

AS 2124—1992

with

AS 2125—1992

AS 2127—1992

(Incorporating Amendment No. 1)

Australian Standard[®]

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

together with

**General conditions of tendering and form of
tender (AS 2125—1992)**

**Form of formal instrument of agreement
(AS 2127—1992)**

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

The following interests are represented on Committee OB/3:

Australian Chamber of Commerce and Industry
Australian Electrical and Electronic Manufacturers Association
Australian Federation of Construction Contractors
Australian Institute of Project Management
Australian Institute of Purchasing and Supply Management
Australian Institute of Quantity Surveyors
Australian Mining Industry Council
Austroads
Construction Industry Engineering Services Group
Electricity Supply Association of Australia
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This Standard was issued in draft form for comment as DR 92053.

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AS 2124

First published as part of AS CA24—1952.
Revised and redesignated in part as AS CA24.1—1964.
Second edition 1973.
Revised and redesignated AS 2124—1978.
Second edition 1981.
Third edition 1986.
Fourth edition 1992.

AS 2125

First published as part of AS CA24—1952.
Revised and redesignated in part as AS CA24.2—1964
and AS CA24.3—1964.
AS CA24.2—1964 revised and redesignated
AS 2125—1978.
AS CA24.3—1964 revised and redesignated
AS 2126—1978.
Second edition AS 2125—1981.
Second edition AS 2126—1981.
AS 2125—1981 and AS 2126—1981 revised,
amalgamated and designated AS 2125—1986.
Third edition 1992.

AS 2127

First published as AS 2127—1978.
Second edition 1981.
Third edition 1986.
Fourth edition 1992.
Reissued incorporating Amendment No. 1 (October 2000)

PUBLISHED BY STANDARDS AUSTRALIA
(STANDARDS ASSOCIATION OF AUSTRALIA)
1 THE CRESCENT, HOMEBUSH, NSW 2140



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PREFACE

These editions of AS 2124, AS 2125 and AS 2127 (bound together) were prepared by the Standards Australia Committee on General Conditions of Contract. While these are the latest editions, the 1986 editions remain as current Standards, the 1981 editions remain as available superseded Standards and the 1978 editions are withdrawn.

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

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

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

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

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

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

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

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WARNING

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

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STANDARDS AUSTRALIA

Australian Standard
General conditions of contract

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

1 CONSTRUCTION OF CONTRACT

The law governing the Contract, its interpretation, any agreement to arbitrate and the conduct of any arbitration or litigation, is the law of the State or Territory stated in the Annexure. 15

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

Communications between the Principal, the Superintendent and the Contractor shall be in the English language. 20

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

Where provisions in the General Conditions of Contract are expressed to be alternatives and the Contract fails to state which alternative applies, the first alternative shall apply. 25

2 INTERPRETATION

In the Contract, except where the context otherwise requires —

‘Bill of Quantities’ means a document named therein as a Bill of Quantities issued to tenderers by or on behalf of the Principal, stating estimated quantities of work to be carried out; 30

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

‘Contract’ means the agreement between the Principal and the Contractor;

‘Contract Sum’ means — 35

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

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

(c) where the Principal accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (a) and (b), 40

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

‘Contractor’ means the person bound to execute the work under the Contract;

‘Date of Acceptance of Tender’ means the date which appears on the notice in writing of acceptance of the tender; 45

‘Date for Practical Completion’ means—

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

(b) where the Annexure provides a period of time for Practical Completion, the last day of the period, 50

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

‘Date of Practical Completion’ means—

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

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

‘day’ means calendar day;

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

‘month’ means calendar month;

‘person’ includes a firm or body corporate or unincorporate or an individual;

‘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; and

(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;

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

‘Principal’ means the Principal stated in the Annexure;

‘provisional sum’ includes monetary sum, contingency sum and prime cost item;

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

‘Separable Portion’ means a portion of the work under the Contract described in the Contract as a Separable Portion or which the Superintendent has determined pursuant to Clause 35.4 shall be a Separable Portion;

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

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

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

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

‘Temporary Works’ means works used in the execution of the work under the Contract but not forming part of the Works;

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

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

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

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

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

Words importing a gender include every gender.

3 NATURE OF CONTRACT

3.1 Performance and Payment

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

The Principal shall pay the Contractor—

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

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

3.2 Quantities

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

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

3.3 Adjustment for Actual Quantities—Schedule of Rates

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

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

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

4 BILL OF QUANTITIES

4.1 Purpose of the Bill of Quantities

Alternative 1

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

Alternative 2

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

Alternative 3

A Bill of Quantities forms part of the Specification.

4.2 Pricing and Lodgement

Where there is a Bill of Quantities:

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

4.3 Errors in Pricing

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

4.4 Errors in Bills of Quantities

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

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

- (i) in the case of Clause 4.4(a) where the item is deficient in quantity or in the case of Clause 4.4(c) — upon application in writing to the Superintendent by the Contractor; and
 - (ii) in the case of Clause 4.4(a) where the item is excessive in quantity or in the case of Clause 4.4(b) — upon notification in writing to the Contractor by the Superintendent,
- the lump sum accepted by the Principal for the execution of the whole of the work to which the Bill of Quantities relates shall except when the value of the error is less than \$400, be adjusted by such amount as is required to correct the error, determined in the manner provided by Clause 40.5 for the valuation of variations as if the correction were a variation under Clause 40.

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

5 SECURITY, RETENTION MONEYS AND PERFORMANCE UNDERTAKINGS

5.1 Purpose

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

5.2 Provision of Security

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

5.3 Form of Security

The security shall be in the form of cash, bonds or inscribed stock issued by the Australian Government or the Government of a State or Territory of Australia, interest bearing deposit in a trading bank carrying on business in Australia, an approved unconditional undertaking given by an approved financial institution or insurance company, or other form approved by the party having the benefit of the security. 5

The party having the benefit of the security shall have a discretion to approve or disapprove of the form of an unconditional undertaking and the financial institution or insurance company giving it or other form of security offered. The form of unconditional undertaking attached to these General Conditions is approved. 10

If the security is not transferable by delivery, it shall be accompanied by an executed transfer or such other documentation as is necessary to effect a transfer of the security. The costs (including all stamp duty or other taxes) of and incidental to the transfer and retransfer, shall be borne by the party providing the security. 15

5.4 Time for Lodgement of Security

Security shall be lodged within 28 days of the Date of Acceptance of Tender. 15

5.5 Recourse to Retention Moneys and Conversion of Security

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

- (a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and 20
- (b) the party has given the other party notice in writing for the period stated in the Annexure, or if no period is stated, five days of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and
- (c) the period stated in the Annexure or if no period is stated, five days has or have elapsed since the notice was given. 25

5.6 Substitution of Security for Retention Moneys

The Contractor shall be at liberty at any time to provide in lieu of retention moneys, security in any of the forms permitted in Clause 5.3. To the extent that such security is provided, the Principal shall not deduct retention moneys and shall forthwith release retention moneys. 30

* 5.7 Reduction of Security and Retention Moneys

Upon issue of the Certificate of Practical Completion, the Principal's entitlement to security and retention moneys shall be reduced to the percentage thereof stated in the Annexure or, if no percentage is stated, to 50 per cent thereof. 35

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. 40

5.8 Release of Security

If the Contractor has provided additional security pursuant to Clause 42.4, the Principal shall release that additional security within 14 days of the incorporation into the Works of the unfixed plant or materials in respect of which the additional security was furnished. 45

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

If the Contractor has provided security, then the Principal shall release it when required by Clause 42.8. 50

5.9 Interest on Security and Retention Moneys

Alternative 1

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

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

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

Alternative 2

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

5.10 Deed of Guarantee, Undertaking and Substitution

Where—

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

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

For the purpose of Clause 5.10, the terms 'corporation' and 'subsidiary' have the meanings defined in the Corporations Law.

6 EVIDENCE OF CONTRACT

6.1 Contract in Absence of Formal Instrument of Agreement

Unless a Formal Instrument of Agreement is executed by the parties, the agreement in writing between the parties for the execution of the work under the Contract, including documents or parts of documents to which reference may properly be made to ascertain the rights and obligations of the parties, shall evidence the Contract.

6.2 Formal Instrument of Agreement

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

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

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

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

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

7 SERVICE OF NOTICES

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

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

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

8 CONTRACT DOCUMENTS

8.1 Discrepancies

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

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

8.2 Dimensions

Where any discrepancy exists between figured and scaled dimensions, the figured dimensions shall prevail.

8.3 Supply of Documents by Principal

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

Documents supplied to the Contractor by the Principal shall remain the property of the Principal and shall be returned by the Contractor to the Principal on demand in writing. The documents shall not, without the prior written approval of the Principal, be used, copied or reproduced for any purpose other than the execution of the work under the Contract.

8.4 Supply of Documents by Contractor

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

If the Contractor submits documents to the Superintendent, then—

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

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

8.5 Availability of Documents

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

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

8.6 Confidential Information

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

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

* 8.7 Media Releases

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

9 ASSIGNMENT AND SUBCONTRACTING

9.1 Assignment

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

9.2 Subcontracting

The Contractor shall not without the written approval of the Superintendent, which approval shall not be unreasonably withheld, subcontract or allow a subcontractor to assign or subcontract work described in the Annexure.

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

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

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

Approval may be conditional upon the subcontract including—

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

9.3 Contractor's Responsibility

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

10 SELECTED AND NOMINATED SUBCONTRACTORS

10.1 Definitions

If the Contract provides that certain work or the supply of certain items shall be subcontracted to a Selected or Nominated Subcontractor, the work or the supply of the items is ‘Selected Subcontract Work’ or ‘Nominated Subcontract Work’ as the case may be, and: 5

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

‘Nominated Subcontractor’ means — 10

- (a) a subcontractor to whom the Contractor is directed by the Superintendent to subcontract Nominated Subcontract Work; or
- (b) a subcontractor named in the Contract with whom the Principal has entered into a prior contract for Nominated Subcontract Work, and in which prior contract the subcontractor has consented to the assignment by the Principal of the benefit of the prior contract, a copy of which is included in the tender documents; or 15
- (c) a subcontractor named in the Contract with whom the Principal has entered into a prior contract for Nominated Subcontract Work, and in which prior contract the subcontractor has consented to the novation of the prior contract by the Principal pursuant to a deed of novation, a copy of which is included in the tender documents. 20

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

10.2 Selected Subcontract

If the Contract includes Selected Subcontract Work, the Contractor shall subcontract the Selected Subcontract Work to a Selected Subcontractor. If the tender documents specify the terms and conditions upon which the subcontract is to be entered into, the subcontract shall include those terms and conditions. 25

10.3 Nominated Subcontract

If the Contract includes Nominated Subcontract Work, at such time as is necessary to avoid delay to the Contractor, the Superintendent shall direct the Contractor to subcontract the Nominated Subcontract Work to a Nominated Subcontractor. 30

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

If the Contract provides that the Principal may novate to the Contractor a prior contract made between the Principal and a Nominated Subcontractor in respect of Nominated Subcontract Work, the Contractor shall when directed by the Superintendent, execute a deed of novation of that prior contract in the form included in the tender documents and unless the Contract otherwise provides, the Contractor shall give the Principal credit for payments made by the Principal to the Nominated Subcontractor in respect of the Nominated Subcontract Work. 35 40

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

- (a) that in respect of the Nominated Subcontract Work, the Nominated Subcontractor will undertake towards the Contractor obligations and liabilities which will enable the Contractor to discharge the Contractor’s obligations and liabilities to the Principal under the terms of the Contract; 45
- (b) that the Nominated Subcontractor will indemnify the Contractor against loss resulting from any failure by the Nominated Subcontractor to perform such obligations or fulfil such liabilities; 50
- (c) that the Nominated Subcontractor will indemnify the Contractor against loss resulting from any negligence by the Nominated Subcontractor and the Nominated Subcontractor’s servants and agents and against any misuse by them of any Constructional Plant or Temporary Works provided by the Contractor for the purposes of the Contract; 55

(d) that the Nominated Subcontractor will lodge security in a form provided by Clause 5.3 and that security and retention moneys shall be calculated on the same scale and on the same basis respectively as apply in the Contract;

(e) equivalent to those in Clause 44.

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

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

15 (i) the Contractor shall not be bound to discharge obligations and liabilities under the Contract to the extent that the subcontract terms so specified by the Superintendent are inconsistent with the discharge; and

(ii) if the Contractor suffers loss arising out of the refusal of the Nominated Subcontractor to accept such provisions, the Principal shall pay to the Contractor the amount of loss which the Contractor could not reasonably avoid.

10.4 Provisions Applying Generally to Selected and Nominated Subcontract Work

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

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

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

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

35 (i) the Principal shall have no liability to a Selected or Nominated Subcontractor arising from the subcontract between the Contractor and the Selected or Nominated Subcontractor; and

(ii) the Principal shall not be liable to the Contractor for any act, default or omission or breach of contract by a Selected or Nominated Subcontractor, arising from the subcontract between the Contractor and the Selected or Nominated Subcontractor.

*** 10.5 Direct Payment of Nominated Subcontractor**

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

(a) such payment shall be made on behalf of the Contractor; and

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

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

10.6 Termination of Nominated Subcontract

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

11 PROVISIONAL SUMS

A provisional sum included in the Contract shall not itself be payable by the Principal but where at the direction of the Superintendent the work or item to which the provisional sum relates is performed or supplied by—

- (a) the Contractor, the work or item shall be valued under Clause 40.5;
- (b) a subcontractor to the Contractor the Principal shall pay the Contractor the amount payable by the Contractor to the subcontractor for the work or item, disregarding any damages payable by the Contractor to the subcontractor or vice versa, plus the amount or percentage thereon for profit and attendance stated in the Annexure or, where not so stated, as stated elsewhere in the Contract; and
- (c) a Nominated Subcontractor pursuant to a prior contract made between the Principal and a Nominated Subcontractor, the benefit of which has been assigned to the Contractor, the Principal shall pay the Contractor the amount stated in the Annexure or the percentage for profit and attendance stated in the Annexure of the amount payable by the Principal to the Nominated Subcontractor for the work or item or, where no amount or percentage is stated, as stated elsewhere in the Contract, disregarding any damages payable by the Principal to the Nominated Subcontractor or vice versa.

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

12 LATENT CONDITIONS

12.1 Definition

Latent Conditions are—

- (a) physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by the Contractor at the time of the Contractor's tender if the Contractor had —
 - (i) examined all information made available in writing by the Principal to the Contractor for the purpose of tendering; and
 - (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; and
 - (iii) inspected the Site and its surroundings; and
- (b) any other conditions which the Contract specifies to be Latent Conditions.

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.

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

- (a) the Latent Condition encountered and in what respects it differs materially;
- (b) the additional work and additional resources which the Contractor estimates to be necessary to deal with the Latent Condition;
- (c) the time the Contractor anticipates will be required to deal with the Latent Condition and the expected delay in achieving Practical Completion;
- (d) the Contractor's estimate of the cost of the measures necessary to deal with the Latent Condition; and
- (e) other details reasonably required by the Superintendent.

12.3 Extension of Time and Cost

Delay caused by a Latent Condition may justify an extension of time under Clause 35.5.

If a Latent Condition causes the Contractor to —

- (a) carry out additional work;
 - (b) use additional Constructional Plant; or
 - (c) incur extra cost (including but not limited to the cost of delay or disruption),
- which the Contractor could not reasonably have anticipated at the time of tendering, a valuation shall be made under Clause 40.5.

12.4 Time Bar

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

13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

The Principal warrants that unless otherwise provided in the Contract —

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

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

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

14 STATUTORY REQUIREMENTS

14.1 Complying with Statutory Requirements

The Contractor shall comply with the requirements of —

- (a) Acts of the Commonwealth;
- (b) Acts and Ordinances of the State or Territory in which the work under the Contract or any part thereof is carried out;
- (c) Ordinances, regulations, by-laws, orders and proclamations under the Acts and Ordinances;
- (d) persons acting in the exercise of statutory powers enabling them to give directions affecting the work under the Contract.

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

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

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

* 14.2 Payment Where There is No Variation

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

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

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

14.3 Notices and Fees

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

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

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

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

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(a) an increase or decrease in a fee or charge, the difference shall be valued under Clause 40.5; and

(b) there is a new fee or charge, that fee or charge shall be reimbursed by the Principal to the Contractor.

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14.4 Documents Evidencing Approvals of Authorities

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

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15 PROTECTION OF PEOPLE AND PROPERTY

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

(a) provide all things and take all measures necessary to protect people and property;

(b) avoid unnecessary interference with the passage of people and vehicles;

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(c) prevent nuisance and unreasonable noise and disturbance.

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

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If the Contractor or the employees or agents of the Contractor damage property, including but not limited to public utilities and services and property on or adjacent to the Site, the Contractor shall promptly make good the damage and pay any compensation which the law requires the Contractor to pay.

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

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16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE

16.1 Care of the Work Under the Contract

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

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

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

16.2 Reinstatement

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

16.3 Excepted Risks

The Excepted Risks are—

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

17 DAMAGE TO PERSONS AND PROPERTY OTHER THAN THE WORKS

17.1 Indemnity by Contractor

The Contractor shall indemnify the Principal against —

- (a) loss of or damage to property of the Principal, including existing property in or upon which the work under the Contract is being carried out; and
- (b) claims by any person against the Principal in respect of personal injury or death or loss of or damage to any property,

arising out of or as a consequence of the carrying out by the Contractor of the work under the Contract, but the Contractor's liability to indemnify the Principal shall be reduced proportionally to the extent that the act or omission of the Principal or employees or agents of the Principal may have contributed to the loss, damage, death or injury.

Clause 17.1 shall not apply to—

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

17.2 Indemnity by the Principal

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