



PORT MACQUARIE  
HASTINGS COUNCIL

# Formal Instrument of Agreement

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<b>Contract Name</b>	<b>Ocean Drive Duplication, Port Macquarie</b>
<b>Contract No.</b>	<b>T-21-50</b>
<b>Parties</b>	<b>PORT MACQUARIE HASTINGS COUNCIL ABN 11 236 901 601</b>  <b>DITCHFIELD CONTRACTING ABN 16 056 793 830</b>

## FORMAL INSTRUMENT OF AGREEMENT

**PARTIES**                    **PORT MACQUARIE HASTINGS COUNCIL**  
**ABN 11 236 901 602**  
of 17 Burrawan Street, Port Macquarie NSW 2444.

and

**DITCHFIELD CONTRACTING PTY LTD**  
**ABN 16 056 793 830**  
of 8 Dee Crescent, Tuncurry NSW 2428

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### BACKGROUND

- A. The Principal is carrying out T-21-50 Ocean Drive Duplication, Port Macquarie (**Project**).
- B. The Contractor has made an offer to the Principal to carry out and perform Works in connection with the Project.
- C. The Principal has accepted the Contractor's offer to carry out the Works.
- D. The parties' agreement is constituted and governed by the terms of this Contract.

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### OPERATIVE PROVISIONS

#### 1. Contract Documents

The following documents constitute the Contract:

- (a) this Formal Instrument of Agreement
- (b) T-21-50 Letter of Award and attachments dated 26 August 2022
- (c) the GC21 (Edition 2) General Conditions of Contract
- (d) the GC21 Contract Information - Contract Issue dated 26 August 2022
- (e) Annexures to the Contract as follows:
  - (i) Annexure A: T-21-50 Principal's Documents including attachments:
    - 1. Project Drawings - all listed in the Ocean Drive Duplication Drawing Schedule including:
      - ✓ Civil & Structural
      - ✓ Traffic Signals
      - ✓ Electrical
      - ✓ Telstra
      - ✓ NBN Co

- ✓ Optus
  - ✓ PMHC Water & Sewer
  - ✓ Other Drawings
2. Project Specific Technical Specifications:
- ✓ General (G1, G2-C2, G4, G7, G10, G22, G36, G38, G40, G71)
  - ✓ Quality (Q6)
  - ✓ Materials (3051, 3071, 3151, 3152, 3153, 3154, 3204, 3211, 3222, 3252, 3253, 3254, 3258, 3259, 3261, 3263, 3268, 3269, 3351, 3352, 3353, 3354, 3356, 3357, 3368, 3385, 3400, 3411, 3552, 3553, 3556, 3580, 3651, 3851)
  - ✓ Bridgeworks (B30, B59, B80, B115, B153, B201, B203, B220, B240, B264, B312, B345)
  - ✓ Roadworks (R11, R15, R16, R24, R33, R44, R53, R54, R55, R57, R58, R63, R67, R71, RW74, R83, R101, R106, R116, R132, R142, R143, R145, R178, R179, R201, R204)
  - ✓ Traffic Services (TS101, TS200)
- (ii) Annexure B: Request for Tender Addendums:
1. Addendum #1 dated 23 March 2022 - Questions, responses and attachments
  2. Addendum #2 dated 24 March 2022 - Questions, responses and attachments
  3. Addendum #3 dated 31 March 2022 - Questions, responses and attachments
  4. Addendum #4 dated 6 April 2022 - Questions, responses and attachments
  5. Addendum #5 dated 12 April 2022 - Questions, responses and attachments
  6. Addendum #6 dated 13 April 2022 - Questions, responses and attachments
  7. Addendum #7 dated 21 April 2022 - Questions, responses and attachments
  8. Addendum #8 dated 28 April 2022 - Questions, responses and attachments
  9. Addendum #9 dated 4 May 2022 - Questions, responses and attachments
- (iii) Annexure C: Post tender correspondence:
1. Request for Clarification 1
    - Letter from Principal to Contractor dated 18 May 2022.
    - Letter and supporting attachments from Contractor to Principal dated 25 May 2022.
  2. Request for Clarification 2
    - Letter from Principal to Contractor dated 14 June 2022.
    - Letter and supporting attachments from Contractor to Principal dated 17 June 2022.
  3. Request for Clarification 3
    - Letter from Principal to Contractor dated 1 July 2022.
    - Letter from Contractor to Principal dated 4 July 2022.
- (iv) Annexure D: Schedule of Rates (Main Works Package & Option 1B) price schedule - dated 12 May 2022; and

- (v) Annexure E: Contractor's Tender Program (Main Works Package & Option 1B) - dated 12 May 2022.

## **2. MISCELLANEOUS**

### **2.1 Prior Works**

Any Works performed by the Contractor prior to the execution of this Formal Instrument of Agreement form part of the Works under the Contract and will be subject to the terms of the Contract.

### **2.2 Interpretation**

In this Formal Instrument of Agreement terms have the meaning given by the Contract Conditions, unless the context clearly indicates otherwise.

**EXECUTED** as a Deed.

Signed for and on behalf of **Port Macquarie Hastings Council** in accordance with s683 of the *Local Government Act 1993 (NSW)*.

[Redacted]

C. M. Allen (Sep 6, 2022 15:32 GMT+10)

Signature of Chief Executive Officer

or

~~Public Officer~~

~~In the presence of:~~

~~Signature of Witness~~

~~Witness Name~~

**EXECUTED** by the **Contractor**

**Ditchfield Contracting Pty Ltd**

**ABN: 16 056 793 830**

*In accordance with section 127 of the Corporations Act 2001 (Cth)*

[Redacted]

Warren Ditchfield (Sep 6, 2022 15:26 GMT+10)

Signature of director

~~Signature of director/secretary/  
sole director/sole director & secretary\*  
\*delete whichever is not applicable~~

**Warren Ditchfield**

Print name

~~Print name~~



Transport  
for NSW

# **New South Wales Government**

## **GC21 (Edition 2)**

### **General Conditions of Contract**

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#### **Preface**

#### **GC21 (Edition 2) General Conditions of Contract**

- **Contract framework**
- **Carrying out the Works**
- **Claim and Issue resolution**
- **Termination**
- **Meanings**
- **Contract Agreement**
- **Contract Information**
- **Schedules**
- **Attachments**

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**GC21 (Edition 2) General Conditions of Contract**  
1 January 2010

Report number (find)

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**NOTE:**

TfNSW specific changes from GC21 (Edition 1), (excluding Contract Information, Schedules and Attachments), are marked with | in the right margin.

**Principal Arranged Insurance**

### **Acknowledgments**

This New South Wales Government GC21 (Edition 2) General Conditions of Contract was developed by the NSW Construction Consultative Committee based on experience in the use of Edition 1.

GC21 (Edition 2) General Conditions of Contract was developed in consultation with representatives of:

- Department of Services Technology & Administration
- Department of Housing
- Transport for NSW
- Department of Health
- Sydney Water Corporation

### **Government Codes and Guidelines**

Copies of the NSW Codes and Guidelines referred to in the GC21 (Edition 2 [To be confirmed as to further edition date and details]) General Conditions of Contract may be obtained from the NSW Procurement or NSW Industrial Relation websites as follows:

[www.buy.nsw.gov.au](http://www.buy.nsw.gov.au)

NSW Government *Supplier Code of Conduct*

Work, Health and Safety Management Guidelines for construction procurement

Procurement Board Direction PBD 2020-03: *Skills, Training and Diversity in Construction*

*Aboriginal Procurement Policy*

[www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au)

NSW Government Implementation Guidelines to the NSW Code of Practice for Procurement:  
Building and Construction



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# Preface

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## The GC21 Edition 2 General Conditions of Contract

The GC21 Edition 2 General Conditions of Contract build on the experience and project success delivered with Edition 1 which had a highly effective emphasis on co-operative contracting and enhanced communication between the parties.

Edition 2 focuses on streamlining, updating and improving the operation of the contract to reflect experience and practice.

The requirement for Contractors to use the GC21 Subcontract has been discontinued in Edition 2, and replaced with a short list of mandatory requirements to give the Contractor and subcontractors flexibility in their commercial arrangements.

## Using this document

All defined words and phrases have initial capitals and are in italics in the GC21 General Conditions of Contract unless they are one of the following basic terms, which appear too often for italics to be used:

- Contract
- Contract Information
- Contractor
- Consultant
- Date of Contract
- Principal
- Site
- Subcontract
- Subcontractor
- Supplier
- Valuer
- Works

Attachments 1, 2, and 3 do not form part of the Contract.

## PROJECT SPECIFIC CHANGES

Any project specific changes have been indicated in the following manner:

(a) Text which is additional to the base document and which is included in the Specification is shown in bold italics e.g. ***Additional Text***.

(b) Text which has been deleted from the base document and which is not included in the Specification is shown struck out e.g. ~~Deleted Text~~.

# Contract framework

This section deals with the purpose and structure of the Contract. It allocates responsibilities and sets up the procedures for making the Contract work. Underlying it are the basic principles of GC21: co-operative contracting, enhanced communication, clear definition of roles, responsibility for outcomes, and promoting best practice.

---

## Roles and relationships

Although the parties have different responsibilities, co-operation is a key element of the Contract.

### 1 General responsibilities

- .1 The Contractor must:
  - .1 design and construct the Works in accordance with the Contract; and  
*The extent of the Contractor's Design obligations is specified in clause 39 and Contract Information item 38A.*
  - .2 perform and observe all its other obligations under the Contract.
- .2 The Principal must:
  - .1 pay the Contractor the *Contract Price* for its performance, in accordance with and subject to the Contract; and
  - .2 perform and observe all its other obligations under the Contract.
- .3 The Principal may give instructions to the Contractor concerning the Works and anything connected with the Works, and the Contractor must comply at its own cost unless the Contract expressly provides otherwise.

### 2 Authorised persons

#### Contractor's Authorised Person

- .1 The Contractor must ensure that, at all times, there is a person appointed to act as the *Contractor's Authorised Person*. The *Contractor's Authorised Person* acts with the Contractor's full authority in all matters relating to the Contract. The Contractor must promptly notify the Principal of the name and contact details of the *Contractor's Authorised Person* and of any change in those details. If the Principal reasonably objects to the *Contractor's Authorised Person* at any time, the Contractor must replace that person.

#### Principal's Authorised Person

- .2 The Principal must ensure that, at all times, there is a person appointed to act as the *Principal's Authorised Person*. The Principal must promptly notify the Contractor of the name and contact details of the *Principal's Authorised Person* and of any change in those details.
- .3 The *Principal's Authorised Person* does not act as an independent certifier, assessor or valuer. The *Principal's Authorised Person* acts only as an agent of the Principal.
- .4 The *Principal's Authorised Person* may delegate any of its contractual functions and powers to others by written notice to the Contractor.

### 3 Co-operation

- .1 The parties must do all they reasonably can to co-operate in all matters relating to the Contract, but their rights and responsibilities under the Contract (or otherwise) remain unchanged unless the parties agree in writing to change them.

### 4 Duty not to hinder performance

- .1 Each party must do all it reasonably can to avoid hindering the performance of the other under the Contract.

### 5 Early warning

- .1 Each party must promptly inform the other if it becomes aware of anything that is likely to affect the time for *Completion*, or the cost or quality of the Works. The parties must then investigate how to avoid or minimise any adverse effect on the Works and *Scheduled Progress*.



- .2 Information provided by a party under clause 5.1 must not be used against that party as an admission of breach of the Contract.

## 6 Evaluation and monitoring

As the Contract proceeds, regular meetings (usually monthly) allow the parties and selected stakeholders to evaluate performance and identify priorities for improvement.

- .1 The parties must meet regularly to evaluate and monitor performance of the Contract.

*Performance Evaluation and Performance Evaluation Record forms are provided at Attachments 2 and 3. They do not form part of the Contract and the parties may amend them to suit the specific attributes of the Contract.*
- .2 The parties must decide jointly who will participate in the meetings. Participants may include Subcontractors, Suppliers, Consultants and, if appropriate, representatives of government authorities, end users and local communities. Participation in meetings does not give the participants any additional rights or responsibilities.
- .3 Nothing concerning or in connection with completed evaluation forms changes either party's rights and responsibilities, or can be relied on or used by one party against another in any proceedings.
- .4 Participants in the evaluation and monitoring meetings must meet their own costs for attendance, and the parties must share equally the other costs.

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## The Contract

### 7 The Contract

The Contract is formed by the Principal sending a Letter of Award to the Contractor, unless the Principal expressly requires the Contract to be formed by execution of a formal agreement or deed.

- .1 The Contract is made up solely of the *Contract Documents*, which supersede all understandings, representations and communications made between the parties before the Date of Contract in relation to the subject matter of the Contract. The *Contract Documents* are:
  - .1 these GC21 General Conditions of Contract;
  - .2 the Contract Information;
  - .3 the annexed Schedules;
  - .4 the *Principal's Documents* as at the Date of Contract; and
  - .5 the other *Contract Documents* listed in Contract Information item 26.
- .2 The *Contract Documents* must be read as a whole, 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.
- .3 The terms of the Contract cannot be amended or waived unless both parties agree in writing.
- .4 The Principal must give the Contractor the number of copies of the *Principal's Documents* stated in Contract Information item 27.
- .5 Where the Principal sends a *Letter of Award* to the Contractor, unless the Principal expressly states, in the *Letter of Award* or any other document given to the Contractor before the *Letter of Award*, that no contract is formed until a formal agreement or deed is executed or some other specified condition is satisfied, the Contract is formed by the Principal's acceptance of the Contractor's tender in the *Letter of Award*. Even where a *Letter of Award* has been used to form the Contract, the Principal may require the Contractor to execute a formal agreement or deed. If required, the Contractor must execute and return to the Principal two copies of the agreement or deed within 14 days after the Principal's written request for their execution. The Principal will return an executed copy to the Contractor.

#### Access to Contract Compliance Information

- .6 At any time during the Contract, the Contractor must provide the Principal with sufficient access to the workplace, and to information, records and other relevant documentation, resources (including personnel) and all other things necessary to allow the Principal to carry out reviews and audit of the Contractor's compliance with all Contract requirements. This access may include, but is not limited to:

- .1 details of the Contractor's subcontract arrangements for the project;
  - .2 information relating to the Contractor's payment of subcontractors, suppliers and employees; and
  - .3 where the Contractor has submitted to the Principal a signed Contractor Statement and Supporting Statement (schedule 6), evidence to support these statements.
- .7 Where the Contractor is an unincorporated joint venture comprising each of the *Joint Venture Participants*, the provisions in Schedule 16 shall apply.

## **8 Scope of the Works, Temporary Work and work methods**

- .1 The Works are described in brief in Contract Information item 3 and in more detail in the *Contract Documents*, and include:
  - .1 all work specifically referred to in or contemplated by the Contract;
  - .2 all work and items necessary to achieve the effective and efficient use and operation of the Works; and
  - .3 all work and items necessary for the Works to be fit for the purposes required by the Contract.
- .2 Other work required in connection with the Contract includes:
  - .1 all work and items, other than the Works, specifically referred to in or contemplated by the Contract;
  - .2 all work and items necessary to properly carry out and complete the Works; and
  - .3 all work and items reasonably inferred from the *Contract Documents* as necessary to properly perform the other obligations of the Contractor under the Contract.
- .3 The Contractor acknowledges that:
  - .1 it is both experienced and expert in work of the type, complexity and scale of the Works;
  - .2 it has made full allowance in the *Contract Price* for the matters referred to in clauses 8.1 and 8.2; and
  - .3 unless the Contract expressly provides an entitlement to payment, everything required to be done by the Contractor under the Contract is to be done at the Contractor's own cost.
- .4 The Contractor acknowledges that *Variations* instructed by the Principal may change the scope of the Works.
- .5 Unless the Contract specifies, or the Principal instructs, that the Contractor use a particular work method or perform particular *Temporary Work*, the Contractor is solely responsible for determining the work methods and the requirements for all *Temporary Work*.
- .6 If requested in writing by the Principal, the Contractor must, within the time specified in the request, advise the Principal of:
  - .1 its price (excluding all costs of delay or disruption) for any proposal by the Principal to use a particular work method or perform particular *Temporary Work* proposed by the Principal or to change a work method or *Temporary Work* specified in the Contract;
  - .2 the anticipated effect of the Principal's proposal on achieving *Completion*; and
  - .3 the effect of the Principal's proposal on any other matter specified by the Principal.
- .7 If the parties agree in writing on the effects of the Principal's proposal and the Principal instructs the Contractor to carry out the proposal, the *Contractual Completion Dates* and *Contract Price* must be adjusted as agreed.
- .8 Subject to clause 8.9, if the Principal instructs the Contractor to use a particular work method or perform particular *Temporary Work* or to change a specified work method or *Temporary Work* without first agreeing in writing with the Contractor the effects of the instruction, the Contractor may claim:
  - .1 an extension of time in accordance with clause 50 and consequent delay costs due under clause 51, subject to the requirements of those clauses; and
  - .2 an increase in the *Contract Price* to be valued in accordance with clause 47 for any unavoidable costs incurred by it additional to what it would have incurred if the Principal had not given the instruction.

- .9 If the need for the instruction given under clause 8.8 arises from the Contractor's own act or omission, the Contractor is not entitled to any extension of time or adjustment to the *Contract Price*.

## **9 Assignment**

- .1 The Contractor must not assign a right or benefit under the Contract without first obtaining the Principal's written consent.

## **10 Governing law of the Contract**

- .1 The Contract is governed by the laws of New South Wales, and the parties submit to the non-exclusive jurisdiction of the courts of New South Wales.

## **11 Notices and instructions**

- .1 Notices must be sent to the relevant persons at the addresses in Contract Information items 4 to 11 or 52, or at the address for service most recently notified in writing by the addressee.
- .2 All notices must be in writing, and all instructions by the Principal must be in writing or, if given orally, must be confirmed in writing as soon as practicable.

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# **Statutory and Government Requirements**

## **12 Statutory Requirements**

- .1 The Principal must ensure that the licences, authorisations, approvals and consents listed in Contract Information item 14 are obtained and paid for.
- .2 The Contractor is responsible for:
- .1 compliance with all *Statutory Requirements*, subject to clause 49, except if, because of the nature of the requirement, only the Principal can comply (in which case the Contractor will perform the Works so as not to put the Principal in breach of any *Statutory Requirements*);
  - .2 giving all notices necessary to comply with *Statutory Requirements*;
  - .3 obtaining all licences, authorisations, approvals and consents necessary to carry out the work in connection with the Contract, other than those listed in Contract Information item 14; and
  - .4 the payment of all necessary fees and charges, other than those listed in Contract Information item 14.
- .3 As a condition of achieving *Completion*, the Contractor must give to the Principal originals of all licences, authorisations, approvals, consents and other documents issued by authorities or providers of services in connection with the Works or the Site.

## **13 Codes of Conduct and Guidelines**

### **Terminology**

- .1 In addition to terms defined in this document, terms used in this clause have the same meaning as is attributed to them in the New South Wales Industrial Relations Guidelines: Building and Construction Procurement, as in force and updated from time to time (NSW Guidelines) (updated September 2017). The NSW Code is available at [www.buy.nsw.gov.au](http://www.buy.nsw.gov.au) and the NSW Guidelines are available at [www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au).

### **Primary Obligation**

- .2 The parties must comply with and meet any obligations imposed by the NSW Government *Supplier Code of Conduct*, as in force and updated from time to time (*NSW Code*) and the *NSW Guidelines*.
- .3 The Contractor must notify the Construction Compliance Unit (CCU) and the Principal of any possible non-compliance with the NSW Code and NSW Guidelines and of remedial action taken, within 24 hours of becoming aware of the possible non-compliance.
- .4 Where the Contractor engages a Subcontractor, Supplier or Consultant, the Contractor must ensure that the Subcontract imposes on the Subcontractor, Supplier or Consultant equivalent obligations to those in Clause 13.2 (under the heading NSW Code and NSW Guidelines),

including that the Subcontractor, Supplier or Consultant must at all times comply with, and meet any obligations imposed by, the NSW Code and the NSW Guidelines.

- .5 The Contractor must not appoint or engage another party in relation to the Contract where that appointment or engagement would breach a sanction imposed on the other party in relation to the NSW Code or NSW Guidelines.

#### **Access and information**

- .6 The Contractor must maintain adequate records of compliance with the NSW Code and NSW Guidelines by it, its Subcontractors, Suppliers, Consultants and their related entities.
- .7 The Contractor must allow, and take reasonable steps to facilitate, authorised personnel (including personnel of the CCU) to:
  - .1 enter and have access to sites and premises controlled by the Contractor, including but not limited to the Site;
  - .2 inspect any work, material, machinery, appliance, article or facility;
  - .3 access information and documents;
  - .4 inspect and copy any record relevant to the Contract;
  - .5 have access to personnel; and
  - .6 interview any person;

as is necessary for the authorised personnel to monitor and investigate compliance with the NSW Code and NSW Guidelines, by the Contractor, its Subcontractors, Suppliers, Consultants, and related entities.

- .8 The Contractor, and its related entities, must agree to, and comply with, a request from authorised personnel (including personnel of the CCU) for the production of specified documents by a certain date, whether in person, by post or electronic means.

#### **Sanctions**

- .9 The Contractor warrants that at the time of entering into this Contract, neither it, nor any of its related entities, are subject to a sanction in connection with the NSW Code or NSW Guidelines that would have precluded it from responding to a procurement process for work to which the NSW Code and NSW Guidelines apply.
- .10 If the Contractor does not comply with, or fails to meet any obligation imposed by, the NSW Code or NSW Guidelines, a sanction may be imposed against it in connection with the NSW Code or NSW Guidelines.
- .11 Where a sanction is imposed:
  - .1 it is without prejudice to any rights that would otherwise accrue to the parties; and
  - .2 the State of NSW (through its agencies, Ministers and the CCU) is entitled to:
    - .1 record and disclose details of noncompliance with the NSW Code or NSW Guidelines and the sanction; and
    - .2 take them into account in the evaluation of future procurement processes and responses that may be submitted by the Contractor, or its related entities, in respect of work to which the NSW Code and NSW Guidelines apply.

#### **Compliance**

- .12 The Contractor bears the cost of ensuring its compliance with the NSW Code and NSW Guidelines, including in respect of any positive steps it is obliged to take to meet its obligations under the NSW Guidelines. The Contractor is not entitled to make a claim for reimbursement or an extension of time from the Principal or the State of NSW for such costs.
- .13 Compliance with the NSW Code and NSW Guidelines does not relieve the Contractor from responsibility to perform the Works and any other obligation under the Contract, or from liability for any Defect in the Works or from any other legal liability, whether or not arising from its compliance with the NSW Code and NSW Guidelines.
- .14 Where a change in the Contract or Works is proposed, and that change may, or may be likely to, affect compliance with the NSW Code and NSW Guidelines, the Contractor must immediately notify the Principal (or nominee) of the change, or likely change and specify:
  - .1 the circumstances of the proposed change;

- .2 the extent to which compliance with the NSW Code and NSW Guidelines will be, or is likely to be, affected by the change; and
- .3 what steps the Contractor proposes to take to mitigate any adverse impact of the change (including any amendments it proposes to a *Workplace Relations Management Plan (State)* or Work Health and Safety Management Plan); and

the Principal will direct the Contractor as to the course it must adopt within 10 Business Days of receiving notice.

#### **TfNSW**

- .15 The parties must comply with Principal's Statement of Business Ethics available from TfNSW website.
- .16 The parties must comply with Principal's Customer Charter available from TfNSW website.

### **14 No collusive arrangements**

- .1 The Contractor warrants that it has not engaged in any collusive or anti-competitive arrangement or understanding in connection with its tender for, or entry into, the Contract.
- .2 Without limiting any other right or remedy, the Principal may recover from the Contractor the value of any payment or other benefit made directly or indirectly to an unsuccessful tenderer or a trade or industry association in breach of the warranty in clause 14.1.

### **15 Compliance with NSW Government Requirements**

#### **Compliance with NSW Government Guidelines and Policies**

- .1 The Contractor must implement and maintain the systems, strategies and plans required to comply with the following NSW Government Guidelines and Policies, and as required by Contract Information item 15:
  - .1 NSW Code;
  - .2 The Work, Health and Safety Management Guidelines for Construction Procurement;
  - .3 the NSW Guidelines;
  - .4 the NSW Government Procurement Board Direction *Skills, training and diversity in construction*; and
  - .5 the NSW Government *Aboriginal Procurement Policy*.
- .2 The requirements of relevant NSW Government Guidelines and Policies are additional to any other requirements of the Contract and *Statutory Requirements*.
- .3 The Contractor must submit and implement the plans identified in Contract Information item 15 by the times stated there. Those plans must comply with all requirements of the relevant NSW Government Guidelines and the Contract.
- .4 The Contractor must:
  - .1 systematically manage its obligations under the Contract and applicable *Statutory Requirements* according to the systems, plans and procedures required under clauses 15.1 and 15.3;
  - .2 review and update its systems, plans and procedures to ensure ongoing compliance with the Contract;
  - .3 control non-conformances and undertake corrective and preventive action as and when necessary; and
  - .4 provide sufficient access to the workplace, and to information, records and other relevant documentation, resources (including personnel) and all other things necessary to allow the Principal to carry out reviews and audit of the Contractor's plans and procedures and confirm compliance with the Contract.

#### **Aboriginal Participation**

- .5 The *APP Contract Value* for Aboriginal participation in this Contract is the amount stated in Contract Information item 15D.
- .6 If Contract Information item 15D states that clauses 15.5 and 15.6 apply, the Contractor must:
  - .1 within 15 Business Days after the Date of Contract, provide a finalised *Aboriginal Participation Plan* developed from the Aboriginal Participation Plan submitted by the

Contractor at the time of tender, which sets out how the *Aboriginal Participation Requirement* for the Contract will be achieved;

- .2 comply with and implement the *Aboriginal Participation Plan* to meet the *Aboriginal Participation Requirement*; and
- .3 provide to the Principal, in an agreed format:
  - .1 a *Aboriginal Participation Report* within 5 Business Days after 31 March, 30 June, 30 September and 31 December for the duration of the Contract, which provides details of how the *Aboriginal Participation Plan* is being implemented and quantifies, with appropriate calculations, the *Actual Aboriginal Participation* being achieved to date. The report is to include verifiable evidence to support the *Actual Aboriginal Participation* reported; and
  - .2 the final *Aboriginal Participation Report*, at the time stated in Contract Information item 15D. Details included in the final *Aboriginal Participation Report* must describe and explain:
    - .1 how the *Aboriginal Participation Plan* has been implemented and quantify the *Actual Aboriginal Participation* for the Contract; and
    - .2 whether the *Actual Aboriginal Participation* by the Contractor is less than the *Aboriginal Participation Requirement*, and if so, include a calculation of the *Unmet Percentage*;
- .4 provide any information or assistance, as reasonably requested by the Principal, to enable the Principal to meet its obligations under the *Aboriginal Procurement Policy*; and
- .5 where an *Unmet Percentage* has been assessed by the Principal, pay the Principal, within 30 Business Days after the *Actual Completion Date*, an amount equal to the *Unmet Percentage* multiplied by the *APP Contract Value*. The amount so calculated will be a debt due from the Contractor to the Principal. Once such monies are received, the Principal will direct that amount to the Aboriginal Participation Fund established by Training Services NSW.

#### **Compliance with the Heavy Vehicle National Law - Chain of Responsibility Provisions**

- .7 The Contractor must comply with the chain of responsibility provisions of the *Heavy Vehicle National Law (NSW)* (2013).

#### **Financial Assessment**

- .8 Without limiting or otherwise restricting clause 19, the Contractor acknowledges and agrees that:
  - .1 the Principal may, during the term of the Contract, undertake or procure the undertaking of ongoing financial assessments (Financial Assessment) of the Contractor;
  - .2 the Financial Assessment may be undertaken at three monthly (or longer) intervals from the Date of Contract; and
  - .3 it must, if requested by the Principal, within 10 Business Days of receiving such request, provide any documents, information and evidence as is reasonably required by the Principal in connection with the Financial Assessment.
- .9 If:
  - .1 the Contractor fails to comply with clause 15.8.3; or
  - .2 the Principal determines, acting reasonably, that it is not satisfied with the findings of any Financial Assessment,

the Principal may, at any time before *Completion*:

- .3 notify the Contractor that one or more *Parent Company Guarantee(s)* is or are required and the Contractor must, within 14 days of receiving the notice, give the Principal that or those *Parent Company Guarantee(s)* duly executed by the relevant *Parent Company Guarantor*. If required by the Principal, the Contractor must also provide evidence satisfactory to the Principal of proper execution, as referred to in clause 33.7.3 (which may include a requirement for a legal opinion in a form acceptable to the Principal from a foreign law firm acceptable to the Principal); and/or

- .4 require the Contractor to implement a *Subcontractors and Suppliers Proof of Payment Procedure*, in which case the Contractor must implement a *Subcontractors and Suppliers Proof of Payment Procedure*.

### **Prequalification**

- .10 The Contractor must:
  - .1 hold and maintain the level of prequalification specified in the *Principal's Documents* under the National Prequalification System for Civil (Road and Bridge) Construction Contracts; and
  - .2 only use Subcontractors, Consultants and Suppliers who hold the levels of prequalification under the National Prequalification System for Civil (Road and Bridge) Construction Contracts specified in the *Principal's Documents*, or who are:
    - .1 registered with the Principal in the relevant category; or
    - .2 accredited by a third party for the class of work, as specified in the *Principal's Documents*; and
  - .3 ensure that its Subcontractors, Consultants and Suppliers maintain the levels of prequalification under the National Prequalification System for Civil (Road and Bridge) Construction Contracts specified in the *Principal's Documents*, or;
    - .1 maintain registration with the Principal in the relevant category; or
    - .2 maintain accreditation by a third party for the class of work, as specified in the *Principal's Documents*.

### **Skills, training and diversity**

- .11 The Contractor must:
  - .1 if Contract Information item 15C states that this clause 15.11.1 applies:
    - .1 embed an Apprenticeship target of 20% of the Trades Workforce engaged in carrying out of the Works; and
    - .2 consider the capacity of subcontractors to contribute to skills and training targets;
  - .2 if Contract Information item 15C states that this clause 15.11.2 applies, ensure that the following Infrastructure Skills Legacy Program targets are achieved in connection with the Works:
    - .1 20% of the total Project Workforce to be made up of Learning Workers;
    - .2 20% of all trades positions engaged in carrying out the Works to be made up of Apprentices;
    - .3 at least 2% of all trade positions engaged in carrying out the Works to be made up of women;
    - .4 at least 8% of the total Project Workforce engaged in carrying out the Works is aged less than 25 years; and
    - .5 reporting the employment and training outcomes for people from the local region, as defined in Contract Information item 15C; and
  - .3 meet any other commitments made in the Contractor's accepted tender concerning skills, training and diversity.
  - .4 provide to the Principal within 5 Business Days after 31 March, 30 June, 30 September and 31 December for the duration of the Contract, quarterly reports in the form set out in Attachment A of the *Training Management Guidelines* or such other form as required by the Principal's Authorised Person, giving details of its achievement of the targets and demonstrating that the Contractor is meeting (or will meet) the commitments made in the Contract.
  - .5 Defined terms used in clause 15.11 have the meaning given to them in the *Training Management Guidelines*.

### **Indigenous Participation Plan**

- .12 If Contract Information item 15D states that clauses 15.12 applies, the Contractor must comply with and implement the Indigenous Participation Plan.

## **16 Appointment of principal contractor for WHS**

- .1 Unless otherwise stated in Contract Information item 17A, subject to clause 16.2, the Principal appoints the Contractor as principal contractor for all construction work carried out in connection with the Contract, and the Contractor must discharge the responsibilities imposed on a principal contractor by the Work Health & Safety Regulation 2017 (NSW). The Principal authorises the Contractor to exercise such authority of the Principal as is necessary to do this.
- .2 Where the Contractor is a joint venture:
  - .1 the Principal appoints the *Joint Venture Participant* stated in Contract Information item 17B as the *Joint Venture Principal Contractor* for the purposes of Schedule 16; and
  - .2 subject to the provisions of Schedule 16, the *Joint Venture Principal Contractor* is the principal contractor referred to in clause 16.1 and must discharge the responsibilities of the Contractor under clause 16.1.

## **17 Compliance with Australian Government requirements**

### **Building Code**

- .1 If Contract Information item 16A specifies that the *Building Code* applies, the Contractor must comply with the requirements of the *Building Code* and the obligations set out in Schedule 12.

### **Work Health and Safety Accreditation Scheme**

- .2 If required by Contract Information item 16B, the Contractor must:
  - .1 maintain accreditation under the Work Health and Safety Accreditation Scheme (**Scheme**) established by section 43 of the *BCIIP Act* while carrying out *Building Work*; and
  - .2 comply with all conditions of the Scheme accreditation.

### **Australian Industry Participation Plan (AIP Plan)**

- .3 If required by Contract Information item 16C, the Contractor must comply with and implement the Certified AIP Plan.

## **18 Working hours and working days**

- .1 The Contractor must observe:
  - .1 *Statutory Requirements* which regulate working hours and working days; and
  - .2 any requirements in Contract Information item 18.

## **19 Authorisation to release and use information**

- .1 The Contractor authorises the Principal to:
  - .1 provide information about the Contractor, including information provided by the Contractor and information related to the Contractor's performance, to other Commonwealth, State or local government agencies at any time or for any reason; and
  - .2 take account of information about the Contractor, including reports of unsatisfactory performance, from any government agency or other reputable source, when deciding whether to offer the Contractor future opportunities for work.
- .2 The Contractor agrees and acknowledges that the Principal and its agents (including the Principal's Authorised Person and any delegates of the Principal's Authorised Person when acting as agent for the Principal only) are entitled to rely on the defence of qualified privilege for the purposes of section 30 of the *Defamation Act 2005* (NSW) in making information available to others as contemplated by clause 19.1.1.
  - .3 The Contractor releases and indemnifies the Principal from and against any claim, action, loss, damage, expense or liability the Principal may sustain or incur in connection with anything authorised by clause 19 or anything done by a recipient of the information.

## **20 Long service levy**

- .1 The Contractor must:



- .1 pay to the Long Service Corporation or that body's agent all amounts payable for the long service levy in respect of the Contractor's Work under the Building and Construction Industry Long Service Payments Act 1986 (NSW) (in this clause, the Long Service Payments Act), at the times and in the amounts as are due and payable under the Long Service Payments Act, including:
  - .1 before commencing any construction work under this contract; and
  - .2 if the Long Service Corporation serves a notice under [section 41 of] the Long Service Payments Act requiring payment of an additional amount of long service levy, within the time specified in the notice; and
- .2 produce to *Principal's Authorised Person* the documents evidencing payment of the amounts referred to in clause 20.1.1.

## 21 Registration and licences

- .1 All vehicles and plant used in carrying out work in connection with the Contract must be registered as required by law.
- .2 All drivers who operate vehicles or plant in carrying out work in connection with the Contract must be licensed to operate those vehicles or plant as required by law.
- .3 Whenever requested, the Contractor must promptly provide documentary evidence of compliance with clause 21.

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## Management duties

### 22 Time management

The Contractor must actively manage progress, anticipating and responding to events to stay on schedule and achieve the *Contractual Completion Dates*.

#### Contract Program

- .1 The Contractor must submit a *Contract Program* to the Principal within 14 days after the Date of Contract. If the Principal so instructs, the program submitted by the Contractor with its tender is the *Contract Program* until the Contractor submits a *Contract Program*.
- .2 The *Contract Program* must:
  - .1 reflect *Scheduled Progress* and show the *Contractual Completion Dates* for the whole of the Works and all *Milestones*;
  - .2 show, and be consistent with, all constraints on access, performance and coordination;
  - .3 show the start and finish dates or, in the case of future activities, the intended start and finish dates, of all design and construction activities and other significant events;
  - .4 show the logical relationship between activities and events, the sequence of activities which constitutes the critical path or paths, time leads and lags, and resource and other constraints;
  - .5 show the dates when the Contractor will require information, documents, instructions or materials from the Principal and the dates when the Contractor will provide information or documents to the Principal; these dates must be consistent with dates which the Principal could reasonably have anticipated at the Date of Contract;
  - .6 be accurate, comprehensive and complete;
  - .7 comply with any other specific requirements of the Contract, including any specified format or software; and
  - .8 comply with any reasonable requirements of the Principal.
- .3 The Contractor must update the *Contract Program* at the following times:
  - .1 at least once every month; and
  - .2 whenever there is a significant change in scheduling; and
  - .3 within 7 days after receiving an instruction from the Principal to do so; and
  - .4 when required to comply with clause 50.4; and
  - .5 following the granting of an extension of time under clause 50.

- .4 Updated *Contract Programs* must take account of the Contractor's actual progress to the date of the update (status date), and must be submitted promptly to the Principal.
- .5 The Principal need not respond to the Contractor about a *Contract Program*, but if the Principal advises the Contractor that the *Contract Program* submitted does not comply with the requirements of the Contract, or otherwise instructs the Contractor, the Contractor must revise the *Contract Program* so that it complies with the requirements of the Contract and the instructions of the Principal, and must submit the revised *Contract Program* to the Principal within 7 days after receiving the Principal's advice or instructions.

#### **Scheduled Progress**

- .6 The Contractor must carry out all work in connection with the Contract so as to achieve *Scheduled Progress*.
- .7 Whenever requested, the Contractor must demonstrate to the Principal that it is achieving *Scheduled Progress*.
- .8 If the Contractor does not demonstrate to the Principal that it is achieving *Scheduled Progress*, the Principal may instruct the Contractor to take all reasonable steps to achieve *Scheduled Progress* at its own cost. An instruction under this clause is not an *Acceleration Notice*.

#### **Minimisation of delay**

- .9 When there is any change in work in connection with the Contract, or the program or sequence of the work, the Contractor must take all reasonable steps to:
  - .1 carry out any additional work concurrently with other work; and
  - .2 otherwise minimise any effects on the time for *Completion*.

### **23 Intellectual property**

- .1 The Contractor assigns or otherwise transfers *Intellectual Property Rights* in all *Data* created specifically for the Contract, upon its creation, to the Principal. The Contractor, at its own cost, will do all things necessary, including execution of all necessary documentation, to vest ownership of all such *Intellectual Property Rights* in the Principal.
- .2 The Contractor must include provisions in all Subcontracts and agreements with Consultants to ensure that *Intellectual Property Rights* in all *Data* created specifically for the Contract are assigned or otherwise transferred to the Principal upon their creation.
- .3 The Contractor, Subcontractors and Consultants are granted royalty-free licences to use the *Data* for the purposes of the Contract.
- .4 For *Data* not created specifically for the Contract but required to use, operate, maintain, modify and decommission the Works, the Contractor must obtain irrevocable royalty-free licences to allow the Principal to use that *Data* for those purposes, including a right to sub-licence.
- .5 Licences referred to in clause 23.4 apply in perpetuity from the Date of Contract or (if the *Data* has not then been created) from the date the *Data* is created.
- .6 The Contractor is responsible for the timely payment of all royalties and fees for *Intellectual Property Rights* it uses in connection with the Contract and the Works.
- .7 The Contractor indemnifies the Principal against any claims (including *Claims*), actions, loss or damage arising out of any failure to make such payments or any infringement or alleged infringement of *Intellectual Property Rights* in relation to *Data* created or provided by the Contractor in connection with the Contract, including any related design, materials, documents or methods of working, or otherwise in the course of the Contractor's performance of the Contract
- .8 The Contractor warrants that the *Data* created or provided by the Contractor under the Contract, including any related design, materials, documents and methods of working, will not infringe any *Intellectual Property Rights*.
- .9 The Contractor must ensure that *Data* created specifically for the Contract by or for the Contractor is only used for the purposes of the Contract.
- .10 The Principal may grant the Contractor a royalty-free licence to use innovations developed during the course of the Contract for purposes agreed by the Principal.

## **24 Confidentiality**

- .1 The Contractor must maintain all *Data* secret and confidential and disclose it only to those persons to whom disclosure is reasonably necessary for the purposes of the Contract. This provision does not relate to *Data* which is generally available to the public or which is required to be disclosed by law.

## **25 Media releases and enquiries**

- .1 The Contractor must obtain the Principal's prior written consent to:
  - .1 any press release or promotional advertisement it wishes to make or place concerning the Contract, the Principal or the Works; and
  - .2 the release for publication in any media of any information concerning the Contract, the Principal or the Works.
- .2 The Contractor must refer any media enquiries concerning the Contract, the Principal or the Works to the Principal. The Contractor must not respond to any media enquiry without the Principal's prior written consent.
- .3 The Contractor must ensure that all Consultants, Subcontractors and Suppliers comply with clause 25 and obtain the Principal's prior written consent (through the Contractor) before doing anything which, if done by the Contractor, would require the Principal's prior written consent.
- .4 The Principal may give or refuse its consent, in its absolute discretion.

## **26 Care of people, property and the environment, indemnities and limitations**

### **Obligations of care**

- .1 The Contractor is responsible for all of the following:
  - .1 preventing personal injury or death;
  - .2 preventing loss or damage to the Site and the Works;
  - .3 preventing loss or damage to adjoining and other properties and the environment arising in connection with carrying out the Works;
  - .4 locating and caring for existing services;
  - .5 repairing or making good loss or damage to the Works and the Site; and
  - .6 bearing the cost of repairing, or making good, loss or damage to adjoining and other properties and the environment arising in connection with carrying out the Works.
- .2 If, in the opinion of the Principal, urgent action is required to avoid death, injury, loss or damage, and the Contractor does not take the necessary action immediately when the Principal requests it, the Principal may take the action (without relieving the Contractor of its obligations), at the Contractor's cost, and the Principal's costs of doing so will be recoverable as a deduction from the *Contract Price*.

### **Indemnities for property, personal injury or death**

- .3 The Contractor indemnifies the Principal against loss or damage to:
  - .1 the Works, from the date the Contractor begins carrying out the Works; and
  - .2 the Site and anything brought onto the Site for the purposes of the Contract from the date the Contractor is given access to the Site, or the relevant part of the Site, until and including the *Actual Completion Date* of the whole of the Works except that, in respect of any part of the Works which is occupied or taken into use by the Principal under clause 64, this indemnity ceases when that part is occupied or taken into use and the indemnity in clause 26.4 then applies as if the *Actual Completion Date* had been achieved with respect to that part.
- .4 After the *Actual Completion Date* of the whole of the Works, the Contractor indemnifies the Principal against loss or damage to the Works, the Site, and anything brought onto the Site for the purposes of the Contract:
  - .1 arising out of carrying out its obligations under the Contract, including carrying out *Variations*, making good *Defects* and removing *Materials* from the Site; or
  - .2 which occurred while the Contractor indemnified the Principal under clause 26.3.

- .5 The Contractor's liability for loss or damage under clauses 26.3 and 26.4 is reduced to the extent that the loss or damage is contributed to or caused by:
  - .1 any act or omission of the Principal;
  - .2 any risk specifically excepted in the Contract;
  - .3 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; or
  - .4 ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or any of its Subcontractors, Consultants or Suppliers.
- .6 The Contractor indemnifies the Principal against the following where they arise in connection with carrying out the Works:
  - .1 all damage to property other than property covered under clause 26.3;
  - .2 all claims (including *Claims*), actions, other liability, and loss, including loss of use, in connection with property other than property covered under clause 26.3; and
  - .3 all claims (including *Claims*), actions, other liability, and loss in connection with personal injury, or death.
- .7 The Contractor's liability to indemnify the Principal under clause 26.6 is reduced to the extent that the loss, damage, injury or death is contributed to or caused by an act or omission by the Principal.

#### **Limitation of liability**

- .8 *The Contractor's liability to the Principal in connection with loss or liability other than for personal injury or death, in respect of any one occurrence arising in connection with the Contract is limited to the amount stated in Contract Information item 19.*
- .9 *Clause 26.8 does not limit or affect any liability of the Contractor in respect of claims, actions, costs, losses, damages or liability in connection with:*
  - .1 *liability which cannot be limited at law;*
  - .2 *intellectual property and indemnities given by the Contractor in connection with intellectual property;*
  - .3 *conduct of the Contractor which is negligent or is carried out with wilful or reckless disregard for the consequences to the Principal, the public or the environment;*
  - .4 *fraudulent or criminal conduct;*
  - .5 *the Contractor's abandonment of its obligations under the Contract; or*
  - .6 *the Contractor's obligation to pay liquidated damages under the Contract.*

#### **Classes of excluded loss**

- .10 *The Contractor's liability may be further limited to the extent that the Professional Standards Act 1994 (NSW), or any equivalent statutory provision in any other state or territory, applies.*

#### **Consequential loss**

- .11 *The Contractor is not liable to the Principal for any loss of profit, loss of any contract, loss of revenue, loss of use, loss of business opportunities, loss of anticipated savings, damage to goodwill, loss of customers or any indirect or consequential losses or damages not in the reasonable contemplation of the parties at the Date of Contract, arising in connection with the Contract, other than:*
  - .1 *loss in connection with any of the matters referred to in clause 26.9; or*
  - .2 *loss that is or should be covered by insurance required under the Contract to be held by the Principal or the Contractor, or which would have been covered but for an act or omission of the Contractor or any of its employees, agents, Subcontractors, Suppliers or Consultants.*

#### **Exclusion of proportionate liability**

- .12 If Contract Information item 20 states that proportionate liability is excluded from the Contract then, to the extent permitted by law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW), and any equivalent statutory provision, is excluded in relation to all rights, obligations

and liabilities in connection with the Contract whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or otherwise.

## **27 Insurance**

The Contract Information states whether the Principal or the Contractor is to provide Works and public liability insurance. All other insurance required must be provided by the Contractor.

- .1 *If Contract Information item 21 or 22 states that the Principal is responsible to effect insurance covering the Works or public liability, the Principal must, not later than the Date of Contract, effect that insurance in accordance with the Contract Information item, on terms not less beneficial to the Contractor than those described in the insurance policy or policies or other details of insurance provided or made available to the Contractor by the Principal before the Date of Contract. The Principal must provide or make available to the Contractor a copy of the relevant insurance policy.*
- .2 *If Contract Information item 21 or 22 states that the Contractor is responsible to effect insurance covering the Works or public liability, the Contractor must, before starting work in connection with the Contract, effect that insurance in accordance with the Contract Information item, as follows:*
  - .1 *a Works policy of insurance to cover loss or damage to the Works; and*
  - .2 *a public liability policy of insurance to cover loss or damage to property or injury or death to persons arising out of or in connection with carrying out the Works.*
- .3 *Before starting work in connection with the Contract, the Contractor must effect any insurance required in accordance with Contract Information items 23, 24, 25 and 25A as follows:*
  - .1 *workers compensation and related liability insurance in accordance with the requirements of the Workers Compensation Act 1987 (NSW) and where possible, extended to indemnify the Principal against statutory liability to persons employed by the Contractor;*
  - .2 *if stated in Contract Information item 24, a professional indemnity policy of insurance to cover liability for breach of professional duty (whether in contract or otherwise) arising out of any negligence, whether in relation to errors in design, documentation, supervision or other professional duties of the Contractor (whether in contract or otherwise), and extended to include cover for any breach of all such professional duties carried out on behalf of the Contractor by Subcontractors, Suppliers or Consultants;*
  - .3 *if any work in connection with the Contract includes the use of waterborne craft of 8 or more metres in length, a marine liability policy of insurance to cover the use of such craft, as specified in Contract Information item 25; and*
  - .4 *if any work in connection with the Contract includes the use of motor vehicles of any kind, third party property damage policies of insurance, or policies of insurance that include cover for third party property damage, to cover the use of such vehicles by the Contractor as specified in Contract Information item 25A.*
- .4 *The party that is required to effect insurance must pay all necessary premiums and maintain the insurance in accordance with the requirements of the relevant Contract Information item.*
- .5 *The Contractor must ensure that every Subcontractor, Supplier and Consultant is insured for workers compensation and related liability in accordance with the requirements of the Workers Compensation Act 1987 (NSW) at all times.*
- .6 *Unless otherwise instructed by the Principal, the Contractor must make and manage all insurance claims.*
- .7 *The Contractor must meet the costs of all excesses or deductibles.*
- .8 *All policies must:*
  - .1 *require the insurer to notify the Principal (other than in relation to workers compensation and professional indemnity) 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*
  - .2 *provide that a notice of claim given to the insurer by the Principal, the Contractor, or a Subcontractor, Supplier or Consultant will be accepted by the insurer as a notice of claim given by all of the insured.*

- .9 *Each policy referred to in clauses 27.2 and 27.3.3 must:*
  - .1 *name or otherwise identify the Principal and the Contractor as persons covered by the policy or to whom the insurance cover provided by the policy extends; and*
  - .2 *include a cross-liability clause under which the insurer agrees that the term “insured” applies to each of the persons covered as if a separate policy of insurance had been issued to each of them, and a waiver of subrogation clause, under which the insurer agrees to waive all rights of subrogation or action against any of the persons covered.*
- .10 *The Contractor must:*
  - .1 *ensure that in respect of each policy of insurance required to be effected or taken out as required by clause 27 by the Contractor or any Subcontractor, Supplier or Consultant, it:*
    - .1 *does not do anything which prejudices any insurance;*
    - .2 *if necessary, rectifies anything which might prejudice any insurance;*
    - .3 *reinstates an insurance policy if it lapses;*
    - .4 *does not cancel, vary or allow an insurance policy to lapse without the prior written consent of the Principal;*
    - .5 *immediately notifies the Principal of any event which may result in an insurance policy lapsing or being cancelled; and*
    - .6 *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; and*
  - .2 *ensure that any non-disclosure by one insured does not prejudice the right of any other insured to claim on the policy; and*
  - .3 *ensure that a notice to the insurer by one insured will be deemed to be a notice by all insured parties.*
- .11 *The Contractor must give the Principal proof that all insurance policies required to be effected by the Contractor under the Contract are current:*
  - .1 *before starting work in connection with the Contract; and*
  - .2 *whenever requested in writing by the Principal.*
- .12 *The Contractor must give the Principal copies of all insurance policies it is required to effect and maintain whenever requested in writing by the Principal.*
- .13 *If the Principal has a reasonable objection to an insurer or to any conditions of an insurance policy, and notifies the Contractor of the objection and the reasons for the objection, the Contractor must, within five Business Days after receiving the notification, either obtain insurance from another insurer or arrange changes to the insurance policy, so that the Principal has no objections.*
- .14 *If the Contractor fails to comply with clauses 27.11, 27.12 or 27.13, the Principal may effect and maintain the relevant insurance policy and pay the necessary premiums. The Principal may recover from the Contractor the cost of the premiums and the Principal’s reasonable costs of effecting and maintaining the insurance, as a debt due from the Contractor to the Principal.*
- .15 *The Contractor must, as soon as practicable, inform the Principal in writing of the occurrence of an event that may give rise to a claim under a policy of insurance effected as required by the Contract and must ensure that the Principal is kept fully informed of subsequent action and developments concerning the claim.*
- .16 *If there is a claim under the Works policy of insurance for damage or destruction that is significant, as determined by the Principal acting reasonably:*
  - .1 *all settlement amounts must be paid by the insurer directly to the Principal;*
  - .2 *the Principal may decide to have the Works reinstated, or may decide not to proceed with the Works, without creating any default by the Principal under the Contract; and*
  - .3 *the Contractor must reinstate the Works if instructed to by the Principal and, except as otherwise provided in the Contract, may only make a Claim for payment for reinstatement of the Works up to the amount of any insurance settlement.*

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## Subcontractors, Suppliers and Consultants

Contractual relationships between the Contractor and Subcontractors, Suppliers and Consultants must be on a similar basis to those between the Principal and Contractor. Clause 31 specifies which requirements apply to Consultants and Suppliers.

### 28 Subcontractor relationships

- .1 The Contractor is solely responsible for all Subcontractors (including Subcontractors engaged in accordance with clause 29.3) and is liable for their acts and omissions as if such acts or omissions were those of the Contractor. Subcontracting of any obligation under the Contract does not affect the Contractor's obligations or liability under the Contract.
- .2 The Contractor indemnifies the Principal against all claims (including *Claims*), actions, loss or damage and all other liability arising out of any acts or omissions of Subcontractors.
- .3 The Contractor agrees that if required by the Principal it will, at no additional cost and to the Principal's reasonable satisfaction:
  - .1 implement a *Subcontractors and Suppliers Proof of Payment Procedure*; and
  - .2 submit the documents required by the *Subcontractors and Suppliers Proof of Payment Procedure*;  
in Schedule 17 (Subcontractors and Suppliers Proof of Payment Process).
- .4 If required to implement the *Subcontractors and Suppliers Proof of Payment Procedure*, in addition to implementing the process set out in Schedule 17 (Subcontractors and Suppliers Proof of Payment Process), the Contractor acknowledges and agrees:
  - .1 to pay, within 3 Business Days of receiving payment of a *Scheduled Amount*, all outstanding amounts owed to Subcontractors and Suppliers listed in the Contractor's Statement and Supporting Statement for each of its *Payment Claims*;
  - .2 within 5 Business Days of receiving payment of a *Scheduled Amount* to:
    - .1 provide proof, to the Principal's satisfaction, of payment of all outstanding amounts to Subcontractors and Suppliers; and
    - .2 confirm that no monies remain outstanding to Subcontractors and Suppliers in respect of each *Payment Claim*;
  - .3 that if it fails to provide the required proof of payment:
    - .1 it will issue, no later than the 5th Business Day from receipt of payment from the Principal, an irrevocable payment direction in the form of an irrevocable authority in writing to the Principal in favour of each unpaid Subcontractor and Supplier identified on the Contractor's Statement and Supporting Statement; and
    - .2 that the Principal will be entitled to rely on any irrevocable payment directions as a reason for withholding an amount from the Contractor in the next month's *Payment Schedule* and
  - .4 that if it fails to either provide the required proof of payment or issue an irrevocable payment direction as required by this clause 28 the Principal may have recourse to the *Undertaking* provided under clause 33.
- .5 The Contractor must include in every Subcontract:
  - .1 details of the Contractor's obligations in connection with the Contract which are to be carried out by the Subcontractor;
  - .2 the relevant provisions of clauses 13, 14, 15 (clause 15.6 must be included), 23, 24 and 25;
  - .3 a requirement to implement a *Subcontractors and Suppliers Proof of Payment Procedure* if instructed by the Principal;
  - .4 consent for the Subcontract to be novated to the Principal or its nominee, if required by the Principal in the circumstances contemplated by clause 73.6.3; and
  - .5 when possible, a right of termination for convenience.
- .6 In addition, the Contractor must include:
  - .1 in each Subcontract valued at or over the amount stated in Contract Information item 29:

- .1 a requirement to implement a *Subcontractors and Suppliers Proof of Payment Procedure* when instructed by the Principal; and
  - .2 written provisions giving effect to the requirements set out in Schedule 9 (Subcontract requirements).
- .2 in each Subcontract valued below the amount stated in Contract Information item 29, a written provision requiring the Contractor to pay the Subcontractor within the number of days stated in Contract Information item 30 after the Subcontractor has claimed payment in accordance with the Subcontract.
- .7 The Contractor must immediately inform the Principal and provide a copy of the relevant documents if it receives:
- .1 a *Contractor's Statement and Supporting Statement* from a Subcontractor or Supplier with a payment claim (submitted as required by the *Building and Construction Industry Security of Payment Act 1999 (NSW)*) that identifies as unpaid any subcontractor or supplier to a Subcontractor or Supplier;
  - .2 a payment withholding request (within the meaning of and served under the *Building and Construction Industry Security of Payment Act 1999 (NSW)*); or
  - .3 any other written advice received by the Contractor in respect to non-payment of a subcontractor or a supplier to a Subcontractor and Supplier.
- .8 The Contractor agrees that if required by the Principal it will, at no additional cost and to the Principal's reasonable satisfaction, instruct a Subcontractor or a Supplier (for a Subcontract valued at or over the amount stated in Contract Information item 29):
- .1 to implement a *Subcontractors and Suppliers Proof of Payment Procedure*; and
  - .2 submit the documents required by the *Subcontractors and Suppliers Proof of Payment Procedure*,
- as set out in Schedule 17(Subcontractors and Suppliers Proof of Payment Process).

## **29 Engaging Subcontractors**

- .1 The Contractor must not subcontract the whole of the Works, but may subcontract parts of the Works in accordance with clauses 28 and 29.
- .2 If requested, before engaging any Subcontractor and at any other time, the Contractor must provide the Principal with the name and address of the proposed Subcontractor. The Principal may object to the appointment of any proposed Subcontractor on reasonable grounds. If the Principal objects to any proposed Subcontractor, the Contractor must propose another Subcontractor.
- .3 If Contract Information item 31 includes a list of *Preferred Subcontractors* for a particular class of work, the Contractor must only engage a Subcontractor from that list for work of that class. If no *Preferred Subcontractor* on the list will subcontract to carry out the work, the Contractor must provide a revised list and the provisions of clause 29.2 will apply.
- .4 If instructed by the Principal, the Contractor must accept novations of the contracts of specified Principal's consultants, contractors or suppliers, on the terms specified in the Contract.

## **30 Subcontractor warranties**

- .1 For each trade, item or area of work listed in Contract Information item 32, the Contractor must obtain from each relevant Subcontractor, before that Subcontractor completes its work, a warranty to the Principal in the form of Schedule 1 (Subcontractor's Warranty).
- .2 Clause 30.1 does not affect any of the Contractor's other obligations under the Contract.

## **31 Consultant and Supplier relationships**

- .1 Clauses 28.1 to 28.6 inclusive and 29 apply to Consultants in the same way they apply to Subcontractors.
- .2 Clauses 28, 29 and 30 apply to Suppliers in the same way they apply to Subcontractors, unless the context requires otherwise.



**31A Details of Subcontractors, Consultants and Suppliers**

- .1 The Contractor must keep the Principal informed at all times of the name, address, relevant contact and telephone number of each Subcontractor, Consultant or Supplier engaged by the Contractor in connection with the project or the Works.
- .2 The Contractor must update and submit the *Subcontractors, Suppliers and Consultants Register* (Attachment 8) to the Principal each month.
- .3 In addition to the requirements of clause 31A.1 and 31A.2, the Principal may request that the Contractor provide it with any other information as may reasonably be required by the Principal in relation to such contracts with each Subcontractor, Consultant or Supplier.

# Carrying out the Works

This section deals with design and construction activities. It contains provisions that apply to the physical carrying out of the Works and also covers procedures for payment.

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## Starting

### 32 Start-up workshop

The start-up workshop is held to encourage the parties and others concerned with the Works to work co-operatively towards achieving a successful Contract. Start-up workshop guidance material is provided at Attachment 1 and does not form part of the Contract.

- .1 The Principal must convene a start-up workshop within 28 days after the Date of Contract or such other period as the parties agree.
- .2 The parties must attend the start-up workshop and must jointly decide who else will attend. Clause 6.4 applies to the costs of the workshop.
- .3 The objective of the start-up workshop is to promote a culture of co-operation and teamwork for the management of the Contract. The parties agree to conduct the workshop collaboratively so as to achieve this objective.

### 33 Undertakings and Parent Company Guarantee

The Contractor is required to give the Principal unconditional *Undertakings* to pay on demand, provided by financial institutions on the Contractor's behalf. If required by the Contract, the Contractor must give the Principal an executed *Parent Company Guarantee*.

- .1 Within 14 days after the Date of Contract (and before starting work on the Site), the Contractor must give the Principal the *Completion Undertaking* and the *Post-Completion Undertaking* for amounts calculated in accordance with Contract Information items 33 and 34 respectively. The *Undertakings* must be in the form specified in Schedule 2 (Undertaking).
- .2 Unless the Principal has made or intends to make a demand against an *Undertaking*, the Principal must return the *Undertakings* (or, if applicable, the balance remaining after a demand on the *Undertakings*) to the Contractor as follows:
  - .1 the *Completion Undertaking* within 14 days after the *Actual Completion Date* of the whole of the Works; and
  - .2 the *Post-Completion Undertaking* at the end of the period stated in Contract Information item 35 after the *Actual Completion Date* of the whole of the Works provided that at that time:
    - .1 there are no outstanding *Defects* or unresolved *Issues*; and
    - .2 there are no moneys of any nature, including debts, damages and indemnity claims, payable by the Contractor to the Principal.
- .3 When any of the circumstances in clause 33.2.2 apply, the *Post-Completion Undertaking* will be returned when those circumstances no longer apply.
- .4 When *Completion* of a *Milestone* is achieved, the Principal may (in its absolute discretion) agree to a proportionate reduction in the amount held as *Undertakings*, based on the proportion of the Works included in the *Milestone*.
- .5 *Undertakings* must be provided by a bank, building society, credit union or insurance company acceptable to the Principal.
- .6 The Contractor must not take any steps to prevent the Principal making a demand against the *Undertakings*, or to prevent the provider of an *Undertaking* from complying with the *Undertaking* or any demand by the Principal.
- .7 If Contract Information item 35B specifies that a *Parent Company Guarantee* is required:
  - .1 subject to clause 33.7.2, the Contractor must within 14 days after the Date of Contract, give the Principal a *Parent Company Guarantee* duly executed by the *Parent Company Guarantor*;
  - .2 if the Contractor comprises more than one entity, each entity comprising the Contractor must within 14 days after the Date of Contract, give the Principal a *Parent Company Guarantee* duly executed by its *Parent Company Guarantor*.; and

- .3 if required by the Principal, the Contractor (and where relevant, each entity comprising the Contractor) must also provide evidence satisfactory to the Principal (in its sole discretion, which, where a *Parent Company Guarantor* is domiciled in a foreign jurisdiction, may include a requirement for a legal opinion in a form acceptable to the Principal from a foreign law firm acceptable to the Principal) that the *Parent Company Guarantor* has properly executed the *Parent Company Guarantee* and is legally bound by it.

### **34 Site access**

- .1 The Principal must give the Contractor access to sufficient of the Site to allow the Contractor to start work by the later of:
  - .1 when the Contractor has complied with relevant requirements of the Contract; and
  - .2 the time stated in Contract Information item 13.
- .2 If the Principal does not give the Contractor access to the Site as required by clause 34.1, the Contractor has no remedy or entitlement other than:
  - .1 an extension of time in accordance with clause 50 and consequent delay costs due in accordance with clause 51; and
  - .2 when an entitlement arises under clause 75, to terminate the Contract.
- .3 The Contractor must permit the Principal, including its authorised employees and agents, to have access to the Site and to the premises of the Contractor at all reasonable times and must arrange for equivalent access to premises of Subcontractors, Suppliers and Consultants. The Principal may require access for any reasonable purpose connected with the Contract, including surveillance, audit, inspection, *Testing*, certification and recording of information.
- .4 Without limiting any other requirement, the Contractor must meet all its obligations under the Contract to provide *Undertakings* and effect insurance before it is entitled to start any work for or in connection with the Contract.

Refer to clauses 27 (Insurance) and 33 (Undertakings).

### **35 Engagement and role of Valuer**

Refer to Schedule 4 (Agreement with Valuer), under which the Valuer makes determinations about value and time under clauses 47 and 50.

- .1 If Contract Information item 50A states that a Valuer must be engaged or if the parties agree to engage a Valuer, then:
  - .1 the parties, acting reasonably, must endeavour to agree in writing on the identity of the Valuer within 21 days after the Date of Contract or, failing agreement, the Principal must request the person named in Contract Information item 50B to select the Valuer;
  - .2 within a further 21 days after the date of selection of the Valuer, the Principal and the Contractor must jointly engage the Valuer using the form in Schedule 4 (Agreement with Valuer); and
  - .3 a Valuer's certificate will be final and binding unless the net amount of the Valuer's determination (excluding any amount for interest) exceeds the amount stated in Contract Information item 50C, in which case either party may commence litigation in respect of the matters referred to the Valuer, but only within 56 days after receiving the determination.
- .2 The parties may agree at any time to engage a Valuer in accordance with this clause, either for a single valuation or on an ongoing basis. When the parties agree to engage a Valuer after the Date of Contract, "Date of Contract" for the purposes of clause 35.1.1 refers to the date the parties agree to appoint the Valuer.

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## **The Site**

### **36 Site information**

- .1 The parties acknowledge that:
  - .1 at the Date of Contract, the Principal has provided in good faith the information concerning the Site identified in Contract Information items 36A and 36B;

- .2 the information identified in Contract Information items 36A and 36B does not form part of the Contract;
- .3 the Principal does not guarantee the completeness of the information identified in Contract Information item 36A;
- .4 the Principal does not guarantee the accuracy, quality or completeness of the information identified in Contract Information item 36B; and
- .5 the Principal has no duty of care in connection with information identified in Contract Information item 36B, or with having provided it.

*Other information concerning the Site may be included in the Contract.*

- .2 The Contractor warrants that it:
  - .1 has made its own inquiries concerning the Site, including checking information provided by the Principal;
  - .2 has examined the Site and surrounds and satisfied itself through its own investigation as to the *Site Conditions* which might reasonably be expected;
  - .3 has made its own assessment of the risks, contingencies and other circumstances which might affect the work in connection with the Contract and has allowed fully for these in the *Contract Price* (subject to clause 37);
  - .4 did not in any way rely on the completeness of the information identified in Contract Information item 36A other than as a guide for ascertaining what further Site information the Contractor considers it needs to obtain;
  - .5 did not rely on the accuracy, quality or completeness of information identified in Contract Information item 36B; and
  - .6 has made its own interpretations, deductions and conclusions and did not in any way rely on interpretations, deductions and conclusions made by or for the Principal.

### **37 Site Conditions**

- .1 The Contractor is solely responsible for dealing with any adverse *Site Conditions*:
  - .1 so as to minimise delay;
  - .2 so as to minimise increased costs; and
  - .3 without awaiting any instruction from the Principal,
 but must comply with any instruction given by the Principal
- .2 Clauses 37.3 to 37.8 do not apply if it is stated in Contract Information item 37 that the Contractor is to bear the risk of adverse *Site Conditions*.
- .3 Subject to clause 37.2, if the Contractor becomes aware of adverse *Site Conditions* that differ materially from those it should reasonably have expected at close of tenders, the Contractor must notify the Principal in writing as soon as possible and in any event within 7 days after becoming aware of those *Site Conditions*. Where practicable, the notification should be given before the *Site Conditions* are disturbed. The notification must include details of:
  - .1 the *Site Conditions* the Contractor claims are adverse;
  - .2 the manner in which the Contractor contends they differ materially from the *Site Conditions* the Contractor should reasonably have expected at close of tenders (having regard to the warranty in clause 36.2), including any information supporting this contention;
  - .3 the effect on the Works;
  - .4 the effect on achieving *Completion*;
  - .5 the additional work and resources involved and the Contractor's estimate of its entitlement to any adjustment to the *Contract Price*; and
  - .6 any other matters the Contractor considers relevant.
- .4 The Principal may request the Contractor to provide further information about the matters notified under clause 37.3.
- .5 After considering the Contractor's notification under clause 37.3, the Principal must notify the Contractor whether it agrees with the Contractor's contentions under clause 37.3.1 and 37.3.2 as to the nature of the conditions encountered and whether or not the Contractor should reasonably have expected them.

- .6 If the Principal agrees that there are adverse *Site Conditions* that differ materially from those the Contractor should reasonably have expected at the close of tenders and the Contractor has given the notice required by clause 37.3:
  - .1 the parties may agree in writing as to the effects of the unexpected adverse *Site Conditions* (including any *Variation* necessary), and any affected *Contractual Completion Dates* and the *Contract Price* must be adjusted as agreed;
  - .2 if the parties are unable to agree in writing as to the effects of the unexpected adverse *Site Condition*, the Principal may instruct a *Variation* and clause 48 applies to the *Variation*;
  - .3 in addition to the entitlements the Contractor has as a result of any *Variation* instructed under clause 37.6.2, the Contractor may also claim:
    - .1 an extension of time in accordance with clause 50 and any consequent delay costs due under clause 51, for any delay incurred by it as a result of the unexpected adverse *Site Conditions* that has not been taken into account in any extension of time granted as a result of the *Variation*; and
    - .2 an increase in the *Contract Price* to be valued in accordance with clause 47 for any unavoidable additional costs incurred by the Contractor as a result of the unexpected adverse *Site Conditions*, but excluding any costs included in the valuation of the *Variation*; and
  - .4 if no *Variation* is instructed in clause 37.6.2, the Contractor may claim:
    - .1 an extension of time in accordance with clause 50 and consequent delay costs due under clause 51; and
    - .2 an increase in the *Contract Price* to be valued in accordance with clause 47 for any unavoidable additional costs incurred by the Contractor as a result of the unexpected adverse *Site Conditions*.
- .7 If the Principal does not agree with the Contractor's contentions under clauses 37.3.1 and 37.3.2, the Contractor may notify an *Issue* under clause 69.
- .8 Costs and delay incurred by the Contractor as a result of unexpected adverse *Site Conditions* before it gave the notice required by clause 37.3 must not be counted in any valuation or extension of time.

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## Design

The Contractor always has some design, design coordination and design management responsibility. The extent of design by the Contractor may be as little as shop detailing, as much as the full design of the Works, or something in between.

### 38 Faults in Contract Documents

- .1 The Contractor must check the *Contract Documents* and notify the Principal of *Faults* in any *Contract Documents* at least 21 days before the Contractor proposes to use those *Contract Documents*.
- .2 The Principal must resolve any *Fault* notified under clause 38.1.
- .3 If the Contractor has notified the Principal of a *Fault* in accordance with clause 38.1, then subject to clause 38.4:
  - .1 to the extent that the Principal resolves the *Fault* by instructing a *Variation*, clause 48 applies; and
  - .2 to the extent that the Principal resolves the *Fault* other than by instructing a *Variation*:
    - .1 if the resolution delays the Contractor in achieving *Completion*, the Contractor may claim an extension of time and delay costs due in accordance with clause 51, or the Principal may assess a reduction of time in accordance with clause 50; and
    - .2 if the resolution results in the Contractor incurring costs that are greater or less than the Contractor should reasonably have foreseen at the close of tenders, the *Contract Price* may be increased or decreased in accordance with clause 47.
- .4 If the Principal resolves a *Fault* in the *Contract Documents* that was not notified in accordance with clause 38.1, the Contractor is not entitled to any costs for delay or the cost of any aborted work.

### **39 Design by Contractor and Contractor's Documents**

#### **Design responsibilities**

- .1 The Contractor must carry out all design, including completion of design provided by the Principal, necessary in connection with the Works, including:
  - .1 design, design development, documentation, workshop detailing and coordination of design and the interaction of the various disciplines;
  - .2 development of the design provided by the Principal for elements referred to in Contract Information item 38A.1; and
  - .3 full design by the Contractor of elements referred to in Contract Information item 38A.2.
- .2 The Contractor must carry out its design responsibilities so that the Works are fit for the purposes required by the Contract and comply with the other requirements of the Contract.
- .3 The Contractor's design responsibilities are reduced to the extent that the Works are not fit for a purpose required by the Contract because of the design provided by the Principal.
- .4 Subject to clause 39.6, design or design development does not constitute a *Variation* or reduce the Contractor's design responsibilities under clause 39.

#### **Departures from the design provided by the Principal**

- .5 Subject to clause 39.7, the Contractor must not depart from the design provided by the Principal unless instructed in writing by the Principal.
- .6 If the Contractor considers that some departure from the design provided by the Principal is desirable to ensure the effectiveness and efficiency of the Works, then the Contractor may propose a *Variation* under clause 48.
- .7 In carrying out the design and design development of the elements referred to in Contract Information item 38A.3, the Contractor may depart from the design provided by the Principal, but only to the extent that:
  - .1 any such departure does not adversely affect the construction, operation or maintenance of the Works or their performance or fitness for the purposes required by the Contract; and
  - .2 the Contractor has notified the Principal in writing (specifying that it relates to a proposed departure from the design) of the proposed departures and the Principal has not notified the Contractor of any objection within 7 days after receiving the notification.

#### **Design review**

- .8 To the extent specified in the Contract, the Contractor must review its design in consultation with persons nominated by the Principal, and develop the design and the *Contractor's Documents* allowing for any matters identified in the review.

#### **Contractor's Documents**

- .9 The Contractor must produce *Contractor's Documents* which:
  - .1 will ensure that the Works are fit for the purposes required by the Contract; and
  - .2 meet the requirements of all of the following:
    - .1 the Contract;
    - .2 *Statutory Requirements*;
    - .3 the Principal's instructions;
    - .4 the National Construction Code (if stated in Contract Information item 38B) and relevant Australian Standards; and
    - .5 if no other standard is specified in the Contract, good industry standards applicable to the Works.
- .10 The requirements of clause 39.9 are not affected by any *Variation*.

### **40 Submitting Contractor's Documents**

- .1 Unless the Contract provides otherwise, the Contractor must submit *Contractor's Documents* to the Principal at least 21 days before the date the Contractor proposes to use them for procurement, manufacture, fabrication or construction. *Contractor's Documents* must be

submitted progressively with sufficient detail to demonstrate what is proposed. The number of copies must be as stated in Contract Information item 28.

- .2 The Principal need not respond to the Contractor about the *Contractor's Documents*.
- .3 If the Principal objects to the *Contractor's Documents*, the Contractor must take the objections into account and discuss them with the Principal. The Contractor must correct any *Fault*, error or omission in the *Contractor's Documents*.
- .4 Nothing the Principal does or omits to do in connection with the *Contractor's Documents* makes the Principal responsible for the *Contractor's Documents*, or prevents the Principal from relying on or enforcing any right under the Contract or otherwise.

## **41 Innovation**

Clause 41 provides an incentive to the Contractor to improve its service to the Principal by innovation. An innovation proposal must improve or add value to the Works and result in savings for the Principal, including projected whole-of-life costs. If the Principal accepts the Contractor's proposal, the Contractor benefits by sharing in any proved and agreed immediate financial benefit. The Principal benefits from the value added to the Works through direct savings in the cost of delivering of the Works, reduced operating or maintenance costs or other changes in whole-of-life costs. Proposals to delete part of the Works or substitute Materials without any demonstrated long-term or repeated improvement and value will not be considered innovation.

- .1 The Contractor may submit in writing to the Principal, a proposal for changes to the Works, including the design or *Materials*, which are likely to offer significant long-term or repeated improvement and value to the Principal. The Contractor's proposal must include details of:
  - .1 the proposed change to the Works and the proposed change in the Contract Price;
  - .2 potential risks to the Principal and the Contractor if the proposal is accepted;
  - .3 any changes required to *Contractual Completion Dates*;
  - .4 projected changes in operating and maintenance costs;
  - .5 projected changes in whole-of-life costs;
  - .6 any resulting financial benefit to the Principal and any other improvement and value the Principal will receive; and
  - .7 any resulting financial benefit to the Contractor.
- .2 The proposal must not include anything which might adversely affect the construction, operation or maintenance of the Works or their performance or fitness for the purposes required by the Contract.
- .3 The Principal must consider the Contractor's proposal, but is not bound to accept it. The Principal, at its sole discretion, will determine:
  - .1 whether the proposal constitutes innovation; and
  - .2 whether the Principal agrees to accept the proposal.The Principal may accept the Contractor's proposal subject to conditions.
- .4 No *Claim* will arise out of the Principal's consideration of, or failure to accept, any proposal.
- .5 Before any proposal proceeds, the parties must agree on the financial benefit each will receive.

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## **Construction**

### **42 Setting out the Works and survey**

- .1 The Contractor must set out the Works in accordance with the Contract.
- .2 The Contractor may request from the Principal any additional information that is necessary for setting out the Works and is not included in the *Contract Documents*. Such a request must be made at least 14 days before the information is planned to be used for setting out. As soon as practicable, the Principal must provide any additional information which it has or can reasonably obtain.
- .3 If at any time the Contractor discovers or is made aware of any error in the location, level, dimensions or alignment of the Works:
  - .1 the Contractor must notify the Principal; and

- .2 unless instructed otherwise by the Principal, the Contractor must rectify the error to ensure that the Works comply with the Contract.
- .4 If an error notified in accordance with clause 42.3.1 is due to a *Fault* in the *Contract Documents*, clause 38 applies.
- .5 The Contractor must give the Principal a copy of a survey showing the Works as constructed on the Site, including the relationship of the Works to any relevant property boundaries, easements (including any right of way) and improvements on the Site. If requested in writing by the Contractor, the Principal may agree in writing that certain matters can be excluded from the survey. The survey must be carried out by a registered surveyor or other surveyor to whom the Principal has no objection.

### 43 Construction

- .1 The Contractor must supply all *Materials* and construct the Works in accordance with all of the following:
  - .1 the Contract;
  - .2 the Contractor's Documents;
  - .3 Statutory Requirements;
  - .4 the Principal's instructions;
  - .5 the National Construction Code (if stated in Contract Information item 38B) and relevant Australian Standards; and
  - .6 if no other standard is specified in the Contract, good industry standards applicable to the Works.

### 44 Testing

- .1 The Contractor must *Test*, all parts of the Works that are specified in the Contract to be *Tested*, give the Principal the opportunity to witness the *Tests* by giving reasonable notice, and make the results available to the Principal.
- .2 The Principal may instruct the Contractor at any time to carry out any other *Test* of any part of the Works.
- .3 The Principal must pay for any *Test* instructed under clause 44.2, as an addition to the *Contract Price*, if the results of the *Test* show compliance with the Contract. Otherwise the Contractor bears the cost, including any costs of opening up and reinstating any part covered up.
- .4 The Contractor must make good any part of the Works where *Testing* has not shown compliance with the Contract and must repeat the *Testing*, at its own cost, until the results of the *Tests*, as reported in writing to the Principal, confirm that the Works comply with the Contract.

### 45 Defects

The Principal considers the Contractor to be an expert in the design and construction of the Works and holds the Contractor responsible for its work. The Principal requires *Completion* to be defect-free.

These *Defects* provisions are to ensure that the Works are constructed to the standards required by the Principal. The Principal can also rely on its common law rights. Also refer to clause 67 which deals with *Defects* after *Completion*.

- .1 The Contractor must identify and promptly make good all *Defects* so that the Works comply with the Contract.
- .2 At any time before *Completion*, the Principal may instruct the Contractor to make good *Defects* within the time specified in a *Defect Notice*.

*A similar provision applies after Completion under clause 67.1.*
- .3 If the Contractor fails to make good the *Defects* in the time specified in the *Defect Notice*, the Principal may have the *Defects* made good by others and then:
  - .1 the cost of doing so will be a debt due from the Contractor to the Principal; and
  - .2 the Contractor will be responsible for the work involved in making good the *Defects* as if the Contractor had carried out the work.
- .4 Nothing in clause 45 reduces the Contractor's warranties and other liabilities and obligations under the Contract, or affects the Principal's common law right to damages or any other right or remedy.



- .5 If at any time before *Completion* the Contractor becomes aware of any defect or deficiency which results from design or other work or actions for which it is not responsible, it must:
  - .1 promptly notify the Principal; and
  - .2 carry out any *Variation* instructed by the Principal to make good the defect or deficiency.

#### **46 Acceptance with Defects not made good**

- .1 The Principal, in its absolute discretion, may agree that specific *Defects* need not be made good.
- .2 Before the Principal does so, the Principal may propose reductions from the *Contract Price* and any terms it requires, and:
  - .1 If the Contractor agrees with the proposed reductions and terms, the *Contract Price* must be adjusted accordingly.
  - .2 If the Contractor agrees with the proposed terms but not with the proposed reductions, the appropriate decrease in the *Contract Price* will be valued in accordance with clause 47. A valuation of this kind must take into account any increased future costs, loss of income or reduction in asset life.
  - .3 If the parties do not agree in writing on the Principal's proposed terms, the Contractor must make good the *Defects* identified by the Principal.
- .3 The Contractor remains liable for all *Defects* (whether known or not known) other than the specific *Defects* identified, in a written agreement made under clause 46, as not to be made good.

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## **Changes to work and time**

#### **47 Valuation of changes**

- .1 When the Contract provides for valuation of an increase or decrease in the *Contract Price* or requires a valuation to be made in accordance with clause 47, the process and principles set out below apply.
- .2 If a Valuer is engaged, either party may by giving notice to the other party and to the Valuer, request the Valuer to determine the increase or decrease in the *Contract Price*. If no Valuer is engaged at the relevant time, the parties may agree to engage a Valuer for the purposes of making the valuation.
- .3 If no Valuer is engaged and the parties do not agree to engage a Valuer, the Principal will assess the amount of the increase or decrease in the *Contract Price*, applying the valuation principles set out in clauses 47.5 to 47.10.

The Contractor may dispute the Principal's assessment of an increase or decrease by giving notice of an *Issue* in accordance with clause 69. Clause 35.1.3 applies to a determination of the Valuer.

- .4 Regardless of the appointment of a Valuer or any other provision of clause 47, if the valuation relates to additional work, the Principal may instruct the Contractor to carry out additional work as *Daywork* and the requirements of Schedule 8 (*Daywork*) apply.

#### **Valuation principles**

- .5 Subject to clause 47.8, the value of additional or increased work is to be determined or assessed as the sum of:
  - .1 the additional reasonable direct cost to the Contractor including labour, *Materials* and plant of the additional or increased work (not including the *Contractor's Margin*);
  - .2 the additional reasonable costs to the Contractor of Subcontractor and Consultant work involved in carrying out the additional or increased work (not including the *Contractor's Margin*); and
  - .3 an additional amount for the *Contractor's Margin*, calculated as the percentage stated in Contract Information item 44 of the total of the costs under clauses 47.5.1 and 47.5.2,
- .6 The value of decreased or omitted work and any reduction in costs under clause 38, is to be determined or assessed as that of work or costs included in the *Contract Price* based on the rates and lump sums in the Contract or, if there are no applicable rates or lump sums in the Contract, on the basis of reasonable rates and prices applying at the close of tenders. The deduction must include a reasonable amount for any time-dependent costs which will not be incurred by the Contractor and profit on the decreased or omitted work.

- .7 Subject to clause 47.8, the value of a claim for unavoidable additional costs (where the Contractor is entitled to make one) is to be determined or assessed as the sum of:
- .1 the value of any additional or increased work necessary and unavoidable to respond to the circumstances that arose, after taking all reasonable steps to minimise the impact of those circumstances; and
  - .2 any other reasonable costs incurred by the Contractor that were necessary and unavoidable to respond to the circumstances that arose, after taking all reasonable steps to minimise the impact of those circumstances (excluding any costs the Contractor would have incurred if the circumstances had not arisen).
- The Contractor is entitled to claim unavoidable additional costs under clauses 8.8, 37.6 and 53.3 when the conditions of those clauses are satisfied.**
- .8 A valuation under clauses 47.5 and 47.7 must not include:
- .1 any costs, losses or expenses attributable to any default or negligence of the Contractor, Subcontractors or Consultants;
  - .2 any amount for costs that the Contractor would have incurred anyway or should reasonably have allowed for at the Date of Contract;
  - .3 any allowance for delay or delay costs; or
  - .4 any amount that the Contractor is not entitled to claim under clause 37.8 or 49.6.
- .9 A valuation under clause 46 must take into account the specific matters required by that clause.
- .10 When a valuation under clause 47 relates to a *Variation* or to any other circumstance where any *Contractual Completion Date* may require adjustment, the applicable extension or reduction of time and any delay costs due are to be determined at the same time and by the same entity (Valuer or Principal, as the case may be) as the valuation.

#### **Application of adjustments**

- .11 The *Contract Price* must be adjusted as determined or assessed under clause 47.

## **48 Variations**

### **Instructing and commencing Variations**

- .1 The Principal may instruct a *Variation* in writing at any time before *Completion* of the whole of the Works (and after *Completion* in accordance with clause 67.1.3) and the Contractor must comply.
- .2 Unless instructed otherwise by the Principal, the Contractor must not start carrying out a *Variation* until its effect on achieving *Completion* and its value have been agreed in writing or, if they have not been agreed, the necessary adjustments have been determined or assessed in accordance with clause 47.
- .3 If requested in writing by the Principal, the Contractor must, within the time specified in the request, advise the Principal of:
  - .1 its price (excluding all costs of delay or disruption) for a proposed *Variation*;
  - .2 the anticipated effect of the proposed *Variation* on achieving *Completion*; and
  - .3 the effect of the proposed *Variation* on any other matter specified by the Principal.
- .4 If the parties have agreed in writing on the effects of a proposed *Variation*, and the Principal instructs the Contractor to carry out the *Variation*, the *Contractual Completion Dates* and the *Contract Price* must be adjusted as agreed.
- .5 If the parties have not agreed in writing on the effects of a proposed *Variation*, the Principal may instruct the *Variation* and then:
  - .1 any consequent adjustment of the *Contract Price* will be determined or assessed in accordance with clause 47; and
  - .2 the Contractor may claim an extension of time or the Principal may assess a reduction in time in accordance with clause 50.

### **Variations proposed by the Contractor**

- .6 The Contractor may make a written proposal for a *Variation* for the Contractor's convenience.
- .7 The Principal may accept the Contractor's proposal but is not obliged to do so. The Principal's acceptance may be subject to conditions, including that the *Variation* is at the Contractor's risk.

If the Principal accepts the Contractor's proposal, the Principal must instruct a *Variation*, stating any conditions, and make any agreed adjustments to the affected *Contractual Completion Dates* and the *Contract Price*.

- .8 If the Contractor considers that a *Variation* is necessary but the Principal has not instructed a *Variation*, the Contractor must notify the Principal within 7 days after the Contractor should reasonably have known that a *Variation* was necessary.
- .9 If the Principal does not agree that a *Variation* is necessary, all issues relating to the claimed *Variation* must be dealt with under clauses 68 to 71.
- .10 The Contractor acknowledges that development of the design by the Contractor does not constitute a *Variation*.

#### **49 Changes to Statutory Requirements**

- .1 If the Contractor becomes aware of changes in *Statutory Requirements* that require a change to work in connection with the Contract (not including changes that the Contractor should reasonably have expected at close of tenders), the Contractor must notify the Principal in writing within 7 days after becoming aware of the changes in *Statutory Requirements*. The notification must include details of:
  - .1 the changes to *Statutory Requirements*;
  - .2 why the changes to *Statutory Requirements* should not reasonably have been expected by the Contractor at close of tenders;
  - .3 the changes to work in connection with the Contract that the Contractor considers necessary;
  - .4 any delays in achieving *Completion*;
  - .5 any additional work and resources involved and the Contractor's estimate of its entitlement to any adjustment to the *Contract Price*; and
  - .6 any other matters the Contractor considers relevant.
- .2 The Principal may request the Contractor to provide further information about the matters notified under clause 49.1.
- .3 After considering the Contractor's notification under clause 49.1, the Principal must notify the Contractor whether it agrees with the Contractor's contentions under clause 49.1.1 and 49.1.2 as to the change in *Statutory Requirements* and whether or not the Contractor should reasonably have expected them.
- .4 If the Principal agrees that there are changes in *Statutory Requirements* that require changes to the work in connection with the Contract (that the Contractor should not reasonably have expected at the close of tenders) and if the Contractor has given the notice required by clause 49.1 then:
  - .1 the parties may agree in writing as to the effects of the change in *Statutory Requirements* (including any *Variation* necessary), and any affected *Contractual Completion Dates* and the *Contract Price* must be adjusted as agreed; and
  - .2 if the parties are unable to agree in writing as to the effects of the unexpected change in *Statutory Requirements* the Principal may instruct a *Variation*, and clause 48 applies to the *Variation*.
  - .3 in addition to the entitlements the Contractor has as a result of any *Variation* instructed under clause 49.4.2, the Contractor may also claim:
    - .1 an extension of time in accordance with clause 50 and any consequent delay costs due under clause 51, for any delay incurred by it as a result of the unexpected change in *Statutory Requirements* that has not been taken into account in any extension of time granted as a result of the *Variation*; and
    - .2 an increase in the *Contract Price* to be valued in accordance with clause 47 for unavoidable additional costs incurred by the Contractor as a result of the unexpected change in *Statutory Requirements*, but excluding any additional or increased work included in the *Variation*; or
  - .4 if no *Variation* is instructed, the Contractor may claim:
    - .1 an extension of time in accordance with clause 50 and consequent delay costs due under clause 51, subject to the requirements of those clauses; and

- .2 an increase in the *Contract Price* to be valued in accordance with clause 47 for any unavoidable additional costs incurred by the Contractor because of the unexpected change in *Statutory Requirements*.
- .5 If the Principal does not agree with the Contractor's contentions under clauses 49.1.1 and 49.1.2, the Contractor may notify an *Issue* under clause 69.
- .6 Costs and delay incurred by the Contractor as a result of changes in *Statutory Requirements* before it gave the notice required by clause 49.1 must not be counted in any valuation or extension of time.

## 50 Changes to Contractual Completion Dates

The Contractor is responsible for managing progress to achieve *Contractual Completion Dates* for *Milestones* (if any) and for the Works. The initial *Contractual Completion Dates* are stated in the *Contract Information* and these may be adjusted under the Contract.

Clause 50 sets out the conditions under which the Contractor may claim an extension of time for a delay event. It also entitles the Principal to extend time for any reason, at its sole discretion.

### Extensions of time

- .1 The Contractor is entitled to an extension of time to any *Contractual Completion Date*, for the number of days assessed by the Principal, if the Contractor satisfies the Principal that:
  - .1 the Contractor is or will be delayed in achieving *Completion* by a cause beyond the control of the Contractor which occurs on or before the *Contractual Completion Date*, including an act, default or omission of the Principal, but not including any cause which the Contract expressly states is at the Contractor's risk or for which the Contract expressly precludes a claim for extension of time; and
  - .2 the Contractor has given the Principal the notices and other information required by clauses 50.3 and 50.4.

*Refer to clause 22 for Contract Program requirements*
- .2 The Contractor must take all reasonable steps to avoid delay and its effects.
- .3 If the Contractor wishes to claim an extension of time for any delay, it must submit to the Principal:
  - .1 an initial notice within 7 days after the start of the delay, setting out the cause of the delay, relevant facts, and the expected effect on any *Contractual Completion Dates*;
  - .2 a claim within 28 days after the start of the delay, setting out the extension of time claimed and other information sufficient for the Principal to assess the claim; and
  - .3 updates to that claim every subsequent 28 days while the delay continues.
- .4 With every claim made under clause 50.3.2 or 50.3.3, the Contractor must submit an updated *Contract Program* which shows the effects of the delay on the critical path and *Completion*.
- .5 The Contractor is only entitled to an extension of time for delays occurring on days on which the Contractor usually carries out work for the Contract.
- .6 The Contractor is not entitled to an extension of time for any period when the Contractor:
  - .1 is delayed by multiple causes, where at least one of those causes is a cause that does not give an entitlement to an extension of time under clause 50.1.1; or
  - .2 would have been delayed anyway by another delay (or cause of delay) for which the Contractor has no entitlement to an extension of time (regardless of which delay commenced first, or the time of commencement of the respective delays).
- .7 The Contractor is not entitled to an extension of time for any days which are expressly not to be counted under clause 37.8 or 49.6.
- .8 Without limiting clause 50.3, where the initial notice required by clause 50.3.1 is submitted later than 7 days after the start of the delay, any entitlement to an extension of time applies only to the period of delay assessed from the date which is 7 days prior to the date of submission of the initial notice to the Principal.
- .9 The Principal may, in its absolute discretion but without any obligation to do so, extend any *Contractual Completion Date* at any time and for any reason, whether or not the Contractor has claimed an extension of time.

### **Reductions in time**

- .10 If a *Variation* or resolution of a *Fault* under clause 38 leads to less time being required for *Completion*, the Principal may determine a reasonable adjustment to the affected *Contractual Completion Date*.

### **Adjustment to Contractual Completion Dates**

- .11 The relevant *Contractual Completion Dates* must be adjusted to account for any extension or reduction of time assessed under clause 50.

## **51 Delay costs and liquidated damages**

### **Delay costs**

- .1 The Contractor is entitled to delay costs only for delay or disruption to the whole of the Works caused by:
- .1 a *Variation* (other than a *Variation* for the Contractor's convenience);
  - .2 failure to give the Contractor access to the Site within the time stated in Contract Information item 13;
  - .3 subject to clause 8.9, an instruction under clause 8.8;
  - .4 adverse *Site Conditions* that differ materially from those the Contractor should reasonably have expected at the close of tenders (subject to clause 37.8 and Contract Information item 37);
  - .5 resolution of a *Fault* notified in accordance with clause 38.1;
  - .6 changes in *Statutory Requirements* that the Contractor should not reasonably have expected at the close of tenders and that require changes to work in connection with the Contract (subject to clause 49.5);
  - .7 a suspension instruction under clause 53 if the need for the suspension arises from the Principal's act or omission; or
  - .8 a breach of the Contract by the Principal.
- .2 Delay costs are calculated at the applicable rate in Contract Information item 49A for the number of working days by which the *Contractual Completion Date* for the whole of the Works is extended because of a cause (or combination of causes) listed in clause 51.1, subject to the limitations in clause 37.8, 38.4 and 49.6. A working day means a working day as described in Contract Information item 18.
- .3 Notwithstanding clause 51.2, the Contractor is not entitled to delay costs for any period when the Contractor:
- .1 is delayed by multiple causes, where at least one of those causes is not listed in clause 51.1; or
  - .2 would have been delayed anyway by another delay (or cause of delay) for which the Contractor has no entitlement to delay costs (regardless of which delay commenced first, or the time of commencement of the respective delays).
- .4 The applicable rate of delay costs will be reduced where any part of the Works is being used or occupied prior to *Completion* under clause 64. The reduced rate of delay costs will be in the same proportion to the original rate as the value of the remaining work is to the *Contract Price* (as adjusted to the time of occupation). The value of the remaining work will be assessed by the Principal, acting reasonably.
- .5 The Contractor has no remedy or entitlement connected with delay or disruption other than:
- .1 the amounts to be paid under clause 51;
  - .2 an extension of time to any *Contractual Completion Date* to which it is entitled under clauses 48 or 50; or
  - .3 any remedy it may have under clause 74 or 75.

### **Liquidated damages**

- .6 If Contract Information item 49B states that liquidated damages do not apply, the Principal may claim general damages if the Contractor fails to achieve *Completion* of the Works or any Milestone by its *Contractual Completion Date*.

- .7 If Contract Information item 49B states that liquidated damages apply and the Contractor fails to achieve *Completion* of the Works or any Milestone by a *Contractual Completion Date* to which liquidated damages apply, the Contractor will be liable to pay the Principal liquidated damages at the rate stated in Contract Information item 49B, for every day after the *Contractual Completion Date*, up to and including the *Actual Completion Date*.
- .8 If, however, the Contract is terminated before the Contractor achieves *Completion*, any liquidated damages will apply only up to the date of termination of the Contract.
- .9 A failure by the Principal at any time to demand payment or to deduct, withhold or set-off the liquidated damages does not amount to a waiver of, or otherwise affect, the Principal's rights and entitlements.
- .10 If any *Contractual Completion Date* is extended after the Contractor has paid or the Principal has deducted liquidated damages, the Principal must re-pay any excess liquidated damages to the Contractor, subject to any right of set-off.
- .11 The applicable rate of liquidated damages will be reduced where any part of the Works is being used or occupied prior to *Completion*, under clause 64. The reduced rate of liquidated damages will be in the same proportion to the original rate as the value of the remaining work is to the *Contract Price* (as adjusted to the time of occupation). The value of the remaining work will be assessed by the Principal, acting reasonably.
- .12 The Contractor acknowledges that the rates for liquidated damages in Contract Information item 49B are a genuine pre-estimate of the Principal's loss and agrees that it will not challenge any rate for liquidated damages as being in the nature of a penalty.

## **52 Acceleration**

- .1 The Principal may issue an *Acceleration Notice* instructing the Contractor to accelerate progress of the Works. The Contractor must comply unless, before taking any steps to accelerate, it demonstrates to the satisfaction of the Principal that the acceleration instructed cannot reasonably be achieved.
- .2 If requested in writing by the Principal, the Contractor must, within the time specified in the request, advise the Principal of:
  - .1 its price (excluding all costs of delay or disruption) for a proposed acceleration; and
  - .2 the effect of a proposed acceleration on any other matter specified by the Principal.
- .3 Whenever possible, the parties must agree on the steps to be taken, and the basis for reimbursing the Contractor's costs for acceleration, before the Contractor takes those steps.
- .4 If the Contractor achieves the acceleration instructed, taking into account any relevant extension of time that has been given, the *Contract Price* must be adjusted as agreed, or if not agreed, by a valuation made in accordance with clause 47.

## **53 Principal's suspension**

- .1 The Principal may instruct the Contractor to suspend progress of the Works, and the Contractor must comply with that instruction.
- .2 The Contractor must resume carrying out the Works when instructed by the Principal.
- .3 If the need for the suspension arises from the Principal's act or omission, and causes the Contractor delay, or unavoidable costs, additional to what the Contractor would have incurred had the suspension not been instructed, the Contractor may claim:
  - .1 an extension of time in accordance with clause 50, without the Contractor meeting the preconditions required by clause 50 other than provision of an updated *Contract Program* demonstrating the delays caused by the suspension;
  - .2 any consequent delay costs due under clause 51; and/or
  - .3 an increase in the *Contract Price* to be valued in accordance with clause 47, with no double counting of delay costs.
- .4 The Contractor has no other remedy or entitlement in connection with a suspension by the Principal.

## 54 Contractor's suspension

- .1 If the Contractor suspends work at any time in accordance with the *Building and Construction Industry Security of Payment Act 1999* (NSW), it may be entitled to an extension of time under clause 50, but despite clause 51, it will not be entitled to any payment for delay or disruption.
- .2 Clause 54 is not intended to limit any rights of the Contractor under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

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# Payment

## 55 The Contract Price

- .1 The *Contract Price* (at the Date of Contract), and the basis of calculating it, are stated in Contract Information item 40.
- .2 If stated in Contract Information item 41, the *Contract Price* (and the rates and/or lump sums it includes) will be adjusted for rise or fall in costs, on the terms set out in Schedule 7 (Costs Adjustment Formula).

### Schedules of Rates

- .3 If Contract Information item 40 states that a *Schedule of Rates* is the basis of calculation of the *Contract Price*, then without limiting clause 8:
  - .1 the *Contract Price* is a notional price only, determined by adding together the products of the stated quantity for each item and its rate;
  - .2 all quantities are estimated, and none are guaranteed;
  - .3 some of the items may be provisional (that is, they may not be required at all); and
  - .4 the Contractor will be paid at the applicable rate stated in the *Schedule of Rates* for the measured quantity of work actually carried out in accordance with the Contract.

### Provisional Sums

- .4 If Contract Information item 42 states that the *Contract Price* includes a *Provisional Sum*, then:
  - .1 the Contractor must not carry out the work specified against that *Provisional Sum* unless instructed by the Principal;
  - .2 if the Principal does not instruct the Contractor to carry out the work, the *Provisional Sum* for that work must be deducted from the *Contract Price*;
  - .3 if requested by the Principal, the Contractor must, to the extent possible taking into account the nature of the work, the timing of the request and within the time specified by the Principal, confirm in writing:
    - .1 the work and items necessary to properly carry out and complete the work specified against the *Provisional Sum*;
    - .2 the Contractor's reasonable estimated price to carry out the work; and
    - .3 the effect of the proposed work on any other matter specified by the Principal;
  - .4 if the Principal instructs the Contractor to carry out the work:
    - .1 the Contractor must comply with the instruction;
    - .2 the *Contract Price* will be adjusted by deducting the *Provisional Sum* from the *Contract Price* and adding to the *Contract Price* the following actual direct costs reasonably incurred by the Contractor for the works specified against the *Provisional Sum* and instructed by the Principal, as assessed by the Principal acting reasonably and without double counting:
      - .1 additional labour, *Materials* and plant;
      - .2 mobilisation and demobilisation of any additional construction plant and vehicles (where brought to Site only for the *Provisional Sum* work instructed by the Principal);
      - .3 additional supervisory and administrative staff (where brought to Site only for the *Provisional Sum* work instructed by the Principal);
      - .4 work carried out by a *Subcontractor*, *Supplier* or *Consultant* (excluding any amount payable due to default or negligence on their part or that of the

Contractor in the performance of the *Provisional Sum* work instructed by the Principal),

plus the *Provisional Sum Margin*; and

- .3 the costs of supervisory, technical and administrative personnel who are already engaged (including off Site) by the Contractor to carry out the Works and who are engaged to carry out the *Provisional Sum* work will not be included in the Principal's assessment of the cost of the *Provisional Sum* work for the purpose of adjusting the *Contract Price*.

### **Provisional Quantities**

- .5 If the Principal instructs the Contractor to carry out work which is the subject of a *Provisional Quantity* and that instruction requires the Contractor to carry out a greater or lesser quantity of work than the *Provisional Quantity*, the *Contract Price* must be adjusted by the amount calculated by multiplying the contract rate applicable to the *Provisional Quantity* work by the difference between the *Provisional Quantity* and the quantity of work carried out.

## **56 Goods and Services Tax (GST)**

- .1 Unless otherwise expressly stated in the Contract, all prices, rates or other sums payable in accordance with the Contract ~~include~~ **exclude** an amount for GST.
- .2 The Principal will issue a tax invoice for each taxable supply it makes to the Contractor.
- .3 ~~The Principal will issue to the Contractor a Recipient Created Tax Invoice (RCTI) for each taxable supply (other than an excluded supply) made by the Contractor to the Principal, and will issue an adjustment note for any adjustment event. The parties may agree in writing from time to time which supplies are excluded supplies.~~
- .4 ~~The Contractor must not issue a tax invoice in respect of any supply it makes to the Principal, other than an excluded supply. The Contractor must give the Principal a tax invoice for an excluded supply at or before the time the Contractor makes a *Payment Claim* or otherwise invoices the Principal for that supply.~~
- .5 Each party must be registered for GST and must notify the other party if it ceases to be registered for GST ~~or to comply with any of the requirements of any taxation ruling issued by a taxation authority relating to the creation of RCTIs.~~

### **Reimbursable expenses**

- .6 If the Contract requires a party to pay for, reimburse or contribute to any expense, loss or outgoing ("reimbursable expense") suffered or incurred by the other party, the amount required to be paid, reimbursed or contributed by the first party must be the sum of:
  - .1 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
  - .2 to the extent that the other party's recovery from the first party is consideration for a taxable supply to the first party, any GST payable in respect of that supply.

## **57 Prepayment**

*Prepayment* is an advance payment against the *Contract Price* which provides early cash flow to the Contractor. The *Prepayment* is repaid by the Contractor progressively by deductions from amounts payable under the Contract. *Prepayment* is secured by *Undertakings* provided to the Principal in respect of the *Prepayment*. *Prepayment* may be utilised for any purpose related to the Contract.

- .1 The Contractor may claim *Prepayment*, as an advance payment against the *Contract Price* (but not as a *Payment Claim*), at any time before achieving *Completion* of the whole of the Works if all the following apply:
  - .1 the total amount claimed for *Prepayment* is no more than the amount stated in Contract Information item 45;
  - .2 the *Prepayment* does not exceed the remaining balance of the *Contract Price* less any amount that the Principal considers payable by the Contractor to the Principal;
  - .3 no more than one-third of the *Prepayment* amount is retained by the Contractor and the balance is assigned directly to Subcontractors, Suppliers and Consultants in the proportions notified to the Principal;



- .4 the Contractor has established to the Principal's satisfaction that the *Prepayment* will be utilised for a purpose related to the Contract;
  - .5 the Contractor has provided *Undertakings* to the Principal for the amounts of the *Prepayment*; and
  - .6 the Contractor has assigned to Subcontractors, Suppliers and Consultants their respective shares of the *Prepayment* by effective written assignments, and has notified the Principal of the assignments, including the amounts assigned to each Subcontractor.
- .2 The Principal must pay the amount claimed within 14 days after the Contractor provides evidence that all the conditions in clause 57.1 have been met.
  - .3 The Contractor must repay the *Prepayment* by way of progressive deductions from payments otherwise due under the Contract.
  - .4 The Principal must return *Undertakings* provided for *Prepayment* when the amount of the *Prepayment* has been fully repaid.
  - .5 The Principal may have recourse to the *Undertakings* provided for *Prepayment* if the *Prepayment* has not been fully repaid and:
    - .1 the unpaid balance of the *Contract Price* is insufficient to cover the outstanding balance of the *Prepayment*;
    - .2 the Contract is terminated; or
    - .3 the Contractor's employment under the Contract is terminated.

## 58 Payment Claims

The Contract allows for progress payments by regular (usually monthly) payments or payments based on *Milestone Completion* or both.

- .1 Subject to clauses 58.2 and 58.3, the Contractor must submit a *Payment Claim* each month, on the date in the month specified in Contract Information item 46A, for work carried out up to that date.
  - .2 For *Milestones* for which Contract Information item 46B states that payments will be made after they reach *Completion*, each *Payment Claim* may only include the value of work in those *Milestones* if they reached *Completion* before the *Milestones' Contractual Completion Dates*.
  - .3 The Contractor must submit the *Final Payment Claim* within the time specified in clause 61.
  - .4 *Payment Claims* must be in the form of, and include all of the information required by, Schedule 3 (Payment Claim Worksheet) or in another form agreed by the Principal.
  - .5 Every *Payment Claim* must:
    - .1 identify the work and *Materials* to which the *Payment Claim* relates;
    - .2 state the value of that work and those *Materials*;
    - .3 identify and state the amount the Contractor claims for any other *Claim* that the Principal has agreed or is required to pay under clause 68 or any other provision of the Contract;
    - .4 state the amount of interest, if any, that the Contractor claims under clause 62; and
    - .5 state the *Claimed Amount*, after allowing for retention of the *Completion Amount* specified in clause 60 and for payments already made.
  - .6 Every *Payment Claim* must be accompanied by:
    - .1 completed and true Contractor's Statement and Supporting Statement in the form of Schedule 6 executed on the date of the *Payment Claim*;
    - .2 all relevant calculation;
    - .3 all relevant *Conformance Records*; and
    - .4 any other information specified in the Contract.
- ### Unincorporated Materials
- .7 *Payment Claims* must not include any amount for *Materials* intended for incorporation in the Works but not yet incorporated unless all of the following conditions are satisfied:
    - .1 the Principal has agreed in writing to pay the Contractor for the unincorporated *Materials*;
    - .2 where the value of the unincorporated *Materials* is greater than \$100,000, the Contractor has provided:

- .1 an *Undertaking* equal to the value of the unincorporated *Materials* (to be returned when the *Materials* are incorporated into the Works); and
- .2 a statement in the terms in Schedule 11;
- .3 the Contractor provides evidence no later than 14 days before submitting the *Payment Claim* that:
  - .1 the unincorporated *Materials* are, or upon payment will become, the property of the Principal free of any *Encumbrance*;
  - .2 the unincorporated *Materials* are clearly identified as the property of the Principal and are insured for their full value;
- .4 upon the *Materials* becoming the property of the Principal, they are entrusted to the Contractor for the purpose of carrying out the Works and the Contractor is solely liable for their care; and
- .5 for any unincorporated *Materials* imported or to be imported into Australia, the Contractor has given the Principal a clean on board bill of lading drawn or endorsed to the order of the Principal, appropriate insurance certificates and a Customs invoice.
- .8 The Contractor warrants that no *Encumbrance* exists over any *Materials* paid for by the Principal or incorporated into the Works.
- .9 If the Contract or the Contractor's employment under the Contract is terminated by the Principal, the Contractor must ensure that, in respect of any unincorporated *Materials* for which payment has been made or which have been appropriated to the Contract, the Principal may enter upon any premises where the *Materials* are stored and take possession of these *Materials*.

## 59 Payments

- .1 Within 10 *Business Days* after being served a *Payment Claim* by the Contractor, the Principal must provide a *Payment Schedule* to the Contractor that:
  - .1 identifies the *Payment Claim* to which it relates;
  - .2 indicates the amount the Principal proposes to pay, as the *Scheduled Amount*; and
  - .3 if the *Scheduled Amount* is less than the *Claimed Amount*, provides reasons explaining why it is less and why any money is being withheld. Reasons why the *Scheduled Amount* is less than the *Claimed Amount* may include failure by the Contractor to comply with any outstanding obligations under:
    - .1 clause 33 (Undertakings);
    - .2 clause 27 (Insurances);
    - .3 clause 28 (Subcontractor relationships) and Schedule 17 (Subcontractors and Suppliers Proof of Payment Process);
    - .4 clause 57 (Prepayment);
    - .5 clause 58.6.1(Contractor's Statement and Supporting Statement (Schedule 6)).
    - .6 clause 58.6.2 to 58.6.4 (other items to accompany a *Payment Claim*);
    - .7 clause 58.9 (Unfixed Materials); and
    - .8 any provision of the Contract requiring the Contractor to submit anything or provide proof of any state of affairs at the time of a *Payment Claim*.
  - .4 ***The Contractor must, upon receipt from the Principal of a Payment Schedule, submit to the Principal a tax invoice. The tax invoice shall be for the Scheduled Amount identified in the Payment Schedule excluding GST; the GST component; and the total Scheduled Amount including the GST component.***
- .2 The Principal must pay the Contractor the *Scheduled Amount* within 15 *Business Days* after being served with the *Payment Claim*.
- .3 All payments to the Contractor must be made by electronic funds transfer to the Contractor's account notified to the Principal for that purpose. Changes to the Contractor's account details must be notified in accordance with protocols established by the Principal.
- .4 Payment by the Principal is payment on account only and is not evidence that the Principal accepts the value, quantity or quality of work or that the Contractor has complied with the Contract or that the Contractor has any particular entitlement.

## 60 Completion Amount

The *Completion Amount* is intended to provide an incentive; the earlier the Contractor achieves defect-free *Completion* of the whole of the Works, the earlier the *Completion Amount* is paid.

- .1 If Contract Information item 47 specifies a *Completion Amount*, the Contractor may claim it in the next *Payment Claim* after *Completion* of the whole of the Works or, if applicable, a specified *Milestone*, subject to the Principal's right to set-off under clause 63.
- .2 The Principal will retain the *Completion Amount* from payments when the amount paid to the Contractor exceeds 50% of the *Contract Price* at the Date of Contract. The amount retained against each payment must not exceed 50% of the value of the payment.
- .3 The Principal will own any interest earned on the monies retained for the *Completion Amount*.

## 61 Final payment

Clause 61 contains provisions which apply to the Contractor's *Final Payment Claim* and the Principal's *Final Payment Schedule*.

- .1 To the extent permitted by law, the Contractor must submit a *Final Payment Claim* within 13 weeks after achieving *Completion* of the whole of the Works. The *Final Payment Claim* must include any *Claim* not previously included in a *Payment Claim*. Any *Claim* not submitted before or with the *Final Payment Claim* is barred.
- .2 Within 10 *Business Days* after receiving the *Final Payment Claim* or, if the Contractor has not submitted a *Final Payment Claim*, within 15 weeks after the whole of the Works reaches *Completion*, the Principal must provide a *Final Payment Schedule* to the Contractor.
- .3 If the Principal proposes to make no payment to the Contractor and claims that the Contractor must pay the Principal money, the *Final Payment Schedule* must state the amount that the Principal claims the Contractor must pay, and include reasons and particulars supporting that claim.
- .4 Payments identified in the *Final Payment Schedule* as due from the Contractor to the Principal must be made within 14 days after the *Final Payment Schedule* is provided. Payments due from the Principal to the Contractor must be made in accordance with clause 59.
- .5 The issue of the *Final Payment Schedule* is conclusive evidence that all necessary adjustments to the *Contract Price* have been made and all entitlements of the Contractor have been met, except for those required by:
  - .1 arithmetical error; or
  - .2 resolution of:
    - .1 any *Claim* made in accordance with clause 61.1;
    - .2 any *Issue* properly notified under clause 69 prior to the *Final Payment Claim*; or
    - .3 any *Issue* arising out of the *Final Payment Schedule*, but only if it is notified to the Principal within 28 days after the date of the *Final Payment Schedule*.
  - .3 clause 61.6.
- .6 The Contractor's liability under the Contract or otherwise is not affected by the issue of the *Final Payment Schedule*. The Contractor's liability continues until any limitation period under statute expires.

## 62 Interest on late payments

- .1 A party which fails to make a payment within the time specified in the Contract must pay interest to the other party on the unpaid amount, at the rate stated in Contract Information item 48, for the period the payment is late.

## 63 Set-off

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

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# Completion

## 64 Early use

- .1 Before the Contractor achieves *Completion*, the Principal, or anyone authorised by the Principal, may use or occupy any part of the Works which is sufficiently complete and then:
  - .1 the Contractor's responsibilities are not affected, except if they are reduced under clauses 26.3 or 26.7 or if the Principal, or anyone authorised by the Principal to use or occupy any part of the Works, causes the Contractor's work to be hindered; and
  - .2 the Principal becomes responsible for any additional insurance required.
- .2 If the Principal requires use or occupation of any part of the Works before the Contractor achieves *Completion*, the Principal must give not less than 21 days' notice in writing to the Contractor and must specify those parts to be used or occupied.
- .3 The Contractor must assist and cooperate with those using or occupying the Works.
- .4 No later than 21 days after receipt of a notice under clause 64.2, the Contractor must provide to the Principal all the documents and other things listed in the definition of *Completion* that are relevant to the parts of the Works to be used or occupied.

## 65 Completion

The Contract requires defect-free *Completion*. *Completion* applies to any *Milestone* as well as to the whole of the Works.

- .1 The Contractor must achieve *Completion* by the *Contractual Completion Date*.
- .2 When the parties, each acting reasonably, agree that *Completion* has been achieved, the Principal must give the Contractor a notice stating the *Actual Completion Date*.

## 66 Close-out workshop

The close-out workshop is an opportunity to review the management of the Contract. It is also used to collect and provide feedback to the parties to enable them to improve the overall communication and management process for any possible future contract.

- .1 The Principal must convene a close-out workshop within 21 days after *Completion* of the whole of the Works.
- .2 The parties must attend the close-out workshop and must jointly decide who else will attend. Clause 6.4 applies to the costs of the workshop.

## 67 Defects after Completion

- .1 At any time after *Completion*:
  - .1 the Principal may instruct the Contractor to make good any *Defect* within the time specified in a *Defect Notice*;
  - .2 if the Contractor fails to make good the *Defect* in the time specified in the *Defect Notice*, the provisions of clauses 45.3 and 45.4 will apply; and
  - .3 the Principal may instruct a *Variation* in connection with any *Defect* instead of requiring the *Defect* to be made good under clause 67.1.1.
- .2 Clause 67 does not reduce the Contractor's liability, whether arising under the Contract or otherwise. The Contractor's liability continues until any limitation period under statute expires.
- .3 Clause 67 does not affect the Principal's rights under clause 46.

# Claim and Issue resolution

This section provides a step-by-step procedure for handling *Claims* and *Issues*.

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## Claim resolution

### 68 Contractor's Claims

- .1 If the Contractor makes:
    - .1 a *Claim* under a provision of the Contract that does not specify a time for making the *Claim*; or
    - .2 a *Claim* in connection with the Contract or the Works, but not under a provision of the Contract,  
the *Claim* must be submitted within 28 days after the later of the start of the event giving rise to the *Claim*; and the time the event should have become known to the Contractor, with reasonable diligence on its part.
  - .2 If the Contractor fails to make a *Claim* within the applicable specified time, the Contractor will not be entitled to interest on any amount paid in relation to the *Claim* for the period before the Contractor made the *Claim*. However, any *Claim* not made within the time specified in clause 61.1 is barred.
  - .3 Each *Claim* must include information sufficient for the Principal to assess the *Claim*, including the factual and legal basis, detailed quantification and responses by the Contractor to the questions set out in paragraphs 1.1.1 and 1.1.2 of Schedule 5 (Expert Determination Procedure).
  - .4 The Principal must assess a *Claim*, and reach agreement with the Contractor or reject, within 28 days, or other agreed period, after receiving the information required under clause 68.3. The Principal must provide an outline in writing for the basis of assessment or rejection, as relevant.
  - .5 If the Principal agrees to a *Claim* involving money, the Contractor may claim the agreed amount only by including it in a *Payment Claim*.
  - .6 If a *Claim* is rejected or not agreed within the period referred to in clause 68.4 it will become an *Unresolved Claim*, and the Contractor may notify the Principal of an *Issue* under clause 69.1.
  - .7 The provisions of clauses 68.2 to 68.6 apply generally to all *Claims*, whether made under clause 68 or under another provision of the Contract, unless determination of the *Claim* is regulated by a separate procedure under any applicable legislation.
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## Issue resolution

Generally, the aim of the Contract is for the parties to resolve matters through discussions as soon as possible and within the times specified. Further steps are only needed if the representatives of the parties who are involved in day to day management of the Contract are unable to resolve matters themselves.

### 69 Notification of Issue

- .1 The Contractor may dispute an assessment, determination or instruction of the Principal, or seek resolution of an *Unresolved Claim*, by giving notice to the Principal (with a copy to the Principal's senior executive named in Contract Information item 7) of an *Issue* within 28 days after notification of the assessment, determination or instruction, or within 28 days after it becomes an *Unresolved Claim*. The Contractor's notice to the Principal must include a statement of:
  - .1 the basis for the Contractor disputing the assessment, determination or instruction of the Principal with reasons; and
  - .2 where the Contractor's position with regard to the *Claim* has changed, the reasons for the change in position.
- .2 Either party may give notice to the other (with a copy to that party's senior executive) of an *Issue* (excluding an *Issue* referred to in clause 69.1, but including a claim by the Principal) about the meaning or effect of the Contract, or about any matter connected with the Contract, within 28 days after becoming aware of the *Issue*. The notice must include a statement outlining:

- .1 the basis for notifying the *Issue* with reasons; and
- .2 the party's position with regard to the *Issue* and where the position has changed, the reasons for the change in position
- .3 Subject to clause 69.6, the parties must follow the *Issue* resolution procedures in clauses 69, 70 and 71 before either commences litigation or takes similar action.
- .4 If notice of an *Issue* under clause 69.1 or 69.2 is given outside the time prescribed by those clauses, the party giving the notice is not entitled to claim or recover interest for the period before the notice was given. This clause does not affect the absolute time bar in clause 61.
- .5 The Principal is not liable to pay damages (whether in contract, for negligence or otherwise) for making an incorrect assessment, determination or instruction.
- .6 The *Issue* resolution procedure in clauses 69, 70 and 71 does not prevent a party from seeking an urgent declaration or injunction from a court.

## **70 Resolution by senior executives**

- .1 If a party gives notice of an *Issue* under clause 69, the senior executives named in Contract Information items 7 and 11 must promptly confer to try to resolve the *Issue*.
- .2 The parties may agree at any time after notice of an *Issue* is given under clause 69 to engage in an Alternative Dispute Resolution Procedure in respect of that *Issue*. An agreement to engage in an Alternative Dispute Resolution Procedure must specify:
  - .1 whether the decision, finding, determination, result or agreed outcome of the *Alternative Dispute Resolution Procedure* will be final and binding on the parties within any agreed monetary limit;
  - .2 that the *Alternative Dispute Resolution Procedure* may, by agreement between the parties, be varied or extended from time to time to include additional or fewer processes; or
  - .3 that if the *Alternative Dispute Resolution Procedure* has not produced a decision, finding, determination, result or agreed outcome of the *Issue* in question within a specified period of time, either party may commence court proceedings in respect of the *Issue*.
- .3 If the parties have agreed that the Alternative Dispute Resolution Procedure is to be final and binding on the parties to some extent and that procedure produces a decision, finding, determination, result or agreed outcome of the *Issue*, neither party is entitled to commence, conduct or continue court proceedings in respect of that *Issue* to that extent.
- .4 If the Alternative Dispute Resolution Procedure engaged by the parties under clause 70.2 is Expert Determination then unless otherwise agreed, clause 71 will apply to the Expert Determination.
- .5 If the parties, within 28 days after a notice of an *Issue* is given under clause 69, have not agreed to engage in an Alternative Dispute Resolution Procedure under clause 70.2, then the parties will be deemed to have agreed to engage in Expert Determination under clause 71.

## **71 Expert Determination**

- .1 The representative of the Principal for the purposes of clause 71 is the person named in Contract Information item 52. This person may differ from the Principal's Authorised Person.
- .2 If an *Issue* is to be referred to *Expert Determination* under clause 70, the parties must endeavour to agree on the *Expert* to be engaged. If they cannot agree within 28 days after having agreed to engage in Expert Determination, in accordance with clause 70.5 or as a part of *Alternative Dispute Resolution Procedure*, the *Expert* will be nominated (on the application of either party) by the person named in Contract Information item 53. That person must not nominate:
  - .1 an employee of the Principal or the Contractor;
  - .2 a person who has been connected with the Works or the Contract; or
  - .3 a person who the Principal and the Contractor have already considered and not been able to agree on.
- .3 When the person to be the *Expert* has been agreed or nominated, the Principal, on behalf of both parties, must engage the *Expert* by a letter of engagement (with a copy to the Contractor) that sets out:
  - .1 the *Issues* referred to the *Expert* for determination;

- .2 the *Expert's* fees;
  - .3 the procedure for *Expert Determination* in Schedule 5 (*Expert Determination Procedure*); and
  - .4 any other matters which are relevant to the engagement.
- .4 The Principal and the Contractor must share equally the *Expert's* fees and out-of-pocket expenses for the determination, and bear their own costs.
  - .5 The procedure for *Expert Determination* is set out in Schedule 5 (*Expert Determination Procedure*).
  - .6 In response to any *Issue* referred to the *Expert* by a party, the other party may raise any defence, set-off or cross-claim.
  - .7 Subject to clauses 71.8 and 71.9, the parties must treat each determination of an *Expert* as final and binding and a party that owes money to the other pursuant to the determination must pay that amount to the other party within 28 days after receiving the determination.
  - .8 Neither party may commence litigation in respect of the matters determined by the *Expert* unless the determination:
    - .1 does not involve paying a sum of money; or
    - .2 requires one party to pay the other an amount in excess of the amount stated in Contract Information item 54, calculated without having regard to:
      - .1 any interest that may be payable; and
      - .2 any amount that has been paid pursuant to the *Building and Construction Industry Security of Payment Act 1999*.
  - .9 Neither party may commence litigation in respect of the matters determined by the *Expert* unless they do so within 56 days after receiving the determination.

## **72 Parties to perform the Contract**

- .1 The parties must continue to perform their obligations under the Contract at all times, regardless of any *Claim* or *Issue* or the conduct of any *Issue* resolution procedures under clauses 69 to 71.

# Termination

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## Termination

### 73 Termination for Contractor's Default or Insolvency

- .1 The Principal may terminate the Contractor's employment under the Contract for *Contractor's Default* or *Contractor's Insolvency* by giving notice in accordance with clause 73.
- .2 Nothing in clause 73 affects or negates the Principal's common law rights to terminate or for damages.
- .3 In the case of *Contractor's Default*, the Principal must first give the Contractor notice that it has 7 days after receipt of that notice to remedy the *Contractor's Default*.
- .4 If the Contractor fails to:
  - .1 give the Principal a notice containing clear evidence that it has remedied a *Contractor's Default*; or
  - .2 propose steps reasonably acceptable to the Principal to remedy the *Contractor's Default*,the Principal may give the Contractor a notice terminating its employment under the Contract.

*If a right to terminate exists at common law, a notice to terminate at common law may be given without first giving notice to remedy a Contractor's Default.*
- .5 In the case of *Contractor's Insolvency*, the Principal may give the Contractor a notice terminating its employment under the Contract.
- .6 If the Principal terminates the Contractor's employment under clause 73 it may, at its sole discretion, employ others to complete the Works and all the following will then apply:
  - .1 The Contractor must leave the Site as soon as reasonably practicable and remove all *Temporary Work* and *Materials* it has brought onto the Site, apart from any *Temporary Work* and *Materials* identified by the Principal as being necessary to have the Works completed.
  - .2 The Contractor must assign to the Principal the Contractor's rights and benefits in all its contracts and agreements in connection with the Works, warranties and unconditional undertakings, bank guarantees, insurance bonds, other security of a similar nature or purpose and retention held by the Contractor, with effect from the date of termination of its employment under the Contract.
  - .3 The Contractor must consent to a novation to the Principal or its nominee of all Subcontracts and its other contracts concerning the Works, as required by the Principal. The Principal may at any time make payments and may deduct, withhold or set-off any amounts to be paid under the novated contracts from amounts otherwise payable to the Contractor or from any *Undertakings* given on the Contractor's behalf.
  - .4 The Contractor must do everything and sign all documents necessary to give effect to clause 73, and it irrevocably appoints the Principal as its attorney to do this in its name if it fails to do so.
  - .5 If, on *Completion*, the cost to the Principal of completing the Works exceeds the amount that would have been paid to the Contractor to complete, then the difference will be a debt due from the Contractor to the Principal.
  - .6 The Principal may make provisional assessments of the amounts payable to the Principal under clause 73.6.5 and may, without limiting any other right of recourse, demand them against the *Undertakings*.

### 74 Termination for Principal's convenience

- .1 The Principal may terminate the Contract, by giving notice with effect from the date stated in the notice, for its convenience and without the need to give reasons.
- .2 The Contractor must comply with any instructions of the Principal to wind down and stop work.
- .3 The Contractor must leave the Site by the date stated in the termination notice and remove all *Temporary Work*, *Materials* and other unfixed things it has brought onto the Site apart from *Materials* for which payment has been made or is due under clause 58 and any other items identified in the termination notice as to be retained on the Site.



- .4 After termination under clause 74.1, subject to its rights under the Contract (including clause 63), the Principal must pay the Contractor:
  - .1 the amount due to the Contractor for all work carried out (as determined under clauses 58 and 59) to the date the termination notice takes effect, after taking into account previous payments including any *Prepayments* and any deductions, retentions or set-offs under clauses 59, 60 and 63;
  - .2 the cost of *Materials* reasonably ordered by the Contractor for the Works which the Contractor is legally liable to accept, but only if on payment these unincorporated *Materials* become the property of the Principal, free of any *Encumbrance*;
  - .3 the reasonable, direct costs incurred by the Contractor for the removal of the *Temporary Work* and other things from the Site in accordance with clause 74.3, but only to the extent that the Contractor complies with a strict duty to mitigate costs;
  - .4 an amount of 2% of the unpaid portion of the *Contract Price*, less the amounts payable under clauses 74.4.1 and 74.4.2; and
  - .5 the costs reasonably incurred by the Contractor prior to receiving notice of termination in the expectation of completing the Works, where those costs have not been recovered through any other payment by the Principal, but only to the extent that the Contractor complies with a strict duty to mitigate costs.
- .5 The Principal must return the *Undertakings*, subject to its rights under the Contract.
- .6 The payments referred to in clause 74.4 are full compensation for termination under clause 74 and the Contractor has no *Claim* for damages or other entitlement, whether under the Contract or otherwise.

## **75 Termination for Principal's default**

- .1 If the Principal:
  - .1 fails to pay the Contractor any amount in accordance with the Contract which is not in dispute;
  - .2 commits any fundamental breach of the Contract; or
  - .3 fails to give the Contractor access to the Site sufficient to start work required by the Contract within 3 months after the Date of Contract (or longer period specified in the Contract or agreed by the parties),the Contractor may give a notice requiring the Principal to remedy the default within 28 days after receiving the notice.
- .2 If the Principal fails to remedy the default, or to propose steps reasonably acceptable to the Contractor to do so, the Contractor may issue a notice terminating the Contract and clauses 74.3 to 74.6 will then apply. The Contractor's sole remedy for the Principal's breach will be the applicable amounts referred to in clause 74.4.

## **76 Termination notices**

- .1 Notices under clauses 73, 74 and 75 must be in writing and be delivered by hand, registered post or equivalent, or facsimile.

## **77 Survival**

- .1 Without limiting the survival of any clause by operation of law, clauses 23, 24, 25 and all indemnities in the Contract survive termination.

# Meanings

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## Meanings

### 78 Interpretation

- .1 Words in the singular include the plural, and vice versa.
- .2 No legal interpretation applies to the disadvantage of any party on the basis that the party provided the *Contract Documents*, or any part of them.
- .3 “Including” and similar words are not words of limitation.
- .4 Headings and notes are provided to guide the parties and form part of the Contract.

### 79 Definitions

Some words and phrases have special meanings in the Contract. In some cases, the defined meaning is different from the meaning that the word or phrase might have in ordinary usage, or it might include conditions that don't normally apply. In order to understand the Contract, you need to take these special meanings into account.

All defined words and phrases have initial capitals and are in italics in the GC21 General Conditions of Contract unless they are one of the following basic terms, which appear too often for italics to be used:

- Contract
- Contract Information
- Contractor
- Consultant
- Date of Contract
- Principal
- Site
- Subcontract
- Subcontractor
- Supplier
- Valuer
- Works

Wherever the following words and phrases are used in this Contract with initial capitals, they have the special meanings set out in clause 79.

#### **ABC Commissioner**

Has the meaning given in the *BCIIP Act*.

#### **ABCC**

Has the meaning given in the *Building Code*.

#### **Aboriginal Business**

Means a business that has at least 50 per cent Aboriginal or Torres Strait Islander ownership and that is recognised as such by Supply Nation, the NSW Indigenous Chamber of Commerce or a similar acceptable indigenous business verification organisation.

#### **Aboriginal Employee**

Means an employee of the Contractor or Subcontractor, who is a person of Aboriginal or Torres Strait Islander descent as verified by the Contractor in accordance with guidance provided under the *Aboriginal Procurement Policy*.

#### **Aboriginal Participation Plan**

Has the meaning given in clause 15.6.1.

#### **Aboriginal Participation Requirement**

Means the mandatory minimum requirement for Aboriginal participation in the Contract as determined by:

- .1 at least 1.5% (or a higher percentage as set out in Contract Information item 15D) of the specified *APP Contract Value* is subcontracted to *Aboriginal Businesses*;
- .2 at least 1.5% (or a higher percentage as set out in Contract Information item 15D) of the full time equivalent (FTE) Australian based workforce deployed on the Contract are *Aboriginal Employees*, on average, over the duration of the Contract, excluding *Milestones* or Works that do not include design or construction;
- .3 at least 1.5% (or a higher percentage as set out in Contract Information item 15D) of the specified *APP Contract Value* is applied to the cost of education, training or

capability building for *Aboriginal Employees* or *Aboriginal Businesses* directly contributing to the Contract; or

- .4 any combination of the above, such that the combined percentages add up to at least 1.5% or a higher percentage as set out in Contract Information item 15D.

Note that the 1.5% (or the higher percentage as set out in item 15D of the Contract Information) expresses mathematically the extent of Aboriginal participation required by combining financial and non-financial factors.

### **Aboriginal Procurement Policy**

Means the NSW Government's *Aboriginal Procurement Policy* and published at <https://buy.nsw.gov.au/policy-library/policies/aboriginal-procurement-policy>.

### **Acceleration Notice**

A written instruction under clause 52.1, from the Principal to the Contractor, to accelerate progress of the Works, identified as an "*Acceleration Notice*".

### **Actual Aboriginal Participation**

Means the percentage of actual Aboriginal participation in the Contract, as determined by combining:

- .1 the percentage of the *APP Contract Value* that is subcontracted to *Aboriginal Businesses*;
- .2 the percentage of the full time equivalent Australian based workforce deployed on the Contract who are *Aboriginal Employees*, on average over the period of the Contract, excluding *Milestones* or Works that do not include design or construction; and
- .3 the percentage of the *APP Contract Value* that is applied to the cost of education, training or capability building for *Aboriginal Employees* or *Aboriginal Businesses* directly contributing to the Contract.

### **Actual Completion Date**

The date on which *Completion* of the Works or a *Milestone* (as applicable) is achieved by the Contractor.

### **Allowable Exclusions**

Means costs to be incurred by the Contractor over which it has little or no control and which are agreed in writing as being excluded from the *APP Contract Value* by the Principal and the Contractor or if not agreed, as determined by the Principal.

### **APP Contract Value**

The amount stated as such in Contract Information item 15D, equal to the *Contract Price* (at the Date of Contract) less *Allowable Exclusions*. The APP Contract Value is fixed for the duration of the Contract.

### **BCIIP Act**

Means the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).

### **Building Code**

Means the Building Code issued under subsection 34(1) of the *BCIIP Act*, being the document titled '*Code for the Tendering and Performance of Building Work 2016*'.

### **Building Code Entity**

Means each of:

- .1 the Contractor;
- .2 the Contractor's Subcontractors; and
- .3 the Contractor's related entities (as contemplated by section 3(2) of the *Building Code*).

### **Building Contractor**

Has the meaning given in the *BCIIP Act*.

### **Building Industry Participant**

Has the meaning given in the *BCIIP Act*.

## **Building Work**

For the purposes of:

- .1 clause 17.1, Contract Information item 16A and Schedule 12, has the meaning given in the *Building Code*; and
- .2 clause 17.2 and Contract Information item 16B, has the meaning given in the *BCIIP Act*.

## **Business Day**

Any day other than a Saturday, Sunday, public holiday in New South Wales, or 27, 28, 29, 30 or 31 December.

## **Certified AIP Plan**

An Australian Industry Participation Plan drafted by the Principal, updated with the Contractor's details (where relevant) and certified by the relevant authority.

## **Chain of Responsibility Provisions**

Sections of the *Heavy Vehicle National Law (NSW) (2013)* under which the Contractor may be a party to the chain of responsibility.

## **Claim**

A claimed entitlement of the Contractor in connection with the Contract, in tort, in equity, under any statute, or otherwise. It includes a claimed entitlement to an extension of time or for breach of contract by the Principal.

## **Claimed Amount**

The amount claimed by the Contractor in a *Payment Claim*.

## **Commonwealth**

Means the Commonwealth of Australia.

## **Completion**

The state of the Works or a *Milestone* being complete, with no *Defects* or omissions, except for *Defects* not known.

This includes:

- .1 the supply to the Principal of:
  1. all *Subcontractor's* warranties, operation and maintenance manuals, licences, access codes, as-built drawings or work-as-executed drawings required by the Contract or required for the use and maintenance of the Works;
  2. certificates, authorisations, approvals and consents from statutory authorities and service providers;
  3. those certificates required for the occupation, use and maintenance of the Works; and
  4. all other documents;
- .2 *Testing* required by the Contract;
- .3 the provision of all training required by the Contract; and
- .4 all other requirements specified in the Contract.

## **Completion Amount**

An amount stated in Contract Information item 47 and included in the *Contract Price*, which becomes payable only after *Completion* of the whole of the Works or, if applicable, a specified *Milestone*.

## **Completion Undertaking**

The *Undertaking* required under clause 33.1, for the percentage of the *Contract Price* (at the Date of Contract) stated in Contract Information item 33.

## **Conformance Records**

Records which show conformance by the Contractor with particular requirements of the Contract.

**Consultant**

A consultant engaged by the Contractor to design parts of the Works or to provide other professional services. It includes a consultant whose contract with the Principal is novated to the Contractor.

**Contract**

The agreement between the Contractor and the Principal constituted by the *Contract Documents*.

**Contract Documents**

All the documents listed or referred to in clause 7.1.

**Contract Information**

The document described as such in the *Contract Documents*, which sets out information for the purposes of the Contract.

**Contract Price**

The amount stated as such in Contract Information item 40 including *Provisional Sums*, subject to adjustment in accordance with the Contract.

**Contract Program**

The program described in clause 22.

**Contractor**

The party named in Contract Information item 8A or, where the Contractor is an unincorporated joint venture, the *Joint Venture Participants* named in item 8B, including its (or their) successors and permitted assignees.

**Contractor's Authorised Person**

The person appointed to act on behalf of the Contractor under clause 2, named in Contract Information item 9 or as subsequently notified to the Principal.

**Contractor's Default**

A substantial breach of the Contract by the Contractor, including any of the following:

- .1 abandoning the carrying out of the Works;
- .2 suspending progress of the carrying out of the Works in whole or part without the written agreement or instruction of the Principal, except for suspension under clause 54;
- .3 significantly failing to achieve *Scheduled Progress*;
- .4 failing to comply with an instruction in writing or confirmed in writing by the Principal;
- .5 failing to carry out the Works with professional skill, care and competence;
- .6 failing to maintain any registration or licence required by law to carry on activities required under the Contract;
- .7 failing to provide *Undertakings* or *Parent Company Guarantee(s)* as required under clause 33 or *Parent Company Guarantee(s)* as required under clause 15.8;
- .8 failing to effect and maintain insurance policies as required under the Contract;
- .9 failing to hold and maintain prequalification under the National Prequalification System for Civil (Road and Bridge) Construction Contracts, or failing to use a Subcontractor, Consultant or Supplier who holds and maintains prequalification, or who is registered with the Principal in the category or accredited for the class of work, for the relevant part of the Works, as required under clause 15.9 and the *Principal's Documents*; or
- .10 failing to implement or maintain a *Subcontractors and Suppliers Proof of Payment Procedure* in accordance with clauses 28.3 and 28.4.

**Contractor's Documents**

Drawings, specifications, calculations and other documents and information, meeting the requirements of clause 39, which the Contractor must produce to design and construct the Works in accordance with the Contract.

### **Contractor's Insolvency**

Any of the following applying to the Contractor:

- .1 the Contractor is insolvent;
- .2 the Contractor indicates it does not have the resources to perform the Contract;
- .3 an application for winding up is made which is not stayed within 14 days;
- .4 a winding-up order is made;
- .5 a controller, administrator, receiver, receiver and manager, provisional liquidator or liquidator is appointed;
- .6 a mortgagee enters into possession of any property of the Contractor;
- .7 notice is given of a meeting of creditors for the purposes of a deed of arrangement;  
or
- .8 any actions having a similar effect are taken.

### **Contractor's Margin**

An amount added to the costs calculated under clauses 47.5.1 and 47.5.2, to allow for profit and off Site overhead costs.

### **Contractual Completion Date**

The last day of the period stated in Contract Information item 13, by which the Contractor must achieve *Completion* of the Works or of a *Milestone* (as applicable), as adjusted under the Contract.

### **Data**

The *Contractor's Documents* and all other drawings, sketches, specifications, digital records, computer software, data and information relating to the Contract.

### **Date of Contract**

- .1 If a specific date is nominated in Contract Information item 12, Date of Contract means that date.
- .2 If no specific date is nominated in Contract Information item 12, Date of Contract is to be determined as follows:
  - .1 Unless the Principal expressly states, in the *Letter of Award* or any other document given to the Contractor before the *Letter of Award*, that no contract is formed until a formal agreement or deed is executed, Date of Contract means the date of the *Letter of Award*, irrespective of whether the *Letter of Award* is conditional or unconditional and irrespective of whether the Principal also requires execution of a formal agreement or deed.
  - .2 If the Principal has expressly stated that no contract is formed until a formal agreement or deed is executed, Date of Contract means the date the formal agreement or deed is executed by the Principal after the Contractor has executed it.

### **Daywork**

Work carried out by the Contractor for which payment is made on the basis of daily time and cost records for labour, plant, *Materials*, services and other items as provided in Schedule 8 (Daywork).

### **Defect**

An error, omission, shrinkage, blemish in appearance or other fault in the Works or which affects the Works, resulting from a failure of the Contractor to comply with the Contract.

### **Defect Notice**

A notice issued by the Principal under clause 45.2 or 67.1.

### **Designated Building Law**

Has the meaning given in the *BCIP Act*.

### **Encumbrance**

A mortgage, charge, lien, title retention, trust, power or other encumbrance.

**Expert**

A person engaged to determine *Issues* under clause 71.

**Expert Determination**

The process of determination of an *Issue* by an *Expert*, under clause 71 and the procedure in Schedule 5 (Expert Determination Procedure).

**Fault**

Ambiguity, inconsistency or discrepancy.

**Final Payment Claim**

A *Payment Claim* given by the Contractor to the Principal under clause 61.1.

**Final Payment Schedule**

A *Payment Schedule* given by the Principal to the Contractor under clause 61.2.

**Indigenous Participation Plan**

Means the plan set out in Schedule 13 (Indigenous Participation Plan) which is a requirement under of the *Employment and Supplier – Use Infrastructure Framework*.

**Intellectual Property Rights**

Any copyright, patent right, registered design or other protected right.

**Issue**

Any issue, dispute or difference raised by either party under clause 69.

**Joint Venture Participant**

Means each person that comprises the Contractor, as identified in Contract Information item 8B.

**Joint Venture Principal Contractor**

Means the relevant *Joint Venture Participant* identified in Contract Information item 17B.

**Letter of Award**

A letter from the Principal to the Contractor awarding the Contract to the Contractor.

**Materials**

Includes materials, plant, equipment and other goods.

**Milestone**

A part of the Works specified as such in Contract Information item 13.

**National Construction Code**

Means the National Construction Code produced and maintained by the Australian Building Codes Board, as in force and updated from time to time.

**NSW Code**

Has the meaning given in clause 13.2.

**NSW Government Guidelines and Policies**

Means those guidelines and policies referred to in clause 15.1, as in force and updated from time to time.

**NSW Guidelines**

Has the meaning given in clause 13.1.

**Parent Company Guarantee**

A parent company guarantee in the form of Schedule 15.

**Parent Company Guarantor**

The person or persons specified in Contract Information item 35B, or such other entity as is consented to by the Principal.

**Payment Claim**

A claim for payment made by the Contractor to the Principal under clauses 58 or 61.

### **Payment Schedule**

A schedule containing the Principal's assessment of a *Payment Claim* and stating the amount the Principal proposes to pay, as referred to in clauses 59 and 61.

### **Post-Completion Undertaking**

The *Undertaking* required under clause 33.1, for the percentage of the *Contract Price* (at the Date of Contract) stated in Contract Information item 34.

### **Preferred Subcontractor**

A Subcontractor, Supplier or Consultant listed in Contract Information item 31 for a specified trade or area of work.

### **Prepayment**

The amount to be advanced by the Principal in accordance with clause 57 and Contract Information item 45.

### **Principal**

The entity named in Contract Information item 4, including its successors and assignees.

### **Principal's Authorised Person**

The person appointed to act on behalf of the Principal under clause 2, named in Contract Information item 5 or as subsequently notified to the Contractor.

### **Principal's Documents**

The drawings, specifications, and other documents provided to the Contractor and containing the Principal's requirements in respect of the Works.

### **Provisional Quantity**

The quantity of an item of work specified in the Contract for which it is not known, at the Date of Contract, whether the work will be required or what the actual quantity will be.

### **Provisional Sum**

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

### **Provisional Sum Margin**

An amount calculated by applying the percentage stated in Contract Information item 43 to the costs assessed under clauses 55.4.4.2.1 to 55.4.4.2.4 to allow for profit and off Site overhead costs.

### **RMS or RTA or Roads and Traffic Authority**

"RTA" or "Roads and Traffic Authority" or "RMS" or "Roads and Maritime Services" means the Principal, and a reference to any "RTA" or "RMS" document (including an RTA or RMS Specification, Test Method or other document) is a reference to the equivalent document published by the Principal (or the RTA or RMS), regardless of whether it is titled "RTA", "Roads and Traffic Authority", "Roads and Maritime Services", "RMS", "Transport for NSW" or "TfNSW" (in this respect, the parties acknowledge that the Principal is progressively updating its documents from "RTA" or "RMS" to "TfNSW" and that this is likely to be ongoing during the currency of the Contract).

### **Schedule of Rates**

Any document included in the Contract identified as a *Schedule of Rates*, or which shows rates payable for carrying out items of work described in that document.

### **Scheduled Amount**

The amount of payment (if any) stated in a *Payment Schedule*, that the Principal proposes to make in relation to a *Payment Claim* as referred to in clause 59.1.2.

### **Scheduled Progress**

The rate of progress consistent with carrying out the work required by the Contract expeditiously and without undue delay, so that the Works and all *Milestones* will be completed by their respective *Contractual Completion Dates*.



## **Site**

The lands and other places to be made available by the Principal to the Contractor for the purpose of executing the Works, including any existing buildings, services or other improvements, as briefly described in Contract Information item 2.

## **Site Conditions**

Any physical conditions of the Site (including sub-surface conditions, but excluding weather conditions or physical conditions which are a consequence of weather conditions) encountered in carrying out work in connection with the Contract.

## **Statutory Requirements**

The laws relating to the Works or the Site, or the lawful requirements of any authority or provider of services having jurisdiction over the Works, the Site, the environment or the Contract, or anyone or anything connected with the Works or the Site or the Contract.

## **Subcontract**

An agreement between the Contractor and a Subcontractor or a Supplier.

## **Subcontractor**

An entity (including one engaged in accordance with clause 29.3) engaged by the Contractor to carry out part of the Works or the *Temporary Work*, or both, other than a Consultant or a Supplier.

## **Subcontractors and Suppliers Proof of Payment Procedure**

The administrative procedure set out in clauses 28.3 and 28.4 and as required by clause 28.6 by which:

- .1 the monthly process set out in Schedule 17 (Subcontractors and Suppliers Proof of Payment Process) is implemented;
- .2 the Contractor:
  - .1 provides proof to the Principal that it has paid Subcontractors and Suppliers; and
  - .2 satisfies the Principal that subcontractors and suppliers to Subcontractors and Suppliers have been paid; and
- .3 as relevant:
  - .1 the Principal obtains an irrevocable payment direction in favour of each unpaid Subcontractor and Supplier if the Contractor fails to provide proof of payment; or
  - .2 the Contractor obtains an irrevocable payment direction in favour of each unpaid subcontractor and supplier if a Subcontractor or Supplier fails to provide proof of payment.

## **Subcontractors, Suppliers and Consultants Register**

A register in the form of Attachment 8 prepared by the Contractor in accordance with clause 31A.2.

## **Supplier**

An entity engaged by the Contractor to supply *Materials* in connection with the Works.

## **Temporary Work**

Temporary structures, amenities, physical services and other work, including *Materials*, plant and equipment used to carry out the Works but not forming part of the Works.

## **Test**

Examine, inspect, measure, prove and trial, including uncovering any part covered up, if necessary; *Testing* and other derivatives of *Test* have a corresponding meaning.

## **Training Management Guidelines**

The NSW Government *Training Management Guidelines: Skills, training and diversity in construction* (July 2020),

([https://www.training.nsw.gov.au/forms\\_documents/programs\\_services/islp/training\\_management\\_guidelines.pdf](https://www.training.nsw.gov.au/forms_documents/programs_services/islp/training_management_guidelines.pdf)), as in force and updated from time to time.

**Undertaking**

An unconditional undertaking to pay on demand, in the relevant form of Schedule 2 (Undertaking).

**Unmet Percentage**

Is the difference between the *Aboriginal Participation Requirement* and the *Actual Aboriginal Participation* in the Contract.

**Unresolved Claim**

A *Claim* rejected or not agreed under clause 68.6.

**Value Completed**

The value of work (including design work) carried out by the Contractor and included in a *Payment Claim*, as referred to in Schedule 3 (Payment Claim Worksheet).

**Valuer**

The entity engaged to determine time and value matters under clause 35.

**Variation**

Any change to the Works including additions, increases, omissions and reductions to and from the Works, but not including:

1. such changes in respect of the development by the Contractor of the design for the Works (including development of shop drawings and other *Contractor's Documents*) in accordance with the requirements of the Contract; or
2. work specified against a *Provisional Sum*.

**Works**

The works to be designed, constructed and handed over to the Principal on *Completion* by the Contractor, including all work and items of the types referred to in clause 8.1, work specified against a *Provisional Sum* (where instructed) and *Variations*, but excluding *Temporary Work*. The term applies to the Works as a whole and also to any part of the Works unless the context requires otherwise. Contract Information item 3 briefly describes the Works.

**Workplace Relations Management Plan (Commonwealth)**

Has the meaning given to 'WRMP' in the *Building Code*.

**Workplace Relations Management Plan (State)**

Means the Workplace Relations Management Plan contemplated by the *NSW Guidelines*

# Contract Information

The Contract Information is part of the Contract. Words and phrases are defined in clause 79.

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## Contract

Item

### 1 Contract name

The Contract name is:

Ocean Drive Duplication, Port Macquarie

The Contract number is:

T-21-50

### 2 Site

*Defined in clause 79*

The Site is:

Ocean Drive carriageway between approximately 300m south of the Matthew Flinders Drive intersection and approximately 100m north of the Clearwater Crescent intersection, Port Macquarie, including upgrades to adjacent local roads and intersections and working areas as provided in TfNSW G1 Clause 4 and generally referenced within Drawing set No. RU-PM10-016.

### 3 Description of the Works

*Mentioned in clause 8*

The Works are:

as defined in TfNSW G1 Clauses 1 and 2.

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## Principal's details

### 4 Principal

The Principal is:

Port Macquarie-Hastings Council

### 5 Principal's Authorised Person

*Mentioned in clause 2*

The *Principal's Authorised Person* is:

Chris Pell  
Senior Project Manager, Organisational  
Project Delivery  
Port Macquarie-Hastings Council

### 6 Notices to the Principal

*Mentioned in clause 11*

Notices must go to the *Principal's Authorised Person* named above, at the address or number shown here.

Office address:  
(for delivery by hand)

Port Macquarie-Hastings Council  
17 Burrawan St  
Port Macquarie, NSW 2444

Postal address:  
(for delivery by post)

PO Box 84  
Port Macquarie, NSW 2444

Facsimile number:

N/A

e-mail address:

chris.pell@pmhc.nsw.gov.au

## 7 Principal's Senior executive

*Mentioned in clauses 69 & 70*

The Principal's senior executive is:

Chris Favaloro  
Group Manager, Organisational Project  
Delivery  
Port Macquarie-Hastings Council

Office address:  
(for delivery by hand)

As shown in Contract Information Item 6

Postal address:  
(for delivery by post)

As shown in Contract Information Item 6

e-mail address:

chris.favaloro@pmhc.nsw.gov.au

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## Contractor's details

### 8 Contractor

#### A – Contractor

The Contractor is:

Ditchfield Contracting Pty Ltd  
ABN: 16 056 793 830

#### B – Joint Venture Participants

The Contractor comprises the following  
*Joint Venture Participants* jointly and  
severally:

Not applicable

*Mentioned in clause 7.7*

### 9 Contractor's Authorised Person

The Contractor's Authorised Person is:

[Redacted]

*Mentioned in clause 2*

### 10 Notices to the Contractor

*Mentioned in clause 11*

Notices must go to the Contractor's Authorised Person named above, at the address or number shown here.

Office address:  
(for delivery by hand) 8 Dee Crescent  
Tuncurry NSW 2428

Postal address:  
(for delivery by post) PO Box 256  
Tuncurry NSW 2428

e-mail address: [REDACTED]

## 11 Contractor's senior executive

*Mentioned in clause 70*

The Contractor's senior executive is: [REDACTED]

Office address:  
(for delivery by hand) As shown in Contract Information Item 10

Postal address:  
(for delivery by post) As shown in Contract Information Item 10

Facsimile number: N/A

e-mail address: [REDACTED]

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## Dates and times

### 12 Date of Contract

*Defined in clause 79*

The Date of Contract is: date of the Principal's *Letter of Award* to the Contractor.

### 13 Times for Site access and Completion

*Site access: Mentioned in clause 34*

*Contractual Completion Date and Completion: Mentioned in clause 65*

Time periods for Site access and for calculating *Contractual Completion Dates* are as shown.

#### A -- Whole of the Works

Description	Time Period for giving Site access	Time Period for Completion
<del>Main Works Package (including Temporary Stage 1 tie-in)</del>	<del>14 days from Date of Contract.</del>	<del>100 weeks from Date of Contract</del>
Main Works Package & Option 1B (excluding Temporary Stage 1 tie-in)	14 days from Date of Contract.	120 weeks from Date of Contract

## B – Milestones

Milestone number	Description	Time Period for giving Site access	Time Period for Completion
	No Milestones are applicable.	<del>(“as for the whole of the Works” applies in the boxes below if not filled in)</del>	<del>(“as for the whole of the Works” applies in the boxes below if not filled in)</del>
1		»	» — weeks from <i>Date of Contract</i>
2		»	» — weeks from <i>Date of Contract</i>
3		»	» — weeks from <i>Date of Contract</i>
4		»	» — weeks from <i>Date of Contract</i>

## Statutory and Government requirements

### 14 Fees, charges and approvals

*Mentioned in clause 12*

Approvals that have been obtained or will be obtained, and fees and charges that have been paid or will be paid, by the Principal are:

None obtained or paid by the Principal

### 15 Compliance with NSW Government guidelines

#### A – Work Health and Safety (WHS)

*Mentioned in clause 15.1*

Is the Contractor required to implement a Corporate WHS Management System? (Yes/No)

Yes

Is the Contractor required to submit a Project WHS Management Plan? (Yes/No)

Yes

#### B – Workplace Relations (WR)

*Mentioned in clause 15.1*

Is the Contractor required to submit a *Workplace Relations Management Plan (State)*? (Yes/No)

Yes

within 14 days after the *Date of Contract*

#### C – Skills and Training

*Mentioned in clause 15.1*

Is the Contractor required to comply with the skills, training and diversity requirements in clause 15.11.1? (Yes/No)	No
Is the Contractor required to comply with the skills, training and diversity requirements in clause 15.11.2? (Yes/No)	No
For the purposes of clause 15.11.2.5, the local region means:	PMHC local government area

## D – Aboriginal Participation

*Mentioned in clauses 15.1, 15.5, 15.6 and 15.12*

Is the Contractor required to comply with the Aboriginal Procurement Policy requirements in clauses 15.5 and 15.6? (Yes/No)	No
The <i>APP Contract Value</i> for Aboriginal participation in this Contract is:	Not Applicable
Aboriginal participation percentage	Not Applicable
The final Aboriginal Participation Plan must be provided:	Not Applicable
Is the Contractor required to comply and implement the Indigenous Participation Plan in accordance with clause 15.12?	No

## 16 Requirements for Commonwealth Funded projects

### A – Building Code

*Mentioned in clause 17.1*

Does the <i>Building Code</i> apply to the Works as there is <i>Commonwealth</i> funding (above the minimum thresholds specified in Schedule 1 of the Building Code) for the project which the Works form part of?	No
On or after 2 December 2016, has the Contractor or a related entity of the Contractor submitted a response to an expression of interest or tender (howsoever described) for <i>Commonwealth</i> funded <i>Building Work</i> (regardless of whether or not that project was procured by the Principal or whether or not the Contractor or the Contractor's related entity were successful)?	Not Applicable

Is a *Workplace Relations Management Plan (Commonwealth)* required?

No

## **B – Work Health and Safety Accreditation Scheme**

*Mentioned in clause 17.2*

Is the Contractor required to maintain accreditation under the Work Health and Safety Accreditation Scheme?

No

## **C – Australian Industry Participation Plan**

*Mentioned in clause 17.3*

Is the Contractor required to implement the Certified Australian Industry Participation Plan?

No

## **17 Principal contractor**

### **A – Single entity Contractor**

*Mentioned in clause 16*

Is the Contractor appointed as principal contractor? (Yes/No)

Yes

Where the Contractor is a joint venture, Contract Information Item 17B applies also.

### **B – Joint Venture Contractor**

*Mentioned in clause 16 and Schedule 16*

Which *Joint Venture Participant* is the *Joint Venture Principal Contractor*?

N/A

## **18 Working hours and working days**

*Mentioned in clause 18*

Working hours and working days are:

As per TfNSW G1 Clause 7

---

## **Liability**

### **19 Limitation of liability**

*Mentioned in clause 26.8*

Subject to clause 26.9, the limit of the Contractor's liability to the Principal in respect of any one occurrence in connection with loss or liability other than personal injury or death is:

Notwithstanding anything contained in this Contract to the contrary, the maximum aggregate liability of the Contractor for any and all claims in respect of this Contract is limited to the Contract Price payable to the Contractor, except to the extent that such liability is met under an insurance policy maintained by the Contractor under this Contract.



## 20 Proportionate liability

*Mentioned in clause 26.12*

Is proportionate liability excluded from the Contract? (Yes/No) Yes

---

## Insurance

### 21 Works insurance

*Mentioned in clauses 27.1 and 27.2*

The party responsible for effecting Works insurance is:

The Contractor

Minimum cover is:

The sum of the Main Works Package and Option 1B plus 20%.

Period of cover is:

until issue of the *Final Payment Schedule*.

### 22 Public liability insurance

*Mentioned in clauses 27.1 and 27.2*

The party responsible for effecting public liability insurance is:

The Contractor

Minimum cover is:

\$20 million

Period of cover is:

until issue of the *Final Payment Schedule*.

### 23 Workers compensation insurance

*Mentioned in clause 27.3*

Minimum cover is:

as required by law.

Period of cover is:

until issue of the *Final Payment Schedule*.

### 24 Professional indemnity insurance

*Mentioned in clause 27.3.2*

Is a professional indemnity insurance policy to be held by the Contractor? (Yes/No)

Yes

Minimum cover is:

\$5M

Period of cover is:

From the *Date of Contract* until 12 months after *Completion* of all the *Works*

### 25 Marine liability insurance

*Mentioned in clause 27.3.3*

Is a Marine Liability insurance policy to be held by the Contractor? (Yes/No)

No

Minimum cover is:

Not Applicable

Period of cover is:

Not Applicable

### 25A Motor vehicle 3rd party property damage insurance

*Mentioned in clause 27.3.4*

Is motor vehicle 3rd party property damage insurance to be held by the Contractor?? (Yes/No)

Yes

Minimum cover is:

\$20 million for any one occurrence.

Period of cover is:

the whole of the period of use of motor vehicles on work in connection with the Contract.

---

## Contract Documents

### 26 Other Contract Documents

*Mentioned in clause 7.1.5*

Other *Contract Documents* (not listed in clause 7) are:

As listed in the Instrument of Agreement

---

## Principal's Documents

### 27 Copies of Principal's Documents

*Mentioned in clause 7.4*

The number of copies of the *Principal's Documents* to be provided to the Contractor is:

1 electronic copy

---

## Contractor's Documents

### 28 Copies of Contractor's Documents

*Mentioned in clause 40.1*

The number of copies of the *Contractor's Documents* to be provided to the Principal is:

1 electronic copy in a format acceptable to the Principal

---

## Subcontract work

### 29 Inclusion of consistent requirements in Subcontracts

*Mentioned in clause 28.6.1*

The Subcontract value requiring inclusion of the provisions set out in Schedule 9 (Subcontract requirements) is:

\$100,000.00.

### 30 Payment period for Subcontracts

*Mentioned in clause 28.6.2*

The maximum period before payment, for Subcontracts less than the value stated in Contract Information item 29, is:

15 *Business Days*.

### 31 Preferred Subcontractors

*Mentioned in clause 29.3*

The *Preferred Subcontractors* referred to in clause 29 are:

Names of <i>Preferred Subcontractors</i>	Class of work
Telstra	Telstra Adjustment Works
Optus	Optus Adjustment Works
NBN Co	NBN Adjustment Works

### 32 Subcontractor's warranty

*Mentioned in clause 30.1*

Trades or areas of work requiring a Subcontractor's warranty are:

Manufacture and Delivery of Road Signs,  
Clause 10 of TfNSW 3400  
Cold Applied Elastomeric Joint Sealants,  
Clause 5 of TfNSW B312  
Bridge Nameplates and Number Plates,  
Clause 6.2 of TfNSW B345

---

## Undertakings and Parent Company Guarantee

### 33 Completion Undertaking

*Mentioned in clause 33.1*

The amount of the *Completion Undertaking* is:

4% of the *Contract Price*

### 34 Post-Completion Undertaking

*Mentioned in clause 33.1*

The Amount of *Post-Completion Undertaking* is:

1% of the *Contract Price*

### 35 Return of Post-Completion Undertaking

*Mentioned in clause 33.2.2*

The period at the end of which the *Post-Completion Undertaking* must be returned is:

12 months

### 35B Parent Company Guarantee

*Mentioned in clause 15.8 and 33.7*

Is a *Parent Company Guarantee* required? (yes/no)

Subject to Principal's right to require a *Parent Company Guarantee* at any time in accordance with clause 15.8

The *Parent Company Guarantor(s)* is / are:

Not Applicable

---

## Site information

### 36 Site information

*Mentioned in clause 36*

Information contained in the documents identified in *Contract Information* items 36A and 36B does not form part of the Contract.

### A - Documents not guaranteed for completeness

Documents not guaranteed for completeness are:

Not Used

### B Documents not guaranteed for accuracy, quality or completeness

Documents not guaranteed for accuracy, quality or completeness are:

All documents provided in *Annexure F - Documents for Information*

## 37 Site Conditions

*Mentioned in clause 37.2*

Is the Contractor to bear the full risk, including cost and time implications, of encountering and dealing with materially adverse *Site Conditions*? (Yes/No)

No

---

## Design and documentation

### 38 Scope of design activities

*Mentioned in clause 1.1.1*

#### A - Design by the Contractor

*Mentioned in clause 39*

.1 Items, services and components of the Works for which the Contractor is responsible for developing the design provided by the Principal (clause 39.1.2):

All necessary design for or in respect of the Works not already performed by the Principal, including but not limited to all design development, documentation and coordination of the design of the various engineering and architectural disciplines, workshop detailing and finalisation of the design in all respects, in accordance with the *Contract Documents*. Refer also to clause 39.

Under no circumstances may the Contractor change the Principal's design without the Principal's prior written approval.

If the Principal's design is required to be changed with the Principal's approval, the *Variation* is to be valued under clause 48.

.2 Items, services and components of the Works which the Contractor must fully design (clause 39.1.3):

RSW Design as per TfNSW R57

.3 Items, services and components of the Works in respect of which the Contractor may depart from the design provided by the Principal (clause 39.7):

None

#### B – National Construction Code

*Mentioned in clauses 39 and 43*

Does the *National Construction Code* apply? (Yes/No)

Yes for those parts of the Works which meet one or more of the classifications of buildings described in the *National Construction Code*.

**39 Not Used**

---

## Payments

**40 Contract Price at the Date of Contract**

*Mentioned in clauses 55.1 and 55.3*

The *Contract Price* at the Date of Contract is:

\$ 80,126,573.71

**Basis of payment:**

The basis of payment is:  
(Lump sum / *Schedule of Rates* / *Schedule of Rates* and lump sums)

Schedule of Rates

**41 Rise or fall adjustments**

*Mentioned in clause 55.2*

Are rise or fall adjustments applicable to the Contract? (Yes/No)

Yes

**42 Provisional Sums**

*Mentioned in clause 55.4*

*Provisional Sum* items referred to in clause 55.4 are:

Refer to Schedule of Rates

**43 Provisional Sum margin**

*Mentioned in clause 55.4*

The percentage for *Provisional Sum* margin is:

10%

**44 Contractor's Margin**

*Mentioned in clauses 47 and 79*

The percentage for *Contractor's Margin* is:

10%

**45 Amount of Prepayment**

*Mentioned in clause 57.1.1*

The amount of *Prepayment* is:

10% of the *Contract Price*

**46 Payment date and method**

**A - Date for Payment Claims**

*Mentioned in clause 58.1*

The date in the month for making *Payment Claims* is:

The last *Business Day* of each calendar month.

## B - Method of payment

*Mentioned in clause 58.2*

*Milestones* for which payment will not be made until after they reach *Completion*:

Not used

## 47 Completion Amount

*Mentioned in clause 60*

The *Completion Amount* is:

Nil

## 48 Interest on late payments

*Mentioned in clause 62*

The rate of interest per annum is:

the rates as determined by the Uniform Civil Procedure Rules 2005 on unpaid judgments for the period in which the amount remains unpaid

---

## Delay costs

### 49 Delay costs and liquidated damages

*Mentioned in clauses 34 and 51*

#### A - Delay costs

The following rates apply per working day. These rates\* are exclusive of GST.

For any delay to Completion of the whole of the Works that occurs within the first 8 weeks from the Date of Contract, including where the Principal fails to give the Contractor access to the Site in accordance with clause 34 the rate\* is:

\$ 12,324

For any delay to Completion of the whole of the Works that occurs after the expiry of the first 8 weeks from the Date of Contract, the applicable rate\* is as set out below:

- If the cause of the delay falls within clause 51.1.1, the rate\* is: \$ 35,424
- If the cause of delay falls within clauses 51.1.3 to 51.1.8, then:
  - If some construction activity continues or is possible, the rate\* is: \$ 37,356
  - If no construction activity continues or is possible:
    - the rate\* applicable for the first 10 working days of any single period of delay is: \$ 45,149
    - the rate\* for each subsequent working day after the first 10

\$ 35,424

working days of any single period of delay is:

*\* The rates for each are separate and distinct from each other.*

## B - Liquidated damages

*Mentioned in clauses 51.5 and 51.6*

Do liquidated damages apply to this Contract? (Yes/No)

These rates\* are exclusive of GST.

The rate\* per day for liquidated damages for the whole of the Works\* is:

~~The rates per working day for liquidated damages for Milestones\* are: (exclusive of GST)~~

Milestone 1: \$ >>  
Milestone 2: \$ >>  
Milestone 3: \$ >>

*\* The rates for each are separate and distinct from each other.*

---

## Engagement of Valuer

### 50 Engagement of Valuer

#### A - Engagement of Valuer

*Mentioned in clause 35*

Must a Valuer be engaged? (Yes/No)

#### B - Person to select the Valuer

*Mentioned in clause 35*

The person is:

Telephone number:

Facsimile number:

#### C - Litigation Threshold

*Mentioned in clause 35*

The threshold amount for litigation following a Valuer's determination is:

---

## Expert Determination

### 51 Not used

### 52 Expert Determination representative

*Mentioned in clause 71*

The representative of the Principal for all of the purposes in clause 71, and

under Schedule 5 (Expert Determination Procedure) is:

Office address:  
(for delivery by hand)

As shown in Contract Information Item 7

Postal address:  
(for delivery by post)

As shown in Contract Information Item 7

e-mail address:

As shown in Contract Information Item 7

### **53 Person to nominate an Expert**

The person is:

*Mentioned in clause 71*

Chairperson, Resolution Institute  
Tower B, Zenith Centre  
Suite 602, Level 6  
821-843 Pacific Highway  
Chatswood 2067

Telephone number:

Telephone (02) 9251 3366

### **54 Threshold amount for litigation**

*Mentioned in clause 71*

The threshold amount for litigation following an *Expert's* determination is:

\$500,000.00



# Schedules

<b>Schedule 1</b>	<b>Subcontractor's Warranty</b>
<b>Schedule 2</b>	<b>Undertaking</b>
<b>Schedule 3</b>	<b>Payment Claim Worksheet</b>
<b>Schedule 4</b>	<b>Agreement with Valuer</b>
<b>Schedule 5</b>	<b>Expert Determination Procedure</b>
<b>Schedule 6</b>	<b>Contractor's Statement and Supporting Statement</b>
<b>Schedule 7</b>	<b>Costs Adjustment Formula</b>
<b>Schedule 8</b>	<b>Daywork</b>
<b>Schedule 9</b>	<b>Subcontract requirements</b>
<b>Schedule 10</b>	<b>Not Used</b>
<b>Schedule 11</b>	<b>Statement regarding Materials</b>
<b>Schedule 12</b>	<b>Compliance with Building Code</b>
<b>Schedule 13</b>	<b>Not Used</b>
<b>Schedule 14</b>	<b>Not Used</b>
<b>Schedule 15</b>	<b>Parent Company Guarantee</b>
<b>Schedule 16</b>	<b>Joint venture provisions</b>
<b>Schedule 17</b>	<b>Subcontractors and Suppliers Proof of Payment Process</b>

Schedule 1

# Subcontractor's Warranty

The Contractor has entered into the Contract with the Principal for the carrying out of the Works.

The Subcontractor has entered into an agreement with the Contractor for the Subcontract Work or Products, which are to be used by the Contractor in performing the Contract.

In return for the Principal allowing the Subcontract Work or Products to be used in the Works, the Subcontractor agrees to give the warranties, indemnities and other promises in this Deed. The obligations created by this Deed are in addition to the obligations of the Subcontractor to the Contractor and do not affect any other rights or remedies available to the Principal against the Contractor or the Subcontractor.

Refer to clause 30.1 of the GC21 General Conditions of Contract.

## Definitions

Deed dated:	.....
	<b>between</b>
Subcontractor or Supplier:	.....
	.....
	ABN .....
	<b>and</b>
The Principal:	Port Macquarie-Hastings Council
	<b>concerning</b>
The Contract:	The contract between the Principal and the Contractor
Contract Name:	Ocean Drive Duplication, Port Macquarie
Contract Number:	T-21-50
Works:	The works to be designed (to the extent specified) and constructed by the Contractor, as described in the Contract.
The Contractor:	Ditchfield Contracting Pty Ltd
	ABN 16 056 793 830
Subcontract Work or Products:	.....
Warranty Period:	.....years from the <i>Actual Completion Date</i> of the whole of the Works.

Other words and phrases in this Deed have the meanings given in the Contract.

In this Deed, the term Subcontractor includes Supplier. The terms Subcontractor, Contractor and Principal include their successors and permitted assignees.

---

## Terms of Deed

### 1 Warranty

- .1 The Subcontractor warrants that all work performed and all *Materials* supplied by the Subcontractor as part of the Subcontract Work or Products will:
  - .1 comply in all respects with the requirements of the Contract;
  - .2 to the extent that the quality of *Materials* or standard of workmanship is not specified in the Contract, comply with the applicable industry standards, including (without limitation) the Building Code of Australia and any applicable Australian Standards; and
  - .3 be fit for the purposes for which they are required.
- .2 The Subcontractor warrants that it will use reasonable skill and care in performing all work associated with the Subcontract Work or Products.

## **2 Replacement or making good**

- .1 The Subcontractor promises to replace or make good, to the reasonable satisfaction of the Principal, any of the Subcontract Work or Products which are found, within the Warranty Period, to:
  - .1 be of a lower standard or quality than referred to in clause 1 of this Deed; or
  - .2 have deteriorated to such an extent that they are no longer fit for the purposes for which they were required.
- .2 The liability of the Subcontractor is reduced to the extent that deterioration is caused by:
  - .1 mishandling, damage before installation, or incorrect installation, in each case caused by others;
  - .2 normal wear and tear;
  - .3 incorrect operational procedures or maintenance, in each case not attributable to the Subcontractor; or
  - .4 any other cause beyond the control of the Subcontractor.
- .3 Nothing in this Deed affects the Subcontractor's liability with respect to the Subcontract Work or Products.

## **3 Costs**

- .1 The Subcontractor promises to undertake, and meet the reasonable cost of, any work necessary to:
  - .1 carry out any part of the Works to enable the requirements of clause 2 of this Deed to be met; or
  - .2 restore or make good the Works after meeting those requirements,whichever the Principal requires.

## **4 Indemnity**

- .1 The Subcontractor indemnifies the Principal against claims (including *Claims*, actions and loss or damage) arising out of breach by the Subcontractor of clauses 1 or 2 of this Deed.

## **5 Notice of Defects**

- .1 The Principal may notify the Subcontractor in writing if it considers there has been any breach of the warranty in clause 1 of this Deed or if the Principal requires the Subcontractor to replace or make good any of the Subcontract Work or Products under clause 2 of this Deed.

## **6 Time to remedy**

- .1 The Subcontractor must do everything to remedy any breach notified to it, or to carry out any replacement or making good required under clause 5 of this Deed, within a reasonable time after receiving the Principal's notice.

## **7 Failure to remedy**

- .1 If the Subcontractor fails to complete the work specified in the Principal's notice under clause 5 of this Deed within a period determined by the Principal to be reasonable in the circumstances, the Principal may give written notice to the Subcontractor that the Principal intends to have that work carried out by others. This notice must allow a reasonable period for the Subcontractor to respond.
- .2 If the Subcontractor fails to complete the work by the date specified in clause 7.1 of this Deed, or another date agreed by the parties, the Principal may have the work carried out by others, and the Subcontractor indemnifies the Principal for the reasonable costs and expenses of doing so.

## **8 Urgent action by Principal**

- .1 The Principal may take any urgent action necessary to protect the Works, other property or people as a result of a breach of clause 1 of this Deed.
- .2 The Subcontractor agrees that the Principal taking such action does not affect the warranty or any other obligation of the Subcontractor under this Deed.
- .3 The Subcontractor indemnifies the Principal for the reasonable costs and expenses paid or payable in taking that action.

**9 Assignment**

- .1 The Principal may assign its rights and benefits under this Deed to the owner or operating authority of the Works and must give notice of that assignment to the Subcontractor.

**10 Operation of Deed**

- .1 This Deed comes into effect when executed by the Subcontractor, and is effective whether or not executed by the Principal.

**Executed as a deed**

The common seal of the Subcontractor was affixed in accordance with its Articles of Association in the presence of:

Signature of Director/Secretary: .....  
Name of Director/Secretary: .....  
Signature of Director: .....  
Name of Director: .....

or (if the Subcontractor is not a corporation)

Signed, sealed and delivered on behalf of the Subcontractor by:

Signature of Authorised Person: .....  
Name of Authorised Person: .....

**and witnessed by:**

Signature of witness: .....  
Name of witness (in full): .....

Signed, sealed and delivered on behalf of the Principal by:

Signature of Authorised Person: .....  
Name of Authorised Person: .....

**and witnessed by:**

Signature of witness: .....  
Full name of witness: .....  
Place: .....

Schedule 2

# Undertaking

Refer to clauses 33, 57 and 58 of the GC21 General Conditions of Contract.

## On behalf of the Contractor

Name of Financial Institution: .....

The Principal: Port Macquarie-Hastings Council

The Contractor: Ditchfield Contracting Pty Ltd  
ABN 16 056 793 830

Security Amount: \$ .....

The Contract: The contract between the Principal and the Contractor

Contract Name: Ocean Drive Duplication, Port Macquarie

Contract Number: T-21-50

### Undertaking

- .1 At the request of the Contractor and the Financial Institution, and in consideration of the Principal accepting this *Undertaking* from the Financial Institution in connection with the Contract, the Financial Institution unconditionally undertakes to pay on demand any amount or amounts demanded by the Principal to the maximum aggregate sum of the Security Amount.
- .2 The Financial Institution unconditionally agrees that, if notified in writing by the Principal (or someone authorised by the Principal) that it requires all or some of the Security Amount, the Financial Institution will pay the Principal at once, without reference to the Contractor and despite any notice from the Contractor not to pay.
- .3 The Principal must not assign this *Undertaking* without the prior written agreement of the Financial Institution, which must not be unreasonably withheld.
- .4 This *Undertaking* continues until one of the following occurs:
  - .1 the Principal notifies the Financial Institution in writing that the Security Amount is no longer required;
  - .2 this *Undertaking* is returned to the Financial Institution; or
  - .3 the Financial Institution pays the Principal the whole of the Security Amount, or as much as the Principal may require overall.
- .5 At any time, without being required to, the Financial Institution may pay the Principal the Security Amount less any amounts previously paid under this *Undertaking* (or a lesser sum specified by the Principal), and the liability of the Financial Institution will then immediately end.

Dated ..... at .....

**Execution by the Financial Institution:**

**Schedule 3**

# Payment Claim Worksheet

Refer to clause 58 of the GC21 General Conditions of Contract.

*The Contractor:* Ditchfield Contracting Pty Ltd  
 ABN 16 056 793 830

*The Contract:* The contract between the Principal and the Contractor

*Contract Title:* Ocean Drive Duplication, Port Macquarie

*Contract Number:* T-21-50

*Name of Financial Institution:* » .....

*Account Name:* » .....

*Account Number:* » .....

Where the Contract includes a schedule of prices for work covered by a lump sum.

Item no	Description of work	Quantity	Unit	Rate *	Value Completed \$*
Total Value Completed for schedule of prices					

Where the Contract includes a Schedule of Rates

Pay Item	Description of work	Quantity	Unit	Rate *	Value Completed \$*
Total Value Completed for Schedule of Rates					

Materials

Pay Item	Description of work	Quantity	Unit	Rate *	Value Completed \$*
Total Value Completed for Materials					

Variations

Pay Item	Description of work	Quantity	Unit	Rate *	Value Completed \$*
Total Value Completed for Variations					

**Total Value Completed \$**

**GST**

**Total Value including GST**

\* Amounts and rates are GST exclusive.

Schedule 4

# Agreement with Valuer

Refer to clause 35 of the GC21 General Conditions of Contract.

## Definitions

Agreement dated: .....

**between:**

The Valuer: .....

ABN .....

**and:**

The Principal: Port Macquarie-Hastings Council

**and:**

The Contractor: Ditchfield Contracting Pty Ltd

ABN 16 056 793 830

**concerning:**

The Contract: The contract between the Principal and the Contractor

Contract Name: Ocean Drive Duplication, Port Macquarie

Contract Number: T-21-50

Dated: .....

The Works: The works to be designed and constructed by the Contractor, as described in the Contract.

Unless the context requires otherwise, other words and phrases in this agreement have the meanings given in the Contract.

The terms Contractor and Principal include their successors and permitted assignees.

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## Terms of agreement

### 1 Request to determine and acceptance

- .1 The parties request the Valuer to determine the value and time associated with *Variations* and other matters referred to the Valuer under the Contract. The Valuer agrees to comply with this request in accordance with this agreement.

### 2 Determination by Valuer

- .1 When a matter is referred to the Valuer by either party, the Valuer must consult with both parties, determine the matter in accordance with this agreement and as specified in the Contract, and issue a certificate stating the determination within 28 days (or another period agreed by the parties) after the matter is referred to the Valuer.
- .2 If a certificate issued by the Valuer contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the Valuer must correct the certificate.

### 3 Principles for valuation

- .1 The Valuer must determine all matters referred to it in accordance with the principles and procedures set out in the Contract.

**4 Meeting**

- .1 The Valuer may meet with the parties together to discuss a matter referred under this agreement. The parties agree that such a meeting is not a hearing which would give anything under this agreement the character of an arbitration.

**5 Documents**

- .1 The Valuer must take into consideration:
.1 documents, information and other written material which has been exchanged by the parties before the request to the Valuer;
.2 any submission or submission in reply made by a party to the Valuer (which must be copied to the other party); and
.3 information or material provided under clause 6.1.2 of this agreement.
.2 The Valuer must fix appropriate times for the provision of any submissions and submissions in reply.
.3 The parties acknowledge that when a matter referred to the Valuer involves a claim from a Subcontractor, Supplier or Consultant’s, the Valuer will give the relevant Subcontractor, Supplier or Consultant the opportunity to be involved in the valuation process. The Valuer must wherever possible include in the certificate details of the entitlement determined for each Subcontractor, Supplier or Consultant.

**6 Role of Valuer**

- .1 The Valuer:
.1 acts as an expert and not as an arbitrator;
.2 is not expected or required to obtain or refer to any information or material relating to trade information or other third party material but may do so if the Valuer wishes; and
.3 must issue a certificate in a form the Valuer considers appropriate, stating the Valuer’s determination, with reasons.

**7 Certificate final**

- .1 Subject to clause 35.1.3 of the GC 21 General Conditions of Contract, the parties agree to accept the determination in the Valuer’s certificate as final and binding.

**8 Liability of Valuer**

- .1 The Valuer is not liable for anything done or omitted by the Valuer under this agreement, other than fraud.

**9 Fees and expenses**

- .1 The Principal and the Contractor must share equally the fees and out-of-pocket expenses of the Valuer for the determination. However, the Principal alone must pay all such fees and out-of-pocket expenses related to any Variation which the Principal proposes but does not later instruct.
.2 The fees payable to the Valuer under this agreement are:
.1 An administration fee of \$» for reviewing the Contract Documents
.2 An amount for the time involved in performing the Valuer’s duties under this agreement based on these hourly rates:
Director \$...../hour
Associate \$...../hour
Senior Quantity Surveyor / Engineer \$...../hour
Quantity Surveyor / Engineer \$...../hour
Technician \$...../hour
.3 Substantiated out-of-pocket expenses.



**10 Confidentiality**

- .1 The parties and the Valuer must keep confidential all proceedings and submissions relating to a determination by the Valuer. They must not divulge information to any other person except with the prior written consent of the other party, or as required by law, or in order to enforce a determination of the Valuer.

**11 Termination of agreement**

- .1 This agreement may be terminated by a written notice to the Valuer signed by both the Principal and the Contractor. The Principal and the Contractor may then, separately or together, recover all documents each had provided to the Valuer. They must then pay all the Valuer’s outstanding fees and expenses in accordance with clause 9 of this agreement.

**12 Payment**

- .1 The Principal and the Contractor must pay the Valuer within 14 days after receiving an invoice which complies with this agreement.
- .2 The Principal and the Contractor must advise the Valuer of the necessary details for invoicing if they have agreed that one of them will make payments to the Valuer on behalf of both.

**13 Period of engagement of Valuer**

- .1 Unless this agreement is terminated under clause 11 of this agreement, the Valuer is engaged until the time of issue of the *Final Payment Schedule*, plus any further period of time required for any referred matter which has not been determined by the Valuer by the time the *Final Payment Schedule* is issued.

**Signed by the Contractor:**

Signature of Authorised Person: .....  
Name of Authorised Person: .....  
Date: .....

**Signed by the Principal:**

Signature of Authorised Person: .....  
Name of Authorised Person: .....  
Date: .....

**Signed by the Valuer:**

Signature of Valuer: .....  
Name of Valuer: .....  
Date: .....

## Schedule 5

# Expert Determination Procedure

Refer to clause 71 of the GC21 General Conditions of Contract.

## 1 Questions to be determined by the Expert

- .1 For each *Issue*, the *Expert* must determine the following questions, to the extent that they are applicable to the *Issue* and unless otherwise agreed by the parties:
  - .1 Is there an event, act or omission which gives the claimant a right to compensation, or assists in otherwise resolving the *Issue* if no compensation is claimed:
    - .1 under the Contract,
    - .2 for damages for breach of the Contract, or
    - .3 otherwise in law?
  - .2 If so:
    - .1 what is the event, act or omission?
    - .2 on what date did the event, act or omission occur?
    - .3 what is the legal right which gives rise to the liability to compensation or resolution otherwise of the *Issue*?
    - .4 is that right extinguished, barred or reduced by any provision of the Contract, estoppel, waiver, accord and satisfaction, set-off, cross-claim or other legal right?
  - .3 In light of the answers to the questions in clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:
    - .1 what compensation, if any, is payable by one party to the other and when did it become payable?
    - .2 applying the rate of interest specified in the Contract, what interest, if any, is payable when the *Expert* determines that compensation?
    - .3 if compensation is not claimed, what otherwise is the resolution of the *Issue*?
- .2 The *Expert* must determine, for each *Issue*, any other questions identified or required by the parties, having regard to the nature of the *Issue*.

## 2 Submissions

- .1 The procedure for submissions to the *Expert* is as follows:
  - .1 The party to the Contract which referred the *Issue* to *Expert Determination* must make a submission in respect of the *Issue*, within 15 *Business Days* after the date of the letter of engagement of the *Expert* referred to in clause 71.3 of the GC21 General Conditions of Contract.
  - .2 The other party must respond within 15 *Business Days* after receiving a copy of that submission or such longer period as the other party may reasonably require, having regard to the nature and complexity of the *Issue* and the volume of the submission. If the parties do not agree on that longer period, the party desiring the longer period may make a submission on the point to the *Expert*, within the time specified by the *Expert*, and the *Expert* will promptly determine any extra time permitted. The response to the submission in clause 2.1.1 may include cross-claims.
  - .3 The party referred to in clause 2.1.1 may reply to the response of the other party, but must do so within 10 *Business Days* or such longer period as that party may reasonably require (in the same terms as in clause 2.1.2) after receiving the response, and must not raise new matters.
  - .4 The other party may comment on the reply, but must do so within 10 *Business Days* or such longer period as that party may reasonably require (in the same terms as in clause 2.1.2) after receiving the reply, and must not raise new matters.
- .2 The *Expert* must ignore any submission, response, reply, or comment not made within the time given in clause 2.1 of this Expert Determination Procedure, unless the Principal and the Contractor agree otherwise.

- .3 The *Expert* may request further information from either party. The request must be in writing, with a time limit for the response. The *Expert* must send a copy of the request and the response to the other party, and give the other party a reasonable opportunity to comment on the response.
- .4 All submissions, responses, replies, requests and comments must be in writing. If a party to the Contract gives information to the *Expert*, it must at the same time give a copy to the other party. All documents to be sent to the Principal under this Expert Determination Procedure must be sent to the relevant person at the relevant postal or other address stated in Contract Information item 52.

### **3 Conference**

- .1 The *Expert* may request a conference with both parties to the Contract. The request must be in writing, setting out the matters to be discussed.
- .2 The parties agree that such a conference is not to be a hearing which would give anything under this Expert Determination Procedure the character of an arbitration.

### **4 Role of Expert**

- .1 The *Expert*:
  - .1 acts as an *Expert* and not as an arbitrator;
  - .2 must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the *Expert's* own expertise; and
  - .3 must issue a certificate in a form the *Expert* considers appropriate, stating the *Expert's* determination and giving reasons, within 16 weeks, or as otherwise agreed by the parties, after the date of the letter of engagement of the *Expert* referred to in clause 71.3 of the GC21 General Conditions of Contract.
- .2 If a certificate issued by the *Expert* contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the *Expert* must correct the certificate.

Schedule 6

# Contractor's Statement and Supporting Statement

Refer to clause 58.6.1 of the GC21 General Conditions of Contract

## 1. Form of Statutory Declaration

<b>Statutory Declaration</b>	<b>Oaths Act (NSW) Ninth Schedule</b>
I, .....	Insert full name of Declarant
Of .....	Insert address
<i>do solemnly and sincerely declare that</i>	
1. I am the representative of ..... (ABN.....) ("the Contractor")	Insert name of Contractor, and ABN if applicable
in the Office Bearer capacity of .....	Insert position title of Declarant
2. The Contractor has a contract with ..... (ABN.....)  to carry out ..... [Contract No. ....] ("the Contract")	Insert name of Principal and ABN
	Insert name of Contract and Contract No.
3. I personally know the facts which I have set out in this declaration.	
4. All employees who have at any time been engaged by the Contractor for work done under the Contract a) have been paid all remuneration and benefits to the date of this declaration payable to them by the Contractor in respect of their employment on work under the Contract, and b) have otherwise had accrued to their account all benefits to which they are entitled from the Contractor as at the date of this declaration in respect of their employment on work under the Contract pursuant to any award, enterprise agreement, act or regulation,	
with the exception of the employees and respective amounts unpaid or not accrued for each employee listed below	
Employee  Amount unpaid or not accrued  .....  .....	Insert names and addresses of the unpaid employees, the amounts unpaid, and whether in respect of wages, allowances, holiday pay, long service leave payments and superannuation entitlement etc.
5. Attached to and forming part of this declaration, as Annexure A, is a supporting statement for the purposes of section 13(7) of the Building and Construction Industry Security of Payment Act 1999 (NSW).	
6. In all cases where a subcontractor or supplier to the Contractor has provided services and/or materials in respect of the Contract and has submitted a claim to the Contractor for these services or materials which as at the date of this statutory declaration would have been due and payable but which the Contractor disputes, the reasons for such dispute have been notified in writing to the subcontractor or supplier by the Contractor prior to the date of this statutory declaration. Where such dispute relates to part only of the subcontractor or supplier's claim, that part of the claim not in dispute has been paid by the Contractor to the subcontractor or supplier as at the date of this statutory declaration except for the amounts listed in 5 above.	
7. The provisions of the Contract relating to the payment of employees, subcontractors and suppliers of the Contractor have been complied with by the Contractor.	
8. The Contractor has been informed by each subcontractor to the Contractor (except for subcontracts not exceeding \$25,000 at their commencement) by statutory declaration in equivalent terms to this declaration (made no earlier than the date 14 days before the date of this declaration)	
a) that their subcontracts with their subcontractors and suppliers comply with the requirements of the Contract relating to payment of employees and subcontractors, and b) that all their employees and subcontractors, as at the date of the making of such a declaration:	

i) have been paid all remuneration and benefits due and payable to them by; or

ii) had accrued to their account all benefits to which they are entitled from;

the subcontractor of the Contractor or from any other subcontractor (except for subcontracts not exceeding \$25,000 at their commencement) in respect of any work under the Contract, and

c) of details of any amounts due and payable or benefits due to be received or accrued described in 8(b) above which have not been paid, received or accrued,

except for the following subcontractors to the Contractor who have failed to provide such a declaration

Subcontractor

Due amount unpaid

.....

.....

9. Where a subcontractor to the Contractor has provided a declaration as in 8 above, and it includes unpaid amounts or benefits either not received or not accrued, details of the subcontractor, details of the affected employees, suppliers and subcontractors of the subcontractor, and the respective amounts or benefits either unpaid or not accrued are as follows

Employee, subcontractor or supplier

Amount unpaid or not accrued

.....

.....

10. In relation to the statutory declaration provided by each subcontractor to the Contractor, I am not aware of anything to the contrary of what is contained therein, and on the basis of the contents of those statutory declarations, I believe that information to be true.

11. Attached to and forming part of this declaration, as Annexure B, is a "Contractor's Statement" given by the Contractor in its capacity as 'subcontractor' (as that term is defined in the Workers Compensation Act 1987, Payroll Tax Act 2007 and Industrial Relations Act 1996) which is a written statement

a) under section 175B of the Workers Compensation Act 1987 in the form and providing the detail required by that legislation;

b) under Schedule 2 Part 5 of the Payroll Tax Act 2007 in the form and providing the detail required by that legislation; and

c) under section 127 of the Industrial Relations Act 1996 in the form and providing the detail required by that legislation.

12. I personally know the truth of the matters which are contained in this declaration and the attached Contractor's Statement.

13. All statutory declarations and Contractor's Statements received by the Contractor from subcontractors were

a) given to the Contractor in its capacity as 'principal contractor' as defined in the Workers Compensation Act 1987, the Payroll Tax Act 2007 and the Industrial Relations Act 1996 ("Acts"); and

b) given by the subcontractors in their capacity as 'subcontractors' as defined in the Acts.

14. I am not aware of anything which would contradict the statements made in the statutory declarations or written statements provided to the Contractor by its subcontractors, as referred to in this declaration.

*Insert names and addresses of the Contractor's subcontractors who have not submitted a declaration, and unpaid amounts due or otherwise due to each of them by the Contractor in respect of this claim*

*Insert names of the subcontractors, the name and addresses of the unpaid employees, subcontractors and suppliers and amounts listed as unpaid or not accrued to them.*

*I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths Act 1900 (NSW). I am aware that I may be subject to punishment by law if I wilfully make a false statement in this declaration.*

Declared at ..... on .....  
 (place) (day) (month) (year)

.....  
 (signature of Declarant)

*in the presence of an authorised witness, who states*

I, .....  
*(Name of authorised witness)*

(\* Please cross out any text that does not apply)

1. \* *I saw the face of the person.*

OR

\* *I did not see the face of the person because the person was wearing a face covering,  
but I am satisfied that the person had a special justification for not removing the covering.*

2. \* *I have known the person for at least 12 months.*

OR

\* *I have not known the person for at least 12 months,  
but I have confirmed the person's identity using an  
identification document and the document I relied on was* .....  
*(describe identification document relied on)*

.....  
*(signature of authorised witness)*

.....  
*(date)*

.....  
*(name of authorised witness)*

.....  
*(Justice of the Peace / Solicitor of the Supreme Court of New South Wales)*

*[or other person legally authorised to administer an oath under the Oaths Act 1900 (NSW) or where the declaration is sworn outside the  
State of New South Wales, any person having authority to administer an oath in that place.*

*Authorised witness must print or stamp his or her full name, qualification and address before whom the declaration is made.  
JPs must include their registration number.]*

## 2. Annexure A - Supporting Statement

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this Statement the terms “principal”, “head contractor”, “subcontractor”, and “construction contract” have the meanings given in section 4 of the Building and Construction Industry Security of Payment Act 1999.

The Contractor is a “head contractor” in terms of the Building and Construction Industry Security of Payment Act 1999, and makes relevant statements below accordingly.

This Statement must be signed by the Contractor (or by a person who is authorised, or held out as being authorised, to sign the statement by the Contractor).

Relevant legislation includes *Building and Construction Industry Security of Payment Regulation 2020* cl 18

### Main Contract

**Head contractor:**

Ditchfield Contracting Pty Ltd

*(Business name of the head contractor)*

**ABN** 16 056 793 830

**ACN** \_\_\_\_\_

**Of**

8 Dee Crescent, Tuncurry NSW 2438

*(Address of Contractor)*

has entered into a contract with

**Port Macquarie-Hastings Council**

Contract description

Ocean Drive Duplication, Port Macquarie

Contract number/identifier

T-21-50

### Subcontracts

The head contractor has entered into a contract with the subcontractors listed in the Schedules to this Statement

### Period

This Statement applies for work between: \_\_\_\_\_ and \_\_\_\_\_ inclusive,

subject of the payment claim dated: \_\_\_\_\_

I, \_\_\_\_\_ (full name) being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that to the best of my knowledge and belief all subcontractors, if any, have been paid all amounts that have become due and payable (including any retention amounts) in relation to the construction work that is the subject of this payment claim. These subcontractors and the amounts paid to them are identified in Schedule 1 to this Statement. Any subcontractors with whom an amount has not been paid by the head contractor are identified in Schedule 2 to this Statement.

**NOTE: it is an offence under s 13(7) of the Act for a head contractor to serve a payment claim on the principal, if it is not accompanied by a supporting statement that indicates that it relates to that payment claim. The maximum penalty is \$110,000 for corporations, and \$22,000 for an individual.**

**It is also an offence under the Act, for a head contractor to knowingly make a statement that is false or misleading in a material particular in the particular circumstances. The maximum penalty is \$110,000 for corporations, and \$22,000 or 3 months imprisonment (or both) for individuals.**







**Further Information**

These notes are not intended as legal advice and Contractors should obtain their own professional advice if they have any questions about this Statement or these Notes. Copies of relevant legislation can be found at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

### 3. Annexure B - Contractor's Statement

	<b>Transport for NSW</b>	<h2 style="margin: 0;">Contractor Statement</h2> <p style="margin: 0;">Payment of Workers, Payroll Tax &amp; Worker's Compensation Premiums</p>																				
<p><b>All suppliers/contractors must provide this Statement with every invoice/Payment Claim for all works/services carried out for Transport for NSW (TINSW). TINSW is entitled by law to withhold payment until this Statement is provided (see Note 2 overleaf).</b></p>		<p style="font-size: small;">Workers Compensation Insurance Certificate of Currency for the work period in question. Unless the contractor is exempt </p>																				
<b>Details</b>																						
Contractor's Legal Name:	_____																					
Contractor's Trading / Business Name:	_____																					
Contractor's ABN:	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> <td style="width: 20px; height: 20px;"> </td> </tr> </table>																					Contractor's ACN: _____
Contractor's Address:	_____																					
TINSW Contract No:		Project/Contract Title: _____																				
Description of Works:	_____																					
Period of Work this Statement applies to (see Note 3):	From: _____	To: _____																				
Invoice or Payment Claim Numbers this applies to:	_____																					
Invoice or Payment Claim Dates this Statement applies to:	_____																					
<b>Declaration</b>																						
<b>Tick one in each row</b>																						
I declare that the following is true to the best of my knowledge and belief in respect of the Period of Work above:																						
All workers engaged by the Contractor in respect of the works have been paid all remuneration entitlements.	_____																					
All workers compensation insurance premiums have been paid and <b>attached</b> is a true copy of a Certificate of Currency for workers compensation insurance valid for the period covered by this Statement; <b>or</b>	_____	_____																				
the Contractor is an exempt employer for workers compensation purposes (see Note 6):	_____	_____																				
The Contractor is registered as an employer under the Payroll Tax Act 2007 and has paid all payroll tax due in respect of employees in relation to the works the subject of this Statement; <b>or</b>	_____	_____																				
the Contractor is not required to be registered:	_____	_____																				
The Contractor has not engaged any subcontractors for the works the subject of this Statement, <b>or</b>	_____	_____																				
The Contractor has engaged subcontractors and has obtained a similar statement to this Statement from each of those subcontractors and believes it to be true	_____	_____																				
I am authorised to make this declaration and I am in a position to know the truth of its contents																						
Signature of Authorised Person:	Name of Signatory (print): _____																					
Date:	Position / Job Title of Signatory (print - see Note 4): _____																					
(Electronic copy is available at: <a href="http://home.nsw.gov.au/forms/categories/contractandroadworks/45052093.pdf">http://home.nsw.gov.au/forms/categories/contractandroadworks/45052093.pdf</a> )																						
(see Notes on page 2) Page 1 of 2																						

## Notes for Contractor's Statement

1. A Contractor is any person or company who carries out work under a contract of any kind for any business of TfNSW. References to "Subcontractor" and "Principal Contractor" in the legislation mentioned below have been changed in this Statement to "Contractor" and "TfNSW" respectively to avoid confusion.

2. This form is prepared for the purposes of section 127 of the *Industrial Relations Act 1996* ("IRA"), section 175B of the *Workers Compensation Act 1987* ("WCA") and Schedule 2 Part 5 of the *Payroll Tax Act 2007* ("PTA"). These provisions allow TfNSW to withhold payment from a Contractor without any penalty unless and until the Contractor provides to TfNSW a Statement declaring that:

a. All workers compensation insurance premiums payable up to and including the date(s) on the Statement have been paid, and all premiums owing during the term of the contract will be paid; and

b. all remuneration payable to relevant employees for work under the contract has been paid; and

c. all payroll tax payable relating to the work undertaken has been paid.

3. Section 127 of the IRA says that the Statement must state the period to which it relates. For sequential statements ensure that the dates provide continuous coverage.

4. The person signing this declaration must be a person who is authorised by the Contractor either to sign this Statement (or to sign statements of this kind) and must be a person who is in a position to know the truth of the statements. The Contractor's principal accounting/financial officer may be appropriate. An individual project manager will normally not be appropriate. If the Contractor is a company then the person signing should be a director unless the company has delegated the power to sign such statements to another person (eg the principal accounting officer).

5. A Statement is not required where TfNSW is making payment to a receiver, liquidator or trustee in bankruptcy (see section 127(10) of the IRA, section 175B(12) of the WCA and Sch 2 Part 5 (20) of the PTA).

6. Section 127(6) of the IRA says that references to payments to workers means all types of remuneration to which they are entitled.

7. As of 30 June 2011, an employer is exempt from taking out workers compensation insurance if the employer pays less than \$7500 annually on wages, does not employ an apprentice or trainee and is not a member of a group for workers compensation purposes.

### Generic Version of Statement

This form has been specially adapted for use specifically for Contractors working for TfNSW. Generic versions of this Statement for non-TfNSW use can be obtained at:

[http://www.industrialrelations.nsw.gov.au/pdfs/subcontractor\\_statement\\_form.pdf](http://www.industrialrelations.nsw.gov.au/pdfs/subcontractor_statement_form.pdf); or  
<http://www.osr.nsw.gov.au/lib/doc/forms/opt011.pdf>.

### Record Retention

TfNSW will keep a copy of this Statement for 7 years. If the Contractor obtains a similar statement from its subcontractor then the Contractor must keep that statement for 7 years.

### Offences for False Statement

Knowingly giving a false statement may be an offence under section 127(8) of the IRA, section 175B of the WCA and Sch 2 Part 5 clause 18(8) of the PTA.

### Further Information

These notes are not intended as legal advice and Contractors should obtain their own professional advice if they have any questions about this Statement or these Notes. For more information, refer to OSR Revenue Ruling PT 59 at [www.revenue.nsw.gov.au](http://www.revenue.nsw.gov.au), visit the SafeWork NSW website [www.safework.nsw.gov.au](http://www.safework.nsw.gov.au), Office of State Revenue website [www.revenue.nsw.gov.au](http://www.revenue.nsw.gov.au), or the Department of Finance, Services and Innovation at [www.finance.nsw.gov.au](http://www.finance.nsw.gov.au). Copies of the *Workers Compensation Act 1987*, the *Payroll Tax Act 2007* and the *Industrial Relations Act 1996* can be found at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

## Schedule 7

# Costs Adjustment Formula

Refer to clause 55.2 of the GC21 General Conditions of Contract.

### 1 No adjustment if contract period less than 52 weeks

- .1 Except for cost adjustment for the supply of bitumen calculated under clause 7 of this schedule, if the time stated in the Contract Information for Completion of the Works is 52 weeks or less from the Date of Contract, the Contract is not subject to adjustment for rise and fall in costs.

### 2 Method of cost adjustment

- .1 If the time stated in the Contract Information for Completion of the Works is more than 52 weeks from the Date of Contract, each payment under clause 59 of the Contract shall be adjusted in accordance with this clause 2.
- .2 The method of adjustment is as follows (in the order set out below):-
  - .1 Deduct from the value of the Payment Schedule otherwise proposed to be made by the Principal under clause 59 of the Contract the sum of:-
    - (1) the value of the immediately preceding Payment Schedule; and
    - (2) amounts payable to the Contractor for items referred to in clause 6 for work carried out in performance of the Contract and incorporated in the Works since the date of the immediately preceding Payment Schedule.
  - .2 Multiply the result by the Costs Adjustment Factor in clause 3.
  - .3 If the net Costs Adjustment Factor is positive, add the result to the value of the payment to be made.
  - .4 If the net Costs Adjustment Factor is negative, subtract the result from the value of the payment to be made.

### 3 Costs adjustment formula

- .1 Subject to clause 4, the Costs Adjustment Factor is determined by the following formula:-

$$C = r \left( \frac{R_n}{R_o} \times \frac{X_n - X_o}{100 + X_o} + \frac{R_n}{R_o} \times \frac{Y_n - Y_o}{100 + Y_o} \right) + 0.85 \left( \frac{R_n - R_o}{R_o} \right)$$

where

- C = Costs Adjustment Factor
- r = Labour costs proportion of the Contract which for the purposes of this clause is 0.425 only for bridge construction contracts (and the bridge construction portion of combined road and bridge construction contracts) and 0.350 only for roadworks, earthworks and drainage contracts (and the roadworks construction portion of combined road and bridge construction contracts).
- R<sub>n</sub> = Road and Bridge Construction New South Wales Index Number 3101, which is in 6427.0 - Producer Price Indexes, Table 17 as published by the Australian Bureau of Statistics applicable to the calendar month immediately preceding the last calendar month in which the work the subject of the relevant payment schedule was carried out.
- R<sub>o</sub> = Road and Bridge Construction New South Wales Index Number 3101, which is in 6427.0 - Producer Price Indexes, Table 17 as published by the Australian Bureau of Statistics applicable to the calendar month preceding the calendar month during which tenders closed.
- X<sub>n</sub> = Current Payroll Tax Rate, which is the rate per centum payable on wages under New South Wales legislation imposing payroll tax applicable to the calendar month immediately preceding the last calendar month in which the work the subject of the relevant Payment Schedule was carried out.

- Xo = Base Payroll Tax Rate, which is the rate per centum payable on wages under New South Wales legislation imposing payroll tax applicable as at the calendar month immediately preceding the calendar month during which tenders closed.
- Yn = Current Workers' Compensation Premium Rate, which is the rate for Road and Bridge Construction (Code 412100 of the Workcover Industry Classification System) published by Insurance and Care NSW(icare), applicable as at the calendar month immediately preceding the last calendar month in which the work the subject of the relevant Payment Schedule was carried out.
- Yo = Base Workers' Compensation Premium Rate, which is the rate for Road and Bridge Construction (Code 412100 of the Workcover Industry Classification System) published by Insurance and Care NSW(icare) applicable on the first day of the calendar month immediately preceding the calendar month during which tenders closed.

NOTE: Rates published by Australian Bureau of Statistics are for quarterly periods and the rate for the calendar month will be the rate for the quarter containing that calendar month. Rates published by icare are yearly and the rate for the calendar month will be the rate for the year containing that calendar month.

#### **4 Adjustment of new rates**

- .1 If the Principal instructs a Variation under clause 48 of the Contract which is not, in the opinion of the Principal, of the same class of works provided in the Contract schedules, every payment made under clause 59 of the Contract for the Variation will be adjusted in the following manner:-
  - .1 the value of the Works to be certified by the Principal in a Payment Schedule under clause 59 of the Contract will be multiplied by the Costs Adjustment Factor referred to in clause 3 as varied by clause 4.1.3;
  - .2 the amount which is produced as a result of the operation of clause 4.1.1 will, where the Costs Adjustment Factor (as varied by this clause) is positive, be added to, or where the Cost Adjustment Factor (as varied by this clause) is negative, be subtracted from the Principal's assessment value of the Works under clause 59 of the Contract; and
  - .3 for the purposes of clause 4, the words "the calendar month in which the Contractor submitted or the Principal assessed the rate or price" referred to in clause 4 replace the words "the calendar month during which tenders closed" in the definition of each of the terms "R", "Xo" and "Yo" in clause 3.

#### **5 Index Numbers as first published**

- .1 The Index Numbers referred to in this clause as being published by the Australian Bureau of Statistics are the numbers as first published for a particular month by the Australian Bureau of Statistics. For the purposes of this clause, those numbers are not subject to alteration following publication of revised, amended or corrected numbers.

#### **6 Items not to be adjusted**

- .1 Payments made to the Contractor for the following items will not be adjusted at all:-
  - .1 extra work instructed by the Principal under clause 48 of the Contract to be executed by the Contractor at a price or prices agreed between the Principal and the Contractor unless the agreement expressly provides for cost adjustment;
  - .2 items paid for as Provisional Sums in accordance with the Contract; and
  - .3 items subject to a separate cost adjustment under clause 7.

#### **7 Cost adjustment for the supply of bitumen**

- .1 The Contract Price shall be subject to adjustments for variations in the cost of bitumen supplied by the Contractor. The adjustment shall be effected in the Payment Claims submitted by the Contractor in accordance with clause 58 of the Contract and the Payment Schedules issued under clause 59 of the Contract.
- .2 Any cost adjustment under this clause 7 shall be calculated from the formula:-

$$D = (C - B) \times A$$

---

where –

A = the quantity of bitumen derived from –

1. The calculation of residual bitumen at 15 degrees Centigrade where the product is sprayed bituminous surfacing or a tack coat.
2. The approved design binder content where the product is asphalt.
3. The approved residual binder content where the product is a bituminous slurry surfacing.

B = the Price of Class 170 bitumen applicable on the last day of the month immediately preceding the month during which the tenders closed;

C = the Price of Class 170 bitumen on the last day of the month immediately preceding the month during which the work is performed; and

D = the applicable cost adjustment for this payment claim.

The Price of Class 170 bitumen shall be the average of the prices for the suppliers contracted to supply TfNSW on its panel contract for the Supply of Bitumen and Related Products.

## **8 No other costs adjustment**

- .1 Unless expressly provided elsewhere in the Contract, there is no adjustment for any costs changes except as provided by clauses 2-7 inclusive. The Contractor accepts the provisions under clauses 2-7 inclusive in full compensation for all costs changes which occur after the closing date of tenders irrespective of their nature and including those consequent upon alteration in the standard working hours and industrial conditions applicable to or prescribed for any industry generally by an Act, Court, Commission or Authority.

## Schedule 8

# Daywork

Refer to clause 47.4 of the GC21 General Conditions of Contract.

### 1 Daywork procedure and determination

- .1 If the Principal instructs that a *Variation* be carried out as *Daywork*, the Principal and Contractor must agree the amount, type and conditions of use of labour, plant and materials to be used in the *Variation*.
- .2 The Contractor must record the particulars of all resources used by the Contractor each day in carrying out the *Variation*. The method of recording the resources must be agreed by the Contractor and the Principal.
- .3 When submitting a claim for payment for the *Variation* in a *Payment Claim* under clause 58, the Contractor must submit the records and all time sheets, wages sheets, invoices, receipts and other documents that are necessary to support this *Payment Claim*.
- .4 The Principal must assess the value of the *Variation* to be paid to the Contractor in respect of each *Payment Claim* and in making its assessment under clause 59 must have regard to the following:
  - .1 the amount of wages and allowances for labour calculated by multiplying the hourly rate of the nearest appropriate labour classification in Annexure E of Specification G2-C2, by the relevant labour hours worked on the *Variation*;
  - .2 the amount of hire charges for construction plant and vehicles hired from third parties or owned by the Contractor, calculated by multiplying the hourly rate of the nearest appropriate construction plant and vehicle classification in Annexure E of Specification G2-C2, by the relevant plant or vehicle hours worked on the *Variation*;
  - .3 where there is no appropriate construction plant or vehicles listed in Annexure E of QA Specification G2-C2, then the reasonable actual amount of hire charges for that construction plant and vehicles hired from third parties or owned by the Contractor as recorded on invoices or other relevant documentation;
  - .4 the reasonable actual mobilisation and demobilisation costs of construction plant and vehicles (where brought to Site only for the directed *Daywork*);
  - .5 the reasonable costs to the Contractor of Subcontractor and Consultant work involved in carrying out the *Variation*;
  - .6 the reasonable actual cost at the Site of all materials; and
  - .7 the reasonable actual cost of additional supervisory and administrative staff brought to the Site only for the directed *Daywork*.
- .5 In addition to the amounts assessed for the items in clause 1.4 above, the value of the *Variation* will include an additional amount for the *Contractor's Margin for Daywork* calculated as 12% of the total of the assessed costs under clause 1.4.
- .6 The hourly rates referred to under clause 1.4.1 and 1.4.2 are subject to cost adjustment in accordance with Schedule 7

### 2 Amounts included in and excluded from *Daywork*

- .1 Assessment by the Principal of the valuation of a *Variation* carried out as *Daywork* will include valuation of all reasonable and necessary costs incurred of personnel, plant, vehicles, Subcontractor, Consultant and materials used by the Contractor in carrying out the *Variation* as instructed by the Principal, subject to:
  - (i) the valuation of the *Variation* will only include costs for actual time of any resources which are employed on the *Variation*; and

- (ii) the costs of supervisory, technical and administrative personnel that are normally engaged on the Works and continue to be so during the *Daywork* will not be included in the Principal's assessment of the valuation of the *Variation*.
- .2 Subject to clause 2.1, no other costs are to be included in the Principal's valuation of the *Variation* carried out by *Daywork*, other than those costs outlined in clause 1.



## Schedule 9

# Subcontract requirements

Refer to clause 28.6.1 of the GC21 General Conditions of Contract.

## General requirements for specified subcontracts

In addition to its obligations under clause 28.3 to 28.8 inclusive, for all Subcontracts valued at or over the amount stated in Contract Information item 29, the Contractor must include requirements consistent with the provisions of the following clauses and schedules of this Contract:

1. clause 3 – Co-operation
2. clause 4 – Duty not to hinder performance
3. clause 5 – Early warning
4. clause 6 – Evaluation and monitoring
5. clause 10 – Governing law of the Contract
6. clause 13 – Compliance with Code of Practice for Procurement
7. clause 14 – No collusive arrangements
8. clause 15.1.2 – Work Health and Safety management, except that the submission and implementation of the Safe Work Method Statements is subject to the decision of the Contractor as principal contractor for Work, Health and Safety matters.
9. clause 15.1.5 – Aboriginal Participation
10. clause 17.3 – Compliance with the Certified AIP Plan, where required by Contract Information item 16C
11. clause 23 – Intellectual Property
12. clause 24 – Confidentiality
13. clause 25 – Media releases and enquiries
14. clause 26 – Care of people, property and the environment, indemnities and limitations
15. clauses 27.13, 27.18 - Insurances
16. clause 28 – Subcontractor relationships
17. clause 58 – Payment Claims
18. clause 59 – Payments
19. Schedule 1 (Subcontractor's Warranty) together with an obligation to execute and deliver the Warranty to the Principal (only if the Subcontractor is required by clause 30 to provide the warranty)
20. Schedule 9 (Subcontract requirements)
21. Schedule 17 (Subcontractors and Suppliers Proof of Payment Process)

Schedule 10

**Not used**

Schedule 11

# Statement regarding Materials

Refer to clause 58.7 of the GC21 General Conditions of Contract.

I am a representative of *[name of company/entity with custody of the Materials or on whose land the Materials are stored]* in the capacity of *[insert position]* and I am authorised to make this statement on behalf of the Company. I confirm that the Company has no lien, charge or other encumbrance over the materials listed in the schedule to this statement (“Materials”). I acknowledge that the Materials are the property of the Principal named in the schedule to this statement (“Principal”) and I hereby irrevocably authorise the Principal or its officers or others acting with its authority to enter the premises where the Materials are stored at any reasonable hour to inspect or remove the Materials. I undertake to make no claim or charge against the Principal in respect of the storage of the Materials.

SCHEDULE

**Materials**

*[list the Materials]*

Principal  
*Port Macquarie-Hastings Council*

SIGNED .....

DATE:.....

## Schedule 12

# Compliance with Building Code

Refer to clause 17.1 of the GC21 General Conditions of Contract.

- .1 The Contractor must comply, and ensure that each other *Building Code Entity* complies, in the performance of the Contract, with the requirements of the *Building Code* and the *BCIIP Act*, including by ensuring that no Subcontractor:
  - .1 where Contract Information item 16A specifies that the *Building Code* applies because *Commonwealth* funding (above the minimum thresholds specified in Schedule 1 of the *Building Code*) has been obtained for the project which the Works form part of:
    1. is, at the date of their engagement subject to an 'enterprise agreement' (as that term is defined in the *Fair Work Act 2009* (Cth)) that does not meet the requirements of section 11 of the *Building Code*;
    2. is, at the date of their engagement subject to an 'exclusion sanction' (as that term is defined in section 3(3) of the *Building Code*) or is excluded from undertaking work funded by a state or territory government, unless approval to engage that *Building Code Entity* has been obtained from the *ABC Commissioner*; and
    3. without limiting any other obligation on the Contractor under the Contract, uses any *Materials* in the performance of the *Works* that do not, at a minimum, comply with the relevant Australian standards published by, or on behalf of, Standards Australia Limited (ABN 85 087 326 690); or
  - .2 at the date of their engagement, has failed to fully comply with any adverse decision, direction or order made by a court or tribunal for a breach of the *BCIIP Act*, a *Designated Building Law*, a work health and safety law (including, but not limited to, the *Work Health and Safety Act 2011* (NSW) and the Work Health and Safety Regulation 2017 (NSW)) or competition and consumer and consumer law (including, but not limited to, the *Competition and Consumer Act 2010* (Cth)).
- .2 Compliance with the *Building Code* will not relieve the Contractor from its responsibility to perform the Contract, or from liability for any *Defect* in the Works arising from compliance with the *Building Code*.
- .3 Where Contract Information item 16A states that a *Workplace Relations Management Plan (Commonwealth)* is required, the Contractor must comply, and must ensure that each of its Subcontractors complies, with the version of the *Workplace Relations Management Plan (Commonwealth)* provided by the Contractor that the Principal notifies the Contractor has been approved by the *ABCC*.
- .4 The Contractor must maintain adequate records of the compliance with the *Building Code* by each *Building Code Entity*.
- .5 The Contractor must notify the *ABCC* of any breach or suspected breach of the *Building Code* as soon as practicable but no later than 2 working days after becoming aware of the breach or suspected breach and of the steps proposed to be taken to rectify the breach.
- .6 The Contractor acknowledges the powers and functions of the *ABC Commissioner* and the *ABCC* under the *BCIIP Act* and the *Building Code* and will ensure that each *Building Code Entity* complies with any requests made by the *ABCC* and the *ABC Commissioner* within those powers and functions, including but not limited to requests for entry under section 72 of the *BCIIP Act*, requests to interview any person under section 74 of the *BCIIP Act*, requests to produce records or documents under sections 74 and 77 of the *BCIIP Act* and requests for information concerning matters relating to the *Building Code* under section 7(c) of the *Building Code*.
- .7 If the Contractor does not comply with the requirements of the *Building Code* or the *BCIIP Act* in the performance of the Contract such that a sanction is applied by the *ABC Commissioner*, the *ABCC* or the Minister for Employment, without prejudice to any rights that would otherwise accrue, those parties will be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by the Contractor or a related entity in respect of work funded by the *Commonwealth* or its agencies.

- .8 The Contractor agrees that it and each other *Building Code Entity* will agree to a request from the Principal, the Commonwealth (or any person authorised by the *Commonwealth*) or any person contemplated by the *BCIIP Act* or the *Building Code* as having a right to obtain information from a *Building Code Entity*, to provide such information as is relevant to confirming whether a *Building Code Entity* has complied with the *Building Code* within a specified period, in person, by fax, by post or other means.
- .9 Where Contract Information item 16A specifies that *Commonwealth* funding (above the minimum thresholds specified in Schedule 1 of the *Building Code*) has been obtained for the project which the Works form part of, the Contractor must, prior to engaging any Subcontractor, obtain and retain from each proposed Subcontractor a copy of a 'Declaration of Compliance', substantially in the form set out in the document titled '*Code for the Tendering and Performance of Building Work 2016 – Model Clauses Type B: Model Clauses for Tender and Contract Documentation for Contractors and Subcontractors*'.
- .10 Without limiting any other obligation on a *Building Code Entity* under the *Building Code*, the Contractor must ensure that all Subcontracts impose obligations on Subcontractors equivalent to the requirements of this Schedule 12.

Schedule 13

**Not used**

Schedule 14

**Not Used**

## Schedule 15

# Parent Company Guarantee

Refer to clause 33.7 and Contract Information Item 35B of the GC21 General Conditions of Contract.

## Deed of Guarantee and Indemnity

made at \_\_\_\_\_ on \_\_\_\_\_ 20\_\_\_\_  
between Port Macquarie-Hastings Council (ABN 11 236 901 601) (PMHC)  
(Principal)  
and [insert Guarantor's name] (ABN [insert Guarantor's ABN]) of [insert Guarantor's address] (Guarantor)

## Recitals

- A The Principal has agreed to enter into the Contract with the Contractor on the condition that the Guarantor provides this Deed.
- B The Guarantor has agreed on the following terms and conditions to guarantee to the Principal all of the Obligations and to indemnify the Principal against any loss arising from any failure by the Contractor to perform the Obligations.
- C The Guarantor considers that by providing this Deed there will be a commercial benefit flowing to it.

## This Deed provides

## 1. Definitions and interpretation

### 1.1 Definitions

In this Deed:

**Contract** means the [insert details] Contract between the Principal and the Contractor dated on or about the date of this Deed.

**Contractor** means [insert Contractor's name, ABN and address].

**Deed** means this deed of guarantee and indemnity between the Principal and the Guarantor.

**Event of Default** means any event which constitutes a breach of, or is duly and properly declared to be an event of default (howsoever described) by, the Contract.

**Guaranteed Money** means all money the payment or repayment of which from time to time forms part of the Obligations.

**Insolvency Provision** means any Law relating to insolvency, sequestration, liquidation or bankruptcy (including any Law relating to the avoidance of conveyances in fraud of creditors or of preferences, and any Law under which a liquidator or trustee in bankruptcy may set aside or avoid transactions), and any provision of any agreement, arrangement or scheme, formal or informal, relating to the administration of any of the assets of any person.

**Legal Opinion** means a legal opinion:

- (a) from lawyers to the Guarantor, authorised to practice in the place of incorporation of that Guarantor, stating that this deed is binding and enforceable against that Guarantor;
- (b) which states that it may be relied upon by the Principal; and
- (c) in a form reasonably satisfactory to the Principal.

**Obligations** means all the liabilities and obligations of the Contractor to the Principal under or arising out of or in any way in connection with the Contract or the work to be carried out or performed by the Contractor under, out of or in connection with the Contract, and includes any liabilities or obligations which:

- (a) are liquidated or unliquidated;
- (b) are present, prospective or contingent;
- (c) are in existence before or come into existence on or after the date of this Deed;



- (d) relate to the payment of money or the performance or omission of any act;
  - (e) sound in damages only; or
  - (f) accrue as a result of any Event of Default,
- and irrespective of:
- (g) whether the Contractor is liable or obligated solely, or jointly, or jointly and severally with another person;
  - (h) the circumstances in which the Principal comes to be owed each liability or obligation and in which each liability or obligation comes to be secured by this Deed, including any assignment of any liability or obligation or of this Deed; or
  - (i) the capacity in which the Contractor and the Principal comes to owe or be owed such liability or obligation,

and **Obligation** means any liability or obligation forming part of the Obligations.

**Personal Property Securities Register** has the meaning given in the PPS Law.

**Power** means any right, power, authority, discretion, remedy or privilege conferred on the Principal by the Contract, by statute, by law, or by equity.

**PPS Law** means:

- (a) the *Personal Property Securities Act 2009* (Cth) (“PPSA”) and any regulation made at any time under the PPSA, including the *Personal Property Securities Regulations 2010* (Cth) (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a law or regulation referred to in paragraph (a) of this definition.

**Relevant Person** means the Contractor, the Guarantor and any person who has executed a Security in favour of the Principal.

**Security** means a ‘security interest’ (as that term is defined in the PPS Law), mortgage, charge, pledge, lien, hypothecation, guarantee (including this Deed), indemnity (including the indemnity under this Deed), letter of credit, letter of comfort, performance bond, contractual right of set-off or combination or other assurance against loss which secures the Guaranteed Money or the performance of any other Obligation, and whether existing at the date of this Deed or at any time in the future.

**Specified Rate** means the rate determined by the Uniform Civil Procedure Rules 2005 on unpaid judgments for the period in which the amount remains unpaid.

**Transaction Document** means each of:

- (a) this Deed;
- (b) the Contract;
- (c) any other document which the Guarantor and the Principal so designate in writing;
- (d) each other document contemplated by or required in connection with any of the above or the transactions they contemplate; and
- (e) each document entered into for the purpose of amending, novating, restating or replacing any of the above.

## 1.2 Defined terms

Terms used in this Deed which are not otherwise defined will have the meaning given to them in the Contract.

## 1.3 Interpretation

In this Deed, headings (including headings in parentheses in sub-clauses) are for convenience only and do not affect the interpretation of this Deed and unless the context otherwise requires:

- (a) an obligation or liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;
- (b) references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), a trust or a partnership;

- (c) anything (including an amount) is a reference to the whole and each part of it and the words "including", "for example" or "such as" when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (d) a reference to any party to this Deed includes that party's executors, administrators, successors, and permitted substitutes and assigns, including any person taking part by way of novation and in the case of a trustee, includes a substituted or additional trustee;
- (e) a reference to any Authority, institute, association or body is:
  - (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
  - (ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or objects as that Authority, institute, association or body;
- (f) a reference to a document (including this Deed) is to that document as amended, novated, supplemented, varied or replaced from time to time;
- (g) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or any section or provision of either of these includes:
  - (i) all ordinances, by-laws, regulations of and other statutory instruments (however described) issued under that statute or delegated legislation; and
  - (ii) any consolidations, amendments, re-enactments and replacements;
- (h) a word importing the singular include the plural (and vice versa) and a word indicating a gender includes every other genders.
- (i) a reference to:
  - (i) a party or clause is a reference to a party or clause of or to this Deed
  - (ii) a paragraph or a sub-paragraph is a reference to a paragraph or sub-paragraph in the clause in which the reference appears
  - (iii) the Deed includes all attachments and annexures to it;
- (j) where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (k) for all purposes (other than where designated as a Business Day), "day" means calendar day;
- (l) a reference to "\$" or "dollar" is to Australian currency;
- (m) no term or provision of the Deed will be construed against a party on the basis that the Deed or the term in question was put forward or drafted by or on behalf of that party; and
- (n) (n) any reference to "information" will be read as including information, representations, statements, data, samples, bore logs, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated.

## **2. Guarantee**

### **2.1 Guarantee**

The Guarantor irrevocably and unconditionally guarantees to the Principal the due and punctual performance by the Contractor of all the Obligations.

### **2.2 Payment by Guarantor**

If the Contractor does not pay the Guaranteed Money when due, the Guarantor must on demand pay to the Principal the Guaranteed Money which is then due and unpaid or which later becomes due, owing or payable.

### **2.3 Perform obligations**

If the Contractor defaults in the performance or observance of any of the Obligations, the Guarantor must, in addition to its obligations under clause 2.2 of this Deed, on demand from time to time by the Principal, immediately perform any of the Obligations then required to be performed by the Contractor in the same manner as the Contractor is required to perform the Obligations.

### **3. Indemnity**

As a covenant separate and distinct from that contained in clause 2.1, the Guarantor irrevocably and unconditionally agrees to indemnify the Principal and at all times to keep the Principal indemnified against any loss or damage suffered by the Principal arising out of or in connection with:

- (a) any failure by the Contractor to perform the Obligations;
- (c) any Obligation or liability that would otherwise form part of the Obligations being void, voidable or unenforceable against or irrecoverable from the Contractor for any reason, and whether or not the Principal knew or ought to have known of that reason; or
- (d) a disclaimer of any contract (including the Contract) or property made by a liquidator of the Contractor pursuant to Part 5.6 Division 7A of the *Corporations Act 2001* (Cth) or any other applicable laws.

### **4. Liability**

#### **4.1 Liability of Guarantor**

- (a) A reference in this Deed to the obligations or liabilities of the Guarantor is a reference to the Guarantor's obligations or liabilities as either guarantor or indemnifier (or both) under this Deed.
- (b) The use of the expression "Guarantor" in this Deed in relation to a party must not be construed as diminishing that party's obligations as an indemnifier under this Deed.
- (c) The provisions of this Deed which preserve the liability of the Guarantor as a guarantor apply, appropriately modified, to any liability which arises whether in regard to that party's guarantee or its indemnity under this Deed.

#### **4.2 Limit of liability**

- (a) Notwithstanding any other clause in this Deed but subject to paragraphs (b) and (c) below:
  - (i) the liability of the Guarantor under this Deed will not exceed the liability which the Guarantor would have had to the Principal arising out of or in connection with the Contract if the Guarantor had been named as the Contractor under the Contract (assuming that the Contract is valid, binding and enforceable in accordance with its terms); and
  - (ii) payment by one of the Contractor or the Guarantor to or in favour of the Principal shall be deemed to be good discharge against the Principal in respect of that payment.
- (b) The limitation of liability under this clause 4.2 does not apply to liability to pay any interest in accordance with clause 7.3 of this Deed, liability to pay any GST in accordance with clause 8.3 of this Deed, or otherwise.
- (c) Nothing in this clause shall limit the Guarantor's liability for Obligations which arise from or would have arisen from any voided, voidable, unenforceable or irrecoverable Obligations referred to in clause 3(b) of this Deed (if those Obligations had not been voided, avoided, unenforceable or irrecoverable), subject to such liability not exceeding the liability that the Contractor would have had if the Obligations had not been voided, voidable, unenforceable or irrecoverable.

### **5. Nature and preservation of liability**

#### **5.1 Absolute liability**

- (a) The liability of the Guarantor under this Deed is absolute and is not subject to the performance of any condition precedent or subsequent by the Contractor or the Guarantor.
- (b) This Deed binds each person who has executed it, notwithstanding that:
  - (i) any person, whether named as a party or not, does not execute this Deed;
  - (ii) the execution of this Deed by any person is invalid, forged or irregular in any way; or
  - (iii) this Deed is or becomes unenforceable, void or voidable against any other person.

#### **5.2 Unconditional liability**

The liability of the Guarantor under this Deed will not be affected by any act, omission, matter or thing which, but for this clause 5.2, might operate in law or in equity to release the Guarantor from that liability or reduce the Guarantor's liability under this Deed, including any of the following:

- (a) the occurrence before, on or at any time after the date of this Deed, of any Insolvency Event in relation to the Contractor or the Guarantor;
- (b) the receipt by the Principal of any payment, dividend or distribution under any Insolvency Provision in relation to the Contractor or the Guarantor;
- (c) the occurrence of any Event of Default;
- (d) the Contract or any payment or other act, the making or doing of which would otherwise form part of the Obligations being or becoming or being conceded to be frustrated, illegal, invalid, void, voidable, unenforceable or irrecoverable in whole or in part for any reason whether past, present or future;
- (e) any Security or any Transaction Document being terminated or discharged (whether by any party thereto or by operation of law) or being or becoming void, voidable or unenforceable for any reason, or the Principal accepting or declining to accept any Security from any person at any time;
- (f) the Principal granting time, waiver or other indulgence or concession to, or making any composition or compromise with, the Contractor or the Guarantor;
- (g) the Principal not exercising or delaying (whether deliberately, negligently, unreasonably or otherwise) in the exercise of any remedy or right it has for the enforcement of the Contract or any Obligation;
- (h) any laches, acquiescence or other act, neglect, default, omission or mistake by the Principal;
- (i) the determination, rescission, repudiation or termination, or the acceptance of any of the foregoing, by the Principal or the Contractor or the Guarantor of the Contract or any Obligation;
- (j) any variation to the Contract or any Obligation, whether or not that variation is substantial or material, or imposes any additional liability on or disadvantages the Contractor or the Guarantor;
- (k) the full, partial or conditional release or discharge by the Principal or by operation of law, of the Contractor or the Guarantor from the Contract or any Obligation;
- (l) any change in membership (whether by death or retirement of an existing member, admission of a new member, or otherwise) or in the name of any partnership, firm or association in which the Contractor or the Guarantor is a member;
- (m) the transfer, assignment or novation by the Principal or the Contractor or the Guarantor of all or any of its rights or obligations under the Contract or under any other Obligation;
- (n) any failure by the Principal to disclose to the Guarantor any material or unusual fact, circumstance, event or thing known to, or which ought to have been known by, the Principal relating to or affecting the Contractor at any time before or during the currency of this Deed, whether prejudicial or not to the rights and liabilities of the Guarantor and whether or not the Principal was under a duty to disclose that fact, circumstance, event or thing to the Guarantor or to the Contractor;
- (o) the Principal agreeing with the Contractor or the Guarantor not to sue, issue process, sign or execute judgment, commence proceedings for bankruptcy or liquidation, participate in any administration, scheme or deed of arrangement or reconstruction, prove in any bankruptcy or liquidation, or do anything else in respect of the liability of the Contractor or the Guarantor;
- (p) (where the Guarantor is an individual) the death or mental incapacity of the Guarantor;
- (q) the provisions of section 440J of the *Corporations Act 2001* (Cth) operating to prevent or delay:
  - (i) the enforcement of this Deed against any Guarantor; or
  - (ii) any claim for contribution against any Guarantor;
- (r) the Principal enforcing, releasing, disposing of, surrendering, wasting, impairing, destroying, abandoning, prejudicing, or failing or delaying to perfect, maintain, preserve, realise or enforce any Transaction Document or any Security, whether negligently or otherwise;
- (s) any breach by the Principal of any term of any Transaction Document or Security or any other act or omission (negligent or otherwise) of the Principal with regard to any Transaction Document, any Security or any Relevant Person which is prejudicial to the interests of the Guarantor;
- (t) any claim by any person that a payment to, receipt by, or other transaction in favour of the Principal in or towards satisfaction of the Guaranteed Money is void, voidable or capable of being set aside under any law relating to bankruptcy, insolvency or liquidation being upheld, conceded or compromised;

- (u) the transfer, assignment or novation by the Principal or any Relevant Person of all or any of its rights or obligations under any Transaction Document or Security to which it is a party; or
- (v) a disclaimer of any contract (including the Contract) or property made by a liquidator of the Contractor pursuant to Part 5.6 Division 7A of the *Corporations Act 2001* (Cth) or other applicable laws.

### **5.3 No merger**

- (a) This Deed is in addition to and does not merge with, postpone, lessen or otherwise prejudicially affect the Contract or any other Power of the Principal.
- (b) The Principal will hold any judgment or order obtained by it against any person in respect of the Guaranteed Money or the Obligations collaterally with this Deed, and this Deed will not merge in that judgment or order.

### **5.4 No obligation to gain consent**

No consent is required from any Guarantor nor is it necessary for the Guarantor to or be made aware of any event referred to in clause 5.2, any transaction between the Principal and the Contractor, or any particulars concerning any Obligation.

### **5.5 Appropriation**

- (a) The Principal is under no obligation to marshal or appropriate in favour of the Guarantor or to exercise, apply, transfer or recover in favour of the Guarantor any Security or any funds or assets that the Principal holds, has a claim on, or has received or is entitled to receive, but may do so in the manner and order as the Principal determines in its absolute discretion.
- (b) The Principal may hold in a suspense account (without liability to pay interest) any money which it receives from the Guarantor, or which it receives on account of the Guarantor's liability under this Deed, and which the Principal may, at its discretion, appropriate in reduction of the Guarantor's liability under this Deed.

### **5.6 Void or voidable transactions**

If:

- (a) the Principal has at any time released or discharged:
  - (i) the Guarantor from its obligations under this Deed; or
  - (ii) any assets of the Guarantor from a Security,in either case in reliance on a payment, receipt or other transaction to or in favour of the Principal; or
- (b) any payment or other transaction to or in favour of the Principal has the effect of releasing or discharging:
  - (i) the Guarantor from its obligations under this Deed; or
  - (ii) any assets of the Guarantor from a Security;
- (c) that payment, receipt or other transaction is subsequently claimed by any person to be void, voidable or capable of being set aside for any reason, including under an insolvency Provision or under the general law; and
- (d) that claim is upheld or is conceded or compromised by the Principal,

then:

- (e) the Principal will immediately become entitled against the Guarantor to all such rights (including under any Security) as it had immediately before that release or discharge;
- (f) the Guarantor must immediately do all things and execute all documents as the Principal may reasonably require to restore to the Principal all those rights; and
- (g) the Guarantor must indemnify the Principal against costs, losses and expenses suffered or incurred by the Principal in or in connection with any negotiations or proceedings relating to the claim or as a result of the upholding, concession or compromise of the claim.

### **5.7 No set-off, counterclaim**

The liability of the Guarantor under this Deed will not be reduced or avoided by any defence, set-off or counterclaim available to the Contractor against the Principal.

## **5.8 Claim on the Guarantor**

The Principal is not required to make any claim or demand on the Contractor, or to enforce the Contract, or any other right, power or remedy against the Contractor before making any demand or claim on the Guarantor.

## **5.9 No representation by Principal etc.**

The Guarantor acknowledges that it has not entered into this Deed as a result of any representation, promise, statement or inducement to the Guarantor by or on behalf of the Principal, the Contractor or any other person.

## **5.10 No contribution**

The Guarantor must not make a claim under or enforce any right of contribution it may have against any other Relevant Person unless and until the Obligations have been paid, discharged or recovered by the Principal in full.

# **6. Representations and Warranties**

## **6.1 General representations and warranties**

The Guarantor or, if there is more than one Guarantor, each Guarantor represents and warrants to the Principal that:

- (a) this Deed constitutes a valid and legally binding obligation of the Guarantor in accordance with its terms;
- (b) the execution, delivery and performance of this Deed by the Guarantor does not breach any law, or any document or agreement to which the Guarantor is a party or which is binding on it or any of its assets;
- (c) no litigation, arbitration, mediation, conciliation, criminal or administrative proceedings are current, pending or, to the knowledge of the Guarantor, threatened, which, if adversely determined, may have a material adverse effect on the business assets or financial condition of the Guarantor;
- (d) all information relating to the Guarantor provided to the Principal in connection with this Deed is true in all material respects and is not, by omission or otherwise, misleading in any material respect; and
- (e) the Guarantor has not entered into this Deed as the trustee of any trust.

## **6.2 Corporate representations and warranties**

The Guarantor, or if there is more than one Guarantor, each Guarantor, that is or purports to be a body corporate, further represents and warrants to the Principal that:

- (a) it is duly incorporated and has the corporate power to own its property and to carry on its business as is now being conducted;
- (b) the execution, delivery and performance of this Deed does not breach the Constitution of the Guarantor and, if the Guarantor or any of its subsidiaries is listed on the Australian Securities Exchange Limited or on any other stock exchange, those listing requirements or business rules;
- (c) it has the power, and has taken all corporate and other action required, to enter into this Deed and to authorise the execution and delivery of this Deed and the performance of its obligations under this Deed;
- (d) the Guarantor has filed all corporate notices and effected all registrations with the Australian Securities and Investments Commission or similar office in its jurisdiction of incorporation and in any other jurisdiction as required by law and all of those filings and registrations are current, complete and accurate;
- (e) the execution of this Deed is in the best commercial interests of the Guarantor;
- (f) this Deed is executed for valuable consideration, the receipt and adequacy of which the Guarantor acknowledges;
- (g) it is not in liquidation, provisional liquidation or receivership, or under administration, and no matter relating to it or any of its subsidiaries is the subject of a direction under, or having effect as if it were a direction under, section 14 of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASC Law'), or the subject of an investigation under, or taken to be under, the ASC Law;

- (h) this Deed constitutes a valid and legally binding obligation, enforceable in accordance with its terms, to rank at all times at least equally with all of its other present and future unsecured payment obligations (including, without limitation, contingent obligations), other than those which are mandatorily preferred by law and that the Guarantor has taken all action required to ensure that its obligations under this Deed so rank and will continue to so rank;
- (i) its financial statements current as at the date of this Deed have been prepared in accordance with the laws of Australia and (except where inconsistent with those laws) generally accepted accounting principles consistently applied, and give a true and fair view of the financial condition of it and its subsidiaries as at the date to which they are made up, and of the results of operations for the financial year then ended, and there has been no change since that date having a material effect on it, or on it and its subsidiaries on a consolidated basis;
- (j) the written information and reports (if any) which it has given to the Principal in connection with the negotiation and preparation of this Deed:
  - (i) was, when given, true and accurate in all material respects and not misleading, whether by omission or otherwise; and
  - (ii) contain forecasts and opinions all of which were made or formed after due and careful consideration on the part of its relevant officers based on the best information available to it and were fair and reasonable when made or formed; and
- (k) it is not necessary or desirable to ensure the legality, validity, enforceability or admissibility in evidence of this Deed that this Deed or any other instrument be filed or registered with any government agency or that any Taxes be paid.

### **6.3 Representations and warranties repeated**

The Guarantor acknowledges that the Principal entered into the Contract in reliance on the representations and warranties in this clause 6.

Each representation and warranty in this Deed will be repeated on each day whilst any of the Guaranteed Money remains outstanding (whether or not then due for payment) with reference to the facts and circumstances then subsisting, as if made on each such day.

### **6.4 No representations to Guarantor**

The Guarantor confirms that it has not executed this Deed as a result of or in reliance upon any promise, representation, statement or information of any kind or nature whatever given or offered to it by or on behalf of the Principal whether in answer to any inquiry by or on behalf of the Guarantor or not.

## **7. Payments**

### **7.1 On demand**

All money payable by the Guarantor under this Deed must be paid by the Guarantor on demand by the Principal in immediately available funds to the account and in the manner notified by the Principal to the Guarantor.

### **7.2 Payment in gross**

All money received or recovered by the Principal on account of the Guaranteed Money will be treated as payments in gross without any right on the part of the Guarantor to claim the benefit of any money received or recovered by the Principal or any Security, until the Principal has been paid 100 cents in the dollar in respect of the Guaranteed Money.

### **7.3 Interest**

As a liability separate and distinct from the Guarantor's liability under clauses 2 and 3, the Guarantor must on demand by the Principal pay interest on all amounts due and payable by it and unpaid under or in respect of this Deed. Interest will accrue on those amounts from day to day from the due date up to the date of actual payment, before and (as separate and independent obligation) after judgment, at the Specified Rate and, if not paid when due, will itself bear interest in accordance with this clause 7.3. Interest is calculated on the basis of the actual number of days on which interest has accrued and on a 365 day year.

#### **7.4 Merger**

If the liability of the Guarantor to pay to the Principal any money under this Deed becomes merged in any judgment or order, then, as an independent obligation, the Guarantor will pay interest on the amount of that money at the rate which is the higher of that payable under clause 7.3 and that fixed by or payable under the judgment or order.

#### **7.5 No set-off or deduction**

All payments by the Guarantor to the Principal under this Deed will be without any set-off or counterclaim and the Guarantor irrevocably waives any right of set-off or counterclaim which it may have against the Principal.

#### **7.6 No deduction for Taxes**

- (a) All payments by the Guarantor under this Deed will be without deduction or withholding for or on account of any present or future Taxes, unless the Guarantor is compelled by law to deduct or withhold the same.
- (b) If the Guarantor is compelled by law to make any deduction or withholding for or on account of any present or future Taxes (not being Taxes on the overall net income of the Principal), then the Guarantor must:
  - (i) pay to the Principal any additional amounts necessary to enable the Principal to receive (after all deductions and withholdings for those Taxes) a net amount equal to the full amount which would otherwise be payable to the Principal if no deduction or withholding was required to be made;
  - (ii) promptly (and within the time prescribed by law) pay to the relevant taxing authority the amount of those Taxes which it is compelled by law to deduct or withhold, and indemnify the Principal for any Taxes and interest or penalties to which the Principal may become liable consequent on the failure of the Guarantor to pay those Taxes; and
  - (iii) deliver to the Principal, promptly on request from the Principal, a copy of any receipt issued by the relevant taxing authority on payment of those Taxes.

#### **7.7 Certificate of the Principal**

Without limiting clause 12.4, a certificate in writing of the Principal certifying the amount payable by the Contractor or the Guarantor to the Principal or stating any other act, matter or thing relating to this Deed or the Contract will be prima facie evidence of the contents of the certificate.

#### **7.8 Currency indemnity**

- (a) The Australian Dollar is the currency of payment by the Guarantor under or in connection with this Deed, except that payment by the Guarantor of or in relation to any Obligation which is denominated in a foreign currency must be made in that foreign currency.
- (b) If for any reason any amount payable by the Guarantor under or in connection with this Deed is received by the Principal in a currency (“**Payment Currency**”) other than the currency (“**Agreed Currency**”) in which that amount is required to be paid under this Deed (whether as a result of any judgment or order, the liquidation of the Guarantor or otherwise), and the amount obtained (net of charges) by the Principal on its conversion of the amount of the Payment Currency received into the Agreed Currency is less than the amount payable under this Deed in the Agreed Currency, then the Guarantor will, as an independent and additional obligation, indemnify the Principal for that deficiency and for any loss sustained as a result of that deficiency

### **8. Expenses and stamp duties**

#### **8.1 Expenses**

- (a) The Guarantor must on demand reimburse the Principal for and keep the Principal indemnified against all expenses, including legal fees, costs and disbursements on a solicitor/own client basis (or on a full indemnity basis, whichever is the higher) assessed without the necessity of taxation incurred by the Principal in connection with:
  - (i) any subsequent consent, agreement, approval, waiver, amendment to or discharge of this Deed; and
  - (ii) any exercise, enforcement or preservation, or attempted exercise, enforcement or preservation, of any rights under this Deed.



- (b) Each party must pay its own expenses incurred in negotiating and executing this Deed.

## **8.2 Stamp duties**

- (a) The Guarantor must pay all stamp duties, transaction, registration and similar Taxes, including fines and penalties, financial institutions duty and debits tax which may be payable to or required to be paid by any appropriate authority, or determined to be payable in connection with the execution, delivery, performance or enforcement of this Deed or any payment, receipt or other transaction contemplated by this Deed.
- (b) The Guarantor must indemnify the Principal against any loss or liability incurred or suffered by it as a result of the delay or failure by the Guarantor to pay Taxes.

## **8.3 Goods and Services Tax**

If the Principal is or becomes liable to pay any GST (including any penalty) in respect of any supply it makes under, or in connection with, this Deed (“GST Liability”) then:

- (a) to the extent that an amount is payable by the Guarantor to the Principal under this Deed for that supply - the amount will be increased by the full amount of the GST Liability; and
- (b) otherwise- the Guarantor will indemnify and keep the Principal indemnified for the full amount of the GST Liability.

## **9. PPSA**

The parties agree that the terms of this Deed may constitute one or more 'security interests' (as that term is defined in the PPSA) (“Security Interest”) for the purpose of the PPS Law and that:

- (a) to perfect any such Security Interest the Principal may register a financing statement(s) on the Personal Property Securities Register;
- (b) the Guarantor will have no rights under sections 95, 118, 121(4), 125, 130, 132, 135, 142 and 143 of the PPS Law;
- (c) the application of Part 4.3 (other than sections 123, 124, 126, 128, 129(1), 133, 134(1) and 136) of the PPS Law is contracted out of if that Part would apply by virtue of section 116(2) of the PPS Law;
- (d) the Guarantor waives its right to receive notice of a verification statement under section 157 of the PPS Law;
- (e) for the purposes of section 275(6) of the PPS Law, the parties agree not to disclose information of the kind mentioned in section 275(1) of the PPS Law in respect of the Security Interest;
- (f) the Guarantor agrees that the Principal may seize any collateral subject to the Security Interest and/or dispose of any such collateral in such manner and generally on such terms and conditions as the Principal thinks desirable, and otherwise do anything that the Guarantor could do in relation to that collateral; and
- (g) the Guarantor must, promptly on request by the Principal, provide any such information and execute and deliver any such documents as the Guarantor may reasonably require to protect the Securities granted to the Principal by the Guarantor under or in relation to this Deed.

## **10. Assignments**

- (a) The Principal may assign, novate or otherwise transfer all or any part of its rights under this Deed and may disclose to a proposed assignee or transferee any information in the possession of the Principal relating to the Guarantor.
- (b) The Guarantor must not assign, novate or otherwise transfer all or any part of its rights or obligations under this Deed without the prior written consent of the Principal.

## **11. Governing law, jurisdiction and arbitration**

### **11.1 Governing law**

This Deed and where applicable, the arbitration reference contained in clause 11.3, is governed by and will be construed according to the laws of New South Wales.

### **11.2 Jurisdiction**

- (a) This clause 11.2 only applies where clauses 11.3 to 11.7 do not apply.

- (b) The Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts and appellate courts of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought relating in any way to this Deed.
- (c) The Guarantor irrevocably waives any objection it may now or in the future have to the venue of any action or proceedings, and any claim it may now or in the future have that any proceeding has been brought in an inconvenient forum, where that venue falls within paragraph (b) of this clause.

### **11.3 Reference to arbitration**

- (a) Clauses **Error! Reference source not found.** to **Error! Reference source not found.** will only apply where the Guarantor is a foreign company (as defined in section 9 of the *Corporations Act 2001* (Cth)).
- (b) Any controversy, claim or dispute directly or indirectly based upon, arising out of, relating to or in connection with this Deed (including any question relating to the existence, validity or termination of this Deed) must be referred to and finally resolved by arbitration in accordance with either:
  - (i) the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Arbitration Rules); or
  - (ii) the Australian Centre for International Commercial Arbitration Expedited Arbitration Rules (ACICA Expedited Arbitration Rules),which rules the parties agree will be modified and amended as required to the extent that the rules conflict with the requirements of this Deed.
- (c) Notwithstanding any provision of the ACICA Expedited Arbitration Rules to the contrary, if:
  - (i) a party considers that a dispute about a matter may be resolved in accordance with the ACICA Expedited Arbitration Rules and that party wishes to progress the dispute in accordance with the ACICA Expedited Arbitration Rules, that party must give the other party notice that it considers that the dispute may be resolved in accordance with the ACICA Expedited Arbitration Rules (Arbitration Expedition Notice); and
  - (ii) the other party agrees (in writing) that the matter in dispute is suitable to be resolved in accordance with the ACICA Expedited Arbitration Rules, the other party must advise the party that provided the Arbitration Expedition Notice that the proposed use of the ACICA Expedited Arbitration Rules is accepted in writing within 2 Business Days of receipt of the Arbitration Expedition Notice,then the dispute will be referred to and finally resolved by arbitration in accordance with the ACICA Expedited Arbitration Rules.
- (d) The seat of the arbitration will be Sydney.
- (e) The number of arbitrators will be one.
- (f) The language of the arbitration will be English.

### **11.4 Powers of the arbitrator**

The arbitral tribunal has the power to grant all legal, equitable and statutory remedies, except punitive damages.

### **11.5 Consolidation**

The parties agree that section 24 of the *International Arbitration Act 1974* (Cth) will apply in respect of consolidations.

### **11.6 Joinder**

The arbitral tribunal has the power, on the application of any party to this arbitration agreement, to allow a third party who the arbitrator considers has a sufficient interest in the outcome of the arbitration to be joined in the arbitration as a party. Each party to this Deed hereby consents to such joinder. In the event of such joinder of parties in the arbitration, the arbitrator has the power to make a single final award, or separate awards, in respect of all parties so joined in the arbitration.

### **11.7 Award final and binding**

Any award will be final and binding upon the parties.

### **11.8 Guarantor incorporated outside Australia**

If the Guarantor is incorporated outside of Australia, a Legal Opinion must be provided by the Guarantor to the Principal, on the date of execution of this Deed.

## **12. Miscellaneous**

### **12.1 Notices**

- (a) Any notices contemplated by this Deed must be in legible writing and delivered to the relevant address or sent to the email address as set out below (or to any new address or email address that a party notifies to the others);
  - (i) to the Principal: [Insert details. These details should be the same as the Notices details in the Contract]  
Email: [Insert. See note above]
  - (ii) to the Guarantor: [Insert details]  
Email: [Insert]
- (b) A notice sent by email will be taken to have been received at the local time (in the place of receipt of that email) that would be determined if section 13A of the Electronic Transactions Act 2000 (NSW) were to apply.
- (c) Where the Guarantor is domiciled in a country other than Australia, without preventing any other mode of service, any document in an action or process may be served on any party by being delivered to or left for that party at its address for service of notices under this Deed. The Guarantor appoints the Contractor (whose address for service is as at set out in the Contract) as its agent to accept service of process under or in connection with this Deed, and the Guarantor warrants that the Contractor has accepted the appointment. The appointment may not be revoked without the Principal's consent. The Guarantor agrees that service of documents on its process agent is sufficient service on the Guarantor, and that failure by a process agent to notify the Guarantor of any document in an action in connection with the project contemplated by this Deed and the Contract and will not invalidate the action concerned.

### **12.2 Continuing obligation**

This Deed is a continuing obligation notwithstanding any termination by the Guarantor, settlement of account, intervening payment, a disclaimer of any contract or property made by a liquidator of the Contractor pursuant to Part 5.6 Division 7A of the *Corporations Act 2001* (Cth) or other applicable laws, express or implied revocation or any other matter or thing, and the Principal will continue to be entitled to the benefit of this Deed as regards to the due and punctual performance of all the Obligations until a final discharge has been given to the Guarantor.

### **12.3 Further assurance**

The Guarantor must immediately on the request of the Principal, and at the cost of the Guarantor, do and perform all further acts and things and execute and deliver all further documents as the Principal reasonably requires, or as are required by law, to perfect or to give effect to the rights and powers of the Principal created, or intended to be created, by this Deed.

### **12.4 Form of demand**

A demand on the Guarantor for payment under this Deed may be in the form and contain any information as the Principal determines. It need not specify the amount of the Guaranteed Money, nor the method or basis of the calculation of all or any part of the Guaranteed Money, including amounts of, or in the nature of, interest.

### **12.5 Entire agreement**

This Deed constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite, and supersede:

- (a) any prior agreement (whether in writing or not), negotiations and discussions between the parties in relation to the subject matter of this Deed; or
- (b) any correspondence or other documents relating to the subject matter of this Deed that may have passed between the parties prior to the date of this Deed and that are not expressly included in this Deed.

## 12.6 Joint and several liability

The obligations of the Guarantor, if more than one person, under this Deed, are joint and several. Each person constituting the Guarantor acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this Deed) of the other as if those acts or omissions were its own and the Principal may proceed against any or all of them. This Deed binds each person who signs as a "Guarantor" even if another person who was intended to become a "Guarantor" does not become a "Guarantor" or is not bound by this Deed.

## 12.7 Severance

If, at any time, any provision of this Deed is or becomes void, illegal, invalid or unenforceable in any respect under the Law of any jurisdiction (including the *Building and Construction Industry Security of Payment Act 1999* (NSW)), then:

- (a) that will not affect or impair:
  - (i) the legality, validity or enforceability in that jurisdiction of any other provision of this Deed; or
  - (ii) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Deed; and
- (b) the provision will be construed in a manner which:
  - (i) avoids the provision being void, illegal, invalid or unenforceable; and
  - (ii) subject to clause 12.7(b)(1) above, preserves to the maximum possible extent:
    - A. the enforceability of the provision and the provisions of this Deed; and
    - B. the original effect and intent of this Deed.

## 12.8 Transfer of functions or Public Transport Agency assets

- (a) The parties acknowledge that:
  - (i) a Public Transport Agency may be reconstituted, renamed, dissolved, replaced or restructured and that some or all of the powers, functions, assets, rights, liabilities or responsibilities of a Public Transport Agency may be transferred to or vested in another entity;
  - (ii) if a Public Transport Agency is reconstituted, renamed, dissolved, replaced or restructured and/or some or all of that Public Transport Agency's powers, functions, rights or responsibilities are transferred to or vested in another entity, then unless otherwise notified by the Public Transport Agency, references in this Deed to that Public Transport Agency must, subject to any facilitative legislation, be deemed to refer, as applicable, to the reconstituted, renamed, restructured or new entity or entity replacing that Public Transport Agency to the extent that such entity has assumed or has had transferred to it or vested in it those powers, functions, rights or responsibilities; and
  - (iii) a Public Transport Agency may be required to or may, at its absolute discretion, elect to (including as a result of changes to New South Wales government policy or directions) acquire, or dispose of, any property or assets.
- (b) The Guarantor acknowledges and agrees that it must, to the extent required by a Public Transport Agency and without limiting any facilitative legislation, negotiate in good faith any variations required to this Deed, or any replacement agreement or agreements for this Deed to give effect to a Public Transport Agency being reconstituted, renamed, dissolved, replaced or restructured.
- (c) The Guarantor will be taken for all purposes to have consented to, and will not have, and no Public Transport Agency will be liable for, any claim as a result of any action, matter or circumstance referred to in, or contemplated by this clause **Error! Reference source not found.**
- (d) For the purposes of this clause **Error! Reference source not found.**, "another entity" means a government or semi-government entity including any agency, statutory corporation, statutory authority, department or state owned corporation.

## 12.9 Remedies cumulative

Each Power is cumulative and in addition to each other Power available to the Principal.

## 12.10 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by law or under this Deed by the Principal will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by law or under this Deed.
- (b) Any waiver or consent given by the Principal under this Deed will only be effective and binding on the Principal if it is given or confirmed in writing by the Principal.
- (c) No waiver by the Principal of:
  - (i) a breach of any term of this Deed; or
  - (ii) any other failure by the Guarantor to comply with a requirement of this Deed,will operate as a waiver of another breach of that term or failure to comply with that requirement or of a breach of any other term of this Deed or failure to comply with any other requirement of this Deed.

## 12.11 Consents

Any consent of the Principal referred to in, or required under, this Deed may be given or withheld, or may be given subject to any conditions, as the Principal (in its absolute discretion) thinks fit, unless this Deed expressly provides otherwise.

## 12.12 Moratorium legislation

To the fullest extent permitted by law, the provisions of all laws operating directly or indirectly to lessen or affect in favour of the Guarantor any obligation under this Deed, or to delay or otherwise prevent or prejudicially affect the exercise of any Power, are expressly waived.

## 12.13 Set-off

- (a) The Principal may (without prior notice at any time) set-off any obligation then due and payable by the Guarantor under this Deed against any obligation (whether or not due and payable) by the Principal to the Guarantor, regardless of the place or currency of payment of either obligation or the office or branch through which either obligation is booked. If the obligations are in different currencies, the Principal may convert either obligation into the currency of the other obligation at a market rate of exchange determined by it for the purpose of the set-off. If either obligation is unliquidated or unascertained, the Principal may affect the set off in an amount estimated by it in good faith to be the amount of that obligation.
- (b) The Principal is not obliged to exercise any right of set off pursuant to clause **Error! Reference source not found.**, which is in addition to its other rights of combination of account, set-off or lien (by contract or operation of law).
- (c) On its exercise of any set off pursuant to clause **Error! Reference source not found.** against the Guarantor, the Principal will promptly notify the Guarantor of details of that set-off.

## 12.14 Variations

This Deed may only be amended, varied or replaced by a document signed by or on behalf of both the Principal and the Guarantor.

## 12.15 Provisions limiting or excluding liability

Any provision of this Deed which seeks to limit or exclude a liability of the Principal or the Guarantor is to be construed as doing so only to the extent permitted by law.

## 12.16 Counterparts

- (a) This Deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes an original of this Deed, and all together constitute one agreement.
- (b) A party who has executed a counterpart of this Deed may exchange that counterpart with another party by emailing the counterpart executed by it to that other party and, upon request by that other party, will thereafter promptly deliver by hand or post to that party the executed counterpart so exchanged by email, but delay or failure by that party to so deliver a counterpart of this Deed executed by it will not affect the validity of this Deed.

### **12.17 Vienna Convention**

The United Nations Convention on Contracts for the International Sale of Goods and the *Sale of Goods (Vienna Convention) Act 1986* (NSW) does not apply to this Deed.

### **12.18 Execution by less than all parties**

This Deed binds each of the persons executing it notwithstanding:

- (a) that one or more of the persons named in this Deed as a Guarantor may not execute or may not become or may cease to be bound by this Deed; or
- (b) that the Principal may not execute or may only subsequently execute this Deed.

### **12.19 Civil Liability Act**

- (a) It is agreed that the operation of Part 4 of the Civil Liability Act 2002 (NSW) is excluded in relation to all and any rights, obligations and liabilities under this Deed whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or otherwise.
- (b) Without limiting the generality of clause 12.19(a), it is further agreed that the rights, obligations and liabilities of the Principal and the Guarantor (including those relating to proportionate liability) are as specified in this Deed and not otherwise whether such rights, obligations and liabilities are sought to be enforced by a claim in contract, tort or otherwise.

**Executed** as a deed.

**Executed** by [insert Guarantor's name and ABN] by or in the presence of:

---

Signature of Director

---

Name of Director in full

**Signed Sealed and Delivered** by

as an authorised delegate of **Port Macquarie-Hastings Council (ABN 11 236 901 601)** in the presence of:

---

Signature of Witness

---

Name of Witness in full

---

Signature of Secretary/other Director

---

Name of Secretary/other Director in full

---

Signature

## Schedule 16

# Joint venture provisions

Refer to clause 7.7 of the GC21 General Conditions of Contract.

1. The Contractor acknowledges and agrees that it is constituted by more than one person or body, being an unincorporated joint venture between each of the *Joint Venture Participants*.
2. Each *Joint Venture Participant*:
  - .1 warrants to the Principal that as at the Date of Contract, it has entered into a joint venture agreement (in a form which has been previously provided to the Principal) with each other *Joint Venture Participant*, for the purposes of performing its obligations under the Contract;
  - .2 agrees not to abandon, vary or terminate the joint venture agreement referred to in clause 2.1 of this Schedule 16 without the prior written consent of the Principal (given or withheld, or subject to conditions, at the absolute discretion of the Principal);
  - .3 agrees that except as provided under clauses 3.1 and 3.2 of this Schedule 16, the obligations of the Contractor under the Contract are joint and several and each person or body constituting the Contractor acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this agreement) of the other as if those acts or omissions were its own;
  - .4 agrees that the term *Contractor's Insolvency* as it applies to the joint venture constituting the Contractor will be taken to mean that any of the criteria identified in the definition of that term apply to any of the *Joint Venture Participants*; and
  - .5 agrees to comply with any additional conditions in relation to the joint venture agreement required by the Principal in any *Contract Document* given to the Contractor before the Date of Contract.
3. Without limiting the Contractor's obligations under any other provision of the Contract:
  - .1 the *Joint Venture Principal Contractor* acknowledges that where it has been engaged as the principal contractor pursuant to clause 16 of the Contract and Contract Information items 17A and 17B, its appointment is subject to clause 3.3 of this Schedule 16;
  - .2 the *Joint Venture Principal Contractor* agrees that for the purposes of the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2017* (NSW) (**WHS Laws**) it is the "person conducting a business or undertaking" (**PCBU**) carrying out the construction work and the PCBU in respect of the work to be carried out by the Contractor, including the Works; and
  - .3 the Principal may, at its sole discretion, notify the Contractor that it has terminated the engagement of the *Joint Venture Principal Contractor* as principal contractor and advise the Contractor of the new principal contractor for the purposes of the WHS Laws. If the engagement of the *Joint Venture Principal Contractor* as principal contractor is terminated, then the Contractor must comply (at no additional cost to the Principal) with all requirements of the new principal contractor in executing the Works and its other obligations under the Contract so as to enable the new principal contractor to meet its obligations under the WHS Laws.



## Schedule 17

# Subcontractors and Suppliers Proof of Payment Process

Refer to clauses 28 and clause 58 of the GC21 General Conditions of Contract.

Business Day each Month	Action	Documents Required
1 <sup>st</sup> Business Day	Contractor issues <i>Payment Claim</i>	<ul style="list-style-type: none"><li>Contractor's Statement and Supporting Statement (<i>Refer Schedule 6</i>)</li></ul>
10 <sup>th</sup> Business Day	Principal issues <i>Payment Schedule</i>	
15 <sup>th</sup> Business Day	Principal pays Contractor the <i>Scheduled Amount</i>	
18 <sup>th</sup> Business Day	Contractor must issue Subcontractors and Suppliers Payments List, Accounts Payable Retention Summary and Accounts Payable Statement reconciled to the <i>Scheduled Amount</i>	<ul style="list-style-type: none"><li>Subcontractors and Suppliers Payments List (<i>Refer Attachment 4</i>)</li><li>Accounts Payable Retention Summary (<i>Refer Attachment 5</i>)</li><li>Accounts Payable Statement for total value of completed work due for payment (<i>Refer Schedule 3 and Attachment 6</i>)</li></ul>
20 <sup>th</sup> Business Day	Contractor must issue Payment Details and Banker's Statement no later than 5 Business days after payment of <i>Scheduled Amount</i> reconciled to Subcontractors and Suppliers Payments List	<ul style="list-style-type: none"><li>Payment Details (<i>Refer Attachment 7</i>)</li><li>Banker's Statement evidencing payment of each item on the Accounts Payable Statement (<i>Refer Attachment 6</i>)</li></ul>

### Note:

The Subcontractors and Suppliers Proof of Payment Process is indicative of a work flow predicated on Payment Claims being issued on the 1<sup>st</sup> day of each month. The Principal and the Contractor must align the Subcontractors and Suppliers Proof of Payment Process with the agreed date for making Payment Claims as set out in item 46A of Schedule 1 (Contract Information).

# Attachments

Attachments 1, 2, and 3 do not form part of the Contract.

- Attachment 1 GC21 Start-up Workshop**
- Attachment 2 Performance Evaluation**
- Attachment 3 Performance Evaluation Record**
- Attachment 4 Subcontractors and Suppliers Payments List**
- Attachment 5 Accounts Payable Retentions Summary**
- Attachment 6 Accounts Payable Statement**
- Attachment 7 Payment Details**
- Attachment 8 Subcontractors, Suppliers and Consultants Register**

## Attachment 1

# The GC21 Start-up Workshop

The start-up workshop is held to encourage the parties and others concerned with the Contract and the Works to work co-operatively to achieve a successful contract. This Attachment 1 is intended as a guide for the participants.

The workshop takes place within 28 days after the Date of Contract. The workshop should take half a day, although large or complex contracts may require longer.

Refer to clause 32 of the GC21 General Conditions of Contract.

## Participants

The workshop participants include representatives of the Principal, the Contractor and others concerned with the Works. This might include representatives of authorities, eventual users of the Works, the local community, Consultants, Subcontractors and Suppliers.

## Program

### Opening

The first speaker's tasks should be to focus the participants on goals and on issues such as teamwork, co-operation, achieving a successful project, and the major foreseeable challenges.

### Discussions on co-operation

The parties aim to promote a culture of co-operation which participants in the workshop should understand and be committed to.

The workshop participants may break into small groups to discuss sections of the Contract dealing with co-operation, and how they apply to the Works.

### Communication framework and directory

The workshop participants should reach consensus on a framework to allow participants to co-operate on all aspects of the project. Communication arrangements should be recorded and names and contact information exchanged.

### Concerns and problems

The participants should identify concerns or possible future problems and jointly prepare an action plan for their resolution.

### Opportunities for innovation

The parties aim to encourage innovation. Opportunities may be lost if they are recognised too late. Participants may identify, discuss opportunities and plan for pursuing innovation and present them to the workshop. These ideas may then be developed if feasible and appropriate.

### Evaluation and monitoring process

This process is explained so that participants understand their roles at the regular monitoring meetings. The evaluation and monitoring forms are discussed, and altered if necessary to suit particular needs of the project and Contract. The participants decide when the regular monitoring meetings will occur, and who will attend.

### Conclusion

Before the workshop concludes, all participants should have an opportunity to comment and provide feedback for possible improvements to future workshops and monitoring meetings.

A copy of the Procurement Practice Guide *GC21 meetings and workshops* may be obtained from the NSW Government Procurement System for Construction at:

[http://www.nswprocurement.com.au/ppg/gc21\\_meetings\\_and\\_workshops.pdf](http://www.nswprocurement.com.au/ppg/gc21_meetings_and_workshops.pdf)

## Attachment 2

# Performance Evaluation (example)

Refer to clause 6 of the GC21 General Conditions of Contract.

Evaluation and monitoring meetings should focus on achievable improvements in contract communication and management. Attachments 1 and 2 provide a structure for evaluation and discussion

Attachment 2 indicates topics that are suitable for assessing performance and monitoring progress as the Contract proceeds.

They are provided for guidance only, and the topics are suggestions only. Each evaluation team should choose its own topics to reflect issues specific to the Contract. Use Attachment 2A on the next page to develop a Contract-specific Performance Evaluation form

Contract name: .....

Contract number: .....

Date: .....

### Rating system

5 excellent

4 above expectation

3 meeting expectation

2 below expectation

1 unsatisfactory

Topic	Objectives	Your rating (this period)	Group rating (this period)
Communication	Open, honest, constructive, timely, efficient and effective communications. <ul style="list-style-type: none"> <li>Quality communications including co-operation between parties, observing the duty not to hinder performance, providing early warning, and evaluation and monitoring.</li> </ul>	<input type="text"/>	<input type="text"/>
Time	<i>Completion by Contractual Completion Dates</i> <ul style="list-style-type: none"> <li>time management - milestone achievement on or before the due date.</li> <li>extensions of time</li> </ul>	<input type="text"/>	<input type="text"/>
Cost	Financial success for all parties by meeting or bettering budget targets <ul style="list-style-type: none"> <li>Cost/Financial management. Including early warning and agreement to <i>Variations</i>, pre-payment, quantity measurement, payments, final payment.</li> </ul>	<input type="text"/>	<input type="text"/>
Quality	Meets or exceeds specified/agreed requirements <ul style="list-style-type: none"> <li>Quality management. Including quality standards, <i>design</i> requirements, fitness for purpose, innovation, <i>faults</i> and <i>defects</i> rectification, defect free <i>completion</i>, post <i>completion</i>.</li> <li>Encourage continuous improvement and personnel development through planning, innovation, flexibility and common sense.</li> </ul>	<input type="text"/>	<input type="text"/>
Safety	Safe working environment for project team and general public. <ul style="list-style-type: none"> <li>Work, Health and Safety management. Including co-operation between parties, minimising WHS incidents, evaluation and monitoring</li> </ul>	<input type="text"/>	<input type="text"/>
Claims and Issue Resolution	<ul style="list-style-type: none"> <li>Resolve issues and claims early at an appropriate level. Open and frank discussions. Transparency</li> </ul>	<input type="text"/>	<input type="text"/>
Environment	Environmental management. Including planning energy & water conservation, waste management, resource conservation, pollution reduction, protection of environment, healthy work environment <ul style="list-style-type: none"> <li>Pro-active management of impacts and commitments.</li> <li>Minimise environmental incidents</li> </ul>	<input type="text"/>	<input type="text"/>
Contract Relations	Co-operative contract relationships including compliance with NSW Government codes of practice and Guidelines; industrial relations management; and subcontractor, supplier and consultant performance, <ul style="list-style-type: none"> <li>Enjoy work and working together.</li> <li>Enhanced reputations of personnel and organisations involved.</li> </ul>	<input type="text"/>	<input type="text"/>
Community Relations	<ul style="list-style-type: none"> <li>Proactively enhance and maintain good community relations</li> <li>Minimise impacts on the community.</li> <li>Proactive management of commitments to individuals and groups.</li> </ul>	<input type="text"/>	<input type="text"/>

Traffic Management	<ul style="list-style-type: none"><li>• Minimise disruption and inconvenience to traffic and provide safe traffic conditions.</li><li>• Safe access to the Site for the project team, subcontractors, suppliers and visitors.</li><li>• Safe access for adjacent residents.</li></ul>	<input type="checkbox"/>	<input type="checkbox"/>
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- **IMPORTANT:** During each meeting, the evaluation team should decide on an action plan for items needing improvement.

Attachment 2A

# Performance Evaluation

Insert in the form below topics that are important to the Contract.

Contract title: »  
 Contract number: »  
 Date: »

**Rating system**  
 1 excellent  
 2 above expectation  
 3 meeting expectation  
 4 below expectation  
 5 unsatisfactory

Topic	Objectives	Your rating (this period)	Group rating (this period)
Communication	Open, honest, constructive, timely, efficient and effective communications. <ul style="list-style-type: none"> <li>Quality communications including co-operation between parties, observing the duty not to hinder performance, providing early warning, and evaluation and monitoring.</li> </ul> <i>Refer to Contract clauses 3 - 6</i>	<input type="text"/>	<input type="text"/>
Time	<i>Completion by Contractual Completion Dates</i> <ul style="list-style-type: none"> <li>time management - milestone achievement on or before the due date.</li> <li>extensions of time</li> </ul> <i>Refer to Contract clauses 22,50 64-,67.</i>	<input type="text"/>	<input type="text"/>
Cost	Financial success for all parties by meeting or bettering budget targets <ul style="list-style-type: none"> <li>Cost/Financial management. Including early warning and agreement to <i>Variations</i>, pre-payment, quantity measurement, payments, final payment.</li> </ul> <i>Refer to Contract clauses 5,47,48,55-63</i>	<input type="text"/>	<input type="text"/>
Quality	Meets or exceeds specified/agreed requirements <ul style="list-style-type: none"> <li>Quality management. Including quality standards, <i>design</i> requirements, fitness for purpose, innovation, <i>faults</i> and <i>defects</i> rectification, defect free <i>completion</i>, post <i>completion</i>.</li> <li>Encourage continuous improvement and personnel development through planning, innovation, flexibility and common sense.</li> </ul> <i>Refer to Contract clauses 15, 38-46, 48, 50, 69, and 71.</i>	<input type="text"/>	<input type="text"/>
Safety	Safe working environment for project team and general public. <ul style="list-style-type: none"> <li>Work, Health and Safety management. Including co-operation between parties, minimising WHS incidents, evaluation and monitoring</li> </ul> <i>Refer to Contract clause 16, 26 in regard to WHS.</i>	<input type="text"/>	<input type="text"/>
Claims and Issue Resolution	<ul style="list-style-type: none"> <li>Resolve issues and claims early at an appropriate level. Open and frank discussions. Transparency</li> </ul> <i>Refer to Contract clauses 68-72 in regard to Claims and issue resolution.</i>	<input type="text"/>	<input type="text"/>
Environment	Environmental management. Including planning energy & water conservation, waste management, resource conservation, pollution reduction, protection of environment, healthy work environment <ul style="list-style-type: none"> <li>Pro-active management of impacts and commitments.</li> <li>Minimise environmental incidents</li> </ul> <i>Refer to Contract clauses 15, 18, 26 and 29.</i>	<input type="text"/>	<input type="text"/>
Contract Relations	Co-operative contract relationships including compliance with NSW Government codes of practice and Guidelines; industrial relations management; and subcontractor, supplier and consultant performance, <ul style="list-style-type: none"> <li>Enjoy work and working together.</li> <li>Enhanced reputations of personnel and organisations involved.</li> </ul> <i>Refer to Contract clauses 12-21,32</i>	<input type="text"/>	<input type="text"/>
Community Relations	<ul style="list-style-type: none"> <li>Proactively enhance and maintain good community relations</li> <li>Minimise impacts on the community.</li> <li>Proactive management of commitments to individuals and groups.</li> </ul> <i>Refer to clause 6,15</i>	<input type="text"/>	<input type="text"/>
Traffic Management	<ul style="list-style-type: none"> <li>Minimise disruption and inconvenience to traffic and provide safe traffic conditions.</li> <li>Safe access to the Site for the project team, subcontractors, suppliers and visitors.</li> <li>Safe access for adjacent residents.</li> </ul>	<input type="text"/>	<input type="text"/>

*The participants should decide on an action plan during the meeting, after discussing project and contract objectives, comments, observations and suggestions for improvement.*

**Attachment 3**

# Performance Evaluation Record

Insert the Contract-specific topics. Record the participants' ratings for each topic to illustrate trends in the Team's performance.

Contract title: »

Contract number: »

Date: »

**Rating system**

- 1 excellent
- 2 above expectation
- 3 meeting expectation
- 4 below expectation
- 5 unsatisfactory

Objectives		Score	Comments
<b>Communication</b>	Open, honest, constructive, timely, efficient, effective		
<b>Time</b>	Milestone achievement on or before due date		
<b>Cost</b>	Meeting or bettering budget and avoiding cost overruns		
<b>Quality</b>	Meets or exceeds specified/agreed requirements		
<b>Safety</b>	Safe working environment for project team and general public.		
<b>Claim and Issue Resolution</b>	Resolve issues and claims early at an appropriate level. Open and frank discussions. Transparency		
<b>Environment</b>	Planning, conservation of resources, protection of environment, healthy work environment. Pro-active management of impacts and commitments. Minimise environmental incidents		
<b>Contract Relations</b>	Co-operative relationships, compliance with NSW Government codes of practice and Guidelines; I.R. management; and Subcontractor, Supplier and Consultant performance, Enjoy work and working together. Enhanced reputations.		
<b>Community</b>	Proactively enhance and maintain good community relations. Minimise impacts on the community. Proactive management of commitments to individuals and groups.		
<b>Traffic Management</b>	Minimise disruption and inconvenience to traffic and provide safe traffic conditions.		
<b>AVERAGE</b>			

**Attachment 3 (continued)**

# Performance Evaluation Record

The participants' ratings for each topic are recorded here so that the overall performance can be assessed.

**Group**

Contract title »  
 Contract number »  
 Date »

**Rating system**

- 1 excellent
- 2 above
- 3 meeting
- 4 below
- 5 unsatisfactory

		TfNSW Team					Contractor team					Other													
Group Members						T f N S W						C O M P A N Y  X						S U B - C O N T R A C T O R						O t h e r	o v e r a l l
1	Communication					0						0						0						0	
2	Time					0						0						0						0	
3	Cost					0						0						0						0	
4	Quality					0						0						0						0	
5	Safety					0						0						0						0	
6	Claim and Issue Resolution					0						0						0						0	
7	Environment					0						0						0						0	
8	Contract Relations					0						0						0						0	
9	Community Relations					0						0						0						0	
10	Traffic Management					0						0						0						0	
<b>AVERAGE</b>		0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
No	Month																								
1	Jan-03																								
2	Feb-03																								
3	Mar-03																								
4	Apr-03																								
5	May-03																								
6	Jun-03																								
7	Jul-03																								
8	Aug-03																								
9	Sep-03																								
10	Oct-03																								
11	Nov-03																								
12	Dec-03																								



Attachment 4

# Subcontractors and Suppliers Payments List

Project: » .....

Contractor: » ..... Contractor's » .....  
 ABN » ..... Bank: » .....  
 A/C Name: » .....

Date: » .....

Payment Claim: » ..... Period: » .....

The Contractor will pay monies to Subcontractors and Suppliers in accordance with this Payment List.

**Subcontract Retentions (*Refer Accounts Payable Retention Summary*)**

	<i>Amount (incl GST)</i>
Total Retentions for current period	\$ » .....
<i>Less</i> Total Retentions for previous period	\$ » .....
<b>Payment to Contractor for held retentions</b>	<b>\$ » .....</b>

**Payments by Contractor to Subcontractors and Suppliers**

	<i>Scheduled Amount (incl GST)</i>
Payments to Subcontractors and Suppliers ( <i>Refer Accounts Payable Statement</i> )	\$ » .....
Payment to Contractor for held retentions	\$ » .....
Payment to Contractor	\$ » .....
<b>PAYMENT OF CERTIFIED CLAIM AMOUNT</b>	<b>\$ » .....</b>

**Signed by:**

*Contractor*

Name: » ..... \_\_\_\_\_

Signature: \_\_\_\_\_

Date: » ..... \_\_\_\_\_

**Attachment 5**

# AP Retentions Summary (GST inclusive)

Contractor Name:

ABN:

Payment Claim:

Date:

Month	Trans	Invoice eDate	AP Ref	Description	Total Retention	Held Retention	Released Retention	Retention Paid
<b>Subcontractor:</b>								
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
<b>Total for Subcontractor:</b>					» .....	» .....	» .....	» .....
<b>Subcontractor:</b>								
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
<b>Total for Subcontractor:</b>					» .....	» .....	» .....	» .....
<b>Subcontractor:</b>								
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
<b>Total for Subcontractor:</b>					» .....	» .....	» .....	» .....
<b>Subcontractor:</b>								
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
<b>Total for Subcontractor:</b>					» .....	» .....	» .....	» .....
<b>Subcontractor:</b>								
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....	» .....
<b>Total for Subcontractor:</b>					» .....	» .....	» .....	» .....
<b>Total for Project:</b>					» .....	» .....	» .....	» .....
<b>Total for Contractor:</b>					» .....	» .....	» .....	» .....
<b>Grand Totals:</b>					» .....	» .....	» .....	» .....





