

Australian Standard[®]

Subcontract conditions

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AS 2545—1993
(Incorporating Amendment No. 1)

Australian Standard[®]

Subcontract conditions

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PREFACE

This Standard was prepared by the Standards Australia Committee on General Conditions of Contract to supersede AS 2545—1987, *Subcontract conditions* to provide a set of compatible subcontract conditions involving site work on projects where AS 2124—1992, *General conditions of contract*, is in use as the head contract between the Main Contractor and the Principal.

This edition of the Standard has been revised to be compatible with AS 2124—1992, AS 2125—1992 and AS 2127—1992, and is therefore recommended for use in conjunction with them. As far as possible, Clause numbers in this Standard are parallel with the corresponding provisions in AS 2124.

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.

A form of formal instrument of agreement, and general conditions of tendering and form of tender are also included as an annexure at the end of AS 2545. Attention is drawn to the desirability for the parties to this contract to execute the formal instrument of agreement at the earliest opportunity, immediately after the necessary documents to form part of the subcontract are prepared. (See Clause 6.2 in this Standard in relation to the procedure for execution of the formal instrument of agreement.)

To be compatible with AS 2124—1992, this document mirrors it, on a clause by clause basis, unless the subject matter makes it inappropriate to do so. However, the difference between this edition of AS 2545 and the 1987 edition, is, with a number of appropriate exceptions, the same as the difference between AS 2124—1986 and AS 2124—1992. The latter differences are summarized in 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).

Attention is invited to the provisions of Clause 49 in which the details of services and facilities to be provided are to be agreed between the parties, and indicated in the Annexure.

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.

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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 Subcontract conditions

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

1 CONSTRUCTION OF SUBCONTRACT

The law governing the Subcontract, 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.

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 Main Contractor, the Main Contractor's Representative and the Subcontractor shall be in the English language.

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 Subcontract Conditions are expressed to be alternatives and the Subcontract fails to state which alternative applies, the first alternative shall apply.

2 INTERPRETATION

In the Subcontract, 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 Main Contractor, stating estimated quantities of work to be carried out;

'Constructional Plant' means appliances and things used in the execution of the work under the Subcontract but not forming part of the Works;

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

'Date for Substantial Completion' means—

- (a) where the Annexure provides a date for Substantial Completion, the date;
- (b) where the Annexure provides a period of time for Substantial Completion, the last day of the period,

but if any extension of time for Substantial Completion is granted by the Main Contractor's Representative or allowed in any arbitration or litigation, it means the date resulting therefrom;

'Date of Substantial Completion' means—

- (a) the date certified by the Main Contractor's Representative in a Certificate of Substantial Completion issued pursuant to Clause 42.5, to be the date upon which Substantial Completion was reached; or
- (b) where another date is determined in any arbitration or litigation as the date upon which Substantial Completion was reached, that other date;

'day' means calendar day;

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

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

‘Main Contractor’ means the Main Contractor stated in the Annexure;

‘Main Contractor’s Representative’ means the person stated in the Annexure as the Main Contractor’s Representative or other person from time to time appointed in writing by the Main Contractor to be the Main Contractor’s Representative for the purposes of the Subcontract, and notified as such in writing to the Subcontractor by the Main Contractor;

‘Main Contract Works’ means the whole of the work to be executed under the Main Contract;

‘month’ means calendar month;

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

‘Priced Bill of Quantities’ means the Bill of Quantities priced and lodged by the Subcontractor with the Main Contractor’s Representative 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 Subcontract 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;

‘secondary subcontract’ means a subcontract between the Subcontractor and a secondary subcontractor;

‘secondary subcontractor’ means a subcontractor to the Subcontractor;

‘Separable Portion’ means a portion of the work under the Subcontract described in the Subcontract as a Separable Portion or which the Main Contractor’s Representative 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 Subcontractor by the Main Contractor for the purpose of the Subcontract;

‘Specification’ means the specification referred to in the Subcontract and any modification of such specification thereafter directed or the use of which has been permitted by the Main Contractor’s Representative pursuant to powers contained in the Subcontract;

‘Subcontract’ means the agreement between the Main Contractor and the Subcontractor;

‘Subcontractor’ means the person bound to execute the work under the Subcontract;

‘Subcontract Sum’ means—

(a) where the Main Contractor accepted a lump sum, the lump sum;

(b) where the Main Contractor 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 Main Contractor accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (a) and (b),

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

‘Substantial Completion’ is that stage in the execution of the work under the Subcontract 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 Main Contractor’s Representative determines that the Subcontractor 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 Subcontract to be carried out and passed before the Works reach Substantial Completion have been carried out and passed; and
- (c) documents and other information required under the Subcontract which, in the opinion of the Main Contractor’s Representative, are essential for the use, operation and maintenance of the Works have been supplied;

‘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 Subcontractor by the Main Contractor and, so far as concerns the functions exercisable by a Superintendent’s Representative, includes a Superintendent’s Representative;

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

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

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

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 Subcontract Conditions shall not form part of the Subcontract Conditions and shall not be used in the interpretation of the Subcontract.

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 SUBCONTRACT

3.1 Performance and Payment

The Subcontractor shall execute and complete the work under the Subcontract.

The Main Contractor shall pay the Subcontractor—

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

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

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 Main Contractor's Representative by reason of the actual quantity of an item required to perform the Subcontract 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 Main Contractor's Representative to vary the work under the Subcontract, the actual quantity of an item required to perform the Subcontract is greater or less than the quantity shown in the Schedule of Rates—

- (a) where the Main Contractor 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 Main Contractor's Representative as a variation;
- (b) where the Main Contractor accepted a rate for the item, the rate shall apply to 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 Main Contractor's Representative 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 were extra work directed by the Main Contractor's Representative 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 Subcontract only to the extent provided in the Subcontract.

Alternative 2

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

Alternative 3

A Bill of Quantities forms part of the Specification.

4.2 Pricing and Lodgment

Where there is a Bill of Quantities—

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

in the Priced Bill of Quantities shall be notified to the Main Contractor's Representative in writing by the party making the discovery and corrected in a manner agreed between the Subcontractor and the Main Contractor's Representative or, in the event of failure to agree, as determined by the Main Contractor's Representative so that the total of all items in the Priced Bill of Quantities continues to equal the sum accepted by the Main Contractor for the execution of the whole of the work to which the Bill of Quantities relates.

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4.4 Errors in Bills of Quantities

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If the Priced 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;

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then —

- (i) in a 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 Main Contractor's Representative by the Subcontractor; and
- (ii) in a 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 Subcontractor by the Main Contractor's Representative,

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the lump sum accepted by the Main Contractor 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.

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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 Subcontract, measured in accordance with the method of measurement evidenced by the Subcontract.

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5 SECURITY, RETENTION MONEYS AND PERFORMANCE UNDERTAKINGS

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5.1 Purpose

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

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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.

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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.

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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 Subcontract Conditions is approved.

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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.

5.4 Time for Lodgment of Security

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

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 Subcontract in respect of the retention moneys and/or security; and
- (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.

5.6 Substitution of Security for Retention Moneys

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

*** 5.7 Reduction of Security and Retention Moneys**

Upon issue of the Certificate of Substantial Completion, the Main Contractor'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 percent thereof.

Subject to the first paragraph of Clause 5.7, if in the opinion of the Main Contractor's Representative it is reasonable to further reduce the Main Contractor's entitlement to security and retention moneys, that entitlement shall be reduced to the amount which the Main Contractor's Representative determines to be reasonable.

The Main Contractor shall, within 14 days of the Main Contractor's Representative making such a determination, release security and retention moneys in excess of the entitlement.

5.8 Release of Security

If the Subcontractor has provided additional security pursuant to Clause 42.4, the Main Contractor shall release that additional security within 21 days of incorporation into the Works of the unfixed plant or materials in respect of which the additional security was furnished.

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

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

5.9 Interest on Security and Retention Moneys

Alternative 1

A party holding retention moneys and/or cash security shall forthwith deposit the money 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 Main Contractor and the Subcontractor and shall be one from which moneys can only be drawn with the signatures of two persons, one appointed by each of the Main Contractor and the Subcontractor. The moneys shall be held until the Main Contractor or the Subcontractor is entitled to receive them.

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

Upon the Main Contractor or the Subcontractor 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 Main Contractor or the Subcontractor 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 Main Contractor has included in the Subcontract 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 such 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 Subcontract.

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

6 EVIDENCE OF SUBCONTRACT

6.1 Subcontract 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 Subcontract, 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 Subcontract.

6.2 Formal Instrument of Agreement

If the conditions of tender require a Formal Instrument of Agreement, the Main Contractor 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 Subcontractor with a request that it be executed.

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

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

The Main Contractor's Representative may extend the periods under Clause 6.2 by notice in writing to the parties.

The Main Contractor shall bear the cost of any stamp duty payable on the Subcontract.

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 Subcontract or last communicated in writing by that person to the person giving the notice, whichever is the earlier.

The Main Contractor, the Subcontractor and the Main Contractor's Representative shall each notify the others of a change of address.

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

8 SUBCONTRACT DOCUMENTS

8.1 Discrepancies

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

If the direction causes the Subcontractor to incur more or less cost than the Subcontractor 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 Main Contractor

The Main Contractor shall supply to the Subcontractor the number of copies stated in the Annexure, or if no number is stated then 3 copies of the Drawings, Specification, Bill of Quantities (if any) and other documents required by the Subcontract to be supplied to the Subcontractor by the Main Contractor.

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

8.4 Supply of Documents by Subcontractor

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

If the Subcontractor submits documents to the Main Contractor's Representative, then—

- (a) the Main Contractor's Representative shall not be bound to check the documents for errors, omissions or compliance with the requirements of the Subcontract; 10
- (b) notwithstanding the provisions of Clause 23, the Main Contractor's Representative's approval shall not relieve the Subcontractor from responsibility for the Subcontractor's errors or omissions or compliance with the requirements of the Subcontract; 15
- (c) if the Subcontract provides that the Subcontractor must obtain the Main Contractor's Representative'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 28 days) after receipt of the documents, the Main Contractor's Representative shall notify the Subcontractor that the documents are suitable or are not suitable; 20
- (d) if the Main Contractor's Representative notifies the Subcontractor that the documents are not suitable, the Main Contractor's Representative shall give reasons why the documents are not suitable, and the Subcontractor shall submit new or amended documents for the Main Contractor's Representative's direction under this Clause; 25
- (e) the Main Contractor's Representative shall not reject documents which are in accordance with the requirements of the Subcontract. 30

Copies of documents supplied by the Subcontractor shall be the property of the Main Contractor but shall not be used or copied otherwise than for the use, maintenance or alteration of the Works or the Main Contract Works by the Main Contractor, the Principal, the Superintendent and their identified consultants. 35

8.5 Availability of Documents

Whilst work under the Subcontract is being performed, one complete set of Drawings, Specification and other written information supplied by the Main Contractor, the Main Contractor's Representative and the Subcontractor shall be kept by the Subcontractor at the Site or other location approved in writing by the Main Contractor and shall be available at all times for reference by the Main Contractor, the Main Contractor's Representative and any persons nominated in writing by either of them. 40

During the manufacture or assembly of any significant part of the work under the Subcontract 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 Subcontractor at the place of manufacture or assembly and shall be available for reference by the Main Contractor, the Main Contractor's Representative and any person nominated in writing by either of them. 45

8.6 Confidential Information

Drawings, specifications and other information, samples, models, patterns and the like, supplied by either the Subcontractor or the Main Contractor and marked or otherwise identified as confidential shall be regarded as confidential, and shall not be disclosed to a third party other than the Principal, the Superintendent and their identified consultants for the purpose of the execution, use, maintenance or alteration of the Main Contract Works except with the prior agreement of the other party to the Subcontract. 55

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

*** 8.7 Media Releases**

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

9 ASSIGNMENT AND SECONDARY 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 Subcontract or any payment or any other right or benefit or interest thereunder.

9.2 Secondary Subcontracting

The Subcontractor shall not without the written approval of the Main Contractor's Representative which approval shall not be unreasonably withheld, subcontract or allow a secondary subcontractor to assign or subcontract work described in the Annexure.

With a request for approval the Subcontractor shall provide to the Main Contractor's Representative particulars in writing of the work to be subcontracted and the name and the address of the proposed secondary subcontractor.

The Subcontractor shall provide to the Main Contractor's Representative other information which the Main Contractor's Representative reasonably requests, including the proposed secondary subcontract documents without prices.

Within 28 days after a request by the Subcontractor for approval to subcontract work, the Main Contractor's Representative shall advise the Subcontractor of approval or the reasons why approval is not given.

Approval may be conditional upon the secondary subcontract including—

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

9.3 Subcontractor's Responsibility

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

10 SELECTED AND NOMINATED SECONDARY SUBCONTRACTORS

10.1 Definitions

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

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

‘Nominated Secondary Subcontractor’ means—

- (a) a secondary subcontractor to whom the Subcontractor is directed by the Main Contractor’s Representative to subcontract Nominated Secondary Subcontract Work; or
- (b) a secondary subcontractor named in the Subcontract with whom the Main Contractor has entered into a prior contract for the Nominated Secondary Subcontract Work, which prior contract requires the secondary subcontractor to assign the prior contract to the Subcontractor and a copy of which prior contract is included in the tender documents; or
- (c) a secondary subcontractor named in the Subcontract with whom the Main Contractor has entered into a prior contract for the Nominated Secondary Subcontract Work, which requires the secondary subcontractor to enter into deed of novation with the Subcontractor for the Nominated Secondary Subcontract Work and a copy of which deed of novation is included in the tender documents.

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

10.2 Selected Secondary Subcontract

If the Subcontract includes Selected Secondary Subcontract Work the Subcontractor shall subcontract the Selected Secondary Subcontract Work to a Selected Secondary Subcontractor.

If the tender documents specify the terms and conditions upon which the secondary subcontract is to be entered into, the secondary subcontract shall include those terms and conditions.

10.3 Nominated Secondary Subcontract

If the Subcontract includes Nominated Secondary Subcontract Work, at such time as is necessary to avoid delay to the Subcontractor, the Main Contractor’s Representative shall direct the Subcontractor to subcontract the Nominated Secondary Subcontract Work to a Nominated Secondary Subcontractor.

If the Subcontract provides that the Main Contractor may assign to the Subcontractor the benefit of a prior contract made between the Main Contractor and a Nominated Secondary Subcontractor, the Subcontractor shall, when directed by the Main Contractor’s Representative, accept the assignment of that prior contract.

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

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

- (a) that in respect of the Nominated Secondary Subcontract Work, the Nominated Secondary Subcontractor will undertake towards the Subcontractor obligations and liabilities which will enable the Subcontractor to discharge the Subcontractor’s obligations and liabilities to the Main Contractor under the terms of the Subcontract;

(b) that the Nominated Secondary Subcontractor will indemnify the Subcontractor against loss resulting from any failure by the Nominated Secondary Subcontractor to perform such obligations or fulfil such liabilities;

(c) that the Nominated Secondary Subcontractor will indemnify the Subcontractor against loss resulting from any negligence by the Nominated Secondary Subcontractor and the Nominated Secondary Subcontractor's servants and agents and against any misuse by them of any Constructional Plant or Temporary Works provided by the Subcontractor for the purposes of the secondary subcontract;

(d) that the Nominated Secondary 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 Subcontract;

(e) equivalent to those in Clause 44.

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

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

(i) the Subcontractor shall not be bound to discharge obligations and liabilities under the Subcontract to the extent that the secondary subcontract terms so specified by the Main Contractor's Representative are inconsistent with the discharge; and

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

10.4 Provisions applying generally to Selected and Nominated Secondary Subcontract Work

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

With the consent of the Subcontractor, the Main Contractor's Representative may direct the Subcontractor to perform Selected or Nominated Secondary Subcontract Work.

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

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

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

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

* 10.5 Direct Payment of Nominated Secondary Subcontractor

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

- (a) such payment shall be made on behalf of the Subcontractor; and
- (b) if the Subcontractor reasonably requests the Main Contractor in writing not to make a payment to the Nominated Secondary Subcontractor, the Main Contractor shall withhold payment but under no circumstances, including bankruptcy or winding up of the Subcontractor, shall payment be made to the Subcontractor.

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

10.6 Termination of Nominated Secondary Subcontract

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

11 PROVISIONAL SUMS

A provisional sum included in the Subcontract shall not itself be payable by the Main Contractor but where at the direction of the Main Contractor's Representative the work or item to which the provisional sum relates is performed or supplied by—

- (a) the Subcontractor, the work or item shall be valued under Clause 40.5;
- (b) a secondary subcontractor to the Subcontractor the Main Contractor shall pay the Subcontractor the amount payable by the Subcontractor to the secondary subcontractor for the work or item, disregarding any damages payable by the Subcontractor to the secondary 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 Subcontract; and
- (c) a Nominated Secondary Subcontractor pursuant to a prior contract made between the Main Contractor and a Nominated Secondary Subcontractor, the benefit of which has been assigned to the Subcontractor, the Main Contractor shall pay the Subcontractor the amount stated in the Annexure or the percentage for profit and attendance stated in the Annexure of the amount payable by the Main Contractor to the Nominated Secondary Subcontractor for the work or item or, where no amount or percentage is stated, as stated elsewhere in the Subcontract, disregarding any damages payable by the Main Contractor to the Nominated Secondary Subcontractor or vice versa.

The amount payable to a secondary subcontractor for materials or goods is to be taken to be the nett cost to the Subcontractor (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 Subcontractor at the time of the Subcontractor's tender if the Subcontractor had—
 - (i) examined all information made available in writing by the Main Contractor to the Subcontractor 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 Subcontract specifies to be Latent Conditions.

12.2 Notification

If during the execution of the work under the Subcontract, the Subcontractor becomes aware of a Latent Condition, the Subcontractor shall forthwith and where possible before the Latent Condition is disturbed, give written notice thereof to the Main Contractor's Representative.

If required by the Main Contractor's Representative, the Subcontractor shall provide to the Main Contractor's Representative 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 Subcontractor estimates to be necessary to deal with the Latent Condition;
- (c) the time the Subcontractor anticipates will be required to deal with the Latent Condition and the expected delay in achieving Substantial Completion;
- (d) the Subcontractor's estimate of the cost of the measures necessary to deal with the Latent Condition; and
- (e) other details reasonably required by the Main Contractor's Representative.

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 Subcontractor 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 Subcontractor 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 21 days before the date on which the Subcontractor gives the written notice required by the first paragraph of Clause 12.2.

13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

The Main Contractor warrants that unless otherwise provided in the Subcontract—

- (a) design; 5
 - (b) materials;
 - (c) documents; and 10
 - (d) methods of working,
- specified in the Subcontract or provided or directed by the Main Contractor or the Main Contractor's Representative will not infringe any patent, registered design, trademark or name, copyright or other protected right. 15

The Subcontractor warrants that any other design, materials, documents and methods of working provided by the Subcontractor will not infringe any patent, registered design, trademark or name, copyright or other protected right. 20

14 STATUTORY REQUIREMENTS

14.1 Complying with Statutory Requirements 25

The Subcontractor 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 Subcontract or any part thereof is carried out; 30
- (c) Ordinances, regulations, by-laws, orders and proclamations under the Acts and Ordinances; 35
- (d) persons acting in the exercise of statutory powers enabling them to give directions affecting the work under the Subcontract.

If a requirement is at variance with a provision of the Subcontract, as soon as the Subcontractor discovers the variance the Subcontractor shall notify the Main Contractor's Representative in writing specifying the difference. 40

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 Subcontract, the Main Contractor's Representative shall direct a variation under Clause 40.1. 45

Except to the extent that the Subcontract provides reimbursement in respect of a requirement referred to in Clause 14.1 the Subcontractor shall bear the cost of complying with the requirement, whether the requirement existed at the time of tendering or not. 50

* 14.2 Payment Where There is No Variation 50

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 55
- (b) a requirement referred to in Clause 14.1 (d),

which necessitates a change in the Temporary Works or the Subcontractor's method of working and thereby causes the Subcontractor to incur more or less cost than the Subcontractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5. 60

14.3 Notices and Fees 65

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

The Subcontractor shall pay any fees or charges necessary to comply with the requirements referred to in Clause 14.1. 70

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 Subcontractor 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 Subcontract, the fee or charge shall be reimbursed by the Main Contractor to the Subcontractor.

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

- (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 Main Contractor to the Subcontractor.

14.4 Documents Evidencing Approvals of Authorities

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

15 PROTECTION OF PEOPLE AND PROPERTY

Except to the extent that the Main Contractor is required by Clause 49 to provide things or take measures, in so far as compliance with the requirements of the Subcontract permits, the Subcontractor 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;
- (c) prevent nuisance and unreasonable noise and disturbance.

Without limiting the generality of the Subcontractor'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.

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

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

16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE

16.1 Care of the Work Under the Subcontract

From and including the earlier of the date of commencement of work and the date on which the Subcontractor is given access to the Site to 4 p.m. on the Date of Substantial Completion of the Works, the Subcontractor shall be responsible for the care of the work under the Subcontract.

Without limiting the generality of the Subcontractor's obligations, the Subcontractor 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 Subcontractor by the Main Contractor for the purpose of carrying out the work under the Subcontract, things brought on to the Site by secondary subcontractors for that purpose, the Works, the Temporary Works and Constructional Plant and the Subcontractor shall provide the storage and

protection necessary to preserve these items and things and the Works, the Temporary Works and Constructional Plant.

After 4 p.m. on the Date of Substantial Completion the Subcontractor shall remain responsible for the care of outstanding work and items to be removed from the Site by the Subcontractor and shall be liable for damage occasioned by the Subcontractor 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 the direct consequence, without fault or omission on the part of the Subcontractor, of an Excepted Risk defined in Clause 16.3) occurs to anything while the Subcontractor is responsible for its care, the Subcontractor shall at the Subcontractor'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, the Main Contractor, the Main Contractor's Representative or the employees, consultants or agents of any of them;
- (b) any risk specifically excepted in the Subcontract;
- (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 Subcontractor or the Subcontractor's employees or agents;
- (e) use or occupation by the Principal, the Main Contractor or the employees or agents of either of them or other contractors to the Principal or the Main Contractor (not being employed by the Subcontractor or a Nominated Subcontractor engaged by the Main Contractor pursuant to a prior contract the benefit of which has been assigned to the Subcontractor pursuant to the Subcontract) of any part of the Works or the Temporary Works;
- (f) defects in the design of the work under the Subcontract other than a design provided by the Subcontractor.

17 DAMAGE TO PERSONS AND PROPERTY OTHER THAN THE WORKS

17.1 Indemnity by Subcontractor

The Subcontractor shall indemnify the Main Contractor against—

- (a) loss of or damage to property of the Main Contractor, including existing property in or upon which the work under the Subcontract is being carried out;
- (b) claims by any person against the Main Contractor 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 Subcontractor of the work under the Subcontract, but the Subcontractor's liability to indemnify the Main Contractor shall be reduced proportionally to the extent that the act or omission of the Main Contractor or employees or agents of the Main Contractor 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 Subcontractor is limited by another provision of the Subcontract;