



GENERAL CONDITIONS OF CONTRACT

1. Definitions

In this subcontract, except where the context otherwise requires:

- 1.1 **Approval** means any licence, permit, consent, approval, certification, authorisation or other requirement of any person, authority, body or other organisation having jurisdiction in connection with the construction or use of the Subcontract Works;
- 1.2 **Authority** means:
- (1) any government in any jurisdiction;
 - (2) any provider of public utility services, whether statutory or not, and
 - (3) any other public person or instrumentality having rights or responsibilities over the Land, or any development approval with respect to the Land;
 - (4) any semi-governmental, administration, fiscal or financial body, department, commission, authority, tribunal, agency or entity.
- 1.3 **Best Industry Practice** means that degree of skill, care, prudence and foresight which would reasonably and ordinarily be expected of a skilled and experienced contractor engaged in the same type of project as the Subcontractor under the same or similar circumstances.
- 1.4 **Bank Guarantee** means an unconditional undertaking in a form and from a financial institution approved by the Contractor for the purpose of ensuring the Subcontractor's performance of its obligations under this Subcontract;
- 1.5 **Building Code** means the *Code for the Tendering and Performance of Building Work 2016*.
- 1.6 **Business Day** means any day other than
- (1) A Saturday, Sunday or public holiday in New South Wales; or
 - (2) 27, 28, 29, 30 or 31 December
- 1.7 **Civil Liability Legislation** means:
- (1) if the Site is in the Australian Capital Territory, Chapter 7A of the Civil Law (Wrongs) Act 2002 (ACT);
 - (2) if the Site is in New South Wales, Part 4 of the Civil Liability Act 2002 (NSW);

- (3) if the Site is in the Northern Territory, the Proportionate Liability Act 2005 (NT);
- (4) if the Site is in South Australia, the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA);
- (5) if the Site is in Tasmania, the Civil Liability Act 2002 (Tas) and the Wrongs Act 1954 (Tas);
- (6) if the Site is in Victoria, Part IVAA of the Wrongs Act 1958 (Vic); and
- (7) if the Site is in Western Australia, the Civil Liability Act 2002 (WA).

1.8 **Claim** means any request, demand, action, suit, proceeding or entitlement in relation to, arising out of or in connection with this Subcontract or Subcontract Works for:

- (1) Payment;
- (2) Extension of time or compensation;
- (3) in contract or in tort including negligence or under statute or for breach of fiduciary duty or statutory duty, by reason of any other principle whether legal, equitable or statutory;
- (4) unjust enrichment, restitution or under any other principle of law or equity;
- (5) asserted by action, claim, suit, proceeding, deduction, set-off or counterclaim or otherwise;
- (6) for breach of any provision, warranty, representation, obligation, indemnity or undertaking (express or implied); or
- (7) for costs whether ordered or not or assessed or taxed in relation to any proceedings or otherwise.

1.9 **Commencement Date** means the date stated in Item 7 of the Schedule or any other such date as may be determined in accordance with this Subcontract.

1.10 **Completion** means the stage when the Subcontract Works are complete in accordance with the Subcontract and are Defect free;

1.11 **Confidential Information** means all plans, samples, models, patterns, financial, business, technical and other information of whatever kind regarding the Subcontract Works, the Contractor or the Principal (including without limitation any research, diagrams, plans or other documents whatsoever whether or not belonging to the Contractor) disclosed to or obtained by the

Subcontractor before or after the execution of this Subcontract by the Subcontractor.

1.12 **Contractor** means Utech Group or its appointed agent as notified to the Subcontractor in writing and provided to in the Schedule following clause 10.2.

1.13 **Contractor's Project Requirements** means the Contractor's written requirements for the Subcontract Works described in the documents stated in Item 31 which:

- (a) shall include the stated purpose for which the Subcontract Works are intended;
- (b) may include the Principal's design, timing and cost objectives for the works; and
- (c) where stated in Item 31, shall include a Preliminary Design provided in item 29;

1.14 **Contractor's Representative** means the person identified as such in Item 3 of the Schedule or a nominated replacement;

1.15 **Date for Practical Completion** means:

- (1) where Item 9 provides a date for Practical Completion, the date;
- (2) where Item 9 a period of time for Practical Completion, the last day of that period;
- (3) but if any EOT for Practical Completion is directed by the Contractor or allowed for in any expert determination or litigation, it means the resulting date therefrom.

1.16 **Date of Practical Completion** means:

- (1) the date evidenced in a certificate of Practical Completion as the date upon which Practical Completion was reached; or
- (2) where another date is determined in any expert determination or litigation as the date on which Practical Completion was reached, that other date.

1.1 **Deed of Warranty** means the deed in the form of Annexure E to the Formal Instrument of Agreement which is required to be executed pursuant to subclauses 1.40(11).

1.17 **Defect** means any defect, shrinkage, fault, non-conformance, or error or omission in the Subcontract Works including any aspect of the Subcontract Works which is not in accordance with the Subcontract.

- 1.18 **Defects Liability Period** means the defects liability period specified in item 15 (or such further defects liability period fixed by the Contractor in accordance with clause 17.4 of this Subcontract).
- 1.19 **Delay Costs** means the amount specified in Item 14 of the Schedule;
- 1.20 **Design Documents** means the Design Documents identified under item 30 of the Schedule for the construction of the subcontract works and form part of the Subcontract Documents.
- 1.21 **Detailed Design** means but not limited to the development of drawings, computations, independent certification, shop drawings, specifications, design coordination and the like to deliver the subcontractors design and construct obligations.
- 1.22 **Directions** includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.
- 1.23 **EOT** (from 'extension of time') means an adjustment to the Date for Completion in accordance with clause 18.2(4)
- 1.24 **EOT Claim** means a Claim made for an EOT under clause 18.2(6).
- 1.25 **Final Payment Claim** has the meaning given to it in clause 20.8 of this Subcontract.
- 1.26 **Final Progress Claim** has the meaning given to it in clause 20.7 of this Subcontract.
- 1.27 **Force Majeure** means any of the following causes, provided that they are outside the reasonable control of the Contractor and could not have been prevented or avoided by the Contractor taking reasonable steps:
- (1) natural disaster;
 - (2) industrial action or labour disturbance (excluding industrial or labour disturbance of the employees of the Contractor, its subcontractors or any of its Related Entities);
 - (3) an act of war (declared or undeclared) or terrorism;
 - (4) lightning, fire, earthquake, storm, flood or landslide;
 - (5) COVID-19 pandemic or any other pandemic or epidemic; or
 - (6) any order of a court, tribunal or Authority that the Work be suspended (unless due to the Contractor).

- 1.28 **Formal Instrument of Agreement** means the executed document accompanying these Subcontract Conditions and forming part of the Subcontract Documents.
- 1.29 **GST Act** means A New Tax System (Goods and Services Tax) Act 1999 (Cth);
- 1.30 **Head Contract** means the contract entered into between the Contractor and the Principal of the project to which the Subcontract Works relate.
- 1.31 **Insolvency Event** means the happening of any of these events in relation to a party (Defaulting Party):
- (1) execution or other process of a court or Authority or distress is levied for an amount exceeding \$10,000 upon any of the Defaulting Party's property and is not satisfied, set aside or withdrawn within 7 days of its issue;
 - (2) an order for payment is made or judgment for an amount exceeding \$10,000 is entered or signed against the Defaulting Party which is not satisfied within 7 days;
 - (3) the Defaulting Party suspends payment of its debts;
 - (4) where the Defaulting Party is a body corporate:
 - (a) the Defaulting Party becomes an externally-administered body corporate under the Corporations Act 2001;
 - (b) steps are taken by any person towards making the Defaulting Party an externally-administered body corporate (but not where the steps taken consist of making an application to a court and the application is withdrawn or dismissed within 14 days);
 - (c) a controller (as defined in section 9 of the Corporations Act 2001) is appointed of any of the property of the Defaulting Party or any steps are taken for the appointment of a controller (but not where the steps taken are reversed or abandoned within 14 days);
 - (d) the Defaulting Party is taken to have failed to comply with a statutory demand within the meaning of section 459F of the Corporations Act 2001; or
 - (e) a resolution is passed for the reduction of capital of the Defaulting Party or notice of intention to propose such a resolution is given, without the prior written consent of the other party;
 - (5) where the Defaulting Party is a natural person:

- (a) the Defaulting Party authorises a registered trustee or solicitor to call a meeting of his or her creditors or proposes or enters into a deed of assignment or deed of arrangement or a composition with any of his or her creditors;
 - (b) a person holding a security interest in assets of the Defaulting Party enters into possession of or takes control of any of those assets or takes any steps to enter into possession of or take control of any of those assets; or
 - (c) the Defaulting Party commits an act of bankruptcy; or
- (6) an event happens analogous to an event specified in Insolvency Event (a) to (e) to which the law of another jurisdiction applies and the event has an effect in that jurisdiction similar to the effect which the event would have had if the law of Australia applied;
- 1.32 **Inspection Test Plan** means the document/s detailing the tests and inspections to be performed in the course of quality control of the Subcontract Works.
- 1.33 **Intellectual Property** has the same meaning as defined in Article 2 of the *Convention Establishing the World Intellectual Property Organization (as amended on September 28, 1979)*.
- 1.34 **Intellectual Property Right** means all intellectual property rights, including but not limited to, the following rights: patents, copyright, rights in circuit layouts, registered and unregistered designs, Moral Rights, registered and unregistered trademarks, service marks, trade names and any right to have Confidential Information kept confidential, and any application or right to apply for registration of any of those rights.
- 1.35 **Latent Condition** has the meaning in clause 13.1.
- 1.36 **Legislative Requirements** mean:
- (1) acts, ordinances, regulations, orders, awards and proclamations of the Commonwealth and the State of New South Wales;
 - (2) Local laws, by laws, orders, ordinances and legal requirements of any relevant Authority, including local government;
 - (3) Approvals and requirements of obligations having jurisdiction in connection with the carrying out of the work under the Subcontract; and
 - (4) fees and charges payable in connection with the foregoing.
- 1.37 **Milestone** means any defined stage of progress or accomplishment.

1.38 **Moral Right** means the 'moral right of an author' as defined and conferred under the Copyright Act 1968 (Cth), and if any work is used in any jurisdiction other than in Australia, any similar right capable of protection under the laws of that jurisdiction.

1.39 **Notice of Contractor Default** has the meaning in clause 25.5 of the Subcontract.

1.40 **Practical Completion** means the stage when:

- (1) the Subcontract Works are complete in accordance with the Subcontract except for minor omissions and minor Defects (and, for the avoidance of doubt Defects will not be minor if, either individually or together, they derogate from the quality of the Subcontract Works in a material way):
 - (a) which do not prevent the Subcontract Works from being reasonably capable of being used for their stated purpose;
 - (b) which the Contractor determines the Subcontractor has reasonable grounds for not promptly rectifying; and
 - (c) rectification of which will not prejudice the safe and convenient use of the Subcontract Works;
 - (d) where the immediate making good by the Subcontractor is not practicable; and
 - (e) which do not cause any legal restrictions on the use or the occupation of the Subcontract Works;
- (2) those tests which are required by the Contractor to be carried out and passed before the Subcontract Works reach Completion, have been carried out and passed to the satisfaction of the Contractor; and
- (3) documents and other information required under the Contract which, in the opinion of the Contractor, are essential for the use, operation and maintenance of the Subcontract Works, have been supplied;
- (4) all keys, electronic access mechanisms and security coding have been handed to the Contractor;
- (5) any other certificate or Approval, which must be issued or given by an Authority to lawfully occupy or use the Subcontract Works has been issued or given by that Authority and provided to the Contractor and the conditions of all planning Approvals complied with; and
- (6) all rubbish, surplus material and minor items of plant and equipment (including the dismantling and removal of scaffolding, hoardings,

barricades specific for the Subcontract Works – except to the extent the Contractor requires otherwise) has been removed from the Site so as to leave the Site in a clean and tidy condition, except only those items which the Contractor consents in writing may remain on the Site for the purpose of performing any additional work during the Defects Liability Period or for rectifying any Defects;

- (7) the Subcontract Works have been cleaned;
- (8) all plant and equipment forming part of the Subcontract Works of any public area or public open space or used for human services is tested and operational;
- (9) the Subcontract has provided to the Contractor all warranties, guarantees, operation manuals and other documents and information required under the Subcontract which, in the opinion of the Contractor, are essential for the use, operation and maintenance of the Subcontract Works have been supplied;
- (10) to the extent applicable, the Subcontract Works are compliant with all Legislative Requirements and all required Approvals and certificates have been issued and provided by the Subcontractor to the Contractor;
- (11) the Subcontractor has duly executed the Deed of Warranty and provided the executed Deed of Warranty to the Contractor; and
- (12) all services and installations (including mechanical, electrical, hydraulic, water and fire protection services) and other building systems and plant and equipment, have been physically completed and fully commissioned, have been initially tested, as any Authority would require, and perform as required by the terms of the Subcontract both under normal operating conditions and under simulated emergency operation conditions

1.41 **Preliminary Design** means the documents stated in item 29.

1.42 **Principal** means the person or entity so identified in the Head Contract.

1.43 **Principal's Construction Program** means the construction program applicable to the Head Contract, as updated from time to time between the Principal and the Contractor.

1.44 **Procore** means the Procore construction management software (as updated from time to time) accessible at and downloadable from <https://www.procore.com/en-au>.

1.45 **Progress Claim** has the meaning given to it in clause 20.2 of this Subcontract.

1.46 **Provisional Sum** includes monetary sum, contingency sum and prime cost item provided in item 6.

1.47 **Qualifying Cause of Delay** means any of the following:

- (1) a breach of the Subcontract by the Contractor;
- (2) a qualifying cause of delay (or equivalent definition) as defined in the Head Contract,
- (3) but does not include:
 - (a) industrial conditions limited to matters and issues arising specifically on the Site or specifically in relation to the Subcontractor or any related bodies corporate (as defined in the Corporations Act 2001 (Cth));
 - (b) Force Majeure event;
 - (c) the COVID-19 pandemic or any other pandemic or epidemic or the effects of the COVID-19 pandemic or any other pandemic or epidemic; or
 - (d) any act, default or omission of the Subcontractor or their employees, consultants, agents or any other party, other than the Contractor

1.48 **Safety Legislation** means all laws (including legislative requirements) in relation to workplace health and safety which apply in New South Wales, including the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulations 2017* (NSW).

1.49 **Schedule** means the schedule forming part of the Formal Instrument of Agreement.

1.50 **Security** means:

- (a) cash;
- (b) retention moneys;
- (c) interest bearing deposit in a bank carrying on business at the place in New South Wales;
- (d) an approved unconditional undertaking or an approved performance undertaking given by an approved financial institution or an approved insurance company and in a form approved by the Contractor; or

(e) other form approved by the party having the benefit of the security.

as described in clause 5.2 and listed in item 20.

- 1.51 **Security Amount** means the amount(s) of Security stated in Item 21 of the Schedule.
- 1.52 **Security of Payment Act** means the Building and Construction Industry Security of Payment Act 1999 (NSW) or such other equivalent Act in force in the state in which the Site is located.
- 1.53 **Separate Defects Liability Period** has the meaning given to it in clause 17.4 of this Subcontract and listed in item 15 of the Schedule.
- 1.54 **Site** means the lands and other places to be made available and any other lands and places made available to the Subcontractor by the Contractor for the purpose of the Subcontract.
- 1.55 **Subcontract** means the agreement between the Contractor and the Subcontractor constituted by the Subcontract Documents;
- 1.56 **Subcontract Conditions** means the conditions set out in this document and forming part of the Subcontract.
- 1.57 **Subcontract Documents** means the documents described in section 2 of the Formal Instrument of Agreement;
- 1.58 **Subcontract Sum** means the subcontract sum stated in the Schedule, as adjusted in accordance with the terms of this Subcontract.
- 1.59 **Subcontract Superintendent** means the person stated in Item 2 as the Subcontract Superintendent or other person from time to time appointed in writing by the Contractor to be the Subcontract Superintendent and notified as such in writing to the Subcontractor by the Contractor.
- 1.60 **Subcontract Works** means the works and services described in the Subcontract Documents, including though not limited to:
- (1) provision of all necessary labour, plant, equipment, materials and competent supervision required to complete the Subcontract Works;
 - (2) out of hours work necessary to maintain progress in accordance with the Principal's Construction Program, as amended by the Principal from time to time;
 - (3) Site co-ordination, Site measurement and Site set-out, as required to complete the Subcontract Works;

- (4) testing and tagging of all electrical leads and equipment used by the Subcontractor in connection with the Subcontract Works;
- (5) minor items not expressly described in the Subcontract Documents but which are necessary for, or incidental to, Completion of the Subcontract Works; and
- (6) all other things or tasks which are necessary for the Subcontractor to do to comply with its obligations under the Subcontract including variations, remedial work, construction plant and temporary works.

1.61 **Subcontractor** means the subcontractor named in the Schedule.

1.62 **Subcontractor's Associates** means any person or entity associated with the Subcontractor whereby authority is given by the Subcontractor to perform obligations under the Subcontract including, but not limited to, employee, agent, representative or subcontractors contracting to the Subcontractor.

1.63 **Subcontractor's Design Obligations** means all tasks necessary to design and specify the Subcontract Works required by the Subcontract, including preparation of the design documents and, if the documents stated in Item 26 as describing the Contractor's Project Requirements include a preliminary design, developing the Preliminary Design.

1.64 **Subcontractor's Program** means means the construction program set out in Annexure J of this Subcontract.

1.65 **Subcontractor's Representative** means the person identified as such in Item 4 of the Schedule or a nominated replacement whose appointment has been approved by the Contractor.

1.66 **Substantial Breach** include but are not limited to:

(a) failing to:

- (i) perform properly the Subcontractor's Design Obligations;
- (ii) provide Security;
- (iii) provide evidence of insurance;
- (iv) comply with a Direction of the Contractor pursuant to clause 17.2; or
- (v) use the materials or standards of work required by the Subcontract;

(b) failing to wrongful suspension of work;

(c) substantial departure from the Principal's Construction Program without reasonable cause or the Contractor's approval;

- (d) substantial departure from the Subcontractor's Program without reasonable cause or the Contractor's approval;
- (e) where there is no Principal's Construction Program, failing to proceed with due expedition and without delay;
- (f) carrying out Subcontract Works in breach of clause 23; or
- (g) any Substantial Breach as referred to in the Subcontract.

1.67 **Tax Invoice** has the meaning given to that expression under the GST Act; and

1.68 **Variation** means any change in the Subcontract Works, including an addition or Omission, decrease deletion or removal in the scope, quality or character of the Subcontract Works.

1.69 **Working Hours** means the Working Hours identified under item 24 of the Schedule.

2. Interpretation

In these Subcontract Conditions, unless the context indicates a contrary intention:

2.1 **Schedule** – where an item is referred to in the Subcontract Definitions that item has the same meaning and use as it has been given in the Schedule.

2.2 **References** - a reference to a clause, paragraph, schedule or annexure is a reference to a clause, paragraph, schedule or annexure to or of this Subcontract and a reference to an item is a reference to an item in the Formal Instrument of Agreement to this Subcontract.

2.3 **Headings** - clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this Subcontract.

2.4 **Like Words**- Like words have a corresponding meaning.

2.5 **Person** - a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns.

2.6 **Rights and obligations** - a reference to a right or obligation of a party is a reference to a right or obligation of that party under this Subcontract.

2.7 **Requirements**- a requirement to do anything includes a requirement to cause that thing to be done, and a requirement not to do anything includes a requirement to prevent that thing being done.

- 2.8 **Including** - including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind.
- 2.9 **Singular** - the singular includes the plural and vice-versa.
- 2.10 **Legislation** - a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it.
- 2.11 **Joint and several** - an agreement, representation, covenant, right or obligation:
- (1) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (2) on the part of two or more persons binds them jointly and severally.
- 2.12 **Thing** - a thing includes the whole and each part of it separately
- 2.13 **Writing** - a reference to a notice, consent, request, Approval or other communication under this Subcontract or an agreement between the parties means a written notice, consent, request, Approval, communication or agreement.
- 2.14 **Words of limitation** - "Including" and similar expressions are not words of limitation.
- 2.15 **Meaning** - Any terms referred to in this Subcontract that are also defined terms in the Head Contract, have the same meaning in this Subcontract as the meaning given to them in the Head Contract, unless the context otherwise requires or otherwise expressly stated.
- 2.16 **Cost** - Unless this Subcontract expressly provides otherwise, the Subcontractor must perform all of its obligations under this Subcontract at its own cost and expense.

3. **Subcontract Works**

3.1 Subcontract Performance

- (1) The Subcontractor warrants to the Contractor that:
 - (a) It has reviewed the terms of the Subcontract and the terms of the Head Contract, except for commercially sensitive or confidential terms as between the Contractor and Principal.
 - (b) The Subcontractor has the skill, resources and capability to carry out and complete the Subcontract Works in a proper and workmanlike manner to the satisfaction of the Contractor:

- (i) in accordance with the highest standards of industry practice, Legislative Requirements, the Subcontract and the provisions of the Head Contract to the full extent that the same are applicable to the Subcontract;
- (ii) using new materials, which are of merchantable quality and fit for the purpose in which they are to be used; and
- (iii) as and when directed by the Contractor, including as directed in accordance with the Principal's Construction Program;

(2) The Head Contract

- (a) The Subcontractor acknowledges that it has been given a reasonable opportunity to inspect and familiarise itself with the terms of the Head Contract prior to entering into the Subcontract. In addition to its other obligations under the Subcontract, the Subcontractor:
 - (b) must observe, perform and comply with all provisions of the Head Contract on the part of the Contractor to be observed, performed and complied with, insofar as they relate to and apply to the Subcontract Works, and are not inconsistent with the express provisions of the Subcontract, as if those obligations were expressly set out in the Subcontract as obligations of the Subcontractor;
 - (c) The Subcontractor must do all things necessary to assist and enable the performance by the Contractor of its obligations under the Head Contract, so as to ensure the Contractor does not breach any of its obligations under the Head Contract.
- (d) The Subcontractor acknowledges and agrees that:
 - (i) it does not obtain any rights or benefits under the Head Contract;
 - (ii) the Subcontract Sum includes anything reasonably required of the Subcontract by the Contractor to enable it to comply with the Head Contract; and
 - (iii) the Subcontract Sum includes an allowance as to compensation for the Subcontractor of all risks and contingencies which are associated with coordination and cooperation as stated in paragraph iii below.

- (e) Without limiting the Subcontractor's obligations under this Subcontract, the Subcontractor must cooperate and coordinate performance of the Subcontract Works with the Contractor and others, including other subcontractors and consultants of the Principal and the Contractor, carrying out work on or about the Site so as to enable the Contractor to complete its works under the Head Contract in accordance with the requirements of the Head Contract.

4. **The Subcontractor's Warranties**

4.1 Without limitation to any other warranty given by the Subcontractor under this Subcontract, the Subcontractor represents and warrants to the Contractor that:

- (1) it has thoroughly examined and acquired knowledge of the contents of all the Subcontract Documents, all other information or documentation made available either orally or in writing to it by the Contractor before entering into this Subcontract, including relevant extracts of the Head Contract, and obtained all other information necessary to complete the Subcontract Works;
- (2) it and the Subcontractor's Associates, at all times are and will remain suitably qualified and experienced;
- (3) it has entered into this Subcontract without relying on any representation or warranty by the Contractor, the Principal or any other person purporting to represent the Contractor or the Principal;
- (4) it has thoroughly inspected the Site and its adjacent surroundings, including any prior work, existing structures or materials and physical conditions (whether naturally occurring or in consequence of human activity) on, in, over or under the Site and its surroundings;
- (5) all materials supplied by it will be of merchantable quality and suitable for the purpose for which they are used and that, unless otherwise stated in this Subcontract, those materials will be new;
- (6) the Subcontract Works will be completed within the time stipulated in the Subcontract and the completed Subcontract Works will be fit for their intended purpose and free from Defects;
- (7) the Subcontractor and Subcontract Works comply with all the requirements of or to be inferred from, this Subcontract including, without limitation, the requirements of the Building Code, all relevant statutes, standards (including all Australian Standards), Best Industry Practice, regulations, codes, legislation, manufacturer's specifications

and recommendations, provisions of the Head Contract to the full extent that the same are applicable to the Subcontract Works and are not inconsistent with the Subcontract and all authorities having jurisdiction over the Subcontract Works (as amended from time to time);

- (8) it has determined the nature and extent of the Subcontract Works and made all necessary allowances in the Subcontract Sum, including (without limitation) allowance for:
 - (a) the amount of temporary works, materials, labour, plant and equipment necessary to complete the Subcontract Works in accordance with its obligations under this Subcontract; and
 - (b) all ancillary and other works and expenditure and the supply of all items whether or not expressly mentioned in this Subcontract but which are necessary for the satisfactory Completion of the Subcontract Works;
- (9) it has considered its obligations under this Subcontract and that both the Subcontract Sum and Date for Practical Completion are reasonable and each contain all necessary allowances taking into account the risk, responsibilities and costs allocated to the Subcontractor, whether expressly or otherwise;
- (10) it will attend, at the Subcontractor's costs, to and rectify any Defect;
- (11) it has made proper allowance for all matters which might impact on its ability to complete the Subcontract Works or to complete the Subcontract Works within any particular time, cost or quality constraints subject to the express provisions of this Subcontract;
- (12) it has obtained, or will be able to obtain, all necessary consents, permits or authorisations (other than those which the Contractor is required to obtain in accordance with the Subcontract) necessary for it to carry out the work under the Subcontract and the Subcontract Works in accordance with the requirements of the Subcontract;
- (13) all registrations, permits, licences, qualifications and other requirements of its trade are in full force and effect at all times;
- (14) it is a GST registered entity;
- (15) the Subcontract Works will in all respects comply with the *Home Building Act 1989* (NSW) and the *Design and Building Practitioners Act 2020* (NSW), as well as associated regulations, to the extent which that legislation applies to the Subcontract Works, and:

- (a) the Subcontractor will otherwise ensure that it complies with the obligations under the *Home Building Act 1989* (NSW) and the *Design and Building Practitioners Act 2020* (NSW) and associated regulations;
- (b) Will indemnify the Contractor for any loss, damage or Claim arising against the Contractor due to noncompliance of the Subcontract Works with the *Home Building Act 1989* (NSW) and the *Design and Building Practitioners Act 2020* (NSW) and associated regulations

5. Pricing

5.1 Provisional Sums

- (1) The Subcontract Sum includes the Provisional Sums, if any, stated in Item 6.
- (2) The Subcontractor may incur expenditure against Provisional Sums in all respects only as directed by the Contractor in writing. If the Contractor issues a Direction, the Subcontract Sum is adjusted by the amount of the difference between:
 - (a) the Provisional Sum for an item or work; and
 - (b) the actual value of the item or work, which is the value agreed by the parties or, if the parties cannot agree, the value as reasonably determined by the Contractor.

5.2 Security

- (1) Unless otherwise agreed in writing, or where retention is the form of Security, the Subcontractor must provide the Security to the Contractor upon the execution of the Formal Instrument of Agreement.
- (2) The Security provided by the Subcontractor is not held on trust by the Contractor for the benefit of the Subcontractor and is held for the benefit of the Contractor.
- (3) The Subcontractor has no entitlement to the Security provided until the release of the Security is required under the terms of the Subcontract.
- (4) Where the form of security is Bank Guarantee, the Contractor is not obliged to make any payment to the Subcontractor until the Bank Guarantees are provided in accordance with clause 5.2(1).

- (5) If the Security is a (or more than one) Bank Guarantee, the Subcontractor agrees that it will not institute proceedings, exercise any right or take action to instruct or restrain:
 - (a) the financial institution that issued the Bank Guarantees from paying the Contractor pursuant to the Bank Guarantee;
 - (b) the Contractor taking any steps for the purpose of making a demand under any Bank Guarantee, receiving payment under any Bank Guarantee; or
 - (c) the Contractor using the money received under the Bank Guarantee; and
 - (d) the Subcontractor is to bear the cash flow risk and solvency risk associated with any dispute regarding the Contractor's entitlement to have recourse to any Bank Guarantee given as security

5.3 Bill of Quantities

- (1) A bill of quantities (“**BOQ**”) does not form part of this Subcontract and if one is provided it is not warranted by the Contractor to be correct. The Contractor may require the Subcontractor to price a BOQ which may be used, at the sole discretion of the Contractor, to value variations or Progress Claims.

6. **Subcontract Commencement**

- 6.1 The Subcontractor must commence the Subcontract works with due diligence and without delay on the Commencement Date.
- 6.2 On and from the Commencement Date, the Contractor will grant access to the Subcontractor, to certain and sufficient parts of the Site to enable the Subcontractor to commence the relevant Subcontract Works. The Subcontractor must only access the Site during the Working Hours or as directed or varied by the Contractor.
- 6.3 If the Subcontractor has not taken out the relevant insurances under clause 11.6, the Contractor may refuse to give access to the Site until the Subcontractor has complied with its obligations under that clause.
- 6.4 Other works on site
 - (1) The Subcontractor acknowledges and agrees that it is not entitled to exclusive possession of the Site and that the Contractor and others will

be carrying out work on or about the Site at the same time as the Subcontractor is carrying out the Subcontract Works.

- (2) The Subcontractor must coordinate its work with the work being carried out by others on the Site. The Subcontractor has no right to make any Claim against the Contractor in any way relating to the carrying out of works by others

7. **Design Obligations**

7.1 Unless design work is stated in Item 26 of the Schedule, This clause 7 does not apply to this Subcontract.

7.2 The Subcontractor must:

- (1) prepare and execute all Detailed Design development work as necessary in the opinion of the Contractor for the Completion of the Subcontract Works and the works under the Head Contract in accordance with the Principal's Construction Program and in accordance with best engineering, building and Best Industry Practice;
- (2) ensure that the design and construction of the Subcontract Works conforms in all respects with the terms and conditions and requirements of all Authorities having jurisdiction over the Subcontract Works and the works under the Head Contract;
- (3) it has examined and carefully checked the Subcontract Documents and that the Subcontract Documents are suitable, appropriate and adequate for the purpose stated in, or purpose that can be inferred from, the Subcontract and the Head Contract;
- (4) ;
- (5) not make, cause or permit to be made any changes or amendments in any relevant Design Documents otherwise than as contemplated by the Subcontract in the process of design development or otherwise, without the prior written approval of the Contractor; and
- (6) clarify all ambiguities, errors, inadequacies, inaccuracies or discrepancies arising in all documentation at no cost to the Contractor as deemed necessary at the sole discretion of the Contractor.

7.3 The Subcontractor hereby expressly assigns to the Contractor all of its rights, including copyright, title and interest in and to all Design Documents, other materials and information prepared for the Subcontract Works.

7.4 The Subcontractor warrants that it has made due allowance for the status of the Preliminary Design and acknowledges that it will have no Claim for any additional costs at all, including but not limited to, circumstances due to items

not expressly shown in the Preliminary Design or as required by the relevant Australian Standards and the Contractor's Project Requirements.

7.5 Without limiting the generality of the other warranties provided in the Subcontract, the Subcontractor further warrants to the Contractor that the Subcontractor:

- (1) will engage and retain consultants identified in the Subcontractor's tender and who the Subcontractor warrants are suitably qualified and experienced;
- (2) has examined and carefully checked any Preliminary Design included in the Contractor's Project Requirements (if any) and that such Preliminary Design is suitable, appropriate and adequate for its purpose.
- (3) shall execute and complete the Subcontractor's Design Obligations and produce the Design Documents to accord with the Contractor's Project Requirements, and, if applicable, accept the novation and retain the consultants for any work the subject of a prior contract with the Contractor;
- (4) will execute and complete the works under the Subcontract in accordance with the Design Documents so that when complete, the Subcontract Works will be without with Defects, fit for their intended purpose and comply with all the requirements of the Subcontract and Legislative Requirements;
- (5) will complete the Design Documents in a commercially prudent and reasonable manner and in accordance with all suitable methods and practices and requirements of the Contractor; and
- (6) that all design, types of materials methods or systems of proceedings or working proposed, used or specified by the Subcontractor are suitable in all respects for their intended purpose and comply with all relevant authorities' requirements.

7.6 The Subcontractor acknowledges that the warranties provided in the Subcontract shall remain unaffected notwithstanding:

- (1) that design work (including the Preliminary Design) has been carried out by or on behalf of the Contractor and included in the Contractor's Project Requirements;
- (2) that the Subcontractor has or will enter into a novation of any prior contract between the Contractor and a consultant of the Contractor and has or will retain that consultant in connection with the Subcontract Works;

- (3) any receipt or review of, rejection of, or comment or direction on, the Design Documents or any other document provided by the Subcontractor by or on behalf of the Contractor, or any failure by the Contractor or its representative to do any of the things referred to in this clause 7;
- (4) any Variation; and
- (5) any warranties obtained from third parties by the Subcontractor.

8. Design & Intellectual property

8.1 The Subcontractor:

- (1) Unless design work is stated in Item 26 of the Schedule, This clause 8.1 does not apply to this Subcontract.
- (2) must prepare all Detailed Design which in the Contractor opinion is necessary for the Completion of the Subcontract Works;
- (3) warrants, in addition to and without limiting any other warranty given by the Subcontractor under this Subcontract, that the design of the Subcontract Works and the Subcontract Works themselves when constructed will be:
 - (a) fit for their intended purpose;
 - (b) free from design errors and Defects;
 - (c) compliant with Head Contract requirements and works to be performed in connection with the Head Contract; and
 - (d) compliant with all Subcontract Documents and any other document(s) relating to the Site or the Subcontract Works, relevant requirements of the Building Code, relevant statutes, standards (including all Australian Standards), regulations, codes, legislation, manufacturer's specification and recommendations.
- (4) Any review, comment or Approval (or failure to do so) by the Contractor of any design documentation supplied by the Subcontractor does not relieve the Subcontractor from or alter any of its obligations and liabilities under this Subcontract (including the responsibility for those documents).
- (5) The Subcontractor must comply with, and provide any Design Documents as requested by the Contractor and otherwise at the times and in a state which enables the Contractor to comply with any design

review process contained in the Head Contract as advised by the Contractor from time to time.

8.2 Intellectual Property

- (1) In this clause 8.2, Data means drawings, specifications, calculations and any other document and information which the Subcontractor must produce to design (if applicable) and construct the Subcontract Works in accordance with the Subcontract and all other drawings, sketches, specifications, digital records, computer software, data and information relating to the Subcontract.
- (2) The Subcontractor must ensure that Data created specifically for the Subcontract by or for the Subcontractor is only used for the purposes of the Subcontract.
- (3) The Subcontractor assigns or otherwise transfers present and future Intellectual Property Rights in all Data created specifically for the Subcontract, upon its creation, to the Contractor. The Subcontractor, at its own cost, will do all things necessary, including execution of all necessary documentation, to vest ownership of all such Intellectual Property Rights in the Contractor.
- (4) The Subcontractor must obtain for or grant to the Contractor, perpetual, irrevocable, royalty-free licenses to allow the Contractor to use such Intellectual Property in connection with the Subcontract Works.
- (5) The Subcontractor warrants that all of the Subcontractor's materials, documents and methods of working will not infringe any Intellectual Property Rights of others and indemnifies the Contractor against any costs, losses, expenses or damages arising out of any infringement.
- (6) To the extent the Subcontractor has been provided consent by the Contractor to engage its own subcontractors, the subcontractors must ensure that those subcontracts include the warranties and indemnities set out in this clause 4 in favour of the Contractor.
- (7) The Subcontractor warrants that it will obtain a written consent that operates for the benefit of the Contractor, its assignees, licensees or anyone authorised by the Contractor, from each author of the Design Documents to the fullest extent validly permitted by Part IX of the *Copyright Act 1968* (Cth), genuinely consenting to the doing of any acts or omissions that would, except for the giving of the consent, constitute a breach of the author's rights under Part IX of the *Copyright Act 1968* (Cth).

- (8) The Subcontractor must deliver to the Contractor any consents obtained by the Subcontractor under this clause 8 within 3 days of a request being made to that effect by the Contractor.

9. **Subcontract Discrepancies**

9.1 Discrepancies

- (1) If the Subcontractor discovers any discrepancies, contradictions, omissions, ambiguity, errors, faults or inconsistencies within the Subcontract Documents:
 - (a) the Subcontractor must promptly notify the Contractor in writing; and
 - (b) the Contractor may give Directions as to the interpretation of the Subcontract Documents in order to overcome any discrepancies, contradictions, omissions, ambiguity, errors, faults or inconsistencies; and
 - (c) the Subcontractor must, at its own cost, comply with any Direction given by the Contractor as to the interpretation of the Subcontract Documents.

(2) Claim

- (a) The Subcontractor is not entitled to an EOT or any Claim against the Contractor in any way relating to any discrepancies, contradictions, omissions, ambiguity, errors, faults or inconsistencies as between the Subcontract Documents or the Contractor's interpretation of the Subcontract Documents.

(3) Supply of documents by the Subcontractor

- (a) The Subcontractor must at least 56 Business Days before and as a pre-condition to Practical Completion, give the Contractor all warranties, guarantees, operating manuals, maintenance manuals and "as builds" drawings applicable to the Subcontract Works which are required by the Head Contract or this Subcontract.

(4) Supply of documents by the Contractor

- (a) Unless this Subcontract expressly provides otherwise, information or documents of any nature provided by or on behalf of the Contractor to the Subcontractor at any time (other than the Subcontract Documents) are solely for its convenience, only and the Contractor does not warrant or guarantee the accuracy of that information or those documents.

- (b) The Subcontractor is not entitled to any Claim against the Contractor in tort, statute, contract or otherwise (except to the extent that such liability cannot be contracted out of) regarding any interpretations, deductions, inferences drawn or conclusions made by the Subcontractor in relation to such information or documents.

10. **Representatives and Personnel**

10.1 The Contractor:

- (1) appoints the Contractor's Representative to exercise the discretions and powers vested in the Contractor under the Subcontract;
- (2) has the authority to give directions to the Contractor's Representative at all times, to carry out its functions under the Subcontract on behalf of the Contractor, as agent of the Contractor, and not as independent assessor or certifier;
- (3) by notice to the Subcontractor, appoint or nominate another person as the Contractor's Representative, which person may also be replaced at the sole discretion of the Contractor.

10.2 In this Subcontract:

- (1) The Subcontract Superintendent, if appointed and referred to in item 2, may carry out the duties and functions of the Contractor under this Subcontract. When the Subcontract Superintendent is carrying out the duties and functions of the Contractor under this Subcontract they do so not as an independent certifier, valuer, or assessor, but as the agent of the Contractor.
- (2) The Contractor's Representative, if appointed and referred to in item 3, unless expressly stated otherwise in this Subcontract or by written notice given by the Contractor, the Contractor's Representative may carry out the duties and functions of the Contractor under this Subcontract. When the Contractor's Representative is carrying out the duties and functions of the Contractor under this Subcontract they do so not as an independent certifier, valuer, or assessor, but as the agent of the Contractor.

10.3 The Subcontractor acknowledges that the appointment of a person as the Contractor's Representative does not prevent the exercise of any discretion or power by the Contractor.

10.4 For the purposes of the Security of Payment Act, despite any other provision in this Subcontract, unless expressly noted in Item 34 of the Schedule, the

Contractor's Representative is not entitled to accept any Payment Claim on behalf of the Contractor;

10.5 For the purposes of the Security of Payment Act, despite any other provision in this Subcontract, unless expressly noted in Item 35 of the Schedule, the Contractor's Representative is entitled to issue Payment Schedules on behalf of the Contractor;

10.6 The Subcontractor must:

- (1) appoint a Subcontractor's Representative to exercise the discretions and powers vested in the Subcontractor under the Subcontract, on the date of the Subcontract;
- (2) if it wishes to replace the Subcontractor's Representative, obtain the prior written approval of the Contractor, to cancel the appointment and nominate another subcontractor's representative.
- (3) replace the Subcontractor's Representative with an alternative subcontractor's representative upon receipt by the Subcontractor of a written notice by the Contractor's Representative requesting the replacement under clause 10.6(2) of this Subcontract.
- (4) ensure that the Subcontractor's Representative is present on Site whenever any Subcontract Works are being undertaken and, in any event, during the Working Hours; and
- (5) be and ensure that the Subcontractor's Representative must attend any Site meetings as requested by the Contractor;

10.7 Instructions, requests, notices and Directions given or made to the Subcontractor's Representative, either orally or in writing, will be taken to have been given or made to the Subcontractor.

10.8 Recourse

- (1) The Contractor may have recourse to the Security if:
 - (a) it Claims that the Subcontractor is indebted to the Contractor; or
 - (b) the Subcontractor is in breach of any of any of its obligations under this Subcontract; or
 - (c) if the Contractor is entitled to terminate the Subcontract.
- (2) If the Contractor has had recourse to the Security, then it shall be entitled to retain further Security from the Subcontractor, in the amount the Contractor deducted or had recourse to.

10.9 Reduction of Security

- (1) Subject to clause 10.11:
 - (a) Upon the issue of the Certificate of Practical Completion, the Contractor's entitlement to Security is to be reduced by the percentage in item 23 and the reduction will be released and returned to the Subcontractor within 14 days.
 - (b) The Contractor's entitlement to the Security in Item 21 will cease 28 days after the last day of the Defects Liability Period or the defects liability period applicable under the Head Contract, whichever is the longer period.

10.10 Interest

Any amount that is due and payable by the Subcontractor to the Contractor will incur Interest, at the rate applicable under the Head Contract or the default rate in item 49 whichever is the greater.

10.11 Retention of Security

Notwithstanding clause 10.9, even if the Contractor is otherwise required to release the whole or any part of the Security or any other Security under clause 10.8(2), to the Subcontractor, the Contractor is entitled to retain an amount sufficient to cover any outstanding Claims or other Claims alleged by the Contractor, against the Subcontractor, under or in connection with the Subcontract.

10.12 Change of Security

The Subcontractor is not entitled to change or substitute the Security for another form of Security.

10.13 Deed of Guarantee

- (1) Where the Subcontractor is a related or subsidiary corporation (as defined in the *Corporations Act 2001* (Cth)), the Subcontractor must, prior to commencing the Subcontract Works on the Site, provide a deed of guarantee and indemnity, which is duly executed and enforceable, on terms acceptable to the Contractor at the discretion of the Contractor.
- (2) The failure of the Subcontractor to provide the deed of guarantee and indemnity, unless agreed by the parties to this Subcontract in writing, prior to the commencement of the Subcontract Works will entitle the Contractor to terminate this Subcontract without notice.

11. **Indemnity and Insurance**

11.1 Indemnity

- (1) The Subcontractor is liable for, indemnifies and shall keep indemnified the Contractor (to the maximum extent permitted by law) against:
 - (a) all Claims, cost, loss, damage and expense (including legal fees and/or recovery costs on an indemnity basis) suffered by the Contractor and any of the Subcontractor's Associates; and
 - (b) all liabilities incurred by the Contractor as a consequence of any liability the Contractor has or may have to the Principal or another third party in relation to, arising out of or in connection with the Head Contract, the work under the Head Contract or work under a separate subcontract or consultancy agreement

arising directly or indirectly from the performance of the Subcontractor's obligations under the Subcontract, breach of Subcontract, negligence of the Subcontractor or the Subcontractor's Associates.
- (2) Notwithstanding any other provisions of this Subcontract, the Subcontractor unconditionally and irrevocably indemnifies the Contractor from and against any loss that the Contractor suffers in relation to the Subcontractor failing to satisfy its obligations under the Subcontract, including any loss that the Contractor suffers as a result of Claims arising out of or under the Head Contract, related in any way to the Subcontractor failing to satisfy its obligations under the Subcontract.
- (3) The Subcontractor's liability to indemnify the Contractor or the Subcontractor's Associates is not to be reduced proportionally to the extent of the Contractor and Subcontractor's Associate's act or omission contributing to the cost, loss, damage, expense or liability. The Subcontractor is to bear this risk.
- (4) This liability extends to:
 - (a) the Subcontract Works until Practical Completion;
 - (b) plant, equipment and temporary work associated with the Subcontract Works until Practical Completion; and
 - (c) Subcontract Works arising from any act or omission of the Subcontractor during the Defect Liability Period.
- (5) The Subcontractor's Liability under clause 11.1 is an addition to its liability under clause 19 to the extent payments under Clause 19 are not sufficient to or do not compensate for its actual cost, loss, damage and expense suffered and liabilities incurred under clause 11.1.

11.2 Public Liability

- (1) The Subcontractor is solely liable for and must:
 - (a) indemnify the Contractor in respect of; and
 - (b) take out a policy of insurance, noting the Contractor as an insured, insuring against,

any liability, loss, Claim or proceeding whatsoever, arising under any statute or at common law (including liability for negligence or breach of statutory duty but excluding liability which is required by law to be insured under a workers' compensation policy of insurance) in relation to, or in connection with, the death of, or injury to, any person, or any loss of or damage to any property arising out of or in any way connected with, or caused by, the execution of the Subcontract Works. Such insurance must be for the amount (if any) specified in the Item 19 of the Schedule.

- (2) The Subcontractor's public liability insurance policy must:
 - (a) be in the names of the Principal, the Contractor and the Subcontractor and cover those parties and all subcontractors contracting to the Subcontractor for their respective rights and interests and liabilities to third parties and as between the Contractor and the Subcontractor, their liability to each other for death, personal injury or loss or damage to property arising out of the Subcontract Works;
 - (b) contain a waiver of subrogation from the insurer in favour of the Contractor; and
 - (c) provide that a notice of Claim given to the insurer by the Contractor or Subcontractor will be accepted by the insurer as a notice of Claim given by the Subcontractor.

11.3 Workers Compensation

- (1) The Subcontractor must insure against liability for death of, or injury to, persons employed by the Subcontractor, including liability by statute and at common law.

11.4 Vehicle Insurance

- (1) The Subcontractor must, if applicable under Item 19, insure against liability under comprehensive or third party motor vehicle insurance.

11.5 Professional Indemnity

- (1) The Subcontractor must effect, before the commencement of any work under the Subcontract, and for the currency of the Contract, professional indemnity insurance:
 - (a) In the amount specified in item 19 of the Schedule;
 - (b) With an insurer on reasonable terms acceptable to the Contractor;
 - (c) The Subcontractor must retain a professional indemnity insurance policy for a period of 7 years after Completion of the Subcontract Works, on terms and conditions no less favourable than those outlined in the Head Contract. The Subcontractor's liability to the Contractor is not limited or otherwise affected by the terms of any such insurance policy

11.6 The Subcontractor must, as a precondition to the entitlement to payment in connection with the Subcontract, have in place the Insurance policies stated in Clauses 11.2, 11.3, 11.4 and 11.5.

11.7 The Subcontractor must ensure that all subcontractors contracting to the Subcontractor are similarly insured with respect to insurance policies stated in Clauses 11.2, 11.3, 11.4 and 11.5.

11.8 If the Subcontractor fails to provide to the Contractor copies of insurance policies together with certificates of currency in accordance with this Subcontract, the Contractor may effect and maintain such insurance and the cost incurred is a debt due and payable to the Contractor.

11.9 The Subcontractor must as soon as practicable inform the Contractor in writing of any occurrence which it ought reasonably expect may give rise to a Claim under an insurance policy required by this Subcontract, including the provision of all information relating to any Claim or potential Claim.

12. **Assignment and Subcontracting**

12.1 The Contractor must approve all labour employed by the Subcontractor in connection with the Subcontract Works and may, in its absolute discretion, remove from Site any person employed by the Subcontractor or subcontracted to the Subcontractor, who the Contractor believes is not performing in a diligent, competent, safe and tradesman like manner.

12.2 The Subcontractor must not subcontract any of the Subcontract Works or assign this Subcontract or any right, benefit or interest under his Subcontract without the prior written consent of the Contractor. If such consent is given, it may be given in whole, in part or subject to whatever conditions the Contractor requires. The Contractor may impose conditions in its absolute discretion. No consent by the Contractor under this clause shall relieve the Subcontractor of

any of its obligations or liabilities under the Subcontract and the Subcontractor shall be liable for the acts, defaults and omissions of its subcontractors as if they were the acts, defaults or omissions of the Subcontractor.

- 12.3 Pursuant to or in relation to the Head Contract, the Contractor may enter into a tripartite agreement with the Principal's financier. The Subcontractor agrees to:
- (1) execute any Deeds in favour of such financier and/or the Principal in accordance with such tripartite agreement; and
 - (2) do or cause to be done anything required by the Contractor, the Principal or the Principal's financier in relation to such tripartite agreement or to facilitate compliance by the Contractor with its terms.
- 12.4 The Subcontractor must promptly give to the Contractor a copy of any notice of intention to suspend work that the Subcontractor receives from any of its subcontractors contracting to the Subcontractor under the Security of Payment Act if that work forms part of the Subcontract Works.
- 12.5 Subject to Clause 12.4, the Contractor may, in its absolute discretion, pay the subcontractors contracting to the Subcontractor the whole or any part of the money that it states that it is owed by the Subcontractor for its work and the amount of the payment made by the Contractor is a debt due from the Subcontractor to the Contractor.
- 12.6 Payment to the Contractor by the Subcontractor under Clause 12.5 does not relieve the Subcontractor of any of its obligations or liabilities under this Subcontract.
- 12.7 The Subcontractor indemnifies the Contractor against any liability, damage, loss, cost or expense (including legal costs on a full indemnity basis) incurred by the Contractor arising from:
- (1) a suspension by any of its subcontractors contracting to the Subcontractor under the Security of Payment Act, if the relevant work in question forms part of the Subcontract Works;
 - (2) any failure of the Subcontractor to notify the Contractor under clause 12.4; and
 - (3) an assignment pursuant to the Security of Payment Act of the Contractor's obligation to pay money owed to the Subcontractor under this Subcontract to a subcontractors contracting to the Subcontractor.
- 12.8 The Subcontractor's liability under clause 12.7 is in addition to the Subcontractor's liability under clause 19 to the extent that payment made

under that clause is not sufficient to or does not compensate the Contractor for the damage, loss, cost and expense referred to in clause 12.5.

13. Latent Conditions

13.1 Definition

- (1) Latent Conditions are physical conditions on the Site and its near surroundings, including artificial things, but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by a competent subcontractor at the time the Subcontractor entered into the Subcontract if the Subcontractor had inspected:
 - (a) all written information made available by the Contractor to the Subcontractor for the purpose of tendering;
 - (b) all information influencing the allocation in the Subcontractor's tender and reasonably obtainable by the making of reasonable enquiries; and
 - (c) the Site and its near surroundings.

13.2 Warranty

- (1) The Subcontractor warrants that it has obtained, examined and is satisfied with:
 - (a) all written information made available by the Contractor to the Subcontractor for the purpose of tendering;
 - (b) all information influencing the allocation in the Subcontractor's tender and reasonably obtainable by the making of reasonable enquiries; and
 - (c) the Site and its near surroundings; and
 - (d) not relied on any representations, warranties or other information from the Contractor as to Latent Conditions or the Site; and
- (2) has entered into this Subcontract relying on its own investigations of the Site and accepts the Site, any Structure on the Site and the conditions of the Site
- (3) The Contractor makes no representation and gives no warranty as to any:
 - (a) conditions on the Site;

- (b) any structure on the Site
- (c) works completed by previous or current subcontractors; and
- (d) the accuracy, adequacy, suitability or completeness of any documents or information relating to the Site and supplied to the Subcontractor.

13.3 Notification and Risk

- (1) If the Subcontractor becomes aware of a Latent Condition that may result in the Subcontractor being delayed in completing the Subcontract Works, the Subcontractor must promptly notify the Contractor in writing.
- (2) After the Contractor receives a written notice in accordance with clause 16.2(2), the Contractor must issue a Direction pertaining to the condition as soon as practicable and the Subcontractor must comply with the direction. A Direction for the purposes of this clause is not a deemed variation.
- (3) The Subcontractor assumes the risk associated with, and has no entitlement to and EOT or make a Claim in relation to the Site and its surroundings, including:
 - (a) Latent Conditions
 - (b) Any Direction made in accordance with clause 16.2(2) pertaining to any Latent Condition;
 - (c) any delay to the Subcontract Works;
 - (d) any increased cost, loss or expense caused by or arising out of any prior work, existing structures or materials, physical conditions (whether naturally occurring or in consequence of human activity), or any contamination on, in, over or under the Site or its surroundings; or
 - (e) otherwise in any way impacting on the Site (including any extra work, materials or redesign required as a result of any Latent Condition of the Site and its surroundings).

14. **Scope and Standard of Work**

14.1 The Subcontractor warrants to the Contractor that:

- (1) it is aware that the Contractor is relying upon the Subcontractor's advice, skill and judgment to construct the Subcontract Works;
- (2) it shall carry out the Subcontract Works:

- (a) in accordance with its obligations under this Subcontract;
 - (b) in a proper and workmanlike manner to the absolute satisfaction of the Contractor; and
 - (c) using materials which are new of merchantable quality and fit for the purpose for their intended purpose; and
 - (d) in accordance with all relevant Australian standards, Best Industry Practice, Legislative Requirements and the provisions of the Head Contract to the full extent that the same are applicable to the Subcontract Works and are not inconsistent with the Subcontract; and
 - (e) as and when directed by the Contractor, including as directed in accordance with the Contractor's construction program as current from time to time;
- (3) the Subcontract Sum and the Date for Completion are sufficient to enable the Subcontractor to complete the Subcontract Works according to the terms of the Subcontract;
 - (4) it shall, at all times, employ sufficient resources and labor (as required by the Contractor) to carry out and complete the Subcontract Works; and

14.2 Testing

- (1) At any time before Practical Completion, the Contractor may Direct that any part of the work or materials comprising the Subcontract Works be tested. If the Direction requires the Subcontractor to perform the testing, the Contractor may observe and must be promptly provided with the results of any test performed; or
- (2) The reasonable and actual costs of and incidental to testing are to be absolutely borne by the Subcontractor.

14.3 Approvals

- (1) The Subcontractor must obtain and comply with all Approvals and ensure that they are in full force and effect at all times. The Subcontractor must promptly provide the Contractor with copies of all Approvals obtained by the Subcontractor in relation to the Subcontract Works and any other Approval that the Contractor requires.

15. **Variations**

15.1 Variation

- (1) The Contractor may direct the Subcontractor at any time before the Date of Practical Completion to:
 - (a) demolish or remove material or work no longer required by the Contractor;
 - (b) change the levels, lines, positions or dimensions;
 - (c) Amend;
 - (d) Increase or decrease;
 - (e) omit; or
 - (f) change

the nature, quality, character or extent of the Subcontract Works or to execute additional work and no such direction shall vitiate the Subcontract.

- (2) Without limiting the power to direct variations, the Contractor may Direct such Variations as may be necessary to give effect to any Variation Directed under the Head Contract and the power to omit work includes the power to omit work so that it may be done by the Contractor or by other subcontractors.
- (3) The Subcontractor shall not Vary the Subcontract Works except as Directed, in writing, by the Contractor.

15.2 Quotation of Variations

- (1) Within 2 Business Days of receiving a Variation direction under clause 15.1, the Subcontractor shall provide to the Contractor a detailed estimate of:
 - (a) the cost of carrying out the Variation work supported by measurements or other evidence of cost (including but not limited to extra labor or material costs); and
 - (b) the effect on the Construction Program (including the Date for Completion); and
 - (c) any details of an EOT that the Subcontractor seeks.
- (2) In response to any quotation provided by the Subcontractor to the Contractor under clause 15.2, the Contractor may:
 - (a) require the Subcontractor to execute the Variation on the terms of the quotation;

- (b) decline to proceed with the Variation; or
 - (c) reject the quotation and require the Subcontractor to carry out the Variation, in which case the Variation must be valued by the Contractor in accordance with clause 15.3, and any EOT Claim Associated with the variation must be claimed by the Subcontractor and assessed by the Contractor in accordance with the provisions of clause 18.2.
- (3) Variations shall be completed in accordance with the Principal's Construction Program from time to time so as not to delay Completion of the Subcontract Works or the Principal's Construction Program under the Head Contract, notwithstanding that the value of a variation may not be agreed.

15.3 Valuation

- (1) The value of any Variation must be added to or deducted from the Subcontract Sum. If parties do not agree on the value of a Variation, the Contractor must reasonably determine a value for the Variation.

15.4 Variation under Head Contract

- (1) Despite anything in clause 15 and its sub-causes, if a Direction to carry out a Variation under this Subcontract is the result of a direction issued or variation ordered to the Contractor under the Head Contract, to the extent permitted by law, the Subcontractor is not entitled to be paid for that Variation, any amount which is greater than the amount to which the Contractor is entitled to be paid for that Variation under the Head Contract, less a deduction (or addition in the case of a negative valuation) for the Contractor's profit and overheads as determined by the Contractor.

16. **Site**

16.1 Conduct on Site

- (1) In performing the Subcontract Works, the Subcontractor must ensure that all of its and the Subcontractor's Associates will conduct themselves in a diligent, competent, safe and tradesmanlike manner that is reasonably expected by the Contractor and must take all measures and provide all things reasonably necessary to protect people and property.
- (2) Without any notice and in its absolute discretion, the Contractor may direct the Subcontractor to remove from the Site any person whom the Contractor considers to be disruptive, incompetent, negligent or guilty of misconduct.

- (3) Written Approval from the Contractor must be obtained by the Subcontractor before the Subcontractor employs a person on Site or has a person involved in activities in any way connected with the Subcontract Works.

16.2 Protection

- (1) The Subcontractor is responsible for and must protect from damage or loss, the Subcontract Works, until the end of the Defects Liability Period (including any Separate Defects Liability Period), and other things and materials brought on to the Site by or for the Subcontractor. If any damage or loss occurs the Subcontractor must at its own cost promptly make good the damage or loss and fully and sufficiently reinstate and replace the things, damages or loss.
- (2) If the Subcontractor does not comply with the above clause 16.2(1), the Contractor may provide a notice to the Subcontractor, requesting to promptly (and in any event, any period in the absolute discretion of the Contractor) make good the damage or loss fully.
- (3) If the Subcontractor fails to make good the damage or loss promptly, regardless of whether notice under clause 16.2(2) was provided, the Contractor may have that work carried out by itself or others and any cost incurred is a debt due from the Subcontractor to the Contractor.

17. **Defects Liability**

17.1 The Defects Liability Period will commence on the date of issue of the Certificate of Practical Completion.

17.2 Rectification

- (1) At any time prior to the expiration of the Defects Liability Period and any Separate Defects Liability Period, the Contractor becomes aware of any Defects in the Subcontract Works, the Contractor will provide notice to the Subcontractor notifying the Subcontractor of Defects and may Direct the Subcontractor to:
 - (a) remove the material from the Site;
 - (b) demolish all, any or part of the work;
 - (c) redesign , reconstruct, replace or correct the material or work; or
 - (d) not to deliver the material or work to the Site;

and specify a time, prior to the expiration of the Defects Liability Period, which the rectification works are to be completed.

- (2) The Subcontractor will bear all risk and cost associated with any Direction in clause 17.2(1) above and the Subcontractor will have no Claim in respect of that direction.

17.3 Rectification of Works by Others

- (1) If the Subcontractor fails to rectify any Defect in accordance with the clause 17.2(1) the Contractor may:
 - (a) have any Defect rectified by another subcontractor and the Contractor may recover all costs of doing so as a debt due and payable from the Subcontractor to the Contractor:
 - (i) through an adjustment to the Contract Sum or adjustment to any retention amount; or
 - (ii) an offset through any amount owing to the Subcontractor by the Contractor; or
 - (iii) as a debt due and payment by the Subcontractor to the Contractor,
 - (b) accept the Defect and recover its assessment of any consequent reduction in value of the Subcontract Works or Claim upon the Contractor by the Principal as a debt due from the Subcontractor to the Contractor.

17.4 Contractor may fix a further Defects Liability Period

- (1) The Contractor may fix a Separate Defects Liability Period in respect of work to be rectified under this clause 17 which is effective for a period specified by the Contractor, but which must not exceed any Defects Liability Period or further Defects Liability Period required under the Head Contract in respect of such rectification work.

18. **Time and Progress**

18.1 Subcontractor's Program

- (1) Unless otherwise stated in Item 36 of the Schedule, the Subcontractor must give to the Contractor the Subcontractor' Program, on or before the execution of the Formal Instrument of Agreement. The Subcontractor's Program must be developed from the Principal's Construction Program with which the Contractor is required to comply in the performance of the work under the Head Contract.

- (2) The Subcontractor must not depart from the Subcontractor's Program without reasonable cause. The Contractor may Direct the Subcontractor to resequence, reschedule or adjust activities, accelerate or postpone the Subcontract Works and the Subcontract Sum is deemed to include allowance for the Subcontractor's cost of compliance with any such Direction.
- (3) The Contractor may at any time Direct the Subcontractor to supply an updated program. The Subcontractor must within the time stated in the direction supply a further updated program which must identify the changes made to the previous Subcontractor's Program.

18.2 Contents of the Subcontractor's Program

- (1) The Subcontractor's Program must include, to the satisfaction of the Contractor:
 - (a) the date of commencement and the Date for Practical Completion;
 - (b) the sequence and timing of each component of the Subcontract Works;
 - (c) the dates when the Subcontractor is required to provide any information or materials in connection with the Subcontract Works; and
 - (d) all other information reasonably required by the Contractor.
- (2) Milestones
 - (a) If any Milestone and any relevant Milestone date are referred to in Item 10 of the Schedule, the Subcontractor must bring that portion of the Subcontract Works which comprises the Milestone to the stage of Completion by relevant Milestone date specified in Item 10 of the Schedule.
- (3) Suspension
 - (a) The Contractor may at any time and for any reason (including but not limited to suspension of the Head Contract or suspension for convenience) suspend the whole or any part of the Subcontract Works by written notice to the Subcontractor. If the Contractor does so, the Subcontractor must not recommence work on the whole or on the relevant part of the Subcontract Works until the Contractor Directs the Subcontractor to do so in writing.
 - (b) Any cost incurred by the Subcontractor due to a suspension under this clause 18.2(3) is to be borne by the Subcontractor.

(4) Extension of Time

- (a) The Subcontractor shall be entitled to apply for an EOT if:
- (i) the Subcontractor is delayed in reaching Practical Completion by the Date for Practical Completion by a Qualifying Cause of Delay; and
 - (ii) the Subcontractor has complied with and given the notices requirements referred to in clauses 18.2(5) and 18.2(6).

(5) Notice of Delay

- (a) The Subcontractor must immediately and in any event no later than 1 day after the commencement of a Qualifying Cause of Delay, give to the Contractor a written notice of delay setting out:
- (i) a detailed statement of the facts on which the Claim is based;
 - (ii) particulars of the activities on the critical path which have been affected by cause of delay;
 - (iii) the approximate number of days of the delay to the Date for Practical Completion.

(6) EOT Claim

- (a) Subject to the Subcontractor complying with its obligations under clause 18.2(5), the Subcontractor may be entitled to an EOT, as assessed by the Contractor in its absolute discretion, if:
- (i) the Subcontractor is delayed:
 - (i) prior to the Date for Practical Completion, by a Qualifying Cause of Delay, that would cause the Subcontractor to be delayed in reaching Practical Completion, by the Date for Practical Completion.
 - (ii) The Subcontractor provides the Contractor with a written EOT Claim, within 3 days from the date of providing the notice of delay under clause 18.2(5), which sets out and includes:
 - (i) A detailed statement of facts on which the Claims are based;
 - (ii) Particulars of the activities on the critical path which have been affected by the Qualifying Cause of Delay;

- (iii) The exact number of days the Subcontractor will be delayed in reaching the Date for Practical Completion (If the duration or impact of the delay is not ascertainable then the Subcontractor must in the notice state what details are not yet known and must give a further notice or notices advising those details promptly once they are known);
 - (iv) An updated Subcontractor's Program, setting out the impact of the delay;
 - (v) The steps that the Subcontractor has taken to mitigate the delay
 - (vi) The cause of delay was beyond the reasonable control of the Subcontractor;
 - (vii) To the extent only the Subcontractor or the Subcontractor's Associates, caused or contributed to the cause of the delay
- (b) If the delay continues for a period of 7 days or more the Subcontractor must give the Contractor written notice every 3 days from the commencement of the delay until after the delay has ceased, setting out the information required under clause 18.2(6).

18.3 Generally

- (1) If the Subcontractor fails to provide the notices under clauses 18.2(5) and 18.2(6) or does not strictly follow the requirements required by those clauses, then the Subcontractor shall not be entitled to and is completely barred from making an EOT Claim.
- (2) Subject to the Subcontractor complying with clauses 18.2(5) and 18.2(6), the Contractor must reasonably determine what, if any, EOT shall be granted to the Subcontractor and will notify the Subcontractor accordingly. A delay or failure by the Contractor to grant an EOT shall not cause the Date for Practical Completion to be set at large, nor does it constitute a substantial breach of the Contractor.
- (3) The Contractor may (without being obliged to do so) at any time and for any reason it thinks fit or for its own convenience, extend the Date for Practical Completion.
- (4) The Subcontractor's entitlement to any EOT shall be reduced to the extent that the Subcontractor has not:

- (a) taken proper and reasonable steps both to reduce and eliminate the occurrence of the cause of delay and to avoid or minimise the consequences of the delay; or
 - (b) demonstrated to the satisfaction of the Contractor that the delay has affected activities on the Subcontractor's Program for the Subcontract Works; or
 - (c) or has in any way, contributed to the delay.
- (5) If more than one event causes concurrent delays and the cause of at least one of those events is not a Qualifying Cause of Delay, then the Subcontractor is not entitled to an Extension of Time.
- (6) The Subcontractor acknowledges and agrees that its sole entitlement for a delay under this clause and this Subcontract is an EOT to the Date for Practical Completion. The Subcontractor is not entitled, under any circumstances, to apply for any adjustment to the Subcontract Sum, damages, Delay Costs or other payments as a result of the EOT or the event giving rise to the EOT.
- (7) If, in the Contractor's opinion, the Subcontractor is not proceeding with the Subcontract Works in accordance with the Subcontractor's Program or its obligations under the Subcontract, the Contractor may:
 - (a) give a notice to the Subcontractor informing it of the Contractor's opinion; and
 - (b) Direct the Subcontractor to improve or increase its rate of progress so as to comply with the terms of the Subcontract.
- (8) If, in the Contractor's opinion, 3 days after the giving of such notice, the Subcontractor's rate of progress does not sufficiently improve, the Contractor may employ labour, plant and/or purchase materials which, in the Contractor's opinion, will assist completing the Subcontract Works by the Date for Practical Completion, or in accordance with the Principal's Construction Program. Any costs incurred by the Contractor pursuant to this clause shall be a debt due by the Subcontractor to the Contractor.
- (9) The Contractor may, at any time on 48 hours written notice, direct the Subcontractor to accelerate performance of the Subcontract Works so as to reach Practical Completion earlier than the Date for Practical Completion and revise the current Date for Practical Completion. If the Subcontractor cannot reasonably comply with the Contractor's notice under this clause, the Subcontractor shall give the Contractor written notice of the reasons within 24 hours of receiving the Contractor's notice.

If the Subcontractor does not give the Contractor notice in accordance with this clause, then;

- (a) the Subcontractor will be deemed to have accepted the Contractor's Direction;
- (b) the Subcontractor will not be entitled to any Claim in respect of the Contractor's Direction; and
- (c) the Subcontractor will not be entitled to any Claim for the reasonable costs of extra resources if the Contractor's direction was made because of any Defect, act or omission by the Subcontractor.

18.4 Head Contract

- (1) Despite any other clause contained in this Subcontract, if the cause of delay the subject of a written notice under clause 18.2(5) relates to a cause which has also been suffered by the Contractor and is the subject of a Claim being made by or to be made by the Contractor under the Head Contract, then the Subcontractor's entitlement to an Extension of Time under this clause is capped at any extension of time allowed to the Contractor under the Head Contract.

(2) Delay Costs

- (a) The Subcontractor bears the risk of and is liable for any and all increased costs, losses, expenses and damages (including damages for breach of contract) in connection with the Subcontract and the execution of the Subcontract Works resulting from delay or disruption in the progress of the Subcontract Works.
- (b) Any entitlement which the Subcontractor has to an EOT contained elsewhere in this Subcontract is the Subcontractor's sole remedy for any delay or disruption in the progress of the Subcontract Works.

(3) Practical Completion

- (a) The Subcontractor shall give the Contractor at least 28 days written notice of when it considers it will reach Practical Completion. Together with the written notice, and without limiting the definition of Practical Completion, the Subcontractor must provide the documents, information and anything else required under this Subcontract and by the Subcontractor, in relation to the Subcontract Works and the Subcontract Documents required.

- (b) The Contractor shall within 28 days of the Subcontractor's notice either notify the Subcontractor of the reasons why Practical Completion has not been reached, in which case the Subcontractor shall promptly attend to the same and clause 18.4(3)(a) shall reapply, or issue a certificate of Completion which evidences the Date of Practical Completion.
- (c) If the Contractor is of the opinion that Practical Completion has been reached, the Contractor may issue a Certificate of Practical Completion, even though no request has been made.
- (d) The Subcontractor shall give the Contractor at least 7 months written notice of the date upon which the Subcontractor anticipate that it will reach Practical Completion, so as to enable the Contractor to discharge its obligations under the *Residential Apartment Building (Compliance and Enforcement Powers) Act 2020* NSW (if applicable).

19. Liquidated Damages

- 19.1 If the Subcontractor fails to achieve Practical Completion by the Date of Practical Completion, the Subcontractor is indebted to the Contractor for liquidated damages at the rate stated in item 12 of the Schedule for every day after the Date for Completion, up to and including the Date of Practical Completion or the date the Subcontract is terminated (whichever occurs first).
- 19.2 For the purposes of clause 19.1 the Subcontractor and the Contractor agree that the rate for liquidated damages stated in the Subcontract Particulars is a genuine pre-estimate of the minimum loss and damage that the Contractor will suffer if Completion is not achieved by the Date for Completion.
- 19.3 The liability of the Subcontractor under this clause 19 is not and is not deemed to be, inclusive of nor does it in any way limit or reduce, any amount for which the Subcontractor is liable under any indemnity under this Subcontract
- 19.4 The liability of the Subcontractor under this clause 19 is not and is not deemed to be a limitation on the Contractor's rights to recover general damages at common law, where the rate at Item 12 of the Schedule is less than the actual damages suffered by the Contractor, in which circumstances the Contractor can recover at its election either liquidated damages and general law damages for any shortfall or general damages as an alternative to liquidated damages.
- 19.5 If, in any court or other proceedings, the liquidated damages set out in item 12 of the Schedule are found to be a penalty or are otherwise void or unenforceable (either whole or in part), then the Subcontractor will be liable to pay general damages at common law for failure or breach for which liquidated damages would have otherwise been payable.

20. Payment

20.1 The Subcontract Sum

- (1) Subject to the performance by the Subcontractor of its obligations under this Subcontract, the Contractor must pay to the Subcontractor the Subcontract Sum as adjusted in accordance with this Subcontract.
- (2) The Subcontractor acknowledges and agrees that the Subcontract Sum:
 - (a) includes all costs, expenses, fees and charges incurred by the Subcontractor in performing all its obligations under this Subcontract; and
 - (b) is not subject to any rise and fall, foreign exchange adjustment or any other adjustment except to the extent expressly provided by this Subcontract;

20.2 Timing of Progress Claims

- (1) The Subcontractor may submit a Progress Claim in accordance with clause 20.3 to the Contractor's at monthly intervals on the day of the month stated in Item 16 of the Schedule, in respect of work performed by the Subcontractor up to that day. If a Progress Claim is submitted early then it is deemed to be submitted on the day of the month stated in Item 16 of the Schedule, and assessed accordingly.

20.3 Content of Progress Claims

- (1) In each Progress Claim the Subcontractor must include:
 - (a) the Subcontractor's opinion as to the value of the work performed by the Subcontractor to the date of the Progress Claim and notification of all other Claims which the Subcontractor then has against the Contractor whether under this Subcontract or otherwise;
 - (b) detailed evidence to enable the Contractor to assess the claim, including break ups of areas of the works, labour, materials and equipment when requested by the Contractor; and
 - (c) evidence to the satisfaction of the Contractor in the form of a completed statutory declaration and subcontractors statement satisfying the Contractor that:
 - (i) all persons who have at any time been employed by the Subcontractor on the Subcontract Works have, to the date

of the progress Claim, in respect of their employment on the Subcontract Works:

- (i) been paid all money payable to them required by legislation and any applicable and legally binding award or workplace agreement; and
 - (ii) had accrued in respect of them all employment entitlements, including in respect of annual leave, personal leave and RDOs, required by legislation or any applicable and legally binding award or workplace agreement;
- (d) the Subcontractor has made all contributions and payments to any scheme for superannuation, long service leave, redundancy and severance pay or the like as required by legislation and any applicable and legally binding award or workplace agreement;
- (e) all subcontractors contracting to the Subcontractor have to the date of the Progress Claim been paid all monies due and payable to them in respect of the Subcontract Works;
- (f) certificate from each of the Subcontractor's consultants (if any) in a form approved by the Contractor certifying that the Subcontract Works are:
- (i) in accordance with the Subcontract and when completed, will be fit for its purpose and will comply with the Subcontract;
 - (ii) in compliance with all applicable legislation;
 - (iii) fully installed and commissioned (if applicable).

20.4 Validity of Progress Claims

- (1) Failure by the Subcontractor to strictly comply with the requirements of clause 20.3 invalidates the Claim. The Contractor may request additional information in respect of any Progress Claim and the Subcontractor must promptly provide any additional information so requested.
- (2) Unless this Subcontract expressly provides otherwise, the Subcontractor is not entitled to payment for any item of unfixed plant or materials not incorporated into the Subcontract Works.

20.5 Payment certificate

- (1) Within 10 Business Days of receipt of a progress Claim validly submitted under clause 20.3, the Contractor must assess the progress claim and provide to the Subcontractor a payment certificate identifying the Progress Claim to which the payment certificate relates and certifying the amount due to the Subcontractor (or the Contractor as the case may be). If the amount is more or less than the amount claimed by the Subcontractor, the Contractor must provide reasons for the difference.
- (2) The Contractor may allow in any payment certificate adjustment for amounts paid under this Subcontract by the Contractor and amounts that otherwise may be retained, deducted or Claimed by the Contractor from the Subcontractor (whether or not there has been a final determination as to the amount Claimed or the amount Claimed is disputed) under this Subcontract.
- (3) Without limiting clause 20.5 and where the balance of the progress certificate in the progress certificate identifies an amount to be paid by the Contractor to the Subcontractor, the Contractor within 60 business days after the date the Claim was submitted shall pay to the Subcontractor the balance of the progress certificate after setting off such amount as it is entitled to set off as the Contractor elects to set off.

20.6 Progress payments

- (1) Subject to the satisfaction of any pre-conditions to payment set out in this clause 20 and this Subcontract, the Contractor must pay the Subcontractor the amount certified for payment to the Subcontractor in the payment certificate provided by the Contractor within the time provided in item 18 after the provision of a Progress Claim under clause 20.2.

20.7 Final Progress Claim

- (1) Within 30 days of the later of:
 - (a) the completion of rectification, by the Subcontractor, of all Defects;
or
 - (b) the expiry of Defects Liability Period (including any Separate Defects Liability Period),
 - (c) the expiry of the Defects liability period under the Head Contract.

the Subcontractor must submit to the Contractor a Final Progress Claim endorsed as "Final Progress Claim" by the method stated in item 46.

- (2) The Final Progress Claim must state all money which the Subcontractor considers to be due to it from the Contractor in connection with the Subcontract and the Subcontract Works.
- (3) Despite any other provision of this Subcontract, on the expiration of the period for lodging the Final Progress Claim, to the extent permitted by law, any Claim which the Subcontractor could have made against the Contractor and has not made, is barred and the Subcontractor releases the Contractor in respect of all such Claims.

20.8 Final Payment Claim and certificate

- (1) Within 10 Business Days of the receipt of the Subcontractor's Final Progress Claim, the Contractor must assess the Final Progress Claim, along with other Claims whatsoever in connection with the subject matter of the Subcontract and forming the Final Payment Claim, and issue a final payment certificate to the Subcontractor (and the Contractor if clause 10.2 applies), by the method stated in item 47, identifying the Progress Claim to which the payment certificate relates and certifying the final payment amount payable by the Contractor to the Subcontractor or by the Subcontractor to the Contractor, as the case may be.
- (2) The Contractor may allow in the final payment certificate adjustment for amounts paid under this Subcontract and amounts that otherwise may be retained, deducted or Claimed by the Contractor from the Subcontractor (whether or not there has previously been a final determination as to the amount Claimed or the amount Claimed is disputed) under this Subcontract.

20.9 Final payment

- (1) Subject to the satisfaction of any pre-conditions to payment set out in this Subcontract and all other relevant provisions of this Subcontract (including the receipt of the Tax Invoice referred to in the next clause 20.9(2) and the provision by the Subcontractor to the Contractor of an executed Deed of Final Release in the form set out in Schedule 4, unless the Subcontractor not later than 7 days after the issue of the final payment certificate gives a notice to the Contractor that a dispute or difference has arisen under clause 26.1), within 30 days after the issue of the Final payment Claim, the Contractor must pay to the Subcontractor or the Subcontractor must pay to the Contractor (as the case may be), the amount certified in the final payment certificate.
- (2) The party entitled to receive payment must issue the other party with a valid Tax Invoice before the due date for payment.

20.10 Set off

- (1) Without prejudice to any other right available to the Contractor under this Subcontract or at law, the Contractor may, at any time, deduct or set-off from either or both of:
 - (a) any money payable by the Contractor to the Subcontractor under this Subcontract or any other contract between the Contractor and the Subcontractor; and
 - (b) the Security provided by the Subcontractor under this Subcontract, any money due or reasonably Claimed to be due from the Subcontractor to the Contractor whether in connection with this Subcontract or otherwise any other contract between the Contractor and the Subcontractor, including:
 - (i) any amount payable or allowable in favour of the Contractor by way of liquidated damages;
 - (ii) any amount which the Subcontractor owes to the Contractor (whether or not the amount is expressed to be a debt due from the Subcontractor to the Contractor or is an amount in respect of which the Subcontractor indemnifies the Contractor); and
 - (iii) any other loss, cost, expense or damage incurred by the Contractor in respect of which the Subcontractor is or may be liable to the Contractor (including under this Subcontract, any other agreement or on any other basis whatsoever).

20.11 Interest

- (1) Despite any other clause of this Subcontract, any amount which is not paid by the Contractor by the date provided under this Subcontract does not entitle the Subcontractor to interest on the amount.

20.12 Generally

- (1) Without limiting the Contractor's other rights, the Contractor shall not be obliged to make a Progress Payment or the final payment to the Subcontractor if the Subcontractor has failed to:-
 - (a) submit a priced Bill of Quantities (if required) under clause 5.3;
 - (b) sign and return all copies of the Subcontract;
 - (c) submit proof of all required insurances;

- (d) submit as-built drawings, manuals and certificates if required by the Subcontract or requested by the Contractor;
 - (e) in the case of the final payment, deliver to the Contractor an executed deed of release in the form required by the Contractor; and
 - (f) anything else that the Contractor may require.
- (2) Neither the issue of a payment schedule by the Contractor nor a payment in respect of a Progress Claim by the Subcontractor shall be evidence that the subject Subcontract Works have been carried out satisfactorily.

20.13 Plant, Materials and Equipment on Site

- (1) The Contractor shall not be obliged to pay for materials, plant or equipment which have not been delivered to the Site and incorporated into the Subcontract Works but if the Contractor in its absolute discretion is prepared to pay for such materials, plant or equipment, as a condition of such payment:-
- (a) then the Contractor may require the Subcontractor to warrant that it has paid for the materials, plant or equipment and that upon being paid by the Contractor, property in the materials, plant or equipment will vest in the Contractor free of any encumbrance;
 - (b) the materials, plant or equipment shall be held by the Subcontractor at its risk on behalf of the Contractor and shall be properly stored, specially labelled as the property of the Contractor and adequately protected;
 - (c) the Subcontractor shall provide evidence of currency of insurance cover for the materials, plant or equipment, naming the Principal and the Contractor as the insured and covering their interests in the materials, plant or equipment; and
21. the Subcontractor shall provide the Contractor with an unconditional Bank Guarantee for the full value of the payment Claimed in respect of such materials, plant or equipment which shall be held by the Contractor until 21 days after the materials, plant or equipment is delivered to the Site

22. **Industrial Relations**

- 22.1 The Subcontractor must comply, and must ensure that all of its workforce and Subcontractors Associates comply, with all Legislative Requirements in respect of industrial and workplace matters, including:

- (1) all state and federal legislation and legally enforceable codes of practice which apply to the Subcontract Works or the Site; and
- (2) all applicable legally enforceable agreements, awards and workplace agreements.

22.2 The Subcontractor must make available upon reasonable notice whatever documents and records the Contractor requests to see concerning compliance with this clause.

22.3 The Subcontractor must do everything possible to avoid and minimise the consequences of industrial disputes of any kind.

22.4 The Subcontractor is responsible for and assumes all risks of and incidental to all industrial actions, actions, bans, limitations and disputes (whether lawful or unlawful) in relation to industrial relations or employment issues both on and off Site with its workforce and those of its subcontractors contracting to the Subcontractor and agents.

23. **Work Health and Safety**

23.1 Legislation and Obligations

- (1) The Subcontractor must comply with:
 - (a) The relevant workplace and applicable work health and safety, environment protection, dangerous goods and electricity Safety Legislation;
 - (b) Regulations made under that legislation and/or regulations governing that jurisdiction.
 - (c) any Directions on safety or notices issued by any relevant Authority or any code of practice or compliance code appropriate or relevant to the Subcontract Works, as amended from time to time.

The Subcontractor must, so far as is reasonably practicable, and must ensure that its Subcontractor's Associates provide and maintain a working environment that is safe and without risk to health for persons carrying out or affected by the Subcontract Works.

23.2 Health and Safety Requirements

- (1) The Subcontractor:
 - (a) must comply with all relevant Safety Legislation and Safety Requirements:

- (b) warrants that it is familiar with and has the capability and resources to comply with all relevant Safety Legislation and Safety Requirements; and
- (c) must perform all relevant functions and fulfil all relevant duties under all relevant Safety Legislation of an employer or otherwise applicable to the role of the Subcontractor.

The Subcontractor must (and must ensure that all subcontractors engaged to perform work on its behalf) at all times identify and exercise all necessary precautions for the health and safety of all persons including its employees, all subcontractor's employees and Subcontractor's Associates, the Contractor's employees and members of the public who may be affected by the Subcontract Works.

23.3 Contractor's health and safety policies and procedures

- (1) Without limiting clause 23 the Subcontractor must ensure the Subcontract works are delivered in accordance with:
 - (a) any occupational health and safety policies and procedures issued by the Contractor or the Principal from time to time including the requirements of the Contractor's Site management plan; and
 - (b) if the Contractor has been appointed as the principal contractor under the *Work Health and Safety Regulation 2011* (NSW), the Contractor's health and safety coordination plans

The Subcontractor must inform itself of all occupational health and safety policies, procedures or measures implemented or adopted by the Contractor or the Principal (under the Head Contract), including but not limited to the Contractor's Site management plan. If the Subcontractor does not have a copy of the Contractor's Site management plan, it should request a copy from the Contractor.

23.4 Consultation, co-operation and co-ordination

- (1) The Subcontractor must so far as is reasonably practicable consult, co-operate and co-ordinate activities with the Contractor, any suppliers or contractors, Subcontractors Associates or other persons engaged in or associated with the Subcontract Works to ensure optimal health and safety risk management and compliance with respective obligations, Safety Legislation and Safety Regulations of all relevant parties.

23.5 Plant Supply and maintenance

- (1) The Subcontractor must supply all plant, machinery and equipment necessary to ensure that all the Subcontract Works is carried out in a

manner that is safe and without any risk to health. The Subcontractor must ensure that all plant supplied by it is maintained in a condition that is safe and without risk to any person and must comply with any and all Safety Legislation and Safety Requirements.

23.6 Subcontractor reporting obligations

- (1) The Subcontractor must:
 - (a) promptly notify the Contractor of any accident, injury, contamination, property or environmental damage which occurs during the carrying out of or is associated with any part of the Subcontract Works. The Subcontractor must, within two days of any such incident, provide a written report to the Contractor containing complete details of the incident, including the result of any investigation into its cause and any recommendation or strategy for prevention of a recurrence;
 - (b) immediately advise the Contractor in writing of any act, fact or circumstance associated with the activities of the Subcontractor or any other person relevant to the ability of the Subcontractor to carry out any part of the Subcontract Works in a manner that is safe and without any risk to health;
 - (c) provide in writing, with each monthly progress report, the total hours worked during the previous month on the Site by its staff including supervisory and administrative staff and also separately by its subsidiary subcontractors; and
 - (d) maintain records and make reports concerning the health, safety and welfare of people, and damage to property, as the Contractor reasonably requires.

23.7 Subcontractor provision of information

- (1) The Subcontractor must, or must ensure that its agents or subcontractors contracting to the Subcontractor:
 - (a) obtain and consider information on the requirements for safe use of, and the risk to health and safety of all persons from plant or substances supplied under the Subcontract or used for the purpose of carrying out any of the Subcontract Works;
 - (b) as far as its reasonably practicable, supply those persons using or exposed to such plant or substances with adequate health and safety information concerning the plant or substances; and

- (c) ensure that any such plant or substances are safe when properly used or stored.

The Subcontractor must at all times and as soon as practicable, inform the Contractor of all relevant information which becomes known to the Subcontractor (or its agents or subsidiary subcontractors) concerning the safe use, supply, maintenance or storing of the plant or substances. The Subcontractor must also inform the Contractor in relation to such plant and substances as required by Safety Legislation.

23.8 Termination for work health and safety breach

- (1) Any breach by the Subcontractor under this clause 23 is considered a Substantial Breach by the Subcontractor of its obligations under this Subcontract and entitles the Contractor at its option to:
 - (a) suspend the whole or part of the Subcontract Works and the Subcontractor is liable for any cost incurred by the Contractor by reason of the suspension (including the cost of the replacement of the services provided or to be provided by the Subcontractor); or
 - (b) terminate this Subcontract in accordance with clause 25;

24. **Environmental Protection**

24.1 Compliance

- (1) The Subcontractor must comply with all Legislative Requirements in respect of environmental matters and the protection or preservation of the environment which apply to the Subcontract Works or the Site.
- (2) The Subcontractor must do everything possible to protect and preserve the environment, adjoining and any other property from harm or damage arising from or in connection with the carrying out of the Subcontract Works and is responsible for all risk, liability and costs in relation to such harm, expense, loss or damage, including but not limited to any contamination.

24.2 Hazardous Substances and Materials

- (1) If the Subcontractor intends to bring onto the Site any material or substance which may be hazardous to health and safety, the Subcontractor must, before doing so, give information to the Contractor in respect of such material or substance. The information must include plans for the safe handling, storage and use of the material or substance and precautions to be taken. The Contractor may, in its absolute discretion, object or reject the materials or substances, which may be hazardous to health and safety, which the Subcontractor intends to bring

onto the Site. In the event that the Contractor objects or rejects any hazardous material or substance, the Subcontractor is to bear any and all costs in relation to the rejection, removal and any other associated cost in relation to the hazardous material or substance.

24.3 Dust, Noise and Vibration

- (1) Without limiting any other clause in this Subcontract, the Subcontractor must, at its own cost:
 - (a) restrict dust caused by *the* Subcontract Works to a minimum so that it does not adversely impact upon the use or occupation of the Site, including any neighboring property;
 - (b) take all necessary steps to minimise noise and vibration resulting from the Subcontract Works and so that it does not adversely impact upon the use or occupation of the Site, including the use or occupation of any neighboring property; and
 - (c) comply with all Directions of the Contractor or the Contractors Representative or any Authority relating to dust, noise, cleaning, screenings and other barricading of the Site, the Subcontract Works, protective works and all Neighbouring Property.

25. **Default and Termination**

25.1 Notice of Subcontractor's Default

- (1) If in the opinion of the Contractor, the Subcontractor commits a Substantial Breach of this Subcontract then, without limiting any other right it may have, the Contractor may by notice in writing serve upon the Subcontractor a notice entitled "Notice of Subcontractor Default". Upon giving a Notice of Subcontractor Default, the Contractor may suspend payments to the Subcontractor until the substantial breach is remedied.
- (2) A Notice of Subcontractor Default under Clause 25.1 must:
 - (a) State it is given under clause 25.1;
 - (b) identify and particularise the substantial breach complained of; and
 - (c) specify a time, at the Contractor's discretion, within which the Subcontractor is either to remedy the substantial breach or to show cause to the Contractor's satisfaction why the Contractor ought not exercise its rights under clause 25.2; and

- (d) state that if the Substantial Breach is not remedied within the period stated in the sub-clause above, the Contractor is entitled to pursue those actions in the clause below 25.2.

25.2 Failure by Subcontractor to remedy or show cause

- (1) If the Subcontractor fails either to remedy the Substantial Breach or to show cause to the Contractor's satisfaction why the Contractor ought not exercise its rights under this clause 25.2, the Contractor may:
 - (a) by notice in writing to the Subcontractor engage others to, or itself, carry out any part or the whole of the remaining Subcontract Works; or
 - (b) terminate this Subcontract (including after first exercising its rights to engage others to, or itself, carry out any part or the whole of the remaining Subcontract Works)
- (2) If the Contractor engages others to carry out, or itself carries out, any part or the whole of the remaining Subcontract Works, the Contractor must determine the cost so incurred by the Contractor and any other loss or damage sustained by the Contractor as a consequence and the amount determined constitutes a debt due and owing by the Subcontractor to the Contractor.
- (3) If the Contractor terminates this Subcontract it has the same entitlements and the Subcontractor has the same liabilities as each would at law, had the Subcontractor repudiated the Subcontract and the Contractor terminated this Subcontract by acceptance of the Subcontractor's repudiation.

25.3 Subcontractor unable or unwilling to complete

- (1) If the Subcontractor advises the Contractor that the Subcontractor is unable or unwilling to complete performance of this Subcontract, the Contractor may immediately (and without serving upon the Subcontractor a Notice of Subcontractor Default) exercise its rights under clause 25.2 to engage others, or itself, carry out any part or the whole of the remaining Subcontract Works or terminate this Subcontract (including after first exercising its rights to engage others to, or itself, carry out any part or the whole of the remaining Subcontract Works). The Subcontractor will only be entitled to payment of any outstanding Progress Claim (includes any scheduled amount by a payment schedule), up to the date of termination of the Subcontract.

- (2) The Contractor reserves its rights to set off and recourse to Security for any amounts outstanding or due or payable to the Contractor, from the Subcontractor.

25.4 Procedure upon termination or taking work out of hands

- (1) Despite any other provision of this Subcontract, if the Contractor terminates this Subcontract or engages others to carry out or itself carries out any part or the whole of the remaining Subcontract Works (including by way of Variation), the Contractor may without payment of compensation to the Subcontractor:
 - (a) take possession of all documents (including any and all Design Documents), information and the like in the Subcontractor's possession which is connected with the Subcontract Works and reasonably required by the Contractor to facilitate completion of the Subcontract Works;
 - (b) take an assignment of the Subcontractor's rights and benefits under any subcontracts between subcontractors contracting to the Subcontractor including, but not limited to any warranties and guarantees. The Subcontractor must do all things necessary to effect such an assignment; and
 - (c) take possession of any such plant, equipment and other things on or about the Site as are owned by the Subcontractor and are reasonably required by the Contractor to facilitate completion of the Subcontract Works. The Contractor must return any plant, equipment and other things which are surplus to the Subcontractor on completion of the work, subject to the Subcontractor satisfying the debt to the Contractor as determined under clause 25.2(2).

25.5 Contractor's default

- (1) If the Contractor breaches an essential term of the Subcontract then without limiting any other right it may have, the Subcontractor may by notice in writing serve upon the Contractor a notice entitled "Notice of Contractor Default".
- (2) A Notice of Contractor Default given under this clause must:
 - (a) state that it is given under this clause 25.5;
 - (b) identify and adequately particularise the breach of the essential term; and

- (c) specify a time which is at least 21 days from the date the Notice of Contractor Default is given within which the Contractor must remedy the breach.

25.6 Insolvency

- (1) Without prejudice to any other right either party may have, the Contractor or the Subcontractor may terminate this Subcontract by notice in writing upon the date stated in the notice if the other party is subject to an Insolvency Event.
- (2) Despite any other provision of this Subcontract, from the date the Contractor is entitled to terminate this Subcontract under clause 25.6(1):
 - (a) the Contractor is deemed to have become entitled to recourse to all Securities still held by the Contractor; and
 - (b) the Subcontractor has no entitlement to (or to make any Claim in respect of) and the Contractor has no obligation to return to the Subcontractor any Security still held by the Contractor

25.7 Termination for Convenience

- (1) Without limiting any other right available to the Contractor under this Subcontract or at law, the Contractor may at any time, in its absolute discretion and for whatever reason (including, but not limited to its convenience), terminate this Subcontract.
- (2) If the Contractor terminates this Subcontract under clause 25.7, the Subcontractor is entitled to be paid, as assessed by the Contractor:
 - (a) Payment of any outstanding Progress Claim;
 - (b) the value of the Subcontract Works properly performed and executed prior to the date of termination;

25.8 Termination of Head Contract

- (1) Without limiting any other right available to the Contractor under this Subcontract or at law, if the Head Contract is terminated at any time for any reason, the Contractor may terminate this Subcontract immediately by notice in writing to the Subcontractor.
- (2) If the Contractor terminates this Subcontract under this clause 25.8, the Subcontractor's entitlements are limited to those set out in clause 25.7(2).

26. **Dispute Resolution**

26.1 Notice

- (1) If a dispute, difference or issue arises between the Contractor and Subcontractor out of or in connection with the Subcontract Works or this Subcontract, either party may give the other party a written notice specifying the dispute, issue or difference. The notice must specify in reasonable detail:
 - (a) the nature of the dispute or difference;
 - (b) the legal basis of any Claim made by the party serving the notice; and
 - (c) The dispute, difference or issue is to be rectified, settled or solved within 7 days from the date of the notice.
- (2) Neither party may commence proceedings (other than for injunctive or other urgent relief) in respect of any dispute or difference between them, unless a notice under clause 26.1(1) has been served and the procedures in clause 26.2 and 26.3 (inclusive) have been complied with.
- (3) The Subcontractor must indemnify the Contractor against all damage, loss or liability suffered or incurred by the Contractor (including legal costs incurred by the Contractor on an indemnity basis) arising out of or in connection with a dispute in this clause 26.

26.2 Meeting

- (1) If a dispute or difference notified under clause 26.1(1) has not been settled within 7 days of the date of that notice, or other such time as the Contractor determines, either party may, by written notice to the other, require that a person holding a position of senior management of each of the Contractor and the Subcontractor meet and undertake genuine and good faith negotiations on a without prejudice basis, with a view to resolving the dispute, difference or issue.
- (2) If a meeting is required under this clause by either party, then each party must ensure attendance on its behalf by a person holding a position of senior management. Each party must use its best endeavors to ensure that a meeting required under this clause takes place within 7 days of the receipt of a valid written notice requiring the meeting, or within such other time as the Contractor determines.
- (3) If the dispute or difference involves or may involve the Principal, at the option of the Contractor and if the Principal agrees, the Principal may participate in any meeting held under this clause 26.2.

26.3 Mediation

- (1) If the dispute or difference is not resolved under clauses 26.1 and 26.2, the parties must refer the dispute, difference or issue to mediation in accordance with clause 26.3(2).
- (2) If a dispute or difference is referred to mediation, as referred to under clause 26.3(1), the parties agree that:
 - (a) a mediator is to be appointed by agreement between the parties or failing such agreement within 7 days of the referral to mediation, is to be appointed by the Chairman of the New South Wales Chapter of the Institute of Arbitrators and Mediators Australia;
 - (b) the Subcontractor is to be liable for any and all costs in relation to the mediation (including, but not limited to the mediator's fees, fees for mediation rooms, costs of shared equipment, facilities and services of the mediation and any other reasonable costs in relation to the mediation) and payment of the Contractor's reasonable legal fees in relation to the mediation;
 - (c) the parties must agree the venue for the mediation and if they cannot agree, the mediator appointed must nominate the venue;
 - (d) each party may be legally represented in the mediation if they so wish;
 - (e) complete confidentiality must be preserved in respect of the mediation and any documents and information used at or in relation to the mediation; and
 - (f) mediation proceedings including any documents and information used at or in relation to the mediation must not be used as evidence in any legal proceedings and the parties agree not to compel the mediator to give evidence as to any matter in relation to the mediation in any legal proceedings.

26.4 Litigation

- (1) Subject to clause 26.4(2), neither the Contractor nor the Subcontractor may initiate any litigation out of or in connection with the Subcontract Works or the Subcontract unless they have first complied with clauses 26.1 to 26.3 in relation to the dispute, difference or issue which is the subject of the litigation.
- (2) Clause 26.4(1) does not prevent either party from instituting proceedings to enforce payment due under clause 20 or to seek urgent injunctive or declaratory relief in respect of a dispute or difference arising under this Subcontract.

26.5 Disputes under Head Contract

- (1) If the Principal or any other person having the right to do so, condemns any materials, workmanship or design of the Subcontractor or refuses to include their value in any progress or final payment to the Contractor then that condemnation or refusal is conclusive as between the Contractor and the Subcontractor as to those matters.
- (2) In the case of any dispute, difference or issue arising out of any condemnation or refusal, the provisions for dispute resolution between the Contractor and the Subcontractor under clause 26 do not apply. Instead, the Contractor agrees that at the reasonable direction of the Subcontractor, the Contractor must take such steps as are reasonably open to the Contractor under the Head Contract relating to dispute resolution to contest the condemnation or refusal.
- (3) The Subcontractor indemnifies the Contractor against all costs and expenses that it may be subject to by reason of complying with a Direction under clause 26.5(2) and must lodge with the Contractor any Security required by the Contractor against those costs and expenses. Any money that the Contractor recovers is for the benefit of the Subcontractor, subject to any Claim or entitlement of the Contractor.

26.6 Continued performance

- (1) Despite the existence of a dispute or difference, the Contractor and the Subcontractor must continue to perform this Subcontract. If the Contractor or the Subcontractor do not continue to perform the Subcontract and/or the Subcontract Works, this will constitute a Substantial Breach for the purposes of clause 25.

27. **Bar on Claims**

- 27.1 To the extent permitted by law, if the Subcontractor fails to submit a claim for any entitlement under this Subcontract within the relevant time stipulated for that type of claim, under this Subcontract, or fails to comply, strictly, with the requirements of a claim, the Subcontractor will be and is completely barred from making that claim and the Subcontractor will have no claim against the Contractor arising out of or in connection with that claim.
- 27.2 The Contractor will not accept or consider any out of time claims or Claims that do not strictly comply with the requirements of the applicable clause.
- 27.3 If the Subcontractor is barred from a claim under clause 27, the Subcontractor releases the Contractor from any and all liability directly or indirectly in connection with that claim or Claim.

28. **Goods and Services Tax**

- 28.1 Except for terms which are defined in this Subcontract, capitalised expressions set out in this clause 28 bear the same meaning as those expressions in the GST Act.
- 28.2 The Subcontractor warrants that it is a GST registered entity.
- 28.3 Unless this Subcontract provides otherwise, and subject to this clause 28, any consideration that may be payable under this Subcontract is exclusive of any GST. If a party makes a Taxable Supply in connection with this Subcontract for a Consideration which represents its Value, then the Recipient of the Taxable Supply must also pay, at the same time and in the same manner as the Value is otherwise payable, the amount of any GST payable in respect of the Taxable Supply. A party's right to payment under this Subcontract is subject to a valid Tax Invoice being delivered to the recipient of the taxable supply.
- 28.4 To the extent that one party is required to reimburse another party for costs incurred by the other party, those costs do not include any amount in respect of GST for which the other party is entitled to Claim an Input Tax Credit.

29. **Security of Payment**

- 29.1 The parties agree that the Subcontractor must deliver to the Contractor's registered office within 2 Business Days a copy of any written communication it receives or serves in relation to the Security of Payment Act unless the Security of Payment Act states otherwise, in which case the Security of Payment Act is to be followed. The Contractor is entitled at its absolute discretion but not obliged to make any payment directly to the Subcontractor's subcontractors of any amount which becomes due under the Security of Payment Act or otherwise and the amount paid directly to the Subcontractor's subcontractor shall be a debt due and payable by the Subcontractor to the Contractor and the Contractor shall be entitled to deduct, set-off or recover the debt from any amount otherwise owing to the Subcontractor.
- 29.2 The parties agree that if the Subcontractor suspends the whole or any part of the Subcontract Works pursuant to the Security of Payment Act or any other Act then, to the extent permitted by law, the Subcontractor shall not be entitled to an EOT in respect of any delay resulting from such suspension and the Contractor shall not be liable for any cost, loss, expense or damage suffered or incurred by the Subcontractor as a result of such suspension and the Contractor may direct the Subcontractor to omit the whole or any part of the suspended work and thereafter undertake such work itself or engage others to carry out the omitted work.

- 29.3 The Subcontractor shall indemnify, and keep indemnified and hold harmless the Contractor against all damage, expense (including legal costs), loss or liability of any nature suffered or incurred by the Contractor arising out of:
- (1) a suspension pursuant to the Security of Payment Act by subcontractors contracting to the Subcontractor ; or
 - (2) a failure by the Subcontractor to comply with this clause 29.
- 29.4 No reference date will arise following termination of the Subcontract.
- 29.5 For the purpose of section 22(2)(b) of the Security of Payment Act, an adjudicator shall not, in determining any adjudication application, consider the following matters:
- (1) any amount Claimed that relates to a Variation of the Subcontract that is disputed by the Contractor;
 - (2) any amount Claimed under the Subcontract for compensation due to or in connection with Latent Conditions, time-related costs, changes in regulatory requirements, damages for breach of the Subcontract, any other Claim for damages arising under or in connection with the Subcontract or any Claim arising at law other than under the Subcontract
- 29.6 If there is a dispute under this cause requiring the dispute to be referred to arbitration, the arbitrator shall be appointed by the Resolution Institute in the chapter of the state or territory in which the site is located.

30. Notices

- (1) Unless expressly allowed by the terms of this Subcontract, a notice or other communication connected with this Subcontract (Notice) has no legal effect unless it is in writing.
- (2) Subject to Clause 30(5), in addition to any other method of service provided by law, the Notice may be:
 - (a) sent by registered post to the address for service of either party in accordance with the Schedule;
 - (b) Delivered, by hand, at the address for service at the address for service of either party in accordance with the Schedule;
 - (c) sent by email to the email address for service of either party in accordance with the Schedule.

- (3) A Payment Claim made under clause 20 may be received by the Contractor by the method provided in item 45.
- (4) A Notice given under the Security of Payment Act must not be sent by email and must be received by the Contractor through the method identified in item 48.
- (5) A Notice given under clause 10, 18, 24 or 25 may only be sent by email if contained in the schedule under item, 37, 38, 39, 40, 41, 42 and 43 otherwise the notice must only be sent by registered post to the address for service at the address for service of either party in accordance with the Schedule.
- (6) If the Notice is sent or delivered in a manner provided by clause 30(2), 30(3) or 30(4), it will be treated as given to and received by the party to which it is addressed:
 - (a) if sent by post, on the 2nd Business Day (at the address to which it is posted) after posting;
 - (b) if otherwise delivered before 5pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.
 - (c) If sent by facsimile, upon confirmation of correct transmission of the facsimile as evidenced by the transmission report of the sending machine, provided that where transmission is made after 4:00pm on a Business Day in the place of receipt or where transmission is made on a day which is not a Business Day in the place of receipt, then in such cases, at 9:00am on the next following Business Day in the place of receipt; or
 - (d) If sent by email, at the time of sending provided that the sender does not receive notification that the email was not delivered.
- (7) Despite clause 30(6)(c):
 - (a) a facsimile or email message is not treated as given or received if it is not received in full and in legible form and the addressee notifies the sender of that fact within 2 hours after the transmission ends or by the morning (before 9am) of the next Business Day on which it would otherwise be treated as given and received, whichever is later.

31. General

31.1 Governing law and jurisdiction

- (1) The law expressed in Item 8 governs this Subcontract.
- (2) The parties submit to the jurisdiction Identified in item 8.

31.2 Proportionate liability

- (1) The parties agree that the Civil Liability Legislation does not apply to this Subcontract.
- (2) To the extent allowed by law, the parties agree that their rights, obligations and liabilities will be those which would exist if the Civil Liability Legislation did not apply.

31.3 Confidentiality

- (1) The Subcontractor must keep all aspects of this Subcontract and all matters arising from the Subcontract Works confidential and must not disclose these details to any third party without the written Approval of the Contractor except to the extent required by law and to enable performance of this Subcontract.

31.4 Entire agreement

- (1) This Subcontract:
 - (a) contains the entire agreement and understanding between the parties on everything connected with the subject matter of this Subcontract; and
 - (b) supersedes any prior agreement or understanding on anything connect with that subject matter.

31.5 Waiver

- (1) A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- (2) The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.
- (3) A waiver is not effective unless it is in writing.
- (4) Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

31.6 Severability

- (1) If any provision in this Subcontract is unenforceable, illegal or void or makes this Subcontract or any part of it unenforceable, illegal or void, then that provision is severed and the rest of this Subcontract remains in force.

31.7 Costs and outlays

- (1) The Subcontractor is liable to pay for its own and the Contractor's legal costs in connection with the negotiation, preparation and execution of this Subcontract.
- (2) The Subcontractor must pay all stamp duty and other government imposts, taxes, levies or rates payable in connection with this Subcontract and all other documents and matters referred to in this Subcontract when due or earlier if requested in writing by the Contractor.

32. **Personal Properties Security Act 2009 (Cth)**

32.1 In this clause 32, capitalised expressions have the meaning given to them in the Personal Property Securities Act 2009 (Cth) ("**PPSA**"). To the maximum extent permitted by law:

- (1) the Subcontractor acknowledges and agrees that if the Contractor considers that any transaction with the Subcontractor gives rise or will give rise to a Security Interest, then the Subcontractor must take such steps (including signing documents, providing information and giving consents) as are required by the Contractor for the purposes of enabling the Contractor to:
 - (a) register the Security Interest on the Register or otherwise perfect the Security Interest; and
 - (b) achieve the highest ranking security position that the Contractor considers necessary or desirable under the PPSA;

32.2 the Subcontractor must not register, and must use its best endeavours to ensure that it, nor any third party, register a Security Interest on the Register or take any steps to enforce or exercise rights in connection with a Security Interest if and to the extent that such action would adversely impact the security position of the Contractor referred to in clause 32.1 or its rights under the Subcontract;

32.3 the Subcontractor must promptly notify the Contractor in writing should it become aware of any registration or step of the nature contemplated by clause 32.2 and do anything that is required by the Contractor for the purposes of overcoming any adverse impacts;

- 32.4 the Subcontractor must include in all subcontracts contracting to the Subcontractor and any agreements that it enters into for the supply of goods and materials and the hire of plant and equipment, such provisions as are necessary to ensure that in the event the work is taken out of the hands of the Subcontractor, the Contractor is not precluded from exercising its right to take the works out of the hands of the Subcontractor by reason of any competing Security Interests;
- 32.5 the Subcontractor acknowledges and agrees that, by entering into the Subcontract, the Subcontractor grants the Contractor a Security Interest in any Security and in any item of unfixed plant and materials for which the Subcontractor seeks any payment by the Contractor prior to their incorporation into the Subcontract Works, including without limitation, any such item of unfixed plant and/or materials acquired by, or which comes into the possession or control of, the Subcontractor after the date of the Subcontract;
- 32.6 the Subcontractor consents to the Contractor registering any one or more Financing Statements or Financing Change Statements in respect of any Security Interest created by or contemplated under the Subcontract, and undertakes to do all things reasonably required by the Contractor to enable the Contractor to do so;
- 32.7 the Subcontractor agrees not to cause (directly or indirectly) the registration of a Financing Change Statement, or the discharge of any registration, in respect of any item of plant and equipment or make any Amendment Demand without the Contractor's prior written consent;
- 32.8 by including in a Claim for payment under this Subcontract an amount for any item of plant or materials intended for incorporation into the Subcontract Works but not incorporated, the Subcontractor acknowledges and represents, and is deemed to acknowledge and represent, that:
- (1) the requirements of section 19(2) of PPSA have been satisfied in respect of that item; and
 - (2) no other Security Interest in the item exists such as would take priority over a Security Interest registered by the Contractor.
- 32.9 Should the Subcontractor include in a Claim for payment under the Subcontract an amount in breach of this clause 32, then the Claim for payment in issue will be deemed not to include that amount;
- 32.10 the Subcontractor warrants and must ensure that upon payment by the Contractor, all equipment and materials supplied by it under the Subcontract are free from any Security Interest and all other Claims and encumbrances whatsoever. The Subcontractor shall indemnify the Contractor and hold the Contractor free and harmless against any and all Claims by persons furnishing

labour, equipment and materials in connection with the performance of work under the Subcontract; and

32.11 the Subcontractor:

- (1) waives its rights under section 157 of the PPSA to receive notice of any verification statement given to the Contractor by the Registrar; and
- (2) in accordance with section 115 of the PPSA, agrees that sections 95, 120, 121(4), 125, 132(3)(d), 135, 142 and 143 of the PPSA do not apply to the enforcement of Security Interests by the Contractor.

33. Procure Obligations

33.1 Clause 33 only applies if item 44 of the Schedule specifies that it applies.

33.2 Without limiting the generality of the other warranties or Subcontractor obligations provided in the Subcontract, the Subcontractor further warrants to the Contractor that:

- (1) the Subcontractor must ensure that it has, at all times, access to Procure;
- (2) the Subcontractor must access, obtain, and have full knowledge of all drawings, specifications, reports and other documents or information relating to or in connection with the Subcontract Works, that are made available via Procure;
- (3) the Subcontractor must carry out and complete the Subcontract Works, and comply with all other obligations under this Subcontract, in accordance with the requirements stated in or to be inferred from the documents or information referred to in clause 33.2(2) above;
- (4) the Contractor may, at any time, record on Procure any Defect, and direct the Subcontractor to rectify, remove or replace the Defect, at the Subcontractor's own expense, and within such time as directed by the Contractor. The Subcontractor must comply with the Contractor's direction;
- (5) if the Subcontractor has complied with the Contractor's Direction given pursuant to clause 33.2(4), then it must notify the Contractor via Procure that it has complied with the Contractor's direction; and
- (6) if the Subcontractor has not complied with the Contractor's Direction given pursuant to clause 33.2(4), then the Contractor may have the rectification, removal or replacement work carried out by others with the cost incurred in so doing to be a debt due from the Subcontractor to the Contractor.

- (7) Procore must be used for:
 - (a) Claiming and invoicing if provided for in the Schedule;
 - (b) Subcontract Documents, Design Documents and Inspection Test Plan's;
 - (c) Drawings and mark-ups;
 - (d) Legal notices, requests for information ; and
 - (e) Online Subcontractor certification