

# **Road Construction Contract**

## **C6830 General Conditions of Contract**

### **USER GUIDE**

#### **INSTRUCTIONS FOR USE**

The General Conditions of Contract are based on the Australian Standard AS 2124 - 1992 published by Standards Australia.

This guide is intended to be a guide only for any of the parties to a Contract using these General Conditions but do not form part of the Contract.

Amendments have been made, where necessary, to conform to the specific requirements of the Queensland Department of Main Roads and Government legislation.

In this User Guide, the text comprising the General Conditions of Contract has been printed only on the left hand pages. The opposite right hand pages contain a brief commentary on and/or description of selected clauses.

The original issue of this User Guide was produced in 1996 and referred to the August 1996 version of the Road Construction Contract (RCC), which was then current. There have been several subsequent versions of the RCC (viz. December 1999, November 2001, February 2002 and January 2004). The User Guide has therefore been revised to incorporate and comment on all of the important changes made to the RCC up to, and including, the September 2005 version.

In practice, no changes are to be made to the General Conditions of Contract unless authorised by General Manager (Engineering & Technology).

# General Conditions of Contract

## 1 CONSTRUCTION OF CONTRACT

The law governing the Contract, its interpretation, any agreement to arbitrate and the conduct of any arbitration or litigation, is the law of the State of Queensland.

Unless otherwise provided, prices are in Australian currency and payments shall be made in Australian currency at the place stated in Item 1 of the Annexure.

Communications between the Principal, the Superintendent and the Contractor 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 General Conditions of Contract are expressed to be alternatives and the Contract fails to state which alternative applies, the first alternative shall apply.

Where the Contractor is 2 or more persons, the Contract shall be binding upon them jointly and severally.

Any provision of the Contract which purports to or has the effect of limiting or excluding a liability of the Principal shall be construed as limiting or excluding that liability only to the extent permitted by law.

## 2 INTERPRETATION

In the Contract, except where the context otherwise requires —

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

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

‘Contract Duration’ means the number of calendar days between the Date of Acceptance of Tender and the Date for Practical Completion, or, where a period of time is provided in item 2 of the General Conditions of Contract Annexure Part A then it shall mean the period of time;

‘Contract Sum’ means —

- (a) where the Principal accepted a lump sum, the lump sum which includes the GST; or
- (b) where the Principal accepted rates, the sum ascertained by calculating the products of the rates and the corresponding

quantities in the Schedule of Rates and adding GST; or

- (c) where the Principal 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 Contract;

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

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

‘Date for Practical Completion’ means —

- (a) where Item 2 or Item 21 of the Annexure provides a date for Practical Completion, the date;
- (b) where Item 2 or Item 21 of the Annexure provides a period of time for Practical Completion, the last day of the period,

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

‘Date of Practical Completion’ means —

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

‘day’ means calendar day;

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

‘GST’ means the goods and services tax imposed under the GST Legislation. A reference to an amount of GST is reference to the GST liability in respect of the supply in question;

## 1 CONSTRUCTION OF CONTRACT

The law of the Contract is now stated as the law of the State of Queensland. The place for payments is specified in Item 1 of Part A of the Annexure.

Note that where Clauses have Alternatives, the first Alternative applies unless specified otherwise, usually in Part A of the Annexure. Clauses which have Alternatives are Clauses 18, 19, 42.4 and 47.2.

## 2 INTERPRETATION

The Clause contains definitions of common or important terms. Further definitions are found in the body of the Contract.

**Contract Sum:** The "Contract Sum" always remains the same as originally specified in the Contract and includes Provisional Sums (to which Clause 11 applies). The Contract Sum is never adjusted, but the amount payable under the Contract may vary subject to approved variations, the final value of Provisional Sums and the extended value of items in the Schedule of Rates.

**Contract Value:** The value of the contract excluding GST.

"Date for Practical Completion" means that date on which the Contractor is to achieve Practical Completion, taking into account any extensions of time granted to the Contractor under Clause 35.5. There will be a separate Date for Practical Completion for each Separable Portion.

"Date of Practical Completion" means the actual date on which the Contractor achieves Practical Completion. There will be a separate Date of Practical Completion for each Separable Portion.

"day" and "month" wherever mentioned mean calendar day and calendar month, respectively.

"Practical Completion" means:

- (a) the Works are complete except for minor omissions and minor defects which do not prevent the Works from being reasonably capable of being used for their intended purpose, which the Superintendent determines the Contractor need not promptly rectify and which will not prejudice the convenient use of the Works if not rectified;
- (b) all required tests have been carried out; and
- (c) documents essential for use, such as instruction manuals and maintenance manuals have been supplied as required by the Contract.

"provisional sum". Note the distinction between a provisional sum and the amounts in a Schedule of Rates for items described as "provisional", "provisional quantity" or "if ordered, provisional quantity" or Schedule of Rates items with a "P" or "PS" suffix.

**A provisional sum may be contained as an item in a Schedule of Rates.**

"Schedule of Prices" and "Schedule of Rates". The total of the Schedule of Prices, plus GST if applicable, will be equal to the Contract Sum. The Schedule of Prices may be comprised of the extended total value of a number of Schedules of Rates for the various sections of work to be carried out. Note that the rates for the items in a Schedule of Rates should not include GST.

"subcontractor" The definition has been simplified from that appearing in the 1996 version of the Contract and extended so that it now includes suppliers or hirers of materials, plant or equipment.

‘GST Legislation’ means the *A New Tax System (Goods and Services Tax) Act 1999*, associated legislation and any additional or substituted legislation providing for a value added tax, consumption tax, retail tax or other goods and services tax;

‘month’ means calendar month;

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

‘Practical Completion’ is that stage in the execution of the work under the Contract when —

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

‘Principal’ means the Principal stated in Item 3 of the Annexure;

‘provisional sum’ includes monetary sum, contingency sum and prime cost item, but does not include any amounts in a Schedule of Rates for items described or marked “provisional”, “provisional quantity” or “if ordered, provisional quantity” (or similar) or any amounts for numbered items in a Schedule of Rates which include the suffix “P” or “PS”;

‘Schedule of Prices’ means a schedule (other than a Schedule of Rates) which provides an itemised breakdown of the work under the Contract and which is priced by the Contractor in its tender, with the sum of the prices and the amount of GST totalling the Contract Sum and a Schedule of Prices may also include an itemised table of work related tasks for which the

Contractor is required to provide a unit rate in its tender;

‘Schedule of Rates’ means any schedule (other than a Schedule of Prices) included in the Contract which, in respect of any section or item of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices. The rates of payment should not include an amount of GST in respect of the work;

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

‘Site’ means the lands and other places to be made available as described in Item 4 of the Annexure and any other lands and places made available to the Contractor by the Principal for the purpose of the Contract;

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

‘subcontractor’ includes a supplier or hirer of materials, plant or equipment;

‘Superintendent’ means the person stated in Item 5 of the Annexure as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal and so far as concerns the functions exercisable by a Superintendent’s Representative, includes a Superintendent’s Representative;

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

‘supply’ has the meaning given in the GST Legislation;

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

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

## 2 INTERPRETATION (continued)

"Superintendent". Clause 23 deals with the power and obligations of the Superintendent. The Superintendent is required to be named in Part A of the Annexure A.

The definition states that the Superintendent is a person. However, a "person" is also defined and includes a firm or body corporate or unincorporate as well as an individual.

The Superintendent's Representative is a person and Clause 24 requires the person to be an individual.

"Supply" This is a new inclusion and is tied to the definition of "supply" under the GST Legislation.

"Works" and "work under the Contract". Note the difference between the use of these two terms. "Works" means the whole of the work the Contractor is to execute, including variations. "Work under the Contract" means the work that may or may not be required in order to complete the Works and includes Temporary Works.

**NOTE:** The definitions contained in Clause 2 are not exhaustive. Other definitions, as the Note states, are contained in other Clauses. Refer to Clause 5.13 "subsidiary" and "corporation", Clause 7 "notice", Clause 10.1 "Selected Subcontractor", "Nominated Subcontractor-", "Nominated Subcontract Work-", Clause 12.1 latent conditions", Clause 23 "direction", Clause 28.4 "survey mark, Clause 31.1 "test", Clause 33.2 4, construction program". In addition, Clause 40.1 defines a variation and Clause 46, a prescribed notice.

The Road Construction Contract has been drafted so as to be gender neutral.

In accordance with usual contractual drafting practice, words which are defined in Clause 2 and which have a specific meaning are always used with an initial capital letter in the text of the document. They are commonly called "defined terms" of the Contract. Other words such as day, month, person, provisional sum and work under the Contract, are not so identified.

Note also that the last paragraph makes it very clear that the use of "may" permits the Principal or Superintendent to do something, but is not obligatory. "Shall" makes the obligation mandatory.

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

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

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

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

Words importing a gender include every gender.

Where a provision in the Contract states that the Principal or the Superintendent 'may' do something, it shall be read as permitting, but not obliging, the Principal or the Superintendent (as applicable) to do that thing.

### 3 NATURE OF CONTRACT

#### 3.1 Performance and Description

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

The Contract shall be either —

- (a) a schedule of rates contract;
- (b) a lump sum contract; or
- (c) a part schedule of rates and part lump sum contract,

as stated in Item 6A of the Annexure.

For a schedule of rates contract, the Contractor shall be paid on a schedule of rates basis in accordance with Clause 3.2.

For a lump sum contract, the Contractor shall be paid on a lump sum basis in accordance with Clause 3.3.

A part schedule of rates and part lump sum contract shall include a lump sum part, consisting of that part of the Works defined in the Item 6B of the Annexure, and a schedule of rates part, consisting of the remainder of the Works. For the schedule of rates part of the Contract the Contractor shall be paid on a schedule of rates basis in accordance with Clause 3.2, and for the lump sum part of the Contract the Contractor shall be paid on a lump sum basis in accordance with Clause 3.3.

#### 3.2 Payment on Schedule of Rates Basis

The Principal shall pay the Contractor the sum ascertained by —

- (a) multiplying the measured quantity of each item of work actually carried out under the Contract by the rate accepted by the Principal for the item;
- (b) adjusting that sum by any additions or deductions made pursuant to the Contract; and
- (c) adding any GST in respect of the relevant supply.

Quantities in a Schedule of Rates are estimated quantities only and the Principal does not warrant, guarantee or make any representation with respect to the completeness, accuracy or adequacy of the items and quantities in a Schedule of Rates.

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

Where otherwise than by reason of a direction of the Superintendent to vary the work under the Contract, the actual quantity of an item required to perform the Contract is greater or less than the quantity shown in the Schedule of Rates, the rate shall apply to the greater or lesser quantities within the limits of accuracy stated in Clause 3.2 and quantities outside the limits shall be valued under Clause 40.5 as if they were varied work directed by the Superintendent as a variation.

The applicable limits of accuracy for the quantities in the Schedule of Rates shall be plus 10% and minus 10% unless otherwise stated in Item 6C of the Annexure. However total payment for a reduced quantity of work will not exceed the amount calculated by multiplying the quantity of work at the lower limit by the tendered rate.

If, in the opinion of the Superintendent, a Schedule of Rates omits an item which should have been included and the value of that item exceeds \$2,000, the provisions of Clause 8.1 shall apply.

If no rate or price is shown in a Schedule of Rates for an item, the rate or price for that item shall be deemed to have been included elsewhere in the Schedule of Rates.

#### 3.3 Payment on Lump Sum Basis

The Principal shall pay the Contractor for work for which the Principal accepted a lump sum, the lump sum (including GST) adjusted by any additions or deductions made pursuant to the Contract.

### 3 NATURE OF CONTRACT

#### 3.1 Performance and Descriptions

AS2124-1992 is designed to be used as a schedule of rates contract, a lump sum contract, or as a part schedule of rates contract and part lump sum contract with a Schedule of Rates. Payment on schedule of rates basis is dealt with in Clause 3.2 and payment on lump sum basis is dealt with in Clause 3.3.

#### 3.2 Payment on Schedule of Rates Basis

Adjustments to items which are included in a Schedule of Rates are dealt with in two ways as follows:

- (a) Where a lump sum has been accepted for an item and the scope of work required under this item is changed, any difference in the quantity is to be valued under Clause 40.5 as though it were a variation.
- (b) Where a rate for the item has been accepted, the rate shall apply to the greater or lesser quantities within the limits of accuracy. Unless stated otherwise in the Annexure, the limits of accuracy are taken to be  $\pm 10\%$ . The rate as tendered will only apply within that limit of accuracy and if the quantity exceeds the limit of accuracy specified then the excess shall be valued as a variation or, if the quantity is less, the whole reduced quantity shall be valued as a variation.

Note that there is a restriction on the total payment for a reduced quantity of work when valued as a variation such that the payment may not exceed that which would have applied if the quantity at the lower limit had been carried out.

Note also that there is a caveat on the application of the limits of accuracy expressed in the first sentence of paragraph 4, viz.

*“Where otherwise than by reason of a direction of the Superintendent to vary the Work under the Contract, ...”*

Variations must be valued under the processes of Clause 40.5.

#### 3.3 Payment on a Lump Sum Basis

The Schedule of Prices may be used for the valuation of variations insofar as it is relevant for that purpose and in the establishment of the appropriate value of payment claims. Note that under this arrangement work completed is estimated as a % of the whole work.

Items in a Schedule of Prices should describe larger parcels of work, e.g. Bridge Deck. No quantities should be included.

A schedule of rates for variations can be included for such work as pile extension, rock, etc. Again no quantities should be given.

A Schedule of Prices may be used for the purposes of valuation of variations pursuant to Clause 40.5 and for the valuation of claims for payment under Clause 42.1. The Principal does not warrant, guarantee or make any representation with respect to the completeness, accuracy or adequacy of the sections and items in a Schedule of Prices and the Principal shall have no liability to the Contractor (whether in contract, tort or otherwise) arising out of or in connection with any errors in or omissions from the Schedule of Prices.

### 3.4 Rise and Fall

Unless stated otherwise in Item 6D of the Annexure, the moneys payable to the Contractor under the Contract shall not be subject to adjustment for rise and fall in costs.

Where the Contract Duration is equal to, or more than, 365 calendar days, the moneys payable to the Contractor under the Contract shall be subject to adjustment for rise and fall in accordance with Clause 3.1 of the Supplementary Conditions of Contract.

### 3.5 Sales Tax Exemption to Government Departments

Materials, plant and equipment for incorporation into the Works are exempt from payment of sales tax under the Sales Tax (Exemptions and Classifications) Act.

## 4 NOT USED

## 5 SECURITY AND RETENTION MONEYS

### 5.1 Definitions

In Clause 5 —

‘Act’ means the *Subcontractors’ Charges Act 1974* and any Regulations thereunder and includes any amendments to that Act and those Regulations;

‘Claim of Charge’ means any claim which —

- (a) purports to be a claim of charge under the Act;
- (b) is made by any person who purports to be one of the Contractor’s subcontractors (and not a subsubcontractor); and
- (c) purports to be in connection with the performance by that person of any of the work under the Contract;

‘Notice of Claim of Charge’ means a notice which purports to be a notice of claim of charge pursuant to the Act and which is given by a person who purports to be one of the

Contractor’s subcontractors (and not a subsubcontractor);

‘Primary Security’ means the security provided under Clause 5.3 (a) and any further security provided as directed under Clause 5.9 and in each case includes any moneys resulting from the conversion into money of any part of that security which did not originally consist of money;

‘Retention Moneys’ means the retention moneys withheld by the Principal under Clause 42.3;

‘Retention Security’ means the security provided under Clause 5.4 and any further security provided as directed under Clause 5.9 and in each case includes any moneys resulting from the conversion into money of any part of that security which did not originally consist of money;

‘Subcontractor Payment Security’ means the security provided under Clause 5.3 (b)(i) and any further security provided as directed under Clause 5.9 and in each case includes any moneys resulting from the conversion into money of any part of that security which did not originally consist of money;

‘Subcontractors’ Trust Account’ means the account established by the Contractor under Clause 5.6;

the expression ‘have recourse to’ in relation to any security mentioned in Clause 5 includes converting that security into money.

### 5.2 Purpose

The Primary Security, the Retention Moneys and the Retention Security are, subject to the provisions of Clause 5, for the purpose of (in order of priority) —

- (a) ensuring the due and proper performance of the Contract by the Contractor (including, but not limited to, the satisfaction of any debts due from the Contractor to the Principal and any claims which the Principal may have against the Contractor); and
- (b) satisfying Claims of Charge as provided in Clause 5.9.

The Subcontractor Payment Security is, subject to the provisions of Clause 5, for the purpose of (in order of priority) —

- (i) satisfying Claims of Charge as provided in Clause 5.9; and
- (ii) ensuring the due and proper performance of the Contract by the Contractor (including,

### 3.4 RISE AND FALL

See comments in SCoC for details of changes made in the September 2005 version.

## 5 SECURITY AND RETENTION MONEYS

The provisions in this Clause are substantially different to AS2124-1992 and reflect the requirements of the Queensland Government and the Department of Main Roads.

### 5.1 Definitions

Note that the definitions of a "Claim of Charge and a "Notice of Claim of Charge" have been amended since the 1996 version such that a claim can now only be made by, and a Notice can now only be given by, a subcontractor and not a subsubcontractor.

Note that there are three (3) types of security:

- (a) Primary Security;
- (b) Retention Security;
- (c) Subcontractor Payment Security.

### 5.2 Purpose

The purpose of Primary Security, Retention Moneys and Retention Securities is to ensure the due and proper performance of the Contract. The satisfaction of any Claims of Charge from these securities ranks second in importance to satisfying debts due from the Contractor to the Principal and any claims which the Principal might have against the Contractor.

Note the difference in purpose compared to that of the Subcontractor Payment Security.

The purpose of the Subcontractor Payment Security is firstly to satisfy Claims of Charge and secondly for the due and proper performance of the Contract (including the satisfaction of debts due from the Contractor to the Principal etc.)

### 5.3 Provision of Security

Primary Security and Subcontractor Payment Security must be lodged within 14 days of the Date of Acceptance of Tender if option (b)(ii) has not been exercised.

The details in (b)(i) provide for the Subcontractor Payment Security to be a reducing percentage of the Contract Sum for larger Contract Sums. The amount varies from 5% of the Contract Sum to the greater of 2% of the Contract Sum or \$600,000.

If a Contractor initially exercises option (b)(iii), this situation may change during the execution of the Works and should be monitored. See Form C6847 for the Department's standard Statutory Declaration.

Note that since the September 2005 version, the establishment of a Subcontractors' Trust Account is no longer an option for providing the Subcontractors' Payment Security. A contractor may still establish this account for his own purposes but the establishment of the account no longer constitutes provision of the required security under this clause.

- (iii) but not limited to, the satisfaction of any debts due from the Contractor to the Principal and any claims which the Principal may have against the Contractor).

### 5.3 Provision of Security

Within 14 days of the Date of Acceptance of Tender, the Contractor shall lodge with the Principal —

- (a) security (Primary Security) in an amount equal to 1% of the Contract Sum; and

- (b) any of the following —

further security ( Subcontractor Payment Security) in an amount calculated in accordance with the following —

- where the Contract Sum is not greater than \$1,000,000, the amount shall be 5% of the Contract Sum;
  - where the Contract Sum is greater than or equal to \$1,000,000 but not greater than \$5,000,000, the amount shall be 4% of the Contract Sum or \$50,000, whichever is the greater;
  - where the Contract Sum is greater than or equal to \$5,000,000 but not greater than \$20,000,000, the amount shall be 3% of the Contract Sum or \$200,000, whichever is the greater;
  - where the Contract Sum is greater than or equal to \$20,000,000, the amount shall be 2% of the Contract Sum or \$600,000, whichever is the greater;
- (i) a statutory declaration in the form included in the tender documents (Form C6847) declaring that no subcontractors are to be engaged under the Contract.

### 5.4 Substitution of Security for Retention Moneys

The Contractor may at any time with the prior written consent of the Principal (which consent the Principal may give or withhold in its absolute discretion), lodge with the Superintendent a further security in an amount equal to 5% of the Contract Sum.

If the Contractor provides such security, the Principal shall, to the extent of that security —

- (a) not deduct retention moneys under Clause 42.3; and
- (b) forthwith release any retention moneys previously deducted under Clause 42.3.

### 5.5 Form of Security

The Primary Security, the Retention Security and the Subcontractor Payment Security shall in each case be any of the following —

- (a) cash;
- (b) an unconditional irrevocable bank guarantee in the forms included in the tender documents (Forms C6840, C6841, C6842, C6855) and from a bank approved by the Principal; or
- (c) an unconditional irrevocable insurance bond in the forms included in the tender documents (Forms C6843, C6844, C6845, C6856) and from an insurance company approved by the Principal.

A guide to the type of bank or insurance company that the Principal may approve is set out in Item 7A of the Annexure. However, notwithstanding what is set out there, the approval or otherwise of a bank or an insurance company for the purposes of this Clause 5.5 shall be in the absolute discretion of the Principal.

If an insurance company which has given an insurance bond under this Clause 5.5 fails to maintain a rating equal to or better than that set out in Item 7A of the Annexure, the Contractor shall, forthwith upon being requested by the Principal to do so, substitute that insurance bond —

- (i) with a bank guarantee in the same amount and in the form prescribed in Clause 5.5(b) and from a bank approved by the Principal; or
- (ii) with an insurance bond in the same amount and in the form prescribed in Clause 5.5(c) and from a different insurance company approved by the Principal.

The costs of and incidental to providing each security (including, without limitation, all stamp duty and other taxes payable in respect of the security) shall be borne by the Contractor.

### 5.6 Subcontractors' Trust Account

If the Contractor intends to use a Subcontractors' Trust Account, it shall —

- (a) establish a bank account called "Subcontractors' Trust Account" or use a bank account called "Subcontractors' Trust Account" which has been specifically established for use on other contracts with

#### **5.4 Substitution of Security for Retention Moneys**

The Contractor has the right at any time to substitute security for retention moneys, subject to the prior written consent of the Principal. However, the Principal is not obliged to give consent if it has some reason for wishing to retain retention money rather than hold increased security.

#### **5.5 Form of Security**

An unconditional irrevocable bank guarantee is one acceptable form of security. Versions of the Contract subsequent to 1996 require the guarantee to be issued by a bank, not a “financial institution approved by the Principal” as previously.

Note also that an unconditional insurance bond from an approved insurance company (not a “financial institution”) is now an acceptable form of security for the Department. This form of security is also acceptable under AS2124-1992

Item 7A of the Annexure gives guidelines as to the acceptability of a bank or insurance company, but approval is at the absolute discretion of the Principal.

- (b) the Principal and which is not used for any purpose other than those described in Clause 5.6;
- (c) establish and properly maintain such books of account as may be necessary to identify, separately for each of the Contractor's subcontractors —
  - (i) the amounts of cash security and retention moneys from time to time received or withheld from the subcontractors; and
  - (ii) the amounts from time to time deposited to and held in the Subcontractors' Trust Account;
- (d) forthwith upon —
  - (i) receiving any cash security from a subcontractor pursuant to the terms of a subcontract; or
  - (ii) withholding any retention moneys from a subcontractor pursuant to the terms of a subcontract,deposit to the Subcontractors' Trust Account, an amount equal to the amount so received or retained;
- (d) hold all moneys deposited to the Subcontractors' Trust Account upon trust for the benefit of the respective subcontractors from whom the moneys were received or retained and only deal with those moneys in accordance with the terms of the applicable subcontracts or as otherwise required or permitted by law;
- (e) hold all other security provided to it by its subcontractors (including but not limited to any security provided in lieu of retention) upon trust for the benefit of the respective subcontractors who provided such security and only deal with such security in accordance with the terms of the applicable subcontracts or as otherwise required or permitted by law; and
- (f) provide all records described under Clause 5.6 to the Principal for inspection and copying upon reasonable notice in writing.

### 5.7 Conversion of Security

The Principal may convert into money at any time, such part of the Primary Security, the Retention Security and/or any additional security provided pursuant to Clause 42.4 that does not consist of money, and the Principal may do so whether or not it is entitled to exercise a right under the Contract in respect of the security.

The Principal shall not be liable in any way for any loss occasioned by the conversion of any security into money whether that conversion is done pursuant to Clause 5.7 or any other clause.

### 5.8 Recourse to Security and Retention Moneys

The Principal may have recourse to the Primary Security, the Retention Moneys and/or the Retention Security in either or both of the following cases, namely —

- (a) where the Principal has become entitled to exercise a right under the Contract in respect of any such security and/or Retention Moneys;
- (b) where the Principal has received a Notice of Claim of Charge.

The Principal may have recourse to the Subcontractor Payment Security in either or both of the following cases, namely —

- (i) where the Principal has received a Notice of Claim of Charge;
- (ii) where the Principal has otherwise become entitled to exercise a right under the Contract in respect of that security (and notwithstanding any other provision of the Contract, the Principal shall not be so entitled until 3 months after the date of issue of the Final Certificate, and even then, the Principal shall only be so entitled if it has exercised its powers under Clause 5.9 (b) in respect of any Notices of Claim of Charge which it has received).

Nothing in Clause 5.8 or in Clause 5.9 or in any other part of Clause 5 shall limit Clause 5.7 or oblige the Principal to have recourse to any security and/or Retention Moneys where the Principal has received a Notice of Claim of Charge.

### 5.9 Notice of Claim of Charge Received

Where the Principal has received a Notice of Claim of Charge, the moneys mentioned in Clauses 5.9(i) to (vi) —

- (a) shall for the purposes of Section 5(1) of the Act, be deemed to be moneys payable to the Contractor by the Principal under the Contract; and
- (b) may in respect of any Notice of Claim of Charge, be retained by the Principal in accordance with Section 11(1) of the Act or be used by the Principal to make a payment into court under Section 11(5) of the Act.

## 5.6 Subcontractors' Trust Account

Note also the payment recording system for subcontractors referred to in Clause 43.

These are different procedures as required by the Queensland Government and are not found in AS2124 - 1992. Principals, Superintendents and Contractors will need to become familiar with them.

The Superintendent should ensure that the Principal is aware of its rights for inspection and copying as set out in Clause 5.6 (f)

## 5.7 Conversion of Security

The Principal's powers are very wide and the Principal does not need to give notice to the Contractor or the financial institution.

The Principal's powers must be exercised with considerable care.

## 5.8 Recourse to Security and Retention Moneys

The right to have access to security or retention moneys occurs when a party becomes entitled to exercise a right in relation to retention moneys or security. There is no requirement in this Clause, or the Contract generally, to give any notice of intention to have recourse to security.

The receipt of a Notice of Claim of Charge provides the entitlement for the Principal to have recourse to the Primary Security, Retention Security or the Subcontractor Payment Security.

See SL 040 for a form of Notice of Principal's Intention to have Recourse to Retention Moneys.

See SL 041 for a form of Notice of Principal's Intention to have Recourse to Retention Moneys Held in Security.

See SL 042 for a form of Notice of Principal's Intention to have Recourse to Subcontract Payment Security.

## 5.9 Notice of Claim of Charge Received

Upon receipt by the Principal of a Notice of Claim of Charge, the Superintendent should exercise its powers under Clause 5.6(f) and inspect the payment recording system established under Clause 43 for all subcontractors and take copies as appropriate.

The moneys mentioned in the first paragraph of this Clause 5.9 are —

- (i) such part of the Subcontractor Payment Security as consists of cash;
- (ii) the moneys resulting from the conversion into money of any part of the Subcontractor Payment Security that did not consist of money;
- (iii) such part of the Primary Security as consists of cash (but only the balance thereof remaining after the Principal has exercised all of its rights against such moneys);
- (iv) the moneys resulting from the conversion into money of any part of the Primary Security that did not consist of money (but only the balance thereof remaining after the Principal has exercised all of its rights against such moneys);
- (v) the balance of the Retention Moneys after the Principal has exercised all of its rights against such moneys;
- (vi) the moneys resulting from the conversion into money of any part of the Retention Security that did not consist of money (but only the balance thereof remaining after the Principal has exercised all of its rights against such moneys).

If any part of the Primary Security, the Retention Security, the Subcontractor Payment Security, the moneys resulting from the conversion into money of any of those securities or the Retention Moneys is retained by the Principal or paid into court as provided in Clause 5.9(b), the Contractor shall within 14 days of being directed to do so by the Principal, lodge a further security for an amount equal to the amount so retained or paid into court. If the Contractor fails to provide such further security within the stated time, the Principal may deduct from any moneys otherwise due to the Contractor, an amount equal to the amount of the further security required by this Clause 5.9 and such deduction shall become part of the Primary Security, the Retention Security or the Subcontractor Payment Security (as the case requires).

### **5.10 Reduction of Security and Retention Moneys**

Upon the issue of the Certificate of Practical Completion, the Principal's entitlement to —

- (a) the Primary Security;
- (b) the Retention Moneys; and
- (c) the Retention Security

shall be reduced to the percentage thereof stated in Item 7B of the Annexure or, if no percentage is stated, the Primary Security shall not be reduced and the Retention Moneys and the Retention Security shall each be reduced to 20 per cent thereof.

Subject to the first paragraph of Clause 5.10, if in the opinion of the Superintendent it is reasonable to further reduce the Principal's entitlement to the Primary Security, the Retention Moneys and/or the Retention Security, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.

The Principal shall, within 14 days of the Superintendent making such a determination, release the Primary Security, the Retention Moneys and/or the Retention Security (as the case requires) in excess of the entitlement determined by the Superintendent.

### **5.11 Release of Security**

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

Where the Final Certificate certifies a balance owing by the Principal to the Contractor, the Principal shall, subject to the provisions of Clause 5 —

- (a) within 14 days of the issue of the Final Certificate, release to the Contractor any Primary Security, Retention Security or Retention Moneys then held by the Principal; and
- (b) within 4 months after the issue of the Final Certificate, release to the Contractor any Subcontractor Payment Security then held by the Principal.

### **5.12 Interest on Security and Retention Moneys**

The Principal shall own any interest earned on —

- (a) any Primary Security, Retention Security, Subcontractor Payment Security and/or additional security provided under Clause 42.4 which is cash or which is converted into money; and
- (b) any Retention Moneys.

The Principal does not hold any such security, converted moneys or Retention Moneys upon any trust for the Contractor or any other party.

### 5.10 Reduction of Security and Retention Moneys

There are no guidelines as to what circumstances warrant the Superintendent's certifying a further release of security. Under normal circumstances for a Road Construction Contract there will be no need to reduce security to less than what is provided for in the Contract. Note that all versions of the Contract other than 1996 state that, if no percentage is stated in Item 7B of the Annexure, the Primary Security shall NOT be reduced. The early version provided for a 50% reduction. The 80% reduction in retention at Practical Completion has been agreed with industry. A Superintendent would need to be extremely careful that any action by him to further reduce retention was in fact "reasonable" to both parties to the Contract.

### 5.11 Release of Security

The Principal is required to release all security provided for unfixed materials under Clause 42.4 within 14 days of incorporation of those materials into the Works and, in relation to the balance of other securities, within 14 days of the issue of the Final Certificate under Clause 42.8. Note that the scope of unfixed items has been increased to include "equipment" as well as materials and plant. Clause 5.10, which deals with the reduction of security or retention moneys, should be noted. Any Subcontractor Payment Security which is held by the Principal is not released until 4 months after the issue of the Final Certification. See also Forms 3A, 3B and 3C in Annex 1 noted under Clause 5.8.

### 5.12 Interest on Security and Retention Moneys

The Clause provides that the Contractor does not have any entitlement to any interest which may be earned on security or retention moneys.

### 5.13 Deed of Guarantee, Undertaking and Substitution

This Clause:

- (a) requires the form of the Deed to be provided by the Principal in the tender documents; and
- (b) enables the Principal to require the Contractor to provide a Deed from its parent company, if appropriate. Note that the earliest version of the Contract referred to "a party" and "the other party". This has been amended in later versions to provide only for the Contractor providing the Deed to the Principal.

It is important to observe the time requirements stated in the Clause. Within 7 days of the Date of Acceptance of Tender the Principal must request the Contractor to execute the Deed. The Contractor must execute the Deed within 14 days of the request being made.

See C6848 in Part 8 for a Deed of Guarantee, Undertaking and Substitution as used by the Department of Main Roads.

### 5.13 Deed of Guarantee, Undertaking and Substitution

Where —

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

the Contractor shall, if requested by the Principal in writing within 7 days after the Date of Acceptance of Tender lodge with the Principal within 14 days after that request having been made a Deed of Guarantee, Undertaking and Substitution in the form included in the tender documents (Form C6848) duly executed by the Contractor and that other corporation for the performance of the obligations and the discharge of the liabilities of the Contractor under or arising out of the Contract.

For the purpose of Clause 5.13, the terms 'corporation' and 'subsidiary' have the meanings defined in the *Corporations Law*.

## 6 EVIDENCE OF CONTRACT

### 6.1 Contract in Absence of Formal Instrument of Agreement

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

### 6.2 Formal Instrument of Agreement

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

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

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

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

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

Notwithstanding any other provision of the Contract, and without prejudice to any other right or remedy which the Principal may have, if the Contractor has failed to comply with Clause 6.2, the Principal may refuse payment until the Contractor complies with Clause 6.2.

### 6.3 Collusive Arrangements

The Contractor warrants and represents to the Principal that —

- (a) it had no knowledge of the tender price of any other tenderer for the work under the Contract at time of its submission of tender;
- (b) except as disclosed in its tender, it has not entered into any contract, arrangement or understanding to pay or allow any money directly or indirectly to a trade or industry association (above the published standard membership fee) or to or on behalf of any other tenderer in relation to this tender or any contract to be entered into consequent thereon, nor paid or allowed any money on that account, nor will it pay or allow any money on that account;
- (c) except by prior agreement with the Principal it has not paid or allowed or entered into any contract, arrangement or understanding to pay or allow any money directly or indirectly to or on behalf of any other tenderer nor received any money or allowance from or on behalf of any other tenderer in relation to its tender or this Contract entered into consequent thereon, nor will it pay or allow or receive any money as aforesaid;
- (d) if, without the Principal's prior agreement, it receives or has received any money or allowance from any other tenderer in relation to its tender, the other tenderer's tender or this Contract, then without prejudice to any other right or remedy of the Principal, such money or allowance shall be deemed to be held by the Contractor on trust for the Principal and shall be paid to the Principal forthwith.

## 7 SERVICE OF NOTICES

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

## 6 EVIDENCE OF CONTRACT

### 6.2 Formal Instrument of Agreement

Clause 6.2 provides that if the conditions of tender require a Formal Instrument of Agreement then:

- (a) within 28 days after the Date of Acceptance of Tender (see definition in Clause 2) the Principal must prepare and forward the formal document in triplicate to the Contractor;
- (b) the Contractor must execute all three copies and return them to the Principal within 14 days of receipt; and
- (e) the Principal must execute these copies, and, at the Principal's cost, have them stamped (if so required by law) and return one copy to the Contractor, all within 14 days of receipt.

A Formal Instrument of Agreement is found in Form C6805.

Note that the Principal may refuse to pay the Contractor until the Contractor complies with this Clause. However, the Superintendent is still required to issue payment certificates.

The resultant non-payment of a Superintendent's payment certificate could be challenged under the Building and Construction Industry Payments Act 2004. There has not been a challenge at the time of printing this User Guide and hence no legal ruling is available. There are a number of references (eg regarding non submission of a suitable Contract Program)in the GCoC regarding withholding of payment which likewise may be challengeable under BCIPA.

### 6.3 Collusive Arrangements

This clause requires very particular warranties and representations from the Contractor to the Principal that it has had no collusive dealings with any other tenderer. Clause 6.3 (d) of later versions of the Contract has been amended such that any money received by the Contractor under a collusive arrangement is deemed to be held on trust for the Principal. The original version entitled the Principal to withhold an equivalent amount as liquidated damages.

## 7 SERVICE OF NOTICES

All notices are covered by this Clause. Under Clause 7 a notice is deemed to have been given under the Contract either:

- (a) when it is actually received by the person to whom it is addressed; or
- (b) when it is delivered to the address of that person, the address being either that address stated in the Contract or the address last communicated by that person;

whichever of (a) or (b) occurs first.

Note that each party and the Superintendent must notify the others of any change of address.

This Clause has been amended to account for the Building and Construction Industry Payment Act (BCIPA).

that person to the person giving the notice, whichever is the earlier.

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

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

Service of payment claims under the *Building and Construction Industry Payments Act 2004* by the Contractor on the Principal shall be made by forwarding or serving such claims to the Superintendent or such other person nominated by the Principal.

The Contractor must ensure that within 24 hours after any notice (other than a payment claim or payment schedule) under the *Building and Construction Industry Payments Act 2004* is given or received by the Contractor on any subcontractors, a copy of that notice is given to both the Superintendent and the Principal.

## 8 CONTRACT DOCUMENTS

### 8.1 Discrepancies

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

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

### 8.2 Dimensions

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

### 8.3 Supply of Documents by Principal

The Principal shall supply to the Contractor the number of copies stated in Item 8A of the Annexure or if no number is stated, then 5 copies of the Drawings, Specification and other documents required by the Contract to be supplied to the Contractor by the Principal. Documents supplied to the Contractor by the Principal shall remain the property of the Principal and shall be

returned by the Contractor to the Principal on demand in writing.

The documents shall not, without the prior written approval of the Principal, be used, copied or reproduced for any purpose other than the execution of the work under the Contract.

### 8.4 Supply of Documents by Contractor

If the Contract requires the Contractor to supply documents, the Contractor shall supply the number of copies stated in Item 8B of the Annexure or, if no number is stated, 5 copies.

If the Contractor submits documents to the Superintendent, then —

- (a) the Superintendent shall not be bound to check the documents for errors, omissions or compliance with the requirements of the Contract ;
- (b) notwithstanding the provisions of Clause 23, the Superintendent's approval or direction as to suitability shall not relieve the Contractor from responsibility for the Contractors' errors or omissions or compliance with the requirements of the Contract;
- (c) if the Contract provides that the Contractor must obtain the Superintendent's direction whether documents are suitable or are not suitable then within the time stated in Item 8C of the Annexure (or if no time is stated then within 14 days) after receipt of the documents, the Superintendent shall notify the Contractor that the documents are suitable or are not suitable;
- (d) if the Superintendent notifies the Contractor that the documents are not suitable, the Superintendent shall give reasons why the documents are not suitable and the Contractor shall submit new or amended documents for the Superintendent's direction under this Clause within 7 days after receipt of the Superintendent's notice;
- (e) the Superintendent shall not reject documents which are in accordance with the requirements of the Contract.

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

### 8.5 Availability of Documents

Whilst work under the Contract is being performed, one complete set of Drawings, Specification and other written information supplied by the Principal, the Superintendent and

## **8 CONTRACT DOCUMENTS**

### **8.1 Discrepancies**

Each party has an obligation to notify the Superintendent in writing of any ambiguity or discrepancy in any document prepared for the purpose of executing the work under the Contract. This of course includes the contract documents themselves. There is no provision for an order of precedence of documents except as provided in Clause 8.2, where figured dimensions prevail over scaled dimensions. Clause 8.1 requires the Superintendent to resolve ambiguities and discrepancies and, if done in such a way that causes the Contractor to incur more or less cost than the Contractor could have reasonably anticipated at the time of tender, then the difference will be valued as though a variation under Clause 40.5.

See SL 043 for a form of Notice of Ambiguity or Discrepancy in the Contract Documents.

### **8.3 Supply of Documents by Principal**

Clause 8.3 provides that the Principal must supply the number of copies of all contract documents specified in Part A of the Annexure or, if no number is so specified, then 5 copies must be provided.

### **8.4 Supply of Documents by Contractor**

Clause 8.4 provides that the Contractor must supply the number of copies of documents to be provided in the Annexure or, if no number is specified, then 5 copies must be supplied. It also prescribes time limits of 7 and 14 days within which certain actions are to be taken.

Clause 8.4, Item (c) provides that, if the Contractor has to obtain the Superintendent's direction (which includes approval, authorisation or permission-see Clause 23), then the Contractor must do so within the time specified in Part A of the Annexure or, if no time is specified, within 14 days. Clause 8.4 (d) requires that, if the Superintendent notifies the Contractor that the documents are not suitable, then the Contractor must submit new or amended documents within 7 days after receipt of the Superintendent's notice.

See SL 044 for a form of Superintendent's Response Whether Documents are Suitable.

### **8.5 Availability of Documents**

The Contractor must keep at least one set of all documents provided by the Principal on the Site and at any other location where work for the Contract is being manufactured or assembled. All documents must be available for reference by the Principal, Superintendent or any person nominated in writing by either of them

the Contractor shall be kept by the Contractor at the Site or other location approved in writing by the Principal and shall be available at all times for reference by the Principal, the Superintendent and any persons nominated in writing by either of them.

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

### 8.6 Confidential Information

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

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

### 8.7 Media Releases

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

## 9 ASSIGNMENT AND SUBCONTRACTING

### 9.1 Assignment

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

### 9.2 Subcontracting

The Contractor shall not without the written approval of the Superintendent, which approval shall not be unreasonably withheld, allow a subcontractor to assign a subcontract or any

payment or any other right, benefit or interest thereunder.

The Contractor shall not without the written approval of the Superintendent, which approval shall not be unreasonably withheld, subcontract or allow a subcontractor to subcontract any of the work under the Contract but such approval is not required where the value of the subcontract does not exceed \$50,000 unless the work is covered under Clause 9.3.

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

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

The Superintendent will consider the proposed subcontractor's —

- management capability in quality, workplace health and safety and environmental management; and
- technical experience and capability.

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

Approval may be conditional upon the subcontract including —

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

### 9.3 Registered Suppliers

Only registered suppliers shall be used for Work under the Contract covered by the relevant Main Roads' registration categories.

Where a registered supplier is removed from the register after the Superintendent has granted approval of that supplier, the conditions of the Contract shall apply.

### 9.4 Contractor's Responsibility

- (a) Approval to subcontract shall not relieve the Contractor from any liability or obligation under the Contract. Except where the Contract otherwise provides, the

## 8.6 Confidential Information

The prohibition against disclosure of confidential information applies only to documents marked “Confidential” or “In Confidence”. A separate agreement not to disclose such documents must be entered into. The prohibition against disclosure should continue even after the Contract has ended.

## 9 ASSIGNMENT AND SUBCONTRACTING

Assignment is a transfer of legal rights whilst subcontracting applies only to that part of the Contractor's work which is done by others who are in contract (subcontract) with the Contractor and for whom the Contractor is liable. The Contractor's right to subcontract is not unduly restricted and subject to approval from the Superintendent, who must respond within 14 days of the Contractor's request. Approval by the Superintendent must not be unreasonably withheld. Note that the latest version (January 2004) introduces new Clause 9.3 Registered Suppliers, which restricts work under the Contract to registered suppliers for work under the Contract covered by the relevant Main Roads registration category. The automatic right of a Contractor to engage a subcontractor to carry out work with a value of less than \$50,000 is subject to compliance with this requirement. Clause 9.3 Contractor's Responsibility in versions prior to January 2004 becomes Clause 9.4 in this latest version.

Note the definition of "subcontractor" in Clause 2. The 1996 version of the Contract excluded suppliers and plant hire providers from the definition of a “subcontractor”. All later versions include suppliers and hire providers within the definition.

Contractor shall be liable to the Principal for the acts and omissions of subcontractors and employees and agents of subcontractors as if they were acts or omissions of the Contractor.

## 10 SELECTED AND NOMINATED SUBCONTRACTORS

### 10.1 Definitions

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

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

'Nominated Subcontractor' means —

(b) a subcontractor to whom the Contractor is directed by the Superintendent to subcontract Nominated Subcontract Work; or

a subcontractor named in the Contract with whom the Principal has entered into a prior contract for Nominated Subcontract Work, and in which prior contract the subcontractor

(c)

(d)

(e) has consented to the assignment by the Principal of the benefit of the prior contract, a copy of which is included in the tender documents; or

(f) a subcontractor named in the Contract with whom the Principal has entered into a prior contract for Nominated Subcontract Work, and in which prior contract the subcontractor has consented to the novation of the prior contract by the Principal pursuant to a deed of novation, a copy of which is included in the tender documents.

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

### 10.2 Selected Subcontract

If the Contract includes Selected Subcontract Work, the Contractor shall subcontract the Selected Subcontract Work to a Selected Subcontractor. If the tender documents specify the

terms and conditions upon which the subcontract is to be entered into, the subcontract shall include those terms and conditions.

### 10.3 Nominated Subcontract

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

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

If the Contract provides that the Principal may novate to the Contractor a prior contract made between the Principal and a Nominated Subcontractor in respect of Nominated Subcontract Work, the Contractor shall when directed by the Superintendent, execute a deed of novation of that prior contract in the form included in the tender documents (Form C6849) and unless the Contract otherwise provides, the Contractor shall give the Principal credit for payments made by the Principal to the Nominated Subcontractor in respect of the Nominated Subcontract Work.

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

(a) that in respect of the Nominated Subcontract Work, the Nominated Subcontractor will undertake towards the Contractor obligations and liabilities which will enable the Contractor to discharge the Contractors' obligations and liabilities to the Principal under the terms of the Contract;

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

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

## 10 SELECTED AND NOMINATED SUBCONTRACTORS

### 10.1 Definitions

Under Clause 10, a Selected Subcontractor must be one chosen from one or more subcontractors which the Principal must specify in the tender documents, whilst a Nominated Subcontractor is:

- (a) one so nominated by the Superintendent as such;
- (b) one where the Principal has already entered into an agreement with a Subcontractor, and that agreement is to be assigned by the Principal to the Contractor, but only with the Subcontractor's consent; or
- (c) one where the Principal has already entered into an agreement with the Subcontractor and that agreement is to be novated with the Subcontractor's consent. Novation in effect is the acceptance of the agreement by the Contractor in place of the Principal and which relieves the Principal of all rights or obligations under that agreement.

A Nominated Subcontractor described in items (b) and (c) of this Clause equates approximately to what was called a Designated Subcontractor in Clause 10 of the 1986 edition of AS2124.

A copy of the deed of novation referred to in item (c) above must be included by the Principal in the tender documents.

See C6848 for a form of Deed of Novation.

### 10.2 Selected Subcontract

Note that Clause 10.4 also applies to a Selected Subcontract.

### 10.3 Nominated Subcontract

Note that Clauses 10.4, 10.5 and 10.6 also apply to a Nominated Subcontract.

In the event that a preferred Nominated Subcontractor does not enter into a subcontract with the Contractor, considerable care should be exercised before directing a replacement Nominated Subcontractor to enter into a subcontract with the Contractor.

- (d) that the Nominated Subcontractor will lodge security in a form provided by Clause 5.5 and that security and retention moneys shall be calculated on the same scale and on the same basis respectively as apply in the Contract;
- (e) equivalent to those in Clause 44.

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

If the Contractor declines to enter into a subcontract with a Nominated Subcontractor on the ground that the Nominated Subcontractor refuses to enter into a subcontract containing provisions in paragraphs (a) to (e) of Clause 16.2, the Superintendent shall nominate another Nominated Subcontractor or direct the Contractor to enter into a subcontract with the Nominated Subcontractor on such other terms as the Superintendent specifies. In the latter event —

- (i) the Contractor shall not be bound to discharge obligations and liabilities under the Contract to the extent that the subcontract terms so specified by the Superintendent are inconsistent with the discharge; and
- (ii) if the Contractor suffers loss arising out of the refusal of the Nominated Subcontractor to accept such provisions, the Principal shall pay to the Contractor the amount of loss which the Contractor could not reasonably avoid.

#### **10.4 Provisions Applying Generally to Selected and Nominated Subcontract Work**

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

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

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

Subcontract Work shall only be that which is expressly stated in the Contract.

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

- (i) the Principal shall have no liability to a Selected or Nominated Subcontractor arising from the subcontract between the Contractor and the Selected or Nominated Subcontractor; and
- (ii) the Principal shall not be liable to the Contractor for any act, default or omission or breach of contract by a Selected or Nominated Subcontractor, arising from the subcontract between the Contractor and the Selected or Nominated Subcontractor.

#### **10.5 Direct Payment of Nominated Subcontractor**

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

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

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

Clause 10.5 shall not apply to any Nominated Subcontractor to which Clause 10.1 (c) applies.

#### **10.6 Termination of Nominated Subcontract**

The Contractor shall not unreasonably terminate a subcontract for Nominated Subcontract Work and as early as possible the Contractor shall notify the Superintendent of the Contractor's intention to terminate and the reasons. If a Nominated Subcontractor repudiates or abandons a subcontract or it is terminated, the Contractor shall

#### 10.4 Provisions Applying Generally to Selected and Nominated Subcontract Work

This clause confirms that (except as expressly stated in the clause) the Principal has no liability to Selected or Nominated Subcontractors.

#### 10.5 Direct Payment of Nominated Subcontractor

The Principal is obliged to make direct payments to the Nominated Subcontractors nominated under the Contract.

If the Nominated Subcontract is one to which Clause 10.1, Item (b) applies, care must be taken to ensure that this Clause does not conflict with the payment provisions of the assigned Contract.

If the Nominated Subcontract is one to which Clause 10.1, Item (c) applies, then Clause 10.5 has no effect as the Principal cannot have any obligations in respect to the Nominated Subcontractor where a Nominated Subcontract has been novated.

**NOTE:** Clause 10 of AS2124-1992 has been left basically unaltered except that Clause 10.5 is not optional in this Contract.

In the Road Construction Contract the Contractor must be fully advised of the requirements prior to award -Clause 10.1 states:

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

**The use of Nominated and Selected Subcontractors creates useful options for the Department of Main Roads, especially in respect of larger projects with multiple contracts.**

It should also be noted that there is some case law in respect of Nominated Subcontractors.

forthwith notify the Superintendent in writing and the Superintendent shall proceed under Clause 10.3 to nominate a Nominated Subcontractor to complete the subcontract work and Clause 11 (b) shall apply.

## 11 PROVISIONAL SUMS

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

- (a) the Contractor, the work or item shall be valued under Clause 40.5;
- (b) a subcontractor to the Contractor the Principal shall pay the Contractor the amount payable by the Contractor to the subcontractor for the work or item, disregarding any damages payable by the Contractor to the subcontractor or vice versa, plus the amount or percentage thereon for profit and attendance stated in Item 9A of the Annexure or, where not so stated, as stated elsewhere in the Contract and (unless incorporated within the amounts payable under this paragraph) GST; and
- (c) a Nominated Subcontractor pursuant to a prior contract made between the Principal and a Nominated Subcontractor, the benefit of which has been assigned to the Contractor, the Principal shall pay the Contractor the amount stated in Item 9B of the Annexure or the percentage for profit and attendance stated in Item 9B of the Annexure of the amount payable by the Principal to the Nominated Subcontractor for the work or item or, where no amount or percentage is stated, as stated elsewhere in the Contract, disregarding any damages payable by the Principal to the Nominated Subcontractor or vice versa and (unless incorporated within the amounts payable under this paragraph) GST.

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

## 12 LATENT CONDITIONS

### 12.1 Definitions

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 a competent and experienced contractor at the time of the Contractor's tender if such a contractor had —

- (i) examined all information made available in writing by the Principal to the Contractor for the purpose of tendering; and
  - (ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries; and
  - (iii) inspected the Site and its surroundings; and
- (b) any other conditions which the Contract specifies to be Latent Conditions.

### 12.2 Notification

If during the execution of the work under the Contract, the Contractor becomes aware of a Latent Condition, the Contractor shall forthwith and where possible before the Latent Condition is disturbed, give written notice thereof to the Superintendent endorsed "Contractor's Notice Under Clause 12.2".

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

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

### 12.3 Extension of Time and Cost

Delay caused by a Latent Condition may justify an extension of time under Clause 35.5. If a Latent Condition causes the Contractor to —

- (a) carry out additional work;
- (b) use additional Constructional Plant; or

## 11 PROVISIONAL SUMS

A provisional sum is defined in Clause 2. The sum is not itself payable, but where work or an item to which a provisional sum applies is performed or supplied in one of the three alternative ways provided in Items (a), (b) or (c), then it is to be calculated and paid accordingly. Note that under Items (b) and (c), items 9A and/or 9B of the Annexure must be completed as there is no default position.

## 12 LATENT CONDITIONS

### 12.1 Definition

Latent Conditions are in effect defined by Clause 12.1. All weather conditions whether on or about the Site, are excluded from the definition. However, the effects of weather conditions are not excluded from the definition. A crucial aspect of the definition is that the latent condition must be one that could not have been reasonably anticipated by a competent and experienced contractor at the time of the Contractor's tender.

### 12.2 Notification

Clause 12.2 requires the Contractor to notify the Superintendent forthwith of any latent condition. A time bar on recovery of costs as a result of a latent condition is provided for in Clause 12.4. Note that it is mandatory for the Contractor to endorse its notice as "Contractor's Notice Under Clause 12.2". Failure to do so may render the notice invalid.

It is prudent for the Superintendent to properly investigate the alleged latent condition and in this regard the Superintendent should request appropriate details as provided for in items (a) to (e) of this Clause.

See SL 020 for a form of Request for Information Regarding a Latent Condition.

### 12.3 Extension of Time and Cost

Note that the recovery of costs (as detailed in Clause 12.3, Items (a), (b) and (c)) is subject to the requirement that they are such that a competent and experienced Contractor for the size/type of work could not have reasonably anticipated them at the time of tender. Delay and disruption costs are now included in (c) as valid components of a latent condition claim.

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

which a competent and experienced contractor could not reasonably have anticipated at the time of tendering, a valuation shall be made under Clause 40.5.

#### 12.4 Time Bar

Where pursuant to Clause 12.3 a valuation is to be made under Clause 40.5, regard shall not be had to the value of additional work carried out, additional Constructional Plant used or extra cost incurred more than 14 days before the date on which the Contractor gives the written notice required by the first paragraph of Clause 12.2.

### 13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

The Principal warrants that unless otherwise provided in the Contract —

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

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

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

### 14 STATUTORY REQUIREMENTS

#### 14.1 Complying with Statutory Requirements

The Contractor shall comply with the requirements of —

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

- (d) persons acting in the exercise of statutory powers enabling them to give directions affecting the work under the Contract.

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

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

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

#### 14.2 Payment Where There is No Variation

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

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

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

#### 14.3 Notices and Fees

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

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

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

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

## 12.4 Time Bar

The Contractor is deprived of reimbursement of all costs caused by a latent condition which are incurred more than 14 days before notification of that latent condition as per Clause 12.2. It is therefore in the interests of the Contractor to give prompt written notice of the latent condition.

A Superintendent has no power to waive this provision - refer also to Clause 48.

## 13 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

Each party under the Contract warrants to the other that patents, copyright or other intellectual property rights are not being infringed. Note that the exception "...unless otherwise provided by the Contract..." applies only to the Principal.

## 14 STATUTORY REQUIREMENTS

This obligation to comply with statutory requirements rests with the Contractor i.e. it is a Contractor's risk.

However, Clause 14 provides for reimbursement of additional costs to the Contractor in certain cases as follows:

- (a) If a statutory requirement changes the Works, Temporary Works or method of working that are specified in the Contract, a variation may ensue. (Clause 14. 1).
- (b) Where the change in a statutory requirement occurs after 28 days prior to close of tenders or if a person exercising statutory powers directs such a change, the difference in cost of compliance is to be valued under Clause 40.5 even though no variation is required (Clause 14.2).
- (c) Changes in fees will be reimbursable where the fee change or a new fee occurs after 14 days prior to close of tenders. Clause 14.3 also allows reimbursement of any fee imposed by a public body for the expansion of services to the Works if not already dealt with in the Contract.

Unless the Contractor can establish that one of the above situations apply, the Contractor cannot obtain reimbursement and must bear any additional costs.

- (a) an increase or decrease in a fee or charge, the difference shall be valued under Clause 40.5; and
- (b) there is a new fee or charge, that fee or charge shall be reimbursed by the Principal to the Contractor.

#### **14.4 Licences, Registrations, Permits, Approvals and Certificates**

At all times until the Final Certificate is issued, the Contractor must hold, and ensure that its subcontractors, agents and employees hold, all of the licences, registrations, permits, approvals and certificates that they are required by law to hold in order to carry out work of a type required by this Contract.

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

#### **15 PROTECTION OF PEOPLE AND PROPERTY**

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

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

Without limiting the generality of the Contractors' 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 Contractor or the employees or agents of the Contractor damage property, including but not limited to public utilities and services and property on or adjacent to the Site, the Contractor shall promptly make good the damage and pay any compensation which the law requires the Contractor to pay.

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

#### **16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE**

##### **16.1 Care of the Work Under the Contract**

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

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

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

##### **16.2 Reinstatement**

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

Where loss or damage occurs as a direct consequence, without fault or omission on the part of the Contractor, of an Excepted Risk defined in Clause 16.3, the Contractor must, if and to the extent directed by the Superintendent, rectify that loss or damage, which shall be deemed to be a variation under Clause 40. In the case of loss or damage being caused by a combination of Excepted Risks and other risks, any such direction and consequential valuation made under Clause 40.5 shall take into account the proportional responsibility of the Contractor and the Principal.

## **15 PROTECTION OF PEOPLE AND PROPERTY**

The obligation for protection of the Works rests with the Contractor. Note that the Principal has the right to take steps to protect the Works if the Contractor fails to do so, and to recover the cost of so doing from the Contractor. No prior notice is needed.

## **16 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE**

This deals with risks usually covered by a Contract Works policy (previously called a Contractor's Risk policy or Contractor's All Risk policy).

The responsibility of the Contractor for the Site (except to the extent set out in the last paragraph of Clause 16.1) ends at 4pm on the Date of Practical Completion (see definition of this expression in Clause 2). Thereafter the Works are at the Principal's risk except to the extent that the Contractor has remaining responsibilities in completing outstanding work or compliance with obligations under Clauses 30.6, 31.1 and 37.

### **16.2 Reinstatement**

The Contractor is liable to make good all loss or damage to the Works, Temporary Works and Constructional Plant (all as defined in Clause 2) except in certain circumstances, called Excepted Risks, which are listed in Clause 16.3. The Superintendent can direct the Contractor to rectify the loss or damage, and the Contractor must carry out the work. However, where the loss or damage arises from an excepted risk, or to the extent that it does, the cost of the rectification will be deemed to be a variation under Clause 40 and valued accordingly.

Note that the Contractor still remains liable for damage caused by defective material or works (Clause 30.6), testing (Clause 31.1) or during the Defects Liability Period (Clause 37) until the Final Certificate is issued.

### 16.3 Excepted Risks

The Excepted Risks are —

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

## 17 DAMAGE TO PERSONS AND PROPERTY OTHER THAN THE WORKS

### 17.1 Indemnity by Contractor

The Contractor shall indemnify the Principal against —

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

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

Principal may have contributed to the loss, damage, death or injury.

Clause 17.1 shall not apply to —

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

### 17.2 Indemnity by the Principal

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

## 18 INSURANCE OF THE WORKS

### *Alternative 1*

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

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

The insurance cover may exclude —

- (a) the cost of making good fair wear and tear or gradual deterioration but shall not exclude the loss or damage resulting therefrom;
- (b) the cost of making good faulty design, workmanship and materials but shall not exclude the loss or damage resulting therefrom;
- (c) consequential loss of any kind, but shall not exclude loss of or damage to the Works;
- (d) damages for delay in completing or for the failure to complete the Works;
- (e) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause;
- (f) loss or damage resulting from the Excepted Risks (b) and (c) in Clause 16.3.

### 16.3 Excepted Risks

Excepted Risks are set out in this Clause. They are, in summary:

- (a) negligent acts or omissions of the Principal, the Superintendent or those for whom they are responsible;
- (b) risks specifically excepted in the Contract;
- (c) war, revolutions, martial law and similar acts as listed;
- (d) nuclear radioactivity, ionising radiations, as listed;
- (e) use or occupation by the Principal and others (however, see Clause 35.4); and
- (f) defects in design except to the extent that a design is provided by the Contractor.

## 17 DAMAGE TO PERSONS AND PROPERTY OTHER THAN THE WORKS

### 17.1 Indemnity by Contractor

This Clause creates a liability on the Contractor to the Principal for matters which are usually risks covered by a Public Liability policy. The proportioning of liability set out at the end of the first paragraph preserves the Principal's right of indemnity, otherwise the Principal's rights under Clause 17.1 may be destroyed if the Principal is in any way negligent in relation to the loss, etc.

This Clause also excludes certain risks which are listed in Items (i) to (iv).

Under Clauses 18, 19 and 20, where insurances are to be taken out by the Contractor they must be effected before the Contractor starts work. (Refer to Clauses 21.1 and 27.1) Where the Principal takes out these insurances, they must be effected before the Date of Acceptance of Tender.

As the preface to AS2124-1992 is not included as a preface to the GCoC of the RCC, the warning note in the preface is reproduced below:

*"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."*

The above warning should be heeded. This warning draws attention to the fact that Clause 17 does not limit liability for special, indirect or consequential losses, whereas the extent of insurance cover under Clauses 18 and 19 is usually limited.

NOTE: Clauses 18, 19, 20 of AS2124-1992 in respect of insurance have not been amended except for the minor changes as noted:

- Clause 18, Alternative 1, (ii), (iii), (iv) and (v). Specific Item numbers in the Annexure have been added.
- Clause 19 Alternative 1. A specific Item number in the Annexure has been added.
- Clause 20. The words "Where permitted by law" have been added to the beginning of the second paragraph.

## 18 INSURANCE OF THE WORKS

This clause deals with Contract Works insurance. It provides for two alternatives. The alternative applying is specified in Item 10A of the Annexure.

Alternative 1 deals with the situation where the Contractor is to insure. It permits certain exclusions to the insurance cover as listed in Items (a) to (f).

The amount of cover under Clause 18, Alternative 1, must include:

- (i) a sum not less than the Contract Sum. Note that the Contract Sum does not include the value of variations and the cover may need to be greater than the Contract Sum as a result. Refer also to (v) below;
- (ii) the amount stated to cover demolition. This amount must be included in Item 10B of the Annexure;
- (iii) Consultants' fees. These amounts must be stated in Item 10C of the Annexure;
- (iv) value of materials and things supplied by the Principal, this amount must be stated in Item 10D of the Annexure; and
- (v) an additional amount or percentage of the total of the above, as stated in Item 10E of the Annexure (usually to cover anticipated increases in the cost of the Works).

The policy must be in joint names of the parties, must cover both parties and all subcontractors and must be maintained whilst the Contractor remains liable under Clause 16.1 (see Notes to Clause 16).

The insurance cover shall be for an amount not less than the sum of —

- (i) the Contract Sum;
- (ii) the amount stated in Item 10B of the Annexure to provide for costs of demolition and removal of debris;
- (iii) the amount stated in Item 10C of the Annexure to cover fees of consultants;
- (iv) the value stated in Item 10D of the Annexure of any materials or things to be supplied by the Principal for the purposes of the work under the Contract; and
- (v) the additional amount or percentage stated in Item 10E of the Annexure of the total of the items referred to in sub-paragraphs (i) to (iv) of this paragraph.

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

#### *Alternative 2*

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

## **19 PUBLIC LIABILITY INSURANCE**

#### *Alternative 1*

Before the Contractor commences work, the Contractor shall take out a Public Liability Policy of insurance in the joint names of the Principal and the Contractor which covers the Principal, the Contractor, the Superintendent and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights and interests and covers their liabilities to third parties. The policy shall also cover the Contractor's liability to the Principal and Principal's liability to the Contractor for loss of or

damage to property (other than property required to be insured by Clause 18) and the death of or injury to any person (other than liability which is required by law to be insured under a Workers Compensation Policy of insurance).

The Public Liability Policy of insurance shall be for an amount in respect of any one occurrence not less than the sum stated in Item 11B of the Annexure and, unless otherwise specified elsewhere in the Contract, shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Final Certificate is issued under Clause 42.8.

#### *Alternative 2*

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

## **20 INSURANCE OF EMPLOYEES**

Before commencing work the Contractor shall insure against liability for death of or injury to persons employed by the Contractor including liability by statute and at common law. The insurance cover shall be maintained until all work including remedial work is completed.

Where permitted by law, the insurance shall be extended to indemnify the Principal for the Principal's statutory liability to persons employed by the Contractor.

The Contractor shall ensure that every subcontractor is similarly insured.

## **21 INSPECTION AND PROVISIONS OF INSURANCE POLICIES**

### **21.1 Proof of Insurance**

Before the Contractor commences work and whenever requested in writing by the other party, a party liable to effect or maintain insurance shall produce evidence to the satisfaction and approval of the other party of the insurance effected and maintained.

The effecting of insurance shall not limit the liabilities or obligations of a party under other provisions of the Contract.

## 18 INSURANCE OF THE WORKS (continued)

Note particularly the areas which may be excluded from the insurance cover. The actual exclusions can be determined if the policy is inspected, as can the excess amounts in the policy. It is important for the Principal to know the excess that may apply as, in some circumstances, the Principal may make the claim and be subject to the excess. Refer to Clause 16.3 Expected Risks and note in particular Items (a), (e) and (f). Refer also to clause 21.7 Excess/Deductible.

Alternative 2 deals with Principal Arranged Insurance (PAI). This is now Main Roads' preferred form of insurance for construct only contracts (there are some exceptions), where the Principal is responsible for the design. (RSS walls being an exception).

Main Roads has now arranged its own insurance policies and has the option of using Alternative 2, which is Principal Arranged Insurance. These policies came into effect as follows:

Public Liability:                      October 2003

Insurance of the Works:            January 2004

As advised in the Conditions of Tendering Clause 19.2 the policies can be inspected at and copied from the website [www.aonline.com.au](http://www.aonline.com.au)

These policies will be updated and the parties should each have available a copy of the current policies that are applicable to the Contract.

There are some risks that are not covered by Main Roads' PAI and these need to be examined by Contractors to ensure that they have or obtain adequate coverage. Some issues are:

- professional indemnity insurance  
e.g. Design and Construct contracts (RSS Walls)
- QR work, Refer to Clause 40.9 Indemnity and Clause 40.10 Insurances of the SCoC.
- falsework design.

In addition to the policies available on the website [www.aonline.com.au](http://www.aonline.com.au) there is a Contractor's Claims Manual for PAI.

Other documents and internal training material in respect of PAI are held by the Project Development Office and are available on request to Main Roads staff.

## 19 PUBLIC LIABILITY INSURANCE

There are two Alternatives. The alternative applying is specified in Item 11A of the Annexure.

Under Alternative 1, the amount of Public Liability cover required is stated in Item 11B of the Annexure. This policy must cover both parties and the Superintendent as well as all subcontractors. The policy must be maintained until the issue of the Final Certificate.

As for the Works insurance, it is important for the Principal to know the excesses that may apply in particular circumstances and this information should be requested from the Contractor and obtained.

Alternative 2 deals with Principal Arranged Insurance. Refer to the notes under Alternative 2 for Clause 18. Again, Contractors must be fully aware of all aspects of the Main Roads policy, particularly the excesses.

## 20 INSURANCE OF EMPLOYEES

This is commonly known as Workers Compensation Insurance and, as such, is the Contractor's responsibility. It is also the Contractor's responsibility to ensure that all subcontractors have appropriate Workers Compensation Insurance - including any Nominated Subcontractors and Selected Subcontractors.

## 21 INSPECTION AND PROVISIONS OF INSURANCE POLICIES

### 21.1 Proof of Insurance

Before the Contractor starts work, and whenever the other party so requests, the party responsible for effecting insurance (Alternative 1 or 2) must provide the other party with evidence which is satisfactory to the other party that the necessary insurance has been effected and maintained. The Superintendent must ensure that, if Alternative 1 applies, all.

The Contractor shall be deemed to have examined, assessed and understood the Principal's insurance policies.

### **21.2 Failure to Produce Proof of Insurance**

If, after being requested in writing by the other party so to do, a party fails to produce evidence of compliance with insurance obligations under Clauses 18, 19 or 20 to the satisfaction and approval of the other party, the other party may effect and maintain the insurance and pay the premiums. The amount paid shall be a debt due from the party in default to the other party. Where the defaulting party is the Contractor, the Principal may refuse payment until evidence of compliance with insurance obligations under Clauses 18, 19 or 20 is produced by the Contractor to the satisfaction and approval of the Principal. The rights given by Clause 21.2 are in addition to any other right.

### **21.3 Notices from or to the Insurer**

The party effecting insurance under Clause 18 or 19 shall ensure that each policy of insurance contains provisions acceptable to the other party that will —

- (a) require the insurer, whenever the insurer gives the Principal, the Contractor or a subcontractor a notice of cancellation or other notice concerning the policy at the same time to inform the other party in writing that the notice has been given;
- (b) provide that a notice of claim given to the insurer by the Principal, the Superintendent, the Contractor or a subcontractor shall be accepted by the insurer as a notice of claim given by the Principal, the Superintendent, the Contractor and the subcontractor and that a failure by one insured to discharge its obligations of disclosure and good faith or to observe the terms of the policy will not prejudice the cover of the other insureds; and
- (c) require the insurer, whenever the party fails to renew the policy or to pay a premium, to give notice in writing thereof forthwith to the Principal and the Contractor and prior to the insurer giving any notice of cancellation.

### **21.4 Notices of Potential Claims**

The Contractor shall, as soon as practicable, inform the Principal in writing of any occurrence that may give rise to a claim under a policy of insurance required by Clause 18 or 19 and shall keep the Principal informed of subsequent developments concerning the claim. The Contractor shall ensure that subcontractors in

respect of their operations similarly inform the Principal.

Where a policy of insurance required by the Contract has been effected by the Principal the Principal shall similarly inform the Contractor.

The Contractor shall comply with the terms of the policies of insurance effected under Clauses 18, 19 and 20 (including, but not limited to, the notification requirements under those policies).

### **21.5 Settlement of Claims**

Upon settlement of a claim under the insurance specified by Clause 18 —

- (a) to the extent that the work under the Contract needing reinstatement has been the subject of a payment or allowance by the Principal to the Contractor, if the Contractor has not completed reinstatement of that work, moneys received shall, if requested by either party, be paid into a bank agreed upon by the parties in an account in the joint names of the Contractor and the Principal. As the Contractor proceeds to reinstate the loss or damage, the Superintendent shall certify against the joint account for the cost of reinstatement; and
- (b) to the extent that the work to be reinstated has not been the subject of a payment or allowance by the Principal to the Contractor, the Contractor shall be entitled immediately to receive from moneys received, the amount of money so paid in relation to any loss suffered by the Contractor relating to that work under the Contract (including the supply of goods and materials on site whether or not incorporated into the Works).

### **21.6 Cross Liability**

Any insurance required to be effected by the Contractor in joint names in accordance with the Contract shall include a cross-liability clause in which the insurer agrees to waive all rights of subrogation or action against any of the persons comprising the insured and for the purpose of which the insurer accepts the term 'insured' as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

### **21.7 Excess/Deductible**

The Contractor shall bear or pay any excess or deductible which is applicable to any claim made under any of the policies of insurance effected

## 21 INSPECTION AND PROVISIONS OF INSURANCE POLICIES (continued)

the Contractor's policies are made available to the Principal and that they are examined to ensure they comply. It may not be sufficient to receive a broker's certification that the policies comply. This is the Principal's decision. If Alternative 2, applies, not only should the Superintendent advise the Principal of its obligations, but the Superintendent must ensure that the Contractor's insurance policies in areas not covered by the Principal's insurance are made available and examined. These are likely to include matters listed in the exclusions to Main Roads' insurance of the Works policy and its Combined General and Products Liability Policy. Also, a Contractor may have an additional policy which reduces the amount of excess it pays on a claim. Note that an amendment to the January 2004 version of the RCC states that the Contractor shall be deemed to have "*examined, assessed and understood the Principal's insurance policies.*"

### 21.2 Failure to Produce Proof of Insurance

If requested by the Principal, the Contractor is required to produce evidence of insurance required to be effected by the Contractor. Failure to do so may be a substantial breach of contract under Clause 44.2, Item (f). The Principal is also given the right to refuse payment of moneys due under the Contract unless such proof is provided, or to take out such insurance and recover the cost thereof from the Contractor. The Superintendent should be fully aware of these provisions and, in his agency role, be in a position to advise the Principal if required.

The Contractor also has the right to require proof that the Principal has effected the insurance (PAI) required to be effected by the Principal. Failure to do so may be a substantial breach under Clause 44.7, Item (c).

See SL 046 for a form of Notice to Provide Evidence of Insurance.

### 21.3 Notices from or to the Insurer

This clause requires each policy to require the Insurer to notify the other party of a cancellation of the policy or a failure to renew the policy. The policy must also provide that a notice of claim by one party is to be accepted by the Insurer as a notice given by all parties.

Whilst there is no specific clause in the PAI document setting out the notification process if the policy is cancelled, by law Insurers are required to notify the Insured in the event of cancellation. Also, under the provisions of the PAI document, the insurer is not permitted to cancel the policy unless the Insured defaults on payment.

### 21.4 Notices of Potential Claims

See SL 047 for a form of Notice of Potential Insurance Claim.

Note the previous reference to the Contractor's Claim Manual available on the website [www.aonline.com.au](http://www.aonline.com.au).

### 21.5 Settlement of Claims

Note that work of reinstatement need not commence until the claim has been settled. When it has been settled:

- (a) where work of reinstatement is still to be effected, the settlement moneys are to be paid into a joint account and the Superintendent is to certify for payments against that account;
- (b) where the Contractor has not claimed a progress payment for the work to be reinstated (i.e. on work done since the last progress claim), then the Contractor may submit a progress claim for that work and be paid immediately the settlement moneys under the policy are received.

### 21.6 Cross Liability

A cross liability clause is required in each policy under the Contract to ensure that all parties covered by the policies are to be regarded as an "insured" for the purposes of the policies.

### 21.7 Excess/Deductible

This is a new clause added after the 1996 version. It states that the Contractor is to bear the cost of any excess or deductible applicable to a claim made under any of the policies effected under Clauses 18, 19 or 20, except where the claim arises from an Excepted Risk and in circumstances for which the Contractor was not at fault. These provisions apply whether Alternative 1 or Alternative 2 applies. As noted above, there are circumstances where the Principal may be required to pay the excess and Main Roads should know the excess amounts that apply in the Contractor's policies.

under Clauses 18, 19 or 20 except where the claim is with respect to loss or damage which is the direct consequence, without fault or omission on the part of the Contractor, of an Excepted Risk defined in Clause 16.3.

## **22 CLERK OF WORKS AND INSPECTORS**

The Superintendent shall forthwith notify the Contractor in writing of the name of any Clerk of Works or inspector appointed by the Principal or the Superintendent.

## **23 SUPERINTENDENT**

The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent —

- (a) acts honestly and fairly;
- (b) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and
- (c) arrives at a reasonable measure or value of work, quantities or time.

If pursuant to a provision of the Contract enabling the Superintendent to give directions, the Superintendent gives a direction, the Contractor shall comply with the direction.

In Clause 23 'direction' includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.

Except where the Contract otherwise provides, a direction may be given orally but the Superintendent shall as soon as practicable confirm it in writing.

If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent confirms it in writing.

For the purpose of receiving and delivering claims (including payment claims made under the *Building and Construction Industry Payments Act 2004*) the Superintendent shall act as an agent of the Principal.

## **24 SUPERINTENDENT'S REPRESENTATIVE**

The Superintendent may from time to time appoint individuals to exercise any functions of the Superintendent under the Contract but not more

than one Superintendent's Representative shall be delegated the same function at the same time. The appointment of a Superintendent's Representative shall not prevent the Superintendent from exercising any function.

The Superintendent shall forthwith notify the Contractor in writing of —

- (a) the appointment and the name of any Superintendent's Representative and the functions delegated to the Superintendent's Representative;
- (b) the termination of the appointment of a Superintendent's Representative.

If the Contractor makes a reasonable objection to the appointment of a representative, the Superintendent shall terminate the appointment.

## **25 CONTRACTOR'S REPRESENTATIVE**

The Contractor shall personally superintend the execution of the work under the Contract or, at all times during which any activities relating to the execution of the work under the Contract are taking place, have a competent representative present on the Site and, if required by the Superintendent, at other places at which activities relating to the execution of the work under the Contract are taking place.

The Contractor shall forthwith notify the Superintendent in writing of the name of the representative and of any subsequent changes. Any direction defined in Clause 23 shall —

- (a) if it relates to the execution of work on the Site and is given to the representative on the Site; or
- (b) if it relates to the execution of work at any other place and is given to the representative at the other place,

be deemed to have been given to the Contractor.

Matters within the knowledge of a representative of the Contractor shall be deemed to be within the knowledge of the Contractor.

If the Superintendent makes a reasonable objection to the appointment of a representative, the Contractor shall terminate the appointment and appoint another representative

## **26 CONTROL OF CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS**

The Superintendent may direct the Contractor to have removed from the Site or from any activity connected with the work under the Contract,

## 22 CLERK OF WORKS AND INSPECTORS

The Superintendent has an obligation to notify the Contractor of the names of inspectors. This must be done promptly and, it is suggested, before an inspector takes any actions under the Works. It is a requirement of the Contract to keep this advice up to date.

See SL 003 for a Notice of Appointment of Inspector.

## 23 SUPERINTENDENT

The Superintendent's obligation is to act honestly and fairly, within a time prescribed under the Contract or within a reasonable time, and to arrive at reasonable measures or value. It is not uncommon for these requirements to be specifically quoted in the Contractor's claims and this is an increasing trend.

The Superintendent fulfils the dual role of independent certifier and agent of the Principal and it is important for the Superintendent to appreciate which role he is fulfilling when executing any function. The Principal can appoint any employee or, in fact, any person as Superintendent and the definition of "person" in Clause 2 includes a firm or body corporate (e.g. a consulting engineering company). The Superintendent does not have to be an individual. ***However, note that the Principal has an obligation to ensure that there is a Superintendent appointed at all times and that the Superintendent does in fact discharge the stated responsibilities honestly and fairly, and in a timely manner.***

Note the wide definition of "direction", which includes terms such as agreement, approval and explanation. A great deal of what the Superintendent does is considered to be a "direction" and this is significant in regards to Clause 40 VARIATIONS. Again, the wide definition of "direction" is often referred to in claims and Superintendents need to be aware of the definition and its implications.

Note that if the Contractor, in writing, requests written confirmation of an oral instruction, the Superintendent's direction need not be complied with until it is confirmed in writing.

## 24 SUPERINTENDENT'S REPRESENTATIVE

While the Superintendent may be a body corporate, a Superintendent's Representative must be an "individual". The Superintendent must keep the Contractor informed of any changes to the appointment or powers of Superintendent's Representatives.

Whilst there may be more than one Superintendent's Representative at any time, the Clause prohibits more than one having the same function at any one time.

See SL 002 for a form of Notice of Appointment of Superintendent's Representative.

See SL 048 for a form of Notice of Termination of Superintendent's Representative.

## 25 CONTRACTOR'S REPRESENTATIVE

Note the requirements to be "competent" to personally superintend the execution of the Work under the Contract and to be on the site "at all times" when work is taking place. ***The reader's attention is also drawn to Clause 4.2 Project Manager of the Supplementary Conditions of Contract, which addresses the requirements for the Project Manager and Contractor's Representative, particularly on smaller projects.***

When exercising the right to object to a Contractor's Representative, the Superintendent should bear in mind his obligations under Clause 23.

See SL 049 for a form of Notice of Objection to Contractor's Representative.

## 26 CONTROL OF CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS

Note that reason for exercising the right to require the removal of employees or subcontractors must be one of those reasons stated in the Clause. Note that the Superintendent, if exercising this right, must make his judgement on misconduct or negligence as an independent certifier not as an agent of the Principal.

See SL 050 for a form of Notice to Remove Person.

within such time as the Superintendent directs, any person employed in connection with the work under the Contract who, in the opinion of the Superintendent, is guilty of misconduct or is incompetent or negligent. The person shall not thereafter be employed on the Site or on activities connected with the work under the Contract without the prior written approval of the Superintendent.

## **27 SITE**

### **27.1 Possession of Site**

The Principal shall on or before the expiration of the time stated in Item 12 of the Annexure give the Contractor possession of the Site or sufficient of the Site to enable the Contractor to commence work. If the Principal has not given the Contractor possession of the whole Site, the Principal shall from time to time give the Contractor possession of such further parts of the Site as may be necessary to enable the Contractor to execute the work under the Contract in accordance with the requirements of the Contract. The Principal shall advise the Contractor in writing of the date upon which the Site or any part thereof will be available.

Notwithstanding the provisions of Clause 27.1, if the Contractor is in breach of Clause 21.1, the Principal may refuse to give the Contractor possession of the Site or any part of the Site until the Contractor has complied with the requirements of Clause 21.1.

Possession of the Site shall confer on the Contractor a right to only such use and control as is necessary to enable the Contractor to execute the work under the Contract.

### **27.2 Access for the Principal and Others**

The Principal and the Principals' employees and agents may at any time after reasonable notice to the Contractor have access to any part of the Site for any purpose.

The Contractor shall permit the execution of work on the Site by persons engaged by the Principal and shall cooperate with them and coordinate the Contractor's work with their work.

If requested by the Contractor, the Principal shall provide to the Contractor the names of the persons so engaged.

The Contractor shall at all reasonable times give the Principal, the Superintendent, the Clerk of Works and inspectors appointed under Clause 22, and other persons authorised in writing by the Principal or by the Superintendent access to the work under the Contract at any place where the

work is being carried out or materials are being prepared or stored.

The Principal shall ensure that the Contractor is not impeded in the execution of the Contractor's work by any persons referred to in Clause 27.2, whilst exercising the right of access given by Clause 27.2.

### **27.3 Delivery of Materials to and Work on Site Before Possession**

Until possession of the Site or part of the Site is given to the Contractor under Clause 27.1, the Contractor shall not deliver materials to or perform work on the Site or part of the Site, as the case may be, unless approval in writing is given by the Superintendent.

### **27.4 Use of Site by Contractor**

Unless the Contract otherwise provides or the Superintendent gives prior written approval, the Contractor shall not use the Site or allow it to be used for —

- (a) camping;
- (b) residential purposes; or
- (c) any purpose not connected with the work under the Contract.

### **27.5 Finding of Minerals, Fossils and Relics**

Valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the Site shall as between the parties be and remain the property of the Principal. Immediately upon the discovery of these things the Contractor shall take precautions to prevent their loss or removal or damage and shall notify the Superintendent of the discovery.

If compliance with obligations under Clause 27.5 causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5.

## **28 SETTING OUT THE WORKS**

### **28.1 Setting Out**

The Superintendent shall supply to the Contractor the survey marks specified in the Contract. Upon receipt of any necessary information and survey marks, the Contractor shall set out the Works in accordance with the Contract and shall provide all instruments and things necessary for that purpose.

### **28.2 Care of Survey Marks**

The Contractor shall keep in their true positions all survey marks supplied by the Superintendent.

## **27 SITE**

### **27.1 Possession of Site**

The Site is to be made available to the Contractor within the time specified in Item 12 of the Annexure. The Principal is not obliged to give the Contractor possession of the Site if the Contractor has failed to notify insurances identified in Clause 21.1. Possession of the Site conveys only a licence to use the Site and this can be withdrawn by the Principal at any time, subject to the legal consequences of doing so unjustifiably.

Note that the Principal should give a separate notice when the Contractor has complied with Clause 21.1 Proof of Insurance.

See SL 051 for a form of Notice Giving Possession of Site.

## **28 SETTING OUT THE WORKS**

### **28.1 Setting Out**

Note the obligation of the Superintendent to supply setting out and survey information. This must be done so as to avoid any delay to the Contractor.

If a survey mark is disturbed or obliterated, the Contractor shall immediately notify the Superintendent and, unless the Superintendent otherwise directs, the Contractor shall reinstate the survey mark.

If the disturbance or obliteration is caused by a person referred to in Clause 27.2, other than the Contractor, the cost incurred by the Contractor in reinstating the survey mark shall be valued under Clause 40.5.

### 28.3 Errors in Setting Out

If the Contractor discovers an error in the position, level, dimensions or alignment of any work under the Contract, the Contractor shall immediately notify the Superintendent and, unless the Superintendent otherwise directs, the Contractor shall rectify the error.

If the error has been caused by incorrect survey marks supplied by the Superintendent, the cost incurred by the Contractor in rectifying the error shall be valued under Clause 40.5.

### 28.4 Survey Mark Defined

‘Survey mark’ in Clause 28 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 work under the Contract.

## 29 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT

### 29.1 Provision of Materials, Labour and Constructional Plant

Except to the extent that the Contract otherwise provides, the Contractor shall supply everything necessary for the proper performance of the Contractor’s obligations and discharge of the Contractor’s liabilities under the Contract.

### 29.2 Removal of Materials and Constructional Plant

From time to time the Superintendent may by written notice to the Contractor direct the Contractor not to remove from the Site Constructional Plant or materials. Thereafter, the Contractor shall not remove the materials or the Constructional Plant without the prior written approval of the Superintendent, which approval shall not be unreasonably withheld.

### 29.3 Manufacture and Supply of Materials

The Superintendent may direct the Contractor to supply particulars of —

- (a) the mode and place of manufacture;

- (b) the source of supply;
- (c) the performance capacities; and
- (d) other information,

in respect of any materials, machinery or equipment to be supplied by the Contractor under or used in connection with the Contract.

## 30 MATERIALS AND WORK

### 30.1 Quality of Materials and Work

The Contractor shall use the materials and standards of workmanship required by the Contract. In the absence of any requirement to the contrary, the Contractor shall use suitable new materials.

### 30.2 Quality Assurance

The Contractor shall, if requirements are so stated in the Contract —

- (a) plan, establish and maintain a quality system which conforms to those requirements;
- (b) provide the Superintendent with access to the quality system of the Contractor and each of the subcontractors of the Contractor to enable monitoring and quality auditing.

Any such quality system shall be used only as an aid to achieving compliance with the Contract and to document such compliance. Such system shall not relieve the Contractor of the responsibility to comply with the Contract.

### 30.3 Defective Materials or Work

If the Superintendent discovers material or work provided by the Contractor which is not in accordance with the Contract, the Superintendent may direct the Contractor to —

- (a) remove the material from the Site;
- (b) demolish the work;
- (c) reconstruct, replace or correct the material or work; or
- (d) not to deliver the material or work to the Site.

The Superintendent may direct the times within which the Contractor must commence and complete the removal, demolition, replacement or correction.

If the Contractor fails to comply with a direction issued by the Superintendent pursuant to Clause 30.3 within the time specified by the Superintendent in the direction and provided the Superintendent has given the Contractor notice in writing that after the expiry of 7 days from the date on which the Contractor receives the notice the Principal intends to have the work carried out by

## 28.4 Survey Mark Defined

Note the wide definition of "survey mark".

## 29 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT

### 29.2 Removal of Materials and Constructional Plant

Note that the Contractor must obtain the approval of the Superintendent to remove the Contractor's own constructional plant and materials from the Site, although approval must not be withheld unreasonably. This right to refuse approval is important because Clause 44.5 confers on the Principal the right to use the Contractor's Constructional Plant and materials should the Principal take over the work if the Contractor fails to show cause under Clause 44.4.

See SL 052 for a form of Notice Not to Remove Materials or Plant.

### ~~29.4 Apprentice/Training Requirements~~ NOTE: Deleted

Note that this whole sub-section has been deleted from versions subsequent to 1996. It has been relocated to the Supplementary Conditions of Contract.

## 30 MATERIALS AND WORK

### 30.1 Quality of Materials and Work

New materials must be used unless specified otherwise in the Contract.

### 30.2 Quality Assurance

The Note draws attention to the fact that Quality Assurance requirements, if appropriate, are to be set out elsewhere in the Contract documents. Standards Australia has a handbook for the ISO 9000 series of quality Standards. The reference number is HB 90.3 : 2000 "The Construction Industry Guide to ISO 9001 : 2000."

Refer to the Department's "Standard Specifications Roads" and in particular to MRS 11.50 "Specific Quality System Requirements".

Attention should be given to the statement that a Quality System is an aid to achieving compliance with the Contract and that any such system shall not relieve the Contractor of the responsibility for compliance with the Contract.

### 30.3 Defective Material or Work

The Principal has wide powers to have defective materials or work rectified if the Contractor fails to comply with a Superintendent's notice to do so, and in particular if the Contractor fails to comply within the time specified. Care should be taken to distinguish between the Superintendent's powers to direct works covered by items (a), (b), (c) and (d) and the Principal's powers to have the work done by others.

See SL 053 for a form of Notice of Defective Work.

See SL 054 for a form of Notice that Principal Proposes to Rectify Defective Materials or Work.

other persons, the Principal may have the work of removal, demolition, replacement or correction carried out by other persons and the cost incurred by the Principal in having the work so carried out shall be a debt due from the Contractor to the Principal.

### **30.4 Variations due to Defective Materials or Work**

Instead of a direction under Clause 30.3, the Superintendent may direct a variation pursuant to Clause 40. The variation shall be valued under Clause 40.5 and —

- (a) if the variation causes an increase or decrease in the value to the Principal of the Works, regard shall also be had to the increase or decrease; and
- (b) if the variation results in the Contractor incurring more or less cost than would reasonably have been incurred had the Contractor been given a direction under Clause 30.3, regard shall also be had to the difference.

### **30.5 Acceptance of Defective Material or Work**

Instead of a direction under Clause 30.3 or 30.4, the Superintendent may notify the Contractor that the Principal elects to accept the material or work notwithstanding that it is not in accordance with the Contract. In that event the resulting decrease in the value of the Works to the Principal and any other loss suffered by the Principal shall be valued in accordance with the applicable provisions of the Specification dealing with such valuations, and in the absence of such provisions, at a relevant value as determined by the superintendent.

### **30.6 Generally**

The Superintendent shall give either a direction under Clause 30.3 or 30.4 or a notice under Clause 30.5 as soon as practicable after the Superintendent becomes aware that material or work is not in accordance with the Contract. The Superintendent may give the direction or notice at any time before the issue of the Final Certificate under Clause 42.8.

Except to the extent that to do so would be inconsistent with a direction under Clause 30.4 or a notice under Clause 30.5 and notwithstanding that the Superintendent has not given a direction under Clause 30.3, the Contractor shall promptly remove, demolish, replace or correct material or work that is not in accordance with the Contract.

A progress payment, or a test or a failure by the Superintendent or anyone else to disapprove any material or work shall not prejudice the power of

the Superintendent to subsequently give a direction under Clause 30.3 or 30.4 or a notice under Clause 30.5.

Nothing in Clause 30 shall prejudice any other right which the Principal may have against the Contractor arising out of the failure of the Contractor to provide material or work in accordance with the Contract.

The Superintendent shall not be obliged to give a direction under Clause 30.4 or a notice under Clause 30.5 to assist the Contractor.

## **31 EXAMINATION AND TESTING**

### **31.1 Superintendent May Order Tests**

In Clause 31 'test' includes examine and measure.

At any time prior to the issue of the Final Certificate the Superintendent may direct that any material or work under the Contract be tested. The Contractor shall provide such assistance and samples and make accessible such parts of the work under the Contract as may be required by the Superintendent. On completion of the tests, the Contractor shall make good the work under the Contract so that it fully complies with the Contract.

### **31.2 Covering Up of Work**

The Superintendent may direct that any part of the work under the Contract shall not be covered up or made inaccessible without the Superintendent's prior approval.

### **31.3 Who Conducts Tests**

Tests shall be conducted as provided in the Contract or by the Superintendent or a person (which may include the Contractor) nominated by the Superintendent.

### **31.4 Notice of Tests**

Before conducting a test under the Contract the party conducting the test, being the Superintendent or the Contractor, shall give reasonable notice in writing to the other of the time, date and place of the test. If the other does not then attend, the test may nevertheless proceed.

### **31.5 Procedure if Tests Delayed**

Without prejudice to any other right, if the Contractor or the Superintendent delays in conducting a test, the other, after giving reasonable notice in writing of intention to do so, may conduct the test.

### 30.4 Variations due to Defective Materials or Work

The Superintendent may direct a variation under this clause, which will result in *a valuation being made of the amount owing to, or from, the Contractor. That is, the variation may well result in a deduction being made, rather than additional payment, or the Contractor may have to carry out additional work to rectify the defective materials or work. The Superintendent should state in the direction whether or not the Contractor will receive additional payment for such extra materials or work.*

When issuing directions under Clauses 30.3 or 30.4 the Superintendent should specify which clause applies.

### 30.5 Acceptance of Defective Material or Work

Note that the Principal has the power to accept work not in accordance with the Contract - the Superintendent notifies the Contractor of the decision. The Superintendent acts as an independent certifier when valuing any such variation. Versions of the Contract up until January 2004 provided for the decreased value of the Works or loss to be valued under Clause 40.5, but the January 2004 version allows it to be assessed “..at a relevant value as determined by the superintendent.” (sic). The Superintendent should have a reasonable basis for his valuation.

See SL 075 for a form of Notice of Acceptance of Defective Work.

### 30.6 Generally

The Superintendent is allowed very wide powers to give directions under Clause 30 relating to materials or work under the Contract. Note particularly the last paragraph, which states that the Superintendent is not obliged to give a notice which is primarily aimed at assisting the Contractor.

## 31 EXAMINATION AND TESTING

### 31.1 Superintendent May Order Tests

Note that ‘test’ includes examine and measure.

Under Clause 31, the power of the Superintendent to direct tests continues up to the issue of the Final Certificate.

Note that Clause 31 provides for the Superintendent to order tests - the Principal has no such power. Even if the Principal asserts that material or work is not in accordance with the Contract under Clause 31.8, the Principal cannot order the actual tests under Clause 31. 1. It is possible that the person nominated by the Superintendent pursuant to Clause 31.3 would be the Principal's agent.

See SL 055 for a form of Notice of Test.

### 31.6 Results of Test

Results of tests shall be promptly made available by each party to the other and to the Superintendent.

### 31.7 Costs of Testing

Costs of and incidental to testing shall be valued under Clause 40.5 and shall be borne by the Principal or paid by the Principal to the Contractor unless —

- (a) the Contract provides that the Contractor shall bear the costs or the test is one which the Contractor was required to conduct other than pursuant to a direction under Clause 31.1; or
- (b) the test shows that the material or work is not in accordance with the Contract; or
- (c) the test is in respect of work under the Contract covered up or made inaccessible without the Superintendent's prior approval where such was required; or
- (d) the test is consequent upon a failure of the Contractor to comply with a requirement of the Contract.

Where such costs are not to be borne by the Principal, they shall be borne by the Contractor or paid by the Contractor to the Principal.

### 31.8 Access for Testing

If, during the Defects Liability Period —

- (a) the Principal or the Superintendent asserts that material or work is not in accordance with the Contract; and
- (b) the Contractor requests permission to test the material or work,

the Principal shall not unreasonably refuse the Contractor access to test the material or work.

## 32 WORKING HOURS

The working hours and working days shall be as stated in the Annexure and if not so stated as notified by the Contractor to the Superintendent prior to commencement of work on Site and shall not be varied without the prior approval of the Superintendent except when in the interests of safety of the work under the Contract or to protect life or property the Contractor finds it necessary to carry out work outside the working hours or on other than the working days stated in the Contract. In such cases the Contractor shall notify the Superintendent in writing of the circumstances as early as possible.

All costs attributable to the contract administration by or on behalf of the Principal of work during times approved pursuant to the previous paragraph shall be borne by the Principal.

## 33 PROGRESS AND PROGRAMMING OF THE WORKS

### 33.1 Rate of Progress

The Contractor shall proceed with the work under the Contract with due expedition and without delay.

The Contractor shall not suspend the progress of the whole or any part of the work under the Contract except where the suspension is under Clause 44.9 or is directed or approved by the Superintendent under Clause 34.

The Contractor shall give the Superintendent reasonable advance notice of when the Contractor requires any information, materials, documents or instructions from the Superintendent or the Principal.

The Principal and the Superintendent shall not be obliged to furnish any information, materials, documents or instructions earlier than the Principal or the Superintendent, as the case may be, should reasonably have anticipated at the Date of Acceptance of Tender.

The Superintendent may direct in what order and at what time the various stages or parts of the work under the Contract shall be performed. If the Contractor can reasonably comply with the direction, the Contractor shall do so. If the Contractor cannot reasonably comply, the Contractor shall notify the Superintendent in writing, giving reasons. No direction by the Superintendent shall constitute or be regarded as a direction under this paragraph unless the direction is in writing and expressly states that it is a direction under this paragraph.

If compliance with the direction causes the Contractor to incur more or less cost than otherwise would have been incurred had the Contractor not been given the direction, the difference shall be valued under Clause 40.5.

### 33.2 Construction Program

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

### 31.7 Costs of Testing

This Clause deals with who bears the cost of testing under Clause 31. The cost of testing will fall on the Principal unless:

- (a) the Contract provides that the cost of the test is to be borne by the Contractor (common for QA contracts.);
- (b) the test shows that the material or work does not comply with the Contract requirements;
- (c) the work is covered up without the Superintendent's approval; or
- (d) the test is consequent on a failure of the Contractor to comply with the Contract.

### 31.8 Access for Testing

The Contractor has a right of access for testing during the Defects Liability Period when the Contractor otherwise would not be on Site nor have a right of access to the Site.

## 32 WORKING HOURS

Item 13 of the Annexure has provision for the working hours to be stated. This is different to AS2124-1992, which has no such provision. The default position is Monday to Friday - 7.00am to 5.00pm except for Public Holidays.

Considerable care needs to be taken in regard to the setting of working hours and any amendment during the Works.

There is a difference between the "working hours" under this Clause and the days used in the counting of days for delay, time claims, etc. A simple example may be where a Contractor is permitted (Clause 32) to work 6 days per week but only programs for, and works, 5 days per week. Most likely using 5 days per week would be appropriate in a delay analysis.

A change in the approved working days does not necessarily change the days used for the counting of days under Clause 35.5.

## 33 PROGRESS AND PROGRAMMING OF THE WORKS

The Supplementary Conditions of Contract contains Clause 8 Planning and Review of Progress - Major Contracts which is additional to the requirements of Clause 33. These are comprehensive provisions which need to be read in conjunction with Clause 33.

### 33.1 Rate of Progress

The third paragraph gives the Contractor a right to give reasonable notice of when the Contractor requires information and materials. While the Contractor may plan to complete work earlier than originally advised, the Principal and Superintendent are under no obligation to assist the Contractor to expedite the Works.

Key obligations on the Contractor are:

- (a) to proceed with due expedition and without delay; and
- (b) not to suspend the progress of the Works unless under Clauses 44.9 or as directed by the Superintendent.

The Superintendent has power to alter the sequence of the Works, but this may result in cost consequences for the Contractor and claims for additional payment. Refer also Clause 33.3 Acceleration.

### 33.2 Construction Program

Note the definition of "construction program". See also the Supplementary Conditions of Contract. If the Superintendent orders a program which does not comply with this definition there may be cost consequences to the Principal. Clause 33.2 does not affect rights or obligations under Clause 33.1.

See SL 005A for a form of Notice that Construction Program Required.

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

The Contractor may voluntarily furnish to the Superintendent a construction program.

The Superintendent may direct the Contractor to furnish to the Superintendent a construction program within the time and in the form directed by the Superintendent

The Contractor shall not, without reasonable cause, depart from —

- (a) a construction program included in the Contract; or
- (b) a construction program furnished to the Superintendent.

The furnishing of a construction program or of a further construction program shall not relieve the Contractor of any obligations under the Contract including the obligation to not, without reasonable cause, depart from an earlier construction program.

### 33.3 Acceleration

Where the Contractor is entitled to an extension of time for Practical Completion under Clause 35.5, the Superintendent may, instead of granting a reasonable extension of time under that Clause, direct the Contractor in writing to accelerate the performance of the work under the Contract so as to overcome the whole or part of the delay which gave rise to the entitlement to an extension of time and the Contractor shall comply with that direction.

If the Superintendent directs the Contractor under Clause 33.3 to accelerate the performance of the work under the Contract so as to overcome the whole of the delay in question, the Contractor shall no longer be entitled to any extension of time for that delay.

If the Superintendent directs the Contractor under Clause 33.3 to accelerate the performance of the work under the Contract so as to overcome part only of the delay in question, the Contractor shall no longer be entitled to any extension of time for that part of the delay, but the Superintendent shall grant a reasonable extension of time under Clause 35.5 for the balance of the delay.

No direction by the Superintendent shall constitute or be regarded as a direction under Clause 33.3 unless it is in writing and expressly states that it is a direction under Clause 33.3.

If compliance with a direction to accelerate given under Clause 33.3 causes the Contractor to incur more or less cost than otherwise would have been incurred had the Contractor not been given the

direction, the difference shall be valued under Clause 40.5.

## 34 SUSPENSION OF THE WORKS

### 34.1 Suspension by Superintendent

If the Superintendent considers that the suspension of the whole or part of the work under the Contract is necessary —

- (a) because of an act or omission of —
  - (i) the Principal, the Superintendent or an employee, consultant or agent of the Principal; or
  - (ii) the Contractor, a subcontractor or an employee or agent of either;
- (b) for the protection or safety of any person or property; or
- (c) to comply with an order of a court,

the Superintendent shall direct the Contractor to suspend the progress of the whole or part of the work under the Contract for such time as the Superintendent thinks fit.

### 34.2 Suspension by Contractor

If the Contractor wishes to suspend the whole or part of the work under the Contract, otherwise than under Clause 44.9, the Contractor shall obtain the prior written approval of the Superintendent. The Superintendent may approve of the suspension and may impose conditions of approval. The Superintendent is not obliged to approve the suspension.

### 34.3 Recommencement of Work

As soon as the Superintendent becomes aware that the reason for any suspension no longer exists, the Superintendent shall direct the Contractor to recommence work on the whole or on the relevant part of the work under the Contract.

If work is suspended pursuant to Clause 34.2 or 44.9, the Contractor may recommence work at any time after reasonable advance notice to the Superintendent.

### 34.4 Cost of Suspension

Any cost incurred by the Contractor by reason of a suspension under Clause 34.1 or Clause 34.2 shall be borne by the Contractor but if the suspension is due to an act or omission of the Principal, the Superintendent or an employee, consultant or agent of the Principal and the suspension causes the Contractor to incur more or less cost than otherwise would have been incurred but for the

### 33.3 Acceleration

This Clause is an addition to AS2124-1992, which does not give the Superintendent general power to accelerate works under the contract. Acceleration clauses are not usually found in standard form contracts. The Clause gives the Superintendent (not the Principal) powers to order acceleration in lieu of granting all or part of a delay for which the Contractor is entitled to an extension of time. The Clause does not give the Superintendent the power to order acceleration in the absence of such an entitlement to an extension of time.

The delay arising out of the event for which the Contractor would otherwise have been entitled to an extension to time should be advised by the Superintendent. As with any other power the Superintendent exercises under the Contract it must be done bearing in mind Clause 23.

**Following any such written direction the Contractor is bound to accelerate. If it fails to accelerate it will be in breach of contract and it may be subject to liquidated damages (if any) for late completion.**

The Superintendent should ask the Contractor to identify acceleration methods and record costs as they are incurred. Acceleration costs and consequential effects are notoriously difficult to quantify. Where possible, costs should be agreed in advance.

In respect of valuation under Clause 40.5 of any additional costs incurred, the provisions in respect of the "disruption" due to acceleration are not expected to result in reliance on Clause 40.5(f) for valuation of the costs of acceleration.

While this clause is the only clause in the General Conditions of Contract that gives the power to the Superintendent to order acceleration, other actions of the Superintendent (or Principal) may result in the Contractor having to accelerate in order to achieve completion by the Date for Practical Completion. For example, the Superintendent may be considerably late in granting proper extensions of time to the Contractor.

In such a case a Contractor may be forced to accelerate to make up the extensions of time not approved. It is important for the Contractor to advise the reasons for any acceleration, preferably in writing - and preferably before any acceleration takes place.

*Particular note should be taken of the fifth paragraph of Clause 33.1 with regard to directions by the Superintendent as to the order and time for various stages of the work under the Contract, and the references to acceleration and cost in Clause 8.6 Items (b) and (c) respectively of the SCoC.*

*A written direction under Clause 33.1 can be the basis for a claim for additional payment, but no direction regarding the use, suitability or change to a construction program submitted under Clause 8.2 is a direction to accelerate or vary the order or duration of work. The Superintendent must take care that there can be no ambiguity as to the intent of any direction which he issues.*

## 34 SUSPENSION OF THE WORKS

### 34.1 Suspension by Superintendent

Suspension of the work by the Superintendent must be exercised honestly and fairly (as required by Clause 23 and only for the reasons given in Clause 34.1). Suspension cannot be directed for improper purposes, i.e. by the Superintendent, at the whim of the Principal, without putting the Principal in breach of Contract.

See SL 056 for a form of Notice of Suspension of Work.

### 34.2 Suspension by Contractor

The Contractor cannot suspend as of right, except with the Superintendent's written approval or as provided by Clauses 44.9 and 44.11. Note that all versions subsequent to 1996 state that the Superintendent is not obliged to approve the suspension but must act reasonably under the terms of the Contract.

### 34.3 Recommencement of Work

Note that the Superintendent must give the Contractor reasonable notice of when work is to be recommenced after a period of suspension. Clause 23 is relevant in determining what is "reasonable" in the circumstances.

### 34.4 Cost of Suspension

The Contractor is only entitled to costs of the suspension if the suspension is due to an act or default of the Principal or Superintendent, or those for whom the Principal is responsible. If the cause of the suspension purportedly given under Clause 34.1 (b) or (c) is due to the act or omission of the Principal, or a person for whom the Principal is responsible, then the Contractor may be entitled to reimbursement of additional costs under Clause 40.5.

suspension, the difference shall be valued under Clause 40.5.

### 34.5 Effect of Suspension

Suspension shall not affect the Date for Practical Completion but the cause of suspension may be a ground for extension of time under Clause 35.5.

## 35 TIMES FOR COMMENCEMENT AND PRACTICAL COMPLETION

### 35.1 Time for Commencement of Work on the Site

The Contractor shall give the Superintendent 7 days' notice of the date upon which the Contractor proposes to commence work on the Site.

The Superintendent may reduce the period of notice required.

The Contractor shall commence work on the Site within 14 days after the Principal has given the Contractor possession of sufficient of the Site to enable the Contractor to commence work.

The Superintendent may extend the time for commencement of work on the Site.

### 35.2 Time for Practical Completion

The Contractor shall execute the work under the Contract to Practical Completion by the Date for Practical Completion.

Upon the Date of Practical Completion the Contractor shall give possession of the Site and the Works to the Principal.

The Contractor may if it chooses accelerate progress at its own cost and reach Practical Completion before the Date for Practical Completion, but if it does choose to accelerate, then —

- (a) neither the Principal, the Superintendent nor any other person for whom the Principal is responsible will be obliged to do or refrain from doing anything to enable the Contractor to reach Practical Completion before the Date for Practical Completion; and
- (b) the time for performance of the Principal's and the Superintendent's obligations shall not be affected by the Contractor's decision to accelerate.

### 35.3 Separable Portions

The interpretations of —

- (a) Date for Practical Completion,
- (b) Date of Practical Completion;
- (c) Practical Completion,

and Clauses 5.10, 16, 35, 37, 38, 42.3 and 42.5 shall apply separately to each Separable Portion and references therein to the Works and to work under the Contract shall mean so much of the Works and the work under the Contract as is comprised in the relevant Separable Portion.

If the Contract does not make provision for the amount of security, retention moneys, liquidated damages or bonus applicable to a Separable Portion, the respective amounts applicable shall be such proportion of the security, retention moneys, liquidated damages or bonus applicable to the whole of the work under the Contract as the value of the Separable Portion bears to the value of the whole of the work under the Contract.

### 35.4 Use of Partly Completed Works

If a part of the Works has reached a stage equivalent to that of Practical Completion but another part of the Works has not reached such a stage and the parties cannot agree upon the creation of Separable Portions, the Superintendent may determine that the respective parts shall be Separable Portions.

In using the Separable Portion that has reached Practical Completion, the Principal shall not hinder the Contractor in the performance of the work under the Contract.

### 35.5 Extension of Time for Practical Completion

Within 14 days of it becoming evident to the Contractor that anything, including an act or omission of the Principal, the Superintendent or the Principals' employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall notify the Superintendent in writing with details of the possible delay and the cause. The notice must be endorsed "Contractor's Notice of Possible Delay Under Clause 35.5".

When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall give notice to the Superintendent who shall notify the Contractor in writing of the extent of the likely delay.

If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the commencement of that cause the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion endorsed "Contractor's Extension of Time Claim Under Clause 35.5" and setting out the facts on which the;

### 34.5 Effect of Suspension

Suspension may also entitle the Contractor to an extension of time under Clause 35.5, provided it falls within one of the causes listed in Clause 35.5(a) or (b). However, note the qualification in Clause 35.5 in the event of there being a concurrent cause of delay by the Contractor (see Notes to Clause 35.5).

## 35 TIMES FOR COMMENCEMENT AND PRACTICAL COMPLETION

### 35.1 Time for Commencement of Work on the Site

The Contractor must start work within 14 (calendar) days of the Principal giving possession of sufficient of the Site to start work and, in any event, the Contractor must give 7 days prior notice (which need not be in writing) of when the Contractor proposes to start. The Superintendent has the right to extend these time limits.

### 35.2 Time for Practical Completion

Note the definitions of Practical Completion and Date for Practical Completion in Clause 2. Note that possession of both the Site and the Works (see definitions of these words in Clause 2) must be handed over to the Principal at Practical Completion.

The provisions in respect of acceleration at the Contractor's choice have been added to this clause. In respect of the Contractor meeting its obligations, it is obviously important for the Superintendent to differentiate between any ordered or forced acceleration and acceleration by the Contractor of its own volition.

For example, the Contractor must note that acceleration of its own volition does not provide an obligation on the Principal to accelerate the supply of Principal supplied items or to accelerate any obligations of the Principal, such as approval of drawings.

### 35.3 Separable Portions

This Clause provides for staged Practical Completion. Each part of the Works stated at the time of tender to be completed at different times is defined as a Separable Portion. Note that any balance of the Works must also be specified as a Separable Portion.

Except in relation to the matters dealt with in the last paragraph of Clause 35.3, references in certain Clauses to the "Works" and "work under the Contract" mean that part of the "Works" or "work under the Contract" comprised in the relevant Separable Portion.

The Clauses referred to are:

- (a) Clause 5.10 - Reduction of Security and Retention Moneys;
- (b) Clause 16 - Care of the Work and Reinstatement of Damage;
- (c) Clause 35 - Times for Commencement and Practical Completion;
- (d) Clause 37 - Defects Liability;
- (e) Clause 38 - Cleaning Up;
- (f) Clause 42.3 - Retention Moneys; and
- (g) Clause 42.5 - Certificate of Practical Completion.

The use of Separable Portions is an important part of the Road Construction Contract and, while it provides advantages to all parties, there are additional steps that must be undertaken so that the Contract is administered properly for each Separable Portion.

### 35.4 Use of Partly Completed Works

This Clause gives wide power to the Superintendent to create, in default of agreement by the parties, Separable Portions to enable the Principal to occupy a part of the Works before Practical Completion of the whole of the Works. This can overcome, for a Principal, legal and contractual difficulties which may be caused if the Principal wishes to occupy part of the Works before Practical Completion.

The Superintendent does not have the power to create Separable Portions except as provided in this Clause, i.e. it is not a general power to be used at the Superintendent's choice.

See SL 057 for a form of Notice of Separable Portions.

claim is based, the Contractor shall be entitled to an extension of time for Practical Completion.

The causes are —

- (a) events occurring on or before the Date for Practical Completion which are beyond the reasonable control of the Contractor including but not limited to —

industrial conditions;

inclement weather,

but not including a delay, breach, act or omission by any subcontractor or any of the Contractor's employees;

- (b) any of the following events whether occurring before, on or after the Date for Practical Completion —

- (i) delays caused by —

- the Principal;
- the Superintendent;
- the Principal's employees, consultants, other contractors or agents;

- (ii) actual quantities of work in the Schedule of Rates being greater than the quantities determined by reference to the upper limit of accuracy stated in Item 6C of the Annexure (otherwise than by reason of a variation directed under Clause 40);

- (iii) Latent Conditions;

- (iv) variations directed under Clause 40;

- (v) repudiation or abandonment by a Nominated Subcontractor;

- (vi) changes in the law;

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

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

- (ix) claims referred to in Clause 17.1 (iv);

- (x) any breach of the Contract by the Principal;

- (xi) any other cause which is expressly stated in the Contract to be a cause for

extension of time for Practical Completion.

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

In determining whether the Contractor is or will be delayed in reaching Practical Completion regard shall not be had to —

— whether the Contractor can reach Practical Completion by the Date for Practical Completion without an extension of time;

— whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

With any claim for an extension of time for Practical Completion, or as soon as practicable thereafter, the Contractor shall give the Superintendent written notice of the number of days extension claimed.

The Contractor shall not be entitled to an extension of time for any delay in respect of which the Contractor has failed to comply strictly with the provisions of the third paragraph of Clause 35.5.

Subject to Clause 33.3, if the Contractor is entitled to an extension of time for Practical Completion the Superintendent shall, within 28 days after receipt of the notice of the number of days extension claimed, grant a reasonable extension of time. If within the 28 days the Superintendent does not grant the full extension of time claimed, the Superintendent shall before the expiration of the 28 days give the Contractor notice in writing of the reason.

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

Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.

Neither a delay caused by any one or more of the causes mentioned in Clauses 35.5(b)(i), (b)(iv) or (b)(x) nor a failure by the Superintendent to grant an extension of time or a reasonable extension of time under Clause 35.5 or to do so within the time

### 35.5 Extension of Time for Practical Completion

The most important provisions of this Clause are as follows:

**1st paragraph.** All causes of delay, including those caused by the Contractor, must be notified by the Contractor to the Superintendent in writing within 14 days of the delay becoming evident. Note that the time limit of 14 days is added to AS2124-1992 and provides a time constraint for the Contractor to notify time claims. All versions of the Contract subsequent to the 1996 version require the notice to be endorsed "Contractor's Notice of Possible Delay Under Clause 35.5." This is to remove any doubt that the letter, fax etc from the Contractor is a notice of possible claim and not just for information purposes.

**2nd paragraph** This imposes an obligation on the Principal to notify the Superintendent of delays within the Principal's knowledge. The Superintendent in turn notifies the Contractor. This obligation on the Principal is often overlooked.

See SL 063 for a form of Principal's Notice of Delay.

**3rd paragraph** If the Contractor wishes to claim an extension of time for Practical Completion the Contractor must claim for the extension within 28 (calendar) days after the commencement of the cause (note that the 1996 version says "after the delay occurs"). In order to trigger the 28 (calendar) days period within which the Superintendent must respond, the number of days extension of time sought by the Contractor must be included in the notice or advised at some later time. Note that this claim must also be clearly endorsed "Contractor's Extension of Time Claim Under Clause 35.5", similar to the Notice.

**4th paragraph** Note the causes of delay for which extensions of time are to be granted.

**5th paragraph** This paragraph deals with concurrent delays and deprives the Contractor of a right to an extension of time (and consequently any damages or extra costs for same) during a period where a delay for which an extension of time may not be granted (usually but not necessarily caused by the Contractor) occurs concurrently with any other delay which might lead to an extension of time. The paragraph is intended to encourage Contractors to minimise or eliminate their own delays as soon as possible and is often disputed by Contractors.

**6th paragraph** The effect of this paragraph is that the Contractor owns the float under its construction program. However, the Superintendent has the power to order acceleration under Clause 33.3

**7th paragraph** This provides that the Contractor must claim a number of days extension of time in order to trigger the time for response by the Superintendent set out in the ninth paragraph.

**8th paragraph** This confirms that the notice provisions of the third paragraph must be complied with. The time bar will apply.

**9th paragraph** When the Contractor claims a specified number of days extension of time, the Superintendent has 28 (calendar) days to respond to the claim. If the full claim is not granted or the claim is rejected, the Superintendent is obliged to give written reasons why. See further the Note to the 11th paragraph below.

See SL 022 and SL 021 for a form of Superintendent's Grant of Extension of Time.

**10th paragraph** This paragraph ensures that the implied common law obligation on the Contractor to mitigate and to minimise loss, so far as delay is concerned, expressly applies to these Conditions of Contract.

**11th paragraph** The Superintendent may grant extensions of time even if the Contractor fails to apply for same. This may be necessary to preserve the Principal's right to liquidated damages for periods of delay for which the Contractor is not entitled to extensions of time. The Superintendent must be cautious if he wishes to grant an EOT for any other purpose.

**12th paragraph** This paragraph seeks to prevent time being set at large due to any delay by the Principal or by any delay or failure by the Superintendent to grant or to respond to a claim for an extension of time. The Contractor's right to recover damages due to these delays or failures is, however, preserved even though the Contractor cannot rely on the "prevention principle". Note that all versions subsequent to 1996 have "...for breach of Contract." added at the end to make clear the basis of the Contractor's claim for damages.

The wording "preceding paragraph" relates to the accepted causes for a delay for which an extension of time is claimed.

When there is a delay caused by any other event (eg Contractor's plant has broken down) then, to the extent that the Contractor caused delay is concurrent, there is an EOT.

If any of the reasons listed occur at the same time, ie are concurrent, the extension of time for the whole period is to be granted.

The "preceding paragraph" refers to the causes listed in paragraphs (a) and (b) after the words "the causes are".

stated in this Clause nor the giving of a direction to accelerate under Clause 33.3 shall —

- set the Date for Practical Completion at large; or
- render Clause 35.6 unenforceable,

and the legal principle known as the “prevention principle” shall not apply where there has been such a delay or failure, but nothing in this paragraph shall prejudice any right of the Contractor to damages for breach of Contract.

### **35.6 Liquidated Damages for Delay in Reaching Practical Completion**

If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in Item 14 or Item 21 of the Annexure for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs.

If after the Contractor has paid or the Principal has deducted liquidated damages, the time for Practical Completion is extended, the Principal shall forthwith repay to the Contractor any liquidated damages paid or deducted in respect of the period up to and including the new Date for Practical Completion.

### **36 DELAY OR DISRUPTION COSTS**

Where the Contractor has been granted an extension of time under Clause 35.5 for any delay caused by any of the events referred to in Clause 35.5 (b)(i), the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay. The amount payable (if any) shall include the percentage margin for off-site overheads stated in Item 15 of the Annexure but shall not include profit or loss of profit or rise and fall.

Nothing in Clause 36 shall —

- (a) oblige the Principal to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Contract; or
- (b) limit the Principal's liability for damages for breach of the Contract.

### **37 DEFECTS LIABILITY**

The Defects Liability Period stated in Item 16 or Item 21 of the Annexure shall commence on the Date of Practical Completion. Where no period is

stated in Item 16 or Item 21 of the Annexure, the Defects Liability Period shall be 90 days.

As soon as possible after the Date of Practical Completion, the Contractor shall rectify any defects or omissions in the work under the Contract existing at Practical Completion.

At any time prior to the 14th day after the expiration of the Defects Liability Period, the Superintendent may direct the Contractor to rectify any omission or defect in the work under the Contract existing at the Date of Practical Completion or which becomes apparent prior to the expiration of the Defects Liability Period. The direction shall identify the omission or defect and state a date by which the Contractor shall complete the work of rectification and may state a date by which the work of rectification shall commence. The direction may provide that in respect of the work of rectification there shall be a separate Defects Liability Period of a stated duration not exceeding the period stated in Item 16 or Item 21 of the Annexure. The separate Defects Liability Period shall commence on the date the Contractor completes the work of rectification. Clause 37 shall apply in respect of the work of rectification and the Defects Liability Period for that work of rectification.

If the work of rectification is not commenced or completed by the stated dates, the Principal may have the work of rectification carried out at the Contractor's expense, but without prejudice to any other rights that the Principal may have against the Contractor with respect to such omission or defect and the cost of the work of rectification incurred by the Principal shall be a debt due from the Contractor.

If it is necessary for the Contractor to carry out work of rectification, the Contractor shall do so at times and in a manner which causes as little inconvenience to the occupants or users of the Works as is reasonably possible.

### **38 CLEANING UP**

The Contractor shall keep the Site and the work clean and tidy. The Contractor shall regularly remove rubbish and surplus material.

Within 14 days after the Date of Practical Completion the Contractor shall remove Temporary Works and Constructional Plant.

The Superintendent may extend the time for removal of Temporary Works or Constructional Plant necessary to enable the Contractor to perform remaining obligations.

### 35.6 Liquidated Damages for Delay in Reaching Practical Completion

A rate per day for Liquidated Damages must be specified in Item 14 or Item 21 of the Annexure. Note that if there are Separable Portions, a rate per day for each Separable Portion may be specified in the Annexure. If a rate is not so specified, the last paragraph of Clause 35.3 should be noted.

### 36 DELAY OR DISRUPTION COSTS

Note that this Clause has been amended in some significant areas from the original version in 1996.

Extra costs may be payable to the Contractor where an extension of time is granted because of a cause of delay to which Clause 35.5, Item (b)(i) applies (act or omission of the Principal, the Principal's employees or agents or the Superintendent). The clause now provides for the Principal to pay the Contractor for costs incurred because of the delay (if any), including the percentage margin for off-site overheads which is to be stated in Item 15 of the Annexure. It makes it clear that the amount payable will not include profit or loss of profit.

The application of the % stated in Item 15 of the Annexure is to the ". . . extra costs as are necessarily incurred by the Contractor by reason of the delay".

Some claims have been received where cost per day has been calculated and this cost applied for the length of the delay. This is not the intent of the clause. The clause requires that the percentage for off site overheads (excluding profit) be applied to the extra costs incurred as a result of the delay.

Note that not all delay or disruption costs are claimable under Clause 36. If no extension of time applies, another right to claim must be found e.g. Clause 40.

In Clause 36:

- (i) Item (a) prevents the Contractor being paid delay costs or damages more than once for the same cause; and
- (ii) Item.(b) preserves the Principal's liability to pay damages for any breach of contract by the Principal.

The last paragraph in the 1996 version, which referred to a 14 day time bar on payment for delays arising from a latent condition, has been deleted.

### 37 DEFECTS LIABILITY

The length of the Defects Liability Period should be specified in Item 16 or Item 21 of the Annexure otherwise it will be of 90 days duration only.

Defects existing at Practical Completion must be rectified as soon as possible.

Note that the Superintendent has the right to direct a separate Defects Liability Period in respect of defects which have occurred in the Defects Liability Period. A failure by the Contractor to rectify defects during the Defects Liability Period may give the Principal a right to employ others to do so after prior notice has been given and to recover the cost from the Contractor.

See SL 058 for a form of Notice to Rectify Defects.

Under AS2124 - 1992 and this Contract the Superintendent does not have the discretion to reduce the Defects Liability Period.

### 38 CLEANING UP

There is a continuing obligation on the Contractor to keep the Site clean and tidy and to remove rubbish. Although under Clause 35.2 the Contractor is to give possession of both the Site and the Works to the Principal on Practical Completion, Clause 38 gives the Contractor a further 14 days to remove Temporary Works and Constructional Plant (both are defined in Clause 2).

See SL 073 for a form of Notice to Effect Cleaning Up.

Notwithstanding the provisions of Clause 44, if the Contractor fails to comply with any obligation imposed on the Contractor by Clause 38, the Superintendent may, after the Superintendent has given reasonable notice in writing to the Contractor, have the work of cleaning and tidying up carried out by other persons and the reasonable cost incurred by the Principal in having the work so carried out may be recovered by the Principal as a debt due from the Contractor to the Principal. The rights given by this paragraph are in addition to any other right.

### 39 URGENT PROTECTION

If urgent action is necessary to protect the work under the Contract, other property or people and the Contractor fails to take the action, the Principal may take the necessary action. If the action was action which the Contractor should have taken at the Contractor's cost, the cost incurred by the Principal shall be a debt due from the Contractor.

If time permits, the Superintendent shall give the Contractor prior written notice of the Principal's intention to take action under Clause 39.

### 40 VARIATIONS

#### 40.1 Variations to the Work

The Superintendent may direct the Contractor to —

- (a) increase, decrease or omit any part of the work under the Contract;
- (b) change the character or quality of any material or work;
- (c) change the levels, lines, positions or dimensions of any part of the work under the Contract;
- (d) execute additional work; and/or
- (e) demolish or remove material or work no longer required by the Principal.

The Contractor shall not vary the work under the Contract except as directed by the Superintendent or approved in writing by the Superintendent under Clause 40.

The Contractor is bound only to execute a variation which is within the general scope of the Contract.

The Contractor shall not be bound to execute a variation directed after Practical Completion unless the variation is in respect of rectification work referred to in Clause 37.

#### 40.2 Proposed Variations

Upon receipt of a notice in writing from the Superintendent advising the Contractor of a

proposed variation under Clause 40, the Contractor shall advise the Superintendent whether the proposed variation can be effected. If the variation can be effected, the Contractor shall —

- (a) advise the Superintendent of the effect which the Contractor anticipates that the variation will have on the construction program and time for Practical Completion; and
- (b) provide an estimate of the cost (including delay costs, if any) of the proposed variation.

The Principal shall reimburse the Contractor for the reasonable costs of complying with the requirements of Clause 40.2.

#### 40.3 Pricing the Variation

Unless the Superintendent and the Contractor agree upon the price for a variation, the variation directed or approved by the Superintendent under Clause 40.1 shall be valued under Clause 40.5.

The Superintendent may direct the Contractor to provide a detailed quotation for the work of a variation supported by measurements or other evidence of cost.

#### 40.4 Variations for the Convenience of the Contractor

If the Contractor requests the Superintendent to approve a variation for the convenience of the Contractor, the Superintendent may do so in writing. The approval may be conditional.

Unless the Superintendent otherwise directs in the notice approving the variation, the Contractor shall not be entitled to —

- (a) an extension of time for Practical Completion; or
- (b) extra payment,

in respect of the variation or anything arising out of the variation which would not have arisen had the variation not been approved.

The Superintendent shall not be obliged to approve a variation for the convenience of the Contractor.

#### 40.5 Valuation

Where the Contract provides that a valuation shall be made under Clause 40.5, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount ascertained by the Superintendent as follows —

- (a) if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;

## 39 URGENT PROTECTION

In cases of emergency where the Contractor fails to take appropriate action, wide powers are given to the Principal to protect the work and to recover the cost of doing so.

## 40 VARIATIONS

### 40.1 Variations to the Work

Items (a) to (e) in effect constitute a definition of a variation under these General Conditions of Contract. Variations must be ordered in writing under Clause 40.1 and must be within the general scope of the Contract. Subject to those conditions, this Clause constitutes an agreement by the Contractor to carry out variation work and a failure or refusal to do so may be a breach of contract by the Contractor.

*The definition of "direction" as given in Clause 23 is quite broad and covers actions such as "explanation", "permission" and "requirement" etc. The Superintendent must take care that, when he gives an explanation etc., the Contractor does not interpret this as a direction which will result in a subsequent claim for a variation under Clause 40. The Superintendent should state his expectation, in writing, as to whether or not there will be a consequent time or cost impact so that the Contractor has the opportunity to respond immediately if it disagrees.*

Clause 23 defines "direction" and Superintendents should be cautious when making agreements, giving explanations or approving works that they are not in effect making a direction under this Clause, which will result in a claim for additional payment for a variation.

The Clause provides a limit on the Superintendent's power to order variations after the Date of Practical Completion (except in respect of Clause 37).

### 40.2 Proposed Variations

This Clause gives the Superintendent the right to require the Contractor to advise whether a variation proposed, but not yet confirmed, can be effected. The Principal is required to pay the Contractor the cost of providing the information set out in Clause 40.2, Items (a) and (b). This Clause is intended to restrict the practice, thought to be prevalent, of a Principal using a Contractor as a free pricing service in these circumstances.

Superintendents should ensure the Principal is aware of the possible costs involved.

See SL 023A for a form of Request to Price Proposed Variation.

### 40.3 Pricing the Variation

If a variation is to proceed, the Contractor and Superintendent may either agree on a price for the variation or, failing agreement, the variation is to be valued under Clause 40.5. If the Superintendent directs the Contractor to provide measurements (e.g. by a quantity take off) or other evidence of cost, the Principal will be liable to pay the Contractor these costs over and above normal overhead cost (see last paragraph of Clause 40.5).

When the Superintendent gives his approval to a variation in writing he should specify both time or cost consequences. In particular, if it is a nil cost variation he should say so.

See SL 024A for a form of Request for Variation Quotation.

### 40.5 Valuation

This Clause prescribes the method by which variations are to be valued in default of agreement under Clause 40.3 and to value work referred elsewhere in the Contract (see, for instance, Clauses 3.2, 3.3, 8. 1, 11 (a), 12.3, 14.2, 14.3(a), 27.5, 28.2, 28.3, 30.4, 30.5, 31.7, 33.1, 33.3 and 34.4).

The order in which the valuation process is to take place is set out in Clause 40.5, Items (a), (b) and (c), and is as follows:

- (a) If the Contract prescribes relevant specified rates or prices to be used in determining values (e.g. of variations), then these rates or prices are to be used.
- (b) If Item (a) does not apply, then the rates or prices in a Schedule of Prices or Schedule of Rates, if appropriate, are to be used.
- (c) If neither Item (a) nor (b) applies, then reasonable rates or prices are to be used. Note that the rates used are to be exclusive of GST.

- (b) if Clause 40.5 (a) does not apply, the rates or prices in a Schedule of Prices or Schedule of Rates shall be used to the extent that it is reasonable to use them;
- (c) to the extent that neither Clause 40.5 (a) or 40.5 (b) apply, reasonable rates or prices which are exclusive of GST shall be used in any valuation made by the Superintendent;
- (d) in determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads;
- (e) if the valuation is of an increase or decrease in a fee or charge or is a new fee or charge under Clause 14.3, the value shall be the actual increase or decrease or the actual amount of the new fee or charge without regard to overheads or profit;
- (f) if the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation of the extra costs shall include the percentage margin for off-site overheads stated in Item 15 of the Annexure but shall not include profit or loss of profit or rise and fall;
- (g) if Clause 11 (b) applies, the percentage referred to in Clause 11 (b) shall be used for valuing the Contractor's profit and attendance; and
- (h) daywork shall be valued in accordance with Clause 41; and
- (i) the amount of GST in respect of the relevant supply or part being valued shall be added.

Where rise and fall is applicable to the contract, each variation shall include a valuation of rise and fall except for a valuation related to extra costs incurred by the Contractor for delay and disruption (under clause 40.5(f)), or for a valuation based on actual cost or current prices. Rise and fall shall be valued in accordance with Supplementary Conditions of Contract clause 3.1 where 'A' shall be the unadjusted value of the variation. The final valuation shall be the unadjusted value plus any cost adjustment.

When under Clause 40.3 the Superintendent directs the Contractor to support a variation with measurements and other evidence of cost, the Superintendent shall allow the Contractor the reasonable cost of preparing the measurements or other evidence of cost that has been incurred over and above the reasonable overhead cost.

## 41 DAYWORK

The Superintendent may direct that quantities greater than those determined by reference to the upper limit of accuracy referred to in Clause 3.2 or variations directed by the Superintendent under Clause 40.1 shall be carried out as Daywork. The Contractor shall thereafter each day record particulars of all resources used by the Contractor for the execution of the Daywork and each day furnish to the Superintendent the particulars and copies of time sheets, wages sheets, invoices, receipts and other documents evidencing the cost of the Daywork. The Superintendent may direct the manner in which matters are to be recorded.

In determining the value of Daywork regard shall be had to —

- (a) the amount of wages and allowances paid or payable by the Contractor at the rates obtaining on the Site at the time as established by the Contractor to the satisfaction of the Superintendent or at such other rates as may be approved by the Superintendent;
- (b) the amount paid or payable by the Contractor in accordance with any statute or award applicable to day labour additional to the wages paid or payable under Clause 41 (a);
- (c) the amount of hire charges in respect of Constructional Plant approved by the Superintendent for use on the work in accordance with such hiring rates and conditions as may be agreed between the Superintendent and the Contractor or, in the absence of agreement, in accordance with such rates and conditions as may be determined by the Superintendent;
- (d) the amounts paid for services, subcontracts and professional fees;
- (e) the actual cost to the Contractor at the Site of all materials supplied and required for the work; and
- (f) the charge stated in Item 17 of the Annexure or, if no charge is stated, a charge agreed between the Superintendent and the Contractor to cover overheads, administrative costs, site supervision, establishment costs, attendance and profit, or, in the absence of agreement, a reasonable charge determined by the Superintendent.

Amounts payable for Daywork shall not be subject to adjustment for rise and fall in costs notwithstanding that the Contract may provide for adjustment for rise and fall in costs.

#### 40.5 Valuation (continued)

Thus, if the Contractor is pricing a variation, this order must be followed whilst the same order applies if the Superintendent is ascertaining the value. Note that the Superintendent's valuation under Clause 40.5 is may be reviewed either by a court or an arbitrator under Clause 47 (see Clause 47. 1).

Items (d) to (i) deal with other matters to be taken into account in determining a value under Clause 40.5, Item (a), (b) or (c).

Note that Item (i), which refers to the inclusion of GST, is not found in the 1996 version.

Considerable care needs to be taken in respect of Clause 40.5(f), which deals with the inclusion of the percentage margin for off-site overheads, which is to be stated in Item 15 of the Annexure.

The delay or disruption must be genuine and not merely extra work. For example, if the Superintendent ordered (say 5%) additional earthworks there may be some "delay" in that earthwork plant stays on site longer even if the critical path has moved from earthworks to following activities, as it often does when a significant amount of earthworks has been completed. The time related costs within the schedule rate may well be sufficient to cover the variation work, thus there will be no additional "delay" costs. In practice it will often be difficult to separate out delay costs.

Is is preferable to word the instruction stating that the price for the work is to include all costs including effects on the programme of work.

It is extremely important that the Superintendent does not invent procedures outside the requirements of this Clause to value variations.

*For example, if the Schedule contains a rate that is directly applicable to valuing a particular variation then the Superintendent must use this rate, even though he recognises that the rate contains a "loading" for the recovery of overhead and that this may lead to "over recovery" or "doubling up" of overhead because it coincides with overhead cost recovery under another variation. Clause 40.5 sets out rules to apply which must be followed. There is no guarantee that a perfectly fair result to each party will apply in all cases.*

One example of this would be not to apply a relevant Schedule rate because it contains overheads which may lead to so called "over recovery" by the Contractor. Clause 40.5 sets out rules to apply and there is no guarantee that a perfectly fair result to each party will apply in each case.

The last paragraph of Clause 40.5 provides that the Principal shall be liable to pay the Contractor's costs of obtaining measurements or other evidence of cost (in excess of normal overhead costs) when a direction to do so is issued by the Superintendent under Clause 40.3.

#### 40.6 Notice of Variations **DELETED**

This Clause was deleted for all versions of the Contract subsequent to the 1996 version. It has been incorporated into an amendment to Clause 46 – refer to the amended clause.

#### 41 DAYWORK

The Superintendent has the power to order Daywork in respect of matters referred to in Clause 3.2 or variations under Clause 40. If Daywork is ordered, the Contractor is obliged to keep daily records in the manner provided. Note that under Item (f) the charge to cover overheads and other matters must be specified in Item 15 of the Annexure.

The last sentence in respect of Rise and Fall requires careful consideration. It is not unusual for there to be some complications in valuing work which consists of:

- (i) unit rates specified in the Contract e.g. plant rates which are subject to Rise and Fall;
- (ii) actual (current) costs which are already escalated;
- (iii) subcontractors' costs which may or may not be subject to Rise and Fall.

Note that there are no prescribed percentage loadings in the Clause, although they may be specified in Item 17 of the Annexure.

In the absence of prescribed rates reasonable rates must be used by the Superintendent.

It is not appropriate for the Superintendent to order Dayworks retrospectively, thus belatedly advising the Contractor of the need to keep specific records. However, in the absence of ordering Dayworks, records of plant, labour, etc. can be used to arrive at a reasonable valuation of the variation under Clause 40.5.

See SL 024B for a form of Direction to Perform Daywork.

## 42 CERTIFICATES AND PAYMENTS

### 42.1 Progress Claims, Certificates, Calculations and Time for Payment

At the times for progress claims stated in Item 18A of the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent progress claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Progress claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof and GST. For the sake of clarification the supply (whether work is done or otherwise) in respect of which the claim is made (other than a claim for release of retention) shall be treated as a separate taxable supply for the purposes of calculation of the GST.

Within 14 days after receipt of a progress claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract but the Superintendent shall not be required to include in any such certificate, and the Principal shall not be obliged to pay for, any work for which evidence of conformance has not been provided to the Superintendent. However, where the relevant evidence of conformance has not been submitted due only to the normal delays involved in processing, testing, analysis and reporting, the Contractor may include that completed work for which evidence of conformance will be submitted in the next month. In this case, the Contractor

shall submit with its progress claim a statement which lists the relevant completed work and certifies that evidence of conformance will be presented to the Superintendent no later than the end of the calendar month subsequent to the month of the relevant progress claim.

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

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.

Within 7 days of issue of the Superintendent's Payment Certificate, the Contractor shall issue to the Principal or the Principal shall issue to the Contractor, as the case may be, a tax invoice complying with the GST Legislation in respect of the relevant supply.

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

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

If any work for which payment has been made is found not to be in accordance with the Contract, the Superintendent may take this into account in valuing any future certificate.

## 42.1 Progress Claims, Certificates, Calculations and Time for Payment

Note that this Clause has been amended from the original 1996 version in all but one of the subsequent versions, viz. December 1999, (no change in November 2001), February 2002 and January 2004. It is likely that the February 2002 version in particular may still be in use for some current contracts and particular care should be taken to identify that version and the impact of the amendment, as discussed in detail below.

This Clause provides for the Contractor to make monthly progress claims and for the Superintendent to issue payment certificates. The amendments added to AS2124-1992 include provision for the Superintendent not to certify payment for works for which there is no evidence of conformance. Further, if payment was already certified, then this can be corrected.

However, a major issue arises with the Contractor providing a statement (guarantee) that the quality of completed work (e.g. a lot) conforms in order that payment can be made before all QA documentation is to hand. This concession can be abused, with the same lot being “guaranteed” for many months, i.e. the QA documentation is not finalised. This needs to be monitored by the Superintendent.

While the amount on the Superintendent's Certificate is, in general, required to be paid by the Principal, the 4th paragraph of Clause 42.1 preserves the right of the Principal (as well as the Contractor) to dispute a payment certificate. When ascertaining the amount of the payment certificate, the Superintendent is required under Clause 42.1 to take into account all amounts due under any other provisions of the Contract.

In all versions of the Road Construction Contract, the 2<sup>nd</sup> paragraph requires the Superintendent to issue a payment certificate within 14 days of receiving a claim for payment from the Contractor. If the Superintendent fails to issue a certificate within this time he has put the Principal in breach of Contract.

Under the 4<sup>th</sup> paragraph, the Principal is required to pay the certified amount (subject to the right of dispute as noted above) either within 14 days of receiving the certificate or within 28 days of the Superintendent's having received the Contractor's payment claim, whichever is the earlier. That is, if the Superintendent issues the certificate in less than 14 days, then the Principal is obliged to pay the certified amount within 14 days of that earlier date, and so the Contractor will receive its payment in less than 28 days. This will usually be to the Contractor's benefit and not the Principal's.

If the Superintendent is late in issuing the certificate (i.e. takes longer than 14 days), provided that the Principal pays the certified amount within 28 days of the Superintendent's receipt of the payment claim then, most likely the Contractor has suffered no damage as the result of the initial late action by the Superintendent and the issue should progress no further. The Principal will have been required to make payment in less than 14 days (in 10 days if the Superintendent's certificate had been, say, issued after 18 days instead of 14), which may cause procedural problems or inconvenience for the Principal. The Superintendent should ensure that certificates are issued on time and not risk exposure of the Principal.

However, there is current legal precedent to suggest that the Principal may be liable to pay the full amount of the Contractor's progress claim and that a certificate issued later, but within 28 days, does not remedy the late certification by the Superintendent. The Principal may make the payment certified within 28 days of the date of the Contractor's claim but be exposed in an action for full payment of the amount claimed by the Contractor.

However, it is important to note the potential impact on the Principal of the changes to the 4<sup>th</sup> paragraph of this clause in the various amendments. In versions of the Contract where the words “*..or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim*” have NOT been deleted, (all versions except February 2002), if payment is not made within the time or times prescribed in this paragraph (maximum 28 days), then the Principal is obliged to pay the full amount of the Contractor's claim, regardless of what amounts it might contain in respect of claims with which the Superintendent might not agree and might have disallowed from the certificate, had it been issued. Recent case law has supported this obligation.

The February 2002 version, where these words have been deleted, avoids this situation. It is therefore of paramount importance that the Superintendent issues payment certificates within the time limit to avoid exposing the Principal to making unwarranted payments.

When ascertaining the amount of the payment certificate, the Superintendent is required under Clause 42.1 to take into account all amounts due under any other provisions of the Contract.

The more usual of these are:

- (a) Any amounts due under the following:
  - (i) Clause 5.5 Recourse to Retention Moneys and Conversion of Security.
  - (ii) Clause 5.7 reduction of (cash) security and retention moneys.
  - (iii) Clause 5.8 release of (cash) security.

## 42.2 Correction of Payment Certificates

At any time and from time to time, the Superintendent may by a further certificate correct any error which has been discovered in any previous certificate, other than a Certificate of Practical Completion or Final Certificate.

Any correction must also correct the amount of GST in accordance with the GST Legislation.

## 42.3 Retention Moneys

The Principal may deduct retention moneys from moneys otherwise due to the Contractor as stated in Item 18B of the Annexure.

## 42.4 Unfixed Materials, Plant and Equipment

### *Alternative 1*

Notwithstanding Clause 42.1, the Contractor may not claim payment for, and the Principal is not obliged to pay for, any unfixed materials, plant or equipment that have not been incorporated in the Works unless —

- (a) the materials, plant or equipment —
  - (i) have been manufactured solely for the purpose of incorporation in the Works;
  - (ii) are of the type stated in Item 18D of the Annexure; and
  - (iii) are properly stored, clearly marked the property of the Principal and adequately protected and insured;

and either —

- (b) the Contractor provides additional security in one of the forms provided by Clause 5.5 in an amount equal to the payment claimed for the materials, plant or equipment; or
  - (i) the materials, plant or equipment —
  - (ii)
  - (iii) are stored on the Site; and
  - (iv) have been paid for in full by the Contractor and are the unencumbered property of the Contractor and proof thereof is provided to the satisfaction of the Superintendent.

If pursuant to a payment certificate issued under Clause 42.1, the Principal pays the Contractor an amount which includes the value of any unfixed materials, plant or equipment that have not been incorporated in the Works, the materials, plant or equipment will become the property of the

Principal, free of any lien, charge or any other encumbrance, at the time the payment is made.

### *Alternative 2*

If the Contractor claims payment for materials, plant or equipment intended for incorporation in the Works but not incorporated the Principal shall not be obliged to make payment for such materials, plant or equipment but the Principal may make payment, if the Contractor establishes to the satisfaction of the Superintendent that —

- (a) such materials, plant or equipment have reasonably but not prematurely been delivered to or adjacent to the Site;
- (b) ownership of such materials, plant or equipment will pass to the Principal upon the making of the payment claimed; and
- (c) such plant or materials, plant or equipment are properly stored, labelled the property of the Principal and adequately protected.

Upon payment to the Contractor of the amount claimed, the materials, plant or equipment the subject of the claim shall be the property of the Principal free of any lien, charge or other encumbrance.

### *Alternative 3*

The Contractor shall not be entitled to payment for materials, plant or equipment not incorporated in the Works.

## 42.5 Certificate of Practical Completion

The Contractor shall give the Superintendent at least 14 days notice of the date upon which the Contractor anticipates that Practical Completion will be reached.

When the Contractor is of the opinion that Practical Completion has been reached, the Contractor shall in writing request the Superintendent to issue a Certificate of Practical Completion. Within 14 days of the receipt of the request, the Superintendent shall give to the Contractor and to the Principal a Certificate of Practical Completion certifying the Date of Practical Completion or give the Contractor in writing the reasons for not issuing the Certificate.

When the Superintendent is of the opinion that Practical Completion has been reached, the Superintendent may issue a Certificate of Practical Completion whether or not the Contractor has made a request for its issue.

## 42.6 Effect of Certificates

The issue of a payment certificate or a Certificate of Practical Completion shall not constitute

#### 42.1 Progress Claims, Certificates, Calculations and Time for Payment (continued)

- (iv) Clause 21.2 payment of insurance premium when the other party has failed to do so.
  - (v) Clause 30.3 cost of rectifying defects on default by the Contractor.
  - (vi) Clause 37 cost of rectifying defects in the Defects Liability Period on default by the Contractor.
  - (vii) Clause 38 cost of cleaning up on default by the Contractor.
  - (viii) Clause 39 cost of urgent protection.
  - (ix) Clause 43 failure to pay workers or subcontractors when court order obtained.
- (b) Amounts to be deducted under the following:
- (i) Clause 42.3 retention moneys.
  - (ii) Clause 43 failure to provide evidence of payment of wages or subcontractors.
- (c) Amounts payable under the following:
- (i) Clause 31.7 cost of testing when Contractor liable.
  - (ii) Clause 35.6 liquidated damages.
  - (iii) Clause 36 delay or disruption costs or damages.
  - (iv) Clause 42.1 value of work, and certain off-site unfixed plant and materials.
  - (v) Clause 42.4 other off-site plant or materials.
  - (vi) Clause 42.9 interest on overdue payments.
- (d) The cost of rectifying defects.

In effect, the Superintendent must include all set-offs under the Contract in the payment certificates. The Principal has a limited right of set-off for moneys due outside the Contract, (see Clause 42.10).

The time requirements for dealing with progress payments under Clause 42.1 are as follows:

- (i) The Contractor makes a progress claim (which may include any other claim under the Contract) within or at the times specified in Item 18A of the Annexure. All parties must note Clause 46.2 which bars certain claims if not made within specified times.
- (ii) The Contractor also makes a progress claim on the issue of the Certificate of Practical Completion. (The Contractor does not have to wait until the next date for making a payment claim set out in the Annexure.)
- (iii) Within 14 (calendar) days of receipt of the claim the Superintendent values the claim and issues a payment certificate to both parties. In making this valuation, the Superintendent must take into account any amount due or to be credited under other provisions of the Contract (See Items (a) to (d) above).
- (iv) The Principal pays the Contractor (or the Contractor pays the Principal if the payment certificate so specifies) the amount of the payment certificate. Payment is to be made either within 28 (calendar) days of the claim or 14 (calendar) days of the date of issue (not service) of the certificate (whichever is the earlier). Note the potential for the Principal to have to pay the full amount claimed if the Superintendent does not issue the certificate in time, as described above.

The second last paragraph of Clause 42.1 and also Clause 42.4 deal with payment for Unfixed Plant and Materials. As noted above, details of the Principal's obligations to pay for imported items have been moved from Clause 42.1 to Clause 42.4 in all but the 1996 version.

See SL 059 for a form of Payment Certificate.

#### 42.2 Correction of Payment Certificates

This Clause enables the correction by the Superintendent of any error in a payment certificate. Note that a Certificate of Practical Completion or Final Certificate cannot be amended. Any correction made must also correct the amount of GST applicable.

See SL 060 for a form of Amended Payment Certificate.

#### 42.3 Retention Moneys

The limit of retention moneys and any item on which retention moneys are to be retained must be listed in Item 18B of the Annexure.

approval of any work or other matter nor shall it prejudice any claim by the Principal or the Contractor.

#### 42.7 Final Progress Claim

Within 28 days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Superintendent a final payment claim and endorse it 'Final Payment Claim'.

The Contractor shall include in that claim all moneys which the Contractor considers to be due from the Principal under or arising out of the Contract or any alleged breach thereof.

After the expiration of the period for lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred.

#### 42.8 Final Certificate

Within 14 days after receipt of the Contractor's Final Progress Claim or, where the Contractor fails to lodge such claim, the expiration of the period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor and to the Principal a final payment certificate endorsed 'Final Certificate', but the Superintendent shall not be obliged to issue the Final Certificate until the Contractor has fulfilled all of its obligations under the Contract. In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contract or any alleged breach thereof.

Unless either party, either before the Final Certificate has been issued or not later than 15 days after the issue thereof, serves a notice of dispute under Clause 47, the Final Certificate shall be evidence in any proceedings of whatsoever nature and whether under the Contract or otherwise between the parties arising out of the Contract, that the Works have been completed in accordance with the terms of the Contract and that any necessary effect has been given to all the terms of the Contract which require additions or deductions to be made to the Contract Sum, except in the case of —

- (a) fraud, dishonesty or fraudulent concealment relating to the Works or any part thereof or to any matter dealt with in the said Certificate;
- (b) any defect (including omission) in the Works or any part thereof which was not

apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate; or

- (c) any accidental or erroneous inclusion or exclusion of any work, plant, materials or figures in any computation or any arithmetical error in any computation.

#### 42.9 Interest on Overdue Payments

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the rate stated in Item 18E of the Annexure and if no rate is stated the rate shall be 18 percent per annum. Interest shall be compounded at six monthly intervals.

#### 42.10 Set Offs by the Principal

Without limiting the Principals' rights under any other provision in the Contract and notwithstanding the provisions of Clauses 42.1 and 42.8 or the issue of any certificate by the Superintendent under those Clauses, the Principal may deduct from any moneys due to the Contractor any debt due from the Contractor to the Principal and any claim which the Principal may have against the Contractor —

- (a) whether or not the debt or claim arises by way of damages, debt, restitution or otherwise; and
- (b) whether or not the factual basis giving rise to the debt or claim arises out of this Contract, any other contract or is independent of any contract.

If the moneys payable to the Contractor are insufficient to discharge the debt or claim the Principal may have recourse to —

- (i) retention moneys and/or the Retention Security under Clause 5.4; and
- (ii) if retention moneys and any Retention Security are insufficient, security provided under Clause 5.3 (a); and
- (iii) (subject to Clause 5.2) if security provided under Clause 5.3 (a) is insufficient, to security provided under Clause 5.3 (b)(i).

Nothing in Clause 42.10 shall affect the right of the Principal to recover from the Contractor the whole of the debt or claim or any balance that remains

#### 42.4 Unfixed Plant and Materials

Alternative 1 applies unless otherwise specified in Part A of the Annexure.

Alternative 1 requires the Principal to pay for unfixed items provided they have been specifically manufactured for incorporation in the Works, are of the type specified, and are properly stored, marked as the property of the Principal and adequately insured etc. The Contractor must also provide additional security equal to the payment claimed. Goods so certified and paid for become the unencumbered property of the Principal at the time the payment is made.

Alternative 2 allows payment at the Principal's option provided certain pre-conditions set out are met and Alternative 3 precludes the Contractor from claiming payment for unfixed items.

#### 42.5 Certificate of Practical Completion

The Contractor must give the Superintendent at least 14 (calendar) days notice (it need not be in writing) of when Practical Completion will be achieved. The Contractor must give a further notice when Practical Completion is achieved. The Superintendent is obliged to give a Certificate of Practical Completion unless the Superintendent believes Practical Completion has not been reached, in which event the Superintendent must notify the Contractor and supply reasons. Note the requirements for the Superintendent to act in accordance with Clause 23. The Superintendent also has the right to issue a Certificate of Practical Completion, even if not applied for by the Contractor. Refer also to powers available in Clause 35.4 to order Separable Portions.

See SL 029 for a form of Certificate of Practical Completion.

See SL 072 for a form of Notice that Practical Completion has not been Reached.

#### 42.7 Final Progress Claim

The Contractor is required to lodge a Final Progress Claim within 28 (calendar) days of the end of the last Defects Liability Period. The claim must include all claims, although Clause 46 would probably have the effect of barring many claims other than for the Contract Sum or for variations, long before a Final Progress Claim is made.

#### 42.8 Final Certificate

A Final Certificate is required to be issued by the Superintendent within 14 (calendar) days of receipt of the Contractor's Final Progress Claim or, if the Contractor fails to lodge such a claim, then 28 days after the end of the last Defects Liability Period as referred to in Clause 37.

Unless a Notice of Dispute under Clause 47.1 has been served no later than 15 (calendar) days after the issue of the Final Certificate, that Certificate is evidence that the Works have been completed in accordance with the Contract and that all payments have been made under the Contract except:

- (a) in the case of fraud or deliberate concealment;
- (b) for latent defects; or
- (c) for arithmetical or like errors.

Retention moneys and security held by the Principal are also to be released within 14 (calendar) days after issue of the Final Certificate.

The amendment to AS2124-1992 provides for the Superintendent to delay issuing the Final Certificate until the Contractor has fulfilled all its obligations under the Contract.

See SL 031 for a form of Final Certificate.

#### 42.9 Interest on Overdue Payments

Interest is payable by either party to the other on overdue moneys. If an interest rate is not stated in Item 18E of the Annexure then a rate of 18% p.a. applies.

owing. This Clause shall survive the termination of the Contract.

### **43 PAYMENT OF WORKERS AND SUBCONTRACTORS**

Upon entry into a subcontract the Contractor shall, in respect of that subcontract establish a payment recording system for that subcontractor as set out in an appropriate form.

The recording system shall record all details of transactions with a subcontractor including, at least, details of claims for payment, payments made, retention and securities held in cash or unconditional undertakings or any other form.

The record of payment system shall be —

- (a) kept by the Contractor until the Final Certificate is issued by the Superintendent;
- (b) provided to the Superintendent for inspection and copying upon reasonable notice in writing.

The Contractor shall deliver to the Superintendent with each payment claim a statutory declaration, in the form included in the tender documents (Form C6850), sworn by the Contractor, or where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts attested to stating that all subcontractors of the Contractor have been paid all that is due and payable to such subcontractors up to the date of submission by the Contractor of a payment claim in respect of the work under the Contract and that all its employees who at any time have been engaged on work under the Contract by the Contractor have been paid all moneys due and payable to them up to the date of submission by the Contractor of a payment claim, in respect of their employment on the work under the Contract. The Superintendent may also request reasonable supporting documentary evidence of those matters.

Before the payment of any money to the Contractor by the Principal, the Superintendent may also require the Contractor to deliver to the Superintendent a statutory declaration, in the form included in the tender documents (Form C6851), by any subcontractor, or where the subcontractor is a corporation, by a representative of the subcontractor who is in a position to know the facts attested to stating that all subcontractors of the subcontractor have been paid all that is due and payable to them up to the date of submission by the Contractor of a payment claim in respect of the work under the Contract and that all employees who have been engaged by the subcontractor have been paid all moneys due and payable to them up to the date of submission by the Contractor of a

payment claim in respect of their engagement on the work under the Contract. The Superintendent may also request reasonable supporting documentary evidence of those matters.

If the Contractor provides to the Superintendent satisfactory proof of the maximum amount due and payable to workers and subcontractors by the Contractor, the Principal shall not be entitled to withhold any amount in excess of the maximum amount.

At the written request of the Contractor and out of moneys payable to the Contractor, the Principal may on behalf of the Contractor make payments directly to any worker or subcontractor.

If any worker or subcontractor obtains a court order in respect of moneys referred to in Clause 43 and produces to the Principal the court order and a statutory declaration that it remains unpaid, the Principal may pay the amount of the order, and costs included in the order, to the worker or subcontractor and the amount paid shall be a debt due from the Contractor to the Principal.

After the making of a sequestration order or a winding up order in respect of the Contractor, the Principal shall not make any payment to a worker or subcontractor without the concurrence of the official receiver or trustee of the estate of the bankrupt or the liquidator as the case may be.

### **44 DEFAULT OR INSOLVENCY**

#### **44.1 Preservation of Other Rights**

If a party breaches or repudiates the Contract, nothing in Clause 44 shall prejudice the right of the other party to recover damages or exercise any other right.

#### **44.2 Default by the Contractor**

If the Contractor commits a substantial breach of contract and the Principal considers that damages may not be an adequate remedy, the Principal may give the Contractor a written notice to show cause.

Substantial breaches include but are not limited to —

- (a) suspension of work, in breach of Clause 33.1;
- (b) failing to proceed with due expedition and without delay, in breach of Clause 33.1;
- (c) failing to lodge security in breach of Clause 5;
- (d) failing to use the materials or standards of workmanship required by the Contract, in breach of Clause 30.1;

#### 42.10 Set Offs by the Principal

This clause has been amended from AS2124-1992.

Clause 42.10 permits a Principal to recover debts not only on this contract but also on any contract with the same Contractor. This is a powerful provision for the Department of Main Roads, which may have numerous concurrent contracts with the same Contractor. A Principal must be careful to use the powers provided strictly in accordance with this Clause. The Superintendent has no power under Clause 42.10 and nothing in respect of set-offs should appear on a Payment Certificate.

The Clause also allows the Principal to have recourse to retention moneys and Retention Security, Primary Security and Subcontractor's Payment Security.

The Clause still operates after the Final Certificate has been issued.

### 43 PAYMENT OF WORKERS AND SUBCONTRACTORS

The first four paragraphs are amendments to AS2124-1992 and apply particularly to the payment recording system for subcontractors. The Contractor is required to have a record of payment system which is available for inspection by the Superintendent (not Principal) and to supply sworn information with each payment claim.

The last four paragraphs provide particular provisions for the Principal in respect of direct payments to workers and subcontractors.

### 44 DEFAULT OR INSOLVENCY

#### 44.1 Preservation of Other Rights

This Clause preserves each party's common law rights to terminate the Contract due to repudiation of the Contract by the other party, to sue for damages for breach of contract, or both.

Clauses 44.2 to 44.6 deal with the Principal's rights under the Contract for breach of the Contract by the Contractor.

#### 44.2 Default by the Contractor

Where the Contractor is in substantial breach of the Contract, Clause 44.2 provides that a Principal may require the Contractor to show cause why the Principal should not exercise its rights under Clause 44.4 to take the work out of the Contractor's hands or to terminate the Contract..

Some substantial breaches are listed in Items (a) to (j). This list is not exhaustive but a breach not listed may not necessarily be a substantial breach but may only be a breach entitling the Principal to damages. ***The reader is directed to the SCoC, Clauses 7.1, 9.1, 32 and 33 for further references to substantial breaches under Clause 44.2***

It is advisable to seek legal or other expert advice in such cases.

Note that the amendment to AS2124-1992 has added a new item (g) and a new item (h). It is a substantial breach to fail to comply with Clause 9.2 Subcontracting e.g. assign a subcontract without approval. It is a substantial breach to fail to comply with Clause 5.13 and not lodge a Deed of Guarantee, Undertaking and Substitution when properly requested to do so.

See SL 064 for a Form of Principal's Notice to Show Cause.

- (e) failing to comply with a direction of the Superintendent under Clause 30.3, in breach of Clause 23;
- (f) failing to provide evidence of insurance, in breach of Clause 21.1;
- (g) failing to comply in any respect with Clause 9.2;
- (h) failing to deliver a statutory declaration or supporting documentary evidence, in breach of Clause 43;
- (i) providing a statutory declaration pursuant to Clause 43 which is false, misleading or deceptive in any respect; and/or
- (j) failing to lodge a Deed of Guarantee, Undertaking and Substitution, in breach of Clause 5.13.

#### 44.3 Requirements of a Notice by the Principal to Show Cause

A notice under Clause 44.2 shall —

- (a) state that it is a notice under Clause 44 of the General Conditions of Contract;
- (b) specify the alleged substantial breach;
- (c) require the Contractor to show cause in writing why the Principal should not exercise a right referred to in Clause 44.4;
- (d) specify the time and date by which the Contractor must show cause (which time shall not be less than 7 clear days after the notice is given to the Contractor); and
- (e) specify the place at which cause must be shown.

#### 44.4 Rights of the Principal

If by the time specified in a notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 44.4, the Principal may by notice in writing to the Contractor —

- (a) take out of the hands of the Contractor the whole or part of the work remaining to be completed; or
- (b) terminate the Contract.

Upon giving a notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of —

- (g) the date upon which the Contractor shows reasonable cause;
- (i) the date upon which the Principal takes action under Clause 44.4 (a) or (b); or

- (ii) the date which is 7 days after the last day for showing cause in the notice under Clause 44.2.

If the Principal exercises the right under Clause 44.4 (a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 44.6.

#### 44.5 Procedure when the Principal Takes Over Work

If the Principal takes work out of the hands of the Contractor under Clause 44.4 (a) the Principal shall complete that work and the Principal may without payment of compensation take possession of such of the Constructional Plant and other things on or in the vicinity of the Site as are owned by the Contractor and are reasonably required by the Principal to facilitate completion of the work.

If the Principal takes possession of Constructional Plant or other things, the Principal shall maintain the Constructional Plant and, subject to Clause 44.6, on completion of the work the Principal shall return to the Contractor the Constructional Plant and any things taken under this Clause which are surplus.

#### 44.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor

When work taken out of the hands of the Contractor under Clause 44.4 (a) is completed the Superintendent shall ascertain the cost incurred by the Principal in completing the work and shall issue a certificate to the Principal and the Contractor certifying the amount of that cost.

If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Principal. The Principal shall keep records of the cost in a similar manner to that prescribed in Clause 41.

If the Contractor is indebted to the Principal, the Principal may retain Constructional Plant or other things taken under Clause 44.5 until the debt is satisfied. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the Constructional Plant or other things and apply the proceeds to the satisfaction of the debt and the

#### **44.3 Requirements of a Notice by the Principal to Show Cause**

Clause 44.3 sets out the requirements of a notice to show cause. All of the requirements listed must be strictly complied with, otherwise the notice will be ineffective and may lead to the Principal being in breach of contract.

See SL 064 for a form of Principal's Notice to Show Cause.

Service of the notice may be effected by any method complying with the provisions of Clause 7. At least 7 clear (calendar) days notice must be given. This means the day of service is not counted and the Principal cannot exercise any right to take work out of the hands of the Contractor or to terminate the Contract until at least the 8th calendar day after the day of service. e.g. if served on the 1st May, the next step under Clause 44.4 cannot be taken until the 9th May. The notice must also specify a date to show cause, e.g. 9th May, so that service in this example must be effected by the 1st May, otherwise service will be defective and the notice ineffective.

#### **44.4 Rights of the Principal**

The Principal has two options which may be exercised if the Contractor fails to show cause. The legal authorities are not entirely clear on the test to be applied by the Principal in determining whether the Contractor has properly shown cause following a show cause notice but, if the Contractor purports to show cause, legal advice should be sought before a Principal proceeds either to take work out of the hands of the Contractor under Clause 44.4 (a) or to terminate the Contract under Clause 44.4 (b). Renard's Case (Renard Construction (ME) Pty Ltd v Minister for Public Works (1992) 26 NSAILR 234) has caused some uncertainty in this area of contract law.

See SL 061 for Notice to Take Works out of Hands of the Contractor.

See SL 062 for Principal's Notice of Termination of Contract.

#### **44.5 Procedure when the Principal Takes Over Work**

and

#### **44.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor**

These two Clauses set out the contractual rights of the parties where the Principal takes over the work under Clause 44.4 (a).

costs of sale. Any excess shall be paid to the Contractor.

#### 44.7 Default of the Principal

If the Principal commits a substantial breach of contract and the Contractor considers that damages may not be an adequate remedy, the Contractor may give the Principal a written notice to show cause.

Substantial breaches include but are not limited to —

- (a) failing to make a payment, in breach of Clause 42.1;
- (b) failure by the Superintendent to either issue a Certificate of Practical Completion or give the Contractor, in writing, the reasons for not issuing the Certificate within 14 days of receipt of a request by the Contractor to issue the Certificate, in breach of Clause 42.5;
- (c) failing to produce evidence of insurance, in breach of Clause 21.1; and/or
- (d) failing to give the Contractor possession of sufficient of the Site, in breach of Clause 27.1, but only if the failure continues for longer than the period stated in Item 19 of the Annexure.

#### 44.8 Requirements of a Notice by the Contractor to Show Cause

A notice under Clause 44.7 shall —

- (a) state that it is a notice under Clause 44 of the General Conditions of Contract;
- (b) specify the alleged substantial breach;
- (c) require the Principal to show cause in writing why the Contractor should not exercise a right referred to in Clause 44.9;
- (d) specify the time and date by which the Principal must show cause (which shall not be less than 7 clear days after the notice is given to the Principal); and
- (e) specify the place at which cause must be shown.

#### 44.9 Rights of the Contractor

If by the time specified in a notice under Clause 44.7 the Principal fails to show reasonable cause why the Contractor should not exercise a right referred to in Clause 44.9, the Contractor may by notice in writing to the Principal suspend the whole or any part of the work under the Contract.

The Contractor shall lift the suspension if the Principal remedies the breach but if within 28 days after the date of suspension under Clause 44.9, the

Principal fails to remedy the breach or, if the breach is not capable of remedy, fails to make other arrangements to the reasonable satisfaction of the Contractor, the Contractor may by notice in writing to the Principal terminate the Contract.

The Contractor shall be entitled to recover from the Principal any damages incurred by the Contractor by reason of the suspension.

#### 44.10 Rights of the Parties on Termination

If the Contract is terminated under Clause 44.4(b) or Clause 44.9 the rights and liabilities of the parties shall be the same as they would have been at common law had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages.

#### 44.11 Insolvency

If —

- (a) a party informs the other party in writing or creditors generally that the party is insolvent or is financially unable to proceed with the Contract;
- (b) execution is levied against a party by a creditor;
- (c) a party is an individual person or a partnership including an individual person, and if that person —
  - (i) commits an act of bankruptcy;
  - (ii) has a bankruptcy petition presented against him or her or presents his or her own petition;
  - (iii) is made bankrupt;
  - (iv) makes a proposal for a scheme of arrangement or a composition; or
  - (v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration order made, under Part X of the Bankruptcy Act 1966 (Cth); or
- (d) in relation to a party being a corporation —
  - (i) notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;
  - (ii) the party enters a deed of company arrangement with creditors;
  - (iii) a controller or administrator is appointed;

#### **44.7 Default of the Principal**

This Clause sets out the Contractor's rights where the Principal defaults. Again, there must be a substantial breach before the right to give a "show cause notice" can be exercised. Substantial breaches by the Principal are listed in Clause 44.7 (a) to (e) but these are not exhaustive. Other breaches may not necessarily be substantial breaches but may give the Contractor a right only to damages. Legal advice should be sought where appropriate.

#### **44.8 Requirements of a Notice by the Contractor to Show Cause**

This Clause sets out the strict requirements of the notice. See Notes to Clause 44.3 above.

#### **44.9 Rights of the Contractor**

If cause is not shown by the Principal, the Contractor has the right to suspend the whole or any part of the work under the Contract. In most cases the Contractor cannot exercise any right to terminate the Contract until at least 28 (calendar) days suspension has first occurred, after which a further notice to terminate the Contract must be given if the Contractor wishes to take that step.

#### **44.10 Rights of the Parties on Termination**

The rights of each party on termination are the same as if repudiation of the Contract had occurred at common law.

#### **44.11 Insolvency**

Where a party has a right to terminate due to the insolvency of the other party, (insolvency is in effect defined by Clause 44.11 (b), (c) and (d)) then the Principal can take the work out of the hands of the Contractor (but not terminate) without first giving a notice to show cause and the Contractor can suspend work (and after 28 (calendar) days terminate the Contract) without giving a notice to show cause. A party can exercise these rights even if there is no breach of the Contract by the insolvent party. The rights under this Clause only operate when the act of insolvency by the insolvent party corresponds exactly to an act of insolvency listed in Clause 44.11.

See Engineering Policy EP1 for a flowchart on the process to be followed when a Contractor becomes involved.

- (iv) an application is made to a court for the winding up of the party and not stayed within 14 days;
- (v) a winding up order is made in respect of the party;
- (vi) it resolves by special resolution that it be wound up voluntarily (other than for a members' voluntary winding-up);
- (vii) a mortgagee of any property of the party takes possession of that property; or
- (viii) a receiver or a receiver and manager is appointed in respect of any property or undertaking of the party,

then, where the other party is —

- A. the Principal, the Principal may, without giving a notice to show cause, exercise the right under Clause 44.4 (a) or Clause 44.4 (b); or
- B. the Contractor, the Contractor may, without giving a notice to show cause, exercise the right under Clause 44.9.

The rights given by Clause 44.11 are in addition to any other rights and may be exercised notwithstanding that there has been no breach of contract.

#### 45 TERMINATION BY FRUSTRATION

If, under the law governing the Contract, the Contract is frustrated, the Principal shall pay the Contractor —

- (a) for work executed prior to the date of frustration, the amount which would have been payable if the Contract had not been frustrated and the Contractor had made a progress claim on the date of frustration;
- (b) the cost of materials reasonably ordered by the Contractor for the work under the Contract, which the Contractor is liable to accept, but only if the materials become the property of the Principal upon payment;
- (c) costs reasonably incurred by the Contractor in the expectation of completing the whole of the work under the Contract and not included in any payment by the Principal;
- (d) all retention moneys and security;
- (e) the reasonable cost of removal of Constructional Plant;

the reasonable cost of return to their place of recruitment of the Contractor's employees engaged

in the work under the Contract at the date of frustration.

#### 46 TIME FOR NOTIFICATION OF CLAIMS AND DISPUTING SUPERINTENDENTS' DIRECTIONS

##### 46.1 Contractor's Prescribed Notice

The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract unless within 28 days after the first day upon which the Contractor could reasonably have been aware of the breach, the Contractor has given to the Superintendent the prescribed notice.

The Principal shall not be liable upon any other claim by the Contractor —

- (a) in respect of or arising out of any direction or approval by the Superintendent (including but not limited to a direction or approval which the Superintendent did not expressly acknowledge to be a variation under Clause 40 but which the Contractor claims is a variation under that clause);
- (b) under any provision of the Contract (including but not limited to Clauses 34.4, 36 and 40.5);
- (c) in respect of or arising out of the subject matter of the Contract;
- (d) in tort or under any statute;
- (e) upon a quantum meruit or for restitution based on unjust enrichment; or
- (f) for additional payment or compensation on any other legal or equitable basis,

unless within 28 days after the first day upon which the Contractor could reasonably have been aware of the act, omission, direction, approval or other event, fact, matter or circumstance on which the claim is or will be based, the Contractor has given to the Superintendent a prescribed notice.

A "prescribed notice" is a notice in writing which must be endorsed "Prescribed Notice Under Clause 46.1" and include particulars of all of the following —

- (i) the breach, act, omission, direction, approval or circumstances on which the claim is or will be based;
- (ii) the provision of the Contract or other basis for the claim or proposed claim; and
- (iii) the quantum or likely quantum of the claim.

## **45 TERMINATION BY FRUSTRATION**

Queensland, unlike New South Wales and Victoria, does not have a Frustrated Contracts Act. This Clause is provided because of the inadequacies of the common law where a contract is held to be frustrated. Frustration has a precise legal meaning and in effect usually means that a contract is impossible to perform because of some outside intervening act. Legal advice should be sought whether a contract has in fact been frustrated under the provisions of this Clause.

## **46 TIME FOR NOTIFICATION OF CLAIMS AND DISPUTING SUPERINTENDENTS' DIRECTIONS**

### **46.1 Contractor's Prescribed Notice**

This Clause reflects the Department's concerns for the earliest possible notification of all claims that may occur under the Contract. There is a considerable onus on the Superintendent to determine if a claim is properly made under Clause 46.1 before the claim is admitted and assessed. The Superintendent must immediately assess all the conditions for the prescribed notice in (i), (ii) and (iii) are satisfied. Failure of the Superintendent to reject claims which do not comply with the requirements for a prescribed notice may expose the Principal to additional cost and in turn may expose the Superintendent to claims from the Principal.

The requirements for a prescribed notice under this Clause do not apply in the situations listed in Clause 46.1 at items A to D:

- A any claims for the Contract Sum or any part thereof;
- B any claims for payment of a variation directed by the Superintendent under Clause 40;
- C any claims for payment for a variation made under Clause 12.3; or
- D any claim for an extension of time (to which Clause 35.5 applies).

Clause 46.1 bars claims which are not submitted within 28 days after the first day on which the Contractor could reasonably be aware of the breach or the act, omission, direction, approval or other event, fact, matter or circumstance on which the claim is based. The prescribed notice must be endorsed "Prescribed Notice Under Clause 46.1" and contain the particulars noted in Items (i), (ii) and (iii). The Superintendent must assess any purported prescribed notice against these requirements.

This Clause 46.1 shall not have any application to —

- A. any claim for payment to the Contractor of an amount or amounts forming part of the original Contract Sum;
- B. any claim for payment for a variation directed by the Superintendent in writing and expressly acknowledged therein by the Superintendent to be a variation under Clause 40;
- C. any claim for payment for a variation made pursuant to Clause 12.3; or
- D. any claim for an extension of time for Practical Completion.

Nothing in Clause 46.1 shall limit the operation or effect of any other notice provision, time-bar provision, condition precedent or limitation or exclusion clause in the Contract nor waive the effect of any failure by the Contractor to comply with any such provision or requirement.

#### **46.2 Time for Disputing Superintendent's Decisions**

Where the Superintendent has given —

- (a) a certificate or valuation under the Contract; or
- (b) a determination (other than a decision under Clause 47.2) with respect to a claim by the Contractor, including but not limited to —
  - (i) a claim for breach of the Contract by the Principal;
  - (ii) a claim of the type referred to in paragraphs (a) to (f) of Clause 46.1;
  - (iii) a claim for payment for a variation directed or approved under Clause 40; and
  - (iv) a claim for an extension of time for Practical Completion,

the Superintendent may also give a notice under Clause 46.2 with respect to the certificate, valuation or determination.

Such notice may be given at the same time that the certificate, valuation or determination is given or at any time thereafter but must —

- A. be in writing and endorsed "Superintendent's Notice under Clause 46.2";
- B. be given to the Principal and the Contractor;
- C. identify the certificate, valuation or determination to which it relates; and
- D. state that the certificate, valuation or determination will be final and binding upon the parties and not subject to dispute unless

either party, within 28 days after receiving the Superintendent's notice, gives a notice of dispute in accordance with Clause 47.1 disputing the certificate, valuation or determination.

If neither the Principal nor the Contractor gives a notice of dispute in accordance with Clause 47.1 within 28 days after receipt of a Superintendent's notice under Clause 46.2, then the certificate, valuation or determination to which the Superintendent's notice relates shall be final and binding upon the parties and not subject to dispute notwithstanding Clause 47.

Nothing in Clause 46.2, nor the giving of a Superintendent's notice under this clause, shall limit the operation or effect of Clause 46.1 or any other notice provision, time-bar provision, condition precedent or limitation or exclusion clause in the Contract nor waive the effect of any failure by the Contractor to comply with Clause 46.1 or with such other provision or requirement.

## **47 DISPUTE RESOLUTION**

### **47.1 Notice of Dispute**

If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by registered post to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract, and subject to Clause 44, the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.

A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in an arbitration.

### **47.2 Further Steps Required Before Proceedings**

#### *Alternative 1*

Within 14 days after service of a notice of dispute, the parties shall confer at least once, and at the option of either party and provided the Superintendent so agrees, in the presence of the Superintendent, to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

## 46.2 Time for Disputing Superintendents' Decisions

The original version of the Construction Contract did not include Clause 46.2 from AS 2124 – 1992. This was first included in the December 1999 version and is considerably expanded on the AS2124 – 1992 text. The thrust of the clause is a provision for the Superintendent to give a Superintendent's notice which brings a disputed certificate, valuation or determination to a head. The Contractor and/or Principal must decide whether to accept the Superintendent's decision or treat the matter as a dispute under Clause 47. This allows the Superintendent to stop a repetitive, and sometimes pointless, process of the Contractor or Principal continuing to refer a disputed issue to the Superintendent without any substantial new evidence. Obviously, the Superintendent must exercise this power with discretion and in accordance with Clause 23.

Note particularly the conditions precedent in Items (a) and (b) and the requirements for the notice in Items A, B, C and D. Item A contains the requirement for an endorsement "Superintendent's Notice Under Clause 46.2" and without the endorsement the notice is likely to be invalid.

See SL 084 and SL 085 for Superintendent's Notice under Cl 46.2 and Superintendent's Confirmation of Finality respectively.

## 47 DISPUTE RESOLUTION

The dispute resolution procedures include provision for the parties to confer to try to settle the dispute or, failing that, to explore alternative dispute resolution procedures before formal arbitration or litigation proceedings are commenced. Clause 47 envisages two alternative methods of dispute resolution procedures.

Under the second Alternative of Clause 47.2, the role of the Superintendent is given more prominence. It would be anticipated that this latter alternative would be used by parties who are familiar with the system of dispute resolution under NPWC3. These two alternative dispute resolution procedures are best demonstrated by the procedures summary included below.

If the dispute proceeds to Arbitration then references should be made to The Commercial Arbitration Act 1990.

The Department will usually use Alternative 2 but must specify this in the Annexure Part A.

Note that the 1996 version of the Contract gave the Principal the power to determine whether the dispute would be resolved by arbitration or litigation, but later versions have removed this exclusive right. While the party giving notice has the option of nominating litigation or arbitration, there is no fixed method to determine a forum if the parties disagree. Legal advice should be sought in such circumstances.

### 47.1 Notice of Dispute

A notice of dispute must be served by hand or by registered mail on the other party and to the Superintendent.

### 47.2 Further Steps Required Before Proceedings

(Note that **Alternative 1** will apply unless **Alternative 2** of Clause 47.2 is stated to apply in Item 20 of Part A of the Annexure).

#### Alternative 1

A compulsory conference (with or without the Superintendent) is to be held within 14 (calendar) days of service of notice of dispute under Clause 47. 1. The conference must be attended by persons having authority to settle. If not settled at this or subsequent conferences, parties are to explore other methods of resolving dispute. (e.g. by Expert Determination).

If the dispute is not settled then either party can refer the dispute to arbitration or litigation. Note that initial versions of the Road Construction Contract provided for the Principal to decide whether litigation or arbitration was chosen.

See SL 066 for forms of Notices Referring Dispute to Arbitration/Litigation.

#### Alternative 2

Note that the party served with the notice may provide a written response. An early response reduces the 42 days provided for the Superintendent's response. This alternative requires the Superintendent to make another written decision on the claim, including his reasons for the decision

In the event that the dispute cannot be so resolved or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by notice in writing delivered by hand or sent by registered post to the other party refer such dispute to arbitration or litigation.

#### *Alternative 2*

A party served with a notice of dispute may give a written response to the notice to the other party and the Superintendent within 28 days of the receipt of the notice.

Within 42 days of the service on the Superintendent of a notice of dispute or within 14 days of the receipt by the Superintendent of the written response, whichever is the earlier, the Superintendent shall give to each party the Superintendent's written decision on the dispute, together with reasons for the decision.

If either party is dissatisfied with the decision of the Superintendent, or if the Superintendent fails to give a written decision on the dispute within the time required under Clause 47.2 the parties shall, within 14 days of the date of receipt of the decision, or within 14 days of the date upon which the decision should have been given by the Superintendent confer at least once to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference, each party shall be represented by a person having authority to agree to a resolution of the dispute.

In the event that the dispute cannot be so resolved or if at any time after the Superintendent has given a decision either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may, by notice in writing delivered by hand or sent by registered post to the other party, refer such dispute to arbitration or litigation.

### **47.3 Arbitration**

Arbitration shall be effected by a single arbitrator who shall be nominated by the Chairperson for the time being of the Queensland Chapter of the Institute of Arbitrators and Mediators Australia. Such arbitration shall be held in Queensland.

Unless the parties agree in writing, any person agreed upon by the parties to resolve the dispute pursuant to Clause 47.2 shall not be appointed as an arbitrator, nor may that person be called as a witness by either party in any proceedings.

Notwithstanding Clause 42.9, the arbitrator may award whatever interest the arbitrator considers reasonable.

If one party has overpaid the other, whether pursuant to a Superintendent's certificate or not and whether under a mistake of law or fact, the arbitrator may order repayment together with interest.

### **47.4 Summary or Urgent Relief**

Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under Clause 42 or to seek urgent injunctive or declaratory relief in respect of a dispute under Clause 47 or any matter arising under the Contract.

## **48 WAIVER OF CONDITIONS**

Except as provided at law or in equity or elsewhere in the Contract, none of the terms of the Contract shall be varied, waived, discharged or released, except with the prior consent in writing of the Principal in each instance.

## **49 FURTHER GOODS AND SERVICES TAX REQUIREMENTS**

### **49.1 General**

This Clause 49.1 applies in respect of any supply under or in connection with this Contract for which the method of calculating the GST in respect of that supply has not been specified.

The consideration for any supply to which this clause applies does not include GST.

To the extent that any supply made under or in connection with this Contract is a taxable supply, the consideration for that supply is increased by an amount determined by the supplier, not exceeding the amount of that consideration (or its market value) multiplied by the rate at which GST is imposed in respect of the supply.

The amount so determined must be paid by the recipient of the supply even if the recipient disputes the determination.

If either party is entitled under this Contract to be reimbursed or indemnified by the other party for a cost or expense incurred in connection with this Contract, the reimbursement or indemnity payment must not include any GST component of the cost or expense for which an input tax credit may be claimed by the party entitled to be reimbursed or indemnified, or by its representative member.

If either party is not satisfied with this further decision by the Superintendent, or if the Superintendent fails to give his decision within the prescribed time, the parties must hold at least one conference to try to resolve the dispute. This conference must be held within 14 days of either the date of receipt of the Superintendent's decision or the date when the decision should have been given. As for Alternative 1, the conference must be attended by persons having the authority to settle.

If not settled or otherwise resolved, further notice served by either party will refer the dispute to arbitration or litigation.

See SL 067, SL 076 and SL 068 for forms of Notices Referring Dispute to Arbitration/Litigation.

### **47.3 Arbitration**

If referred to arbitration then it must be by a single arbitrator nominated by the Chairperson of the Queensland Chapter of the Institute of Arbitrators and Mediators Australia. Previous versions of the Road Construction Contract had provision for the nominating authority to be named in the Annexure.

Be aware that the arbitration can take many different forms and can be structured to suit individual circumstances.

### **47.4 Summary or Urgent Relief**

The above procedures do not exclude the right of a party to sue on a Superintendent's payment certificate or to seek urgent court relief.

## **48 WAIVER OF CONDITIONS**

The Superintendent has no authority under the Contract to waive Contract conditions.

Contractors should be wary of the Superintendent apparently waiving conditions as, at some later time, the Principal may rely on such conditions.. This exposes the Principal who, under Clause 23, has responsibilities for the performance of the Superintendent.

## **49 FURTHER GOODS AND SERVICES TAX REQUIREMENTS**

This is a new Clause, not contained in AS 2124 – 1992, which sets out the procedures and obligations for complying with the GST Legislation as it applies to goods and services provided under or in connection with the Contract.

### **49.1 General**

This clause is to be applied to the calculation of the GST payable on any taxable "supply" made under the Contract where the method of calculating the GST has not been specified. The amount by which the base "supply" cost is increased is determined by the supplier but is not to exceed the amount of the base cost multiplied by the GST rate. The amount so calculated must be paid by the recipient, even if he disagrees with it.

Where either party is entitled to be reimbursed or indemnified by the other party in respect of a cost or expense incurred under the Contract, the amount of the reimbursement or indemnity must not include any GST allowance or a tax credit which the recipient is entitled to claim; i.e., the recipient is not entitled to be reimbursed for the cost plus GST and then also claim a tax credit as well.

## 49.2 Adjustment

If an adjustment event, as defined in the GST Legislation, occurs –

- (a) the supplier must make a determination as to the amount of the consideration payable for the supply; and
- (b) if the GST component of that consideration differs from the amount originally determined, the amount of the difference must be paid by, refunded to or credited to the recipient, as the case may be.

## 49.3 Tax Invoice

A supplier must issue a tax invoice which complies with the requirements of the GST Legislation to the recipient of a supply to which Clause 49.1 applies, or in respect of which an adjustment has been made under Clause 49.2, in accordance with Clause 42.1 in regard to the GST inclusive consideration or the adjustment amount, as the case may be.

## 49.4 Regulated Supplies

For a supply which is a Regulated Supply (as that term is defined for the purposes of section 75AT of the *Trade Practices Act 1974 (Cth)*), the supplier must, if requested by the recipient and at the cost of the recipient, provide evidence that in making a determination as to the amount of GST payable the supplier took account of benefits obtained as a direct result of the New Tax System changes (as that term is defined for the purposes of 75AT of the *Trade Practices Act 1974 (Cth)*).

## 49.2 Adjustment

If an “adjustment event” as defined in the GST Legislation occurs (i.e. the base cost of the supply item is changed) then;

- (i) the supplier must assess the amount payable for the “supply”; and
- (ii) if the amount of the GST payable differs from the amount originally determined, then the recipient of the “supply” must either pay the extra GST or receive a refund, as appropriate

## 49.3 Tax Invoice

The supplier must provide a tax invoice which complies with the GST Legislation, and which takes account of any adjustment that might have been made under Clause 49.2.

## 49.4 Regulated Supplies

Where a supply item is a Regulated Supply as defined under the Trade Practices Act, the supplier must, if so requested by the recipient (and at the recipient’s cost) provide evidence that it took proper account of benefits available under the New Tax System changes when determining the amount of GST payable. (A Regulated Supply is a “supply” that was made during the two year implementation period for the New Tax System. The implementation period commenced on 1 July 2000 and ended on 30 June 2002.)

That is, the recipient is entitled to be shown proof that, when determining the amount of GST payable, the supplier made proper reference to the GST Legislation so as to ensure that the amount was assessed correctly.

It is noted that, as the implementation period ended on 30 June 2002, the incidence of a Regulated Supply is now likely to be rare and will disappear completely with time.