**Victorian Public Sector – Annexure Part B Special Conditions of Contract for use in association with Australian Standard General conditions of contract for AS 2124-1992**

| **Revision:** | **Date:** | **Clause reference:** | **Details:** | **Endorsed by:** |
| --- | --- | --- | --- | --- |
| August 2011 | 8 August 2011 | Not applicable | This record of revisions included. | DPCD |
| August 2011 | 8 August 2011 | Clause 52: Victorian Industry Participation Policy  | Amended to include an option for departments to replace references to the Principal with references to the Superintendent.Drafting note also included. | CCAP |
| December 2011 | 19 December 2011 | 42.3A, 42.6, 42.7, 42.8, 47, 47.2A, 54, 55 & 56 | Correct anomalies and harmonise as suggested by Minter Ellison | CCAP  |
| July 2012 | 12 July 2012 | New Clause 57 Victorian Code and Victorian Guidelines | New clause to comply with the requirements of the *Victorian Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry* | CCAP |
| October 2012 | 5 October 2012 | New Clause 58 National Code and National Guidelines | To provide for compliance, where applicable, with the National Code and National Guidelines | CCAP |
| February 2013 | August 2012 |  | Responsibility for administration of the PDCM Act moved from DPCD to DTF. | Minister |
| February 2015 | February 2015 | Removal Clause 57 Victorian Code and Victorian Guidelines | Removal of clause following abolition of the *Victorian Code of Practice for the Building and Construction Industry* | CCAP |
| February 2015 | February 2015 | Clause 58 changed to clause 57 and amended  | To replace National Code and National Guidelines with the Building Code 2013 and Supporting Guidelines | CCAP |
| September 2017 | 26 September 2017 | Throughout | Update AS4300 Special Conditions as suggested by Minter Ellison | DTF |
| January 2018 | 10 January 2018 | 2, 55 | Update reference to *Occupational Health and Safety Regulations* 2017 | DTF |
| June 2018 | 28 June 2018 | Throughout | Update AS4300 Special Conditions as part of multi-agency working group | DTF |
| August 2018 | 27 August 2018 | 43A | New clause 43A inserted. | DTF |
| August 2020 | 4 August 2020 | 47A, 47B47.347.547.45151A, 51B, 51C, 51D5657.2(a)(iii)Annexure Part N | Include clauses in main body of contract.Clause 47.3 revised.Clause renumbered as 47.4.Clause renumbered as 47.5.Clause 51 revisedNew clauses 51A, 51B, 51C, 51D insertedClause 56 removedRevised to reflect policies in operationUpdate form of statutory declaration | DTF |
| February 2021 | 8 February 2021 | 2, 29.5Annexure Part A | Clauses updated based on *Prohibition of High-Risk Cladding Products Declaration*Delete reference to Clause 5.9 in Annexure Part AInsert reference to clause 43A(b)(v) in Annexure Part A | DTF |
| April 2021 | 26 April 2021 | 33.7 | New optional clause 33.7.  | DTF |
| June 2022 | 16 June 2022 | 51B, Annexure Part A Annexure Part O | Clauses revised to implement Building Equality Policy. | DTF |
| December 2022 | 1 December 2022 | 51D, Annexure Part A Item 64C57.251, Annexure Part A Item 63AAnnexure Part D51B52A51E, Annexure Part P, Annexure Part A Items 64E-G9.2 and 61 | Working for Victoria – Delete and mark ‘Not in use’Delete reference to Clause 51DLocal Jobs First – revise clauseLocal Jobs First – Delete and mark Not used.Social procurement – revise clause.New clause Protective Data Security Standards inserted.New Clause, Annexure Part P and Annexure Part A items inserted – Fair Jobs Code.Clauses revised. | DTF |
| June 2023 | 13 June 2023 | 5151B | Local Jobs First (LJF) – revise clauses including definitionsBuilding Equality Policy – revise definitions | DTF |
| October 2023 | 11 October 2023 | 42.1Annexure A51B | Correcting drafting errors in 42.1 and Annexure ABuilding Equality Policy – Revise clauses including definitions | DTF |

**Introduction**

These Special Conditions of contract replace Part B of the Annexure to the General conditions of contract (AS 2124 – 1992).

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**Victorian Government Special Conditions of Contract for use in association with Australian Standard AS 2124 – 1992.**

## Annexure Part B

|  |  |
| --- | --- |
| **ANNEXURE to the Australian Standard General conditions of contract (AS2124-1992)** | **PART B** |

Table 1 below identifies Clauses which have been deleted, have been amended and differ from, or have been added to, the Australian Standard AS 2124-1992.

|  |  |  |
| --- | --- | --- |
|  | Clauses which have been deleted from the General Conditions in AS AS2124-1992: |  |
|  |  | **5.1; 5.8; 14.2; 14.3; 27.5.** |
|  | The following clauses have been amended and differ from the corresponding clauses in AS AS2124-1992: |  |
|  |  | **1; 2; 3.1; 3.2; 3.3; 4.2; 4.4; 5.2; 5.3; 5.4; 5.5; 5.6; 5.7; 5.9; 5.10; 6.1; 6.2; 7; 8.1; 8.3; 8.4; 8.6; 9.1; 9.2; 9.3; 10; 11; 12; 13; 14.1; 16.1; 16.3; 18; 19; 21.1; 21.3; 21.6; 23; 26; 27.1; 29.1; 30.3; 30.6; 31.1; 33.2; 34.1; 34.4; 35.3; 35.4; 35.5; 35.6; 35.7; 35.8; 36; 37; 40.1; 40.2; 40.4; 40.5; 41; 42.1; 42.2; 42.3; 42.5; 42.6; 42.7; 42.8; 42.9; 42.10; 42.11; 43; 44.1; 44.2; 44.3; 44.4; 44.7; 47.4; 44.8; 44.9; 44.10; 44.11; 46.1; 46.2; 47.1; 47.2; 47.3, 47.4.** |
|  | The following clauses have been added to those of AS AS2124-1992: |  |
|  |  | **3.4; 3.5; 3.6; 6.3; 6.4; 7A; 7B; 12.2A; 12.2B; 12A; 13.2; 13.3; 13.4; 13.5; 14A; 14.5; 14.6; 20A; 21.7; 26A; 27A; 27B; 29.4; 29.5; 33.3; 33.4; 33.5; 33.6; 33.7; 35.3A; 35.9; 35.10; 42.1A; 42.5A; 42.5B; 44.1A; 44A; 44B; 47.2A; 47.2B; 47.5; 49; 49A; 49B; 50; 51; 51A, 51B, 51C, 51D, 51E; 52; 52A; 53; 54; 55; 57; 58; 59; 60; 61; 62.** |
|  | The amendments to the following clauses apply unless struck out by the Principal (Principals should not strike out the amendments unless the issues addressed by the amendments have been covered in the specification): |  |
|  |  | **8.1; 14.** |

**Table 1: Victorian Public Sector changes to AS 2124 – 1992**

The provisions of the document described as “General conditions of contract (AS 2124-1992)” which form part of the Contract between the parties are amended, added to, and varied in the following respects:

### **Clause 1 Construction of Contract**

Clause 1 is amended by replacing the words "the Annexure" with "Annexure Part A".

### **Clause 2 Definitions**

#### **Clause 2 is amended as follows:**

* **The existing definition of 'Contract' is deleted and replaced with the following new definition:**

'Contract' means the agreement between the Principal and the Contractor, which is constituted by this document together with the other Contract Documents;

* **The existing definition of 'Date for Practical Completion' is amended by replacing the words "the Annexure" with "Annexure Part A";**
* **The existing definition of 'Date of Acceptance of Tender' is deleted.**
* **The existing definition of 'Practical Completion' is deleted and replaced by the following new definition:**

'Practical Completion' is that stage in the execution of the work under the Contract when:

(a) the Works are complete except for minor omissions and minor defects:

(i) which do not prevent the Works from being reasonably capable of being used for their intended purpose; and

(ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and

(iii) rectification of which will not prejudice the convenient use of the Works; and

(b) those tests which are required by the Contract to be carried out and passed before the Works reach Practical Completion have been carried out and passed;

(c) documents and other information required under the Contract which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works have been supplied;

(d) the Contractor has supplied all shop drawings and draft as built drawings as required by the Contract or requested by the Superintendent;

(e) the Contractor has provided all original warranties;

(f) the Contractor has provided evidence of compliance with all relevant aspects of the quality assurance system including, but not limited to, having undertaken all final inspections and testing of the Works required by that system.); and

(g) without limiting subparagraph (c), the Contractor has supplied to the Principal:

(i) the originals of all operating and maintenance manuals for all plant and equipment forming part of the Works; and

(ii) all notices, permits, approvals and certificates required to be obtained from relevant authorities;

* **The existing definition of 'Principal' is amended by replacing the words "the Annexure" with "Annexure Part A".**
* **The existing definition of 'provisional sum' is deleted and replaced with the following new definition:**

'provisional sum' means an amount described as such (or an amount described as an allowance or an estimate or a prime cost amount) in Annexure Part A or elsewhere in the Contract Documents;

* **The existing definition of 'Site' is deleted and replaced with the following new definition:**

'Site' means the area identified as such in the Annexure Part A;

* **The existing definition of 'Superintendent' is amended by replacing the words "the Annexure" with "Annexure Part A".**
* **The existing definition of 'Works' is amended by inserting the following words after the words "including variations provided for by the Contract":**

(together with any minor or incidental work which, in the opinion of the Superintendent, is reasonably and obviously necessary for the completion of the work under the Contract or which is reasonably capable of inference from the Contract Documents);

* **The following new paragraph is inserted after the paragraph commencing with "Words importing a gender…":**

The words ''include" and "including" (or any derivative of these words) are not words of limitation.

* **The following new definitions are added to Clause 2:**

'Artefacts' has the meaning given in Clause 27A;

*‘BCA Volume One’ means Volume One of the National Construction Code Series including any variations or additions in the Appendix Victoria set out in the Appendices to that Volume;*

'Business Day' means a day that is not a Saturday, Sunday, Statutory or Public Holiday;

'Certificate of Practical Completion' means the certificate referred to in Clause 42.5 in the form of Annexure Part F;

'Claim' includes any claim, action, demand or proceeding:

(a) under, arising out of, or in any way in connection with, the Contract, including any direction of the Superintendent;

(b) arising out of, or in any way in connection with work under the Contract, the Works, or either party's conduct before the Date of Contract; or

(c) otherwise at law or in equity, including by statute, in tort (for negligence or otherwise, including negligent misrepresentation) or for restitution,

including for an increase in the Contract Sum, for payment of money (including damages) or for an extension of time;

'Contract Documents' means the documents described as such in Annexure Part A;

'Date of Contract' means the date which appears on the notice in writing of acceptance of the tender or the Formal Instrument of Agreement to which these General Conditions of Contract are attached (whichever is earlier);

'Deed of Guarantee and Indemnity' means the deed in Annexure Part G;

'direction' means an instruction by the Superintendent or the Principal:

(a) described as a direction;

(b) having regard to the nature of the communication from the Superintendent or the Principal, is properly characterised as a communication that the Contractor shall comply with;

'DMS Contract' means a contract for the Document Management System between the Contractor and the provider of the Document Management System;

'Document Management System' means the document management system stated in Annexure Part A, if any;

'Environment' includes the meaning given to that term at common law and in any legislation in force in the place in which the Site is situated including any land, water, atmosphere, climate, sound, odour, taste, the biological factor of animals and plants and any aesthetic social factors;

'Environmental Law' means any law regulating or otherwise relating to the Environment including any law relating to land use, planning, pollution of air, water, soil or groundwater, chemicals, waste, the use of transport, storage and handling of dangerous goods, the health or safety of any person or any other matters relating to, but not limited to, the protection of the Environment, health or property;

'Final Payment Schedule' means a payment schedule issued by the Superintendent to the Principal and to the Contractor pursuant to Clause 42.8;

'Formal Instrument of Agreement' means the document in the form of Annexure Part E;

'Hazardous Material' means any hazardous materials including asbestos, any form of organic, inorganic or chemical matter whether solid, liquid, gas, odour, heat, sand, vibration, radiation or substance which makes or has the capacity to make the Environment:

(a) unsafe or unfit for habitation or occupation by persons or animals;

(b) degraded in its capacity to support plant life;

(c) contaminated; or

(d) otherwise environmentally degraded;

'Industrial Action' means employee and industrial relations matters affecting the Site or the work under the Contract, including:

(a) a strike, lockout, demarcation, ban, limitation on work or industrial dispute; and

(b) any claim relating to employment or industrial arrangements of the Contractor or a subcontractor;

'Industrial Relations Law' means all workplace, employment or industrial relations related Legislative Requirements;

'Industrial Relations Management Plan' means a plan prepared by the Contractor which demonstrates how employment and industrial relations issues and risks related to the Works will be managed and which meets the requirements of the specifications;

'Information Documents' means:

(a) the Site Information; and

(b) any other document or information issued or made available:

(i) on, before or after the date of submission of the tender; or

(ii) on, before or after the Date of Contract, other than any information, data, or document which the Principal is obliged by the terms of the Contract to provide to the Contractor and the Contractor is expressly obliged by the terms of the Contract to rely on,

to the Contractor in respect of work under the Contract which is marked, called, or otherwise described as, an "Information Document" or as being "for tendering purposes" or "for tenderers' information only", or has been provided for that purpose;

'Intellectual Property Right' means any patent, registered design, trademark or name, copyright or other protected right;

'Key Personnel' means the persons identified in Annexure Part A;

‘Legislative Requirements’ includes—

(a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the State or Territory in which the work under the Contract or any part thereof is being carried out;

(b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of the work under the Contract; and

(c) fees and charges payable in connection with the foregoing;

‘Modern Slavery Legislation’ means the Modern Slavery Act 2018 (Cth) and any similar legislation in force from time to time in Victoria.

'Native Title Application' means any claim or application under any Legislative Requirement or future Legislative Requirement relating to native title, including any application under Section 61 of the Native Title Act 1993 (Cth), except for any such claim or application which is in any way materially based or reliant upon the existence of Artefacts on, under, near or around the Site;

'OHS Law' means the Occupational Health & Safety Act 2004 (Vic), the Occupational Health and Safety Regulations 2017 (Vic) and all other applicable occupational health and safety legislation, regulations, rules, Codes of Practice and Australian Standards as amended from time to time;

'payment claim' means the claim referred to in Clause 42.1 in the form of Annexure Part H;

'Principal's Policies and Procedures' means:

(a) all policies and procedures issued by the State of Victoria, a government department or a municipal, public or statutory authority in relation to the work under the Contract of the type being performed under this Contract or the conduct of a person such as the Contractor in carrying out such work, which are either:

(i) publicly available; or

(ii) provided to the Contractor by or on behalf of the Principal; and

(iii) any policies and procedures included at Annexure Part J;

(b) any policies and procedures included at Annexure Part J;

1. *‘Prohibited Cladding Products’ means:*
	1. *aluminium composite panels with a core of less than 93% inert mineral filler (inert content) by mass in external cladding as part of a wall system; and*
	2. *expanded polystyrene products used in an external insulation and finish (rendered) wall system;*
2. *‘Protective Data Security**Standards’ has the meaning given to that term in the Privacy and Data Protection Act 2014 (Vic);*
3. *‘Public Sector Data’ has the meaning given to that term in the Privacy and Data Protection Act 2014 (Vic);*

'Regular Performance Reports' has the meaning given in Clause 57.2(a);

'Request for Tender' means the request for tender issued by the Principal to the Contractor and other tenderers in relation to the Works;

'Required Rating' means the required rating in Annexure Part A;

'Security' has the meaning given in Clause 5.3;

'Separate Contractor' means any person other than the Contractor and its subcontractors, engaged by the Principal, who carries out work in or about the Site;

'Shared Reporting Contract' has the meaning given in Clause 57.3(a);

'Shared Reporting Information' has the meaning given in Clause 57.2(b)(ii);

'Shared Reporting Process' has the meaning given in Clause 57.3(b);

'Shared Reporting Regime' means the regime set out in Clauses 57.2 and 57.3;

'Site Conditions' means any physical conditions on, under or over the surface of, or at or in the vicinity of, the Site including:

(a) ground water, ground water hydrology and the effects of any de-watering;

(b) physical and structural conditions above, upon and below the ground including any in-ground services or works and partially completed structures;

(c) topography, ground surface conditions and geology including seismic conditions, rock, other materials and sub-surface conditions;

(d) climatic and weather conditions, rain, surface water run-off and drainage, water seepage, wind blown dust and sand, and seasons; and

(e) Hazardous Materials;

'Site Information' means:

(a) any document, specification, drawing, calculation, information, data, report or sample (whatever its form) marked or described as being 'Site Information' or marked or described in a similar fashion and made available or provided to the Contractor by or on behalf of the Principal prior to the Date of Contract;

(b) any borehole core or borehole log made available or provided to the Contractor by or on behalf of the Principal, whether prior to or after the Date of Contract; and

(c) any document, specification, drawing, calculation, information, data, report or sample (whatever its form) made available or provided to the Contractor by or on behalf of the Principal, whether prior to or after the Date of Contract, regarding Site Conditions;

'State Entity' means the Crown in the right of Victoria, Ministers of the Crown and a public body (as that term is defined under the Financial Management Act 1994 (Vic));

'Statutory or Public Holiday' means a day that is wholly or partly observed as a public holiday throughout Victoria;

‘Supplier Code of Conduct’ means the Supplier Code of Conduct issued by the Victorian Government for suppliers providing works or services to the Victorian Government (as amended from time to time).

‘variation’ means any of those actions which the Superintendent is able to direct the Contractor to do by reason of Clause 40.1 (a) - (e);

### **Clause 3 Nature of Contract**

#### **Clause 3.1 is deleted and replaced with the following:**

The Contractor shall execute and complete the work under the Contract in accordance with the Contract and directions given or purported to be given by the Superintendent under a provision of the Contract.

Subject to the Contractor complying with the Contract, the Principal shall pay the Contractor:

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

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

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

#### **Clause 3.2 is amended by adding the following words to the end of the Clause:**

"and shall not entitle the Contractor to any extension of time unless and until the Contractor is expressly entitled to an extension of time under Clause 35.5."

#### **Clause 3.3 is amended by:**

* replacing the words "the Annexure" with "Annexure Part A"; and
* inserting the word "and" after subparagraph (a).

#### **A new Clause 3.4 is inserted as follows:**

##### ***3.4 No adjustment to Contract Sum***

The Contractor acknowledges and agrees that:

(a) the Contract Sum represents its full and complete payment and includes an allowance for:

(i) all matters and things necessary for the performance and completion of the Works in accordance with the Contract; and

(ii) all of the Contractor’s obligations under the Contract;

(b) except as expressly provided for in the Contract, the Contractor is not entitled to any:

(i) adjustment in the Contract Sum or to additional payment under the Contract or arising out of or in connection with the Works; or

(ii) an extension of time to the Date for Practical Completion; and

(c) the Contract Sum and any rates, costs or prices included in the Contract are not subject to adjustment for rise and fall in respect of any site allowance or by reason of fluctuations in exchange rates or changes in the cost of labour, Temporary Works, Materials and Equipment, or for any other matter, even where there is an extension of time to the Date for Practical Completion.

#### **A new Clause 3.5 is inserted as follows:**

##### ***3.5 Contractor’s warranties regarding Contract Sum***

The Contractor represents and warrants to the Principal that, before the Date of Contract, the Contractor has examined:

(a) the Contract, the Site and its surroundings including the Environment and all other information relevant or necessary to determine the Contract Sum; and

(b) and relied solely upon its own assessment, skill, expertise and enquiries in respect of all information relevant to the risks, contingencies and other circumstances having an effect on determining the Contract Sum.

#### **A new Clause 3.6 is inserted as follows:**

##### ***3.6 Warranties***

The Contractor warrants to the Principal that the Contractor at all times shall have sufficient capacity to meet all of its obligations under the Contract.

### **Clause 4 Bill of Quantities**

#### **Clause 4.2 is amended by replacing the words "the Annexure" with "Annexure Part A".**

### **Clause 5 Security, Retention Moneys and Performance Undertakings**

#### **Clause 5.1 is deleted and marked as 'Not Used'.**

#### **Clause 5.2 is deleted and replaced with the following:**

##### ***5.2 Provision of Security***

*The Contractor shall provide Security in the amount stated in Annexure Part A and in accordance with this Clause 5.*

#### **Clause 5.3 is deleted and replaced with the following:**

##### ***5.3 Form of Security***

The security shall be in the form set out in Annexure Part A, or other form approved by the Principal (**Security**).

The Security may have an expiry date, provided that:

(a) the expiry date is no earlier than the date of expiry of the last Defects Liability Period; and

(b) if any Security has an expiry date, the Contractor shall procure the delivery to the Principal of replacement Security for the same value and which satisfies the requirements of this Clause 5 at least 30 Business Days prior to the relevant expiry date.

*The Principal shall have a discretion to approve or disapprove of the form of an unconditional undertaking or other form of Security offered. The form of unconditional undertaking attached to these General Conditions is approved.*

*The Contractor shall ensure that the financial institution or insurance company giving the Security has the Required Rating. At any time, if the financial institution or insurance company giving the Security does not maintain the Required Rating, the Contractor shall within 5 Business Days provide replacement Security from a financial institution or insurance company that has the Required Rating.*

#### **Clause 5.4 is deleted and replaced with the following:**

##### ***5.4 Time for lodgement of Security***

Security shall be lodged prior to the earlier of:

(a) 14 days after the Date of Contract; and

(b) the commencement of the Works on Site by the Contractor.

*If the Contractor does not lodge Security in accordance with this Clause, the Principal may, notwithstanding Clause 42.1, withhold payment of moneys otherwise due to the Contractor until the Contractor lodges the Security.*

#### **Clause 5.5 is deleted and replaced with the following:**

##### ***5.5 Recourse to retention moneys and conversion of Security***

*The Principal may have recourse to Security, retention moneys and/or cash security and/or may convert into money security that does not consist of money where the Principal has become entitled to exercise a right under the Contract in respect of the retention moneys and/or Security or there is a debt due under the Contract to the Principal from the Contractor or the Principal believes (acting reasonably) it has a bona fide claim against the Contractor.*

*The Contractor is not entitled to commence any proceeding, seeking relief by way of injunction or any other relief, which has as its objective the obtaining of an order preventing the other party from having recourse to retention moneys and/or Security even though the party contemplating the commencement of proceedings may assert that there is no right to have recourse to retention moneys and/or Security.*

#### **Clause 5.6 is deleted and replaced with the following:**

##### ***5.6 Substitution of Security for retention moneys***

*Subject to the prior written consent of the Principal (which consent shall not be unreasonably withheld), the Contractor shall at any time provide in lieu of retention moneys or Security in any of the forms permitted in Clause 5.3. To the extent that such Security is provided, the Principal shall not deduct retention moneys and shall forthwith release retention moneys.*

#### **Clause 5.7 is deleted and replaced with the following:**

##### ***5.7 Reduction and release of Security and retention moneys***

*The Principal's entitlement to Security and retention moneys shall be reduced as stated in Annexure Part A.*

*Subject to the first paragraph of Clause 5.7, if in the opinion of the Superintendent it is reasonable to further reduce the Principal's entitlement to Security and retention moneys, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.*

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

*The Principal's entitlement to Security for any item of unfixed plant and materials pursuant to Clause 42.4 shall cease 10 Business Days after incorporation into the Works of the unfixed plant or materials.*

#### **Clause 5.8 is deleted and marked as "Not Used".**

#### **Clause 5.9 is deleted and replaced with the following:**

The Principal does not hold any Security, or any retention moneys on trust. The Principal is permitted to hold any retention money as part of its general unallocated cash reserves or in any similar manner. The Principal shall own any interest earned on retention moneys.

If the Principal converts any Security into money, any interest earned on those moneys will be retained by the Principal, except that if the Principal is required to repay any of those moneys to the Contractor, the Principal will also pay to the Contractor, any interest earned by the Principal on the repaid moneys.

#### **Clause 5.10 is deleted and replaced with the following:**

##### ***5.10 Deed of Guarantee and Indemnity***

*If Annexure Part A provides that a Deed of Guarantee and Indemnity is required, the Contractor shall, within 10 Business Days after the Date of Contract, provide to the Principal:*

(a) the Deed of Guarantee and Indemnity duly executed and enforceable against the Guarantor; and

(b) if the Guarantor is incorporated outside of Australia, a legal opinion supporting, and in respect of, the Deed of Guarantee and Indemnity in a form acceptable to the Principal.

### **Clause 6 Evidence of Contract and Tender**

#### **The heading is amended to read "Evidence of Contract and Tender".**

#### **Clause 6.1 is deleted and replaced with the following:**

Unless a Formal Instrument of Agreement is executed by the parties, the Contract Documents shall constitute the Contract.

#### **Clause 6.2 is amended by:**

* replacing the words " Formal Instrument of Agreement" in the first paragraph with "Formal Instrument of Agreement"; and
* replacing the words "Date of Acceptance of Tender" with the words "Date of Contract".

#### **A new Clause 6.3 is inserted as follows:**

##### ***6.3 Contractor's Tender***

(a) The Contractor warrants that all representations made in the Contractor's tender, including the tender schedules, are true.

(b) A breach by the Contractor of the warranty given in Clause 6.3(a) will be a substantial breach for the purposes of Clause 44.2.

(c) Unless agreed in writing by the Superintendent (such agreement not to be unreasonably withheld) or otherwise specified in the Principal's Project Requirements the Contractor shall:

(i) deploy the methodology described in the Contractor's tender; and

(ii) deploy the personnel and resources described in the Contractor's tender.

#### **A new Clause 6.4 is inserted as follows:**

##### ***6.4 Conflict of Interest***

(a) The Contractor warrants to the Principal that neither it, nor any contractor, consultant or employee of the Contractor:

(i) has, as at the Date of Contract; or

(ii) between release of the Request for Tender in respect of the Contract and the Date of Contract, had,

*any conflict of interest or duty in relation to the work under the Contract.*

(b) If the Contractor becomes aware of any circumstances, arrangements, corporate relationships or understandings that constitute, or may reasonably be considered to constitute, an actual, potential or perceived conflict of interest or duty of the Contractor or any contractor, consultant or employee of the Contractor, the Contractor shall immediately notify the Principal and describe how it proposes to manage any such actual, potential or perceived conflict of interest or duty.

(c) The Principal may direct the Contractor in relation to a conflict of interest or duty of the Contractor in relation to the work under the Contract.

(d) The Contractor shall comply with any direction of the Principal given under this Clause 6.4.

(e) The Contractor shall not be entitled to make any Claim against the Principal for complying with the requirements of, or a direction given under, this Clause 6.4.

### **Clause 7 Service of Notices**

#### **Clause 7 is amended by inserting a new paragraph after the second paragraph:**

(a) A notice under this Contract shall be:

(i) in writing, in English, by a person duly authorised by the sender; and

(ii) hand delivered, sent by pre-paid express post, or if Annexure Part A provides that notices may be sent electronically, to the electronic address specified in Annexure Part A, or where notice in writing of a new address or electronic mail address has been given by one party to the other, then to any such new address.

(b) A notice given in accordance with Clause 7(a) takes effect when taken to be received (or at such later time specified in the notice). Subject to Clause 7(c), a notice is taken to be received:

(i) if delivered by hand, on the date it is delivered to the addressee;

(ii) if sent by pre-paid express post, on the sixth Business Day after the date of posting;

(iii) if sent by electronic mail, when an acknowledgement that the mail has been successfully transmitted to the intended recipient is recorded on the sender's computer, but if the delivery receipt or transmission is not on a Business Day or is after 6.00pm on a Business Day, the notice is taken to be received at 8.00am the next Business Day.

(c) Without limiting anything else in this Clause, if the notice is a notice given under Clause 12.2, Clause 14.1, Clause 21.4, Clause 33.1, Clause 35.5, Clause 40.2, Clause 42, Clause 44.7, Clause 46 or Clause 47, and Annexure Part A provides that notices may be sent electronically, such notice shall also be delivered by hand or express post in addition to being delivered electronically and will be deemed to be received on the later of the relevant time periods set out in Clause 7(b).

#### **A new Clause 7A is inserted as follows:**

##### ***7A Communications***

The parties agree to the following communication protocols:

(a) all communication shall be made as provided for in the Contract;

(b) the communication shall be in writing (or confirmed in writing as soon as practicable after the communication);

(c) the Superintendent shall be copied into all communication under the Contract;

(d) if the Contractor has provided a communication in accordance with this Contract and the Superintendent or the Principal has not responded to the Contractor's communication, the Contractor may provide the Superintendent or the Principal with a secondary communication which includes a proposed period for response; and

(e) neither the Principal nor the Superintendent is required to respond to any communication provided by the Contractor before the time that the Principal or Superintendent could have reasonably anticipated that a response was required.

Nothing in this Clause 7A is intended to restrict or detract from the requirements under this Contract including the provision relating to notices in Clause 7.

#### **A new Clause 7B is inserted as follows:**

##### ***7B Document Management System***

This Clause 7B applies if indicated in Annexure Part A.

Before the Contractor commences work under the Contract, the Contractor shall enter into the DMS Contract.

Prior to entering into the DMS Contract, the Contractor shall:

(a) obtain the Principal's prior approval to the terms of the DMS Contract; and

(b) provide the Principal with a written authorisation addressed to the provider of the Document Management System to release a copy of, or allow access to, any document on the Document Management System to the Principal at any time.

The Contractor is responsible for:

(c) providing the Principal and the employees, consultants or agents of the Principal with access to the Document Management System; and

(d) paying all costs and charges necessary to facilitate full use of the Document Management System by the Principal, the Contractor or any subcontractor or any of their employees, consultants or agents.

The Contractor acknowledges and agrees that transmission of a document through the Document Management System does not constitute valid delivery or notification pursuant to Clause 7.

Unless otherwise directed by the Principal, the Contractor shall use the Document Management System for the issue and receipt of all documents in connection with or relevant to or arising from the Contract, the Works or the performance of the work under the Contract. The Contractor shall ensure that any document not transmitted via the Document Management System is uploaded to the Document Management System.

The Principal may use any documents on the Document Management System in connection with the Works, the performance of the work under the Contract or to enforce its rights under the Contract or otherwise.

If the Document Management System is unavailable for any reason, the Contractor shall at its cost use alternative methods to transmit documents until such time as the Document Management System is available again. When the Document Management System becomes available again, the Contractor shall, immediately re-transmit by the Document Management System any documents transmitted by alternative methods during the period of unavailability.

### **Clause 8 Contract Documents**

#### **Clause 8.1 is amended by deleting the first sentence in paragraph 1 and replacing it with the following sentence:**

The Contract Documents are to be interpreted in the order of precedence as set out in Annexure Part A.

#### **Clause 8.3 is amended by replacing the words "the Annexure" with "Annexure Part A".**

#### **Clause 8.4 is amended by:**

* **replacing the words "the Annexure" with "Annexure Part A"; and**
* **in subparagraph (c), replacing "must" with "shall".**

#### **Clause 8.6 is deleted and replaced with the following:**

##### ***8.6 Confidential information***

In this Clause 8.6, except where the context otherwise requires:

'Confidential Information' means:

(a) drawings, specifications and other information, samples, models, patterns and the like, supplied by either the Contractor or the Principal and marked or otherwise identified as confidential;

(b) trade secrets, know-how, scientific and technical information;

(c) information in relation to the Contract or the work under the Contract; and

(d) any other information which a party notifies the other is confidential, or which the other party knows or ought to know is confidential.

'Public Disclosure Requirements' means the disclosure of any information (including Confidential Information):

(a) where that disclosure is:

1. required by the Freedom of Information Act 1982 (Vic);
2. mandatory by reason of the Principal being a public entity;
3. prudent or desirable in order to facilitate and support transparent open governance;
4. required due to any requirement of law or any policy of the Victorian Government;
5. required to comply with the disclosure requirements of the Auditor-General, the Ombudsman, Independent Broad-based Anti-corruption Commission, Victorian Information Commissioner or parliamentary accountability; or
6. required for the Principal's annual report or other reporting requirements;

(b) to any contractor, consultant or employee of the Principal by the Principal to the extent necessary in relation to the Principal's rights and obligations under the Contract provided that the party to whom the information is disclosed agrees to maintain the confidentiality of any such information;

(c) to another government department or agency or a municipal, public or statutory authority, provided that the party to whom the information is disclosed agrees to maintain the confidentiality of any such information;

(d) where a Minister of the Crown, the secretary or deputy secretary of a government department or the chief officer (or equivalent) of a government agency, or a representative or delegate of any of them, is required to or considers it prudent or desirable to disclose the information; or

(e) a licensee, or any sublicensees to the extent necessary for, or in connection with, the exercise of any licence granted under Clause 13.2.

Neither party may disclose Confidential Information of the other party without the prior written consent of the other party, except in accordance with this Clause 8.6.

The Principal, or a representative or nominee of the Principal, may:

(a) disclose any information (including any Confidential Information) if such disclosure is required by or is consistent with the Public Disclosure Requirements; and

(b) publish (on the Internet or otherwise) the name of the Contractor and the Contract Sum together with conditions of this Contract generally (including its Annexures and Schedules).

The Contractor may disclose Confidential Information where such disclosure is:

(c) required to be made in relation to any procedure for discovery of documents and any proceedings before any court, tribunal or regulatory body;

(d) to a contractor, consultant or employee of the Contractor, where required for the purposes of carrying out the work under the Contract provided that the party to whom the information is disclosed agrees to maintain the confidentiality of any such information;

(e) to a licensee, or any sublicensees to the extent necessary for, or in connection with, the exercise of any licence granted under Clause 13.2 provided that the party to whom the information is disclosed agrees to maintain the confidentiality of any such information; or

(f) required by law, government policy, court order or the listing rules of the Australian Stock Exchange,

in which case, the Contractor shall notify the Principal of the requirement to disclose as soon as possible after the Contractor becomes aware of any demand or requirement to disclose the relevant Confidential Information and in any event prior to making the disclosure where possible.

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

The Contractor shall:

(g) return to the Principal any Confidential Information of the Principal on demand; or

(h) when directed by the Principal, delete or destroy any Confidential Information of the Principal obtained or stored electronically,

except to the extent that the Confidential Information is incorporated in this Contract or documents which the Contractor is required to retain under any Legislative Requirement. This Clause 8.6 survives the termination or expiration of the Contract.

### **Clause 9 Assignment and Subcontracting**

#### **Clause 9.1 is deleted and replaced with the following:**

The Contractor shall not, without the prior written approval of the Principal and except on such reasonable terms and conditions as are determined in writing by the Principal, assign, transfer, mortgage, pledge, charge or otherwise encumber the Contract or any payment or any other right, benefit or interest of the Contractor under the Contract.

The Principal may, without the consent of the Contractor, novate or assign the Contract or any payment or any other right, benefit or interest under the Contract to a State Entity. On any such assignment or novation the Contractor shall provide to the Principal all necessary assistance and do and execute all things as are deemed necessary or desirable by the Principal to effect such assignment or novation, including executing a deed of novation satisfactory to the Principal.

#### **Clause 9.2 is deleted and replaced with the following:**

For the purposes of this Clause 9.2:

'Secondary Subcontract' means a subcontract between the Subcontractor and a subcontractor to the Subcontractor (in this Clause called the "Secondary Subcontractor") in connection with the work under the Contract;

'Subcontract' means a contract between the Contractor and a third party whereby the third party (in this Clause called the "Subcontractor") agrees to perform work comprising part of the work under the Contract; and

'Subcontracting Commercial Principles' means the following principles:

(a) Subcontract conditions shall:

(i) to the extent reasonably practicable, be compatible with the conditions of this Contract and allocate risks to the party best able to manage the risk;

(ii) not include ‘pay when paid’ or ‘pay if paid’ provisions;

(iii) in respect of the payment provisions:

(A) be consistent with and support the Subcontractor's and Secondary Subcontractors ability to enjoy the benefits provided under the Building and Construction Industry Security of Payment Act 2002 (Vic); and

(B) provide for progress payments and payment to be made in a timely manner, and which shall not subsequently be amended;

(iv) include:

(A) a provision that the Subcontractor shall not assign or enter into a further subcontract for any of the work under the Subcontract without the prior consent in writing of the Contractor;

(B) provisions which may be reasonably necessary to enable the Contractor to fulfil the Contractor's obligations to the Principal;

(C) a provision that if the Contract is terminated and upon the Subcontractor being paid the sum certified by the Superintendent as owing to the Subcontractor, the Contractor and the Subcontractor shall, after the Principal has done so, promptly execute a deed of novation in the form of Annexure Part K;

(D) For the purposes of effecting such novation only, the Contractor hereby irrevocably appoints the Superintendent to be the Contractor’s attorney with authority to execute such documents as are necessary to give effect to the novation and to bind the Contractor accordingly;

(E) insurance obligations on the Subcontractor, satisfactory to the Principal, including where the Subcontractor is a Consultant, provision that the Subcontractor shall effect and maintain professional indemnity insurance;

(F) a right for the Contractor to terminate the Subcontract for convenience;

(G) an obligation on the Contractor to obtain warranties on commercially available terms for all materials from the manufacturers and Subcontractors who manufacture or supply the materials (as the case may be);

(H) obligations on both the Contractor and the Subcontractor to comply with the Principal's Policies and Procedures;

(I) obligations on the Subcontractor to grant any licence or vest any Data and Intellectual Property Rights in accordance with Clause 13 of this Contract;

(J) a provision requiring a Subcontractor or Secondary Subcontractor to warrant that labour engaged by it in connection with the performance of the work under the Contract will be engaged in such a manner which allows the Contractor to comply with its obligations under the Contract; and

(K) a provision requiring a Subcontractor or Secondary Subcontractor to comply with industrial relations laws;(b) the Subcontract complies with the unfair contract terms law as set out under the Australian Consumer Law;

(c) to the extent reasonably practicable, the Subcontract provides for alternative dispute resolution;

(d) the Subcontract does not contain time bar provisions or provisions restraining the rights of the Subcontractor which are not market standard for such a Subcontract; and

(e) where not addressed by any of the above principles, subcontract conditions and obligations shall, to the extent reasonably practicable, be substantially the same as the conditions and obligations set out in this Contract.

Unless otherwise provided in the Request for Tender or where the Contractor has obtained the prior written approval of the Superintendent, the Contractor shall ensure that the terms of the Subcontract or Secondary Subcontract are consistent with the Subcontracting Commercial Principles and do not contain any provisions which are contrary to the Subcontracting Commercial Principles other than those necessary to reflect the terms of this Contract.

Unless otherwise notified by the Principal before the Date of Contract or otherwise directed by the Superintendent in writing, the Contractor shall subcontract to the Subcontractors identified in the Contractor's tender.

If requested by the Superintendent in writing, the Contractor shall provide to the Superintendent:

(f) particulars in writing of the work to be subcontracted and the name and the address of the proposed Subcontractor;

(g) written confirmation that the proposed Subcontract conditions are consistent with the Subcontracting Commercial Principles and do not contain any provisions which are contrary to the Subcontracting Commercial Principles other than those necessary to reflect the terms of this Contract; and

(h) any other information which the Superintendent reasonably requests, including the proposed Subcontract or executed Subcontract (as applicable) without prices.

Unless otherwise provided in the Request for Tender or notified by the Superintendent in writing, the Contractor is not required to obtain any approval from the Superintendent in relation to any Secondary Subcontract or Secondary Subcontract conditions of contract.

Within 10 Business Days after any request by the Contractor for approval under this Clause 9.2, the Superintendent shall advise the Contractor of approval or the reasons why approval is not given.

The Contractor agrees to assign or novate its rights and obligations in a Subcontract to the Principal or a nominee of the Principal and execute any documents required by the Principal to give effect to such assignment or novation (including execution of a deed of novation substantially in the form of Annexure Part K) if both:

(i) the work is taken out of the hands of the Contractor or the Principal terminates the Contract for any reason; and

(j) the Principal directs the Contractor to do so.

#### **Clause 9.3 is deleted and replaced with the following:**

Approval to subcontract shall not relieve the Contractor from any liability or obligation under the Contract. The Contractor shall be liable to the Principal for the acts and omissions of subcontractors and employees and agents of subcontractors (including Selected Subcontractors) as if they were acts or omissions of the Contractor.

The Contractor and Principal agree that subcontractors are engaged by the Contractor as principal in its own right and not as an agent for the Principal.

### **Clause 10 Selected and nominated subcontractors**

#### **Clause 10.2 is deleted and replaced with the following:**

##### ***10.2 Selected subcontract***

If Annexure Part A includes a list of one or more Selected Subcontractors, the Contractor shall subcontract the Selected Subcontract Work to a Selected Subcontractor and thereupon give the Superintendent written notice of that Selected Subcontractor's name.

If no Selected Subcontractor listed in Annexure Part A will subcontract to carry out the Selected Subcontract Work, the Contractor shall provide a list of subcontractors for the written approval of the Superintendent.

#### **Clause 10.3 is amended by:**

* **deleting paragraph 4 (that is, the paragraph commencing with "the Contractor shall ensure…");**
* **replacing the words "in paragraphs (a) to (e) of Clause 10.3" with "which comply with the Subcontracting Commercial Principles,";**
* **renumber subparagraphs (i) and (ii) as (a) and (b) respectively.**

#### **Clause 10.4 is amended by:**

* **in the fourth paragraph, inserting a colon after "Except as herein contained";**
* **in the fourth paragraph, deleting the words "and subject to any responsible objection made by the Contractor pursuant to this Clause"; and**
* **renumbering subparagraphs (i) and (ii) as (a) and (b) respectively.**

### **Clause 11 Provisional Sums**

#### **Clause 11 is amended by replacing the words "the Annexure" in subparagraphs (b) and (c) with "Annexure Part A".**

### **Clause 12 Latent Conditions**

#### **Clause 12.1 is deleted and replaced by the following:**

##### ***12.1 Definition***

Latent Conditions are:

(a) physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works at the time of the Contractor's tender if that contractor had:

(i) examined all information made available in writing by the Principal to the Contractor for the purpose of tendering;

(ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries;

(iii) examined the Site and its surroundings; and

(iv) obtained appropriate professional and technical advice; and

(b) any other conditions which the Contract specifies to be Latent Conditions,

but do not include the conditions identified in Annexure Part A.

#### **Clause 12.2 is deleted a replaced by the following:**

##### ***12.2 Notification***

If during the execution of the work under the Contract, the Contractor becomes aware of a Latent Condition, the Contractor shall forthwith and where possible before the Latent Condition is disturbed, give written notice thereof to the Superintendent. Notification to the Superintendent shall include whether the Contractor intends to carry out urgent action of the kind contemplated in Clause 12.2A. The Contractor shall also obtain evidence in relation to Latent Condition, and produce such evidence on request by the Superintendent.

As soon as practicable after providing such initial written notice to the Superintendent and in any event within 3 Business Days after becoming aware of the Latent Condition, the Contractor shall provide to the Superintendent a statement in writing specifying:

(a) the Latent Condition encountered and in what respects it differs materially;

(b) the additional work and additional resources which the Contractor estimates to be necessary to deal with the Latent Condition;

(c) any other reasonably foreseeable consequences arising from the Latent Condition;

(d) the time the Contractor anticipates will be required to deal with the Latent Condition and the expected delay in achieving Practical Completion;

(e) the Contractor's estimate of the cost of the measures necessary to deal with the Latent Condition; and

(f) other details reasonably required by the Superintendent.

#### **A new Clause 12.2A is inserted as follows:**

##### ***12.2A Urgent action in relation to a Latent Condition***

Without limiting Clause 39, if urgent action is necessary to protect:

(a) the work under the Contract; or

(b) other property or people,

as a result of a Latent Condition or the Contractor becoming aware of a Latent Condition, the Contractor shall carry out such action without delay. Provided that the Contractor has complied with the notification requirements set out in the first paragraph of Clause 12.2 in respect of such action, a valuation in relation to the action shall be made under Clause 40.5.

#### **A new Clause 12.2B is inserted as follows:**

##### ***12.2B Conditions other than Latent Conditions***

The Contractor shall comply with Clause 12.2 in respect of those conditions identified in Annexure Part A, as if those conditions were Latent Conditions**.**

#### **Clause 12.3 is deleted and replaced as follows:**

##### ***12.3 Extension of time and cost***

Delay caused by a Latent Condition may justify an extension of time under Clause 35.5. if the requirements of Clauses 12.2 and 35 are satisfied.

If a Latent Condition causes the Contractor to:

(a) carry out additional work;

(b) use additional Constructional Plant; or

(c) incur extra cost (including but not limited to the cost of delay or disruption),

*which an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works could not reasonably have anticipated at the time of tendering, a valuation shall be made under Clause 40.5.*

#### **Clause 12.4 is amended by:**

* **deleting the phrase "more than 28 days before".**

#### **A new Clause 12A.1 is inserted as follows:**

##### ***12A.1 Information***

###### ***12A.1 Contractor to inform itself***

Without limiting Clauses 12A.2 or 12A.4, the Contractor warrants that it has, and it will be deemed to have, done everything that would be expected of an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works in:

(a) assessing the risks which it is assuming under the Contract;

(b) ensuring that the Contract Sum contains allowances to protect it if any of these risks eventuate; and

(c) ensuring that the construction program contains sufficient flexibility to allow the Contractor to achieve Practical Completion by the Date for Practical Completion if any of these risks eventuate.

#### **A new Clause 12A.2 is inserted as follows:**

##### ***12A.2 Information Documents***

Prior to the Date of Contract, the Principal provided to the Contractor the Information Documents for the information only of the Contractor.

The Contractor:

(a) warrants that it did not in any way rely upon:

(i) the Information Documents; or

(ii) the accuracy, adequacy, suitability or completeness of the Information Documents,

for the purposes of entering into the Contract;

(b) warrants that it entered into the Contract based on its own investigations, interpretations, deductions, information and determinations, and has had the opportunity to obtain appropriate professional and technical advice;

(c) acknowledges and agrees that:

(i) the Principal did not and does not warrant, guarantee or make any representation about the accuracy, adequacy, suitability or completeness of the Information Documents;

(ii) the Principal did not and does not owe any duty of care to the Contractor with respect to the Information Documents; and

(iii) the Information Documents do not form part of the Contract;

(d) acknowledges and agrees that, to the extent permitted by law, the Principal will not be liable upon any Claim by the Contractor arising out of, or in any way in connection with:

(i) the provision of or the purported reliance upon, or use of, the Information Documents by the Contractor or any other person to whom the Information Documents are disclosed; or

(ii) a failure to provide any other information, data or documents to the Contractor.

#### **A new Clause 12A.3 is inserted as follows:**

##### ***12A.3 Non-reliance***

Without limiting Clauses 4.1, 12A.2 or 12A.4, the Contractor:

(a) warrants that it did not in any way rely upon:

(i) any information, data, representation, statement or document made by or provided to the Contractor by the Principal or anyone on behalf of the Principal; or

(ii) the accuracy, adequacy, suitability or completeness of such information, data, representation, statement or document,

for the purposes of entering into the Contract except to the extent that such information, data, representation, statement or document forms part of the Contract;

(b) warrants that it enters into this Contract based on its own investigations, interpretations, deductions, information and determinations and has had the opportunity to obtain appropriate professional and technical advice; and

(c) acknowledges that it is aware that the Principal has entered into the Contract relying upon the acknowledgements and warranties in paragraphs (a) and (b) and Clauses 12A.2 and 12A.4.

#### **A new Clause 12A.4 is inserted as follows:**

##### ***12A.4 Site Conditions***

The Contractor:

(a) warrants that prior to the Date of Contract it has:

(i) examined the Site and its surroundings and done everything reasonably possible to inform itself fully as to the Site Conditions which may affect its performance of the work under the Contract;

(ii) informed itself completely of the nature of the work and materials necessary for the execution of the work under the Contract and the means of access to and facilities at the Site and transport facilities for deliveries to or from the Site;

(iii) informed itself of all requirements of all authorities in relation to the work under the Contract generally and, without limitation, in relation to measures necessary to protect the Environment from any adverse effect or damage arising from execution of the work under the Contract; and

(iv) obtained all appropriate professional and technical advice on all matters and circumstances in respect of the matters referred to in sub-paragraphs (i) - (iii) prior to submitting its tender; and

(b) subject to Clause 12.3, acknowledges and agrees that the Contract Sum includes an amount to compensate the Contractor for all risks associated with the Site Conditions.

### **Clause 13 Patents, Copyright and Other Intellectual Property Rights**

#### **Clause 13 is deleted and replaced with the following:**

##### ***13 Patents, copyright and other intellectual property rights***

##### ***13.1 Warranties and indemnities***

The Principal warrants that unless otherwise provided in the Contract:

(a) design;

(b) materials;

(c) documents; and

(d) methods of working,

*specified in the Contract or provided or directed by the Principal or the Superintendent will not infringe any Intellectual Property Rights.*

*The Contractor warrants that any other design, materials, documents and methods of working provided by the Contractor will not infringe any Intellectual Property Rights.*

#### **A new Clause 13.2 in inserted as follows:**

##### ***13.2 Intellectual Property Rights and Data***

*Subject to Clause 13.3, the Contractor grants to the Principal an irrevocable, non-exclusive, perpetual, transferable, royalty-free licence to use Intellectual Property Rights in any documents or materials provided by the Contractor for the work under the Contract which shall include the right for the Principal to sub-licence such rights to a third party. Such licence shall also include any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the Works.*

*The Contractor undertakes that it has obtained or will obtain valid consent from all relevant authors in the creation of any documents or materials provided by the Contractor for the work under the Contract so that the use by the Principal or its assignees of such material will not infringe any Intellectual Property Rights or any author's moral rights under the Copyright Act 1968 (Cth).*

#### **A new Clause 13.3 in inserted as follows:**

##### ***13.3 Background IP***

(a) In this Clause 13.3, "Background IP" means any Intellectual Property Rights developed by a party independent of this Contract or prior to the date of this Contract that is used for the work under the Contract.

(b) Each party retains ownership of Intellectual Property Rights in any Background IP.

(c) The Contractor grants to the Principal an irrevocable, non-exclusive, perpetual, transferable, royalty-free licence (including the right for the Principal to sub-license such rights to a third party) to use the Contractor's Background IP for the work under the Contract and to obtain the benefit of the Works. Such licence shall also include any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the Works.

(d) The Principal grants the Contractor a non-exclusive licence to use the Principal's Background IP to the extent necessary for the Contractor to perform the work under the Contract.

(e) The Contractor grants the Principal a non-exclusive, irrevocable, perpetual, transferable, royalty-free licence (including the right for the Principal to sub-license such rights to a third party) to use the Contractor's Background IP to the extent necessary for the Principal to access, use, publish or store any Data vested in the Principal in accordance with Clause 13.4.

#### **A new Clause 13.4 in inserted as follows:**

##### ***13.4 Data***

(a) In this Clause 13, "Data" means all point and array information, text, drawings, statistics, tests, analysis and other materials (including geological, geotechnical and environmental information, maps, images, survey results and drill core and cutting samples) embodied in any form which is:

(i) supplied by or on behalf of the Principal in connection with this Agreement (Input Data); or

(ii) generated, recorded, placed, stored, processed, retrieved, printed, accessed or produced utilising the Input Data or for the purpose of the Contract.

(b) All Data hereby vests in the Principal, and the Principal grants to the Contractor an irrevocable licence with the right to sub-license to its contractors the right to use Data for the work under the Contract.

(c) The Contractor shall do everything possible to perfect such vesting including assign to the Principal from the date of creation all Intellectual Property Rights in Data.

(d) The Contractor shall only use, copy or supply Data to the extent necessary to perform its obligations under the Contract.

#### **A new Clause 13.5 in inserted as follows:**

##### ***13.5 Moral Rights***

*The Contractor undertakes that it has obtained or will obtain valid consent from all relevant authors in the creation of any documents or materials provided by the Contractor for the work under the Contract, including the Design Documents, so that the use by the Principal or its assignees of such material will not infringe any Intellectual Property Rights or any author's moral rights under the Copyright Act 1968 (Cth).*

### **Clause 14 Statutory Requirements**

The heading is amended to read "Legislative Requirements and Principal's Policies and Procedures".

#### **Clause 14.1 is amended by:**

* **amending the heading to read "Compliance with Legislative Requirements"; and**
* **deleting Clause 14.1 and replacing it as follows:**

The Contractor must:

(a) comply with all Legislative Requirements in relation to or in connection with the carrying out of the work under the Contract and the performance of its obligations under the Contract except:

(i) the required consents, permits and approvals which are specified in Annexure Part A; or

(ii) those which the Superintendent directs are to be separately satisfied by or on behalf of the Principal;

(b) comply with all Principal's Policies and Procedures in relation to or in connection with the carrying out of the work under the Contract and the performance of its obligations under the Contract;

(c) comply with all conditions and requirements in relation to any consents, permits and approvals relevant to the work under the Contract (whether or not the Contractor was required to obtain such consents, permits and approvals);

(d) undertake the work under the Contract and perform its obligations under the Contract in a manner which will not place the Principal in breach of any Legislative Requirement and which will support compliance by the Principal with all relevant Legislative Requirements; and

(e) when requested by the Principal, provide evidence, satisfactory to the Principal, of the Contractor’s compliance with this Clause and evidence that the Contractor has systems and protocols in place to support compliance with this Clause.

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

*If a Legislative Requirement or an addition or change to the Principal's Policies and Procedures necessitates a change to the Works, the Contractor shall notify the Principal and the Superintendent and wait for a direction from the Principal pursuant to Clause 14.1(g) prior to performing the change (Change of Requirement Notice).*

(f) Any Change of Requirement Notice shall be in writing and detail:

(i) the increased or reduced cost to the Contractor (if any) of performing the change, directly resulting from the change in Legislative Requirements or Principal's Policies and Procedures (as applicable);

(ii) the impact (if any) that performing the change would have on the Contractor achieving Practical Completion by the Date for Practical Completion; and

(iii) the obligations under the Contract that the Contractor would not be able to comply with (if any) if the Principal does not direct the Contractor to perform the change (including any part of the Works which would be prohibited as a consequence of the change in Legislative Requirements or Principal's Policies and Procedures (as applicable)).

(g) Following receipt of a Change of Requirement Notice or in the absence of a Change of Requirement Notice, if the Principal elects, the Principal may (in the Principal’s absolute discretion) direct the Contractor to either:

(i) perform the whole or part of the change, in the manner directed by the Principal (if any); or

(ii) not perform the change,

to the extent permitted by law.

(h) Where the Principal directs the Contractor to perform the change under Clause 14.1(g), to the extent that complying with a direction from the Principal causes the Contractor to incur more or less cost than otherwise would have been incurred, the difference will be valued by the Superintendent as a variation in accordance with Clause 40.5.

(i) Where Clause 14.1(a) applies and the Principal directs the Contractor not to perform the change to the Works under Clause 14.1(g)(ii), the Contractor shall not perform that change and shall be relieved of its obligations under the Contract to the extent:

(i) arising from the change the subject of the relevant Change of Requirement Notice; or

(ii) where the Principal does not agree with the Change of Requirement Notice, to the extent the Principal determines that any obligations cannot be complied with as a result of the Principal’s direction not to perform the change.

(j) The reduction in the scope of the Works resulting from the Contractor being relieved of its obligations under Clause 14.1(i) will be valued as a variation in accordance with Clause 40.5.

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

#### **Clause 14.2 is deleted and marked as 'Not Used'.**

#### **Clause 14.3 is deleted and marked as 'Not Used'.**

#### **A new Clause 14.5 is inserted as follows:**

##### ***14.5 Certificates and approvals***

*The Contractor shall apply for and obtain, or cause to be applied for and obtained, and shall maintain all certificates, licences, consents, permits and other approvals of authorities necessary for:*

(a) the execution of the work under the Contract; or

(b) the occupation of the Works,

except those which are specified in Annexure Part A.

*The Contractor shall give the Principal certified copies of documents issued to the Contractor in respect of the work under the Contract by any organisation having jurisdiction in connection with the carrying out of the work under the Contract.*

#### **A new Clause 14.6 is inserted as follows:**

##### ***14.6 Authorities***

(a) In this Clause 14.6, except where the context otherwise requires:

(i) 'Executive Function' means a function, obligation, discretion or power which a State Entity or the Principal is permitted, empowered or obliged to discharge or perform (together with any action in support or furtherance of such a function, obligation, discretion or power).

(ii) 'State Entity' means the Crown in right of Victoria, Ministers of the Crown and a public body (as that term is defined under the Financial Management Act 1994 (Vic));

(b) The Contractor acknowledges and agrees that the State of Victoria, State Entities and the Principal have Executive Functions beyond matters of concern to the Contract. The State of Victoria, State Entities and the Principal are not, by reason of the Principal entering into the Contract:

(iii) fettering their ability to perform an Executive Function; or

(iv) under any obligation to exercise, or decline to exercise an Executive Function in support of the Contract or the Contractor.

(c) The Contractor acknowledges and agrees that, except to the extent expressly provided otherwise, any action or inaction by the State of Victoria, a State Entity or the Principal in connection with an Executive Function shall not give rise to any Claim by the Contractor against the State of Victoria, the State Entity or the Principal.

(d) This Clause 14.6 survives the termination or expiration of the Contract.

#### **A new Clause 14A is inserted as follows:**

##### ***14A GST***

###### ***14A.1 Definition and interpretation***

(a) Words or expressions used in this Clause 14A which are defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) ('GST Act') have the same meaning in this Clause.

(b) In addition to the definition of 'GST' in the GST Act, any reference to 'GST' also includes any voluntary or notional GST equivalent payments a party is obliged to make under or in relation to the National Tax Reform (Consequential Provisions) Act 2000 (Vic) or any successor legislation or equivalent legislation in another state ('NTR Act').

(c) 'Recipient' means the party acquiring the relevant supply.

(d) 'Supplier' means the party making the relevant supply.

###### ***14A.2 GST Gross-up***

If the Supplier makes a supply under or in connection with this Contract on which GST is imposed, in whole or in part (not being a supply the consideration for which is specifically described in this Contract as inclusive of GST) then:

(a) the consideration payable or to be provided for that supply under this Contract but for the application of this Clause ('GST exclusive consideration') is increased by, and the Recipient of the supply shall also pay to the Supplier, an amount equal to the GST payable on the supply ('GST Amount'); and

(b) the GST Amount shall be paid to the Supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST exclusive consideration is payable or to be provided, subject to the Supplier giving the Recipient a tax invoice in respect of that taxable supply.

###### ***14A.3 Payments and Reimbursements***

(a) If a payment to a party under this Contract is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party, or the representative member of a GST group of which that party is a member, is entitled for that loss, cost or expense.

(b) If a payment is calculated by reference to, or as a specified percentage of, another amount or revenue stream, that payment shall be calculated by reference to, or as a specified percentage of, the amount or revenue stream exclusive of GST.

###### ***14A.4 Adjustments***

If an adjustment event arises in respect of a supply made under or in connection with this Contract, then:

(a) the Supplier shall issue an adjustment note to the Recipient within 5 Business Days of the adjustment event occurring or otherwise as soon as it becomes aware of the adjustment event, outlining the revised amount of GST payable in respect of that supply ('Corrected GST Amount');

(b) if the Corrected GST Amount is less than the previously attributed GST Amount, the Supplier shall refund the difference to the Recipient within 10 Business Days of the adjustment note being issued by the Supplier; and

(c) if the Corrected GST Amount is greater than the previously attributed GST Amount, the Recipient shall pay the difference to the Supplier within 10 Business Days of the adjustment note being issued by the Supplier.

### **Clause 16 Care of the Work and Reinstatement of Damage**

#### **Clause 16.1 is amended by replacing the words "payment certificate" in the second paragraph with "payment schedule".**

#### **Clause 16.3 is amended by:**

* **inserting the word "and" at the end of paragraph (d); and**
* **deleting subparagraph (e).**

### **Clause 18 Insurance of the Work Under the Contract**

#### **Clause 18 is deleted and replaced with the following:**

***Alternative 1***

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

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

*The insurance cover may exclude:*

(a) the cost of making good fair wear and tear or gradual deterioration but shall not exclude the loss or damage resulting therefrom;

(b) the cost of making good faulty design, workmanship and materials but shall not exclude the loss or damage resulting therefrom;

(c) consequential loss of any kind, but shall not exclude loss of or damage to the Works;

(d) damages for delay in completing or for the failure to complete the Works;

(e) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause;

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

*The insurance cover shall be for the sum of:*

(g) the Contract Sum;

(h) the amount stated in Annexure Part A to provide for costs of demolition and removal of debris;

(i) the amount stated in Annexure Part A to cover fees of consultants;

(j) the value stated in Annexure Part A of any materials or things to be supplied by the Principal for the purposes of the work under the Contract; and

(k) the additional amount or percentage stated in Annexure Part A of the total of the items referred to in sub-paragraphs (g) to (j) of this paragraph.

*Option A*

*The insurance policy shall be in the joint names of the Principal and the Contractor, and shall cover the Principal, the Contractor and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights, interests and liabilities. The policy shall be maintained until the Contractor ceases to be responsible under Clause 16.1 for the care of anything.*

*Option B*

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

*Alternative 2*

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

***Alternative 2***

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

*The Contractor will be responsible for the payment of any excess under the policy. The amount of the excess is stated in Annexure Part A.*

### **Clause 19 Public Liability Insurance**

#### **Clause 19 is amended by:**

* inserting the words ' – Option A' after the words 'Alternative 1';
* replacing the second paragraph in Alternative 1 (that is the paragraph beginning with the words "The Public Liability Policy of insurance") with:

*The Public Liability Policy of insurance shall be for the amount in respect of any one occurrence stated in Annexure Part A. The policy shall be maintained until the Final Payment Schedule is issued under Clause 42.8.*

* inserting a new paragraph before 'Alternative 2' as follows:

*Alternative 1 – Option B*

*Before the Contractor commences work, the Contractor shall take out a public liability policy of insurance which covers the Principal, the Contractor, the Superintendent and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights and interests and covers their liabilities to third parties and extends to cover the Principal as an insured party. The policy shall also cover the Contractor's liability to the Principal and Principal's liability to the Contractor for loss of or damage to property (other than property required to be insured by Clause 18) and the death of or injury to any person (other than liability which is required by law to be insured under a workers compensation policy of insurance).*

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

* inserting a new paragraph at the end of 'Alternative 2' as follows:

*The Contractor will be responsible for the payment of any excess under the policy. The amount of the excess is stated in Annexure Part A.*

### **Clause 20A Additional Insurance**

#### **A new Clause 20A is inserted as follows:**

##### ***20A Additional Insurance***

Before the Contractor commences work under the Contract, the Contractor shall effect any such additional insurances stated in Annexure Part A on such terms as the Principal notifies the Contractor.

### **Clause 21 Inspection and Provisions of Insurance Policies**

#### **Clause 21.1 is amended by deleting the first paragraph and replacing it with the following:**

The Contractor shall effect the insurance policies required under Clauses 18, 19 and 20 with an insurer and on terms both approved in writing by the Principal. Before the Contractor commences work and whenever requested in writing by the Principal, the Contractor shall provide to the Superintendent copies of, and evidence to the satisfaction and approval of the Superintendent of, the insurance effected and maintained under the Contract.

#### **Clause 21.3 is amended by:**

* **deleting, in the first paragraph, the words "shall ensure that each policy of insurance contains provisions acceptable to the other party that";**
* **deleting, in paragraph (a), the words "require the insurer" and the word "to";**
* **inserting, at the commencement of paragraph (b), the words "where practicable";**
* inserting, at the end of paragraph (b), the words ", and where this is not practicable the party effecting insurance will, when requested by the Principal, the Superintendent, the Contractor or a subcontractor, promptly give notice of claim to the insurer and that a failure by one insured party to discharge its obligations of disclosure and good faith or to observe the terms of the policy will not prejudice the cover of the other insured parties"; and
* **deleting and replacing paragraph (c) with the following:**

(c) if that party fails to renew the policy or to pay a premium, to give notice in writing thereof forthwith to the Principal, the Superintendent, the Contractor and all subcontractors.

* **insertingthe following new paragraph after subparagraph (c):**

Without limiting the other requirements of this Clause 21.3, if the Contractor receives any notice from an insurer concerning the insurances required by Clause 18, 19 and 20 it shall promptly provide a copy of the notice to the Principal.

#### **Clause 21.6 is amended by inserting the words ", which extends cover to more than one party," after the words "in joint names".**

#### **A new Clause 21.7 is inserted as follows:**

##### ***21.7 Payment***

*The Contractor shall ensure that premiums are paid on time and the conditions of insurance are complied with by the Contractor and its subcontractors.*

### **Clause 23 Superintendent**

#### **Clause 23 is amended by:**

* **deleting, in subparagraph (a), the words “and fairly”;**
* **adding the following new paragraph after existing paragraph 1:**

The Principal shall also ensure that in the exercise of the functions of the Superintendent under Clauses 5.7, 6.2, 8.1, 21.5, and Clauses 35, 40 and 42 of the Contract, the Superintendent acts fairly;

* **deleting, in the existing paragraph 2 (that is the paragraph beginning with the words “If, pursuant to a provision…”), the words “enabling the Superintendent to give directions”; and**
* **inserting the following new paragraph after existing paragraph 5 (that is the paragraph beginning with the words “If the Contractor in writing requests…”):**

If the Contractor considers that a direction may give rise to a claim by the Contractor against the Principal, it shall, as a condition precedent to any entitlement, give the Superintendent notice of that claim. The notice shall be given within 2 Business Days of the direction and in any event before commencing any work under the Contract the subject of the direction. The notice shall set out the general nature of the potential claim and the Contractor's reasonable estimate of the value of the claim. On receipt of this advice from the Contractor, the Superintendent may confirm or revoke the direction. If the Superintendent confirms the direction, the Contractor's entitlement to relief will be determined in accordance with the Contract.

### **Clause 26 Control of Contractor's employees and subcontractors**

#### **Clause 26 is deleted and replaced by the following:**

(a) The Contractor shall only engage, in activities connected with the work under the Contract, persons who are careful, skilled and experienced in their respective trades and professions and suitably qualified and experienced to meet the Contractor’s obligations under the Contract.

(b) The Superintendent may direct the Contractor to have removed from the Site or from any activity connected with the work under the Contract, within such time as the Superintendent directs, any person employed in connection with the work under the Contract (including the Key Personnel) who, in the opinion of the Superintendent (acting reasonably), is guilty of misconduct or is incompetent or negligent.

(c) Any person removed in accordance with Clause 26(b) shall not thereafter be engaged on the Site or on activities connected with the Works without the prior written approval of the Principal.

(d) Where there is a direction given under this Clause 26, the Contractor shall ensure that there is no interruption to the Works.

(e) A breach by the Contractor of this Clause 26 will be a substantial breach for the purposes of Clause 44.2.

#### **A new Clause 26A is inserted as follows:**

##### ***26A Key Personnel***

(a) Subject to Clause 26A(b), the Contractor shall ensure that the Key Personnel are used by the Contractor and the Contractor shall not replace any of those Key Personnel without the prior written consent of the Principal, which approval shall not be unreasonably withheld.

(b) The Contractor may replace any Key Personnel who are no longer available to perform the work under the Contract due to resignation, illness or death.

(c) Where Clause 26A(a) or (b) permits Key Personnel to be replaced, the Contractor shall replace Key Personnel with person(s) of equivalent skills and experience.

(d) A breach by the Contractor of this Clause 26A will be a substantial breach for the purposes of Clause 44.2.

### **Clause 27 Site**

#### **Clause 27.1 is amended by replacing the words "the Annexure" with "Annexure Part A".**

#### **Clause 27.5 is deleted and marked as "Not Used".**

#### **A new Clause 27A is inserted as follows:**

##### ***27A Artefacts***

Any minerals, fossils, bones, coins, artefacts, articles, structures, other remains or objects of antiquity or of anthropological, scientific, geological, historical, aboriginal or archaeological interest or value (**Artefacts**) found on or under the surface of the Site will, as between the parties, be and remain the property of the Principal.

The Contractor shall:

(a) immediately upon the discovery of any Artefacts notify the Principal of such discovery;

(b) at all times permit and allow the Principal or any person authorised by the Principal to watch or examine any excavations on the Site;

(c) take all reasonable precautions to prevent the Artefacts from being damaged or removed until it receives a direction or order from any relevant Authority or the Principal under Clause 27A(e);

(d) immediately notify the Principal of any direction or order received from any relevant authority in respect of that Artefact; and

(e) comply with any directions or orders imposed by any relevant authority upon the Principal or the Contractor or any direction of the Principal in respect of such Artefact.

#### **A new Clause 27B is inserted as follows:**

##### ***27B Native Title Application***

If there is a Native Title Application in connection with the Site, the Contractor shall continue to perform the Works unless otherwise:

(a) directed by the Principal;

(b) ordered by a court or tribunal; or

(c) required by Legislative Requirement.

Without limiting Clause 27B(a), the Principal may by written notice direct the Contractor:

(d) to suspend any or all of the Works until such time as the Principal gives the Contractor further written notice; or

(e) what course to adopt in relation to the Works,

as a consequence of the Native Title Application.

To the extent that there is:

(f) a direction by the Principal under this Clause 27B;

(g) an order of a court or tribunal under Clause 27B(b); or

(h) a requirement by a Legislative Requirement,

in relation to a Native Title Application made after the Date of Contract in connection with the Site causes:

(i) the Contractor to incur more or less cost than otherwise would have been incurred, the difference will be valued by the Superintendent as a variation in accordance with Clause 40.5; or

(j) a delay to the execution of the Works, the Contractor may be entitled to an extension of time if the requirements of Clause 35.5, are satisfied.

Except as expressly stated in this Clause 27B, the Principal is not liable for, or in connection with, any Claim (and the Contractor may not make any Claim) arising out of or in connection with, any Native Title Application in connection with the Site.

### **Clause 29 Materials, Labour and Constructional Plant**

#### **Clause 29.1 is deleted and replaced by the following:**

Except to the extent that the Contract otherwise provides:

(a) the Contractor shall supply everything necessary for the proper performance of the Contractor's obligations and discharge of the Contractor's liabilities under the Contract; and

(b) incidental items not expressly mentioned in the Contract but which are necessary for the satisfactory completion and performance of the work under the Contract shall be supplied and executed by the Contractor without adjustment to the Contract Sum.

#### **A new Clause 29.4 is inserted as follows:**

##### ***29.4 Warranties***

Where the Contract requires, the Contractor shall procure from the relevant subcontractors and suppliers warranties, in the name of the Principal, to the effect stated in the Contract. Such warranties shall be in a form approved by the Superintendent and shall be submitted to the Superintendent (and be in a form exercisable for the benefit of the Principal) prior to the issue of the Final Payment Schedule.

To the extent that the Contractor, in breach of this Clause, does not procure warranties, in the name of the Principal, to the effect stated in the Contract, or in respect of work carried out by subcontractors or materials supplied by suppliers where the Contractor is not obliged to procure such warranties, the Contractor hereby assigns to the Principal all its right, title and interest in the Contractor’s rights against all subcontractors and suppliers in relation to the work under the Contract.

To the extent that the assignment sought to be effected by the preceding paragraph is not effective the Contractor holds the rights sought to be assigned on trust for the Principal and will exercise those rights as directed by the Principal.

Nothing in this Clause 29.4, nor any warranty nor assignment of rights as contemplated by this Clause, will limit or affect any of the Contractor’s obligations or liabilities, or derogate from any rights which the Principal may have against the Contractor, in respect of the subject matter of the warranty or the assigned warranties.

#### **A new Clause 29.5 is inserted as follows:**

##### ***29.5 Cladding Products***

The Contractor shall:

(a) not install Prohibited Cladding Products into any building work in connection with buildings of Type A or Type B Construction;

(b) indemnify the Principal from and against any loss, damage, expense or Claim (including any third party Claim against the Principal) arising out of or in connection with any breach by the Contractor of its obligations under Clause.29.5(a); and

(c) if it becomes aware of the use of any Prohibited Cladding Products being used on the project, immediately notify the Superintendent.

Where used in this Clause 29.5:

Type A Construction has the meaning given to it in Part C1 of the BCA Volume One.

Type B Construction has the meaning given to it in Part C1 of the BCA Volume One.

### **Clause 30 Material and Work**

#### **Clause 30.3 is amended by replacing "must" with "shall" in the second paragraph.**

#### **Clause 30.6 is amended by replacing in the first paragraph, the words "Final Certificate" with "Final Payment Schedule".**

### **Clause 31 Examination and Testing**

#### **Clause 31.1 is amended by replacing in the second paragraph, the words "Final Certificate" with "Final Payment Schedule".**

### **Clause 33 Progress and Programming of the Works**

#### **Clause 33.1 is amended by:**

* **replacing the existing paragraph 4 with the following:**

Regardless of whether or not the Contractor gives a notice under the previous paragraph of this Clause 33.1, the Principal and the Superintendent shall not be obliged to do anything or furnish any information, materials, documents or instructions earlier than the Principal or the Superintendent, as the case may be, should reasonably have anticipated at the Date of Contract as necessary to enable the Contractor to reach Practical Completion on the Date for Practical Completion.

* **replacing the existing paragraph 5 with the following:**

The Superintendent may direct in what order and at what time the various stages or parts of the work under the Contract shall be performed. The Contractor shall comply with any such direction. No direction by the Superintendent shall constitute a direction under this paragraph unless the direction is in writing and expressly states that it is a 'Sequencing Direction' under Clause 33.1.

* **replacing the existing paragraph 6 with the following:**

If compliance with the direction causes the Contractor to incur more or less cost than otherwise would have been incurred had the Contractor not been given the direction, the difference shall be valued under Clause 40.5, except where the direction was given under or for the purpose mentioned in Clause 33.4 or was necessary because of a failure by the Contractor to comply with Clause 27.2.

#### **Clause 33.2 is deleted and replaced with the following:**

##### ***33.2 Construction program***

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

A construction program shall not affect rights or obligations in Clause 33.1.

The Contractor shall not depart from:

(a) a construction program included in the Contract; or

(b) a construction program furnished to the Superintendent,

without reasonable cause or except where the departure is necessary to comply with another clause of the Contract.

The Contractor shall within 10 Business Days of the Date of Contract and, during the course of the Contract, within 10 Business Days of any request from time to time from the Superintendent, prepare and lodge with the Superintendent a construction program for the approval of the Superintendent, showing the Contractor’s bona fide planned work activities and sequences for bringing the work under the Contract to Practical Completion by the Date for Practical Completion.

If the Superintendent rejects a construction program or revised construction program submitted by the Contractor under this Clause, the Contractor shall promptly amend the construction program and resubmit it to the Superintendent for approval.

The construction program shall not form part of the Contract but it may be used by the Superintendent and the Principal to monitor and assess the progress of the work under the Contract.

No review, approval, acceptance or rejection by the Superintendent of, nor any comment or direction by the Superintendent upon or in connection with, a construction program, revised construction program, amended construction program or change to a construction program shall:

(c) relieve the Contractor from any of its liabilities or obligations, especially the obligation to achieve Practical Completion by the Date for Practical Completion;

(d) evidence or constitute a direction by the Principal or the Superintendent to accelerate, disrupt, prolong or vary any or all of the work under the Contract;

(e) evidence or constitute a ‘Sequencing Direction’ by the Superintendent under Clause 33.1 or;

(f) evidence or constitute the granting of any extension of time for Practical Completion; or

(g) affect the time for performance of the Principal’s or the Superintendent’s obligations.

A construction program shall be in the form and comply with any requirements specified in Annexure Part A and comply with any other requirements as the Superintendent, acting reasonably, may direct from time to time. A program that does not comply with these requirements shall not be regarded as a construction program for the purposes of the Contract.

The furnishing of a construction program or of a further construction program shall not relieve the Contractor of any obligations under the Contract including the obligation to not, (without reasonable cause or where the departure is necessary to comply with another clause of the Contract) depart from an earlier construction program.

#### **A new Clause 33.3 is inserted as follows:**

##### ***33.3 Principal and Superintendent not obliged to help Contractor finish early***

The Principal, Superintendent and the Principal’s employees, consultants, Separate Contractors and agents shall not be obliged to do or refrain from doing anything to enable the Contractor to reach Practical Completion before the Date for Practical Completion, and doing or refraining from doing anything to enable the Contractor to reach Practical Completion before the Date for Practical Completion is not a breach, act or omission by any of them.

The time for performance of the Principal’s or the Superintendent’s obligations shall not be affected by the Contractor’s desire or attempts to reach Practical Completion before the Date for Practical Completion.

#### **A new Clause 33.4 is inserted as follows:**

##### ***33.4 Corrective action***

If at any time the progress of the work under the Contract has fallen behind that shown in the construction program or otherwise is not in accordance with the Contract, the Contractor shall at its own cost take the necessary corrective action so as to ensure that progress is maintained in accordance with the Contract. Subject to Clause 32, such corrective action may include the working of overtime and additional shifts, the application of more resources to carry out the work and the adjustment and rescheduling of activities. The Superintendent from time to time may direct the Contractor to provide details of the corrective action it plans to take under this Clause 33.4.

If the Contractor fails to take corrective action in accordance with this Clause, the Superintendent may direct the Contractor as to the corrective action it is to take and the Contractor shall comply with that direction at its own cost.

#### **A new Clause 33.5 is inserted as follows:**

##### ***33.5 Not used***

#### **A new Clause 33.6 is inserted as follows:**

##### ***33.6 Not used***

#### **A new Clause 33.7 is inserted as follows:**

##### ***33.7 Not used***

### **Clause 34 Suspension of the works**

#### **Clause 34.1 is amended by:**

* **deleting the word "or" at the end of paragraph (b);**
* **replacing the comma at the end of paragraph (c) with a semicolon and inserting the word "or" at the end of that paragraph;**
* **inserting a new paragraph (d) as follows:**

(d) for the convenience of the Principal,

#### **Clause 34.4 is amended by inserting the words "or is for the convenience of the Principal" after the words "agent of the Principal ".**

### **Clause 35 Times for Commencement and Practical Completion**

#### **Clause 35.3 is deleted and replaced with the following:**

##### ***35.3 Separable Portions***

The interpretations of:

(a) Date for Practical Completion;

(b) Date of Practical Completion; and

(c) Practical Completion,

and Clauses 5.7, 16, 35, 37, 38, 42.3 and 42.5 shall apply separately to each Separable Portion and references therein to the Works and to work under the Contract shall mean so much of the Works and the work under the Contract as is comprised in the relevant Separable Portion.

If the Contract does not make provision for the amount of Security, retention moneys, liquidated damages or bonus applicable to a Separable Portion, the respective amounts applicable shall be:

(d) in relation to Security, the value of the whole of the work under the Contract; and

(e) in relation to retention moneys, liquidated damages and bonus, such proportion of the retention moneys, liquidated damages or bonus applicable to the whole of the work under the Contract as the value of the Separable Portion bears to the value of the whole of the work under the Contract.

#### **A new Clause 35.3A is inserted as follows:**

##### ***35.3A Creation of new Separable Portions***

The Superintendent may determine by notice in writing to the Contractor that:

(a) works directed to be carried out pursuant to a variation constitute a new Separable Portion; or

(b) the Works be divided into smaller packages of works, each a new Separable Portion.

Except if agreed by the parties in writing, the Date for Practical Completion of each Separable Portion shall not be earlier than the Date for Practical Completion which applied (if any) to the part of the Works comprising that Separable Portion prior to the creation of the new Separable Portion.

#### **Clause 35.4 is amended by inserting the word "unreasonably" before the word "hinder" in the second paragraph.**

#### **Clause 35.5 is deleted and replaced with the following:**

##### ***35.5 Extension of time for Practical Completion***

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

Alternative 1 – Contractor owns the float/contingency in the construction program

If the Contractor:

(a) is or will be delayed in reaching Practical Completion by a cause described in the next paragraph; and

(b) within 14 days after the first occurrence of the cause of the delay gives the Superintendent a written claim for an extension of time for the Date for Practical Completion:

(i) evidencing and setting out the facts on which the Claim is based;

(ii) showing clearly how the delay affects the activities which are on the actual critical path for achieving Practical Completion; and

(iii) stating the steps which the Contractor has taken or proposed to take to alleviate and otherwise deal with the delay,

the Contractor shall be entitled to an extension of time for the Date for Practical Completion.

Alternative 2 – Principal owns the float/ contingency in the construction program

If the Contractor:

(a) is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and which, where the delay occurs prior to the Date for Practical Completion, will delay the Contractor in achieving Practical Completion until a date after the Date for Practical Completion; and

(b) within 10 Business Days after the first occurrence of the cause of the delay, gives the Superintendent a written claim for an extension of time for the Date for Practical Completion:

(i) evidencing and setting out the facts on which the Claim is based;

(ii) showing clearly how the delay affects activities which are on the actual critical path for achieving Practical Completion by the Date for Practical Completion; and

(iii) stating the steps which the Contractor has taken or proposed to take to alleviate and otherwise deal with the delay,

the Contractor shall be entitled to an extension of time for the Date for Practical Completion.

The causes are:

(c) industrial conditions which are not limited to the Contractor, the Contractor's employees or subcontractors, or the Site;

(d) in respect of any one calendar month, inclement weather in excess of the number of working days per calendar month stated in Annexure Part A where any working day is a day which is noted as a working day on the construction program;

(e) a cause described in Annexure Part A,

occurring on or before the Date for Practical Completion which are beyond the reasonable control of the Contractor; and

(f) any of the following events whether occurring before, on or after the Date for Practical Completion:

(i) delay caused by the Principal, the Superintendent, an employee, consultant or agent of the Principal or Superintendent or a Separate Contractor [except to the extent such delay has been caused by such party exercising a right in accordance with the Contract];

(ii) actual quantities of work being greater than the quantities in the Bill of Quantities or the quantities determined by reference to the upper limit of accuracy stated in Annexure Part A (otherwise than by reason of a variation directed under Clause 40);

(iii) Latent Conditions;

(iv) variations directed under Clause 40;

(v) repudiation or abandonment by a Nominated Subcontractor;

(vi) changes in Legislative Requirements or the Principal's Policies and Procedures the subject of a direction under Clause 14.1;

(vii) directions by municipal, public or statutory authorities but not where the direction arose from the failure of the Contractor to comply with a requirement referred to in Clause 14.1;

(viii) delays by municipal, public or statutory authorities not caused by the Contractor;

(ix) claims referred to in Clause 17.1(b)(v);

(x) delay caused by any breach of the Contract by the Principal; or

(xi) a cause described in Annexure Part A.

Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.

Events will be regarded as causing concurrent delays if the delay caused by each individual event (on the basis that the particular individual event had been the only event causing delay), or any part of that delay, occurs at the same time (whether in full or in part) as the delay caused by another individual event (on the basis that the other individual event had been the only event causing delay).

The Contractor shall, with respect to each Claim for an extension of time for Practical Completion:

(g) within 10 Business Days after issuing a written Claim for an extension of time which complies with this Clause 35.5; and

(h) if the effects of the delay continue beyond 20 Business Days after the first occurrence of the cause of the delay, every 10 Business Days (commencing after issuing the first written Claim for an extension of time which complies with this Clause 35.5) until 10 Business Days after the end of the effects of the delay,

give the Superintendent written notice of the number of days extension claimed.

Subject to Clause 35.5, if the Contractor is entitled to an extension of time for Practical Completion the Superintendent shall, within 28 days after receipt of the notice of the number of days extension claimed, grant a reasonable extension of time. If within the 28 days the Superintendent does not grant the full extension of time claimed, the Superintendent shall before the expiration of the 28 days give the Contractor notice in writing of the reason.

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

Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time the Superintendent may in its absolute discretion at any time and from time to time before the issue of the Final Payment Schedule by notice in writing to the Contractor extend the time for Practical Completion for any reason whatsoever. The discretion to grant an extension of time under this paragraph:

(i) may only be exercised by the Superintendent; and

(j) does not need to be exercised for the benefit of the Contractor.

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

#### **Clause 35.6 is amended by replacing in the first paragraph the words "the Annexure" with "Annexure Part A".**

#### **Clause 35.7 is deleted and replaced with the following:**

##### ***35.7 Not used***

#### **Clause 35.8 is amended by replacing the words "the Annexure" with "Annexure Part A".**

#### **A new Clause 35.9 is inserted as follows:**

##### ***35.9 Liquidated damages a genuine pre-estimate***

(a) The Contractor acknowledges and agrees that the Principal will suffer and incur loss and damage if Practical Completion is not reached by the Date for Practical Completion.

(b) The parties agree that the liquidated damages provided for in Clause 35.6 is a fair, reasonable and genuine pre-estimate of the loss and damage which the Principal is likely to suffer and incur as a result of the breach referred to in Clause 35.9(a) and do not constitute a penalty.

(c) The Contractor agrees that it will not assert in any proceedings under Clause 47 or in any court or other proceedings that the liquidated damages provided for in Clause 35.6 are a penalty or that the Clauses or the obligations thereunder to pay liquidated damages is void or unenforceable (whether in whole or in part).

#### **A new Clause 35.10 is inserted as follows:**

##### ***35.10 General damages if liquidated damages are unenforceable***

If, notwithstanding Clause 35.9, the liquidated damages provided for in Clause 35.6 are found to be a penalty, or if Clause 35.6 or the obligation thereunder to pay liquidated damages is found to be void or unenforceable for any reason (whether in whole or in part), then:

(a) the Contractor shall be liable to pay unliquidated damages at law for the breach for which liquidated damages would have been payable had the relevant liquidated damages, Clause or obligation not been a penalty or not been void or unenforceable; but

(b) the Contractor's liability for such unliquidated damages shall not be any greater than the liability which the Contractor would have had if the relevant liquidated damages Clause or obligation had not been a penalty or had not been void or unenforceable.

### **Clause 36 Delay or Disruption Costs**

#### **Clause 36 is deleted and replaced with the following:**

##### ***36 Delay or disruption costs***

For the purposes of this Clause 36, an event referred to in Clause 35.5(b)(i) shall be an event which relates solely to the Contract.

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

Where the Contractor has been granted an extension of time under Clause 35.5 for any delay caused by any other event for which payment of extra costs for delay or disruption is provided for in Annexure Part A or elsewhere in the Contract, the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.

Nothing in Clause 36 shall oblige the Principal to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Contract.

The entitlement of the Contractor under this Clause 36 and the entitlement in respect of extra costs for delay or disruption included in the value of a variation is the Contractor's full entitlement in respect of delay, disruption, prolongation and the like (whether the delay, disruption, prolongation or the like is caused by a breach of contract or otherwise) and the Principal shall not have any liability to the Contractor in excess of that entitlement.

Except as stated, the Contractor has no Claim of any kind whatsoever for delay or disruption arising out of the work under the Contract.

### **Clause 37 Defects Liability**

#### **Clause 37 is amended by:**

* **replacing** **the words "the Annexure" with "Annexure Part A";**
* **inserting the following paragraph after the final paragraph (that is, the paragraph beginning with the words "If it is necessary for the Contractor"):**

Neither the Principal’s rights, nor the Contractor’s liability, whether under the Contract or otherwise according to law, whether before or after the expiration of the Defects Liability Period, will be affected or limited by:

(a) the rights conferred upon the Principal or the Superintendent by this Clause 37 or any other provision of the Contract;

(b) the failure by the Principal or the Superintendent to exercise any such rights; or

(c) any direction of the Superintendent under this Clause 37 or any other provision of the Contract.

### **Clause 40 Variations**

#### **Clause 40.1 is amended by:**

* deleting the "and" after subparagraph (d);
* replacing the full stop "." with a comma "," at the end of subparagraph (e);
* inserting the words "each being a "variation". after subparagraph (e);
* deleting the third paragraph (that is, the paragraph beginning with the words "The Contractor is bound"); and
* deleting the final paragraph, and replacing it as follows:

If the variation directed by the Superintendent is to decrease or omit any part of the work under the Contract, the Principal (acting reasonably) shall be entitled to bring forward the Date for Practical Completion.

The Principal may elect to carry out work that is omitted from the work under the Contract or have that work carried out by other contractors.

The Superintendent may direct a variation, or direct the Contractor as contemplated by Clause 30.3 and Clause 30.5, at any time prior to the issue of the Final Payment Schedule under Clause 42.8. Such a direction will not have the effect of setting time at large or otherwise relieving the Contractor from the obligation to reach Practical Completion by the Date for Practical Completion.

#### **Clause 40.2 is amended by deleting the final paragraph (that is, the paragraph beginning with the words "The Principal shall reimburse").**

#### **Clause 40.4 is amended by:**

* inserting the following new paragraph before the first paragraph:

Where the Superintendent has not directed or approved the variation in writing pursuant to Clause 40.1, the Contractor shall seek the approval of the Superintendent in accordance with this Clause 40.4 prior to commencing work which the Contractor considers to be a variation.

* inserting the word "expressly" before the words "otherwise directs" in the third paragraph (that is, the paragraph beginning with the words "Unless the Superintendent"); and
* inserting, at the beginning on sub paragraph (b), the words "make a Claim against the Principal including a claim for".

#### **Clause 40.5 is amended by deleting the final paragraph (that is, the paragraph beginning with the words "When under Clause 40.3").**

### **Clause 41 Daywork**

#### **Clause 41 is amended by replacing in subparagraph (f) the words "the Annexure" with "Annexure Part A".**

### **Clause 42 Certificates and Payment**

#### **Clause 42.1 is deleted and replaced with the following:**

##### ***42.1 Payment claims, schedules, calculations and time for payment***

The Contractor shall be entitled to claim payment progressively on the later of:

(a) satisfaction of the conditions precedent to the Contractor's entitlement to make a payment claim set out in Clause 42.1A; and

(b) the dates or stages set out in Annexure Part A.

The Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. A payment claim shall:

(c) be in the form of Annexure Part H;

(d) include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor under the Contract or for any alleged breach thereof;

(e) indicate the work to which the payment claim relates and include the documentation required by Clause 42.1A;

(f) set out:

(i) the Contractor’s Australian Business Number;

(ii) the amount claimed by the Contractor and the basis for calculation of that amount;

(iii) the amount of any GST paid or payable by the Contractor with respect to the amount claimed;

(iv) the Contractor’s address for payment;

(v) the Principal’s Reference number;

(vi) the details of any claim arising under Clause 12 or otherwise in respect of a Latent Condition;

(vii) the details of any claim arising under Clause 14.1 or otherwise in respect of the consequences of a change in a Legislative Requirement as described in Clause 14;

(viii) the details of any claim arising under Clause 36 or otherwise in respect of extra costs incurred by reason of delay; and

(ix) the details of any claim capable of being valued under Clause 40.5(f) or otherwise in respect of delay or disruption or loss of productivity;

(g) in respect of each aspect of the claim that is made other than in relation to the work under the Contract:

(x) separately set out details of each such claim;

(xi) refer to each such claim with a unique numerical identifier with the identifiers being consecutive and commencing with the number 1;

(xii) describe the factual circumstances giving rise to the claim; and

(xiii) identify the clause or clauses of the Contract relied on, or, in the absence of reliance on the Contract, the other legal basis relied on in support of the claim.

If a payment claim does not include the details described above then the claim is not, for the purpose of this Clause, a payment claim. The date of receipt of a payment claim is taken to be the later of the date of the receipt of the claim or the date of receipt of the last of the details described above.

Within 10 Business Days after receipt of a payment claim (including the Final Payment Claim made under Clause 42.5), the Superintendent shall issue to the Contractor on behalf of the Principal a payment schedule which sets out:

(h) the amount of the payment which is to be made by the Principal to the Contractor or by the Contractor to the Principal;

(i) the calculations employed to arrive at the amount;

(j) amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal;

(k) any other amount which the Principal is entitled to retain, deduct, withhold or set-off under the Contract;

(l) the amount (if any) which the Superintendent believes to be payable by the Principal to the Contractor or by the Contractor to the Principal (as the case may be) and which the Principal proposes to pay to the Contractor or which is payable by the Contractor to the Principal (as the case may be); and

(m) if the amount in paragraph (l) is less than the amount claimed in the payment claim:

(i) the reason why the amount in paragraph (l) is less than the amount claimed in the payment claim; and

(ii) if the reason for the difference is that the Principal has retained, deducted, withheld or set-off payment for any reason, the reason for the retention, deduction, withholding or set-off.

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

Failure by the Superintendent to set out in a payment schedule an amount which the Principal is entitled to retain, deduct, withhold or set-off from the amount which would otherwise be payable to the Contractor by the Principal will not prejudice the Principal’s right to subsequently exercise its right to retain, deduct, withhold or set-off any amount under this Contract.

The Contractor shall within 5 Business Days of receipt of a payment schedule issue a tax invoice in the name of the Principal to the Superintendent for the amount stated as then payable in the payment schedule. Subject to the provisions of the Contract, within 5 Business Days after receipt by the Superintendent of a tax invoice in the name of the Principal for the amount stated in the payment schedule, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be. A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only.

The Contractor acknowledges and agrees that, without limitation to Clause 43:

(n) the portion of each payment made by the Principal to the Contractor on account of the Contract Sum which is for amounts payable to subcontractors under their subcontracts is held by the Contractor on trust for those subcontractors; and

(o) the Contractor shall pay all subcontractors promptly in accordance with the relevant subcontracts.

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

(p) to be imported into Australia, provided the Contractor has given the Principal a clean on board bill of lading or its equivalent, drawn or endorsed to the order of the Principal and, where appropriate, a custom's invoice for the item; or

(q) listed in Annexure Part A and which is not an item to be imported into Australia, provided the Contractor establishes to the satisfaction of the Superintendent that the Contractor has paid for the item, and the item is properly stored, labelled the property of the Principal and adequately protected.

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

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

#### **A new Clause 42.1A is inserted after Clause 42.1:**

##### ***42.1A Conditions Precedent***

For the purpose of determining when a time for submitting a payment claim arises under this Contract and a ‘reference date’ arises under the Building and Construction Industry Security of Payment Act 2002 (Vic), neither a time for submitting a payment claim or a ‘reference date’ arises unless the Contractor:

(a) in relation to the first payment claim under the Contract has:

1. provided the Principal with Security for the amount (if any) required under Clause 5;
2. executed the Formal Instrument of Agreement in accordance with Clause 6:
3. effected the insurance required by the Contract and (if previously requested by the Superintendent) provided evidence of this to the Superintendent;
4. complied with its obligations in relation to health and safety in accordance with Clause 55 or Clause 56 (as applicable);
5. complied with any other obligation stated in the Contract Documents to be a condition precedent to submitting a payment claim;
6. *provided the Superintendent with programs as required by Clause 33.2;*
7. *complied with Clause 43; and*
8. *provided a Deed of Guarantee, Undertaking and Substitution in accordance with Clause 5.10; and*

(b) in relation to all subsequent payment claims under the Contract has:

1. complied with Clause 43;
2. provided the Principal with Security for the amount (if any) required under Clause 5 and any replacement Security required in accordance with the Contract;
3. effected and maintained the insurance required by the Contract and (if previously requested by the Superintendent) provided evidence of this to the Superintendent; and
4. complied with any other obligation stated in the Contract Documents to be a condition precedent to submitting a payment claim

#### **Clause 42.2 is amended by:**

* amending the heading to read "Correction of payment schedules"; and
* replacing the words "Final Certificate" with "Final Payment Schedule".

#### **Clause 42.3 is amended by replacing the words "the Annexure" with "Annexure Part A".**

#### **Clause 42.4 is amended by:**

* replacing the word "security" with "Security" in Alternative 1;
* inserting a new paragraph (a) before the existing paragraph (a) in Alternative 2 as follows:
1. the Contractor has paid for the item and the item has been insured;
* replace the words "pass to" with "vest in" in paragraph (c);
* insert the words "free of any security interest" after the word "Principal" in paragraph (c); and
* insert the word "any" before "payment to the Contractor" in the final paragraph.

#### **Clause 42.5 is amended by:**

* replacing the words "14 days" with "10 Business Days"; and
* inserting the following new paragraph after the final paragraph;

Within the period stated in Annexure Part A the Contractor shall supply the final as built drawings, to the satisfaction of the Superintendent. Upon receipt of the final as built drawings the Principal's entitlement to Security and retention moneys shall be reduced as stated in Annexure Part A.

#### **Clause 42.6 is deleted and replaced with the following:**

##### ***42.6 Effect of Payment Schedules***

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

#### **Clause 42.7 is deleted and replaced with the following:**

##### ***42.7 Final payment claim***

Within 20 Business Days after the later of the expiration of the Defects Liability Period, or the rectification by the Contractor of all defects in accordance with Clause 37, but subject to Clause 42.1A, the Contractor shall lodge with the Superintendent a final payment claim in such form as the Superintendent may require and endorse it 'final payment claim'.

The Contractor shall include in that claim all other claims whatsoever in connection with the subject matter of the Contract which the Contractor may have against the Principal including damages under or arising out of or in connection with the Contract or any alleged breach thereof.

After the expiration of the period for lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred unless included in the Final Payment Claim and the Principal shall be taken as released and forever discharged from such claims.

#### **Clause 42.8 is deleted and replaced with the following:**

##### ***42.8 Final Payment Schedule***

Within 10 Business Days after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim within 20 Business Days of the expiration of the period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor on behalf of the Principal a final payment schedule endorsed 'Final Payment Schedule'. In addition to satisfying the requirements of Clause 42.1(h) to (m) (to the extent they are applicable), the Superintendent shall set out in the Final Payment Schedule the amount which is due from the Principal to the Contractor or from the Contractor to the Principal under the Contract.

Subject to the Contractor having supplied the Superintendent with a duly completed and executed release in the form set out in Annexure Part L:

(a) within 5 Business Days of receipt of the Final Payment Schedule, the Contractor shall pay to the Principal the moneys certified as due and payable in the Final Payment Schedule; or

(b) within 5 Business Days of receipt by the Superintendent of a tax invoice in the name of the Principal for the amount stated in the Final Payment Schedule, the Principal shall pay to the Contractor the moneys certified as due and payable in the Final Payment Schedule,

as the case may be subject to any right to convert or use the Security. The Principal shall within 20 Business Days release to the Contractor any retention moneys or Security then held by the Principal as set out in Annexure Part A.

#### **Clause 42.9 is deleted and replaced with the following:**

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the rate stated in Annexure Part A. Interest shall be compounded at six monthly intervals.

#### **Clause 42.10 is deleted and replaced with the following:**

##### ***42.10 Set offs by the Principal***

The Principal may at any time withhold, set-off or deduct from any moneys otherwise due to the Contractor:

(a) any debt or other moneys due from the Contractor to the Principal (including any due debt from the Contractor to the Principal pursuant to Security of Payment Act);

(b) any amount that is less than or equal to the amount claimed to be owed under a payment withholding request served on the Principal pursuant to the Security of Payment Act; or

(c) any Claim to money which the Principal may have against the Contractor whether for damages (liquidated or unliquidated) or otherwise,

whether under the Contract or otherwise at law, and if the moneys due to the Contractor are insufficient to discharge the debt or Claim, the Principal may, without limiting the unconditional nature of the Security, have recourse to any Security provided by the Contractor.

The rights given to the Principal under this Clause 42.10 are in addition to and do not limit or affect any other rights of the Principal under the Contract or at law and nothing in this Clause 42.10 affects the right of the Principal to recover from the Contractor the whole of the debt or Claim in question or any balance that remains owing.

Failure by the Principal to deduct from an amount otherwise due to the Contractor any amount which the Principal is entitled to deduct under this Clause 42.10, will not prejudice the Principal’s right to subsequently exercise its right of deduction under this Clause 42.10.

This Clause 42.10 survives the termination or expiration of the Contract.

#### **Clause 42.11 is amended by inserting the words "and without limiting the unconditional nature of the Security," after the words "Clause 5.5".**

### **Clause 43 Payment of Workers and Subcontractors**

#### **Clause 43 is amended by:**

* replacing the words “claim for payment” with “payment claim”, "5 days" with "5 Business Days" and "five days" with "5 Business Days";
* **inserting the words "in the form of Annexure Part N executed" after the words "statutory declaration" in subparagraphs (a)(i) and (b); and**
* **inserting the words "in the form of Annexure Part N executed by the Contractor" after the words "statutory declaration" in subparagraphs (c)(i) and (c)(ii).**

#### **A new Clause 43A is inserted as follows:**

##### ***43A Minimum Rates of Pay for Tip Truck Owner Drivers***

In this clause 43A:

‘Excavation Work’ means work that involves the removal of soil or rock from a site to form an open face, hole or cavity.

‘Freight Broker’ means a broker or agent in the business of procuring or arranging the engagement of independent contractors by hirers, including a person who provides an online platform that facilitates the engagement of contractors by hirers.

‘Published Rates’ means the Rates and Cost Schedules for Tip Truck Owner Drivers developed by the Transport Industry Council.

‘Relevant Published Rate’ means those of the Published Rates applicable to the type of tip truck to be provided by the Tip Truck Owner Driver.

‘Tip Truck Owner Driver’ means an independent contractor who drives a tip truck in connection with excavation work in the building and construction industry.

* 1. *if any aspect of the delivery of the Works or carrying out the work under the contract involves the use of a Tip Truck Owner Driver then the remaining provisions of this clause apply;*
	2. *whether the Contractor engages a Tip Truck Owner Driver directly or indirectly through a subcontractor, secondary subcontractor or Freight Broker, the Contractor must ensure that the Tip Truck Owner Driver is paid according to the following:*
		1. *if the Tip Truck Owner Driver is to be paid at an hourly rate then that must be at least at the Relevant Published Rate plus* *any Freight Broker fees due and payable and road tolls reasonably incurred;*
		2. *if the Tip Truck Owner Driver is to be paid on a per load rate then the per load rate must be arrived at based on a reasonable estimate of the time likely to be required to complete the specific job, multiplied by the Relevant Published Rate adjusted for any agreed incentive component, plus any Freight Broker fees due and payable and road tolls reasonably incurred;*
		3. *for the purposes of calculating a per load rate, a reasonable estimate of the time likely to be required must:*
1. *take into account all of the relevant circumstances of the specific job, including but not limited to the volume or weight of the load to be moved, distance to be travelled for transfer, local traffic conditions, time of day, expected waiting times, special site conditions and other special circumstances; and*
2. *be based on what a competent and experienced person in the position of the person engaging the Tip Truck Owner Driver would consider to be a reasonable estimate;*
	* 1. *if a per load rate includes an incentive component in addition to the minimum rate, the incentive component may be reduced in proportion to any shortfall in the load moved, as agreed between the Tip Truck Owner Driver and the party engaging them;*
		2. *where Annexure Part A states that an adjustment applies to account for project specific requirements, then payments to the Tip Truck Owner Driver must be increased by the rate listed in Annexure Part A; and*
		3. *If the Tip Truck Owner Driver is underpaid, the Contractor must either pay the amount of the underpayment or otherwise ensure that it is paid by the relevant subcontractor or secondary subcontractor or Freight Broker.*

### **Clause 44 Default or Insolvency**

#### **A new Clause 44.1A is inserted as follows:**

##### ***44.1A Sole basis***

The parties acknowledge and agree that termination under Clauses 44, 44A and 45 is the sole basis at law or otherwise upon which either party is entitled to terminate or accept a repudiation of the Contract.

#### **Clause 44.2 is deleted and replaced with the following:**

##### ***44.2 Default by the Contractor***

If the Contractor commits a substantial breach of contract, the Principal may give the Contractor a written notice to remedy the breach.

Substantial breaches include:

(a) suspension of work, in breach of Clause 33.1;

(b) failing to proceed with due expedition and without delay, in breach of Clause 33.1;

(c) failing to lodge Security in breach of Clause 5;

(d) failing to use the materials or standards of workmanship required by the Contract, in breach of Clause 30.1;

(e) failing to comply with a direction of the Superintendent under Clause 30.3, in breach of Clause 23;

(f) failing to provide evidence of insurance, in breach of Clause 21.1;

(g) in respect of Clause 43, knowingly providing a statutory declaration or documentary evidence which contains a statement that is untrue;

(h) if the Contractor's total liability for liquidated damages under Clause 35.6 reaches the amount stated in Annexure Part A;

(i) failing to comply with Clause 57.4; and

(j) if, at any time after the date of commencement of the work under the Contract, the Principal forms the view (acting reasonably) that the Contractor will not be able to achieve Practical Completion by the date which is the number days set out in Annexure Part A after the Date for Practical Completion.

#### **Clause 44.3 is deleted and replaced with:**

##### ***44.3 Requirements of a notice by the Principal to remedy***

A notice under Clause 44.2 shall:

(a) state that it is a notice under Clause 44 of the General Conditions of Contract;

(b) specify the alleged substantial breach; and

(c) specify the time and date by which the Contractor shall remedy the breach (which time shall not be less than 7 clear days after the notice is given to the Contractor).

#### **Clause 44.4 is deleted and replaced with:**

##### ***44.4 Rights of the Principal***

If by the time specified in a notice under Clause 44.2 the Contractor fails to remedy the breach, the Principal may by notice in writing to the Contractor:

(a) take out of the hands of the Contractor the whole or part of the work remaining to be completed; or

(b) terminate the Contract.

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

(a) the date upon which the Contractor remedies the breach;

(b) the date upon which the Principal takes action under Clause 44.4(a) or (b); or

(c) the date which is 7 days after the last day for remedying the breach in the notice under Clause 44.2.

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

#### **Clause 44.7 is amended by:**

* **replacing the words "the Annexure" with "Annexure Part A";**
* **deleting the words "but are not limited to" from paragraph 2; and**
* inserting, in subparagraph (a), the words " and which remains unpaid 14 Business Days after the Contractor gives the Principal notice that the amount has become due and payable and has not been paid" after the words "Clause 42.1".

#### **Clause 44.8 is deleted and replaced with the following:**

##### ***44.8 Requirements of a notice by the Contractor to remedy***

A notice under Clause 44.7 shall:

(a) state that it is a notice under Clause 44 of the General Conditions of Contract;

(b) specify the alleged substantial breach; and

(c) specify the time and date by which the Principal shall remedy the breach (which shall not be less than 7 clear days after the notice is given to the Principal).

#### **Clause 44.9 is amended by replacing, in paragraph one, the words "show reasonable cause why the Contractor should not exercise a right referred to in Clause 44.9" with the words "remedy the breach,".**

#### **Clause 44.10 is amended by adding the following new paragraph to the end of the Clause:**

If the Contract is wrongfully terminated pursuant to Clause 44.9 the Contractor shall only be entitled to recover damages in respect of the wrongful termination of the Contract and shall not be entitled to claim on a quantum meruit or by reason of unjust enrichment.

#### **Clause 44.11 is replaced with the following new Clause:**

If:

(a) a party informs the other party in writing or creditors generally that the party is insolvent or is financially unable to proceed with the Contract;

(b) execution is levied against a party by a creditor;

(c) a party is an individual person or a partnership including an individual person, and if that person:

(i) commits an act of bankruptcy;

(ii) has a bankruptcy petition presented against him or her or presents his or her own petition;

(iii) is made bankrupt;

(iv) makes a proposal for a scheme of arrangement or composition; or

(v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration Order made, under Part X of the Bankruptcy Act 1966 (Cth); or

(d) in relation to a party being a corporation:

(i) notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;

(ii) the party enters a deed of company arrangement with creditors;

(iii) a controller or administrator is appointed;

(iv) an application is made to a court for the winding up of a party and not stayed within 14 days;

(v) a winding up order is made in respect of a party;

(vi) it resolves by special resolution that it be wound up voluntarily (other than for a members' voluntary winding-up); or

(vii) a mortgagee of any property of the party takes possession of that property,

(e) then, where the other party is:

(f) the Principal, the Principal may, without giving a notice to show cause, exercise the right under Clause 44.4(a) or Clause 44.4(b); or

(g) the Contractor, the Contractor may, without giving a notice to show cause, exercise the right under Clause 44.9.

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

#### **A new Clause 44A is inserted as follows:**

##### ***44A Early Termination***

Without prejudice to any of the Principal’s other rights or entitlements or powers under the Contract, the Principal may:

(a) at any time for its sole convenience by written notice to the Contractor terminate the Contract from the date stated in the notice, which date shall be a minimum of the number of days set out in Annexure Part A from the date of the notice; and

(b) thereafter either itself or by third parties complete the uncompleted part of the work under the Contract.

The termination of the Contract by the Principal pursuant to this Clause 44A shall be without prejudice to the rights of either party to recover damages in respect of any prior breach of contract by the other party.

#### **A new Clause 44B is inserted as follows:**

##### ***44B Costs***

If the Principal terminates the Contract under Clause 44A, the Contractor:

(a) subject to Clause 42.8, shall be entitled to payment of the following amounts as reasonably determined by the Superintendent:

1. for work carried out prior to the date of termination the amount which would have been payable if the Contract had not been terminated and the Contractor submitted a payment claim under Clause 42.1 for work carried out to the date of termination;
2. the cost of plant or materials reasonably ordered by the Contractor for the Works for which the Contractor is legally bound to pay provided that:
3. the value of the plant or materials is not included in the amount payable under Clause 44B(a)(i); and
4. title in the plant and materials shall vest in the Principal upon payment;
5. the reasonable cost of removing from the Site all labour, Constructional Plant and other things used in connection with work under the Contract; and
6. an amount for overhead and profit calculated by multiplying the percentage specified in Annexure Part A by the sum of the amounts in Clauses 44B(a)(ii) and (iii),

but in no case shall the total amount payable to the Contractor under this subparagraph (a), when added to other amounts already paid and payable to the Contractor, be more than the Contract Sum as adjusted in accordance with the Contract; and

(b) shall:

1. take all steps possible to mitigate the costs referred to in Clause 44B(a)(ii) and Clause 44B(a)(iii);
2. immediately hand over to the Principal all copies of documents provided by the Principal under Clause 8.3; and
3. cause to be delivered to the Principal any plant and materials referred to in Clause 44B(a)(ii) or any unfixed plant and materials for which the Principal has paid pursuant to Clause 42.4.

The amount to which the Contractor is entitled under this Clause 44B shall be a limitation upon the Principal's liability to the Contractor arising out of, or in any way in connection with, the termination of the Contract and the Contractor may not make any Claim against the Principal arising out of, or in any way in connection with, the termination of the Contract other than for the amount payable under this Clause 44B.

After the Contractor has satisfied its obligations under this Clause 44B, subject to any rights which may have accrued in favour of the Principal, the Principal shall release any Security under Clause 5 or Clause 42.4 then held by the Principal.

### **Clause 46 Time for Notification of Claims**

#### **Clause 46.1 is amended by:**

* **deleting the first paragraph and replacing it with the following:**

*The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract or arising out of or related to the Works (including claims in tort, for a quantum meruit or pursuant to statute) unless within 20 Business Days after the first day on which a competent and experienced contractor could reasonably have been aware of the circumstances which might give rise to any such claim, the Contractor has given to the Principal and to the Superintendent the prescribed notice.*

* **deleting the second paragraph; and**
* **replacing the words "claim for payment" with "payment claim".**

#### **Clause 46.2 is amended by replacing the words "56 days" with "40 Business Days".**

### **Clause 47 Dispute Resolution**

#### **Clause 47.1 is deleted and replaced with the following:**

##### ***47.1 Notice of dispute***

If a dispute (**Dispute**) between the Contractor and the Principal arises out of or in connection with the Contract, including a Dispute in connection with:

(a) a Claim; or

(b) the existence of the Contract,

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

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

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

#### **Clause 47.2 is deleted and replaced with the following:**

##### ***47.2 Further steps required before proceedings***

Within 10 Business Days of the receipt of a Notice of Dispute, the parties shall confer at least once to attempt to resolve the Dispute or to agree on methods of resolving the Dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the Dispute.

#### **Clause 47.2A is inserted as follows:**

##### ***47.2A Resolution of Disputes - Mediation***

Where Annexure Part A provides that Disputes shall be referred to mediation, if the Dispute has not been resolved within 20 Business Days of receipt of the Notice of Dispute, the Dispute shall be referred to mediation and the following provisions shall apply to that mediation.

The mediator shall be a mediator agreed on by the parties or if the parties are unable to agree on a mediator within 5 Business Days, of referral of the Dispute to mediation, a mediator nominated by the stated person in Annexure Part A.

The mediation shall be convened within 20 Business Days of the appointment of the mediator.

Each party agrees to participate in any mediation in good faith and use its best efforts to resolve the Dispute.

The role of any mediator is to assist in negotiating a resolution of the Dispute. Any information or documents disclosed by a party under this Clause shall, unless and until that information or those documents come into the possession of that party through legitimate means other than the mediation:

(a) be kept confidential; and

(b) not be used except to attempt to resolve the Dispute.

Each party shall bear its own costs of complying with this Clause and the parties shall bear equally the costs of any mediator engaged.

After the expiration of the later of 20 Business Days from the appointment of the mediator and 40 Business Days of receipt of the Notice of Dispute (or other period as agreed between the parties), a party that has complied with this Clause may terminate the mediation process by giving notice to the other party.

If the Dispute has not been resolved at the mediation contemplated by this Clause 47.2A within 60 Business Days of the receipt of the Notice of Dispute or the mediation process is terminated in accordance with this Clause 47.2A, then either party may refer the Dispute to expert determination (if applicable) or arbitration.

#### **A new Clause 47.2B is inserted as follows:**

##### ***47.2B Expert Determination***

Where Annexure Part A provides that Disputes shall be referred to expert determination, if the Dispute is not resolved within 20 Business Days of the receipt of the Notice of Dispute, or if Annexure Part A provides that Disputes shall be referred to mediation, at the time that Clause 47.2A provides that Disputes may be referred to expert determination, then either party may refer the Dispute to expert determination.

Any Dispute which is referred to expert determination will be conducted before an independent industry expert to be:

(a) agreed between the parties; or

(b) failing agreement within 5 Business Days of referral of the Dispute to expert determination then a person nominated by the person or organisation stated in Annexure Part A.

The expert determination shall be conducted in accordance with the rules in Annexure Part A and any agreement between the parties.

The parties agree that the expert determination is not an arbitration and the expert is not an arbitrator. The expert:

(c) is required to reach a decision from his or her own knowledge and expertise; and

(d) may open up, review, decide and substitute any statement made by the Superintendent in respect of any Dispute that has been referred to him or her.

The determination of the expert will be substituted for any decision of the Superintendent and will be final and binding on the parties.

#### **Clause 47.3 is deleted and replaced with the following:**

##### ***47.3 Arbitration***

Unless Annexure Part A provides that Disputes shall be referred to expert determination, if the Dispute is not resolved within 20 Business Days of receipt of the Notice of Dispute, or, if Annexure Part A provides that Disputes shall be referred to mediation, at the time that Clause 47.2A provides that Disputes may be referred to arbitration, then either party may refer the Dispute to arbitration.

The parties shall agree the rules of arbitration or failing agreement within 5 Business Days of referral of the Dispute to arbitration, the arbitration shall be conducted in accordance with the rules in Annexure Part A. The seat of the arbitration shall be Melbourne, Australia. The language of the arbitration shall be English. The number of arbitrators shall be one.

**Alternative 1– Arbitration final and binding**

Any award shall be final and binding on the parties.

**Alternative 2 – Appeal from Arbitration**

To the extent that the Commercial Arbitration Act 2011 (Vic) applies to an arbitration commenced under this Clause 47, the parties agree that either party may, under section 34A of the Commercial Arbitration Act 2011 (Vic), bring an appeal to the Supreme Court of Victoria on a question of law arising out of the arbitrator's award.

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

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

#### **Clause 47.4 is amended by deleting the words "or declaratory" and replacing the word "dispute" with "Dispute."**

#### **A new Clause 47.5 is inserted as follows:**

##### ***47.5 Proportionate Liability***

Notwithstanding anything else, to the extent permissible by law, neither the arbitrator or expert will have power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any Dispute referred to arbitration or expert determination pursuant to this Clause 47.

### **New Clause 49 Severability**

#### **The following new Clause 49 is added to the General Conditions:**

##### ***49 Severability***

The parties agree that a construction of this Contract that results in all provisions being enforceable is to be preferred to a construction that does not so result.

If, despite the application of this Clause, a provision of this Contract is illegal or unenforceable:

(a) if the provision would not be illegal or unenforceable if a word or words were omitted, that word or words are severed; and

(b) in any other case, the whole provision is severed,

and the remainder of this Contract continues in force.

#### **A new optional Clause 49A is inserted as follows:**

##### ***49A Not used***

#### **A new optional Clause 49B is inserted as follows:**

##### ***49B Not used***

### **New Clause 50 Auditing**

#### **A new Clause 50 is added to the General Conditions:**

##### ***50 Auditing***

###### ***50.1 Audit of and Other Access to Contractor’s Records***

The Contractor shall permit an accountant or auditor on behalf of the Principal from time to time during ordinary business hours and on reasonable notice, to inspect and verify all records maintained by the Contractor for the purposes of this Contract and the Contractor, its servants, agents and subcontractors shall give all reasonable assistance to any person authorised to undertake such audit or inspection. Any information provided or to which an accountant or auditor has access under this Clause shall be treated as confidential information and shall not be used other than for the purposes of this Contract or disclosed other than as required to comply with the written request of the Auditor General for Victoria.

The confidentiality obligations of the parties shall not extend to:

(a) Information already in the public domain other than due to a breach of this Contract;

(b) any disclosure required by law.

###### ***50.2 Public Audit***

(a) In this Clause 50.2, except where the context otherwise requires:

'Public Audit' means any audit, investigation or enquiry conducted by a Public Auditor or pursuant to any Public Audit Legislation.

'Public Audit Legislation' means Section 94A of the Constitution Act 1975 (Vic) and the Audit Act 1994 (Vic) or any other applicable legislation.

'Public Auditor' means any auditor or officer appointed under any Public Audit Legislation or any authorised nominee or representative of such auditor or officer.

(b) The Contractor shall, at its cost and without any additional entitlement under this Contract:

(i) permit a Public Audit required by any Public Auditor;

(ii) procure that the Contractor's subcontractors and agents permit a Public Audit required by any Public Auditor;

(iii) shall comply with the requirements or requests of, and cooperate with any Public Auditor during the conduct of a Public Audit;

(iv) procure that the Contractor's subcontractors and agents comply with the requirements or requests of, and cooperate with any Public Auditor during, the conduct of a Public Audit; and

(v) provide to the Public Auditor reasonable working accommodation and associated facilities and services required by the Public Auditor for the purposes of undertaking a Public Audit.

(c) Any obligations of confidence which one party has to the other under the Contract or by reason of the entering into of the Contract or the performance of the Contract shall be subject to the obligations, duties, rights and entitlements of the parties in relation to any Public Audit.

(d) This Clause 50.2 survives the termination or expiration of the Contract.

### **New Clause 51 Local Jobs First Policy**

#### **A new Clause 51 is added to the General Conditions:**

##### ***51 Local Jobs First Policy***

*This Clause applies if indicated in Annexure Part A.*

###### ***51.1 Definitions***

In this Clause 51, the following terms have the following meanings:

*‘Apprentice’ means an employee engaged by an employer (other than a Cadet or Trainee) to undertake training in a trade under a National Training Contract. The Local Jobs First Policy requires employers to employ apprentices under a National Training Contract registered with VRQA which combines structured training with paid employment related to a Local Jobs First applicable project. For an Apprentice to be counted towards the Major Projects Skills Guarantee requirement (if applicable) for a project they must be undertaking a course that relates directly to their role on a Local Jobs First Project and is consistent with the Training Contract.*

‘Cadet’ means an employee engaged by an employer (other than an Apprentice or Trainee) who is concurrently enrolled at an Australian University undertaking a tertiary qualification. To be considered a Cadet for the purposes of a Local Jobs First applicable project, a Cadet's employment must be paid practical work experience connected to their tertiary qualification. Cadetships are different to professional traineeships (an employee who is not in an entry level role and is undertaking professional development training), which cannot count towards Major Projects Skills Guarantee (if applicable).

'Industry Capability Network' means Industry Capability Network (Victoria) Limited of Level 23, 370 Little Lonsdale Street, Melbourne VIC 3000 (ACN 007 058 120).

*‘LIDP’* *means the Local Industry Development Plan submitted by the Contractor at the time of the tender and certified by Industry Capability Network (Victoria) by providing an acknowledgement letter.*

*‘LIDP Commitments’ means the obligations and undertakings of the Contractor as detailed in its LIDP.*

*‘LIDP Monitoring Table’ means the table of milestones and LIDP Commitments contained in the LIDP.*

*‘LJF Department’ has the meaning given in section 3(1) the Local Jobs First Act 2003.*

'LJF Responsible Minister' means the Minister with responsibility for administering the Local Jobs First Act 2003.

*‘Local Content’ has the meaning given in section 3(1) of the Local Jobs First Act 2003.*

*‘Local Jobs First Commissioner’**means the person appointed under section 12 of the Local Jobs First Act 2003.*

*‘Local Jobs First Policy’ means the policy of the Victorian Government made under section 4 of the Local Jobs First Act 2003.*

'Notice' means a notice given in accordance with Clause 7.

*‘Trainee’ means an employee engaged by an employer (other than an Apprentice or Cadet) employed under a National Training Contract registered with VRQA that combines training with paid employment in an entry level role related to a Local Jobs First applicable project. For a Trainee to be counted towards the MPSG requirement for a project they must be undertaking a course that relates directly to their role on a Local Jobs First Project and is consistent with the Training Contract. Professional Traineeships (an employee who is not in an entry level role and is undertaking professional development training) cannot count towards Major Projects Skills Guarantee (if applicable).*

*‘Training Contract’ has the meaning given in the Education and Training Reform Act 2006.*

*‘Victorian Management Centre’ is a cloud based secure online platform that enables the registration of projects and associated tenders, the submission of LIDPs, collection, analysis and reporting of local content and jobs data, including the Major Projects Skills Guarantee (if applicable) and supply chain monitoring and reporting.*

*‘VRQA’ means the Victorian Registration and Qualification Authority.*

###### ***51.2 Local Jobs First Policy***

***Local Industry Development Plan***

(a) The Contractor must, in performing its obligations under the Contract:

* + 1. *comply with the LIDP,*
		2. *perform all obligations required to be performed under the LIDP by the due date for performance; and*
		3. *comply with the Local Jobs First Policy.*

(b) The Contractor acknowledges and agrees that its obligations as set out in the LIDP apply during the term of this Contract, any extensions to the term and until all of its Reporting obligations as set out in Clause 51.3 are fulfilled.

(c) The Contractor’s failure to comply with this Clause 51.2 will constitute a material breach of this Contract for the purposes of Clause 44.2.

**Revised LIDP**

*(d) If at any time a variation to this Contract is proposed which involves or effects a change in the nature of any LIDP Commitments, the Contractor must prepare a revised LIDP in collaboration with and which shall be certified by Industry Capability Network (Victoria) (****Revised LIDP****).*

*(e) When requested by the Superintendent, the Contractor must provide the Revised LIDP to the Principal.*

*(f) The Revised LIDP must be agreed by the parties before any variation to the Contract can take effect unless the parties agree that a Revised LIDP is unnecessary.*

*(g) Once the Revised LIDP is agreed by the parties, the Revised LIDP replaces the LIDP and forms part of the Contract.*

###### ***51.3 Reporting***

(a) The Contractor must prepare and maintain records demonstrating its compliance with the LIDP and performance of the LIDP Commitments.

(b) The Contractor must use the Victorian Management Centre for Local Jobs First monitoring and reporting.

(c) If indicated in Annexure Part A, the Contractor must provide a six monthly report demonstrating its progress towards implementing the LIDP through reporting on the Victorian Management Centre.

(d) Prior to or at the Date of Practical Completion and at such other reporting dates for the purposes of this Clause 51.3 as indicated in Annexure Part A, the Contractor must provide to the Superintendent:

(i) the LIDP Monitoring Table identifying LIDP commitments and actual achievements. The LIDP Monitoring Table must identify and explain any departures from the LIDP commitments and the aggregated outcomes as reported in the LIDP Monitoring Table; and

(ii) a statutory declaration in the form set out as part of the online LIDP (**LJF Statutory Declaration**) to confirm that the information contained in the LIDP Monitoring Table is true and accurate. The LJF Statutory Declaration must be made by a director of the Contractor or the Contractor's Chief Executive Officer or Chief Financial Officer.

(e) At the request of the Superintendent, the Contractor must provide further information or explanation of any differences between expected and achieved LIDP outcomes.

(f) The reporting obligations in this Clause 51.3 are in addition to and do not derogate from any other reporting obligations as set out in the Contract.

###### ***51.4 Verification of Contractor’s compliance with LIDP***

(a) The Contractor agrees that each of the Superintendent, the Principal and the LJF Department will have the right to inspect its records in order to verify compliance with the LIDP.

(b) The Contractor must:

(i) permit the Superintendent, the Principal, an accountant or auditor on behalf of the Principal or the LJF Department, or any other person authorised by the Principal or the LJF Department, from time to time during ordinary business hours and upon Notice, to inspect and verify all records maintained by the Contractor for the purposes of the Contract;

(ii) permit the Superintendent, the Principal, or the LJF Department from time to time to undertake a review of the Contractor's performance in accordance with the LIDP; and

(iii) ensure that its employees, agents and subcontractors give all reasonable assistance to the Superintendent, the Principal or the LJF Department to undertake such audit or inspection.

(c) The Contractor acknowledges and agrees that the Superintendent, Principal, the LJF Department, the Principal's and LJF Department’s duly authorised representative and Industry Capability Network (Victoria) are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Contractor compliance with the LIDP.

(d) The obligations set out in this Clause 51.4 are in addition to and do not derogate from any other obligation under the Contract.

###### ***51.5 Use of Local Jobs First Policy information***

The Contractor acknowledges and agrees that:

(a) Industry Capability Network (Victoria) will assess the Contractor's performance against the LIDP;

(b) the statistical information contained in the LIDP and the measures of the Contractor's compliance with the LIDP as reported in the LIDP Monitoring Table:

(i) will be included in the Principal's report of operations under Part 7 of the Financial Management Act 1994 in respect of the Principal's compliance with the Local Jobs First policy in the financial year to which the report of operations relates;

(ii) will be provided to the LJF Responsible Minister for inclusion in the LJF Responsible Minister's report to the Parliament for each financial year on the implementation of the LIDP during that year; and

 (iii) may be disclosed in the circumstances authorised or permitted under the terms of this Contract or as otherwise required by Law.

###### ***51.6 Subcontracting***

(a) The Contractor must ensure that any subcontracts entered into by the Contractor in relation to the Works contain clauses requiring subcontractors:

* + - * 1. *to comply with the Local Jobs First Policy and the LIDP to the extent that it applies to work performed under the subcontract,*
				2. *to provide necessary information that allows the Contractor to comply with its reporting obligations under Clause 51.3, and*
				3. *to permit the Superintendent, the Principal and the LJF Department to exercise their inspection and verification rights under Clause 51.4.*

(b) The subcontracting obligations set out in this Clause 51.6 are in addition to and do not derogate from any other obligations under this Contract.

(c) The Contractor's failure to comply with this Clause 51.6 will constitute a material breach of this Contract for the purposes of Clause 44.2.

###### ***51.7 Local Jobs First Commissioner***

(a) The Contractor acknowledges that:

* + - * 1. *it is required to comply with any information notice issued to it by the Local Jobs First Commissioner in accordance with section 24 of the Local Jobs First Act 2003;*
				2. *it is required to comply with any compliance notice issued to it by the Local Jobs First Commissioner in accordance with section 26 of the Local Jobs First Act 2003;*
				3. *its failure to comply with the compliance notice referred to in this Clause 51.7(a) may result in the issue of an adverse publicity notice by the LJF Responsible Minister under section 29 of the Local Jobs First Act 2003; and*
				4. *the Local Jobs First Commissioner may:*

*monitor and report on compliance with the Local Jobs First Policy and LIDP; and*

*request the Principal to conduct an audit in relation to the Contractor's compliance with the Local Jobs First Policy and the LIDP.*

(b) The Contractor acknowledges that the Commissioner may recommend that the Principal take enforcement proceedings against the Contractor if the Contractor has failed to comply with the Local Jobs First Policy or the LIDP by:

* + - * 1. *applying to a court to obtain an injunction; or*
				2. *taking action available under this Contract.*

### **New Clause 51A Supplier Code of Conduct**

#### **A new Clause 51A is added to the General Conditions:**

##### ***51A Supplier Code of Conduct***

*The Contractor acknowledges that:*

* 1. *the Supplier Code of Conduct is an important part of the State's approach to procurement and describes the State's minimum expectations regarding the conduct of its suppliers;*
	2. *it has read the Supplier Code of Conduct; and*
	3. *the expectations set out in the Supplier Code of Conduct are not intended to reduce, alter or supersede any other obligations which may be imposed on the Contractor, whether under the Contract or at Law.*

### **New Clause 51B Social Procurement Framework**

#### **A new Clause 51B is added to the General Conditions:**

##### ***51B Social Procurement Framework***

1. *(a) This Clause applies if indicated in Annexure Part A.*
2. *(b) The Social Procurement Framework must take one of three forms:*

*Alternative 1: Social Procurement Framework without the Building Equality Policy*

*Alternative 2: Social Procurement Framework plus Building Equality Policy*

*Alternative 3: Building Equality Policy only*

1. *The form of the Social Procurement Framework that applies to this Contract is the alternative indicated in Annexure Part A.*

###### ***51B Alternative 1 – Social Procurement Framework (without Building Equality Policy)***

1. *Clause 51B Alternative 1 applies if indicated in Annexure Part A.*

***51B.1 Definitions***

1. In this Clause 51B, the following terms have the following meanings:

*‘Industry Capability Network (Victoria)’ Industry Capability Network (Victoria) Limited of Level 23, 370 Little Lonsdale Street, Melbourne VIC 3000 (ACN 007 058 120).*

1. ‘Social Procurement Commitment’ means an obligation required to be performed by the Contractor, as set out in the Social Procurement Commitment Schedule, in relation to delivering Social Procurement Framework Outcomes.
2. ‘Social Procurement Commitment Schedule’ means the plan set out in Annexure Part O which includes the Social Procurement Commitments.
3. ‘Social Procurement Framework’ means Victoria’s Social Procurement Framework, as amended from time to time (accessible at https://www.buyingfor.vic.gov.au/victorias-social-procurement-framework).
4. ‘Social Procurement Performance Report’ means a report submitted by the Contractor to the Superintendent, which details the Contractor’s performance against the Social Procurement Commitments made in the Contractor’s Social Procurement Commitment Schedule.
5. *‘Victorian Management Centre’ means the information management platform that collects data to support the Social Procurement Framework and Local Jobs First policy, administered by the Industry Capability Network (Victoria).*

***51B.2 Social Procurement Commitment Schedule***

1. The Contractor must, in performing its obligations under this Contract:
	* + - 1. *comply with the Social Procurement Commitment Schedule.; and*
				2. *perform all Social Procurement Commitments by the due date for performance as set out in the Social Procurement Commitment Schedule or as directed by the Superintendent.*
2. The Contractor acknowledges and agrees that the Social Procurement Commitment Schedule (including the Social Procurement Commitments) applies during the term of the Contract, any extensions to the term and until all of its reporting obligations as set out in Clause 51B.3 are fulfilled.
3. The Contractor's failure to undertake all reasonable measures to achieve compliance with Clause 51B.2(a) may be determined by the Principal to constitute a breach of this Contract.

***51B.3 Reporting***

* + - 1. *The Contractor must prepare and maintain records demonstrating its:*
				1. *compliance with the Social Procurement Commitment Schedule; and*
				2. *performance against the Social Procurement Commitments.*
			2. *The Contractor must, during the term of this Contract, submit Social Procurement Performance Reports to the Superintendent at the intervals set out in Annexure Part A.*
			3. *The Superintendent may direct the Contractor to meet to discuss the contents of the Social Procurement Commitment Report and other issues concerning the progress towards the Social Procurement Commitments including any identified reporting deficiencies and timeframes for rectification.*
			4. *The Social Procurement Performance Report submitted in accordance with Clause 51B.3(a) must:*
				1. *be submitted (where possible) by the Contractor using the Victorian Management Centre, or as otherwise agreed by the Superintendent;*
				2. *be in a form satisfactory to Principal (acting reasonably); and*
				3. *include all supporting information reasonably required by the Superintendent to verify the contents of the Social Procurement Performance Report.*
			5. *In addition to the Social Procurement Performance Reports, within 2 months of the Date for Practical Completion or the date contract is completed or terminated, the Contractor must provide the Superintendent with:*
				1. *a final Social Procurement Performance Report; and*
				2. *a statutory declaration* *in the form set out in Annexure Part O (****Social Procurement Framework Statutory Declaration****) to confirm that the information contained in* *the final Social Procurement Performance Report are true and correct. The Contractor must ensure that the Social Procurement Framework Statutory Declaration is made by a director of the Contractor or the Contractor’s Chief Executive Officer or Chief Financial Officer.*
			6. *At the request of the Superintendent, the Contractor must provide further information about, or explanation of, any:*
	1. *non-compliance with the Social Procurement Commitment Schedule; and*
	2. *failure to perform the Social Procurement Commitments by the due date for performance.*
		+ 1. *The reporting obligations set out in Clause 51B.3 are in addition to, and do not derogate from, any other obligations set out in this Contract.*
1. ***51B.4 Verifying Compliance***
	* + 1. *The Contractor acknowledges and agrees that the Principal will have the right to inspect the Contractor's records in order to verify compliance with the Social Procurement Commitment Schedule.*
			2. *The Contractor must:*
				1. *permit the Principal, or a duly authorised nominee of the Principal and any department and agencies responsible for the Social Procurement Framework, from time to time during ordinary business hours and upon reasonable notice, to inspect and verify all records maintained by the Contractor for the purposes of this Clause 51B.4;*
				2. *permit the Principal, or a duly authorised nominee of the Principal and any department and agencies responsible for the Social Procurement Framework, from time to time to undertake a review of the Contractor's performance against the Social Procurement Commitments; and*
				3. *ensure that its employees, agents and sub-contractors give all reasonable assistance to the Principal, a duly authorised nominee of the Principal nominee of the Principal and any department and agencies responsible for the Social Procurement Framework to undertake such audit, inspection, verification or review.*
			3. *The Contractor acknowledges and agrees that the Principal, or a duly authorised nominee of the Principal and any department and agencies responsible for the Social Procurement Framework are authorised to obtain information from any relevant persons, firms or corporations, including third parties, in connection with the Contractor's performance against the Social Procurement Commitments.*
			4. *The obligations set out in this Clause 51B.4 are in addition to and do not derogate from any other obligation as set out in this Contract.*

***51B.5 Use of information***

* + - 1. *The Contractor acknowledges and agrees that the statistical information contained in the Social Procurement Performance Reports and the measures of the Contractor's compliance with the Social Procurement Commitment Schedule as reported in the final Social Procurement Performance Report:*
				1. *will be provided to any departments and agencies responsible for the Social Procurement Framework, for combined reporting purposes for each financial year on the compliance and performance of the Social Procurement Framework during that year;*
				2. *may be considered in the assessment or review of the Contractor's eligibility to tender for future Victorian Government contracts; and*
				3. *may be disclosed in the circumstances authorised or permitted under the terms of this Contract or as otherwise required by Law.*
			2. *The Contractor acknowledges and agrees that the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Social Procurement Framework from time to time, may use any information provided by the Contractor to assess and review the impact of the Social Procurement Framework on the building and construction industry.*

***51B.6 Subcontracting***

* + - 1. *The Contractor must ensure that any sub-contracts entered into in relation to this Contract contain clauses requiring its sub-contractors:*
				1. *comply with the Social Procurement Commitments to the extent that it applies to work performed under the subcontract;*
				2. *provide all necessary information that allows the Contractor to comply with its obligations under this Clause 51B; and*
				3. *permit the Principal to exercise its verification and inspection rights under Clause 51B.4.*
			2. *The obligations set out in Clause 51B.6 are in addition to, and do not derogate from, any other obligations as set out in this Contract.*
			3. *The Contractors failure to comply with its obligations in Clause 51B.6 in relation to subcontracts and Social Procurement Commitments may be determined by the Principal to constitute a breach of this Contract.*

###### ***51B Alternative 2 – Social Procurement Framework with Building Equality Policy***

*Clause 51B Alternative 2 applies if indicated in Annexure Part A.*

***51B.1 Definitions***

*In this Clause 51B, the following terms have the following meanings:*

*‘Apprentice’ means an employee engaged by an employer (other than a Cadet or Trainee) who is undertaking training in a trade under a National Training Contract which combines structured training with paid employment related to a Building Equality Policy applicable project. For an Apprentice to be counted towards the Building Equality Policy targets they must be undertaking a course that relates directly to their role on a Building Equality Policy applicable project and is consistent with the Training Contract. Apprentices must perform onsite building or construction work related to a Building Equality Policy applicable project.*

*‘Building Equality Policy Actions’ means the three actions that Contractors are required to deliver under the Building Equality Policy:*

*Action 1 – meet project specific gender equality targets*

*Action 2 – engage women as apprentices and trainees to perform building and construction work*

*Action 3 – implement Gender Equality Action Plans.‘Building Equality Policy Commitment’ means a commitment made by the Contractor, as set out in the Social Procurement Commitment Schedule, to deliver the Building Equality Policy Actions.*

*‘Cadet’ means an employee engaged by an employer (other than an Apprentice or Trainee) who is enrolled in vocational education registered with the Australian Skills Quality Agency, or higher education registered with the Tertiary Education Quality and Standards Agency. The Cadet must be employed in an entry-level role, undertake paid practical work experience in connection to their qualification and receive learning opportunities in the course of their employment. Cadets must perform onsite building or construction work related to a Building Equality Policy applicable project. Cadets count towards Building Equality Policy Action 1 Management/supervisory and specialist labour (staff) targets only. Cadets do not apply to all Action 1 targets, only to management/supervisory targets for Action 1.*

*‘Gender Equality Action Plan’ or ‘GEAP’ means the Organisation Wide Gender Equality Action Plan and the Project Specific Gender Equality Action Plan.*

*‘Industry Capability Network (Victoria)’ Industry Capability Network (Victoria) Limited of Level 23, 370 Little Lonsdale Street, Melbourne VIC 3000 (ACN 007 058 120).*

*‘Management / supervisory and specialist labour (staff)’ means people that spend 80 per cent of their time dedicated to a specific project engaged by the Contractor or a subcontractor to perform work under the Contract onsite.*

*‘Non-trade Construction Award covered labour’ means Trainees and ancillary workers engaged by the Contractor or a subcontractor to perform the work under the Contract onsite.*

*‘Organisation Wide Gender Equality Action Plan’ means the plan attached at Annexure A to the Social Procurement Commitment Schedule.*

*‘Project Total Estimated Labour Hours’ has the same meaning as Project Total Estimated Labour Hours in the Local Jobs First Policy as amended from time to time and accessible at* [*www.localjobsfirst.vic.gov.au/*](http://www.localjobsfirst.vic.gov.au/)*.*

*‘Project Specific Gender Equality Action Plan’ means Plan attached at Annexure A to the Social Procurement Commitment Schedule.*

*‘Social Procurement Commitment’ means an obligation required to be performed by the Contractor, as set out in the Social Procurement Commitment Schedule, in relation to delivering a Social Procurement Framework Outcome.*

*‘Social Procurement Commitment Schedule’ means plan set out at Annexure Part O which includes the agreed Social Procurement Commitments, the agreed Building Equality Policy Commitments and the Gender Equality Action Plans.*

*‘Social Procurement Framework’ means Victoria’s Social Procurement Framework, as amended from time to time (accessible at https://www.buyingfor.vic.gov.au/victorias-social-procurement-framework).*

*‘Social Procurement Performance Report’ means a report submitted by the Contractor to the Superintendent, which details the Contractor’s performance against the Social Procurement Commitments and the Building Equality Policy Commitments made in the Social Procurement Commitment Schedule.*

*‘Trade covered labour’ means building / construction qualified trades and Apprentices engaged by the Contractor or a subcontractor to perform work under the Contract onsite.*

*‘Trainee’ means an employee engaged by an employer (other than an Apprentice or Cadet) employed under a National Training Contract that combines training with paid employment in an entry level role related to a Building Equality Policy applicable project. For a Trainee to be counted towards the Building Equality Policy targets they must be undertaking a course that relates directly to their role on a Building Equality Policy applicable project and is consistent with the Training Contract. Professional Traineeships (an employee who is not in an entry level role and is undertaking professional development training) cannot count towards Building Equality Policy. Trainees must perform onsite building or construction work related to a Building Equality Policy applicable project.*

*‘Training Contract’ means a training contract lodged with the Victorian Registration and Qualification Authority (****VRQA****) or a person nominated by the VRQA in accordance with the Education and Training Reform Act 2006.*

*‘Victorian Management Centre’**means the information management platform that collects data to support government and industry with the Social Procurement Framework and Local Jobs First policy, administered by the Industry Capability Network (Victoria).*

***51B.2 Social Procurement Commitment Schedule***

1. *The Contractor must, in performing its obligations under this Contract:*
	1. *comply with the Social Procurement Commitment Schedule; and*
	2. *perform all Social Procurement Commitments and the Building Equality Policy Commitments by the due date for performance as set out in the Social Procurement Commitment Schedule or directed by the Superintendent.*
2. *The Contractor acknowledges and agrees that the Social Procurement Commitment Schedule (including the Social Procurement Commitments and the Building Equality Policy Commitments) applies during the term of this Contract and any extensions to the term and until all reporting obligations under Clause 51B.3 are fulfilled.*
3. *The Contractor’s failure to comply with its obligations in:*
	1. *Clause 51B.2(a) in relation to its Social Procurement Commitments may be determined by the Principal to constitute a breach of this Contract; and*
	2. *subject to Clause 51B.4(d), Clause 51B.2(a) in relation to its Building Equality Policy Commitments may be determined by the Principal to constitute a breach of this Contract.*
4. *The Contractor's failure to comply with its obligations in Clause 51B.2(a) in relation to its Building Equality Policy Commitments at any time prior to 1 January 2024 will not constitute a breach of this Contract.*

***51B.3 Reporting***

1. *The Contractor must prepare and maintain records demonstrating its:*
	1. *compliance with the Social Procurement Commitment Schedule; and*
	2. *performance against the Social Procurement Commitments and the Building Equality Policy Commitments.*
2. *The Contractor must, during the term of this Contract, submit Social Procurement Performance Reports to the Superintendent at the intervals stated in Annexure Part A.*
3. *The Superintendent may direct the Contractor to meet to discuss the contents of the Social Procurement Performance Report and other issues concerning the progress towards the Social Procurement Commitments and the Building Equality Policy Commitments including any identified reporting deficiencies and timeframes for rectification.*
4. *The Social Procurement Performance Report provided in accordance with Clause 51B.3(b) must:*
	1. *be submitted (where possible) by the Contractor using the Victorian Management Centre or as otherwise agreed by the Superintendent;*
	2. *be in a form satisfactory to the Principal (acting reasonably); and*
	3. *include all supporting information reasonably required by the Superintendent to verify the contents of the Social Procurement Performance Report.*
5. *In addition to the Social Procurement Performance Reports, within two months after the Date of Practical Completion or the date when Contract is completed or terminated, whichever is earlier, the Contractor must provide the Superintendent with:*
	1. *a final Social Procurement Performance Report; and*
	2. *a statutory declaration in the form set out in Annexure Part O (Social Procurement Framework Statutory Declaration) to confirm that the information contained in the final Social Procurement Performance Report is true and accurate. The Contractor must ensure the Social Procurement Framework Statutory Declaration is made by a director of the Contractor or the Contractor’s Chief Executive Officer or Chief Financial Officer.*
6. *At the request of the Superintendent, the Contractor must provide further information about, or explanation of, any:*
	1. *non-compliance with the Social Procurement Commitment Schedule; and*
	2. *failure to perform the Social Procurement Commitments or the Building Equality Policy Commitments by the due date for performance.*
7. *The reporting obligations set out in Clause 51B.3 are in addition to, and do not derogate from, any other obligations set out in this Contract.*
8. *With regard to Building Equality Policy Commitments, the Contractor must:*
	1. *notify the Superintendent as soon as practicable, but no later than 20 Business Days after becoming aware that it will not meet any of the Building Equality Policy Commitments: and*
	2. *set out the steps proposed to be taken to meet the Building Equality Policy Commitments.*

***51B.4 Verifying Compliance***

1. *The Contractor acknowledges and agrees that the Principal will have the right to inspect the Contractor's records to verify its compliance with the Social Procurement Commitment Schedule.*
2. *The Contractor must:*
	1. *permit the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Social Procurement Framework and the Building Equality Policy from time to time during ordinary business hours and upon reasonable notice, to inspect and verify all records maintained by the Contractor for the purposes of Clause 51B.4;*
	2. *permit the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Social Procurement Framework and the Building Equality Policy from time to time to undertake a review of the Contractor’s performance against the Social Procurement Commitments or the Building Equality Policy Commitments; and*
	3. *ensure that its employees, agents and subcontractors give all reasonable assistance to the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Social Procurement Framework and the Building Equality Policy, to undertake such inspection, verification or review.*
3. *The Contractor acknowledges and agrees that the Principal, or a duly authorised nominee of the Principal and any departments and agencies responsible for the Social Procurement Framework and the Building Equality Policy, are authorised to obtain information from any relevant persons, firms or corporations, including third parties, in connection with the Contractor’s performance against the Social Procurement Commitments or the Building Equality Policy Commitments.*
4. *The obligations set out in Clause 51B.4 are in addition to, and do not derogate from, any other obligations as set out in this Contract.*

***51B.5 Use of Information***

1. *The Contractor acknowledges and agrees that statistical information contained in the Social Procurement Performance Reports and the measures of the Contractor's compliance with the Social Procurement Commitment Schedule as reported in the final Social Procurement Performance Report:*
	1. *will be provided to any departments and agencies responsible for the Social Procurement Framework and the Building Equality Policy, for combined reporting purposes for each financial year on the compliance and performance of the Social Procurement Framework and the Building Equality Policy during that year;*
	2. *may be considered in the assessment and review of the Contractor’s eligibility to tender for future Victorian Government contracts; and*
	3. *may be disclosed in the circumstances authorised or permitted under the terms of this Contract or as otherwise required by Law.*
2. *The Contractor acknowledges and agrees that the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Social Procurement Framework and the Building Equality Policy from time to time, may use any information provided by the Contractor to assess and review the impact of the Social Procurement Framework and Building Equality Policy on the building and construction industry.*

***51B.6 Subcontracting***

1. *The Contractor must ensure that any subcontracts it enters into in relation to this Contract contain clauses requiring its subcontractors to:*
2. *comply with the Social Procurement Commitments and Building Equality Policy Commitments to the extent that it applies to work performed under the subcontract;*
3. *provide any necessary information that allows the Contractor to comply with its obligations under Clauses 51B.1 to 51B.6; and*
4. *permit the Principal to exercise its verification and inspection rights under Clause 51B.4.*
5. *The obligations set out in Clause 51B.6 are in addition to, and do not derogate from, any other obligations as set out in this Contract.*
6. *The Contractor's failure to comply with its obligations in:*
7. *Clause 51B.6(a) in relation to subcontracts and Social Procurement Commitments may be determined by the Principal to constitute a breach of this Contract; and*
8. *subject to Clause 51B.6(d), Clause 51B.6(a) in relation to subcontracts and Building Equality Policy Commitments may be determined by the Principal to constitute a breach of this Contract.*
9. *The Contractor's failure to comply with its obligations in Clause 51B.6(a) in relation to subcontracts and Building Equality Policy Commitments at any time prior to 1 January 2024 will not constitute a breach of this Contract.*

###### ***51B Alternative 3 –Building Equality Policy only***

*Clause 51B Alternative 3 applies if indicated in Annexure Part A.*

***51B.1 Definitions***

*In this Clause 51B, the following terms have the following meanings:*

*‘Apprentice’ means an employee engaged by an employer (other than a Cadet or Trainee) who is undertaking training in a trade under a National Training Contract which combines structured training with paid employment related to a Building Equality Policy applicable project. For an Apprentice to be counted towards the Building Equality Policy targets they must be undertaking a course that relates directly to their role on a Building Equality Policy applicable project and is consistent with the Training Contract. Apprentices must perform onsite building or construction work related to a Building Equality Policy applicable project.*

*‘Building Equality Policy Actions’ means the three actions that Contractors are required to deliver under the Building Equality Policy:*

*Action 1 – meet project specific gender equality targets*

*Action 2 – engage women as apprentices and trainees to perform building and construction work*

*Action 3 – implement Gender Equality Action Plans.*

*‘Building Equality Policy Commitment’ means a commitment made by the Contractor, as set out in the Social Procurement Commitment Schedule, to deliver the Building Equality Policy Actions.*

*‘Cadet’ means an employee engaged by an employer (other than an Apprentice or Trainee) who is enrolled in vocational education registered with the Australian Skills Quality Agency, or higher education registered with the Tertiary Education Quality and Standards Agency. The Cadet must be employed in an entry-level role, undertake paid practical work experience in connection to their qualification and receive learning opportunities in the course of their employment. Cadets must perform onsite building or construction work related to a Building Equality Policy applicable project. Cadets count towards Building Equality Policy Action 1 only.*

*‘Gender Equality Action Plan’ or ‘GEAP’ means the Organisation Wide Gender Equality Action Plan and the Project Specific Gender Equality Action Plan.*

1. *‘Industry Capability Network (Victoria)’ Industry Capability Network (Victoria) Limited of Level 23, 370 Little Lonsdale Street, Melbourne VIC 3000 (ACN 007 058 120).*
2. *‘Management / supervisory and specialist labour (staff)’ means people that spend 80 per cent of their time dedicated to a specific project engaged by the Contractor or a subcontractor to perform work under the Contract onsite.*
3. *‘Non-trade Construction Award covered labour’ means Trainees and ancillary workers engaged by the Contractor or a subcontractor to perform the work under the Contract onsite.*
4. *‘Organisation Wide Gender Equality Action Plan’ means the plan attached at Annexure A to the Social Procurement Commitment Schedule.*
5. *‘Project Specific Gender Equality Action Plan’ means Plan attached at Annexure A to the Social Procurement Commitment Schedule.*
6. *‘Project Total Estimated Labour Hours’ has the same meaning as Project Total Estimated Labour Hours in the Local Jobs First Policy as amended from time to time and accessible at www.localjobsfirst.vic.gov.au/.*
7. *‘Social Procurement Commitment’ means an obligation required to be performed by the Contractor, as set out in the Social Procurement Commitment Schedule, in relation to delivering a Building Equality Policy Commitment.*
8. *‘Social Procurement Commitment Schedule’ means the plan set out at Annexure Part O which includes the Building Equality Policy Commitments and the Gender Equality Action Plans.*
9. *‘Social Procurement Framework’ means Victoria’s Social Procurement Framework, as amended from time to time (accessible at https://www.buyingfor.vic.gov.au/victorias-social-procurement-framework).*
10. *‘Social Procurement Performance Report’ means a report submitted by the Contractor to the Superintendent, which details the Contractor’s performance against the Building Equality Policy Commitments made in the Social Procurement Commitment Schedule.*
11. *‘Trade covered labour’ means building / construction qualified trades and Apprentices engaged by the Contractor or a subcontractor to perform work under the Contract onsite.*
12. *‘Trainee’ means an employee engaged by an employer (other than an Apprentice or Cadet) employed under a National Training Contract that combines training with paid employment in an entry level role related to a Building Equality Policy applicable project. For a Trainee to be counted towards the Building Equality Policy targets they must be undertaking a course that relates directly to their role on a Building Equality Policy applicable project and is consistent with the Training Contract. Professional Traineeships (an employee who is not in an entry level role and is undertaking professional development training) cannot count towards Building Equality Policy. Trainees must perform onsite building or construction work related to a Building Equality Policy applicable project.*
13. *‘Training Contract’ means a training contract lodged with the Victorian Registration and Qualification Authority (****VRQA****) or a person nominated by the VRQA in accordance with the Education and Training Reform Act 2006.*
14. *‘Victorian Management Centre’ means the information management platform that collects data to support government and industry with the Social Procurement Framework and Local Jobs First policy, administered by the Industry Capability Network (Victoria).*

***51B.2 Social Procurement Commitment Schedule***

1. *The Contractor must, in performing its obligations under this Contract:*
2. *comply with the Social Procurement Commitment Schedule; and*
3. *perform all Building Equality Policy Commitments by the due date for performance as set out in the Social Procurement Commitment Schedule or directed by the Superintendent.*
4. *The Contractor acknowledges and agrees that the Social Procurement Commitment Schedule (including the Building Equality Policy Commitments) applies during the term of this Contract and any extensions to the term and until all reporting obligations under Clause 51B.3 are fulfilled.*
5. *The Contractor’s failure to comply with its obligations, subject to Clause 51B.4(d), in Clause 51B.2(a) in relation to its Building Equality Policy Commitments may be determined by the Principal to constitute a breach of this Contract.*
6. *The Contractor's failure to comply with its obligations in Clause 51B.2(a) in relation to its Building Equality Policy Commitments at any time prior to 1 January 2024 will not constitute a breach of this Contract.*

***51B.3 Reporting***

1. *The Contractor must prepare and maintain records demonstrating its:*
2. *compliance with the Social Procurement Commitment Schedule; and*
3. *performance against the Building Equality Policy Commitments.*
4. *The Contractor must, during the term of this Contract, submit Social Procurement Performance Reports to the Superintendent the intervals stated in Annexure Part A.*
5. *The Superintendent may direct the Contractor to meet to discuss the contents of the Social Procurement Performance Report and other issues concerning the progress towards the Building Equality Policy Commitments including any identified reporting deficiencies and timeframes for rectification.*
6. *The Social Procurement Performance Report provided in accordance with Clause 51B.3(b) must:*
7. *be submitted (where possible) by the Contractor using the Victorian Management Centre or as otherwise agreed by the Superintendent;*
8. *be in a form satisfactory to the Principal (acting reasonably); and*
9. *include all supporting information reasonably required by the Superintendent to verify the contents of the Social Procurement Performance Report.*
10. *In addition to the Social Procurement Performance Reports, within two months after the Date of Practical Completion or the expiry or termination of this Contract, whichever is earlier, the Contractor must provide the Superintendent with:*
11. *a final Social Procurement Performance Report; and*
12. *a statutory declaration in the form set out in Annexure Part O (Social Procurement Framework Statutory Declaration) to confirm that the information contained in the final Social Procurement Performance Report is true and accurate. The Contractor must ensure the Social Procurement Framework Statutory Declaration is made by a director of the Contractor or the Contractor’s Chief Executive Officer or Chief Financial Officer.*
13. *At the request of the Superintendent, the Contractor must provide further information about, or explanation of, any:*
14. *non-compliance with the Social Procurement Commitment Schedule; and*
15. *failure to perform the Building Equality Policy Commitments by the due date for performance.*
16. *The reporting obligations set out in Clause 51B.3 are in addition to, and do not derogate from, any other obligations set out in this Contract.*
17. *With regard to Building Equality Policy Commitments, the Contractor must:*
18. *notify the Superintendent as soon as practicable, but no later than 20 Business Days after becoming aware that it will not meet any of the Building Equality Policy Commitments: and*
19. *set out the steps proposed to be taken to meet the Building Equality Policy Commitments.*

***51B.4 Verifying Compliance***

1. *The Contractor acknowledges and agrees that the Principal will have the right to inspect the Contractor's records to verify its compliance with the Social Procurement Commitment Schedule.*
2. *The Contractor must:*
3. *permit the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Building Equality Policy from time to time during ordinary business hours and upon reasonable notice, to inspect and verify all records maintained by the Contractor for the purposes of Clause 51B.4;*
4. *permit the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Building Equality Policy from time to time to undertake a review of the Contractor’s performance against the Building Equality Policy Commitments; and*
5. *ensure that its employees, agents and subcontractors give all reasonable assistance to the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Building Equality Policy, to undertake such inspection, verification or review.*
6. *The Contractor acknowledges and agrees that the Principal, or a duly authorised nominee of the Principal and any departments and agencies responsible for the Building Equality Policy, are authorised to obtain information from any relevant persons, firms or corporations, including third parties, in connection with the Contractor’s performance against the Building Equality Policy Commitments.*
7. *The obligations set out in Clause 51B.4 are in addition to, and do not derogate from, any other obligations as set out in this Contract.*

***51B.5 Use of Information***

1. *The Contractor acknowledges and agrees that statistical information contained in the Social Procurement Performance Reports and the measures of the Contractor's compliance with the Social Procurement Commitment Schedule as reported in the final Social Procurement Performance Report:*
2. *will be provided to any departments and agencies responsible for the Building Equality Policy, for combined reporting purposes for each financial year on the compliance and performance of the Building Equality Policy during that year;*
3. *may be considered in the assessment and review of the Contractor’s eligibility to tender for future Victorian Government contract; and*
4. *may be disclosed in the circumstances authorised or permitted under the terms of this Contract or as otherwise required by Law.*
5. *The Contractor acknowledges and agrees that the Principal, a duly authorised nominee of the Principal and any departments and agencies responsible for the Building Equality Policy from time to time, may use any information provided by the Contractor to assess and review the impact of Building Equality Policy on the building and construction industry.*

***51B.6. Subcontracting***

1. *The Contractor must ensure that any subcontracts it enters into in relation to this Contract contain clauses requiring its subcontractors to:*
2. *comply with the Building Equality Policy Commitments to the extent that it applies to work performed under the subcontract;*
3. *provide any necessary information that allows the Contractor to comply with its obligations under Clauses 51B.1 to 51B.6; and*
4. *permit the Principal to exercise its verification and inspection rights under Clause 51B.4.*
5. *The obligations set out in Clause 51B.6 are in addition to, and do not derogate from, any other obligations as set out in this Contract.*
6. *The Contractor's failure to comply with its obligations, subject to Clause 51B.6(d), in Clause 51B.6(a) in relation to subcontracts and Building Equality Policy Commitments may be determined by the Principal to constitute a breach of this Contract.*
7. *The Contractor's failure to comply with its obligations in Clause 51B.6(a) in relation to subcontracts and Building Equality Policy Commitments at any time prior to 1 January 2024 will not constitute a breach of this Contract.*

### **New Clause 51C Modern Slavery**

#### **A new Clause 51C is added to the General Conditions:**

##### ***51C Modern Slavery***

*The Contractor acknowledges and agrees that the Contractor must:*

* 1. *comply with the Modern Slavery Legislation to the extent that such legislation is applicable to the Contractor;*
	2. *in any event, facilitate the Principal complying with any of the Modern Slavery Legislation applicable to the Principal, by reporting in a timely manner and providing all information concerning its supply chain and that of its subconsultants and suppliers which the Principal may acting reasonably require, such reporting and other information being provided no later than 60 days after expiry of the period to which the reporting relates to, or earlier where required in order for the Principal to meet its obligations under the applicable Modern Slavery Legislation; and*
	3. *ensure that such reporting and other information is accurate, complete and in such form as the Principal in its discretion requires*

### **New Clause 51D Not in use**

#### **New Clause 51E Fair Jobs Code**

A new Clause 51E is added to the General Conditions:

###### ***51E.1 Fair Jobs Code***

1. *This Clause 51D does not apply unless Item 64D states that it applies.*
2. *The application of the Fair Jobs Code may take one of two forms:*

*Alternative 1 – Fair Jobs Code Pre-Assessment Certificate with related requirements only. Clauses 51E.2, 51E.3(a), 51E.3(b)(i), 51E.3(b)(iv), 51E.3(c), 51E.3(d), 51E.4, 51E.6, 51E.8 and 51E.9 apply.*

*Alternative 2 – Fair Jobs Code Pre-Assessment Certificate with related requirements and FJC Plan Addendum with related requirements. All clauses of Clause 51E apply.*

*The form of the Fair Jobs Code that applies to this Contract is the alternative indicated in Item 64D.*

###### ***51E.2 Definitions***

*In this Schedule:*

*‘Adverse Ruling’ means a ruling (by any court, tribunal, board, commission or other entity with jurisdiction or legal authority to determine the matter) that the Contractor has breached an applicable employment, industrial relations or workplace health and safety law.*

*‘Enforceable Undertaking’ means a promise or agreement made by the Contractor with a regulator, Court or other body (including the Fair Work Ombudsman, WorkSafe Victoria and Wage Inspectorate Victoria) in respect of a breach or alleged/suspected breach of an applicable employment, industrial relations or workplace health and safety law.*

*‘FJC Department’ means the department responsible for Fair Jobs Code.*

*‘FJC Guidelines’ means Fair Jobs Code Guidelines, available at www.buyingfor.vic.gov.au/fair-jobs-code-and-guides.*

*‘FJC Plan Addendum’ means the Contractor’s Fair Jobs Code Plan Addendum set out in Annexure Part P, addressing industrial relations, occupational health and safety requirements and commitments and standards as required by the Fair Jobs Code.*

*‘FJC Plan Addendum Performance Report’ means a report submitted by the Contractor to the Superintendent, which details the Contractor’s performance against the FJC Plan Addendum.*

*‘Fair Jobs Code’ means the Fair Jobs Code issued by the State of Victoria available at https://www.buyingfor.vic.gov.au/fair-jobs-code.*

*‘Fair Jobs Code Unit’ means the Fair Jobs Code Unit, an administrative group within the FJC Department with responsibilities in relation to the Fair Jobs Code.*

*‘Notice’ means a notice given, delivered or served in accordance with this Contract.*

*‘Pre-Assessment Certificate’ means a certificate issued to the Contractor by the Fair Jobs Code Unit prior to entering into this Contract, or which is renewed during the term of this Contract.*

*‘Significant Subcontractor’ means an entity engaged, or to be engaged, under a subcontract directly with the Contractor, where the value of that subcontract is $10 million or more (exclusive of GST) under a Contract valued at $20 million or more (exclusive of GST).*

###### ***51E.3 Fair Jobs Code***

* + 1. *The Contractor warrants that at the time of entering this Contract it holds a valid Pre-Assessment Certificate.*
		2. *In performing its obligations under this Contract the Contractor acknowledges and agrees that it must:*
			- 1. *continue to hold a valid Pre-Assessment Certificate;*
				2. *comply with its FJC Plan Addendum;*
				3. *perform all obligations required to be performed under the FJC Plan Addendum by the due date; and*
				4. *comply with the Fair Jobs Code.*
		3. *If at any time during the term of this Contract the Contractor’s Pre‑Assessment Certificate is revoked by the Fair Jobs Code Unit that revocation will constitute a breach of Clause 51E.3 which will enable the Principal to exercise its rights under Clause 51E.9.*
		4. *The Contractor acknowledges and agrees that the obligations for holding and maintaining a valid Pre-Assessment Certificate apply during the term of this Contract and any extensions to the term and until all of its reporting obligations as set out in Clause 51E.5 are fulfilled.*

###### ***51E.4 Verification of Contractor’s compliance with the Fair Jobs Code Pre-Assessment Certificate***

* + 1. *The Contractor must, on request by the Superintendent, provide a copy of the Pre-Assessment Certificate or any related correspondence with the Fair Jobs Code Unit.*
		2. *If, during the term of this Contract, the Contractor’s Pre-Assessment Certificate expires the Contractor must provide Notice to the Superintendent of the expiry within 10 Business Days.*
		3. *If the Contractor fails to promptly take steps to renew an expired Pre-Assessment Certificate as soon as practicable after notifying the Superintendent of the expiration, the expiration will constitute a breach of Clause 51E which will enable the Principal to exercise its rights under Clause 51E.9.*

###### ***51E.5 Reporting***

* + 1. *The Contractor must prepare and maintain records demonstrating its compliance with, and implementation of, the FJC Plan Addendum.*
		2. *The Contractor must, during the term of this Agreement, provide FJC Plan Addendum Performance Reports at a time or times set out at Item 64E.*
		3. *In additions to the FJC Plan Addendum Performance Reports, prior to or at Practical Completion, and at such other reporting dates for the purpose of this Clause 51E.5(c) as indicated at Item 64F, the Contractor must provide to the Superintendent:*
			1. *a final FJC Plan Addendum Performance Report (final FJC Plan Addendum Performance Report); and*
			2. *a statutory declaration (FJC Statutory Declaration) to confirm that the information contained in the final FJC Plan Addendum Performance Report is true and accurate. The FJC Statutory Declaration must be made by a director of the Contractor or the Contractor’s Chief Executive Officer or Chief Financial Officer.*
		4. *At the request of the Superintendent, the Contractor must provide further information or explanation of any differences between expected and achieved FJC Plan Addendum outcomes.*
		5. *The reporting obligations in Clause 51E.5 are in addition to and do not derogate from any other reporting obligations as set out in this Contract.*

###### ***51E.6 Ongoing duty of disclosure and cooperation and audits***

* + 1. *If during the term of this Contract, the Contractor is the subject of an Adverse Ruling or Enforceable Undertaking it must provide Notice to the Superintendent and the Fair Jobs Code Unit within 10 Business Days of the Adverse Ruling or Enforceable Undertaking being made.*
		2. *During the term of this Contract the Contractor must:*
			1. *cooperate with all reasonable requests from the Superintendent seeking evidence of the Contractor’s compliance with the Fair Jobs Code and the FJC Plan Addendum (where applicable);*
			2. *permit the Superintendent, an accountant or auditor on behalf of the Principal, the FJC Department or any other person authorised by the Principal or FJC Department, from time to time during ordinary business hours and upon Notice, to inspect and verify all records maintained by the Contractor relating to compliance with the Fair Jobs Code and FJC Plan Addendum under this Contract; and*
			3. *ensure that its employees, agents and subcontractors give all reasonable assistance to any person authorised by the Principal or the FJC Department to undertake such audit or inspection.*
		3. *The Principal will bear all costs associated with undertaking any audit in accordance with Clause 51E.6(b)(ii).*
		4. *The Contractor acknowledges and agrees that the Principal, the FJC Department, the Principal’s and the FJC Department’s duly authorised representatives (including the Fair Jobs Code Unit) are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Contractor’s compliance with the Fair Jobs Code.*
		5. *The obligations set out in Clause 51E are in addition to and do not derogate from any other obligation under this Contract.*
		6. *A failure to comply with Clause 51E.6 will constitute a breach of Clause 51E which will enable the Principal to exercise its rights under Clause 51E.9.*

###### ***51E.7 Significant Subcontracting***

* + 1. *The Contractor warrants that any Significant Subcontractors engaged or proposed to be engaged to perform work under this Contract hold a valid Pre-Assessment Certificate when they are engaged or proposed to be engaged.*
		2. *The Contractor must ensure that any subcontracts entered into by the Contractor with Significant Subcontractors in relation to work under this Contract contain clauses requiring Significant Subcontractors to:*
			1. *comply with the Fair Jobs Code;*
			2. *hold a valid Pre-Assessment Certificate;*
			3. *notify the Contractor if its Pre-Assessment Certificate is revoked, or if its Pre-Assessment Certificate expires without being replaced with a new Pre-Assessment Certificate;*
			4. *comply with the ongoing duty of disclosure and cooperation set out in Clause 51E.6, as if references to the Contractor were references to the Significant Subcontractor;*
			5. *comply with the FJC Plan Addendum, to the extent that it applies to work performed under the subcontract;*
			6. *provide necessary information that allows the Contractor to comply with its reporting obligations under Clause 51E.5; and*
			7. *permit the Principal and the FJC Department to exercise their inspection and audit rights under Clause 51E.6.*
		3. *The subcontracting obligations set out in this Clause 51E.7 are in addition to and do not derogate from any other obligations under this Contract.*
		4. *The Contractor’s failure to comply with Clause 51E.7 will constitute a breach of Clause 51E which will enable the Principal to exercise its rights under Clause 51E.9.*

###### ***51E.8 Use of information***

*The Contractor acknowledges and agrees that:*

* + 1. *Fair Jobs Code Unit will assess the Contractor’s compliance with the Fair Jobs Code.*
		2. *Information regarding the Contractor’s compliance with the Fair Jobs Code including any disclosures regarding Adverse Rulings or Enforceable Undertakings:*
			1. *will be reported by the Superintendent to the Fair Jobs Code Unit in compliance with the Principal’s obligations under the Fair Jobs Code; and*
			2. *may be disclosed in the circumstances authorised or permitted under the terms of this Contract or as otherwise required by Law.*
		3. *Nothing in this provision removes the obligation for the Contractor to report Adverse Rulings or Enforceable Undertakings to the Fair Jobs Code Unit as per Clause 51E.6.*

###### ***51E.9 Consequences of breach***

* + 1. *Any breach of the provisions of Clause 51E will enable the Principal, in its absolute discretion, to do any or all of the following:*
			1. *suspend the Contract until such time as the breach has been remedied to the satisfaction of the Principal and within a timeframe acceptable to the Principal;*
			2. *by written notice immediately terminate the Contract; or*
			3. *exercise any rights that it has under this Contract.*

### **New Clause 52 Information Privacy**

#### **A new Clause 52 is added to the General Conditions:**

##### ***52 Information Privacy***

###### ***52.1 Definitions***

(a) ‘Code of Practice’ means a code of practice as defined in, and approved under, the Privacy and Data Protection Act 2014 (Vic);

(b) ‘Information Privacy Principles’ means the principles so identified and set out in the Privacy and Data Protection Act 2014 (Vic); and

(c) ‘Personal Information’ means information or an opinion (including information or an opinion forming part of a database) that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

###### ***52.2 Use of Personal Information***

The Contractor agrees in respect of Personal Information held in connection with this Agreement:

(a) that it shall be bound by the Information Privacy Principles and any applicable Code of Practice with respect to any act done or practice engaged in by the Contractor for the purposes of this Agreement, in the same way and to the same extent as the Principal would have been bound by the Information Privacy Principles and any applicable Code of Practice in respect of that act or practice had it been directly done or engaged in by the Principal; and

(b) to immediately notify the Principal where it becomes aware of a breach of Clause 52.2(a) by it or any of its agents or employees;

###### ***52.3 Continuing Effect***

This Clause 52 shall continue to have effect after the termination or expiration of this Agreement.

### **New Clause 52A Protective Data Security Standards**

#### **A new Clause 52A is added to the General Conditions:**

##### ***52A Protective Data Security Standards***

* 1. *The Contractor acknowledges that the Principal is bound by the Protective Data Security Standards.*
	2. *The Contractor must not do any act or engage in any practice that would contravene or give rise to a breach of a Protective Data Security Standard in respect of any Public Sector Data collected, held, used, managed, disclosed or transferred by the Contractor on behalf of the Principal, under or in connection with the Contract.*

### **New Clause 53 Security of Payment**

#### **A new Clause 53 is added to the General Conditions:**

##### ***53 Security of Payment Act***

###### ***53.1*** ***Application of the Security of Payment Act***

(a) 'Security of Payment Act' means the Building and Construction Industry Security of Payment Act 2002 (Vic) as amended from time to time.

(b) This Clause shall apply if the Security of Payment Act applies.

###### ***53.2*** ***Service of Notices under the Security of Payment Act***

The Contractor shall:

(a) ensure that a copy of any written communication it delivers or arranges to deliver to the Principal of whatever nature in relation to the Security of Payment Act (including, without limitation, a payment claim under the Security of Payment Act), is provided to the Superintendent at the same time; and

(b) when the Contractor becomes aware that a subcontractor is entitled to suspend work pursuant to the Security of Payment Act, promptly and without delay give the Superintendent a copy of any written communication of whatever nature in relation to the Security of Payment Act which the Contractor receives from a subcontractor.

###### ***53.3 The Role of the Superintendent under the Security of Payment Act***

In receiving payment claims or issuing payment schedules pursuant to the Security of Payment Act, the Superintendent acts as the agent of the Principal.

###### ***53.4 Payment Claim***

The date prescribed in Clause 42.1 as the time for payment claims is, for the purpose of the Security of Payment Act, the 'reference date'.

###### ***53.5 Payment Schedule***

(a) The amount (if any) set out in a payment schedule as the amount of payment which the Principal proposes to make to the Contractor is, for the purposes of section 9, 10, 11 and 12 of the Security of Payment Act, the amount of the 'progress payment' (as defined in the Security of Payment Act) calculated in accordance with the Contract which the Contractor is entitled to be paid under the Contract.

(b) Failure by the Superintendent to set out in a payment schedule an amount which the Principal is entitled to retain, deduct, withhold or set-off (whether under this Contract or otherwise) from the amount which would otherwise be payable to the Contractor by the Principal will not prejudice the Principal's right to subsequently exercise that right to retain, deduct, withhold or set-off any amount.

###### ***53.6 Method of Resolving Disputes Regarding Second Class of Variation***

The Principal and Contractor agree that Clause 47 is a method for resolving disputes for the purposes of section 10A(3)(d) of the Security of Payment Act.

###### ***53.7 Authorised Nominating Authority***

In the event of an adjudication application under the Security of Payment Act, the Contractor shall make an adjudication application to one of the authorised nominating authorities referred to in Annexure Part A.

###### ***53.8 Conduct of Adjudication***

In dealing with any adjudication application made by the Contractor under the Security of Payment Act, the Adjudicator shall:

(a) have no power to open up, review or revise any certificate issued under the Contract by the Superintendent;

(b) at all times act impartially between the parties, in accordance with the laws; and

(c) include in the determination the reasons for the determination and the basis on which any amount or date has been decided.

###### ***53.9*** ***Suspension of Works under the Security of Payment Act***

If the Contractor suspends the whole or part of the work under the Contract pursuant to the Security of Payment Act:

1. the suspension shall not of itself affect the Date for Practical Completion but may be a ground for an extension of time under Clause 35.5;
2. the Principal shall not be liable for any costs, expenses, damages, losses or other liability including delay or disruption costs whatsoever suffered or incurred by the Contractor as a result of the suspension other than loss or expenses as a result of the removal by the Principal, from the Contract, of part of the work or supply;
3. the Contractor shall continue to comply with its obligations in relation to all Legislative Requirements as referred to in Clause 14;
4. the Contractor shall hold itself available to return to work as soon as practicable after the right, under the Security of Payment Act, to suspend the carrying out of the work under the Contract, no longer exists;
5. the Contractor shall do all things reasonably practicable to return to work as soon as practicable after the right, under the Security of Payment Act, to suspend the carrying out of the work under the Contract, no longer exists; and
6. the Contractor shall return to work within 3 Business Days of payment by the Principal of the amount outstanding or such lesser period as may be stated in Annexure Part A (being not less than 1 Business Day).

If the Contractor has complied with the obligations set out in this Clause, any inability in the Contractor to return to work within the required time will not be an event giving rise to a right, in the Principal, to damages or to terminate the Contract.

If the Contractor does not resume the work in accordance with this Clause or does not comply with its obligations under this Clause:

1. the Superintendent may direct the Contractor to omit the whole or part of the suspended work (and thereafter the Principal may engage others to carry out the suspended work); or
2. the Principal may give a notice under Clause 44.4(b) as if the Contractor had committed a substantial breach of contract.

In the event that the Superintendent gives a direction to omit work under this Clause and if the direction causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5.

###### ***53.10*** ***Subcontractor suspension***

If the Principal becomes aware that a subcontractor is entitled to suspend work pursuant to the Security of Payment Act, the Principal may (in its absolute discretion) pay the subcontractor such money that is or may be owing to the subcontractor in respect of that work, and any amount paid by the Principal shall be a debt due from the Contractor to the Principal.

###### ***53.11 Indemnity***

The Contractor shall indemnify the Principal against all damage, expense (including legal costs), loss (including consequential and economic loss) or liability of any nature suffered or incurred by the Principal arising out of:

(a) a suspension pursuant to the Security of Payment Act by a subcontractor of work which forms part of the Work; or

(b) a failure by Contractor to comply with Clause 53.2.

### **New Clause 54 Occupational Health and Safety**

#### **A new Clause 54 is added to the General Conditions:**

##### ***54 Occupational Health and Safety***

###### ***54.1 Definition – Principal Contractor***

In this Clause Principal Contractor has the meaning given to that term in regulation 333 of the Occupational Health and Safety Regulations 2017 (Vic).

###### ***54.2 Obligations Under the OHS Law***

(a) In carrying out its obligations under this Contract the Contractor shall comply with the OHS Law. The Contractor shall upon request by, or on behalf of, the Principal demonstrate that it is complying with, and will continue to comply with the OHS Law including having in place the safe systems for and in relation to the execution of the work under the Contract required by the OHS Law.

(b) If an incident occurs which is required to be reported pursuant to a Legislative Requirement or if a 'near miss' occurs (being an event which could have given rise to an incident which is required to be reported pursuant to a Legislative Requirement) the Contractor shall, as soon as practicable after the occurrence of the event, advise the Superintendent, the Principal and (if required) the relevant regulatory authority of the occurrence of the event, the circumstances giving rise to the event and the steps the Contractor will take so as to prevent the event (or a similar event) occurring again in the future. The Contractor shall provide copies of all relevant documents with respect to the matter to the Principal (including all corrective actions).

###### ***54.3 Contractor as Principal Contractor***

(a) This Clause applies unless expressly indicated otherwise in Annexure Part A and unless Clause 54.5 applies.

(b) The Principal appoints the Contractor as the Principal Contractor in accordance with regulation 333(1)(a) of the Occupational Health and Safety Regulations 2017 (Vic).

(c) The Contractor acknowledges and accepts the appointment as Principal Contractor and agrees to carry out and discharge the obligations and accept all liability of a Principal Contractor contained in the OHS Law.

(d) The Principal authorises the Contractor to manage and control the Site to the extent necessary to discharge the duties imposed on a Principal Contractor for the period commencing from the date the Contractor takes possession of the Site and ending on the Date of Practical Completion. The Contractor acknowledges that its responsibilities as Principal Contractor continue (or resume) for any Works undertaken prior to the date the Final Payment Schedule is issued. The Contractor acknowledges and accepts that the management and control of the Site afforded by the Principal is sufficient to allow the Contractor to fulfil the obligations of a Principal Contractor.

###### ***54.4 Contractor not Principal Contractor***

If the Contractor is not the Principal Contractor or is not to be appointed as the Principal Contractor, then the Contractor shall cooperate with the Principal Contractor in the discharge of the obligations as Principal Contractor and comply with any instruction given by the Principal Contractor in its capacity as Principal Contractor.

###### ***54.5 Principal Contractor where the Contractor has Comcare insurance***

(a) This Clause shall apply to the exclusion of Clause 54.3 in the event that the Contractor is licensed to self insure under the Safety, Rehabilitation and Compensation Act 1988 (Cth) and is therefore covered by the Work Health and Safety Act 2011 (Cth) (**Commonwealth OHS Act**) rather than the Occupational Health and Safety Act 2004 (Vic) (**Victorian OHS Act**) and the Occupational Health and Safety Regulations 2017 (Vic) (**Victorian OHS Regulations**).

(b) If indicated in Annexure Part A, the Principal appoints the Contractor as the Principal Contractor in accordance with the Work Health and Safety Regulations 2011 (Cth)(**Commonwealth OHS Regulations**).

(c) The Principal authorises the Contractor to manage and control the Site to the extent necessary to discharge the duties imposed on a Principal Contractor by the Commonwealth OHS Regulations for the period commencing from the date the Contractor takes possession of the Site and ending on the Date of Practical Completion. The Contractor acknowledges that its responsibilities as Principal Contractor continue (or resume) for any Works undertaken prior to the date the Final Payment Schedule is issued. The Contractor acknowledges and accepts that the management and control of the Site afforded by the Principal is sufficient to allow the Contractor to fulfil the obligations of a Principal Contractor.

(d) The Contractor undertakes to immediately comply with directions on safety issued by any relevant authority or by the Principal.

(e) Notwithstanding Clause 54.5(b) and the Contractor's appointment under the Commonwealth OHS Regulations, the Contractor agrees to comply with the terms of the Victorian OHS Act and the Victorian OHS Regulations as if the Contractor had been appointed in accordance with the Victorian OHS Regulations as the Principal Contractor and will do all things necessary and in a manner which ensures that the Contractor satisfies the obligations of a Principal Contractor under the Victorian OHS Act and Victorian OHS Regulations.

###### ***54.6 Health and safety in the execution of the work under the Contract***

In connection with the execution of the work under the Contract, the Contractor shall, as far as practicable, ensure the health and safety of all persons including without limitation, members of the public, the Contractor’s employees, subcontractors and agents.

The Contractor acknowledges that acts or omissions of the Contractor may affect the ability of the Principal to comply with duties and obligations arising under the OHS Law. The Contractor shall ensure so far as is practicable that it does not by its acts or omissions cause or contribute to any breach by the Principal of any provision of the OHS Law and shall take all steps as are practicable to assist the Principal in complying with the provisions of the OHS Law.

The Contractor indemnifies the Principal to the extent permitted by law in respect of any liability, costs, losses or expenses whatsoever arising in connection with any breach of the OHS Law by the Principal which the Contractor has caused or contributed by a breach of this Clause 54. The indemnity given under this paragraph does not restrict or alter and is not restricted or altered by any indemnity given elsewhere under this Contract including under Clause 54.5(e)(ii).

### **New Clause 55 Environment**

#### **A new Clause 55 is added to the General Conditions:**

##### ***55 Environment***

Without limiting the generality of any other provision of this Contract, the Contractor shall in relation to the work under the Contract:

(a) comply with and, at the request of the Superintendent demonstrate that it has in place and complies with an environmental management system;

(b) comply with all environmental obligations imposed on the Contractor under the Contract and under any applicable Environmental Law, including procedures specified in documentation relating to the Contractor's environmental management system;

(c) supervise and monitor the performance of all environmental obligations imposed on the Contractor under the Contract and any applicable Environmental Law;

(d) report to the Principal on all matters relating to the performance or non-performance (as the case may be) of the Contractor's environmental obligations under the Contract set out in Annexure Part A, upon request by the Principal;

(e) ensure that in connection with the execution of the work under the Contract, the Principal does not become liable in connection with any environmental pollution, breach of an Environmental Law or like matter; and

(f) to the extent permitted by law, indemnify the Principal in respect of any liability arising in connection with a statutory obligation relating to a matter in this Clause 55 and any associated costs, losses or expenses.

If the Contractor fails to comply with any of its environmental obligations under the Contract, the Principal may take whatever action is necessary to remedy such failure and if it does so any cost, loss or expense suffered or incurred by the Principal in taking action will be a debt due by the Contractor to the Principal.

### **New Clause 56 Not used**

### **New Clause 57 Records, Reporting and Financial Information**

#### **The following new Clause 57 is added to the General Conditions:**

##### ***57 Records, Reporting and Financial Information***

###### ***57.1 Contractor’s Records***

The Contractor shall create and maintain complete and accurate accounts and records relating to the performance of the work under the Contract and otherwise in connection with the Contract, as would be expected of an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works (Contractor’s Records). The Contractor shall ensure that the Contractor's Records are available to the Principal and any person authorised by the Principal at any time during business hours for examination, audit, inspection, transcription and copying. The Contractor shall keep the Contractor’s Records for a minimum of 7 years, or any other period directed in writing by the Superintendent, after the earlier to occur of:

(a) the expiry of the last Defects Liability Period; and

(b) the termination of the Contract.

###### ***57.2 Reporting***

(a) The Contractor shall submit written reports regarding the Contractor's performance under the Contract (**Regular Performance Reports**) to the Superintendent regularly, and at least monthly at the end of each calendar month (or as otherwise directed by the Principal) while the work under the Contract is being undertaken including in relation to the following:

(i) management of the Works, including overall progress of the work under the Contract and key issues affecting, or likely to affect, the progress of the work under the Contract;

(ii) key issues and actions arising from the work under the Contract including:

(A) financial issues;

(B) occupational health and safety, environment, quality, project organisation structure and staffing, industrial relations, contractor and subcontractor issues; and

(C) incidents notified to the Principal or the Superintendent and outcomes of investigations,

including where relevant the Contractor's response to these issues;

(iii) compliance with the commitments made under the Local Jobs First Policy (Clause 51) and Social Procurement Framework (Clause 51B), (to the extent applicable); and

(iv) any additional information listed in Annexure Part A.

(b) If the Contract is a Shared Reporting Contract under Clause 57.3(a), the Contractor shall:

(i) cooperate with, and provide any assistance reasonably required by, the Superintendent in relation to the Shared Reporting Process; and

(ii) without limiting Clause 57.2(a), provide to the Superintendent any information required by the Superintendent from time to time, within the time requested, for the purposes of the Shared Reporting Process (**Shared Reporting Information**).

###### ***57.3 Shared Reporting Process***

The Contractor acknowledges and agrees that:

(a) the Contract shall be subject to the Shared Reporting Regime if the Contract Sum exceeds the threshold identified in Annexure Part A (**Shared Reporting Contract**); and

(b) if the Contract is a Shared Reporting Contract under Clause 57.3(a), then details of the Contractor's performance under the Contract, including the Regular Performance Reports and the Shared Reporting Information, may be made available by the Principal to other government departments or agencies or municipal, public or statutory authorities (**Shared Reporting Process**), and taken into account by the Principal or those other government departments or agencies or authorities when considering the Contractor for future tendering and contracting opportunities.

###### ***57.4 Evidence of financial standing or financial arrangements***

(a) Any obligations under this Clause 57.4 to provide information in relation to the Guarantor only apply if Annexure Part A provides that a Deed of Guarantee and Indemnity is required.

(b) Without limiting Clauses 57.2(a), the Contractor shall:

(i) within 85 Business Days after the close of each financial year, provide the Principal with certified copies of the audited financial statements for the previous financial year for the Contractor and the Guarantor;

(ii) within 20 Business Days after the end of 1 January or 1 July each year, give to the Principal certified copies of cashflow and profit and loss statements for the Contractor and the Guarantor; and

(iii) as and when requested by the Principal from time to time, promptly and in any event within the period stated in the Principal's request, provide the Principal with:

(A) a copy of such evidence reasonably required by the Principal which demonstrates:

1) the Contractor's financial capacity to meet all of its obligations under the Contract; or

2) the Guarantor's financial capacity to perform its obligations under the Deed of Guarantee and Indemnity; or

(B) reasonable evidence that financial arrangements have been made and are being maintained which will enable the Contractor to meet all of its obligations in accordance with the Contract. If the Contractor or any of its Related Bodies Corporate (as that term is defined in the Corporations Act 2001 (Cth)) intends to make any material change to these financial arrangements, the Contractor shall give notice to the Principal with detailed particulars.

(c) The Contractor shall promptly notify the Principal of:

(i) any material change to any information provided by the Contractor under Clause 57.4(b); or

(ii) any material change in the Contractor's or the Guarantor's financial standing which may affect, or is likely to affect, their financial capacity to meet all of their obligations under the Contract or the Deed of Guarantee and Indemnity (as applicable).

(d) The Contractor shall assist and fully co-operate with, and procure that the Guarantor assists and fully co-operates with the requirements or requests of the Principal, the Superintendent or any of their agents or employees in relation to any review of:

(i) any information provided by the Contractor or the Guarantor under this Clause 57.4; or

(ii) the Contractor's or the Guarantor's financial capacity, or the Contractor's financial arrangements, to meet all other their obligations under the Contract or the Deed of Guarantee and Indemnity (as applicable).

### **New Clause 58 Indemnities**

#### **A new Clause 58 is added to the General Conditions:**

##### ***58 Indemnities***

(a) Each indemnity given by the Contractor under this Contract is a continuing obligation, separate and independent from the other obligations of the parties (including any obligation to pay liquidated damages) and survives the termination or expiration of this Contract.

(b) It is not necessary for the Principal to incur an expense before enforcing a right of indemnity conferred by this Contract.

(c) The Contractor shall pay on demand any amount it is obliged to pay to the Principal under an indemnity in this Contract.

### **New Clause 59 Entire agreement**

#### **A new Clause 59 is added to the General Conditions:**

##### ***59 Entire agreement***

To the extent permitted by law, the parties agree that:

(a) in relation to its subject matter, this Contract:

(i) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and

(ii) supersedes any prior written or other agreement of the parties;

(b) all previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Contract are merged in and superseded by this Contract and will be of no force or effect and no party will be liable to any other party in respect of those matters; and

(c) no oral explanation or information provided by any party to another will affect the meaning or interpretation of this Contract or constitute any collateral agreement, warranty or understanding between any of the parties.

### **New Clause 60 Prior Work**

#### **A new Clause 60 is added to the General Conditions:**

##### ***60 Prior Work***

The terms of the Contract apply to all of the work performed by the Contractor in connection with the work under the Contract even if it was performed prior to the Date of Contract. Any payment made to the Contractor by the Principal prior to the Date of Contract will be treated as a payment under the Contract and will be in part discharge of the Principal's obligation to pay the Contract Sum.

### **New Clause 61 Industrial Relations**

#### **A new Clause 61 is added to the General Conditions:**

##### ***61 Industrial Relations***

###### ***61.1 Industrial relations warranties***

The Contractor warrants that:

(a) before the Date of Contract, it informed itself of all matters relevant to the engagement of labour in connection with the work under the Contract and at the Site; and

(b) all labour engaged by the Contractor or a subcontractor or a secondary subcontractor in connection with the performance of the work under the Contract will be engaged in such a manner which allows the Contractor to comply with its obligations under the Contract.

###### ***61.2 Contractor is responsible for industrial relations management***

The Contractor acknowledges and agrees that it is responsible for, at its own expense:

(a) management of employee and industrial relations matters in connection with the work under the Contract including the resolution of all Industrial Action and all employment and industrial relations matters pertaining to the Contractor;

(b) prompt payment of all salaries, wages, commissions, allowances and other remuneration to employees and for the deduction and payment of the applicable taxes, levies and charges and for the remittance of such sums to tax or other authorities; and

(c) in relation to carrying out the work under the contract, if a sham contracting arrangement is proven to have been entered into, the Contractor must either pay the amount of the underpayment or otherwise ensure that it is paid by the relevant subcontractor or secondary subcontractor.

###### ***61.3 Industrial relations obligations***

The Contractor shall:

(a) comply with and ensure that all subcontractors and secondary subcontractors comply with all Industrial Relations Law and upon request, provide the Principal with evidence of such compliance as the Principal reasonably requires;

(b) comply with and ensure that all subcontractors and secondary subcontractors or other persons engaged in the execution of the work under the Contract comply with, to the extent relevant, the Industrial Relations Management Plan and upon request, provide the Principal with evidence of such compliance as the Principal reasonably requires;

(c) cooperate with and ensure that all subcontractors and secondary subcontractors cooperate with any Other Contractors in order to maintain, to the extent permitted by Legislative Requirements, a stable industrial relations environment;

(d) upon request by the Principal, attend meetings convened by the Principal for the purpose of discussing employment or industrial relations matters relevant or relating to the work under the Contract or the Site;

(e) prepare and submit to the Principal monthly a report detailing compliance with the Industrial Relations Management Plan; and

(f) immediately advise the Principal in writing of any act, fact or circumstance associated with the activities of the Contractor or any other person relevant to the ability of the Contractor to perform the work under the Contract in a manner consistent with this Clause.

Prior to accessing the Site, the Contractor shall ensure that an Industrial Relations Management Plan is prepared and submitted to the Principal in accordance with this Clause. The Industrial Relations Management Plan shall be reviewed and amended (if necessary) and resubmitted to the Principal until the issue of the Final Payment Schedule.

### **New Clause 62 Survival**

#### **A new Clause 62 is added to the General Conditions:**

##### ***62 Survival***

Any clause that is expressed to survive termination or expiration of the Contract, does not in any way expressly or impliedly limit another clause which by its nature or implication is intended to survive termination or expiration of the Contract from doing so.

**The Annexures to these General Conditions of Contract are amended or inserted as set out in the following pages.**

## Annexure Part A

|  |  |  |
| --- | --- | --- |
| **ANNEXURE to the Australian Standard General Conditions of Contract** |  |  |

This Annexure shall be issued as part of the tender documents and is to be attached to the General Conditions of Contract and shall be read as part of the Contract.

|  |  |  |
| --- | --- | --- |
|  | The law applicable is that of the State or Territory of:(Clause 1) |  *(if nothing stated, the State or Territory where the Site is located)* |
|  | Payments under the Contract shall be made at:(Clause 1) |   |
|  | The Principal:(Clause 2) |   |
|  | The address of the Principal: |   |
|  | The Contractor:(Clause 2) |  ACN  |
|  | The address of the Contractor: |   |
|  | The Superintendent:(Clause 2) |  ACN (if applicable)  |
|  | The address of the Superintendent: |   |
|  | Site:(Clause 2 and Clause 27) | ……………………………………………………………………………*(if nothing stated, the land and other places made or which are to be made available to the Contractor by the Principal for the purposes of the Contract and which are designated by the Principal as being the site)* |
|  | Document Management System(Clause 2) | ……………………………………………………………………………. |
|  | Limits of accuracy applying to quantities for which the Principal accepted a rate or rates:(Clause 3.3(b)) |   |
|  | Bill of Quantities - the alternative applying:(Clause 4.1) |   |
|  | The time for lodgement of the priced copy of the Bill of Quantities:(Clause 4.2) |   |
| [[1]](#footnote-2)# | Contractor shall provide security in the amount of:(Clause 5.2) |  *(if nothing stated, none required)* |
|  | Required Rating(Clause 5.3) |  (*if nothing stated,* *the issuer has a credit rating of at least A- by S&P Global Ratings Australia Pty Ltd or A3 by Moody's Investors Service, Inc.*) |
| # | Contactor shall provide security in the form of:(Clause 5.3) |  *(if nothing stated, the Contractor shall provide security in the form of two approved unconditional undertakings given by an approved financial institution or insurance company, each for 50% of the amount set out in Clause 5.2)* |
|  | Time at which the Principal's entitlement to security and retention moneys is reduced:(Clause 5.7 and 42.5) | ………………………………………………………………….*(if nothing stated in accordance with Clause 42.5)* |
|  | The percentage to which the entitlement to security and retention moneys is reduced:(Clause 5.7) |  *(if nothing stated, 50 per cent)* |
|  | Not used | Not used  |
|  |  |  |
|  | Deed of Guarantee and Indemnity(Clause 5.10) | A Deed of Guarantee and Indemnity [is/is not] required. If required it is to be provided by [ ]. |
|  | Contract Documents and order of precedence to be applied in interpreting the contract:(Clause 8.1) | (a) Formal Instrument of Agreement;(b) In the absence of a Formal Instrument of Agreement being executed, the notice in writing of acceptance of tender;(c) Annexure Part B to AS 2124-1992 General Conditions of Contract;(d) AS 2124-1992 General Conditions of Contract and Annexure Part A;(e) the specifications included in Annexure Part C; (f) the drawings included in Annexure Part C;(g) the balance of the Annexures not referred to in paragraphs (a) to (f); and(h) any further documents in addition to the above, if any, described in the Formal Instrument of Agreement referred to in Clause 6.2 of the Contract. |
|  | Can notices be sent electronically?(Clause 7) | [ ]  Yes [ ]  No(*if nothing stated, notices may not be sent electronically*) |
|  | If notices can be sent electronically, means of sending:Relevant email address:The relevant electronic contract management system is: | [ ]  Email[ ]  Electronic contract management system…………………………………………………………………….……………………………………………………………………. |
|  | Addressee for notices under Clause 46 or Clause 47:(Clause 7(d)) | *…………………………………………………………………….* |
|  | Application of Document Management System(Clause 7B) | Applicable / Not applicable*(delete the inapplicable, if nothing selected, not applicable applies)* |
|  | The number of copies to be supplied by the Principal:(Clause 8.3) |   |
|  | The number of copies to be supplied by the Contractor:(Clause 8.4) |   |
|  | The time within which the Superintendent shall give a direction as to the suitability and return the Contractor's copies:(Clause 8.4) |   |
|  | Work which cannot be subcontracted without approval:(Clause 9.2) |   |
|  | Selected Subcontractor(Clause 10.2) | …………………………………………………………………[insert – list of selected subcontractors] |
|  | Provisional Sums(Clause 2 and Clause 11) | *…………………………………………………………………………*(together with any sums within the definition of this expression and which are elsewhere in the Contract Documents and each of the provisional sums is included in the Contract Sum) |
|  | The percentage for profit and attendance:(Clause 11(b)) |   |
|  | The amount or percentage for profit and attendance:(Clause 11(c)) |   |
|  | Conditions excluded from Latent Conditions(Clause 12.1) |  *(if nothing stated, there are no conditions identified)* |
|  | Conditions other than Latent Conditions(Clause 12.2B) |  (*if nothing stated, there are no conditions identified*) |
|  | Principal’s Policies and Procedures(Clause 2 and Clause 14.1) | *………………………………………………………………………….**(if nothing stated, there are no items identified)* |
|  | Legislative Requirements not required to be satisfied by Contractor:(Clause 14.1 and 14.3) |   |
|  | Insurance of the Works - the alternative applying:(Clause 18) |  *(if nothing stated, Alternative 1 – Option A applies)* |
|  | The assessment for insurance purposes of the costs of demolition and removal of debris:(Clause 18(h)) |   |
|  | The assessment for insurance purposes of consultants' fees:(Clause 18(i)) |   |
|  | The value of materials to be supplied by the Principal:(Clause 18(j)) |   |
|  | The additional amount or percentage:(Clause 18(k)) |   |
|  | If Alternative 2 applies the amount of excess for the insurance of the Works:(Clause 18) | ……………………………………………………………………………. |
|  | Public Liability Insurance - the alternative applying:(Clause 19) |  *(if nothing stated, Alternative 1 – Option A applies)* |
|  | The amount of Public Liability Insurance shall be not less than:(Clause 19) |   |
|  | If Alternative 2 applies the amount of excess for the public liability insurance:(Clause 19) | ……………………………………………………………………………. |
|  | Additional Insurances(Clause 20A) | ……………………………………………………………………………. |
|  | Key Personnel(Clause 26A) | ……………………………………………………………………………. |
|  | The time for giving possession of the Site:(Clause 27.1) |   |
| # | Program requirements:(Clause 33.2) | *…………………………………………………………………………….**(if nothing stated, there are no additional program requirements)* |
|  | Not used | Not used |
| [[2]](#footnote-3)# | The Date for Practical Completion:(Clause 35.2) |  *[Insert – this item must be an actual date or period and not a reference to the tender submission or tender documentation]* |
|  | Principal owns the float/contingency in the construction program(Clause 35.5) | ……………………………………………*(if nothing stated, Alternative 2 applies)* |
|  | Number of working days inclement weather per calendar month in excess of which is a cause of delay(Clause 35.5(d)) | ………………………………………..working days*(if nothing stated, 1 working day)* |
|  | Qualifying causes of delay(Clause 35.5(e)) | ……………………………………………….*(if nothing stated, there are no items identified)* |
|  | Additional causes of delay(Clause 35.5(f)(xi)) | ……………………………………………….*(if nothing stated, there are no items identified)* |
| # | Liquidated Damages (Practical Completion) per day:(Clause 35.6) | …………………………………………………………………………….. |
| # | Liquidated Damages (Practical Completion) per day:(Clause 35.7) |   |
| # | Not used | Not used |
| # | Bonus per day for early Practical Completion:(Clause 35.8) |   |
| # | Limit of bonus:(Clause 35.8) |   |
| # | Extra costs for Delay or Disruption:(Clause 36) | Event |
|       |
| # | The Defects Liability Period:(Clause 37) |   |
|  | Not used | Not used |
|  | The Charge for overheads, profit, etc. for Daywork:(Clause 41(f)) |   |
|  | Times for Payment Claims:(Clause 42.1) |   |
|  | Unfixed Plant and Materials for which payment claims may be made notwithstanding that they are not incorporated in the Works:(Clause 42.1(ii)) |   |
|  | Retention Moneys on:(Clause 42.3) | (a) work incorporated in the Works and any work or items for which a different amount of retention is not provided, .......% of the value until .......% of the Contract Sum is held;(b) items on Site but not yet incorporated in the Works, .......%;(c) items off Site but in Australia .......%;(d) items not in Australia .......%;(e) disbursements incurred by the Contractor for customs duties, freight, marine insurance, primage, landing and transport in respect of the work under the Contract .......%; |
|  | Unfixed Plant or Materials - the alternative applying:(Clause 42.4) |   |
|  | Time for provision of final as built drawings(Clause 42.5) | ……………………………………………………………………………*(if nothing stated, within 10 Business Days of the Date of Practical Completion)* |
|  | The rate of interest on overdue payments:(Clause 42.9) |  per cent per annum*(if nothing stated, the rate set by the Attorney General under the Penalty Interest Rate Act 1983)* |
|  | Payments to Tip Truck Owner Driver – adjustment to account for project specific requirements(Clause 43A(b)(v)) |  *(if nothing stated, No adjustment applies)* |
|  | Contractor's total liability for liquidated damages which shall be a substantial breach(Clause 44.2(h)) | ………………………………………………….. |
|  | The delay in achieving Practical Completion which shall be a substantial breach:(Clause 44.2(j)) |  Days |
|  | The delay in giving possession of the Site which shall be a substantial breach:(Clause 44.7) |   |
|  | Number of days' notice of termination(Clause 44A) | [ ] |
|  | Percentage for profit and overhead for early termination (Clause 44B) | [ ]% |
|  | Person responsible for nominating mediator(Clause 47.2A) | ……………………………………………………………………………*(If nothing stated the current Chairman of the Resolution Institute, Victorian Chapter or the Chairman’s nominee.)* |
|  | Application of mediation(Clause 47.2A) | Applicable / Not applicable*(If nothing stated, mediation is not applicable)* |
|  | Application of expert determination(Clause 47.2B) | Applicable / Not applicable*If nothing stated, expert determination is not applicable)* |
|  | Rules for expert determination(Clause 47.2B) | …………………………………………………………………………*(If nothing stated the ADC Guidelines for Expert Determination of the Australian Disputes Centre.)* |
|  | Person responsible for nominating expert(Clause 47.2B) | …………………………………………………………………………*(If nothing stated, by the Resolution Institute.)* |
|  | Rules for arbitration(Clause 47.3) |  *(If nothing stated:**The ACICA Arbitration Rules 2016 except in lieu of Article 11.2 of the ACICA Arbitration Rules 2016, the sole arbitrator shall be appointed by ACICA if the parties:**(a) have not agreed on the choice of sole arbitrator; and**(b) have not provided written evidence of their agreement to ACICA within 10 Business Days of the referral of the Dispute to arbitration or an extended period that the parties may agree upon.)* |
|  | Arbitration final and binding(Clause 47.3) | …………………………………………………………………….*(if nothing stated, Alternative 1 applies)* |
|  | Not used | Not used |
|  | Not used | Not used |
|  | Does the Local Jobs First Policy apply under this contract?(Clause 51) | [ ]  Yes [ ]  No*(if nothing stated, Yes is selected)* |
|  | Local Jobs First reporting – are 6 monthly reports required?(Clause 51.3 (c))***[Guidance Note: 6 monthly reports are required if this Contract is part of a project valued at $20 million or more.]*** | Yes  No *(If nothing stated, Yes is selected)* |
|  | Other reporting dates for the Local Jobs First Policy(Clause 51.3(d)) |  *(If nothing stated, there are no other reporting dates)* |
|  | Does the Social Procurement Framework apply under this contract?(Clause 51B)Social Procurement Framework / Building Equality Policy alternative applying?(Clause 51B)***[Guidance note: If the Social Procurement Framework applies, one of the three alternatives must apply.]*** | [ ]  Yes [ ]  No*(if nothing stated, No is selected)*[ ]  Alternative **1**: Social Procurement Framework without the Building Equality Policy[ ]  Alternative **2:** Social Procurement Framework plus the Building Equality Policy[ ]  Alternative **3**: Building Equality Policy only |
|  | Frequency when Social Procurement Performance Reports are required(Clause 51B.3) |  *(If nothing stated, six monthly)* |
|  | Not in Use | Not in Use |
|  | Does the Fair Jobs Code apply under this contract?(Clause 51E)Fair Jobs Code alternative applying?(Clause 51E)***[Guidance note: If the Social Procurement Framework applies, one of the three alternatives must apply.]*** | [ ]  Yes [ ]  No*(if nothing stated, No is selected)*[ ]  Alternative 1: Fair Jobs Code Pre-Assessment Certificate with related requirements only[ ]  Alternative 2**:** Fair Jobs Code Pre-Assessment Certificate with related requirements only and Fair Jobs Code Plan Addendum with related requirements |
|  | Frequency when FJC Plan Addendum Performance Reports are required(Clause 51E.5(b)) |  *(If nothing stated, 12 monthly)* |
|  | Other reporting dates for the Fair Jobs Code(Clause 51E.5(c)) |  *(If nothing stated, there are no other reporting dates)* |
|  | Period for Contractor to return to work following suspension under the Security of Payment Act:(Clause 53.9(f)) |  Business Days*(if nothing stated, 3 Business Days)* |
|  | Is the Contractor appointed as Principal Contractor?(Clause 54) | [ ]  Yes [ ]  No*(if nothing stated, yes is selected and the Contractor is appointed as Principal Contractor)* |
|  | Environmental report requirements(Clause 55) |   |
|  | Additional information for Regular Performance Reports(Clause 57.2(a)(iv)) |  *(If nothing stated there is no additional information to be included in Regular Performance Reports)* |
|  | Threshold for Shared Performance Reporting:(Clause 57.3(a)) | $500,000 |

|  |
| --- |
| ¶ Separable Portions |
| 1 | Separable Portion: |   |
| 2 | Contractor shall provide security in the amount of:(Clause 5.2) |   |
| Principal shall provide security in the amount of:(Clause 5.2) |   |
| 3 | The Date for Practical Completion:(Clause 35.2) |  *[insert – this item must be an actual date or period and not a reference to the tender submission or tender documentation]* |
| 4 | Liquidated Damages per day:(Clause 35.6) |   |
| 5 | Limit of Liquidated Damages:(Clause 35.7) |   |
| 6 | Bonus per day for early Practical Completion:(Clause 35.8) |   |
| 7 | Limit of bonus:(Clause 35.8) |   |
| 8 | Extra costs for Delay or Disruption:(Clause 36) | Event |
|       |
| 9 | Defects Liability Period:(Clause 37) |   |

## Approved form of unconditional undertaking

Approved form of unconditional undertaking

(Clause 5.3)

At the request of                                                                                  ('the Contractor ') and in consideration of                                                                                ('the Principal') accepting this undertaking in respect of the contract for                                                                                                                                                                                                                                                                                                 ('the Financial Institution') unconditionally undertakes to pay on demand any sum or sums which may from time to time be demanded by the Principal to a maximum aggregate sum of $                                                                                 (                                                                                                                                                      ). The undertaking is to continue until notification has been received from the Principal that the sum is no longer required by the Principal or until this undertaking is returned to the Financial Institution or until payment to the Principal by the Financial Institution of the whole of the sum.

Should the Financial Institution be notified in writing, purporting to be signed by                                                                             for and on behalf of the Principal that the Principal desires payment to be made of the whole or any part or parts of the sum, it is unconditionally agreed that the Financial Institution will make the payment or payments to the Principal forthwith without reference to the Contractor and notwithstanding any notice given by the Contractor not to pay same.

Provided always that the Financial Institution may at any time without being required so to do pay to the Principal the sum of $                                                     (                                                                                                                                                       ) less any amount or amounts it may previously have paid under this undertaking or such lesser sum as may be required and specified by the Principal and thereupon the liability of the Financial Institution hereunder shall immediately cease.

DATED at............................this....................day of......................................20.......

## Annexure Part C Specifications and Drawings

|  |  |
| --- | --- |
| **ANNEXURE to the Australian Standard General Conditions of Contract** | **Part C** |

**Specifications and Drawings**

## Annexure Part D Not used

|  |  |
| --- | --- |
| ANNEXURE to the Australian Standard General Conditions of Contract | **Part D** |

**Not used**

## Annexure Part E Formal Instrument of Agreement

|  |  |
| --- | --- |
| **ANNEXURE to the Australian Standard****General Conditions of Contract** | **Part E** |

**Form of Formal Instrument of Agreement**

Formal Instrument of Agreement

|  |  |
| --- | --- |
| **Date** |  |

**Parties**

|  |  |
| --- | --- |
| Name | [insert] |
| ABN | [insert] |
| ACN | [insert] |
| Short form name | **Principal** |
| Notice details | **[insert]** |

|  |  |
| --- | --- |
| Name | [insert] |
| ABN | [insert] |
| ACN | [insert] |
| Short form name | **Contractor** |
| Notice details | [insert] |

|  |  |
| --- | --- |
| **Project** | **[insert]** |

A The Principal desires to procure the execution of work under the Contract and the delivery of the Works to the Principal.

B The Contractor has agreed to perform work under the Contract and the Works in accordance with this Contract.

**IT IS AGREED** as follows:

Words and phrases defined in the Contract have the same meaning in this Formal Instrument of Agreement as they have in the Contract.

**1. Performance of the Works**

(a) The Contractor must perform work under the Contract and the Works in accordance with the Contract.

(b) The Contractor must, as between the Contractor and the Principal, bear all risks and costs (whether ascertainable at the date of this Contract or not) arising out of or in connection with the performance of work under the Contract and the Works, except to the extent expressly made the responsibility of the Principal under the Contract.

**2. Contract Sum**

The Principal must pay to the Contractor the Contract Sum, and any other sums which become payable under the Contract, in accordance with the Contract.

**3. Authority**

Each person signing this Contract represents that he or she has authority at the date of signing to do so.

**Executed as an Agreement**

[*Insert Principal's execution block, for example:*]

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** for and on behalf of [***insert Principal's details***]  |  |  |  |
|  | ← |  | ← |
| Signature of authorised representative |  | Signature witness  |  |
| Name of authorised representative (print) |  | Name of witness (print) |  |

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** by[#Contractor]in accordance with Section 127 of the *Corporations Act 2001* in the presence of |  |  |  |
|  | ← |  | ← |
| Signature of director |  | Signature of director/company secretary(Please delete as applicable) |  |
| Name of director (print) |  | Name of director/company secretary (print) |  |

## Annexure Part F Certificate of Practical Completion

|  |  |
| --- | --- |
| ANNEXURE to the Australian StandardGeneral Conditions of Contract  | **Part F** |

**Form of Certificate of Practical Completion**

Certificate of Practical Completion

**From:**

|  |  |
| --- | --- |
| Name | [insert] |
| ABN | [insert] |
| ACN | [insert] |
| Short form name | **Superintendent** |
| Notice details | [insert] |

**To:**

|  |  |
| --- | --- |
| Name | [insert] |
| ABN | [insert] |
| ACN | [insert] |
| Short form name | **Principal** |
| Notice details | [insert] |

|  |  |
| --- | --- |
| Name | [insert] |
| ABN | [insert] |
| ACN | [insert] |
| Short form name | **Contractor** |
| Notice details | [insert] |

|  |  |
| --- | --- |
| **Contract** | [insert name and date of Contract] |

Words and phrases defined in the Contract have the same meaning in this Certificate of Practical Completion as they have in the Contract.

**1. Certificate**

Under Clause 42.3 of the Contract entered into between the Principal and the Contractor, the Superintendent certifies that Practical Completion was reached on the date specified below:

Date: [insert]

**2. No relief**

This certificate does not relieve the Contractor of its obligation to execute the Works in accordance with the Contract.

Superintendent Date of issue

Attachments: [insert, if applicable]

## Annexure Part G Deed of Guarantee and Indemnity

|  |  |
| --- | --- |
| ANNEXURE to the Australian StandardGeneral Conditions of Contract  | **Part G** |

**Deed of Guarantee and Indemnity**

Deed of Guarantee and Indemnity

[ ]

ABN [ ]

Principal

[ ]

ABN [ ]

Guarantor

**Deed of Guarantee and Indemnity** made at on 20

**By: [ ] ABN [ ] of [ ] ("Guarantor")**

**In favour of: [ ] ABN [ ] of [ ] ("Principal")**

**Recitals**

* 1. The Principal has agreed to enter into the Contract with the Contractor on the condition that the Guarantor provide this Guarantee.
	2. 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.
	3. The Guarantor considers that by providing this guarantee 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]*** dated on or about the date ***[insert details]*** between the Principal and the Contractor.

**"Contractor"** means ***[insert details]***.

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

**"Event of Insolvency"** means:

1. a "controller" (as defined in section 9 of the Corporations Act 2001 (Cth)), manager, trustee, administrator, or similar officer is appointed in respect of a person or any asset of a person;
2. a liquidator or provisional liquidator is appointed in respect of a corporation;
3. any application (not being an application withdrawn or dismissed within 5 Business Days) is made to a court for an order, or an order is made, or a meeting is convened, or a resolution is passed, for the purpose of:
4. appointing a person referred to in paragraphs (a) or (b);
5. winding up a corporation; or
6. proposing or implementing a scheme of arrangement;
7. any event or conduct occurs which would enable a court to grant a petition, or an order is made, for the bankruptcy of an individual or his estate under any Insolvency Provision;
8. a moratorium of any debts of a person, a personal insolvency agreement or any other assignment, composition or arrangement (formal or informal) with a person's creditors or any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of that person's creditors or a trustee, is ordered, declared or agreed to, or is applied for and the application is not withdrawn or dismissed within 5 Business Days;
9. a person becomes, or admits in writing that it is, is declared to be, or is deemed under any applicable law to be, insolvent or unable to pay its debts; or
10. any writ of execution, garnishee order, mareva injunction or similar order, attachment, distress or other process is made, levied or issued against or in relation to any asset of a person.

**"GST"** means any goods and services tax, consumption tax, value added tax or any similar tax, impost or duty imposed by any law of the Commonwealth of Australia or any State or Territory of the Commonwealth of Australia (whether in force before or coming into force after the date of this Deed).

**"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.

**"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 the Contract, and includes any liabilities or obligations which:

1. are liquidated or unliquidated;
2. are present, prospective or contingent;
3. are in existence before or come into existence on or after the date of this Deed;
4. relate to the payment of money or the performance or omission of any act;
5. sound in damages only; or
6. accrue as a result of any Event of Default,

and irrespective of:

1. whether the Contractor is liable or obligated solely, or jointly, or jointly and severally with another person;
2. 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
3. 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.

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

**"Security"** means a mortgage, charge, pledge, lien, hypothecation, guarantee (including this Deed), indemnity, 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 which is 2% above the rate expressed as a percentage per annum:

1. which is the average of the bid rates shown at approximately 10.15 am on reference rate page “BBSY” on the Reuters Monitor System on the day the relevant amount was due and payable for bank accepted bills having a tenor of 21 Business Days; or
2. if for any reason the rate referred to in paragraph (a) is no longer available or if there is no rate displayed for that period at that time, then the average of the buying rates quoted by 3 banks selected by the Principal at or about 10.15 am on the relevant date referred to in paragraph (a) for bills accepted by such banks having a tenor of 21 Business Days.

**"Taxes"** means all present and future taxes, levies, imposts, deductions, charges, fees and withholdings, in each case plus interest, related penalties, and any charges, fees or other amounts in respect of any of them.

**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:

1. headings are for convenience only and do not affect interpretation and unless the context indicates a contrary intention;
2. if the Contractor is more than one person, “Contractor” means each of them severally and all of them jointly;
3. if the Guarantor is more than one person, “Guarantor” means each of them severally and all of them jointly;
4. the expression “person” includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership, and a trust;
5. a reference to any party includes that party’s executors, administrators, successors and permitted assigns, including any person taking by way of novation;
6. a reference to any document (including this Deed) is to that document as varied, novated, ratified or replaced from time to time;
7. a reference to any statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it, and all ordinances, by-laws, regulations, rules and statutory instruments (however described) issued under it;
8. words importing the singular include the plural (and vice versa), and words importing a gender include every other gender;
9. references to parties, clauses, schedules, exhibits or annexures are references to parties, clauses, schedules, exhibits and annexures to or of this Deed, and a reference to this Deed includes any schedule, exhibit or annexure to this Deed;
10. where a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
11. the word “includes” in any form is not a word of limitation; and
12. a reference to “$” or “dollar” is to Australian currency.

**1.4 No contra proferentem**

No term or provision of this Guarantee will be construed against a party on the basis that the Guarantee or the term or provision in question was put forward or drafted by that party.

**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 Guarantee, 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:

1. any failure by the Contractor to perform the Obligations duly and punctually; or
2. 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.

**4. Liability as Guarantor and indemnifier**

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. 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.

**5. Nature and preservation of liability**

**5.1 Absolute liability**

1. 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.
2. This Deed binds each person who has executed it, notwithstanding that:
3. any person, whether named as a party or not, does not execute this Deed;
4. the execution of this Deed by any person is invalid, forged or irregular in any way; or
5. 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 to reduce the Guarantor’s liability under this Deed, including any of the following:

1. **(Event of Insolvency)**: the occurrence before, on or at any time after the date of this Deed, of any Event of Insolvency in relation to the Contractor or the Guarantor;
2. **(Distribution)**: the receipt by the Principal of any payment, dividend or distribution under any Insolvency Provision in relation to the Contractor or the Guarantor;
3. **(Event of Default)**: the occurrence of any Event of Default;
4. **(Invalidity etc.)**: 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;
5. **(Further Security)**: the Principal accepting or declining to accept any Security from any person at any time;
6. **(Time or indulgence)**: the Principal granting time, waiver or other indulgence or concession to, or making any composition or compromise with, the Contractor or the Guarantor;
7. **(Forbearance)**: 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;
8. **(Acquiescence or other omission)**: any laches, acquiescence or other act, neglect, default, omission or mistake by the Principal;
9. **(Repudiation)**: 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;
10. **(Variation)**: 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;
11. **(Release)**: 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;
12. **(Change of constitution)**: 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;
13. **(Transfer)**: 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;
14. **(Disclosure)**: 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 or the Guarantor 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;
15. **(Covenant not to take action)**: 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;
16. **(Death or incapacity)**: (where the Guarantor is an individual) the death or mental incapacity of the Guarantor; or
17. (**Administration)**: the provisions of section 440J of the Corporations Act 2001 (Cth) operating to prevent or delay:
18. the enforcement of this Deed against any Guarantor; or
19. any claim for contribution against any Guarantor.

**5.3 No merger**

1. 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.
2. 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**

The Guarantor need not consent 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**

1. The Principal is under no obligation to marshal or appropriate in favour of any Guarantor, or to exercise, apply, transfer or recover in favour of any 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.
2. 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:

1. the Principal has at any time released or discharged:
2. the Guarantor from its obligations under this Deed; or
3. 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

1. any payment or other transaction to or in favour of the Principal has the effect of releasing or discharging:
2. the Guarantor from its obligations under this Deed; or
3. any assets of the Guarantor from a Security; and
4. 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
5. that claim is upheld or is conceded or compromised by the Principal,

then:

1. **(Restitution of rights)**: the Principal will immediately become entitled against the Guarantor to all rights (including under any Security) as it had immediately before that release or discharge;
2. **(Restore Principal’s position)**: 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
3. **(Indemnity)**: 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.

**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:

1. **(Legally binding obligation)**: this Deed constitutes a valid and legally binding obligation of the Guarantor in accordance with its terms;
2. **(Execution, delivery and performance)**: the execution, delivery and performance of this Deed by the Guarantor does not breach any Statute or law, or any document or agreement to which the Guarantor is a party or which is binding on it or any of its assets;
3. **(No material adverse effect)**: 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;
4. **(Information)**: 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
5. **(No trusts)**: the Guarantor is not the trustee of any trust nor does it hold any property subject to or impressed by 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:

1. **(Due incorporation)**: it is duly incorporated and has the corporate power to own its property and to carry on its business as is now being conducted;
2. **(Constitution)**: 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 Stock Exchange Limited or on any other stock exchange, those listing requirements or business rules;
3. **(Corporate power)**: 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; and
4. **(Filings)**: the Guarantor has filed all corporate notices and effected all registrations with the Australian Securities and Investments Commission and all of those filings and registrations are current, complete and accurate.

**6.3 Representations and warranties repeated**

Each representation and warranty in this Deed will be repeated on each day whilst any of the Obligations remain outstanding with reference to the facts and circumstances then subsisting, as if made on each such day.

**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 a separate and independent obligation) after judgment, at the Specified Rate for successive 90 day interest periods commencing on the date of default and, if not paid when due, will itself bear interest in accordance with this clause 7.3.

**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 must be:

1. free of any set-off or counterclaim; and
2. without deduction or withholding for or on account of any present or future Taxes, unless the Guarantor is compelled by law to make any deduction or withholding.

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:

1. 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;
2. 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
3. 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.

**7.6 Currency**

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.

**8. Expenses and stamp duties**

**8.1 Expenses**

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:

1. **(Preparation)**: the preparation, negotiation and execution of this Deed and any subsequent consent, agreement, approval, waiver, amendment to or discharge of this Deed; and
2. **(Enforcement)**: any exercise, enforcement or preservation, or attempted exercise, enforcement or preservation, of any rights under this Deed.

**8.2 Stamp duties**

1. **(Payment of all duties)**: 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.
2. **(Indemnity)**: 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, the Contract or this Deed (“GST Liability”) then:

1. 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
2. otherwise - the Guarantor will indemnify and keep the Principal indemnified for the full amount of the GST Liability.

**9. Assignment**

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.

**10. Governing law, jurisdiction and arbitration**

**10.1 Governing law**

This Deed and where applicable, the arbitration reference contained in clause 10.3, is governed by and will be construed according to the laws of Victoria.

**10.2 Jurisdiction**

1. This clause 10.2 only applies where clauses 10.3 to 10.8 do not apply.
2. The Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts and appellate courts of Victoria, 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.
3. The Guarantor irrevocably waives any objection it may now or in the future have to the venue of any 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.

**10.3 Reference to arbitration**

1. Clauses 10.3 to 10.8 will only apply where the Guarantor is a foreign company (as defined in section 9 of the Corporations Act 2001 (Cth)).
2. Any controversy, claim or dispute directly or indirectly based upon, arising out of, relating to or in connection with this deed (including but not limited to any question relating to the existence, validity or termination of this deed) shall be referred to and finally resolved by arbitration in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (known as the ACICA Arbitration Rules).
3. The seat of the arbitration will be Melbourne.
4. The number of arbitrators will be one.
5. The language of the arbitration will be English.
6. Subject to clause 10.6, the arbitral tribunal has the power to grant all legal, equitable and statutory remedies, except punitive damages.

**10.4 Consolidation**

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

**10.5 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.

**10.6 Proportionate liability**

Notwithstanding anything else, to the extent permissible by law, the arbitral tribunal appointed in accordance with clause 10.3 will not have power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any controversy, claim or dispute referred to arbitration in accordance with clause 10.3.

**10.7 Enforcement of interim measures**

The parties agree that section 23 of the International Arbitration Act 1974 (Cth) will apply.

**10.8 Award final and binding**

Any award will be final and binding upon the parties.

**11. Miscellaneous**

**11.1 Notices**

Any communication under or in connection with this Deed:

1. must be in writing;
2. must be addressed as shown below:

**Principal**

Name: *[Insert]*

Address: *[Insert]*

Fax no: *[Insert]*

For the attention of: *[Insert]*

**Guarantor**

Name: *[Insert]*

Address: *[Insert]*

Fax no: *[Insert]*

For the attention of: *[Insert]*

(or as otherwise notified by that party to the other party from time to time);

1. must be signed by the party making the communication or (on its behalf) by the solicitor for, or by any attorney, director, secretary, or authorised agent of, that party;
2. must be delivered or posted by prepaid express post to the address, or sent by fax to the number, of the addressee, in accordance with clause 11.1(b); and
3. will be deemed to be received by the addressee:
4. (in the case of prepaid express post) on the third business day after the date of posting to an address within Australia, and on the fifth business day after the date of posting to an address outside Australia;
5. (in the case of fax) at the local time (in the place of receipt of that fax) which then equates to the time at which that fax was sent as shown on the transmission report which is produced by the machine from which that fax is sent and which confirms transmission of that fax in its entirety, unless that local time is a non business day, or is after 5.00 pm on a business day, when that communication will be deemed to be received at 9.00 am on the next business day; and
6. (in the case of delivery by hand) on delivery at the address of the addressee as provided in clause 11.1(b), unless that delivery is made on a non business day, or after 5.00 pm on a business day, when that communication will be deemed to be received at 9.00 am on the next business day,

where “business day” means a day (not being a Saturday or Sunday) on which banks are generally open for business in the place of receipt of that communication.

**11.2 Continuing obligation**

This Deed is a continuing obligation notwithstanding any termination by the Guarantor, settlement of account, intervening payment, 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 the due and punctual performance of all the Obligations until a final discharge has been given to the Guarantor.

**11.3 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.

**11.4 Form of demand**

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

**11.5 Severance**

If at any time any provision of this Deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

1. the legality, validity or enforceability in that jurisdiction of any other provision of this Deed; or
2. the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Deed.

**11.6 Remedies cumulative**

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

**11.7 Waiver**

1. Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any Power 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 Power.
2. 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.
3. No waiver of a breach of any term of this Deed will operate as a waiver of another breach of that term or of a breach of any other term of this Deed.

**11.8 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.

**11.9 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.

**11.10 Set-off**

1. 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 effect the set off in an amount estimated by it in good faith to be the amount of that obligation.
2. The Principal is not obliged to exercise any right of set off pursuant to clause 11.10(a), which is in addition to its other rights of combination of account, set-off or lien (by contract or operation of law).
3. On its exercise of any set off pursuant to clause 11.10(a) against the Guarantor, the Principal will promptly notify the Guarantor of details of that set-off.

**11.11 Counterparts**

If the Guarantor is more than one person, a Guarantor may execute this Deed on one or more separate counterparts, each of which constitutes the deed of that Guarantor.

Execution page

Executed as a deed poll

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** by **[**                                 **]** by or in the presence of: |  |  |  |
|  |
|  |  |  |  |
| Signature of Director |  |  | Signature of Secretary/other Director |
| Name of Director in full | Name of Secretary/other Director in full |

## Annexure Part H Payment Claim

|  |  |
| --- | --- |
| ANNEXURE to the Australian StandardGeneral Conditions of Contract  | **Part H** |

**Form of Payment Claim**

Payment Claim

**From:**

|  |  |
| --- | --- |
| Name | [insert] |
| ABN | [insert] |
| ACN | [insert] |
| Short form name | **Contractor** |
| Notice details | [insert] |

**To:**

|  |  |
| --- | --- |
| Name | [insert] |
| ABN | [insert] |
| ACN | [insert] |
| Short form name | **Superintendent** |
| Notice details | [insert] |

|  |  |
| --- | --- |
| **Contract** | [insert name and date of Contract] |

Words and phrases defined in the Contract have the same meaning in this Certificate of Practical Completion as they have in the Contract.

**1. Payment claim – work under the Contract**

Under Clause 42.1 of the Contract entered into between the Principal and the Contractor, the Contractor claims payment in relation to work under the Contract as set out below:

*Insert:*

*(i) the Contractor's Australian Business Number;*

*(ii) the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor under the Contract;*

*(iii) the amount claimed by the Contractor and the basis for calculation of that amount;*

*(iv) the amount of any GST paid or payable by the Contractor with respect to the amount claimed;*

*(v) the Contractor’s address for payment;*

*(vi) the Principal’s Reference number;*

*(vii) the details of any claim arising under Clause 12 or otherwise in respect of a Latent Condition;*

*(viii) the details of any claim arising under Clause 14.1 or otherwise in respect of the consequences of a change in a Legislative Requirement as described in Clause 14;*

*(ix) the details of any claim arising under Clause 36 or otherwise in respect of extra costs incurred by reason of delay; and*

*(x) the details of any claim capable of being valued under Clause 40.5(ii) or otherwise in respect of delay or disruption or loss of productivity.*

**2. Payment claim – other claims**

Under Clause 42.1 of the Contract entered into between the Principal and the Contractor, the Contractor claims payment as set out below for items other than in relation to the work under the Contract:

*Insert*

*(i) separate details of each claim;*

*(ii) each such claim with a unique numerical identifier with the identifiers being consecutive and commencing with the number 1;*

*(iii) the factual circumstances giving rise to the claim; and*

*(iv) the clause of clauses of the contract relied on, or, in the absence of reliance on the contract, the other legal basis relied on in support of the claim.*

**3. Payment claim warranties**

In making this claim for payment under Clause 42.1 of the Contract, the Contractor warrants that:

(a) it has provided the Principal with security for the amount (if any) required under Clause 5;

(b) it has executed the formal instrument of agreement in accordance with Clause 6:

(c) it has entered into agreements in accordance with Clause 9.2, and each agreement entered into in accordance with Clause 9.2 has not been varied in a manner that is inconsistent with Clause 9.2;

(d) has effected and maintained the insurance required by the Contract and (if requested) provided evidence of this to the Superintendent;

(e) has complied with its obligations in relation to health and safety in accordance with Clause 15A and Clause 55 or Clause 56 (as applicable); and

(f) has complied with any other obligation stated in the Contract Documents to be a condition precedent to submitting a payment claim.

Contractor Date

Attachments: [insert, if applicable]

## Annexure Part I Not used

|  |  |
| --- | --- |
| ANNEXURE to the Australian StandardGeneral Conditions of Contract  | **Part I** |

**Not used**

## Annexure Part J Principal’s Policies and Procedures

|  |  |
| --- | --- |
| ANNEXURE to the Australian StandardGeneral Conditions of Contract  | **Part J** |

**Principal's Policies and Procedures**

***[Note: To be inserted.]***

## Annexure Part K Deed of Novation

|  |  |
| --- | --- |
| ANNEXURE to the Australian StandardGeneral Conditions of Contract  | **Part K** |

Deed of Novation

(Clause 9.2)

This Deed made the day of 20

between (the Principal)

of ACN

and (the Contractor)

of ACN .

and (the subcontractor)

of ACN

and (the Incoming Contractor)

of ACN

witness that:

1. Upon receipt by the subcontractor of the sum certified by the Superintendent as owing under the prior secondary subcontract prescribed in the Schedule hereto
2. the prior secondary subcontract shall be discharged;
3. the subcontractor shall release the Contractor from the further performance of the prior subcontract and from all claims and demands in connection with the prior secondary contract;
4. the Incoming Contractor shall punctually perform the obligations of the Contractor under the prior contract as far as they are not performed. The Incoming Contractor acknowledges itself bound by the provisions of the prior contract as if the Incoming Contractor had been named in the prior contract; and
5. the subcontractor shall punctually perform like obligations and be bound to the Incoming Contractor as if the provisions of the prior contract were incorporated herein.
6. The Principal and subcontractor each warrant to the Incoming Contractor that:
7. subcontract work carried out to the date hereof is in accordance with the provisions of the prior contract; and
8. all claims and demands in connection with the prior contract have been made to the Contractor.
9. The Principal and subcontractor each indemnifies the Incoming Contractor from all claims and demands of the Contractor, Principal and the subcontractor in connection with the prior contract.
10. A dispute or difference between:
11. the Principal and the subcontractor in connection with the Superintendent's certification of the sum owing under the prior contract; or
12. the Incoming Contractor and the subcontractor in connection with Clause 1(c) or 1(d),
13. shall be resolved pursuant to the provisions of AS 2124-1992 for the purposes of this Clause 4 are incorporated herein.
14. This Deed shall be governed by the laws in force in the State or Territory stated in the provisions of the agreement between the Principal and the Contractor and in the event that no State or Territory is so stated then in accordance with the law for the time being in force in that State or Territory in which the project is being carried out.

Schedule

Documents:

In witness whereof the parties have executed this Deed of Novation by affixing their seals.

THE COMMON SEAL of the Principal

was affixed to this document in the presence of:

Secretary / Director Director

Name (please print) Name (please print)

THE COMMON SEAL of the Contractor

was affixed to this document in the presence of:

Secretary / Director Director

Name (please print) Name (please print)

THE COMMON SEAL of the subcontractor

was affixed to this document in the presence of:

Secretary / Director Director

Name (please print) Name (please print)

THE COMMON SEAL of the Incoming Contractor

was affixed to this document in the presence of:

Secretary / Director Director

Name (please print) Name (please print)

## Annexure Part L Deed of Release

|  |  |
| --- | --- |
| ANNEXURE to the Australian StandardGeneral Conditions of Contract  | **Part L** |

Deed of Release

(Clause 42.8)

**THIS DEED POLL** is made the day of 20

**BY: [ ] (**the **"Contractor")**

**FOR THE JOINT BENEFIT OF: [ ] (**the **"Principal")**

**RECITALS**

A. The Principal and the Contractor are parties to a contract dated [ ] (the **"Contract"**) under which the Contractor agreed to design and construct the [ ].

**OPERATIVE PART**

1. The Contractor has submitted the Final Payment Claim under clause 42.5 of the Contract.

2. Subject to clause 3(c) of this deed, the Contractor hereby releases the Principal from any Claim in connection with any fact, matter or thing arising out of, or in any way in connection with, the work under the Contract, the Works or the Contract.

3. This Deed shall not affect:

(a) any of the Contractor's obligations or liabilities, whether under the Contract or otherwise;

(b) any of the rights or entitlements of the Principal, whether arising under the Contract or otherwise; or

(c) the Principal's obligation under the Contract to:

(i) pay the amount (if any) stated in the Final Payment Schedule issued under clause 42.8 of the Contract as being payable by the Principal to the Contractor; or

(ii) release any security and retention as required by the Contract.

4. Terms used in this Deed have the same meaning as given to them in the Contract.

5. This Deed is governed by the laws in Victoria.

Execution page

Executed as a deed poll

|  |  |  |  |
| --- | --- | --- | --- |
| Executedby the Contractor in accordance with section 127 of the Corporations Act by or in the presence of: |  |  |  |
|  |
|  |  |  |  |
| Signature of Secretary/other Director |  |  | Signature of Director |
| Name of Secretary/other Director in full | Name of Director in full |

## Annexure Part M Not used

|  |  |  |
| --- | --- | --- |
| **ANNEXURE to the Australian StandardGeneral Conditions of Contract** |  | Part M |

**Not used**

## Annexure Part N Statutory Declaration

|  |  |  |
| --- | --- | --- |
| **ANNEXURE to the Australian StandardGeneral Conditions of Contract** |  | Part N |

**Statutory Declaration**

**Project Name:** [insert project name]

**Contract Number:** [insert contract number]

|  |  |  |
| --- | --- | --- |
| **To:** | [insert name] (ACN [insert ACN]) of [insert address]and | ("***Principal***") |
|  | [insert name] (ACN [insert ACN]) of [insert address] | ("***Superintendent***") |
| **From:** | [insert name] (ACN [insert ACN]) of [insert address] | ("***Contractor***") |
| **In the matter of:** | the contract for the construction of the [insert description of the project] entered into between the *Principal* and the *Contractor* dated [insert date of *Contract*] | ("***Contract***") |
| **Period covered by this progress payment claim:** | from: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | ("***Payment Period***") |

I, [insert name] of [insert address], [insert occupation], do solemnly and sincerely declare as follows:

1. I am an employee duly authorised to make this statutory declaration on behalf of the *Contractor*;

2. all employees who are, or have been, engaged by the *Contractor* in connection with the *Contract* have been paid their full remuneration for work done during the *Payment Period* including any superannuation or redundancy payments (if applicable) and in accordance with any applicable award or industrial agreement;

3. subject to clause 4(d), all consultants, suppliers and subcontractors who are, or have been, engaged by the *Contractor* in connection with the *Contract* have been paid in full all amounts that have become payable to them under the terms of their agreement with the *Contractor* during the *Payment Period*;

4. as at the end of the Payment Period:

|  |  |  |
| --- | --- | --- |
| (a) | the total amount payable by the *Contractor* to all subcontractors in respect of work under the *Contract* is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (b) | the amount paid by the *Contractor* to all subcontractors in respect of work under the *Contract* is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (c) | the amount claimed by all subcontractors in respect of work under the *Contract* which is disputed by the *Contractor* as being due and payable is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (d) | the amount referred to in paragraph 4(c) of this statutory declaration is disputed as, at the date of this statutory declaration, on the following grounds:[insert grounds for dispute] |  |

**The Statutory Declaration Witness and the person making**

**this statutory declaration must sign or initial this page**

**Declarant: ……… Witness: ………**

**And I** acknowledge that this declaration is true and correct, and I make it in the belief that a person making a false declaration is liable to the penalties for perjury.

|  |  |  |  |
| --- | --- | --- | --- |
| *Declared* ***at******this day of 20******Before me:*** |  |  |  |
| ***Signed*** |
|  |  |  |  |
| ***Signature of person before whom the declaration is made*** |  |  | ***Name of Declarant*** |
|  |  |  |  |
| ***Name, qualification and contact address of person before whom the declaration is made*** |  |  |  |

**The Statutory Declaration Witness and the person making**

**this statutory declaration must sign or initial this page**

**Declarant: ……… Witness: ………**

## Annexure Part O Social Procurement

|  |  |  |
| --- | --- | --- |
| **ANNEXURE to the Australian StandardGeneral Conditions of Contract** |  | Part O |

### **Social Procurement Commitment Schedule**

***[Insert the version of the Social Procurement Commitment Schedule relevant to the Alternative selected at Annexure Part A.]***

*Clause 51B – Alternative 1 – Social Procurement Framework (without Building Equality Policy)*

[***Insert Social Procurement Commitment Schedule***]

*Clause 51B – Alternative 2 – Social Procurement Framework with Building Equality Policy*

[***Insert Social Procurement Commitment Schedule, including Building Equality Policy Commitments***]

[***Insert Attachment A to Social Procurement Commitment Schedule – Organisation Wide Gender Equality Actions Plan***]

[***Insert Attachment B to Social Procurement Commitment Schedule – Project Specific Gender Equality Actions Plan***]

*Clause 51B – Alternative 3 –Building Equality Policy only*

[***Insert Social Procurement Commitment Schedule, including Building Equality Policy Commitments***]

[***Insert Attachment A to Social Procurement Commitment Schedule – Organisation Wide Gender Equality Actions Plan***]

[***Insert Attachment B to Social Procurement Commitment Schedule – Project Specific Gender Equality Actions Plan***]

**Annexure Part O**

|  |  |  |
| --- | --- | --- |
| **ANNEXURE to the Australian StandardGeneral Conditions of Contract** |  | Part O |

### **Social Procurement Framework Statutory Declaration**

**Statutory Declaration**

|  |  |
| --- | --- |
| *Insert the name, address and occupation (or alternatively,* unemployed *or* retired *or* child*) of person making the statutory declaration.* | I,make the following statutory declaration under the **Oaths and Affirmations Act 2018:** |
| 1. I am a Director of [*insert name of Recipient*] (**Contractor**).
2. The contents of the report provided by the Contractor to the Principal (in accordance with clause 3(e) of Schedule 2 to the Contract) are true and correct.
 |
| *Set out matter declared to in numbered paragraphs. Add numbers as necessary.* |
|  | **I declare that the contents of this statutory declaration are true and correct and I make it knowing that making a statutory declaration that I know to be untrue is an offence.** |
| *Signature of person making the declaration* |  |
|  *Place (City, town or suburb)* | **Declared at** |  | **\*in the state of Victoria** |
|  |
| *Date* | on |
| *Signature of authorised statutory declaration witness* | **I am an authorised statutory declaration witness and I sign this document in the presence of the person making the declaration:** |
| *Date* | on |
| *Name, capacity in which authorised person has authority to witness statutory declaration, and address (writing, typing or stamp)* | A person authorised under section 30(2) of the **Oaths and Affirmations Act 2018** to witness the signing of a statutory declaration. |

**The Statutory Declaration Witness and the person making**

**this statutory declaration must sign or initial this page**

**Declarant: ……… Witness: ………**

**Certificate Identifying Exhibit**

This certificate is used to identify a document as an exhibit to the statutory declaration.

|  |  |
| --- | --- |
| Title of document: |  |
| Date of document (dd/mm/yyyy): |  |

|  |
| --- |
| **The attached document is an exhibit to the statutory declaration and is now produced and shown to the witness identified above in their capacity as a qualified statutory declaration witness.** |
| Name of person making the statutory declaration: |  |  |
| *Signature of person making declaration* |  |  | **** |
| *Date (dd/mm/yyyy)* | on |  |  |
| Name of witness: |  |  |
| *Address* | of |  |  |
| *Signature of statutory declaration witness* |  |  | **** |
| *Date (dd/mm/yyyy)* | on |  |  |
| Qualification as a statutory declaration witness:*(writing, typing or stamp)* |  |  |  |

**The Statutory Declaration Witness and the person making**

**this statutory declaration must sign or initial this page**

**Declarant: ……… Witness: ………**

## Annexure Part P Fair Jobs Code

|  |  |  |
| --- | --- | --- |
| **ANNEXURE to the Australian StandardGeneral Conditions of Contract** |  | Part P |

#### **Fair Jobs Code Plan Addendum**

***[Guidance note: Insert the Fair Jobs Code Plan Addendum.***

***If the FJC Plan Addendum does not apply to this Contract, insert: ‘Annexure Part P does not apply’.]***

1. # Where there are Separable Portions, these items shall be deleted [↑](#footnote-ref-2)
2. # Where there are Separable Portions, these items shall be deleted [↑](#footnote-ref-3)