

Australian Standard™

**Subcontract conditions for design and
construct**



This Australian Standard was prepared by Committee OB-003, General Conditions of Contract. It was approved on behalf of the Council of Standards Australia on 7 September 1999. This Standard was published on 27 December 2000.

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Australian Standard™

Subcontract conditions for design and construct

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PREFACE

This Standard was prepared by the Joint Standards Australia/Standards New Zealand Committee OB/3, General Conditions of Contract.

This Standard incorporates Amendment No. 1 (March 2005). 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.

This Standard is the result of a consensus among Australian and New Zealand representatives on the Joint Committee to produce it as an Australian Standard.

AS 4903—2000 *General conditions of subcontract for design and construct* is a part of the suite of conditions of contract based on AS 4000—1997 *General conditions of contract*.

This Standard covers the following types of project procurement methods:

- (a) design and construct;
- (b) design development and construct; and
- (c) design, novate and construct.

If the project procurement method chosen for the main contract results in the subcontract incorporating design functions, then if the project procurement method is:

- (a) **design and construct**—the Main Contractor would provide the Main Contractor's project requirements, would not normally provide a detailed preliminary design and would not require novation;
- (b) **design development and construct**—the Main Contractor would provide the Main Contractor's project requirements, would always provide a preliminary design and accordingly would complete Annexure Part A Items 14 and 15;
- (c) **design, novate and construct**—the Main Contractor would provide the Main Contractor's project requirements, would always provide a preliminary design, would complete Annexure Part A Items 14 and 15 and would complete Annexure Part A Item 25 stating which secondary subcontract (including consultant's agreement) or selected secondary subcontract is to be novated to the Subcontractor.

Subclauses 8.6, 29.2 and 34.7A, prefixed by *, are optional, and may be omitted in the Contract, where necessary, without making consequential amendments but such omission should be clearly shown on the face of the document by striking out these subclauses or indicating clearly in clause 1 of Annexure Part E or elsewhere that they are *not to apply*. See paragraph (i) of clause 1 for the effect of stating deletions in Annexure Part E.

WARNINGS

- 1) This Standard is not recommended for use as part of the agreement between the Main Contractor and a consultant. AS 4904—2001 *Consultant's Agreement* has been developed for this purpose.
- 2) Users of this Australian Standard are warned that clause 15 (Damage to persons and property other than WUS) does not limit the liability of parties for special, indirect or consequential losses.

This unlimited liability applies notwithstanding any limitations or exclusions permitted under insurance clauses 16A (Insurance of WUS), 16B (Professional indemnity insurance) and 17 (Public liability insurance).

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

- 3) In relation to insurances, the parties should have regard to clause 16A regarding the availability during the tender period of a copy of the insurance policy in relation to WUS, and subclause regarding proof of evidence of insurances generally, before WUS commences under the Subcontract.
- 4) Main Contractors should ensure that their specific requirements are fully and completely incorporated in the Main Contractor's project requirements obtaining specialist advice if necessary. Where a Subcontractor provides a proposed design as part of its tender the parties should consider whether that design should form part of the Main Contractor's project requirements.
- 5) The risk allocation, drafting, interpretation and construction of this Standard are interrelated. Users who alter the Standard do so at their own risk and should obtain specialist advice as to whether it is suitable for a particular project.
- 6) Subcontractors should ensure that they satisfy the requirements of payment for unfixed plant and materials.
- 7) 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 for design and construct

1 Interpretation and construction of Subcontract

In the *Subcontract*, except where the context otherwise requires:

- Item** means an *Item* in Annexure Part A;
- 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;
- certificate of practical completion** has the meaning in subclause 34.6;
- compensable cause** means:
- (a) any act, default or omission of the *Subcontract Superintendent*, the *Main Contractor* or its consultants, agents or other contractors (not being employed by the *Subcontractor*);
 - (b) any act, default or omission of the *Superintendent*, the *Principal* or its consultants, agents or other contractors (not being employed by the *Subcontractor*); or
 - (c) those listed in *Item 35*;
- construction plant** means appliances and things used in the carrying out of *WUS* but not forming part of the *Subcontract Works*;
- date for practical completion** means:
- (a) where *Item 11(a)* provides a date for *practical completion*, the date;
 - (b) where *Item 11(b)* provides a period of time for *practical completion*, the last day of the period,
- but if any *EOT* for *practical completion* is directed by the *Subcontract Superintendent* or allowed in any arbitration or litigation, it means the date resulting therefrom;
- date of acceptance of tender** means the date which appears on the written notice of acceptance of the tender;
- date of practical completion** means:
- (a) the date evidenced in a *certificate of practical completion* as 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;

<i>deed of guarantee, undertaking and substitution</i>	has the meaning in subclause 5.6;
<i>defects</i>	has the meaning in clause 35 and includes omissions;
<i>defects liability period</i>	has the meaning in clause 35;
<i>design documents</i>	means the drawings, specifications and other information, samples, models, patterns and the like required by the <i>Subcontract</i> and created (and including, where the context so requires, those to be created by the <i>Subcontractor</i>) for the construction of the <i>Subcontract Works</i> ;
<i>direction</i>	includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;
<i>dispute</i>	has the meaning in clause 42;
<i>EOT (from 'extension of time')</i>	has the meaning in subclause 34.3;
<i>excepted risk</i>	has the meaning in subclause 14.3;
<i>final certificate</i>	has the meaning in subclause 37.4;
<i>final payment</i>	has the meaning in clause 37;
<i>final payment claim</i>	means the final payment claim referred to in subclause 37.4;
<i>intellectual property right</i>	means any patent, registered design, trademark or name, copyright or other protected right;
<i>latent condition</i>	has the meaning in subclause 25.1;
<i>legislative requirement</i>	includes: (a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where <i>WUS</i> or the particular part thereof is being carried out; (b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of <i>WUS</i>; and (c) fees and charges payable in connection with the foregoing;
<i>main contract</i>	means the agreement between the <i>Principal</i> and the <i>Main Contractor</i> ;
<i>main contract arbitrator</i>	has the meaning in subclause 42.4;
<i>main contract dispute</i>	has the meaning in clause 42;
<i>main contract works</i>	means the whole of the <i>work</i> to be carried out and completed in accordance with the <i>main contract</i> , including <i>variations</i> provided for by the <i>main contract</i> , which by the <i>main contract</i> is to be handed over to the <i>Principal</i> ;
<i>Main Contractor</i>	means the Main Contractor stated in <i>Item 1</i> ;

Main Contractor's project requirements means the *Main Contractor's* written requirements for the *Subcontract Works* described in the documents stated in *Item 14* which:

- (a) shall include the stated purpose for which the *Subcontract Works* are intended;
- (b) may include the *Main Contractor's* design, timing and cost objectives for the works; and
- (c) where stated in *Item 14*, shall include a *preliminary design*;

practical completion is that stage in the carrying out and completion of *WUS* when:

- (a) the *Subcontract Works* are complete except for minor defects:
 - (i) which do not prevent the *Subcontract Works* from being reasonably capable of being used for their stated purpose;
 - (ii) which the *Subcontract Superintendent* determines the *Subcontractor* has reasonable grounds for not promptly rectifying; and
 - (iii) the rectification of which will not prejudice the convenient use of the *Subcontract Works*;
- (b) those tests which are required by the *Subcontract* to be carried out and passed before the *Subcontract Works* reach *practical completion* have been carried out and passed; and
- (c) documents and other information required under the *Subcontract* which, in the *Subcontract Superintendent's* opinion, are essential for the use, operation and maintenance of the *Subcontract Works* have been supplied;

preliminary design means the documents stated in *Item 15*;

prescribed notice has the meaning in subclause 41.1;

Principal means the Principal to the *main contract* stated in *Item 7*;

progress certificate has the meaning in subclause 37.2;

provisional sum has the meaning in clause 3 and includes monetary sum, contingency sum and prime cost item;

public liability policy has the meaning in clause 17;

qualifying cause of delay means:

- (a) any act, default or omission of the *Subcontract Superintendent*, the *Main Contractor* or its consultants, agents or other contractors (not being employed by the *Subcontractor*);
- (b) any act, default or omission of the *Superintendent*, the *Principal* or its consultants, agents or other contractors (not being employed by the *Subcontractor*); or

- (c) other than:
 - (i) a breach or omission by the *Subcontractor*;
 - (ii) industrial conditions or inclement weather occurring after the *date for practical completion*; and
 - (iii) stated in *Item 32*;

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 in clauses 3 and 9 includes a *Subcontractor's consultant*;

security means:

- (a) cash;
- (b) retention moneys;
- (c) bonds or inscribed stock or their equivalent issued by a national, state or territory government;
- (d) interest bearing deposit in a bank carrying on business at the place stated in *Item 13(c)*;
- (e) an approved unconditional undertaking (the form in Annexure Part B is approved) or an approved performance undertaking given by an approved financial institution or insurance company; or
- (f) other form approved by the party having the benefit of the security;

selected secondary subcontract work has the meaning in subclause 9.3;

selected secondary subcontractor has the meaning in subclause 9.3;

separable portion means a portion of the *Subcontract Works* identified as such in the *Subcontract* or by the *Subcontract Superintendent* pursuant to clause 4;

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*;

Subcontract has the meaning in clause 6;

subcontract sum means:

- (a) where the *Main Contractor* accepted a lump sum, the lump sum;
- (b) where the *Main Contractor* accepted rates, the sum of the products ascertained by multiplying the rates by the corresponding quantities in the priced *bill of quantities* or *schedule of rates*; or
- (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*;

Subcontract Superintendent means the person stated in *Item 5* as the Subcontract Superintendent or other person from time to time appointed in writing by the *Main Contractor* to be the Subcontract Superintendent and notified as such in writing to the *Subcontractor* by the *Main Contractor* and, so far as concerns the functions exercisable by a *Subcontract Superintendent's Representative*, includes a *Subcontract Superintendent's Representative*;

Subcontract Superintendent's Representative means an individual appointed in writing by the *Subcontract Superintendent* under clause 21;

Subcontractor means the person bound to carry out and complete *WUS*;

Subcontractor's consultant means any person engaged by the *Subcontractor* to perform consultancy services in connection with *WUS* and includes any *Main Contractor's* consultant whose prior contract is novated to the *Subcontractor* under subclause 9.4;

Subcontractor's design obligations means all tasks necessary to design and specify the *Subcontract Works* required by the *Subcontract*, including preparation of the *design documents* and, if the documents stated in *Item 14* as describing the *Main Contractor's project requirements* include a *preliminary design*, developing the *preliminary design*;

Subcontractor's program has the meaning in clause 32;

Superintendent means the person stated in *Item 9* as the Superintendent or other person from time to time appointed in writing by the *Principal* to be the Superintendent under the *main contract* and notified as such in writing to the *Subcontractor* by the *Main Contractor* and, so far as concerns the functions exercisable under the *main contract* by a Superintendent's Representative, includes a Superintendent's Representative;

survey mark in clause 26 means a survey peg, bench mark, reference mark, signal, alignment, level mark or any other mark for the purpose of setting out, checking or measuring *WUS*;

temporary works means *work* used in carrying out and completing *WUS*, but not forming part of the *Subcontract Works*;

- test** has the meaning in subclause 30.1 and includes examine and measure;
- the Subcontract Works** means the whole of the *work* to be carried out and completed 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*;
- variation** has the meaning in clause 36;
- work** includes the provision of materials;
- WUS (from 'work under the Subcontract')** means the *work* which the *Subcontractor* is or may be required to carry out and complete under the *Subcontract* and includes *variations*, *remedial work*, *construction plant* and *temporary works*,
- and like words have a corresponding meaning.

In the *Subcontract*:

- (a) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or unincorporate;
- (b) time for doing any act or thing under the *Subcontract* shall, if it ends on a Saturday, Sunday or Statutory or Public Holiday, be deemed to end on the day next following which is not a Saturday, Sunday or Statutory or Public Holiday;
- (c) clause headings and subclause headings shall not form part of, nor be used in the interpretation of, the *Subcontract*;
- (d) 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;
- (e) communications between the *Main Contractor*, the *Subcontract Superintendent* and the *Subcontractor* shall be in the English language;
- (f) measurements of physical quantities shall be in legal units of measurement of the jurisdiction in *Item 12*;
- (g) unless otherwise provided, prices are in the currency in *Item 13(a)* and payments shall be made in that currency at the place in *Item 13(b)*;
- (h) the law governing the *Subcontract*, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in *Item 12*; and
- (i) if pursuant to Annexure Part E to these Subcontract Conditions, clauses or their parts in these Conditions are deleted, the *Subcontract* shall be read and construed as though the clause or its part has been deleted, whether or not that particular clause or its part has been struck from these Conditions.

2 Nature of Subcontract

2.1 Performance and payment

The *Subcontractor* shall carry out and complete *WUS* in accordance with the *Subcontract* and *directions* authorized by the *Subcontract*.

The *Main Contractor* shall pay the *Subcontractor*:

- (a) for *work* for which the *Main Contractor* accepted a lump sum, the lump sum; and
- (b) for *work* for which the *Main Contractor* accepted rates, the sum of the products 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*.

2.2 Subcontractor's warranties

Without limiting the generality of subclause 2.1, the *Subcontractor* warrants to the *Main Contractor* that:

- (a) the *Subcontractor*:
 - (i) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the carrying out and completion of *WUS*;
 - (ii) has examined any *preliminary design* included in the *Main Contractor's project requirements* and that such *preliminary design* is suitable, appropriate and adequate for the purpose stated in the *Main Contractor's project requirements*;
 - (iii) shall carry out and complete the *Subcontractor's design obligations* to accord with the *Main Contractor's project requirements* and, if subclause 9.4 applies, accept the novation and retain the *Main Contractor's consultants* for any *work* the subject of a prior contract with the *Main Contractor*; and
 - (iv) shall carry out and complete *WUS* in accordance with the *design documents* so that the *Subcontract Works*, when completed, shall:
 - (A) be fit for their stated purpose; and
 - (B) comply with all the requirements of the *Subcontract*; and
- (b) subject to clause 9, the *Subcontractor's consultants* identified in the *Subcontractor's tender* are suitably qualified and experienced.

2.3 Warranties unaffected

The warranties remain unaffected notwithstanding:

- (a) that design *work* (including the *preliminary design*) has been carried out by or on behalf of the *Main Contractor* and included in the *Main Contractor's project requirements*;
- (b) that the *Subcontractor* has entered into a novation of any prior contract between the *Main Contractor* and a *Main Contractor's consultant* under subclause 9.4 and thereafter has retained that consultant in connection with *WUS*;
- (c) any receipt or review of, or comment or *direction* on, the *design documents* by the *Subcontract Superintendent*; or
- (d) any *variation*.

2.4 Bill of quantities

The Alternative in *Item 16(a)* applies.

Alternative 1

A *bill of quantities* forms part of the *Subcontract* and shall be priced in accordance with subclause 2.5.

Alternative 2

A *bill of quantities* does not form part of the *Subcontract* and shall not be priced in accordance with subclause 2.5 unless so stated in *Item 16(b)*.

2.5 Priced bill of quantities

Where a *bill of quantities* is to be priced:

- (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 carrying out 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 *Subcontract Superintendent* before the expiration of the time for lodgement stated in *Item 16(c)* or such further time as may be directed by the *Subcontract Superintendent* 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.

If the aggregate amount in a priced *bill of quantities* does not equal the sum accepted for the *work*, the subject of the *bill of quantities*, the *Subcontract Superintendent* shall (unless the parties agree within 7 days of notification) determine an appropriate correction of errors and inconsistencies in rates and prices therein, so that the aggregate amount equals such sum.

2.6 Quantities

Quantities in a *bill of quantities* or *schedule of rates* are estimated quantities only.

The *Subcontract Superintendent* is not required to give a *direction* by reason of the actual quantity of an item required to perform the *Subcontract* being greater or less than the quantity shown in a *bill of quantities* which forms part of the *Subcontract* or *schedule of rates*.

2.7 Adjustment for actual quantities

Where, otherwise than by reason of a *direction* to vary *WUS*, the actual quantity of an item required to perform the *Subcontract* is greater or less than the quantity shown in a *bill of quantities* which forms part of the *Subcontract* or *schedule of rates*:

- (a) the *Main Contractor* accepted a lump sum for the item, the difference shall be a deemed *variation*;
- (b) the *Main Contractor* accepted a rate for the item, the rate shall apply to the greater or lesser quantities provided that where limits of accuracy for a quantity in a *schedule of rates* are stated in *Item 17*, the rate shall apply to the greater or lesser quantities within the limits, and quantities outside the limits shall be a deemed *variation*.

If such a *bill of quantities* or *schedule of rates* omits an item which should have been included, the item shall be a deemed *variation*.

Notwithstanding the preceding provisions of this subclause in respect of a *bill of quantities*, a *variation* shall not be deemed for actual quantities of an item pursuant to paragraph(a), or for an omitted item or any adjustment made for actual quantities of an item pursuant to paragraph(b), if the difference, the value of the omitted item or the adjustment respectively is less than \$400.

3 Provisional sums

A *provisional sum* included in the *Subcontract* shall not itself be payable by the *Main Contractor* but where pursuant to a *direction* the *work* or item to which the *provisional sum* relates is carried out or supplied by the *Subcontractor*, the *work* or item shall be priced by the *Subcontract Superintendent*, and the difference shall be added to or deducted from the *subcontract sum*.

Where any part of such *work* or item is carried out or supplied by a *secondary subcontractor*, the *Subcontract Superintendent* shall allow the amount payable by the *Subcontractor* to the *secondary subcontractor* for the *work* or item, disregarding:

- (a) any damages payable by the *Subcontractor* to the *secondary subcontractor* or vice versa; and
- (b) any deduction of cash discount for prompt payment,

plus an amount for profit and attendance calculated by using the percentage thereon stated in *Item 18* or elsewhere in the *Subcontract*, or, if not so stated, as assessed by the *Subcontract Superintendent*.

4 Separable portions

Separable portions may be directed by the *Subcontract Superintendent*, who shall clearly identify for each, the:

- (a) portion of the *Subcontract Works*;
- (b) *date for practical completion*; and
- (c) respective amounts for *security*, bonus, liquidated damages and delay damages (all calculated pro rata according to the ratio of the *Subcontract Superintendent's* valuation of the *separable portion* to the *subcontract sum*).

5 Security

5.1 Provision

Security shall be provided in accordance with *Item 19* or *20*. All delivered *security*, other than cash or retention moneys, shall be transferred in escrow.

5.2 Recourse

Security shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse.

5.3 Change of security

At any time a party providing retention moneys or cash *security* may substitute another form of *security*. To the extent that another form of *security* is provided, the other party shall not deduct, and shall promptly release and return, retention moneys and cash *security*.

5.4 Reduction and release

Upon the issue of the *certificate of practical completion* a party's entitlement to *security* (other than in *Item 19(e)*) shall be reduced by the percentage or amount in *Item 19(f)* or *20(d)* as applicable, and the reduction shall be released and returned within 14 days to the other party.

The *Main Contractor's* entitlement to *security* in *Item 19(e)* shall cease 14 days after incorporation into *the Subcontract Works* of the plant and materials for which that *security* was provided.

A party's entitlement otherwise to *security* shall cease 14 days after *final certificate*.

Upon a party's entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.

5.5 Trusts and interest

Except where held by a government department or agency or a municipal, public or statutory authority, any portion of *security* (and interest earned thereon) which is cash or retention moneys, shall be held in trust for the party providing them until the *Main Contractor* or the *Subcontractor* is entitled to receive them.

Interest earned on *security* not required to be held in trust shall belong to the party holding that *security*.

5.6 Deed of guarantee, undertaking and substitution

Where:

- (a) a party is a related or subsidiary corporation (as defined in the applicable corporations law of the jurisdiction); and
- (b) a form of *deed of guarantee, undertaking and substitution* was included in the tender documents,

that party shall, within 14 days after receiving a written request from the other party, provide such *deed of guarantee, undertaking and substitution* duly executed and enforceable.

6 Evidence of Subcontract

Until a formal instrument of agreement is executed by the parties, documents evidencing the parties' consensus shall constitute the *Subcontract*. If such *Subcontract* requires a formal instrument of agreement, the *Main Contractor* shall, within 28 days of the *date of acceptance of tender*, send it in duplicate for execution by the *Subcontractor*. Within 14 days after receiving them, the *Subcontractor* shall (if they are correct) properly execute both copies and return them.

Within 14 days after receiving them, the *Main Contractor* shall execute both copies, have them stamped as necessary and send one copy to the *Subcontractor*.

The *Subcontract Superintendent* may extend the time under this clause by written notice to the parties.

7 Service of notices

A notice (and other documents) shall be deemed to have been given and received:

- (a) if addressed or delivered to the relevant address in the *Subcontract* or last communicated in writing to the person giving the notice; and

- (b) on the earliest date of:
 - (i) actual receipt;
 - (ii) confirmation of correct transmission of fax; or
 - (iii) 3 days after posting.

8 Subcontract documents

8.1 Discrepancies

Figured shall prevail over scaled dimensions in a discrepancy. Otherwise, if either party discovers any inconsistency, ambiguity or discrepancy in any document prepared for the purpose of carrying out *WUS*, that party shall give the *Subcontract Superintendent* written notice of it. The *Subcontract Superintendent*, thereupon, and upon otherwise becoming aware, shall direct the *Subcontractor* as to the interpretation and construction to be followed.

The *Subcontractor* shall bear the cost of compliance with a *direction* under this subclause to the extent that any inconsistency, ambiguity or discrepancy in the *design documents* or between the *design documents* and the *Main Contractor's project requirements* necessitates the *direction*.

If compliance with any other *direction* under this subclause causes the *Subcontractor* to incur more or less cost than otherwise would have been incurred had the *direction* not been given, the difference shall be assessed by the *Subcontract Superintendent* and added to or deducted from the *subcontract sum*.

8.2 Main Contractor-supplied documents

The *Main Contractor* shall supply to the *Subcontractor* the documents and number of copies thereof, both stated in *Item 21*.

They shall:

- (a) remain the *Main Contractor's* property and be returned to the *Main Contractor* on written demand; and
- (b) not be used, copied nor reproduced for any purpose other than *WUS*.

8.3 Subcontractor-supplied documents

The *Subcontractor* shall supply to the *Subcontract Superintendent* the documents and number of copies at the times or stages stated in *Item 22*.

Other documents and information required by the *Subcontract*, unless elsewhere stated in the *Subcontract*, shall be supplied not less than 14 days before the *work* described in the documents is commenced and shall be in a form satisfactory to the *Subcontract Superintendent*.

If the *Subcontractor* submits a document to the *Subcontract Superintendent*, then except where the *Subcontract* otherwise provides:

- (a) the *Subcontract Superintendent* shall not be required to check that document for errors, omissions, inconsistencies, ambiguities, discrepancies or compliance with the *Subcontract*;
- (b) notwithstanding subclause 2.1, any *Subcontract Superintendent's* acknowledgment or approval shall not prejudice the *Subcontractor's* obligations; and
- (c) if the *Subcontract* requires the *Subcontractor* to obtain the *Subcontract Superintendent's direction* about that document, the *Subcontract Superintendent* shall

give, within the time stated in *Item 23*, the appropriate *direction*, including reasons if the document is not suitable.

A direction by the *Subcontract Superintendent* to vary anything in the *design documents* shall be a *variation* to *WUS* only to the extent that the *design documents*, before such *variation*, complied, or would have complied, with the *Main Contractor's project requirements*.

Except as otherwise provided in the *Subcontract*, copies of documents supplied by the *Subcontractor* shall be the *Main Contractor's* property but shall not be used nor copied otherwise than for the use, repair, maintenance or alteration of *the Subcontract Works*.

8.4 Availability

The *Subcontractor* shall keep available to the *Subcontract Superintendent* and the *Main Contractor*:

- (a) on *site*, one complete set of documents affecting *WUS* and supplied by a party or the *Subcontract Superintendent*; and
- (b) at the place of manufacture or assembly of any significant part of *WUS* off *site*, a set of the documents affecting that part.

8.5 Confidential information

The parties shall ensure that there are kept confidential such documents, samples, models, patterns and other information as are supplied and clearly identified as confidential.

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 *final certificate* or earlier termination of the *Subcontract*. If so required by the *Subcontractor*, the *Main Contractor* shall ensure that the *Subcontract Superintendent*, the *Principal* and the *Superintendent* also enter into such an agreement.

* 8.6 Media

The *Subcontractor* shall not disclose any information concerning the project for distribution through any communications media without the *Main Contractor's* prior written approval (which shall not be unreasonably withheld). The *Subcontractor* shall refer to the *Main Contractor* any enquiries from any media concerning the project.

9 Assignment and secondary subcontracting

9.1 Assignment

Neither party shall, without the other's prior written approval (including terms) assign the *Subcontract* or any payment or any other right, benefit or interest thereunder.

9.2 Secondary subcontracting generally

The *Subcontractor* shall engage and retain the consultants identified in the *Subcontractor's* tender.

The *Subcontractor* shall not without the *Subcontract Superintendent's* prior written approval (which shall not be unreasonably withheld):

* See Preface

- (a) subcontract or allow a *secondary subcontractor* to subcontract any *work* described in *Item 24*; or
- (b) allow a *secondary subcontractor* to assign a *secondary subcontract* or any payment or any other right, benefit or interest thereunder.

With a request for approval, the *Subcontractor* shall give the *Subcontract Superintendent* written particulars of the *work* to be subcontracted and the name and address of the proposed *secondary subcontractor*. The *Subcontractor* shall give the *Subcontract Superintendent* other information which the *Subcontract Superintendent* reasonably requests, including the proposed *secondary subcontract* documents without prices.

Within 21 days of the *Subcontractor's* request for approval, the *Subcontract Superintendent* shall give the *Subcontractor* written notice of approval or of 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 nor subcontract without the *Subcontractor's* written consent;
- (b) provisions which may be reasonably necessary to enable the *Subcontractor* to fulfil the *Subcontractor's* obligations to the *Main Contractor*;
- (c) provision that if the *Subcontract* is terminated and upon the *secondary subcontractor* being paid the sum certified by the *Subcontract Superintendent* as owing to the *secondary subcontractor*, the *Subcontractor* and the *secondary subcontractor* shall, after the *Main Contractor* has done so, promptly execute a deed of novation in the form of Annexure Part C.

For the purpose of effecting such novation only, the *Subcontractor* hereby irrevocably appoints the *Superintendent* under the *main contract* to be the *Subcontractor's* attorney with authority to execute such documents as are necessary to give effect to the novation and to bind the *Subcontractor* accordingly; and

- (d) where the *secondary subcontractor* is a *Subcontractor's consultant*, provision that the *secondary subcontractor* shall effect and maintain professional indemnity insurance on the same terms as are required under *Items 28(c)* and *28(d)*.

9.3 Selected secondary subcontract work

If the *Main Contractor* has included in the invitation to tender a list of one or more *selected secondary subcontractors* for particular *work*, the *Subcontractor* shall subcontract that *work* to a *selected secondary subcontractor* and thereupon give the *Subcontract Superintendent* written notice of that *selected secondary subcontractor's* name.

If no subcontractor on the *Main Contractor's* list will subcontract to carry out the *selected secondary subcontract work*, the *Subcontractor* shall provide a list for the written approval of the *Subcontract Superintendent*.

9.4 Novation

This subclause applies only where the *Main Contractor's project requirements* include a *preliminary design* or the *Subcontract* includes *selected secondary subcontract work*.

When directed by the *Main Contractor*, the *Subcontractor*, without being entitled to compensation, shall promptly execute a deed of novation in the form of Annexure Part D, such deed being between the *Main Contractor*, the *Subcontractor* and the *secondary subcontractor* or *selected secondary subcontractor* stated in *Item 25* for the particular part of the *preliminary design* or *selected secondary subcontract work*.

9.5 Subcontractor's responsibility

Except where the *Subcontract* otherwise provides, the *Subcontractor* shall be liable to the *Main Contractor* for the acts, defaults and omissions of *secondary subcontractors* (including *selected secondary subcontractors*) and employees and agents of *secondary subcontractors* as if they were those of the *Subcontractor*.

Approval to subcontract shall not relieve the *Subcontractor* from any liability or obligation under the *Subcontract*.

10 Intellectual property rights

10.1 Warranties and indemnities

The *Main Contractor* warrants that, unless otherwise provided in the *Subcontract*, the *Main Contractor's project requirements*, design, materials, documents and methods of working, each specified in the *Subcontract* or provided or directed by the *Main Contractor* or the *Subcontract Superintendent* shall not infringe any *intellectual property right*.

The *Subcontractor* warrants that any other design, materials, documents and methods of working, each provided by the *Subcontractor*, shall not infringe any *intellectual property right*.

Each party shall indemnify the other against such respective infringements.

10.2 Intellectual property rights granted to Main Contractor and Principal

The Alternative in *Item 26* applies.

Alternative 1

The *Subcontractor* grants to the *Main Contractor* and to the *Principal* irrevocable licences to use the *design documents* for *WUS*. Such licences shall also include any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the *Subcontract Works* and the copying of the documents for such purposes.

Alternative 2

Copyright and property in the *design documents* (and, as between the *Main Contractor* and the *Subcontractor*, any part of the *preliminary design* produced under a prior contract between the *Main Contractor* and a *Main Contractor's consultant* novated under subclause 9.4) hereby vest in the *Main Contractor*, and the *Main Contractor* grants to the *Subcontractor* an irrevocable licence to use the *design documents* for *WUS*. Such vesting shall not extend to components of the design which have been developed by the *Subcontractor* for general use in the *Subcontractor's work* and have not been specially developed for incorporation in the *design documents*.

The *Subcontractor* shall do everything necessary to perfect such vesting.

The *Subcontractor* shall ensure that the *design documents* are used, copied and supplied only for the purpose of *WUS*.

11 Legislative requirements

11.1 Compliance

The *Subcontractor* shall satisfy all *legislative requirements* except those in *Item 27(a)* and (b) or directed by the *Subcontract Superintendent* to be satisfied by or on behalf of the *Main Contractor*.

The *Subcontractor*, upon finding that a *legislative requirement* is at variance with the *Subcontract* or the *Main Contractor's project requirements*, shall promptly give the *Subcontract Superintendent* written notice thereof.

11.2 Changes

If a *legislative requirement*:

- (a) necessitates a change:
 - (i) to the *Main Contractor's project requirements*;
 - (ii) to the *Subcontract Works*;
 - (iii) to so much of *WUS* as is identified in *Item 27(c)*;
 - (iv) being the provision of services by a municipal, public or other statutory authority in connection with *WUS*; or
 - (v) in a fee or charge or payment of a new fee or charge;
- (b) comes into effect after the 14th day before the closing of tenders but could not reasonably then have been anticipated by a competent subcontractor; and
- (c) causes the *Subcontractor* to incur more or less cost than otherwise would have been incurred,

the difference shall be assessed by the *Subcontract Superintendent* and added to or deducted from the *subcontract sum*.

12 Protection of people and property

Insofar as compliance with the *Subcontract* permits, the *Subcontractor* shall:

- (a) take measures necessary to protect people and property;
- (b) avoid unnecessary interference with the passage of people and vehicles; and
- (c) prevent nuisance and unreasonable noise and disturbance.

If the *Subcontractor* damages property, the *Subcontractor* shall promptly rectify the damage and pay any compensation which the law requires the *Subcontractor* to pay.

If the *Subcontractor* fails to comply with an obligation under this clause, the *Main Contractor*, after the *Subcontract Superintendent* has given reasonable written notice to the *Subcontractor* and in addition to the *Main Contractor's* other rights and remedies, may have the obligation performed by others. The cost thereby incurred shall be certified by the *Subcontract Superintendent* as moneys due from the *Subcontractor* to the *Main Contractor*.

13 Urgent protection

If urgent action is necessary to protect *WUS*, other property or people and the *Subcontractor* fails to take the action, in addition to any other remedies of the *Main Contractor*, the *Subcontract Superintendent* may take the necessary action. If the action was action which the *Subcontractor* should have taken at the *Subcontractor's* cost, the *Subcontract Superintendent* shall certify the cost incurred as moneys due from the *Subcontractor* to the *Main Contractor*.

If time permits, the *Subcontract Superintendent* shall give the *Subcontractor* prior written notice of the intention to take action pursuant to this clause.

14 Care of the work and reinstatement of damage

14.1 Care of WUS

Except as provided in subclause 14.3, the *Subcontractor* shall be responsible for care of:

- (a) the whole of *WUS* from and including the date of commencement of *WUS* to 4:00 pm on the *date of practical completion*, at which time responsibility for the care of the *Subcontract Works* (except to the extent provided in paragraph (b)) shall pass to the *Main Contractor*; and
- (b) outstanding *work* and items to be removed from the *site* by the *Subcontractor* after 4:00 pm on the *date of practical completion* until completion of outstanding *work* or compliance with clauses 29, 30 and 35.

Without limiting the generality of paragraph (a), the *Subcontractor* shall be responsible for the care of unfixed items accounted for in a *progress certificate* and the care and preservation of things entrusted to the *Subcontractor* by the *Main Contractor* or brought onto the *site* by *secondary subcontractors* for carrying out *WUS*.

14.2 Reinstatement

If loss or damage, other than that caused by an *excepted risk*, occurs to *WUS* during the period of the *Subcontractor's* care, the *Subcontractor* shall, at its cost, rectify such loss or damage.

In the event of loss or damage being caused by any of the *excepted risks* (whether or not in combination with other risks), the *Subcontractor* shall to the extent directed by the *Subcontract Superintendent*, rectify the loss or damage and such rectification shall be a deemed *variation*. If loss or damage is caused by a combination of *excepted risks* and other risks, the *Subcontract Superintendent* in pricing the *variation* shall assess the proportional responsibility of the parties.

14.3 Excepted risks

The *excepted risks* causing loss or damage, for which the *Main Contractor* is liable, are:

- (a) any negligent act or omission of the *Superintendent*, the *Principal*, the *Subcontract Superintendent*, the *Main Contractor* or the consultants, agents, employees or other contractors (not being employed by the *Subcontractor*) of the *Principal* or the *Main Contractor*;
- (b) any risk specifically excepted elsewhere in the *Subcontract*;
- (c) war, invasion, acts 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 its *secondary subcontractors* or either's employees or agents;
- (e) use or occupation of any part of *WUS* by the *Principal*, the *Main Contractor* or the consultants, agents or other contractors (not being employed by the *Subcontractor*) of either of them; and
- (f) defects in the design of *WUS*, including the *preliminary design* provided by the *Main Contractor*, as is not warranted under clause 2.

15 Damage to persons and property other than WUS

15.1 Indemnity by Subcontractor

Insofar as this subclause applies to property, it applies to property other than *WUS*.

The *Subcontractor* shall indemnify the *Main Contractor* against:

- (a) loss of or damage to the *Principal's* or the *Main Contractor's* property including existing property in or upon which *WUS* is being carried out; and
- (b) claims in respect of personal injury or death or loss of, or damage to, any other property,

arising out of or as a consequence of the carrying out of *WUS*, but the indemnity shall be reduced proportionally to the extent that the act or omission of the *Superintendent*, the *Principal*, the *Subcontract Superintendent*, the *Main Contractor* or the consultants, agents or other contractors (not being employed by the *Subcontractor*) of the *Principal* or the *Main Contractor* may have contributed to the injury, death, loss or damage.

This subclause shall not apply to:

- (a) the extent that the *Subcontractor's* liability is limited by another provision of the *Subcontract*;
- (b) exclude any other right of the *Principal* or the *Main Contractor* to be indemnified by the *Subcontractor*;
- (c) things for the care of which the *Subcontractor* is responsible under subclause 14.1;
- (d) damage which is the unavoidable result of the construction of the *Subcontract Works* in accordance with the *Subcontract*; and
- (e) claims in respect of the *Main Contractor's* right to have *WUS* carried out.

15.2 Indemnity by Main Contractor

The *Main Contractor* shall indemnify the *Subcontractor* in respect of damage referred to in paragraph (d) of subclause 15.1 and claims referred to in paragraph (e) of subclause 15.1.

16A Insurance of the Subcontract Works

Before the *date of acceptance of tender*, the *Main Contractor* shall ensure that there is in force a policy of insurance in relation to loss or damage to *WUS* in the terms of the policy or proposed policy included in the documents on which the *Subcontractor* tendered or, if not so included, a copy of which was provided to the *Subcontractor* following receipt by the *Main Contractor* of a written request by the *Subcontractor* for a copy of the policy. The policy or proposed policy shall nominate or state the name of the insurer. The *Main Contractor* shall ensure that the policy is maintained while ever the *Subcontractor* has an interest in *WUS* and that all premiums are paid thereon.

16B Professional indemnity insurance

Before commencing *WUS*, the *Subcontractor* shall effect and maintain professional indemnity insurance with levels of cover not less than stated in *Item 28(a)*.

The insurance shall be maintained until the *final certificate* is issued and thereafter for the period stated in *Item 28(b)*.

The *Subcontractor* shall ensure that every *Subcontractor's consultant*, if within a category stated in *Item 28(c)*, shall effect and maintain professional indemnity insurance with levels of cover not less than stated in *Item 28(c)* applicable to that category.

Each such *Subcontractor's consultant's* professional indemnity insurance shall be maintained until the *final certificate* is issued and thereafter for the period as stated in *Item 28(d)*.

17 Public liability insurance

The Alternative in *Item 29(a)* applies.

Alternative 1: Main Contractor to insure

Before the *date of acceptance of tender*, the *Main Contractor* shall ensure that there is in force in relation to *WUS*, a *public liability policy* in the terms of the policy or proposed policy included in the documents on which the *Subcontractor* tendered or, if not so included, a copy of which was provided to the *Subcontractor* following receipt by the *Main Contractor* of a written request from the *Subcontractor* for a copy of the policy. The policy or proposed policy shall nominate or state the name of the insurer. The *Main Contractor* shall ensure that the policy is maintained while ever the *Subcontractor* has an interest in *WUS* and that all premiums are paid thereon.

Alternative 2: Subcontractor to insure

Before commencing *WUS*, the *Subcontractor* shall effect and maintain for the duration of the *Subcontract*, a *public liability policy*.

The policy shall:

- (a) be in the joint names of the *Principal*, the *Main Contractor* and the *Subcontractor*;
- (b) cover the:
 - (i) respective rights and interests; and
 - (ii) liabilities to third parties;
 of the parties, the *Principal*, *Superintendent*, *Subcontract Superintendent*, *Subcontractor's consultants* and *secondary subcontractors* from time to time, whenever engaged in *WUS*;
- (c) cover the parties' respective liability to each other for loss or damage to property (other than property required to be insured by clause 16A) and the death of or injury to any person (other than liability which the law requires to be covered under a workers compensation insurance policy);
- (d) be endorsed to cover the use of any *construction plant* not covered under a comprehensive or third party motor vehicle insurance policy;
- (e) provide insurance cover for an amount in respect of any one occurrence of not less than the sum in *Item 29(b)*; and
- (f) be with an insurer and otherwise in terms both approved in writing by the *Main Contractor* (which approvals shall not be unreasonably withheld).

18 Insurance of employees

Before commencing *WUS*, the *Subcontractor* shall insure against statutory and common law liability for death of or injury to persons employed by the *Subcontractor*. The insurance cover shall be maintained until completion of all *WUS*.

Where permitted by law, the insurance policy or policies shall be extended to provide indemnity for the *Main Contractor's* statutory liability to the *Subcontractor's* employees.

The *Subcontractor* shall ensure that all *Subcontractor's consultants* and *secondary subcontractors* have similarly insured their employees.

19 Inspection and provisions of insurance policies

19.1 Proof of insurance

Before the *Subcontractor* commences *WUS* and whenever requested in writing by the other party, a party liable to insure shall provide satisfactory evidence of such insurance effected and maintained.

Insurance shall not limit liabilities or obligations under other provisions of the *Subcontract*.

19.2 Failure to produce proof of insurance

If after being so requested, a party liable to insure fails promptly to provide evidence of satisfactory compliance, then without prejudice to other rights or remedies, the other party may insure and the cost thereof shall be certified by the *Subcontract Superintendent* as moneys due and payable from the party in default to the other party. Where the defaulting party is the *Subcontractor*, the *Main Contractor* may refuse payment until such evidence is produced by the *Subcontractor*.

19.3 Notices from or to insurer

The *Subcontractor* insuring under Alternative 2 of clause 17 shall ensure that the insurance policy contains provisions acceptable to the *Main Contractor* which:

- (a) requires the insurer to inform both parties, whenever the insurer gives a party or a *Subcontractor's consultant* or a *secondary subcontractor* a notice in connection with the policy;
- (b) provides that a notice of claim given to the insurer by either party, the *Subcontract Superintendent*, a *Subcontractor's consultant* or a *secondary subcontractor* shall be accepted by the insurer as a notice of claim given by both parties, the *Subcontract Superintendent*, the *Subcontractor's consultant* and the *secondary subcontractor*; and
- (c) requires the insurer, whenever the *Subcontractor* fails to maintain the policy, promptly to give written notice thereof to both parties and prior to cancellation of the policy.

19.4 Notices of potential claims

A party shall, as soon as practicable, inform the other party in writing of any occurrence affecting or arising out of *WUS* that may give rise to a claim under an insurance policy required by clause 16A or 17 and shall keep the other party informed of subsequent developments concerning the claim. The *Subcontractor* shall ensure that *Subcontractor's consultants* and *secondary subcontractors* in respect of their operations similarly inform the parties.

19.5 Settlement of claims

Upon settlement of a claim under the insurance required by clause 16A:

- (a) to the extent that reinstatement has been the subject of a payment or allowance by the *Main Contractor* to the *Subcontractor*, if the *Subcontractor* has not completed such reinstatement, insurance moneys received shall, if requested by either party, be paid into an agreed bank account in the joint names of the parties. As the *Subcontractor* reinstates the loss or damage, the *Subcontract Superintendent* shall certify against the joint account for the cost of reinstatement; and
- (b) to the extent that reinstatement has not been the subject of a payment or allowance by the *Main Contractor* to the *Subcontractor*, the *Subcontractor* shall be entitled