with its duty under any applicable <i>statutory requirements</i> to consult, cooperate and coordinate activities with all other persons who have a work health and safety duty in relation to the same matter. <p>b) If, pursuant to a <i>statutory requirement</i> of the state or territory where the <i>work under the Contract</i> is being carried out, workplace health and safety on the <i>site</i> must be managed by a principal contractor, the <i>Principal</i>:</p> <ul style="list-style-type: none"> i) appoints the <i>Contractor</i> to be the principal contractor; and ii) authorises the <i>Contractor</i> to have management and control of the workplace and to discharge the duties of a principal contractor, <p>unless specified in <i>Item 13</i> that another person will be the principal contractor.</p>	<p>Clause 15</p> <p>Agencies expect contractors to demonstrate commitment to providing a safe work environment for all persons. Usually additional safety management requirements, such as the preparation of Safety Plans and Safe Work Method Statements will be included in the specification or elsewhere in the <i>Contract documents</i>.</p> <p>Each jurisdiction has Work Health and Safety legislation in place and in most jurisdictions, a “principal contractor” is responsible for safety on the <i>site</i>. Unless specified otherwise (e.g. where the <i>Principal</i> is managing the construction), the <i>Contractor</i> is appointed to be the principal contractor.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>16 PREVENTION AND REINSTATEMENT OF DAMAGE</p> <p>a) The <i>Contractor</i> is responsible for the prevention of damage to, and for the care of:</p> <ol style="list-style-type: none"> i) the whole of the <i>work under the Contract</i> from and including the date of commencement of the <i>work under the Contract</i> to 4:00 pm on the <i>date of practical completion</i>; ii) unfixed materials, plant or equipment accounted for in a <i>payment schedule</i>; iii) materials, plant or equipment entrusted to the <i>Contractor</i> by the <i>Principal</i>; and iv) after 4:00 pm on the <i>date of practical completion</i>, those parts of the <i>work under the Contract</i> affected during the repair of a <i>defect</i> or the cleaning up of the <i>site</i>. <p>b) If loss or damage (including loss or damage caused by inclement weather), other than that caused by a <i>Principal's risk</i>, occurs to the <i>work under the Contract</i> while under the <i>Contractor's</i> care pursuant to clause 16 a), the <i>Contractor</i> must rectify such loss or damage at its own cost so that the <i>Works</i> comply with the requirements specified in the <i>Contract</i>.</p> <p>c) In the event of loss or damage being caused by a <i>Principal's risk</i>, even though the <i>Contractor</i> has implemented reasonable measures to protect the <i>Works</i> in accordance with clause 16 a):</p> <ol style="list-style-type: none"> i) to the extent <i>directed</i> by the <i>Superintendent</i>, the <i>Contractor</i> must rectify the loss or damage; and ii) the cost of rectification is to be valued pursuant to clause 40.5. <p>d) If the loss or damage is caused by a combination of <i>Principal's risk</i> 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 <i>Principal's risk</i>.</p> <p>e) If the <i>Contractor</i> damages property other than the <i>Works</i>, the <i>Contractor</i> must:</p> <ol style="list-style-type: none"> i) immediately notify the <i>Superintendent</i>; ii) rectify the damage as soon as possible; and iii) pay any compensation required by the law. <p>f) Without affecting the <i>Principal's</i> other rights and remedies, the <i>Principal</i> may an obligation under clause 16 e) carried out by others if:</p> <ol style="list-style-type: none"> i) the <i>Contractor</i> fails to comply with an obligation under clause 16 e); and ii) the <i>Superintendent</i> has given reasonable written notice to the <i>Contractor</i> that it intends to have the obligation carried out by others. <p>g) The cost incurred by the <i>Principal</i> pursuant to clause 16 f) must be assessed by the <i>Superintendent</i> and is a debt due and payable by the <i>Contractor</i> to the <i>Principal</i>.</p>	<p>Clause 16</p> <p>The <i>Contractor</i> has an obligation to prevent damage to the <i>work under the Contract</i>.</p> <p>The <i>Contractor</i> is responsible for the rectification of damage from any risk that occurs to the <i>Works</i> prior to 4.00 pm on the date of practical completion, including any damage that occurs as a result of the weather. Hence the <i>Contractor</i> cannot obtain extra payment from the <i>Principal</i> under the <i>Contract</i> if the <i>Works</i> are damaged by weather events.</p> <p>The <i>Principal's risks</i> include any of the following:</p> <ol style="list-style-type: none"> a) any negligent act or omission of the <i>Superintendent</i> or the <i>Principal</i> or the consultants, agents, employees or other contractors of the <i>Principal</i>; b) any risk specifically allocated to the <i>Principal</i> elsewhere in the <i>Contract</i>; c) use or occupation of any part of the <i>work under the Contract</i> by the <i>Principal</i> or the consultants, agents, employees or other contractors of the <i>Principal</i>; d) <i>defects</i> in the design of the <i>work under the Contract</i>, other than design provided by the <i>Contractor</i> e) war, invasion, acts of foreign enemies, acts of terrorism, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any government or public authority; or f) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel. <p>The <i>Principal</i> will bear the costs of these if they eventuate.</p> <p>If damage occurs from a <i>Principal's risk</i>, the <i>Superintendent</i> can direct that either:</p> <ul style="list-style-type: none"> • the damage is rectified and payment is made to the <i>Contractor</i> for the extra costs; or • the damage remains unrepaired, enabling it to be repaired by someone else if required. <p>The costs are shared proportionately between the parties If the loss or damage is caused by a combination of a <i>Principal's risk</i> and risks for which the <i>Contractor</i> is responsible.</p> <p>The <i>Contractor</i> must repair any damage that occurs to property other than the <i>Works</i> as a consequence of the <i>Contractor's</i> activities. If the <i>Contractor</i> does not repair the damage, under clause 16 f) the <i>Superintendent</i> may (after providing reasonable notice) have the work done by others at the <i>Contractor's</i> expense.</p> <p>If damage to property is permissible (e.g. where a building will be demolished anyway), a specific provision to allow this will need to be included in the <i>Contract</i>.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>17 INDEMNITIES</p> <p>17.1 Contractor’s indemnity</p> <p>a) The <i>Contractor</i> indemnifies the <i>Principal</i> against:</p> <ul style="list-style-type: none"> i) <i>claims</i> in respect of personal injury or death; ii) loss of, or damage to, the <i>Principal’s</i> property; and iii) loss of, or damage to, any other property, <p>arising out of, or as a consequence of carrying out, the <i>work under the Contract</i>.</p> <p>b) The indemnity provided under clause 17.1 a) is to be reduced proportionally to the extent that any act or omission of the <i>Principal</i>, its consultants, agents, employees, other contractors engaged by the <i>Principal</i> or the <i>Superintendent</i>, has contributed to the injury, death, loss or damage.</p> <p>c) Clause 17.1 a) does not apply to:</p> <ul style="list-style-type: none"> i) the extent that the <i>Contractor’s</i> liability is limited by another provision of the <i>Contract</i>; ii) exclude any other right of the <i>Principal</i> to be indemnified by the <i>Contractor</i>; iii) materials, plant or equipment entrusted to the <i>Contractor</i> by the <i>Principal</i> under clause 16 a); iv) damage which is the unavoidable result of the construction of the <i>Works</i> in accordance with a construction methodology specified by the <i>Principal</i>; 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 <i>Contractor</i>. <p>17.2 Principal’s indemnity</p> <p>a) The <i>Principal</i> indemnifies the <i>Contractor</i> against any claim in connection with the <i>Principal’s</i> right to have the <i>work under the Contract</i> carried out on the <i>site</i>.</p>	<p>Clause 17.1</p> <p>Clause 17 requires the <i>Contractor</i> to indemnify the <i>Principal</i> (i.e., agree to cover any loss and damage suffered by the <i>Principal</i>) in the event of injury, death or damage to property. This would include any consequential effects, such as disruption to business, in the event that the <i>Contractor</i> caused damage to neighboring property.</p> <p>Note that clause 17.1 c) iv) only limits the <i>Contractor’s</i> indemnity where the lost or damage is from “the unavoidable result of the construction of the <i>Works</i> in accordance with a construction methodology specified by the <i>Principal</i>”. If the <i>Principal</i> does not specify a method of construction, the indemnity will apply to all loss or damage that occurs as a consequence of the <i>work under the Contract</i>.</p> <p>Clause 17.2</p> <p>The <i>Principal</i> is responsible for ensuring that it has the right to have the <i>Works</i> carried out on the <i>site</i>. It indemnifies the <i>Contractor</i> against any claims in the event that this is not the case.</p>

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<p>18 PRINCIPAL ARRANGED INSURANCE</p> <p>b) This clause 18 applies if the <i>Principal</i> is responsible to effect insurance.</p> <p>c) Not later than the <i>date of acceptance of tender</i>, the <i>Principal</i> must:</p> <ul style="list-style-type: none"> i) specified in <i>Item 14</i>, effect a Works policy of insurance to cover physical loss or damage to the <i>temporary works and Works</i>; and ii) if specified in <i>Item 14</i>, 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 <i>work under the Contract</i>. <p>d) The insurance must be on terms not less beneficial to the <i>Contractor</i> than those described in the insurance policy or policies or other details of insurance provided or made available to the <i>Contractor</i> by the <i>Principal</i> before the <i>date of acceptance of tender</i>.</p> <p>e) The <i>Principal</i> must:</p> <ul style="list-style-type: none"> i) pay all necessary premiums; ii) maintain the insurance until issue of the expiry of the <i>defects liability period</i> or any other period specified in the <i>Contract</i>; and iii) provide or make available to the <i>Contractor</i> a copy of the relevant insurance policy. <p>f) The <i>Contractor</i>:</p> <ul style="list-style-type: none"> i) acknowledges that it has considered the extent of insurance cover provided by the <i>Principal</i> 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. 	<p>Clause 18</p> <p>Many Agencies have insurance policies in place ("<i>Principal Arranged Insurance</i>") to cover Works and Public Liability. These policies will apply if specified in <i>Item 14</i> and/or <i>Item 15</i> respectively.</p> <p>The <i>Principal</i> must provide details of the insurance coverage prior to the <i>date of acceptance of tender</i> and maintain this insurance until the expiry of the <i>defects liability period</i> or other period specified in the <i>Contract</i>.</p> <p>If the <i>Contractor</i> considers that this insurance cover is inadequate, it would need to take out any additional insurance ("difference in conditions") that it considers necessary.</p>

<p>19 CONTRACTOR ARRANGED INSURANCE</p> <p>a) This clause 19 applies if the <i>Contractor</i> is responsible to effect insurance.</p> <p>b) Before starting the <i>work under the Contract</i>, the <i>Contractor</i> must:</p> <p style="margin-left: 20px;">i) if specified in <i>Item 14</i>, effect a Works policy of insurance to cover physical loss or damage to the <i>work under the Contract</i>; and</p> <p style="margin-left: 20px;">ii) if specified in <i>Item 15</i>, 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 <i>work under the Contract</i> and covers the <i>Contractor, Principal, Superintendent and subcontractors</i>.</p> <p>c) Unless another amount is specified in this <i>Contract</i>, the Works insurance must be for an amount which is not less than <i>contract sum</i> (at the <i>date of acceptance of tender</i>) plus 15%.</p> <p>d) The <i>Contractor</i> must:</p> <p style="margin-left: 20px;">i) pay all necessary premiums and maintain the insurance in accordance with the requirements of the <i>Contract</i>;</p> <p style="margin-left: 20px;">ii) unless specified otherwise in the <i>Contract</i>, maintain the insurance until expiry of the <i>defects liability period</i>;</p> <p style="margin-left: 20px;">iii) give the <i>Principal</i> proof that all insurance policies required to be effected by the <i>Contractor</i> under the <i>Contract</i> are current:</p> <p style="margin-left: 40px;">A) before starting the <i>work under the Contract</i>; and</p> <p style="margin-left: 40px;">B) whenever requested by the <i>Principal</i>; and</p> <p style="margin-left: 20px;">iv) give the <i>Principal</i> a copy of all insurance policies it is required to effect and maintain whenever requested by the <i>Principal</i>.</p> <p>e) All policies must:</p> <p style="margin-left: 20px;">i) be in the joint names of the <i>Principal</i> and <i>Contractor</i>;</p> <p style="margin-left: 20px;">ii) require the insurer to notify the <i>Principal</i> 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</p> <p style="margin-left: 20px;">iii) provide that a notice of claim given to the insurer by the <i>Principal, the Contractor, or a subcontractor</i> will be accepted by the insurer as a notice of claim given by all of the insured.</p> <p>f) If the <i>Contractor</i> is not the only insured under a policy of insurance, the <i>Contractor</i> must ensure, where legally possible, that the policy:</p> <p style="margin-left: 20px;">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;</p>	<p>Clause 19</p> <p>If the <i>Contractor</i> is responsible for taking out insurance policies in place to cover Works and Public Liability, it will be specified in <i>Item 14</i> and/or <i>Item 15</i> respectively.</p> <p>The minimum requirements for <i>Contractor</i> arranged insurance are specified in this clause. Note that:</p> <ul style="list-style-type: none"> • The policies must be in the joint names of the <i>Principal</i> and <i>Contractor</i>. • The <i>Contractor</i> must provide the <i>Principal</i> with a copy of the policy. This is necessary to ensure that there are no exclusions in the policy which would render the coverage ineffective. For example, working above certain heights or working over water are sometimes excluded from policies. • The insurer is subject to the <i>Principal's</i> prior approval. • The <i>Contractor</i> must not do anything which prejudices the insurance. • If the <i>Contractor</i> fails to take out the required insurance, the <i>Principal</i> may take it out at the <i>Contractor's</i> expense.
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<p>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</p> <p>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.</p> <p>g) The <i>Contractor</i> 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 <i>Contractor</i> or any <i>subcontractor</i>, it:</p> <p>i) does not do anything which prejudices any insurance;</p> <p>ii) if necessary, rectifies anything which might prejudice any insurance;</p> <p>iii) reinstates an insurance policy if it lapses;</p> <p>iv) does not cancel, vary or allow an insurance policy to lapse without the prior written consent of the <i>Principal</i>;</p> <p>v) immediately notifies the <i>Principal</i> of any event which may result in an insurance policy lapsing or being cancelled; and</p> <p>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.</p> <p>h) If the <i>Principal</i> has a reasonable objection to an insurer or to any conditions of an insurance policy, and notifies the <i>Contractor</i> of the objection and the reasons for the objection, the <i>Contractor</i> must, within 5 <i>business days</i> after receiving the notification, either obtain insurance from another insurer or arrange changes to the insurance policy, so that the <i>Principal</i> has no objections.</p> <p>i) If the <i>Contractor</i> fails to comply with clauses 19 c), 19 d) or 19 h), the <i>Principal</i> may effect and maintain the relevant insurance policy and pay the necessary premiums. The <i>Principal</i> may recover from the <i>Contractor</i> the cost of the premiums and the <i>Principal's</i> reasonable costs of effecting and maintaining the insurance, as a debt due from the <i>Contractor</i> to the <i>Principal</i>.</p>	

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<p>20 OTHER INSURANCE</p> <p>a) Unless clause 20 b) applies, before the <i>Contractor</i> commences work, the <i>Contractor</i> must:</p> <ul style="list-style-type: none"> i) insure against liability for death of or injury to persons employed by the <i>Contractor</i> including liability by statute and at common law; ii) maintain the insurance cover until all <i>work under the Contract</i> is completed; iii) where permitted by law, extend the insurance to indemnify the <i>Principal</i> for the <i>Principal's</i> statutory liability to persons employed by the <i>Contractor</i>; and iv) ensure that every <i>subcontractor</i> working on the <i>site</i> is similarly insured. <p>b) If, in the jurisdiction where the <i>work under the Contract</i> is being carried out, insurance of employees is covered by a statutory scheme of insurance, the <i>Contractor</i> must comply with its obligations under that scheme and if requested by the <i>Superintendent</i>, provide evidence demonstrating compliance with this clause 20 b).</p> <p>c) If stated in <i>Item 18</i>, the <i>Contractor</i> must ensure that a professional indemnity insurance policy is in place which covers the design of <i>temporary works</i>. The policy must be in place prior to the commencement of the design and maintained until the expiry of the <i>defects liability period</i>. The amount of cover must not be less than the amount specified in <i>Item 18</i>, 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 <i>Works</i> which is dependent upon the <i>temporary works</i>.</p>	<p>Clause 20</p> <p>The <i>Contractor</i> must take out insurance to cover the death or injury of employees or if there is statutory scheme applicable in the jurisdiction, comply with that scheme.</p> <p>If the <i>Contractor</i> will be responsible for the design of <i>temporary works</i> that could have serious consequences if it failed (e.g. concrete formwork), it is recommended that it is specified in <i>Item 18</i> that the <i>Contractor</i> must take out Professional Indemnity Insurance.</p>
<p>21 INSURANCE CLAIMS</p> <p>21.1 Management of insurance claims</p> <p>a) The <i>Contractor</i> must:</p> <ul style="list-style-type: none"> i) make and manage all insurance claims; ii) as soon as practicable, notify the <i>Principal</i> 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 <i>Principal</i> informed of subsequent developments concerning the insurance claim; and iii) ensure that <i>subcontractors</i> in respect of their operations similarly inform the <i>Principal</i>. 	<p>Clause 21.1</p> <p>The <i>Contractor</i> is responsible for the management of claims under the insurance policies.</p>

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<p>21.2 Settlement of insurance claims</p> <p>a) Where a settlement has been made under the <i>Works</i> insurance:</p> <ul style="list-style-type: none"> i) unless the parties agree otherwise, the proceeds of the settlement must be paid to the <i>Principal</i>; ii) the <i>Superintendent</i> (acting as a certifier) must assess the amount due to the <i>Contractor</i> for reimbursement of the cost reasonably and necessarily incurred by the <i>Contractor</i> to rectify the loss or damage; and iii) the <i>Principal</i> must pay the <i>Contractor</i> the lesser of the amount assessed under clause 21.2 a) ii) and the amount of insurance settlement. <p>21.3 Excesses or deductibles</p> <p>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 <i>Principal's risk</i> (without fault or omission on the part of the <i>Contractor</i>), the <i>Contractor</i> is responsible for the payment of any excesses or deductibles.</p>	<p>Clause 21.2</p> <p>Unless the parties agree otherwise, the proceeds of an insurance claim are paid to the <i>Principal</i>. The <i>Superintendent</i> (in its certifier role) values the costs necessarily incurred by the <i>Contractor</i> in rectifying the damage and the <i>Principal</i> pays this amount, but not more than the insurance payout. In other words, the <i>Contractor</i> bears the risk that the cost of rectification exceeds the insurance payout.</p> <p>Clause 21.3</p> <p>The <i>Contractor</i> is responsible for the payment of excess or deductibles under the policy (regardless of whether the insurance is taken out by the <i>Contractor</i> or the <i>Principal</i>) unless the cause of the insurance claim is a <i>Principal's risk</i>.</p>
<p>22 SEPARABLE PORTIONS</p> <ul style="list-style-type: none"> a) In addition to <i>separable portions</i> identified in the <i>Contract documents</i> (if any), if either party at any time proposes that the <i>Works</i> be divided into <i>separable portions</i>, that party must at first seek agreement from the other party. b) If a part of the <i>Works</i> has reached, or will reach, a stage equivalent to that of <i>practical completion</i>, but another part of the <i>Works</i> has not reached such a stage, the <i>Superintendent</i> may direct that the respective parts are to be <i>separable portions</i>. c) If new <i>separable portions</i> have been created, the <i>Superintendent</i> (acting as a certifier) must notify each party of the following: <ul style="list-style-type: none"> i) the portion of the <i>Works</i>; ii) the <i>date for practical completion</i>; and iii) the respective amounts for <i>security</i> and liquidated damages. d) The respective amounts for <i>security</i> and liquidated damages must be calculated pro-rata according to the ratio of the <i>Superintendent's</i> valuation of the separable portion to the <i>contract sum</i>. e) A provision of this <i>Contract</i> in respect of <i>defects liability period</i>, <i>site</i>, <i>work under the Contract</i>, <i>Works</i>, <i>date for practical completion</i>, <i>date of practical completion</i>, <i>security</i> and liquidated damages applies separately to each <i>separable portion</i>. f) In using a separable portion that has reached <i>practical completion</i>, the <i>Principal</i> must not impede the <i>Contractor</i> in the performance of the <i>work under the Contract</i>. 	<p>Clause 22</p> <p><i>Separable portions</i> are intended to assist with the progressive management and handover of sections of the <i>Works</i>. The use of <i>separable portions</i> enables the <i>Contractor</i> to achieve the <i>practical completion</i> of a part of the <i>Works</i> before all of the <i>Works</i> are complete and for the <i>Principal</i> to use that part of the <i>Works</i>. There are a number of benefits for the <i>Contractor</i>, such as the <i>Principal</i> becomes responsible for the care and control of that <i>separable portion</i> and the <i>defects liability period</i> commences.</p> <p>Where a party wishes additional <i>separable portions</i> to be created, it must first seek the agreement of the other party. If a part of the <i>Works</i> has reached, or will reach, a stage equivalent to that of <i>practical completion</i>, but another part of the <i>Works</i> has not reached such a stage, the <i>Superintendent</i> may direct that <i>separable portions</i> be created, in which case respective amounts for <i>security</i> and liquidated damages are determined on a pro-rata basis.</p> <p>The definitions of <i>defects liability period</i>, <i>site</i>, <i>work under the Contract</i>, <i>Works</i>, <i>date for practical completion</i>, <i>date of practical completion</i>, <i>security</i> and liquidated damages apply separately to each <i>separable portion</i>.</p>

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<p>23 SUPERINTENDENT</p> <p>a) The <i>Principal</i> must ensure that at all times there is a person appointed to act as the Superintendent.</p> <p>b) The <i>Superintendent</i> is the person stated in <i>Item 3</i> or other person that the <i>Principal</i> appoints from time to time. The <i>Principal</i> must notify the <i>Contractor</i> in writing of any change in the person appointed to be <i>Superintendent</i>.</p> <p>c) Where it is stated in the <i>Contract</i> that the <i>Superintendent</i> is acting as a certifier, the <i>Principal</i> must ensure that the <i>Superintendent</i>:</p> <ul style="list-style-type: none"> i) acts honestly and impartially; ii) acts within the time prescribed under the <i>Contract</i> or where no time is prescribed, within a reasonable time; and iii) arrives at a reasonable measure or value of work, quantities or time. <p>d) In the exercise of all other functions of the <i>Superintendent</i> under the <i>Contract</i>, the <i>Superintendent</i> acts as the agent of the <i>Principal</i> and does not act as an independent certifier.</p> <p>e) If pursuant to a provision of the <i>Contract</i> enabling the <i>Superintendent</i> to give <i>directions</i>, the <i>Superintendent</i> gives a <i>direction</i>, the <i>Contractor</i> must comply with the <i>direction</i>.</p> <p>f) If the <i>Contractor</i> in writing requests the <i>Superintendent</i> to confirm an oral <i>direction</i>, the <i>Contractor</i> is not bound to comply with the <i>direction</i> until the <i>Superintendent</i> confirms it in writing.</p> <p>g) The <i>Principal</i> may, in writing, authorise the <i>Superintendent</i> to act on its behalf in respect of matters relating to the <i>Contract</i>.</p>	<p>Clause 23</p> <p>The <i>Superintendent</i> fulfils the dual role of an independent certifier (e.g. valuing work done, assessing extensions of time) and an agent of the <i>Principal</i> (e.g. directing that a variation is carried out). (See <i>Perini Corporation V Commonwealth of Australia [1969] 2 NSWLR 530</i>)</p> <p>As a certifier, the <i>Superintendent</i> must act impartially, honestly and reasonably. It must give effect to the terms of the <i>Contract</i> without bias or favoritism. The <i>Principal</i> is under an obligation to ensure that the <i>Superintendent</i> performs the certifier role in accordance with clause 23. If the <i>Superintendent</i>, in its role as a certifier, does not act impartially, honestly and reasonably, the <i>Principal</i> may be in breach of <i>Contract</i>. This would entitle the <i>Contractor</i> to damages.</p> <p>In contrast, when acting as an agent of the <i>Principal</i>, the <i>Superintendent</i> may act commercially in the interests of the <i>Principal</i>. Although there is no <i>Principal</i>'s Representative specified in NCW4, the <i>Principal</i> may authorise other persons (which could be the <i>Superintendent</i> in some circumstances) to act on its behalf in writing.</p> <p>NCW4 clearly identifies those clauses where the <i>Superintendent</i> acts as certifier.</p>

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<p>24 SUPERINTENDENT'S REPRESENTATIVE</p> <p>a) The Superintendent may:</p> <p style="padding-left: 20px;">i) appoint other persons to be a <i>Superintendent's Representative</i>; and</p> <p style="padding-left: 20px;">ii) delegate any of its functions under the <i>Contract</i> to a <i>Superintendent's Representative</i>.</p> <p>b) Not more than one <i>Superintendent's Representative</i> may exercise the same function at the same time.</p> <p>c) Notwithstanding the appointment of a <i>Superintendent's Representative</i>, the <i>Superintendent</i> may continue to exercise any of its functions under the <i>Contract</i>.</p> <p>d) The <i>Superintendent</i> must ensure that, at all times, the <i>Contractor</i> is provided with the names of any <i>Superintendent's Representative</i> and the functions delegated to the <i>Superintendent's Representative</i>.</p>	<p>Clause 24</p> <p>It is not usually practical for the <i>Superintendent</i> to undertake all of its functions personally on a large project. Hence the <i>Superintendent</i> may authorise another person to exercise some of its functions under the contract. Typically, the <i>Superintendent</i> will retain some of the more critical functions such as issuing the certificate of practical completion.</p> <p>There is no clause allowing the <i>Contractor</i> to object to an individual being appointed as a <i>Superintendent's Representative</i>. However, if that person did not carry out its role impartially, honestly and reasonably as required under the contract, the <i>Principal</i> may be in breach of contract.</p>
<p>25 CONTRACTOR'S REPRESENTATIVE</p> <p>a) Whenever any activity in connection with the <i>work under the Contract</i> is taking place, the <i>Contractor</i> must ensure that a competent representative is present.</p> <p>b) Prior to the commencement of the <i>work under the Contract</i>, the <i>Contractor</i> must notify the <i>Superintendent</i> of the name of the representative(s) and their responsibilities.</p> <p>c) The <i>Contractor</i> must notify the <i>Superintendent</i> if there is a change of representative(s).</p> <p>d) Any <i>direction</i> which is given to the representative of the <i>Contractor</i> is deemed to have been given to the <i>Contractor</i>.</p> <p>e) The <i>Contractor</i> is deemed to have knowledge of any matter which is known to a representative of the <i>Contractor</i>.</p> <p>f) If a representative does not possess the skills, experience or qualifications required in the <i>Contract</i> (if specified) or in the reasonable opinion of the <i>Superintendent</i> is not competent to undertake the role, the <i>Superintendent</i> may object to the appointment of that representative, in which case the <i>Contractor</i> must appoint another representative.</p>	<p>Clause 25</p> <p>Wherever the <i>Contractor</i> is executing the work under the <i>Contract</i> (whether on the <i>site</i> or at other locations such as at a manufacturer's premises), a competent representative of the <i>Contractor</i> must be present. In addition to being good management practice, it ensures that any of the <i>Superintendent's</i> staff can have direct access to a person with authority to discuss any relevant issue or issue a <i>direction</i>.</p> <p>The <i>Contractor</i> cannot evade responsibility for responding to a <i>direction</i> if it is given to the representative.</p> <p>It is not unusual for there to be a number of representatives, each accountable for a separate part of the <i>work under the Contract</i>.</p> <p>Although the <i>Superintendent</i> has the right to make an objection to the appointment of a representative, it must be based on objective criteria, such as a lack of skills / experience, failing to undertake specified duties, breaching WHS regulations or misbehaviour.</p>

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<p>26 CONTROL OF CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS</p> <p>a) If an employee of the <i>Contractor</i> or a <i>subcontractor</i> or a sole trader engaged by the <i>Contractor</i> or a <i>subcontractor</i>:</p> <ul style="list-style-type: none"> 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 <i>Superintendent</i>, is guilty of misconduct or is incompetent or negligent, <p>the <i>Superintendent</i> may direct the <i>Contractor</i> to ensure that the person is not present at any place where the <i>work under the Contract</i> is being undertaken.</p>	
<p>27 SITE</p> <p>27.1 Possession of site</p> <p>a) The <i>Principal</i> must give the <i>Contractor</i> sufficient possession of the <i>site</i> to allow the <i>Contractor</i> to start the <i>work under the Contract</i> by the date which is the latest of:</p> <ul style="list-style-type: none"> i) the date the <i>Contractor</i> provides <i>security</i> (other than retention money) if required pursuant to clause 5; ii) the date the <i>Contractor</i> provides proof of insurance (if required) pursuant to clause 21; iii) the date the <i>Contractor</i> satisfies any other condition precedent for possession of the <i>site</i> specified in the <i>Contract</i>; and iv) the last <i>business day</i> of the period, stated in <i>Item 19</i>, after the <i>date of acceptance of tender</i>. <p>b) If the <i>Principal</i> is unable to provide the <i>Contractor</i> with possession of the <i>site</i> (or part thereof) in accordance with the <i>Contract</i>, the <i>Principal</i> must notify the <i>Contractor</i> of the date upon which the <i>site</i> or any part thereof will be available to the <i>Contractor</i>.</p> <p>c) Possession of the <i>site</i>:</p> <ul style="list-style-type: none"> i) confers on the <i>Contractor</i> a right only to such use and control as is necessary to enable the <i>Contractor</i> to carry out and complete the <i>work under the Contract</i>; and ii) unless permitted in the <i>Contract</i> or approved otherwise by the <i>Superintendent</i>, excludes any purpose not connected with the performance of the <i>work under the Contract</i>. <p>d) Subject to the <i>Contractor</i> satisfying any applicable requirements in clause 27.1 a), unless the delay in giving the <i>Contractor</i> sufficient possession of the <i>site</i> continues for longer than the time stated in <i>Item 19</i>, delay by the <i>Principal</i> in giving possession is not a breach of the <i>Contract</i>.</p>	<p>Clause 27</p> <p><i>Site</i> means the lands and other places to be made available by the <i>Principal</i> to the <i>Contractor</i> for the purpose of executing the <i>Works</i>. It therefore excludes any land that the <i>Contractor</i> is using which has not been made available by the <i>Principal</i> and off-site manufacturing facilities.</p> <p>The <i>Contractor</i> must provide <i>security</i> and insurances (if any) before the <i>Principal</i> is obliged to give possession of <i>site</i>. However, the <i>Principal</i> could grant possession of <i>site</i> without receiving the <i>security</i> and insurances if it wished to waive that requirement.</p> <p>In many cases, the <i>Contractor</i> will not have unrestricted access to all of the <i>site</i> for the full duration of the <i>Contract</i>. For example, a <i>Contract</i> to extend a building may have restrictions to allow current tenants to have access at certain times or locations. These restrictions will need to be specified elsewhere in the <i>Contract documents</i>.</p> <p>If the <i>Principal</i> does not provide the <i>Contractor</i> with possession of the <i>site</i> in accordance with the <i>Contract</i>, the <i>Principal</i> will be in breach of the <i>Contract</i> and the <i>Contractor</i> will be entitled to make a <i>claim</i> for extra costs and <i>delay costs</i> pursuant to clause 36.</p> <p>If sufficient possession of the <i>site</i> is not given by the time stated in <i>Item 19</i>, the <i>Principal's</i> failure to give the <i>Contractor</i> adequate possession of the <i>site</i> will be a substantial breach of the <i>Contract</i>, entitling the <i>Contractor</i> to give a written notice to show to terminate the <i>Contract</i>.</p>

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<p>27.2 Access to the site for the Principal and others</p> <p>a) At any time, the <i>Superintendent, Principal</i> and their consultants, agents and employees may have access to any place where the <i>work under the Contract</i> is being undertaken for <i>testing</i> or any other reasonable purpose in connection with the <i>Contract</i>.</p> <p>b) When accessing any place where the <i>work under the Contract</i> is being undertaken, the <i>Superintendent, Principal</i> and their consultants, employees and agents must:</p> <ul style="list-style-type: none"> i) comply with the <i>Contractor's</i> reasonable workplace health and safety requirements; and ii) except to the extent reasonably necessary to conduct the <i>test</i> or otherwise permitted in the <i>Contract</i>, not impede the <i>Contractor</i>. <p>c) The Contractor:</p> <ul style="list-style-type: none"> i) must permit the execution of work on the <i>site</i> by other contractors or employees of the <i>Principal</i>; ii) must cooperate with them and coordinate the <i>work under the Contract</i> with the work of the other contractors or employees of the <i>Principal</i>; and <p>d) if specified in the <i>Contract</i>, must not impede other contractors or employees of the <i>Principal</i> undertaking work on the <i>site</i>.</p>	<p>Clause 27.2</p> <p>The <i>Superintendent, Principal</i> and their consultants, agents and employees may access to the <i>site</i> for <i>testing</i>, which includes surveillance, auditing and other activities associated with management of the <i>Contract</i>.</p> <p>The <i>Principal</i>, either through its own employees or through other contractors, may have other work undertaken concurrently on the <i>site</i>. It will be necessary to specify on a <i>Contract</i> specific basis whether the <i>Contractor</i> or the other contractors / employees have precedence to <i>site</i> access.</p>
<p>27.3 Delivery of materials</p> <p>a) Unless the <i>Superintendent</i> gives prior written approval otherwise, the <i>Contractor</i> must not deliver materials to or perform work on the <i>site</i> until possession of the <i>site</i> (or part thereof) is given to the <i>Contractor</i> pursuant to clause 27.1.</p>	<p>Clause 27.3</p> <p>This clause ensures that the <i>Contractor</i> does not restrict the <i>Principal's</i> use of the <i>site</i> before possession of <i>site</i> is granted.</p>
<p>27.4 Discovery of items of value</p> <p>a) The <i>Contractor</i> does not own any items of value found on the <i>site</i>, such as minerals, fossils, objects of antiquity or of anthropological / archaeological interest and coins. If any such item is discovered, the <i>Contractor</i> must immediately:</p> <ul style="list-style-type: none"> i) take precautions to prevent its removal or damage; and ii) notify the <i>Superintendent</i> of the discovery. 	<p>Clause 27.4</p> <p>Unless specified otherwise, the Contractor does not own any valuable items such as minerals, fossils, relics etc. found on the <i>site</i>. Ownership of the items will usually reside with the owner of the <i>site</i>, but in some instances, the items may be subject to statutory requirements, particularly if they are of historical or anthropological significance.</p> <p>If the item is a <i>latent condition</i>, the <i>Contractor</i> may be entitled for payment of extra costs incurred in protecting and removing the item pursuant to clause 12.</p>

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<p>28 CARRYING OUT THE WORKS</p> <p>28.1 Setting out the works</p> <p>a) The <i>Contractor</i> must set out the <i>Works</i> in accordance with the <i>Contract</i>.</p> <p>b) The <i>Principal</i> must:</p> <p>i) supply the information reasonably necessary to enable the <i>Contractor</i> to set out the <i>Works</i>; and</p> <p>ii) provide the <i>Contractor</i> with any <i>survey marks</i> that are specified in the <i>Contract</i>.</p> <p>c) The <i>Contractor</i> must keep in their true positions any <i>survey marks</i> specified in the <i>Contract</i> or as supplied by the <i>Principal</i>.</p> <p>d) If a <i>survey mark</i> is disturbed, the <i>Contractor</i> must:</p> <p>i) immediately notify the <i>Superintendent</i>; and,</p> <p>ii) reinstate the <i>survey mark</i>, unless <i>directed</i> otherwise by the <i>Superintendent</i>.</p> <p>28.2 Interference, nuisance and disturbance</p> <p>a) Unless the <i>Contract</i> permits otherwise, the <i>Contractor</i> must not:</p> <p>i) unnecessarily interfere with the passage of people and vehicles;</p> <p>ii) create unnecessary nuisance; or</p> <p>iii) create unreasonable noise and disturbance.</p> <p>28.3 Publicity</p> <p>a) Unless approved otherwise by the <i>Superintendent</i>, the <i>Contractor</i> must:</p> <p>i) refer any enquiries from external parties regarding the <i>Contract</i> to the <i>Superintendent</i>;</p> <p>ii) not publicise the <i>Contract</i>; or</p> <p>iii) not release any information in connection with the <i>Contract</i> for publication in any media.</p>	<p>Clause 28.1</p> <p>The <i>Contractor</i> is responsible for setting out the <i>Works</i>. It must protect survey marks provided by the <i>Principal</i> and report if any error is found in data provided by the <i>Principal</i>.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>29 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT</p> <p>a) Unless specified otherwise in the <i>Contract</i>, the <i>Contractor</i> must supply everything necessary to meet its obligations under the <i>Contract</i>.</p> <p>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, <i>construction plant</i> and incidentals (including fees, charges, minor items and <i>testing</i>) necessary for the <i>Contractor</i> to fulfil its obligations under the <i>Contract</i>, notwithstanding that the description of the rate or lump sum may not fully describe all of the <i>work under the Contract</i>.</p> <p>c) The <i>Superintendent</i> may direct the <i>Contractor</i> to:</p> <p>i) supply particulars of the mode and place of manufacture, the source of supply, the performance capacities and other related information; and</p> <p>ii) arrange reasonable inspection at such place or sources by the <i>Superintendent</i>,</p> <p>in respect of any materials, plant, machinery or equipment to be supplied by the <i>Contractor</i> and intended to be incorporated into the <i>Works</i>.</p> <p>d) The <i>Superintendent</i> may give the <i>Contractor</i> a written <i>direction</i> not to remove from the <i>site</i>:</p> <p>i) materials, plant, or equipment intended to be incorporated in to the <i>Works</i>; or</p> <p>ii) <i>temporary works</i> or <i>construction plant</i> necessary to complete the <i>Works</i>.</p> <p>e) If compliance with any such <i>direction</i> given under clause 29 d) causes the <i>Contractor</i> to incur additional cost, the cost is to be valued pursuant to clause 40.5.</p>	<p>Clause 29</p> <p>NCW4 defaults to the <i>Contractor</i> supplying everything necessary for the <i>Contract</i>. However, in some instances, the <i>Principal</i> will supply materials to the <i>Contractor</i> which will be incorporated into the <i>Works</i>. This may be for a number of reasons, such as long lead times, having control of the selection of the items or taking advantage of the <i>Principal's</i> bulk-buying capacity. These items must be clearly documented in the <i>Contract documents</i>. The <i>Contractor</i> is responsible for everything else necessary to deliver the <i>Works</i>.</p> <p>A <i>Contractor</i> cannot <i>claim</i> for extra payment for incidentals, minor items, fees, charges etc. These are deemed to be included in the applicable rate or lump sum, even if not specifically mentioned. For example, if the specification / drawings require the supply and installation of a door in accordance with the manufacturer's instructions, the <i>Contractor</i> is not entitled to extra costs for the supply of screws and hinges. Refer also to clause 8.8.</p> <p>Clause 29 d) might be used if the <i>Principal</i> intends to take the work out of the hands of the <i>Contractor</i> where the <i>Contractor</i> has failed to satisfactorily respond to a notice of <i>Contractor's default</i>.</p>
<p>30 MATERIALS AND WORK</p> <p>30.1 Quality of materials and work</p> <p>a) Unless otherwise stated in the <i>Contract</i>, the <i>Contractor</i> must:</p> <p>i) use suitable new materials; and</p> <p>ii) carry out and complete the <i>work under the Contract</i> in accordance with accepted trade practices.</p>	<p>Clause 30.1</p> <p>NCW4 defaults to only new materials being used in the <i>Works</i> and the work being carried out in accordance with accepted trade practices. The latter is not precisely defined and will depend on the circumstances. Usually it is preferable to define the required standard of work in the specification than rely on this clause.</p>

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<p>30.2 Defective work</p> <p>a) If any work carried out by the <i>Contractor</i> (including the provision of materials, plant, or equipment and the compliance with specified processes) is <i>defective</i>, the <i>Contractor</i> must rectify (including repair, rework, reconstruct or replace) the work so that it complies with the specified requirement.</p> <p>b) The rectification must:</p> <ul style="list-style-type: none"> i) be carried out at the <i>Contractor's</i> own expense; ii) be carried out as soon as practicable after the <i>Contractor</i> becomes aware of the <i>defect</i>; iii) not adversely affect the durability, integrity or performance of the <i>Works</i>; and iv) be carried out to minimise disruption and inconvenience to the <i>Principal</i>. <p>c) If requested by the <i>Superintendent</i>, the <i>Contractor</i> must provide full details of the proposed method of rectification and the time by which the work will be rectified.</p> <p>d) The <i>Principal</i> may have <i>defective</i> work rectified by others if:</p> <ul style="list-style-type: none"> i) the <i>Contractor</i> is aware of the <i>defective</i> work; ii) the <i>Contractor</i> fails to rectify the work as soon as practicable; iii) the <i>Superintendent</i> has provided written notice to the <i>Contractor</i> that the <i>Principal</i> intends to have the subject work rectified by others if the work is not rectified within 10 <i>business days</i> of receipt of the written notice or such longer time as the <i>Superintendent</i> reasonably <i>directs</i>; and iv) the <i>Contractor</i> does not rectify the <i>defective</i> work within the time specified in the written notice referred to in clause 30.2 d) iii). <p>e) The cost incurred by the <i>Principal</i> in having <i>defective</i> work rectified pursuant to clause 30.2 d) must be assessed by the <i>Superintendent</i> and is a debt due and payable by the <i>Contractor</i> to the <i>Principal</i>.</p>	<p>Clause 30.2</p> <p>The <i>Contractor</i> is obliged to deliver <i>work under the Contract</i> which conforms to the <i>Contract</i>. It must rectify all <i>defects</i> so that the work complies with the requirements specified in the <i>Contract</i> without awaiting instruction from the <i>Superintendent</i> and as soon as practicable.</p> <p>This clause applies to any process specified in the <i>Contract</i>, such as a safety or environmental management procedure, as well as to the <i>Works</i>.</p> <p>The onus is on the <i>Contractor</i> to demonstrate that any rectification will not adversely affect the long-term performance of the <i>Works</i>.</p> <p>The <i>Superintendent</i> is not obliged to check that the <i>Contractor's</i> work is <i>defect</i> free, but if it becomes aware of <i>defective</i> work that the <i>Contractor</i> is unaware of, it must advise the <i>Contractor</i> of the <i>defect</i>.</p> <p>If the <i>Contractor</i> does not satisfactorily respond to an instruction to rectify a <i>defect</i>, subject to following the process in clause 30.2 d), the <i>Superintendent</i> may have the rectification carried out by others and the <i>Principal</i> may recover the cost from the <i>Contractor</i>.</p>
<p>30.3 Acceptance of defective work</p> <p>a) At any time prior to the issue of a final payment <i>claim</i>, the <i>Contractor</i> may request the <i>Principal</i> to accept the <i>defective</i> work, but the <i>Principal</i> is under no obligation to accept such a proposal.</p> <p>a) If the <i>Principal</i> elects to accept the <i>defective</i> work, the <i>Superintendent</i> (acting as certifier) must adjust the <i>contract sum</i> by an amount which is commensurate with the increase or decrease in the value of the <i>Works</i> to the <i>Principal</i> and includes any other loss suffered by the <i>Principal</i> consequent upon such acceptance.</p>	<p>Clause 30.3</p> <p>If the <i>Principal</i> elects to accept <i>defective</i> work, any change in payment is determined by reference to the change in value to the <i>Principal</i> (which may be the cost of having the rectification done by others) and the cost impact to the <i>Contractor</i> is disregarded.</p>

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<p>30.4 Other rights of the Principal</p> <ul style="list-style-type: none"> a) This clause 30 survives the issue of the <i>certificate of practical completion</i>. b) Nothing in clause 30 prejudices any other right which the <i>Principal</i> may have against the <i>Contractor</i> arising out of the failure of the <i>Contractor</i> to comply with a requirement specified in the <i>Contract</i>. <p>30.5 Suppliers' and manufacturers' warranties</p> <ul style="list-style-type: none"> a) The <i>Contractor</i> must ensure that the <i>Principal</i> 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 <i>Works</i>. b) The provision of a warranty pursuant to this clause 30.5 does not relieve, limit or exclude any of the <i>Contractor's</i> liabilities or obligations under the <i>Contract</i>. <p>30.6 Quality assurance</p> <ul style="list-style-type: none"> a) If specified in <i>Item 20</i>, the <i>Contractor</i> must: <ul style="list-style-type: none"> i) plan, establish, implement and maintain a quality system which conforms to the requirements of the <i>Contract</i>; and ii) provide the <i>Superintendent</i> with access to the quality system of the <i>Contractor</i> and each of the <i>subcontractors</i> to enable monitoring and quality auditing. b) The quality system: <ul style="list-style-type: none"> i) is to be used as an aid to achieving compliance with the <i>Contract</i> and to document such compliance, and ii) will not relieve the <i>Contractor</i> of any responsibilities or obligations in respect of the <i>work under the Contract</i>. 	<p>Clause 30.5</p> <p>In addition to the <i>Contractor's</i> obligations in the <i>defects liability period</i>, manufactured items incorporated into the <i>Works</i> may have further warranties. The <i>Principal</i> must have the right to access these warranties if needed.</p> <p>Clause 30.6</p> <p>If the <i>Contractor</i> is required to implement a quality management system, it must be specified in <i>Item 20</i>. As NCW4 does not provide any details about the requirements for the quality management system, these details will need to be specified elsewhere in the <i>Contract</i>.</p>

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<p>31 TESTING</p> <p>31.1 Responsibility for testing</p> <p>a) Unless specified otherwise, the <i>Contractor</i> is responsible for undertaking all <i>testing</i> necessary to demonstrate that the <i>work under the Contract</i> complies with the requirements specified in the <i>Contract</i>.</p> <p>b) At any time prior to the expiry of the <i>defects liability period</i>, the <i>Superintendent</i> may undertake <i>testing</i> of the <i>work under the Contract</i> or direct that any material or <i>work under the Contract</i> be tested. The <i>Contractor</i> must provide such assistance and samples and make accessible such parts of the <i>work under the Contract</i> as may be required by the <i>Superintendent</i>. On completion of the <i>tests</i>, the <i>Contractor</i> must make good the <i>work under the Contract</i> so that it fully complies with the <i>Contract</i>.</p> <p>c) Before the <i>Contractor</i> conducts a <i>test</i>, reasonable notice must be given to the <i>Superintendent</i> of the time, date and place of the <i>test</i>.</p> <p>d) The <i>Superintendent</i> may direct that any part of the <i>work under the Contract</i> is not to be covered up or made inaccessible without the <i>Superintendent's</i> prior written <i>direction</i>.</p> <p>31.2 Results of tests</p> <p>a) Results of <i>tests</i> must be promptly made available to the other party and to the <i>Superintendent</i>.</p> <p>31.3 Costs of testing</p> <p>a) Unless specified otherwise, where the <i>Contract</i> specifies that a <i>test</i> must be undertaken, the <i>Contractor</i> bears the cost of, and incidental to, that <i>test</i>.</p> <p>b) If further <i>testing</i> is carried out by the <i>Superintendent</i> or as a result of a <i>direction</i> by the <i>Superintendent</i>, costs of and incidental to that <i>testing</i> must be borne by the <i>Principal</i> or be valued pursuant to clause 40.5 and paid by the <i>Principal</i> to the <i>Contractor</i> unless:</p> <p>i) the <i>test</i> shows that the material or <i>work under the Contract</i> is not in accordance with the <i>Contract</i>;</p> <p>ii) the <i>test</i> is in respect of <i>work under the Contract</i> covered up or made inaccessible without the <i>Superintendent's</i> prior approval where such was required; or</p> <p>iii) the <i>test</i> is consequent upon a failure of the <i>Contractor</i> to comply with a requirement of the <i>Contract</i>.</p> <p>31.4 Testing during the defects liability period</p> <p>a) If, during the <i>defects liability period</i>, the <i>Principal</i> or the <i>Superintendent</i> asserts that part of the <i>Works</i> does not comply with the <i>Contract</i>, the <i>Contractor</i> must be given reasonable access to <i>test</i> that part of the <i>Works</i>.</p> <p>b) The costs of and incidental to <i>testing</i> under this clause 31.4 must be borne by the <i>Contractor</i> unless the <i>test</i> shows that the material or work is in accordance with the <i>Contract</i>.</p>	<p>Clause 31.1</p> <p>NCW4 defaults to the <i>Contractor</i> being responsible for undertaking all of the testing necessary to demonstrate compliance with the <i>Contract</i> at its own cost.</p> <p>If the <i>Superintendent</i> orders additional testing, the <i>Principal</i> bears the cost of that <i>testing</i> unless the <i>test</i> identifies defective work or there is a failure of the <i>Contractor</i> to comply with a requirement of the <i>Contract</i>.</p> <p>Note that the definition of <i>test</i> (and hence <i>testing</i>) is very broad and includes surveillance, auditing, examination and measuring.</p>

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<p>32 WORKING DAYS AND WORKING HOURS</p> <p>a) The <i>Contractor</i> is only permitted to perform work under the <i>Contract</i> on the site in accordance with the following:</p> <ul style="list-style-type: none"> i) at times permitted by law; ii) on <i>working days</i>; and iii) during the working hours specified in <i>Item 21</i> or elsewhere in the <i>Contract</i> (if any) or if not specified in the <i>Contract</i>, as notified by the <i>Contractor</i> to the <i>Superintendent</i> before the commencement of work on the site. <p>b) The <i>Contractor</i> may carry out work at other times if it is necessary for safety or for the protection of property. The <i>Contractor</i> must, as soon as practicable, give the <i>Superintendent</i> written notice of such circumstances.</p> <p>c) The <i>working days</i> and working hours must not subsequently be varied by the <i>Contractor</i> without the <i>Superintendent's</i> prior written approval, which may be conditional.</p> <p>d) The cost of administration of the <i>Contract</i> incurred by the <i>Principal</i> will be borne by the <i>Principal</i>, except for any additional administration cost reasonably incurred if the <i>Contractor</i> carries out work under the <i>Contract</i> outside of the <i>working days</i> and working hours specified in the <i>Contract</i>, which are to be borne by the <i>Contractor</i>.</p>	<p>Clause 32</p> <p>The <i>Principal</i> will usually need to know the working days and hours of the <i>Contractor</i> to arrange <i>Contract</i> surveillance and for other administrative matters. However, any restriction on <i>working days</i> and working hours specified in the <i>Contract</i> or by law (e.g. under environmental legislation) takes precedent over the <i>working days</i> and working hours nominated by the <i>Contractor</i>.</p> <p>If the <i>Contractor</i> wishes to work outside the <i>working days</i> and working hours, the <i>Principal</i> may recover the additional administrative costs it incurs from the extra time worked.</p> <p>Note that <i>working days</i> is a defined term and is used in the calculation of an extension of time.</p>
<p>33 PROGRESS AND PROGRAMMING OF THE WORKS</p> <p>33.1 Contract program</p> <p>a) If the <i>Contractor</i> has submitted a program complying with clause 33.1 c) with its tender, this program is the <i>Contract program</i> until the <i>Contractor</i> submits a further <i>Contract program</i> in accordance with this clause 33.1.</p> <p>b) If the <i>Contractor</i> has not submitted a <i>Contract program</i> with its tender, the <i>Contractor</i> must submit a <i>Contract program</i> to the <i>Superintendent</i> within the timeframe specified in the <i>Contract</i> or if no timeframe is specified, within 10 <i>business days</i> of the date of acceptance of tender.</p> <p>c) The <i>Contract program</i> must:</p> <ul style="list-style-type: none"> i) demonstrate how the <i>Contractor</i> is to achieve <i>practical completion</i> by the date for <i>practical completion</i>; 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 <i>Contract</i>; v) show <i>separable portions</i> (if applicable); 	<p>Clause 33.1</p> <p>The <i>Contract program</i> is a very important document. In addition to being used by the <i>Superintendent</i> to monitor the <i>Contractor's</i> progress, it may be used to determine whether the <i>Contractor</i> is entitled to an extension of time and delay costs.</p> <p>If a compliant program has been submitted prior to award of the <i>Contract</i>, this program will become the <i>Contract program</i>. Otherwise, the <i>Contractor</i> must submit the <i>Contract program</i> within the timeframe specified in the <i>Contract</i> or 10 <i>business days</i>.</p> <p>The <i>Contractor</i> is responsible for providing and regularly updating the <i>Contract program</i> so that the <i>Principal</i> can monitor the progress of the <i>Works</i> and to assist with the assessment of a delay claim if one eventuates.</p> <p>The minimum requirements for the <i>Contractor's Contract program</i> are set out in this clause. For larger contracts, the <i>Principal</i> may wish to include additional requirements, such as showing a higher level of detail.</p> <p>The <i>Contract program</i> prepared by the <i>Contractor</i> is a deliverable which, in the usual course of events, is regularly updated as the work progresses. Unless specified otherwise, it is not bound into the <i>Contract</i> because often it will be quickly superseded as work progresses.</p> <p>Having an up-to-date <i>Contract program</i> is essential for assessing any claim for an extension of</p>

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<ul style="list-style-type: none"> 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 <i>Contractor</i> will require information, documents, instructions or materials from the <i>Principal</i> and the dates when the <i>Contractor</i> will provide information or documents to the <i>Principal</i>; and viii) comply with any other specific requirements of the <i>Contract</i>, including any specified format or software. <p>d) During the execution of the <i>work under the Contract</i>, the <i>Contractor</i> must revise the <i>Contract program</i> 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 and provide a copy of the revised <i>Contract program</i> to the <i>Superintendent</i>. In addition, revised <i>Contract programs</i> must be provided to the <i>Superintendent</i> at the times or stages stated in <i>Item 22</i> (if specified).</p> <p>e) The <i>Superintendent</i> may request the <i>Contractor</i> to provide further information, details or explanation of a <i>Contract program</i> and the <i>Contractor</i> must comply with that request within 5 <i>business days</i> or such other time reasonably determined by the <i>Superintendent</i>.</p> <p>f) The <i>Contractor</i> bears all costs associated with complying with the provision of <i>Contract programs</i> pursuant to this clause 33.</p> <p>g) Unless provided for elsewhere under the <i>Contract</i>, the <i>Contractor</i> is not entitled to any adjustment of the <i>contract sum</i> in the event that the actual time or resources vary from those stated in the <i>Contract program</i>.</p>	<p>time, see clause 35.3 a) iii). If the <i>Contractor's</i> work is not progressing in accordance with the current <i>Contract program</i>, it may lose its entitlement to claim an extension of time and therefore it is in the <i>Contractor's</i> interests to keep the <i>Contract program</i> up to date.</p>
<p>33.2 Progress of the work</p> <ul style="list-style-type: none"> a) The <i>Contractor</i> must carry out all work in connection with the <i>Contract</i> expeditiously and without undue delay, so that the <i>Works</i> will achieve <i>practical completion</i> by the <i>date for practical completion</i>. b) If the <i>Contractor</i> is unable to demonstrate that it will achieve <i>practical completion</i> by the <i>date for practical completion</i>, the <i>Superintendent</i> may direct the <i>Contractor</i> to take all reasonable steps to achieve the necessary progress. A <i>direction</i> under this clause is not an acceleration notice pursuant to clause 33.3. 	<p>Clause 33.2</p> <p>Note that if the <i>Contractor</i> falls behind the <i>Contract program</i> and with the current rate of progress cannot achieve <i>practical completion</i> by the <i>date for practical completion</i>, the <i>Superintendent</i> may direct the <i>Contractor</i> to take remedial action. This is not a direction to accelerate.</p>
<p>33.3 Acceleration</p> <ul style="list-style-type: none"> a) The <i>Superintendent</i> may notify the <i>Contractor</i> of a proposal to accelerate the <i>work under the Contract</i>. Unless the <i>Contractor</i> notifies the <i>Superintendent</i> that the acceleration cannot be effected, as soon as practicable after receipt of the notice, the <i>Contractor</i> must provide the <i>Superintendent</i> with the information specified in clause 40.2 a) in regard to the proposal. b) The <i>Superintendent</i> may direct that the <i>work under the Contract</i> is accelerated: <ul style="list-style-type: none"> i) in order to bring forward the <i>date for practical completion</i> to a proposed new date stated in the <i>direction</i>; or 	<p>Clause 33.3</p> <p>The <i>Principal</i> may wish to bring completion of the project forward or to not have the project delayed if the <i>Contractor</i> becomes entitled to an extension of time ("acceleration"). If a direction to accelerate is issued pursuant to clause 33.3, the <i>Principal</i> bears the additional costs incurred.</p> <p>Because acceleration may have significant cost implications, a direction to accelerate must be in writing and identified as such to avoid confusion with a direction under clause 33.2</p>

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<p>35 TIME</p> <p>35.1 Commencement of work</p> <p>a) The <i>Contractor</i> must:</p> <p>i) advise the <i>Superintendent</i> of the date upon which the <i>Contractor</i> proposes to commence work on the <i>site</i> at least <i>5 business days</i> (or such reduced time advised by the <i>Superintendent</i>) before work commences; and</p> <p>ii) commence work on the <i>site</i> within <i>10 business days</i> (or such extended time advised by the <i>Superintendent</i>) after the <i>Principal</i> has given the <i>Contractor</i> possession of the <i>site</i> pursuant to clause 27.1 a).</p> <p>35.2 Practical completion</p> <p>a) The <i>Contractor</i> must carry out all <i>work under the Contract</i> to achieve <i>practical completion</i> by the <i>date for practical completion</i>.</p> <p>b) Upon the <i>date of practical completion</i>, the <i>Contractor</i> must give possession of the <i>site</i> and the <i>Works</i> to the <i>Principal</i>.</p> <p>35.3 Extension of time</p> <p>a) The <i>Contractor</i> is entitled to an extension of time for <i>practical completion</i> only if:</p> <p>i) the <i>Contractor</i> is, or will be, delayed in achieving <i>practical completion</i> by a cause reasonably beyond the control of the <i>Contractor</i>, but not including:</p> <p>A) any cause which the <i>Contract</i> expressly states is at the <i>Contractor's</i> risk;</p> <p>B) any cause, specified in <i>Item 23</i>, which expressly precludes an entitlement for extension of time; and</p> <p>C) inclement weather or industrial conditions after the <i>date for practical completion</i>;</p>	<p>Clause 35.1</p> <p>This clause outlines the requirement for the <i>Contractor</i> providing notification of when it will commence work on <i>site</i>. It also specifies the time by which it must commence of work on the <i>site</i>.</p> <p>Clause 35.2</p> <p>This clause specifies the fundamental obligation of the <i>Contractor</i> in regard to time; that is to achieve <i>practical completion</i> by the <i>date for practical completion</i>.</p> <p><i>Practical completion</i> means that stage in the carrying out and completion of the <i>work under the Contract</i> when the <i>Superintendent</i> (acting as a certifier) determines that:</p> <p>a) the <i>Works</i> are complete except for minor <i>defects</i>:</p> <p>i) which do not prevent the <i>Works</i> from being reasonably capable of being used for their stated purpose;</p> <p>ii) the <i>Contractor</i> has reasonable grounds for not promptly rectifying; and</p> <p>iii) the rectification of which will not prejudice the convenient use of the <i>Works</i>;</p> <p>b) those <i>tests</i> which are required by the <i>Contract</i> to be conducted and passed before the <i>Works</i> reach <i>practical completion</i>, have been conducted and passed;</p> <p>c) documents and other information required under the <i>Contract</i> which are essential for the use, operation and maintenance of the <i>Works</i> have been supplied; and</p> <p>d) any other condition precedent for <i>practical completion</i> specified in the <i>Contract</i> has been satisfied.</p> <p>Clause 35.3</p> <p>The <i>Contractor</i> is entitled to an extension of time for any event reasonably outside of its control unless there is a specific exclusion in the <i>Contract</i> for a particular type of event (either by listing the event in <i>Item 23</i> or if the event is stated to be at the <i>Contractor's</i> risk).</p> <p>However, to be entitled to the extension of time, the <i>Contractor</i> must also:</p> <ul style="list-style-type: none"> • take all reasonable steps to avoid the delay in the first instance and if it is unavoidable, minimise the length of delay; and • comply with the notification provisions.

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<p>ii) the <i>Contractor</i> has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay;</p> <p>iii) the delay is to an activity or activities on the critical path of the then current <i>Contract program</i> and work is proceeding in accordance with this <i>Contract program</i>; and</p> <p>iv) the <i>Contractor</i> has notified the <i>Superintendent</i> of the delay in accordance with clause 35.3 b) and submitted a <i>claim</i> in accordance with the requirements of the <i>Contract</i>.</p> <p>b) If it becomes evident to a party that:</p> <p>i) a cause may delay the <i>work under the Contract</i>; and</p> <p>ii) the <i>Contractor</i> may have an entitlement to an extension of time in clause 35.3 a) i) from that cause,</p> <p>the party must notify the <i>Superintendent</i> and the other party as soon as possible (and in no case more than 1 <i>business day</i> of becoming aware of the cause).</p> <p>c) Unless notification is provided under another provision of the <i>Contract</i>, 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 <i>Superintendent</i>.</p> <p>d) If the <i>Contractor</i> wishes to make a <i>claim</i> for an extension of time, it must submit a <i>claim</i> which:</p> <p>i) identifies the extension of time <i>claimed</i>;</p> <p>ii) includes information sufficient for the <i>Superintendent</i> to assess the <i>claim</i>, including all relevant facts, a copy of the <i>Contract program</i>, current at the start of the delay, which demonstrates how the delay affects the critical path and shows the expected effects of the delay;</p> <p>iii) is submitted within 20 <i>business days</i> after the first day that the <i>Contractor</i> could reasonably have been aware of the start of the delay; and</p> <p>iv) is updated every subsequent 20 <i>business days</i> if the delay continues.</p> <p>e) Within 10 <i>business days</i> after receiving the <i>Contractor's claim</i> for an extension of time, the <i>Superintendent</i> (acting as a certifier) must give the <i>Contractor</i> and the <i>Principal</i>, either:</p> <p>i) a written <i>direction</i> evidencing the extension of time so assessed; or</p> <p>ii) a written <i>direction</i> that the <i>Contractor</i> and/or <i>Principal</i> provide, within 20 <i>business days</i>, further information which is reasonably necessary to assess the <i>claim</i>.</p> <p>f) If the <i>Superintendent</i> has requested further information to assess the <i>claim</i> under clause 35.3 e):</p> <p>i) within 20 <i>business days</i> of the receipt of the information from the <i>Contractor</i> and / or <i>Principal</i>; or</p>	<p>The purpose of clause 35.3 b) and c) is to ensure that if a party is aware of something that is likely to delay the <i>Contractor</i>, the other party and the <i>Superintendent</i> receive an early warning and if appropriate, can take action to mitigate the potential disruption.</p> <p>While it usually will be the <i>Contractor</i> identifying something that might delay the works (e.g. a <i>latent condition</i>), there may be circumstances where the <i>Principal</i> is delaying the work (e.g. a delay in the delivery of <i>Principal</i> supplied products). At this stage, full particulars of the delay are not required – just notification that there may be a delay.</p> <p>A failure to provide the Early Warning would not invalidate a <i>claim</i> for an extension of time, but may make that party liable to damages because of the loss of opportunity for the other party to mitigate its losses.</p> <p>If the <i>Contractor</i> is going to submit a <i>claim</i> for an extension of time pursuant to clause 35.3, it has 20 <i>business days</i> from the start of the delay to submit the claim. The <i>claim</i> must include sufficient detail for the <i>Superintendent</i> to be able to make the assessment, including a <i>Contract program</i> demonstrating how the delay affects the critical path.</p> <p>Within 20 <i>business days</i> after receiving the claim, the <i>Superintendent</i> must either grant an extension of time or ask for further information from either or both of the parties. Information might be sought from the <i>Principal</i> if the <i>Contractor</i> is claiming for <i>Principal</i>-caused delays.</p> <p>If further information is sought, the <i>Superintendent</i> must complete the assessment prior to the expiration of the applicable time periods.</p> <p>If concurrent delays occur, and the cause of at least one of the delay does not entitle the <i>Contractor</i> to an extension of time, then the <i>Contractor</i> is not entitled to any extension of time for the period of concurrency; i.e. the extension of time is not determined by proportioning according to the respective causes.</p>

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<p>ii) if the <i>Contractor</i> or <i>Principal</i> fails to provide further information, within 40 <i>business days</i> of the request for the information,</p> <p>the <i>Superintendent</i> (acting as a certifier) must provide a written <i>direction</i> evidencing the extension of time so assessed, including reasons if the assessment is less than the amount <i>claimed</i>.</p> <p>g) The <i>Contractor</i> is only entitled to an extension of time for delays occurring on <i>working days</i>.</p> <p>h) If:</p> <p>i) two or more events are causing delay simultaneously; and</p> <p>ii) the cause of at least one of those events is not a cause which entitles the <i>Contractor</i> to an extension of time,</p> <p>then to the extent that the delays are concurrent, the <i>Contractor</i> is not entitled to an extension of time for <i>practical completion</i>.</p> <p>i) In determining whether the <i>Contractor</i> is, or will be, delayed in reaching <i>practical completion</i>, regard must not be had to whether the <i>Contractor</i>:</p> <p>i) can reach <i>practical completion</i> by the <i>date for practical completion</i> without an extension of time; or</p> <p>ii) can, by committing extra resources or incurring extra expenditure, make up the time lost.</p> <p>j) Notwithstanding that the <i>Contractor</i> is not entitled to, or has not <i>claimed</i> an extension of time, the <i>Principal</i> may, in its absolute discretion, at any time and from time to time before the issue of the expiry of the <i>defects liability period</i>, by notice to the <i>Contractor</i>, extend the time for <i>practical completion</i> for any reason.</p>	<p>Whether the <i>Contractor</i> can, by committing extra resources or incurring extra expenditure, make up any time lost, is irrelevant to the <i>Contractor's</i> entitlement to an extension of time. Under clause 35.3 h), the <i>Contractor</i> "owns" the float in the <i>Contract</i> program.</p> <p>Note the wording of clause 35.3 j) which takes the Peninsula Balmain decision into account (see <i>Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd</i> [2002] NSWCA 211). Only the <i>Principal</i> can extend the time for practical completion in the absence of an entitlement or claim for an extension of time. However, the <i>Principal</i> may authorise the <i>Superintendent</i> to act on its behalf in this matter.</p>
<p>35.4 Liquidated damages</p> <p>a) If:</p> <p>i) <i>Item 24</i> states that liquidated damages apply; and</p> <p>ii) the <i>Contractor</i> fails to achieve <i>practical completion</i> by the <i>date for practical completion</i>,</p> <p>the <i>Contractor</i> will be liable to pay the <i>Principal</i> liquidated damages at the rate stated in <i>Item 24</i>, (or if applicable, the rate notified by the <i>Superintendent</i> in accordance with clause 22) for every calendar day after the <i>date for practical completion</i>, up to and including the <i>date of practical completion</i>.</p> <p>b) However, if the <i>Contract</i> is terminated before the <i>Contractor</i> achieves <i>practical completion</i>, any liquidated damages will apply only up to the date of termination of the <i>Contract</i>.</p>	<p>Clause 35.4</p> <p>Liquidated damages are predetermined damages payable by the <i>Contractor</i> in the event that it does not achieve <i>practical completion</i> by the <i>date for practical completion</i>. Their purpose is to compensate the <i>Principal</i> for its losses or the additional costs incurred because the <i>Contractor</i> has run late (for example: loss of income, extra contract administration).</p> <p>Specifying liquidated damages has advantages for both parties: the <i>Principal</i> does not need to prove its losses and the <i>Contractor</i> knows the extra payment for which it will be responsible if it is late.</p> <p>Liquidated damages are calculated in calendar days because in most cases, the <i>Principal's</i> losses will not just be restricted to <i>business days</i>.</p>

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<p>c) If <i>Item 24</i> states that liquidated damages do not apply, the <i>Principal</i> may claim general damages if the <i>Contractor</i> fails to reach <i>practical completion</i> by the <i>date for practical completion</i>.</p> <p>d) If any <i>date for practical completion</i> is extended after the <i>Contractor</i> has paid or the <i>Principal</i> has deducted liquidated damages, the <i>Principal</i> must re-pay any excess liquidated damages to the <i>Contractor</i>, subject to any right of set-off.</p> <p>e) The <i>Contractor</i> acknowledges that the rates for liquidated damages in <i>Item 24</i> are a genuine pre-estimate of the <i>Principal's</i> loss and agrees that it will not challenge any rate for liquidated damages as being in the nature of a penalty.</p> <p>f) If a limiting amount or percentage of the <i>contract sum</i> is included in <i>Item 25</i>, the <i>Contractor's</i> liability under this clause 35.4 is limited to that amount or percentage.</p>	<p>Clause 35.4 c) clarifies that if <i>Item 24</i> states that liquidated damages do not apply, then general damages will apply; i.e. the <i>Contractor</i> is indebted for the <i>Principal's</i> actual losses. This approach has greater uncertainty for both parties.</p> <p>Clause 35.4 e) confirms that the liquidated damages are a genuine pre-estimate of the <i>Principal's</i> losses. If they were found to not be a genuine pre-estimate and were in fact a penalty, they would be unenforceable.</p>

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<p>36 DELAY COSTS</p> <p>a) Subject to clause 36 b), the <i>Contractor</i> is entitled to the payment of <i>delay costs</i> only if the <i>Contractor</i> is granted an extension of time pursuant to clause 35.3 as a consequence of any of the following causes:</p> <ul style="list-style-type: none"> i) a <i>variation</i> (other than a <i>variation</i> for the <i>Contractor's</i> convenience or for the <i>Contractor's</i> non-compliance with the <i>Contract</i>); ii) failure to give the <i>Contractor</i> possession of the <i>site</i> in breach of clause 27.1; iii) a <i>latent condition</i> (unless the <i>latent condition</i> is at the <i>Contractor's</i> risk or the cause is specified in <i>Item 11</i>); iv) resolution of an inconsistency, ambiguity or discrepancy in a <i>Principal</i>-supplied document in accordance with clause 8.2; v) a suspension under clause 34 unless the <i>Contractor</i> bears the cost of suspension under clause 34.4; or vi) a <i>Principal's risk</i>. <p>b) The <i>Contractor</i> is not entitled to <i>delay costs</i> for any day which it would have been delayed anyway by a cause for which it has no entitlement to <i>delay costs</i>.</p> <p>c) <i>Delay costs</i> are determined in accordance with the Commercial Framework or, if not included in the Commercial Framework, an amount valued by the <i>Superintendent</i> to cover the reasonable additional costs (but not profit, loss of profit or loss of opportunity) which were necessarily incurred by the <i>Contractor</i> due to delay that have not been included in any other payment in connection with the cause of the delay.</p> <p>d) The <i>Contractor</i> has no remedy or entitlement for additional payment in connection with delay other than <i>delay costs</i>.</p> <p>e) Nothing in this clause 36 obliges the <i>Principal</i> to pay extra costs for delay which have already been included in the value of a <i>variation</i> or any other payment under the <i>Contract</i>.</p>	<p>Clause 36</p> <p>There are a number of events where the <i>Contractor</i> will have an entitlement to extra costs which are calculated on the basis of the additional direct cost to the <i>Contractor</i> (i.e. valued pursuant to clause 40.5).</p> <p>However, these direct costs (i.e. plant, labour materials and subcontract costs) may not account for the ongoing additional costs that the <i>Contractor</i> incurs if there is also a delay on the critical path. These costs may be on-site (e.g. site office running costs, supervisor's salaries, site vehicles) and head office costs (e.g. the cost of running the main office, director's salaries, insurance, financing costs).</p> <p>If the event causing delay is listed in clause 36 a), the <i>Contractor</i> is entitled to the payment of <i>delay costs</i> to compensate for the ongoing costs not covered by direct costs.</p> <p>A number of different approaches may be used by Agencies to calculate <i>delay costs</i> and these will be set out in the Commercial Framework. The simplest approach is to pay a predetermined daily rate for each day of delay. However, this does not take into account that the daily on-site costs are usually minimal at the start and finish of the work, but reach a peak midway through the work.</p> <p>More sophisticated approaches may vary the daily rate according to the stage that the work is at when the delay occurs.</p> <p>If nothing is specified in the Commercial Framework, the <i>Superintendent</i> will need to value the additional costs incurred by the <i>Contractor</i> which have not been included in other payment in connection with the delay.</p> <p>A different delay rate may be included in the Commercial Framework for the <i>Principal</i> failing to give possession of <i>site</i> within the specified time. Where a rate is included in the Commercial Framework for <i>delay costs</i>, it will normally be time based (e.g. an amount per day).</p> <p>The <i>Contractor</i> is not entitled to payment of <i>delay costs</i> if the additional costs it incurs because of the delay have been included elsewhere, for instance, under a <i>latent condition claim</i> or as part of a <i>variation</i>.</p> <p>If an event listed in clause 36 a) has disrupted the <i>Contractor</i> (i.e. caused to <i>Contractor</i> to work inefficiently), the <i>Contractor</i> would be entitled to payment for extra costs resulting from that disruption.</p> <p>The <i>Principal</i> may specifically exclude a particular cause of delay (e.g. <i>latent conditions</i>) from giving an entitlement to delay costs under clause 36. However, under the "prevention principle", any attempt to exclude <i>Principal</i>-caused delay is unlikely to be successful.</p>

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<p>37 DEFECTS LIABILITY</p> <p>a) The Superintendent acts as a certifier in this clause 37.</p> <p>b) The <i>defects liability period</i> commences at 4.00 pm on the <i>date of practical completion</i> and continues for the period stated in <i>Item 26</i>.</p> <p>c) During the <i>defects liability period</i>, if:</p> <ul style="list-style-type: none"> i) the <i>Principal</i> wishes to have a <i>defect</i> rectified, it must not unreasonably delay notifying the <i>Contractor</i> of the existence of the <i>defect</i>; and ii) the <i>Contractor</i> becomes aware of a <i>defect</i>, it must rectify the <i>defect</i> as soon as possible. <p>d) To the extent that is reasonably possible, rectification of a <i>defect</i> must be carried out so as to minimise any inconvenience to the users or occupants or of the <i>Works</i>.</p> <p>e) The <i>Superintendent</i> may direct the <i>Contractor</i> to commence and complete the rectification of a <i>defect</i> by specified dates.</p> <p>f) The Superintendent may extend the <i>defects liability period</i> applicable to the rectified part of the <i>Works</i>. The extended <i>defects liability period</i> commences at 4.00 pm on the date that the rectification is completed and must not exceed the period stated in <i>Item 26</i>.</p> <p>g) If the Contractor does not comply with a <i>direction</i> to rectify a <i>defect</i> within a timeframe specified in the <i>direction</i>, the <i>Principal</i> may have the rectification carried out by others. The cost of doing so will be assessed by the <i>Superintendent</i> and is a debt due and payable by the <i>Contractor</i> to the <i>Principal</i>.</p> <p>h) Nothing in this clause 37 reduces the <i>Contractor's</i> warranties and other liabilities and obligations under the <i>Contract</i>, or affects the <i>Principal's</i> common law right to damages or any other right or remedy.</p>	<p>Clause 37</p> <p><i>Defects</i> that are present at the <i>date of practical completion</i> or become apparent during the <i>defects liability period</i> must be rectified by the <i>Contractor</i>.</p> <p>The rectification must be carried out <u>as soon as possible</u> – not at the <i>Contractor's</i> convenience. Once the <i>Principal</i> has occupied and is using the <i>Works</i>, repair of a <i>defect</i> may be quite disruptive and, in some instances, it may be necessary for the rectification to be carried out outside of the <i>Principal's</i> normal working hours.</p> <p>The <i>Superintendent</i> may <i>direct</i> the <i>Contractor</i> to rectify a <i>defect</i> and if the <i>defect</i> is not rectified in accordance with the <i>direction</i>, the rectification may be done by others at the cost recovered from the <i>Contractor</i>.</p> <p>The <i>defects liability period</i> may extend beyond the date that <i>security</i> is returned to the <i>Contractor</i>. However, if the security has been returned and subsequently the <i>Contractor</i> does make good a <i>defect</i>, the <i>Principal</i> would need to pursue damages through the courts. This would be the same situation as a latent defect becoming evident after the issue of the Final Certificate under a contract using an Australian Standard GCC.</p> <p>Note that GC21 has a period for the rectification of defects which applies until a limitation under statute applies. Agencies may wish to consider a <i>defects liability period</i> which is longer than the period that they may have specified if using an Australian Standard GCC.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>38 CLEANING UP</p> <p>a) The <i>Contractor</i> must:</p> <ul style="list-style-type: none"> i) keep the <i>site</i> and the <i>work under the Contract</i> clean and tidy; i) regularly remove rubbish and surplus material; and ii) remove any <i>temporary works</i> and <i>construction plant</i> within 10 <i>business days</i> (or such extended time reasonably directed by the <i>Superintendent</i>) after the <i>date of practical completion</i>. <p>b) If the <i>Contractor</i> fails to comply with an obligation in this clause 38, the <i>Superintendent</i> may take action pursuant to clause 30.2 d)</p>	<p>Clause 38</p> <p>In many projects, additional environmental management requirements will be included in the specification and these should be read in conjunction with clause 38 a).</p> <p>If the <i>Contractor</i> does not comply with clause 38 a) or b), the <i>Superintendent</i> may give written notice to the <i>Contractor</i> under clause 30.2 d) that if it does not rectify the situation within the specified time, the work may be undertaken by others at the <i>Contractor's</i> expense.</p>
<p>39 URGENT PROTECTION</p> <p>a) If, in the reasonable opinion of the <i>Superintendent</i>:</p> <ul style="list-style-type: none"> i) urgent action is required to avoid death, injury, loss or damage, and ii) the <i>Contractor</i> does not take the necessary action immediately when the <i>Superintendent</i> requests it, <p>the <i>Superintendent</i> may take the action (without relieving the <i>Contractor</i> of its obligations), and the <i>Principal's</i> costs of doing so is a debt due and payable from the <i>Contractor</i>.</p> <p>b) If time permits, the <i>Superintendent</i> must give the <i>Contractor</i> prior written notice of the <i>Principal's</i> intention to take action under this clause 39.</p>	<p>Clause 39</p> <p>While it is expected that this clause would be only rarely used, it enables the <i>Principal</i> or <i>Superintendent</i> to take urgent preventative action if necessary in the absence of the <i>Contractor</i> or the <i>Contractor's</i> Representative.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>40 VARIATIONS AND VALUATION OF WORK</p> <p>40.1 Variations to the work under the Contract</p> <p>a) The <i>Superintendent</i> may <i>direct</i> the <i>Contractor</i> to undertake a <i>variation</i>:</p> <p>i) at any time before the <i>date of practical completion</i>; and</p> <p>ii) after the <i>date of practical completion</i> if the <i>variation</i> is in respect of rectification work referred to in clause 37.</p> <p>b) The <i>Contractor</i> must comply with a <i>direction</i> to undertake a <i>variation</i>, unless the <i>variation</i> is outside the general scope of the <i>Contract</i>.</p> <p>c) If the <i>Contractor</i> considers that a <i>direction</i> by the <i>Superintendent</i> in whole or in part constitutes a <i>variation</i>, within 5 <i>business days</i> of receipt of the <i>direction</i> and before commencing work in response to that <i>direction</i>, it must notify the <i>Superintendent</i>, giving reasons why it considers the <i>direction</i> to be a <i>variation</i>.</p> <p>d) The <i>Superintendent</i> (acting as a certifier), within 5 <i>business days</i> after receipt of the <i>Contractor's</i> notice, must notify the <i>Contractor</i> whether the <i>direction</i> constitutes a <i>variation</i>.</p> <p>e) If the <i>Superintendent</i> notifies the <i>Contractor</i> that the <i>direction</i> does not constitute a <i>variation</i>, the <i>Superintendent</i> must give reasons.</p> <p>40.2 Proposed variations</p> <p>a) The <i>Superintendent</i> may notify the <i>Contractor</i> of a proposed <i>variation</i>. Unless the <i>Contractor</i> notifies the <i>Superintendent</i> that the <i>variation</i> cannot be effected, as soon as practicable after receipt of the notice, the <i>Contractor</i> must advise the <i>Superintendent</i> of:</p> <p>i) the effect on the <i>contract sum</i> (including any detailed supporting calculations or other evidence of cost) or the basis upon which the <i>variation</i> will be valued;</p> <p>ii) any <i>delay costs</i>; and</p> <p>iii) any effect on the <i>Contract program</i> (including the <i>date for practical completion</i>).</p> <p>b) If the <i>Contractor</i> reasonably incurs additional costs in complying with the requirements of this clause 40.2, a valuation must be made pursuant to clause 40.5.</p> <p>c) The <i>Contractor</i> 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.</p>	<p>Clause 40.1</p> <p>Note that <i>variation</i> is a defined term. In addition to a change to a physical characteristic of the <i>Works</i>, <i>variation</i> also includes any change to the <i>work under the Contract</i>, such as a change to a construction method (regardless of whether the method is specified in the <i>Contract</i> or the <i>Contractor</i> has selected the construction method) or construction sequence.</p> <p>The <i>Superintendent</i> acts as an agent of the <i>Principal</i> when directing a <i>variation</i>.</p> <p>If a <i>variation</i> is directed because of the <i>Contractor's</i> non-compliance with a requirement specified in the <i>Contract</i>, the <i>Contractor</i> is not entitled to an adjustment to the <i>contract sum</i>.</p> <p>If the <i>variation</i> is for other reasons (for example, the <i>Principal</i> changes the construction methodology to reduce adverse environmental impacts on adjoining property owners), the <i>Contractor</i> will be entitled to payment for any additional costs it incurs as a result of the <i>variation</i>.</p> <p>If the <i>variation</i> delays work on the critical path, the <i>Contractor</i> may also be entitled to an extension of time under clause 35.3 because it would be from a cause outside of the <i>Contractor's</i> reasonable control.</p> <p>The <i>Contractor</i> would also be entitled to payment for any loss of productivity (sometimes referred to as “disruption” costs); for example, if the construction plant was idle because of a <i>variation</i> which changed the sequence of construction.</p> <p>It is important to note that NCW4 distinguishes the payment for disruption (which is included in the valuation of the <i>variation</i>) from payment for <i>delay costs</i> (under clause 36). The former will be valued on the basis of the actual extra costs incurred, whereas the latter may be based on a predetermined rate specified in the Commercial Framework.</p>

NCW4 CLAUSE	EXPLANATORY NOTES
<p>40.3 Valuation of variations</p> <ul style="list-style-type: none"> a) If compliance with the <i>direction</i> to execute a <i>variation</i> (except a <i>direction</i> required to address the <i>Contractor's</i> non-compliance with the <i>Contract</i>) causes the <i>Contractor</i> to incur more or less cost than otherwise would have been incurred had the <i>Contractor</i> not been given the <i>direction</i>, the difference is to be valued pursuant to clause 40.5. b) The <i>Superintendent</i> may, in its absolute discretion, direct the <i>Contractor</i> to provide a detailed quotation for the work of a <i>variation</i> supported by measurements or other evidence of cost. <p>40.4 Variations for the Contractor's convenience</p> <ul style="list-style-type: none"> a) The <i>Contractor</i> may make a written proposal for a <i>variation</i> for the <i>Contractor's</i> convenience. The <i>Contractor</i> must provide the following with the proposal: <ul style="list-style-type: none"> i) a statement confirming that the proposed <i>variation</i> is for the convenience of the <i>Contractor</i>; ii) the effect of the proposed <i>variation</i> on the <i>work under the Contract</i>; iii) the effect of the proposed <i>variation</i> on the <i>Contract program</i>; iv) the cost effect to the <i>Principal</i> of the proposed <i>variation</i>; v) a statement confirming that the proposed <i>variation</i> will not adversely affect the functional integrity, performance standards or quality standards of the <i>Works</i>; and vi) any other information that the <i>Superintendent</i> reasonably requests. b) The <i>Superintendent</i> may approve the <i>Contractor's</i> proposal but is not obliged to do so. The <i>Superintendent's</i> approval may be subject to conditions. c) Notwithstanding clause 40.3, unless the <i>Superintendent</i> directs otherwise, the <i>Contractor</i> is not entitled to: <ul style="list-style-type: none"> i) an extension of time; or ii) extra payment, <p>in respect of the <i>variation</i> for the convenience of the <i>Contractor</i> or anything arising out of that <i>variation</i> which would not have arisen had that <i>variation</i> not been approved.</p> d) The <i>Contractor</i> bears all costs: <ul style="list-style-type: none"> i) associated with proposing a <i>variation</i> for its convenience; ii) reasonably incurred by the <i>Principal</i> in assessing the proposal (such costs to be a debt due from the <i>Contractor</i> to the <i>Principal</i>); and iii) associated with carrying out the <i>variation</i> if it is approved by the <i>Superintendent</i>. 	<p>Clause 40.4</p> <p>The process for a <i>variation</i> for the <i>Contractor's</i> convenience must be in writing to ensure that there is no confusion about whether there is a change to the <i>contract sum</i>.</p> <p>The onus is placed on the <i>Contractor</i> to demonstrate that any proposed <i>variation</i> for its own convenience will not be detrimental to the <i>Works</i> in any way and that the time / cost implications are fully disclosed before approval is given to proceed. The <i>Contractor</i> is responsible for any costs reasonably incurred by the <i>Principal</i> in assessing the proposal; for example, the <i>Principal</i> may require an independent expert opinion of the proposed variation.</p>

<p>40.5 Valuation</p> <p>a) Where the <i>Contract</i> provides that a valuation must be made pursuant to clause 40.5 or the <i>Superintendent</i> has assessed a <i>claim</i> pursuant to clause 46 h), the change in work or additional costs must be valued by the <i>Superintendent</i> (acting as a certifier) in accordance with clause 40.5 d) and the <i>contract sum</i> must be adjusted by the amount of the valuation.</p> <p>b) The <i>Contractor</i> must use reasonable endeavours to minimise the additional costs of any change to the <i>work under the Contract</i>, which may include obtaining multiple quotations for subcontract work.</p> <p>c) A valuation under clause 40.5 d) must not include:</p> <ul style="list-style-type: none"> i) any costs, losses or expenses attributable to any default or negligence of the <i>Contractor</i>; ii) costs incurred as a result of the failure of the <i>Contractor</i> to minimise its additional costs; and iii) any amount for costs that the <i>Contractor</i> would have incurred anyway or should reasonably have allowed for at the <i>date of acceptance of tender</i>. <p>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:</p> <ul style="list-style-type: none"> i) prior agreement between the <i>Contractor</i> and the <i>Principal</i>; ii) any specific rates or prices included in the <i>Contract</i> 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 <i>Contract documents</i>; iv) an amount determined as follows: <ul style="list-style-type: none"> A) the reasonable direct cost to the <i>Contractor</i> including labour, materials and plant (not including profit and overheads); B) the reasonable costs to the <i>Contractor</i> 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; <p>e) The valuation of <i>delay costs</i> (if any) is determined in accordance with clause 36.</p> <p>f) If the valuation is in respect of work which is in addition to the <i>work under the Contract</i>, the valuation must include an amount for profit and overheads. Rates and prices are deemed to include an amount for profit and overheads unless specified otherwise.</p> <p>g) If the valuation is in respect of work which is taken out of the <i>Contract</i>:</p> <ul style="list-style-type: none"> i) the <i>contract sum</i> must be reduced by the amount of profit that would have been payable if not for the deduction of work; but 	<p>Clause 40.5</p> <p>Clause 40.5 is used to value any change to the <i>work under the Contract</i>, which in most instances will be from a <i>variation</i>, but may come about from other causes (e.g. a change in statutory requirements).</p> <p>It will also be used if the <i>Superintendent</i> has assessed a <i>claim</i> by the <i>Contractor</i> pursuant to clause 46. Once the <i>Superintendent</i> has made the valuation, the <i>Contract sum</i> is adjusted accordingly. Note that a <i>variation</i> does not necessarily mean that there will be a change to the <i>contract sum</i>; for example, a <i>variation</i> to use a difference paint colour may not incur additional costs to the <i>Contractor</i> if it was issued prior to the <i>Contractor</i> purchasing the paint.</p> <p>Under clause 40.5 b), the <i>Contractor</i> has an obligation to take all reasonable steps to minimise the extra costs that may result from a change to the <i>work under the Contract</i>.</p> <p>Under clause 40.5 c), the <i>Contractor</i> cannot claim costs incurred from its own default or negligence, its failure to minimise additional costs or costs that it should have allowed for anyway.</p> <p>Clause 40.5 d) is a very important clause. It prescribes an order of priorities when determining the method of valuing a change to the <i>work under the Contract</i>. In the first instance, the parties may agree on the valuation through negotiation. Otherwise, the <i>Superintendent</i> may apply rates or amounts included in the <i>Contract</i>, or reasonable rates and amounts determined from other sources (e.g. published selling prices from manufacturers and suppliers).</p> <p>If there are no applicable rates or amounts, the valuation is determined through “first principles” costing; i.e., the cost of plant, labour, materials and <i>subcontractors</i> with a percentage for profit and overheads applied.</p> <p>Clause 40.5 d) does not address <i>delay costs</i> (if any), which are determined in accordance with clause 36.</p> <p>The <i>Contractor</i> is entitled to the payment of profit and overheads (which may also be referred to as “<i>Contractor’s Margin</i>”) on any additional work.</p> <p>If work is taken out of the <i>Contract</i>, the <i>Contractor</i> is still entitled for payment of the overheads it would have incurred in the work had gone ahead, but not for profit.</p>
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NCW4 CLAUSE	EXPLANATORY NOTES
<ul style="list-style-type: none">ii) the <i>contract sum</i> will not be reduced by the amount for overheads applicable to the work which is taken out of the <i>Contract</i>, unless the <i>variation</i> is for the <i>Contractor's</i> convenience.h) The <i>Contractor</i> must provide all information reasonably requested by the <i>Superintendent</i> to assist the valuation.i) Rates and prices are deemed to include an amount for profit and overheads unless specified otherwise.	

<p>41 DAYWORK</p> <p>a) The <i>Superintendent</i> (acting as a certifier in this clause 41) may, in its absolute discretion, direct that the following be carried out as <i>daywork</i>:</p> <ul style="list-style-type: none"> 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 <i>variation</i>. <p>b) For work that is carried out as <i>daywork</i>, the <i>Contractor</i> must:</p> <ul style="list-style-type: none"> i) record details of all resources used by the <i>Contractor</i> for the execution of the <i>daywork</i>, including copies of time sheets, wages sheets, invoices, receipts and other documents evidencing the cost of the <i>daywork</i>; ii) provide the details and each day to the <i>Superintendent</i>; and iii) comply with any direction from the <i>Superintendent</i> in regard to the details included in the records. <p>c) The <i>Superintendent</i> must determine the value of <i>daywork</i> from:</p> <ul style="list-style-type: none"> i) the quantities of materials and the time that the <i>construction plant</i> and labour is reasonably and necessarily used on the <i>daywork</i>; and ii) applicable rates and prices in the <i>daywork</i> schedules (if any) contained in the Commercial Framework. <p>d) To the extent that the <i>daywork</i> schedules do not apply, the <i>Superintendent</i> must determine the value of <i>daywork</i> from:</p> <ul style="list-style-type: none"> i) the amount of wages and allowances (inclusive of direct wage overheads) payable by the <i>Contractor</i>; ii) the amount of hire charges in respect of <i>constructional plant</i>; iii) the amounts paid for services, subcontracts and professional fees; and iv) the actual cost to the <i>Contractor</i> of materials supplied and required for the work. <p>e) The <i>Contractor</i> is entitled to payment for overheads (including administrative costs, <i>site</i> supervision, establishment costs, attendance) and profit on <i>daywork</i>. If the rates and amounts used to determine payment for <i>daywork</i> are not inclusive of overheads and profit, the valuation must include an amount determined from:</p> <ul style="list-style-type: none"> 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 <i>Superintendent</i> and the <i>Contractor</i>; or iii) in the absence of agreement, a reasonable percentage determined by the <i>Superintendent</i>. <p>f) The costs of supervisory, technical and administrative personnel who would be engaged on the <i>Works</i> regardless of the <i>daywork</i> are not to be included in the valuation of the <i>daywork</i>.</p>	<p>Clause 41</p> <p><i>Daywork</i> is used where payment is to be made on the basis of rates applied to quantities of materials, plant and labour actually used in constructing the <i>Works</i>.</p>
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NCW4 CLAUSE	EXPLANATORY NOTES
<p>42 CERTIFICATES AND PAYMENTS</p> <p>42.1 Payment claims and payment schedules</p> <p>a) If the <i>SOP Act</i> applies:</p> <p>i) a reference date (as defined in the <i>SOP Act</i>) is the date, or the stage of the <i>work under the Contract</i>, specified in <i>Item 27</i>; and</p> <p>ii) unless expressly stated otherwise, a <i>payment schedule</i> or final <i>payment schedule</i> which is:</p> <p>A) issued and delivered pursuant to the <i>Contract</i>; and</p> <p>B) is compliant with the <i>SOP Act</i>,</p> <p>is a <i>payment schedule</i> or notice of dispute (as the case may be) for the purposes of the <i>SOP Act</i>.</p> <p>b) For the purposes of the <i>SOP Act</i>, the <i>Superintendent</i> acts as the agent of the <i>Principal</i> in regard to:</p> <p>i) receipt of the <i>Contractor's</i> payment <i>claim</i> or a final payment <i>claim</i>;</p> <p>ii) the issue of a <i>payment schedule</i>; and</p> <p>iii) the issue of a notice of <i>dispute</i>.</p> <p>c) The <i>Contractor</i> is to <i>claim</i> payment progressively at the date in the month or stages stated in <i>Item 27</i>.</p> <p>d) Except to the extent prohibited by the relevant <i>SOP Act</i>, an early payment <i>claim</i> is to be treated for the purposes of the <i>Contract</i> as having been made on the due date for making that <i>claim</i>.</p> <p>e) Each payment <i>claim</i>:</p> <p>i) is to be delivered in writing to the <i>Superintendent</i>;</p> <p>ii) must include details (which may be specified elsewhere in the <i>Contract</i> or reasonably requested by the <i>Superintendent</i>) justifying the amount <i>claimed</i>;</p> <p>iii) may include a request for payment for a matter which has been assessed by the <i>Superintendent</i> pursuant to clause 46; and</p> <p>iv) may include details of other amounts then due to the <i>Contractor</i> under the <i>Contract</i>.</p> <p>f) The <i>Superintendent</i> (acting as a certifier) must, within 10 <i>business days</i> after receiving a payment <i>claim</i> which complies with this clause 42, issue and deliver to the <i>Principal</i> and the <i>Contractor</i>, a <i>payment schedule</i>:</p>	<p>Clause 42.1</p> <p>The <i>SOP Act</i> is defined as a reference to the Security of Payment Legislation in the jurisdiction which is applicable to the contract. Clause 42.1 aligns the process specified the <i>SOP Act</i> with the contractual payment process.</p> <p>The <i>Superintendent</i> is authorised to receive payment <i>claims</i> under the applicable <i>SOP Act</i> on behalf of the <i>Principal</i>.</p> <p>If the <i>Superintendent</i> fails to issue the <i>payment schedule</i> within the 10 <i>business days</i> specified, the <i>Principal</i> is obliged to pay the <i>Contract</i> the amount claimed by the <i>Contractor</i>.</p> <p>The issue of a <i>payment schedule</i> or making payment is payment on account only and is not evidence that the work has been carried out satisfactorily.</p> <p>NCW4 defaults to payment by electronic funds transfer.</p>

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<p>i) stating the <i>Superintendent's</i> valuation of amounts due from the <i>Principal</i> to the <i>Contractor</i> pursuant to the payment <i>claim</i> with reasons for any difference; and</p> <p>ii) including the <i>Superintendent's</i> assessment of retention money and amounts due (if any) from the <i>Contractor</i> to the <i>Principal</i> pursuant to the <i>Contract</i>.</p> <p>g) The <i>Principal</i> or the <i>Contractor</i> (as the case may be) must pay to the other party the amount of the <i>payment schedule</i> within the time specified in <i>Item 27</i>, which commences when the payment <i>claim</i> is served.</p> <p>h) If an amount is certified as retention money under clause 42.1 f) ii), the <i>Principal</i> must hold that retention money pursuant to clause 5 until the <i>Contractor</i> is entitled to the return of the retention money (if any).</p> <p>i) If the <i>Contractor</i> does not deliver a payment <i>claim</i> which complies with this clause 42, the <i>Superintendent</i> (acting as a certifier) may still issue and deliver a <i>payment schedule</i> with details of the calculations in the <i>Superintendent's</i> assessment.</p> <p>j) If:</p> <p>i) the <i>Superintendent</i> fails to deliver a payment schedule within 10 business days after receiving a payment <i>claim</i>; and</p> <p>ii) that payment <i>claim</i> complies with this clause 42,</p> <p>the amount claimed in that payment <i>claim</i> is due and payable by the <i>Principal</i> to the <i>Contractor</i>.</p> <p>k) Payment by the <i>Principal</i>, or the issue of a <i>payment schedule</i>, is payment on account only. It is not evidence that the <i>Contractor</i> has complied with the <i>Contract</i> and is subject to clause 42.2.</p> <p>l) Unless stated otherwise in the <i>Contract</i>, all payments to the <i>Contractor</i> must be made in Australian currency by electronic funds transfer to the <i>Contractor's</i> account notified to the <i>Principal</i> for that purpose. Changes to the <i>Contractor's</i> account details must be notified in accordance with protocols established by the <i>Principal</i>. If electronic funds transfer is not used, payments must be made at the <i>Principal's</i> address or another location advised by the <i>Principal</i>.</p> <p>m) If payment is not made in accordance with clause 42.1 g), interest, applied at the rate in <i>Item 27</i> is due and payable on the amount outstanding after the date of default in payment.</p> <p>42.2 Correction of payment schedules</p> <p>a) At any time, the <i>Superintendent</i> may correct any error which has been discovered in a <i>payment schedule</i> by issue of a further <i>payment schedule</i>.</p> <p>b) Any correction must also correct the amount of <i>GST</i> in accordance with the <i>GST Act</i>.</p> <p>c) A <i>certificate of practical completion</i> cannot be reissued.</p>	

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<p>42.3 Retention moneys</p> <p>a) The <i>Principal</i> may deduct retention moneys from moneys otherwise due to the <i>Contractor</i> up to the amount or percentage specified in <i>Item 6</i>.</p> <p>42.4 Unfixed plant and materials</p> <p>a) The alternative applying for payment for unfixed materials, plant or equipment is given in <i>Item 28</i>.</p> <p>Alternative 1</p> <p>b) The <i>Contractor</i> is not entitled to payment for materials, plant or equipment not incorporated in the <i>Works</i>.</p> <p>Alternative 2</p> <p>c) The <i>Contractor</i> may not <i>claim</i> payment for, and the <i>Principal</i> is not obliged to pay for, any unfixed materials, plant or equipment that have not been incorporated in the <i>Works</i> unless:</p> <p>i) the materials, plant or equipment:</p> <p>A) have been manufactured solely for the purpose of incorporation in the <i>Works</i> and have not been manufactured before the date required by the <i>Contract</i>;</p> <p>B) are of the type stated in <i>Item 28</i>;</p> <p>C) are properly stored, clearly marked the property of the <i>Principal</i> and adequately protected and insured;</p> <p>D) are stored on the <i>site</i>; and</p> <p>E) have been paid for in full by the <i>Contractor</i> and are the unencumbered property of the <i>Contractor</i>, free of any <i>security interest</i> upon the making of the payment <i>claimed</i> and proof of such payment and ownership is provided to the satisfaction of the <i>Superintendent</i>;</p> <p>ii) the <i>Contractor</i> provides additional <i>security</i> in a form approved by the <i>Principal</i> for an amount equal to the payment <i>claimed</i> for the materials, plant or equipment; and</p> <p>d) If pursuant to a <i>payment schedule</i>, the <i>Principal</i> pays the <i>Contractor</i> an amount which includes the value of any unfixed materials, plant or equipment that have not been incorporated in the <i>Works</i>, the materials, plant or equipment will become the property of the <i>Principal</i>, free of any lien, charge, <i>security interest</i> or any other encumbrance, at the time the payment is made.</p>	<p>Clause 42.4</p> <p>As with most construction contracts, NCW4 has alternatives of either:</p> <ul style="list-style-type: none"> • paying for unfixed materials etc. (Alternative 1); or • not paying for them until they are incorporated into the <i>Works</i> (Alternative 2). <p>There are a number of conditions precedent included in Alternative 1 and it will require more administrative effort. However, it is like to result in a reduction in the tendered price because of the improved cash flow for the <i>Contractor</i>, particularly when high value equipment is to be installed in the <i>Works</i>.</p>

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<p>42.5 Certificate of practical completion</p> <p>a) The <i>Contractor</i> must:</p> <p>i) give the <i>Superintendent</i> at least 10 <i>business days</i>’ notice of the date upon which the <i>Contractor</i> anticipates that <i>practical completion</i> will be reached; and</p> <p>ii) request the <i>Superintendent</i> to issue a <i>certificate of practical completion</i> when the <i>Contractor</i> is of the opinion that <i>practical completion</i> has been reached.</p> <p>b) Within 10 <i>business days</i> of the receipt of the request, the <i>Superintendent</i> (acting as a certifier) must:</p> <p>i) give to the <i>Contractor</i> and to the <i>Principal</i> a <i>certificate of practical completion</i> certifying the <i>date of practical completion</i>; or</p> <p>ii) notify the <i>Contractor</i> in writing the reasons for not issuing the <i>certificate of practical completion</i>.</p> <p>c) Notwithstanding that <i>Contractor</i> may not have requested the issue of a <i>certificate of practical completion</i>, if the <i>Superintendent</i> is of the opinion that <i>practical completion</i> has been reached, the <i>Superintendent</i> may issue a <i>certificate of practical completion</i>.</p> <p>d) The issue of a <i>certificate of practical completion</i> does not:</p> <p>i) constitute approval of any work or other matter; or</p> <p>ii) prejudice any <i>claim</i> by the <i>Principal</i> or the <i>Contractor</i>.</p> <p>42.6 Contractor's final payment claim</p> <p>a) Within 65 <i>business days</i> after the <i>date of practical completion</i> for the whole of the <i>Works</i>, the <i>Contractor</i> must lodge with the <i>Superintendent</i> a final payment <i>claim</i> and endorse it ‘Final Payment Claim’.</p> <p>b) The <i>Contractor</i> must include in that <i>claim</i> all moneys which the <i>Contractor</i> considers to be due from the <i>Principal</i> under, or arising out of, the <i>Contract</i> or any alleged breach thereof.</p> <p>c) After the expiration of the period for lodging a final payment <i>claim</i>, any <i>claim</i> which the <i>Contractor</i> could have made against the <i>Principal</i> and has not been made is barred.</p>	<p>Clause 42.5</p> <p>Refer to clause 2.1 for the definition of <i>practical completion</i>. In practice, determining when it actually occurs is often problematic and may lead to disagreement. Many Agencies add additional criteria; e.g. the provision of <u>all</u> documentation necessary for the operational and maintenance of the <i>Works</i> and “as constructed drawings”.</p> <p><i>Practical completion</i> has the following consequences:</p> <ul style="list-style-type: none"> • the <i>Principal</i> takes over the care and control of the <i>Works</i>; • the <i>defects liability period</i> commences; • part of the <i>security</i> (usually 50%) is returned to the <i>Contractor</i>; • the potential for liquidated damages to be applied comes to an end; and <p>many of the <i>Superintendent</i>’s powers come to an end (e.g. directing variations, other than in respect of defects)</p>

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<p>42.7 Final payment schedule</p> <p>a) The <i>Superintendent</i> must issue to the <i>Contractor</i> and to the <i>Principal</i> a final <i>payment schedule</i> endorsed 'Final Payment Schedule' within 10 <i>business days</i> after receiving the final <i>payment claim</i> or, if the <i>Contractor</i> has not submitted a final <i>payment claim</i> in accordance with clause 42.7a), within 75 <i>business days</i> after the <i>date of practical completion</i>.</p> <p>b) In the final <i>payment schedule</i>, the <i>Superintendent</i> (acting as a certifier) must certify the amount which, in the <i>Superintendent's</i> opinion, is finally due from the <i>Principal</i> to the <i>Contractor</i> or from the <i>Contractor</i> to the <i>Principal</i> under, or arising out of, the <i>Contract</i> or any alleged breach thereof.</p> <p>c) The issue of the final <i>payment schedule</i> is conclusive evidence that all necessary adjustments to the <i>contract sum</i> have been made and all entitlements of the <i>Contractor</i> have been met, except for those required by:</p> <ul style="list-style-type: none"> i) arithmetical error; or ii) resolution of: <ul style="list-style-type: none"> A) any <i>claim</i> made in accordance with clause 46; B) any <i>dispute</i> properly notified under clause 47 prior to the final <i>payment claim</i>; or C) any <i>dispute</i> arising solely out of the final <i>payment schedule</i>, but only if it is notified to the <i>Superintendent</i> and <i>Principal</i> within 20 <i>business days</i> after the date of the final <i>payment schedule</i>. <p>d) Final payment must be made in accordance with clause 42.1 g).</p> <p>e) The <i>Contractor's</i> liability under the <i>Contract</i> or otherwise is not affected by the issue of the final <i>payment schedule</i>.</p> <p>42.9 Set-off</p> <p>a) If the <i>Principal</i> claims a sum, including a debt due, in connection with the <i>Contract</i> or any other contract between the <i>Principal</i> and the <i>Contractor</i>, the <i>Principal</i> may:</p> <ul style="list-style-type: none"> i) withhold, deduct or set-off the claimed sum against any amount to which the <i>Contractor</i> is otherwise entitled in connection with the <i>Contract</i>; and ii) make a demand against the <i>security</i> provided under the <i>Contract</i> for any amount of the claimed sum in excess of the amount to which the <i>Contractor</i> is otherwise entitled. 	<p>Clause 42.7</p> <p>NCW4 specifies 65 <i>business days</i> after date of <i>practical completion</i> for the whole of the <i>Works</i> as the time limit for submission of the final <i>payment claim</i>. This is a reasonable time for the <i>Contractor</i> to have addressed any known <i>defects</i> (noting the obligation for a <i>defect</i> to be rectified as soon as possible) and determine whether to make any further <i>claims</i> arising out of the <i>Contract</i>.</p> <p>If the <i>Contractor</i> is unreasonably delaying the repair of a <i>defect</i> or disputing whether work is <i>defective</i>, the <i>Superintendent</i> should issue a notice under clause 30.2 prior to the 65 <i>business days</i> expiring. The 65 <i>business days</i> corresponds to 13 calendar weeks used for a similar purpose in CC21.</p> <p>This is fundamentally different to the approach used in some other contracts, where the final <i>payment claim</i> is made around the time that the <i>defects liability period</i> expires. As the <i>defects liability period</i> is often 12 months (or longer on large contracts), it can be very difficult to deal with a <i>claim</i> made just before the expiry of that period – usually the contract administration team has moved on to other jobs and the records have been filed away.</p> <p>Note that NCW4 does not include a Final Certificate, although an Agency may insert such a clause if it requires. However, the issue of a Final Certificate may create confusion because usually the <i>Contractor</i> still has an obligation to repair a latent defect until any limitation under statute applies; ie after the <i>defects liability period</i> expires.</p> <p>Clause 42.9</p> <p>If there is a debt due from the <i>Contractor</i> to the <i>Principal</i> under another contract which remains unpaid, clause 42.9 enables the <i>Principal</i> to deduct money due to the <i>Principal</i> under the other contract from payment due to the <i>Contractor</i> under this Contract.</p>

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<p>43 PAYMENT OF WORKERS AND SUBCONTRACTORS</p> <p>43.1 Subcontractors and workers</p> <p>a) With each payment <i>claim</i>, the <i>Contractor</i> must provide documentary evidence of the payment of any amount which is due and payable to:</p> <p>i) <i>subcontractors</i>; and</p> <p>ii) workers of the <i>Contractor</i> and workers of <i>subcontractors</i>, in respect of the <i>work under the Contract</i>.</p> <p>b) Documentary evidence must be as specified in <i>Item 29</i>.</p> <p>43.2 Entitlement to payment</p> <p>a) If the <i>Contractor</i> has not complied with clause 43.1 for any part of the <i>work under the Contract</i> which is the subject of the payment <i>claim</i> (whether or not included in a <i>payment schedule</i> issued by the <i>Superintendent</i>), the <i>Contractor</i> is not entitled to payment for that <i>work under the Contract</i>.</p> <p>43.3 Direct payment</p> <p>a) Notwithstanding clause 43.2, before final payment, the <i>Principal</i>, if not aware of a relevant relation-back day (as defined in the <i>Corporations Act 2001</i> (Cwlth)) may pay unpaid amounts which are the subject of clause 43.1 in relation to the <i>work under the Contract</i> directly to a <i>subcontractor</i> or a worker if:</p> <p>i) permitted by law;</p> <p>ii) given a court order in favour of the <i>subcontractor</i> or worker; or</p> <p>iii) requested by the <i>Contractor</i>.</p> <p>b) A payment made to a <i>subcontractor</i> or worker under clause 43.3 a) is deemed to be satisfaction of the <i>Principal's</i> obligation to the <i>Contractor</i> to pay pursuant to clause 42 for <i>work under the Contract</i> which is the subject of clause 43.3 a).</p>	<p>Clause 43.1</p> <p>Agencies may specify the form of documentary evidence of payment of workers and <i>subcontractors</i> in <i>Item 29</i>. Often this will be a statutory declaration, but Agencies may wish to also reserve the right to demand copies of electronic fund transfer records if fraud is suspected.</p> <p>Clause 43.2</p> <p>The <i>Principal</i> is empowered by clause 43.3 to pay unpaid moneys directly to a worker or <i>subcontractor</i> where the <i>Principal</i> is either permitted by law to do so, has been given a court order in favour of the worker or <i>subcontractor</i>, or the <i>Contractor</i> requests in writing the <i>Principal</i> so to do.</p> <p>This is subject to the <i>Principal</i> not being aware of a relevant “relation-back day” as defined in the <i>Corporations Law</i>. A “relation-back day” is a term used in the <i>Corporations Act</i> in connection with the winding up of a company that has become insolvent.</p>
<p>44 DEFAULT OR INSOLVENCY</p> <p>44.1 Preservation of other rights</p> <p>a) If a party breaches the <i>Contract</i>, nothing in this clause 44 affects or negates the other party’s common law rights to terminate or for damages.</p>	<p>Clause 44.1</p> <p>This clause preserves the rights of either party at common law. It enables the parties to exercise their common law rights at the same time as their contractual rights where they are not inconsistent with each other. If a party breaches or repudiates the <i>Contract</i>, nothing in clause 44 prejudices the right of the other party to recover damages or exercise any other right in respect of that breach.</p>

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<p>44.2 Termination for Contractor's default or Insolvency</p> <p>a) The <i>Principal</i> may terminate the <i>Contract</i> for the <i>Contractor's default</i> or if the <i>Contractor</i> is the subject of an <i>insolvency event</i> by giving notice in accordance with this clause 44.</p> <p>b) Subject to clause 44.2 d), in the case of <i>Contractor's default</i>, the <i>Principal</i> must first give the <i>Contractor</i> notice that it has 5 <i>business days</i> (or such longer period specified by the <i>Principal</i>) after receipt of that notice to remedy the <i>Contractor's default</i>.</p> <p>c) If the <i>Contractor</i> fails to:</p> <ul style="list-style-type: none"> i) give the <i>Principal</i> a notice containing clear evidence that it has remedied a <i>Contractor's default</i>; ii) propose steps reasonably acceptable to the <i>Principal</i> to remedy the <i>Contractor's default</i>; or iii) commence and complete the steps referred in clause 44.2 c) ii) within the time proposed, <p>the <i>Principal</i> may give the <i>Contractor</i> a notice terminating the <i>Contract</i>.</p> <p>d) If a right to terminate exists at common law, a notice to terminate may be given without first giving notice to remedy a <i>Contractor's default</i>.</p> <p>e) In the case of the <i>Contractor's</i> insolvency, the <i>Principal</i> may give the <i>Contractor</i> a notice terminating the <i>Contract</i>.</p> <p>f) If the <i>Principal</i> terminates the <i>Contract</i> under this clause 44 it may, at its sole discretion, engage others to complete the <i>Works</i> and all the following will then apply:</p> <ul style="list-style-type: none"> i) The <i>Contractor</i> must leave the <i>site</i> as soon as reasonably practicable and remove all <i>temporary works</i> and materials it has brought onto the <i>site</i>, apart from any <i>temporary works</i> and materials identified by the <i>Principal</i> as being necessary to have the <i>Works</i> completed. ii) The <i>Contractor</i> must assign to the <i>Principal</i> the <i>Contractor's</i> rights and benefits in all its contracts and agreements in connection with the <i>Works</i>, warranties and unconditional undertakings, bank guarantees, insurance bonds, other <i>security</i> of a similar nature or purpose and retention held by the <i>Contractor</i>, with effect from the date of termination of its engagement under the <i>Contract</i>. iii) The <i>Contractor</i> must consent to a novation to the <i>Principal</i> or its nominee of all subcontracts and its other contracts concerning the <i>Works</i>, as required by the <i>Principal</i>. The <i>Principal</i> 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 <i>Contractor</i> or from any <i>security</i> given on the <i>Contractor's</i> behalf. iv) The <i>Contractor</i> must do everything and sign all documents necessary to give effect to this clause 44, and it irrevocably appoints the <i>Principal</i> as its attorney to do this in its name if it fails to do so. 	<p>Clause 44.2</p> <p>A notice to remedy a <i>Contractor's default</i> is the first step in the process to take work out of the hands of the <i>Contractor</i> or to terminate the <i>Contract</i>. It is a very serious matter and it is recommended that legal advice is sought before issuing the notice.</p> <p>If the <i>Contractor</i> ceases trading and work stops on <i>site</i>, Clause 44.2 e) would permit the <i>Principal</i> to terminate the <i>Contract</i> immediately.</p> <p>A failure to strictly comply with clause 44.2 may render the notice ineffective and may expose the <i>Principal</i> to damages for breach of <i>contract</i> by serving a defective notice.</p> <p>The notice must include sufficient details of the <i>Contractor's default</i> to enable the <i>Contractor</i> to know what it must do to ameliorate the default and sufficient time must be allowed to give the <i>Contractor</i> the opportunity to implement its response to the notice. Hence caution is recommended if a <i>Contractor</i> has responded to a notice to remedy the <i>Contractor's default</i> with proposed remedial action (see <i>Renard Constructions (ME) Pty Ltd v Minister for Public Works</i> (1992) 26 NSWLR 234).</p>

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<p>v) If, on <i>practical completion</i>, the cost to the <i>Principal</i> of completing the <i>Works</i> exceeds the amount that would have been paid to the <i>Contractor</i> to complete the <i>Works</i>, then the difference will be valued by the <i>Superintendent</i> and the amount certified as a debt due from the <i>Contractor</i> to the <i>Principal</i>.</p> <p>vi) The <i>Superintendent</i> may make provisional assessments of the amounts payable to the <i>Principal</i> under clause 44.2 f) v) and, without limiting any other right of recourse, the <i>Principal</i> may demand them against the <i>security</i>.</p> <p>44.3 Termination for Principal's default</p> <p>a) If the <i>Principal</i>:</p> <ul style="list-style-type: none"> i) fails to pay the <i>Contractor</i> any amount in accordance with the <i>Contract</i> which is not in <i>dispute</i>; ii) commits any fundamental breach of the <i>Contract</i>; or iii) fails to give the <i>Contractor</i> access to the <i>site</i> sufficient to start work required by the <i>Contract</i> within 3 months after the <i>date of acceptance of tender</i> (or longer period specified in the <i>Contract</i> or agreed by the parties), <p>the <i>Contractor</i> may give a notice requiring the <i>Principal</i> to remedy the default within 20 <i>business days</i> after receiving the notice.</p> <p>b) If the <i>Principal</i> fails to remedy the default, or to propose steps reasonably acceptable to the <i>Contractor</i> to do so, the <i>Contractor</i> may issue a notice terminating the <i>Contract</i>.</p> <p>c) If the <i>Principal</i> is the subject of an <i>insolvency event</i>, the <i>Contractor</i> may, without giving a notice to show cause, issue a notice terminating the <i>Contract</i></p> <p>44.4 Termination notices</p> <p>a) A notice issued under this clause 44 must comply with clause 7.</p> <p>44.5 Rights of the parties on termination</p> <p>a) If the <i>Contract</i> 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 <i>Contract</i> and the other party had been entitled to, and elected to, treat the <i>Contract</i> as at an end and recover damages.</p> <p>44.6 Survival</p> <p>a) Without limiting the survival of any clause by operation of law, this clause 44 and all indemnities in the <i>Contract</i> survive termination.</p>	<p>Clause 44.5</p> <p>This clause provides that if the <i>Contract</i> is terminated by either party in accordance with the <i>Contract</i>, the rights and liabilities of the party will be the same as they would have been at common law had the defaulting party repudiated the contract and the other party elected to treat the <i>Contract</i> as at an end and recover damages.</p> <p>This clause in effect restates the common law position that, where a party repudiates a contract, the other party may accept that repudiation, treat the contract as at an end and then recover damages if it so desires.</p>

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<p>45 TERMINATION BY FRUSTRATION</p> <p>a) This clause 45 only applies if the <i>Contract</i> is <i>frustrated</i>.</p> <p>b) Clause 42.1 will apply for the <i>work under the Contract</i> satisfactorily carried out up to the date of <i>frustration</i>.</p> <p>c) In addition to the payment for work satisfactorily carried out up to the date of <i>frustration</i>, the <i>Contractor</i> is entitled to additional payment for the following:</p> <p>d) In addition to the payment for work satisfactorily carried out up to the date of <i>frustration</i>, the <i>Contractor</i> is entitled to additional payment for the costs reasonably and necessarily incurred for demobilising <i>temporary works, construction plant, subcontractors</i> and workers.</p> <p>e) The <i>Contractor</i> must use reasonable endeavours to mitigate the additional costs referred to in clause 45 c).</p> <p>f) If the <i>Contractor</i> has ordered materials and equipment for incorporation into the <i>Works</i> which cannot be returned to the supplier and ownership is transferred to the <i>Principal</i>, the <i>Contractor</i> is entitled for payment for that materials and equipment.</p> <p>g) The <i>Principal</i> must promptly release and return all <i>security</i> (or, if applicable, the balance remaining after a demand on the <i>security</i>) that would have been returned at the <i>date of practical completion</i> had the <i>Contract</i> not been <i>frustrated</i>.</p>	<p>Clause 45</p> <p>Frustration is a legal doctrine; i.e. it applies even if there is no legislation or clause in a contract addressing it.</p> <p>The <i>Contract</i> will be frustrated if the <i>Contract</i> is incapable of being performed due to an unforeseen event without the fault of either party. Examples include:</p> <ul style="list-style-type: none"> • A contract for repair of a building is frustrated if the building burns down without the fault of the contractor. • Supervening illegality, where a law is passed after the award of the contract which renders the fundamental principle of the contract illegal. <p>The leading Australian case is <i>Codelfa Construction Pty Limited v SRA of New South Wales (1982) 149 CLR 337</i>, where an injunction prevented the contract proceeding as originally envisaged.</p> <p>Frustration does not occur if one of the parties is at fault; for example, failing to maintain a licence required under clause 14.3.</p> <p>If, under the jurisdiction where the work is being carried out, there is legislation dealing with frustrated contracts, any definition of frustration in that legislation applies. Otherwise, frustration is where the parties agree that the <i>Contract</i> is <i>frustrated</i> or the <i>Contract</i> is found to be frustrated in a court of law.</p> <p>If a contract is <i>frustrated</i>, the <i>Contract</i> is automatically terminated from that point onwards. Future obligations are discharged, but those in place prior to the date of <i>frustration</i> remain in place. The <i>Superintendent</i> must issue a a payment schedule for the <i>work under the Contract</i> satisfactorily carried out up to the date of <i>frustration</i>, inclusive of specified demobilisation costs.</p>

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<p>46 CLAIMS</p> <p>a) The <i>Superintendent</i> acts as a certifier in this clause 46.</p> <p>b) This clause 46 does not apply if:</p> <ol style="list-style-type: none"> i) the determination of the <i>claim</i> is regulated by a separate procedure under any applicable legislation; or ii) there is a specific provision for the submission and assessment of the <i>claim</i> in the <i>Contract</i>. <p>c) Any notice or response provided by a party to the <i>Superintendent</i> pursuant to this clause 46 must also be provided to the other party at the same time.</p> <p>d) If a party wishes to make a <i>claim</i>, it must give to the <i>Superintendent</i> the <i>prescribed notice</i> within 20 <i>business days</i> after the first day upon which the party could reasonably have been aware of the entitlement to make the <i>claim</i>.</p> <p>e) Subject to clause 42.6 c), if the claimant fails to make a <i>claim</i> within the time specified in clause 46 d), the other party is not liable to the claimant in respect of any <i>claim</i> for costs incurred more than 20 <i>business days</i> before the date on which the party gives the <i>prescribed notice</i> pursuant to clause 46 d).</p> <p>f) Within 20 <i>business days</i> of receipt of the <i>prescribed notice</i>:</p> <ol style="list-style-type: none"> i) the other party may provide a response to the <i>prescribed notice</i> to the <i>Superintendent</i>; and ii) the <i>Superintendent</i> may request the claimant to provide further particulars in connection with the <i>claim</i> to the <i>Superintendent</i>. <p>g) If the claimant wishes to respond to a <i>Superintendent's</i> request to provide further particulars, it must do so within 10 <i>business days</i> of the request.</p> <p>h) If the claimant provides further particulars pursuant to clause 46 g), the other party may provide a response to the <i>Superintendent</i> in regard to the further particulars within 10 <i>business days</i> of receipt of the further particulars.</p> <p>i) The times to submit a response in clauses 46 g) and 46 h) may be extended by the <i>Superintendent</i>, acting reasonably.</p> <p>j) Within 40 <i>business days</i> of the expiry of all applicable timeframes for a party to provide a response pursuant to this clause 46, the <i>Superintendent</i> must assess the <i>claim</i> and notify the parties of the decision.</p> <p>k) Unless a party gives a notice of <i>dispute</i> under clause 47 in respect of the <i>Superintendent's</i> assessment of the <i>claim</i> under clause 46 j), within 20 <i>business days</i> of the notification of that assessment, the amount of the assessment is due and payable.</p>	<p>Clause 46</p> <p>A <i>claim</i> is defined very broadly in clause 2.1 to be any claimed entitlement regarding any matter arising out of, or in connection with, this <i>Contract</i>. It may be:</p> <ul style="list-style-type: none"> • under a specific provision of this <i>Contract</i> (e.g., payment <i>claim</i> or <i>claim</i> for an extension of time); or • any other matter relating to the <i>Contract</i> (e.g., arising out a direction by the <i>Superintendent</i>, in tort, in equity, under any statute and for breach of <i>Contract</i>). <p>However, it excludes a claim made under an insurance policy, calling on <i>security</i> or a demand under the set-off provisions.</p> <p>Unless the <i>claim</i> process is managed by a different clause in the <i>Contract</i> or there is a statutory requirement to follow a separate process, all <i>claims</i> follow the process in clause 46. This ensures that <i>claims</i> are subject to a consistent process and removes any incentive for a <i>claim</i> to be made outside of the <i>Contract</i> (e.g. making a claim for misleading or deceptive conduct under Section 18 of the Australian Consumer Law instead of a <i>claim</i> for a <i>latent condition</i> under clause 12).</p> <p>A <i>claim</i> must be made within the timeframe specified in the <i>Contract</i>, of if there is no applicable timeframe, within 20 <i>business days</i> after the first day upon which the party could reasonably have been aware of the entitlement to make the <i>claim</i>.</p> <p>Where the <i>claim</i> is outside a specific provision of the <i>Contract</i>, the <i>claim</i> must be made on the <i>prescribed notice</i>, which is identified as 'Prescribed Notice Under Clause 46' and must include details of the <i>claim</i>.</p> <p>Provided a <i>claim</i> is submitted before the expiration of the period for lodging a final payment <i>claim</i>, a failure to submit a <i>claim</i> within the specified time does not invalidate the <i>claim</i>. However, a party has no entitlement to payment for costs in respect of the subject of the <i>claim</i> that were incurred more than 20 <i>business days</i> before the party gives the prescribed notice.</p> <p>The party which the <i>claim</i> is made against has an opportunity to provide a response to the <i>Superintendent</i>, and if further particulars are provided, a response to those further particulars. The <i>Superintendent</i> must ensure that both parties have the opportunity to put forward information in regard to the claim in accordance with this clause 46 and act impartially when assessing a claim.</p> <p>A <i>claim</i> submitted after the expiration of the period for lodging a final payment <i>claim</i> is barred (refer clause 42.6).</p> <p>A <i>claim</i> cannot become a <i>dispute</i> until the process in clause 46 is complete. If a party is not satisfied with the <i>Superintendent's</i> assessment, only then may it issue a notice of dispute pursuant to clause 47.</p>

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<p>47 DISPUTE RESOLUTION</p> <p>47.1 Notice of dispute</p> <ul style="list-style-type: none"> a) A party is not entitled to issue a notice of <i>dispute</i> unless the <i>Superintendent</i> has assessed a <i>claim</i> in regard to the subject matter of the <i>dispute</i> and notified the parties of the decision or the time for the <i>Superintendent</i> to notify the parties of the decision has elapsed. b) If a party wishes to <i>dispute</i> any matter, it must deliver by hand or send by registered post to the other party and to the <i>Superintendent</i> a notice of <i>dispute</i> adequately identifying and providing details of the <i>dispute</i> (notice of <i>dispute</i>). c) The parties must continue to perform their obligations under the <i>Contract</i>, subject to clauses 44 and 45, despite the existence of a <i>dispute</i>. d) By mutual agreement, the parties may extend the timeframes in this clause. <p>47.2 Meeting of representatives</p> <ul style="list-style-type: none"> a) Within 10 <i>business days</i> of service of a notice of <i>dispute</i>, the parties and the <i>Superintendent</i> (acting as a certifier) must confer at least once to attempt to resolve the <i>dispute</i> in good faith or attempt to agree to a procedure for resolution of the <i>dispute</i>. Unless the parties agree otherwise, the conference must be held in the state or territory stated in <i>Item 4</i>. 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 <i>dispute</i>. c) All aspects of every such conference, except the fact of its occurrence, are privileged and without prejudice. d) If within 30 <i>business days</i> of the service of a notice of <i>dispute</i>, the <i>dispute</i> remains unresolved, a party may refer the <i>dispute</i> to the resolution process specified in <i>Item 30</i>. e) A <i>dispute</i> for which notice has not been given in accordance with clause 47.2 d) is barred from the resolution process specified in <i>Item 30</i>, litigation or any similar action. 	<p>Clause 47.1</p> <p>A party must first follow the process for submitting and assessing a <i>claim</i> before it can issue a notice of dispute.</p> <p>Clause 47.2</p> <p>The meeting of representatives is intended to ensure that the parties discuss the situation in a non-adversarial environment before a formal dispute resolution process commences. Unless the parties agree otherwise, it should be a face-to-face meeting.</p> <p>The representatives must have sound experience in commercial matters and authority to reach agreement on resolution. The representatives should not have been involved in day-to-day activities and it is expected that they do not have entrenched views or bias in regard to issues associated with the <i>Contract</i>.</p> <p>A high level of knowledge in contractual matters will be required. If a representative does not have this expertise, they should seek the advice and/or assistance of expert advisers.</p> <p>While the parties may negotiate from a purely commercial perspective, at the conference the <i>Superintendent</i> is acting as a certifier and must remain impartial. The <i>Superintendent's</i> role is to ensure all relevant facts are identified and the circumstances clarified.</p> <p>All matters discussed at the conference are 'without prejudice' and cannot be disclosed in a court or any subsequent arbitration or resolution process. However, if an agreement to settle the dispute is reached and a party then failed to abide by that agreement, that agreement may be disclosed in the legal process of enforcing the agreement.</p> <p>If the dispute is not resolved at the conference, a party has 30 <i>business days</i> in which to serve a notice of dispute. If a notice is not issued, the matter is at an end and litigation or any similar action is barred.</p>

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<p>47.3 Alternative 1 – Arbitration</p> <p>a) If Alternative 1 – Arbitration is specified in <i>Item 30</i>, the arbitration must be:</p> <ul style="list-style-type: none"> i) carried out in accordance with, and subject to, the rules stated in <i>Item 31</i>; and ii) held in the state or territory stated in <i>Item 4</i>. <p>b) The parties must endeavour to agree on the arbitrator to be engaged. If they cannot agree within 30 <i>business days</i> of the service of a notice of <i>dispute</i>, the arbitrator (who must be accredited) will be nominated (on the application of either party) by the person named in <i>Item 31</i>. That person must not nominate:</p> <ul style="list-style-type: none"> i) an employee of the <i>Principal</i> or the <i>Contractor</i>; ii) a person who has been connected with the <i>Works</i> or the <i>Contract</i>; or iii) a person who the <i>Principal</i> and the <i>Contractor</i> have already considered and not been able to agree on. <p>47.4 Alternative 2 – Expert Determination</p> <p>a) If Alternative 2 – Expert Determination is specified in <i>Item 30</i>, the expert determination must be conducted in accordance with the provisions of the Dispute Resolution Framework attached as Annexure D.</p> <p>b) The parties must endeavour to agree on the expert to be engaged. If they cannot agree within 30 <i>business days</i> of the service of a notice of <i>dispute</i>, the expert will be nominated (on the application of either party) by the person named in <i>Item 32</i>. That person must not nominate:</p> <ul style="list-style-type: none"> i) an employee of the <i>Principal</i> or the <i>Contractor</i>; ii) a person who has been connected with the <i>Works</i> or the <i>Contract</i>; or iii) a person who the <i>Principal</i> and the <i>Contractor</i> have already considered and not been able to agree on. <p>c) Neither party may commence litigation in respect of the matters determined by the expert unless the determination:</p> <ul style="list-style-type: none"> 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 <i>Item 32</i>, calculated without having regard to: <ul style="list-style-type: none"> A) any interest that may be payable; and B) any amount that has been paid pursuant to the <i>SOP Act</i>. 	<p>Clauses 47.3 – 47.6</p> <p>These clauses describe the alternative dispute resolution processes that may be nominated in Annexure Item 30. If Alternatives 2 or 3 are nominated, details of the process must be included in a Dispute Resolution Framework included as Annexure D.</p> <p>As this is a specialist area, further explanation of these processes is not included in these notes.</p>

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<p>d) Neither party may commence litigation in respect of the matters determined by the expert unless they do so within 40 <i>business days</i> after receiving the determination. Otherwise:</p> <ul style="list-style-type: none"> 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 <i>business days</i>. <p>47.5 Alternative 3 – Alternative Dispute Resolution</p> <p>a) If an Alternative 3 – Alternative Dispute Resolution is specified in <i>Item 30</i>, the parties agree to avoid, manage and resolve disputes in accordance with the provisions of the Dispute Resolution Framework attached as Annexure D.</p> <p>47.6 Alternative 4 – Litigation</p> <p>a) If an Alternative 4 – Litigation is specified in <i>Item 30</i>, the litigation must be conducted in the state or territory stated in <i>Item 4</i>.</p> <p>47.7 Summary relief</p> <p>a) Nothing in the <i>Contract</i> is to prejudice the right of a party to institute proceedings to enforce payment due under the <i>Contract</i> or to seek injunctive or urgent declaratory relief.</p>	

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<p>48 GOODS AND SERVICES TAX</p> <p>a) A word or expression which is defined in the <i>GST Act</i> has the same meaning in this clause 48.</p> <p>b) The <i>Contractor</i> warrants to the <i>Principal</i> that:</p> <ul style="list-style-type: none"> i) the <i>Contractor</i> is registered for <i>GST</i>; and ii) the <i>Contractor's</i> ABN stated in the <i>Contract</i> (or otherwise notified by the <i>Contractor</i> to the <i>Principal</i>) is correct. <p>c) The <i>Contractor</i> must notify the <i>Principal</i> immediately if it ceases to be registered for <i>GST</i> at any time.</p> <p>d) The Commercial Schedule defines whether prices, rates or other sums payable in accordance with the <i>Contract</i> are inclusive or exclusive of <i>GST</i>.</p> <p>e) If the <i>Contract</i> 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:</p> <ul style="list-style-type: none"> 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 <i>GST</i> payable in respect of that supply. <p>f) If stated in <i>Item 33</i> that the <i>Principal</i> will issue recipient created tax invoices for taxable supplies provided by the <i>Contractor</i>, the following will apply:</p> <ul style="list-style-type: none"> i) the <i>Principal</i> will issue tax invoices and adjustment notes in respect of those supplies; ii) the <i>Contractor</i> must not issue tax invoices or adjustment notes in respect of those supplies; iii) the <i>Principal</i> acknowledges that it was registered for <i>GST</i> when it entered into the <i>Contract</i> and that it will notify the <i>Contractor</i> if it ceases to be registered; and iv) the <i>Contractor</i> must notify the <i>Principal</i> immediately it becomes aware of an adjustment event occurring in respect of those supplies. 	<p>Clause 48</p> <p>This clause sets out each parties’ obligations in regard to compliance with the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cwlth).</p> <p>Agencies should specify in the Commercial Framework whether prices are inclusive or exclusive of <i>GST</i>. If nothing is mentioned, under the <i>GST Act</i>, the prices are deemed to be inclusive of <i>GST</i>.</p> <p>Note that <i>Item 33</i> must be completed to advise whether the <i>Principal</i> will issue recipient created tax invoices.</p>