

Master Builders Association Sub-Contract Agreement

SC-7

Sub-Contract No.:

Date: _____ 20 _____

Project: _____

Builder: _____

Sub-Contractor: _____



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FORM OF AGREEMENT

SUB-CONTRACT dated the day of 20 BETWEEN

of address

whose contact details are: telephone fax.....

(hereinafter called "the Builder") of the one part

AND.....

of address

whose contact details are: telephone fax.....

(hereinafter called "the Sub-Contractor") of the other part.

WHEREAS the Builder and the principal/owner (hereinafter called "the Proprietor") have entered into a contract, whose particulars are further described in Clause 2, to build certain works pursuant to and in accordance with the provisions, documents and terms contained or incorporated - whether by express or implied reference or by operation of law – therein (hereinafter called "the Head Contract").

AND WHEREAS the Builder has requested the Sub-Contractor to carry out and complete certain works **specified in more detail in the First Schedule hereof**, which form part of - or which are required by the Builder for the better performing of - the Builder's obligations under the Head Contract, all in accordance with the provisions of this Sub-Contract and the relevant provisions of the Head Contract, (hereinafter called "the Sub-Contract Works").

AND WHEREAS the Sub-Contractor has agreed to do as requested by the Builder, having

- been given reasonable opportunity to inspect and study all components of the Head Contract, all components of the Sub-Contract; and
- acquainted itself with all other matters relevant to
 - * the performance of the Sub-Contract Works and
 - * the consideration contained in its accepted offer, which is specified in Clause 1.1

NOW IT IS HEREBY AGREED that for the above-referred consideration the Sub-Contractor shall carry out and complete the Sub-Contract Works in full accordance with this Sub-Contract agreement (which includes the General Conditions, any Special Conditions and the Schedules).

SIGNED by or on behalf of the Builder:

in the presence of:.....
witness

SIGNED by or on behalf of the Sub-Contractor:

in the presence of:.....
witness

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1. DETAILS OF SUB-CONTRACT

This Clause contains the following aspects of this Sub-Contract and is to be read in conjunction with the appropriate Clauses, Schedules and Appendix hereafter wherever a specific reference is made and annotated.

Clause No.	Item	Agreed Terms	Refer to Text Clause
1.1	Fixed Lump Sum Sub-Contract Price [GST-inclusive]	\$ (..... dollars)	3
1.2	(a) Sub-Contractor's margin on variations affecting the Head Contract (b) Period for Builder to - (i) notify Proprietor of a variation (ii) Notify Sub-Contractor of Proprietor's decision	..... % ..... days days	6.9.1 6.9.2 6.12
1.3	Period for Sub-Contractor to reply to Builder's request for quotation	..... days	6.8.1
1.4	Period/time for submitting the first Payment Claim	on or after If nothing is stated, it shall be the fifteenth (15th) calendar day after start of the Sub-Contract Works on the site.	7.4
1.5	Dates or intervals for submitting subsequent Payment Claims	on or after the day of each month If nothing is stated, it shall be the 15th day. OR at intervals of not less than days If nothing is stated, it shall be 28 calendar days.	7.5
1.6	Earliest date or time for submitting final Payment Claim	..... If nothing is stated, it shall be on the Date of actual (practical) Completion.	7.7
1.7	Due dates for making progress or other payments	No later than on the day following service of the relevant Payment Claim, invoice or other claim or demand If nothing is stated, on the eighth (8th) calendar day.	
1.8	Security for the Sub-Contractor's performance	Option 1: cash retention Option 2: bank guarantee Option 3: other (specified in a Special Condition) Delete the options not used.	
1.9	Cash retention (where selected) (a) maximum amount withheld from each progress payment (b) upper limit of the retention fund	..... % of the amount otherwise to be paid by the Builder If nothing is stated, 10%. % of the Sub-Contract Price If nothing is stated, 5%.	8.2.1 8.2.2
1.10	Reduction of security for the Sub-Contractor's performance (a) time/date when reduced (b) amount of reduction	on If nothing is stated, on the date of actual (practical) completion of the Head Contract. If nothing is stated, one half of the amount of security held by the Builder on the above date.	8.2.7 8.2.7

Clause No.	Item	Agreed Terms	Refer to Text Clause
1.11	Release of balance of retention	on..... If nothing is stated, on the date of final completion of the Head Contract.	8.2.8
1.12	Interest on late payments	..... per cent per annum (..... % p.a.) If nothing is stated, it shall be the rate fixed pursuant to Section 2 of the <i>Penalty Interest Rates Act 1983</i> .	7.12 & 11.8.6
1.13	Defects Liability Period (a) start (b) expiry	on If nothing is stated, on the date of actual (practical) completion of the Sub-Contract. on If nothing is stated, on the date of final completion of the Head Contract.	14.2
1.14	Liquidated & Ascertained Damages (a) under the Head Contract (b) Builder's (c) Sub-Contractor's	\$ per calendar day \$ per calendar day \$ per calendar day	16.1 16.2 16.2
1.15	(a)The Date for commencing the Sub-Contract Works on site shall be and (b)The Date for (practical) Completion of the Sub-Contract shall be OR Commencement and Completion Dates for the Sub-Contract Works (or for various stages and/or components of same) shall be as shown or specified in the agreed Construction Schedule, which is attached to this document as:	..... (state the date, or specify it with respect to certain events or conditions precedent) calendar days following the above Commencement Date Appendix/Schedule/Annexure	
1.16	Basis for Sub-Contractor's entitlement to extension of time	as provided by this Sub-Contract; and by Head Contract clauses:	15
1.17	Minimum required insurance cover: a) Work Care b) Common Law liability to employees c) Contractors' All Risks d) Public Liability	In accordance with statute \$ per occurrence \$ per occurrence \$ per occurrence	32.1(a) 32.1(b) 32.2 32.3
1.18	Agreed Arbitrator * Delete if there is no agreement	..... .....	41.4(a)

2. SALIENT DETAILS OF THE HEAD CONTRACT

The Head Contract is constituted by the documents set out inof that contract.

Location of Works.....:

Proprietor/Owner/Principal

Contract Administrator

Conditions of Head Contract (strike out the type that is not applicable):

(a) Standard form*: unamended / amended**

* Insert publisher and name of the standard form contract (where applicable).

** Whenever the provisions of a standard form of contract being used for the Head Contract are modified in any way (whether within the text or by Schedules, Special Conditions or other documents), it shall be stated here as "AMENDED", and the effect of the amendments in relation to this Sub-Contract should be carefully considered by the parties hereto.

OR

(b) Custom made

Type of Head Contract (strike out the type that is not applicable):

(a) "Major Domestic Building Contract" as defined in the *Building Act 1993* and the *Domestic Building Contracts Act 1995*

OR

(b) Other Building Contract

NOTE the operation of Clause 5.1.6 whenever the Head Contract is a "Major Domestic Building Contract".

3. FIXED LUMP SUM SUB-CONTRACT PRICE

The price for the Sub-Contract Works is the fixed lump sum amount specified in Clause 1.1.

This price is GST-inclusive, and is subject to adjustments under and in accordance with the provisions of this Sub-Contract.

4. SCHEDULE OF RATES (WHERE AGREED)

If it is agreed by the parties that the consideration for the Sub-Contract Works shall be on a Schedule of Rates basis rather than being a fixed lump sum price, then

- Clauses 3 and 1.1 will not apply to that contract and shall be deleted; and
- the agreed details of the consideration – including the applicable Schedule(s) of Rates – shall be set out in a Special Condition (or in Special Conditions) and incorporated in the Sub-Contract.
- All rates shall be GST-inclusive.

5. PERFORMANCE OF THE SUB-CONTRACT WORK

5.1 The Sub-Contractor shall carry out and complete the Works of the Sub-Contract

5.1.1 as described in the **First Schedule** in accordance with the provisions of this Sub-Contract and

5.1.2 so as to observe and comply with all the provisions of the Head Contract to be complied with and observed by the Builder

- so far as they relate or apply to the Sub-Contract Works or any portion thereof; and
- provided that same are not repugnant to or inconsistent with the provisions of this Sub-Contract as if the same were severally set out herein, and

5.1.3 so as to comply with all Acts of Parliament or any regulation or by-law of any Local Authority or any public service company or Authority which has any jurisdiction with regard to the Sub-Contract Work or with whose systems the same are or will or could be connected.

5.1.4 to the reasonable satisfaction of the Principal (and the Principal's Contract Administrator, if any) and of the Builder.

- 5.1.5 as directed from time to time by the Builder (but without any obligation upon the Builder so to do) PROVIDED THAT such directions
- are consistent with the provisions of this Sub-Contract; and
 - if given verbally, are confirmed in writing by the Builder as soon as practicable.
- 5.1.6 Without limiting the generality of any other relevant provision of this Sub-Contract, whenever the Head Contract is a Major Domestic Building Contract, the Sub-Contractor hereby provides to the Head Contractor and to the Principal with respect to the Works of this Sub-Contract all of the warranties implied into the Head Contract by operation of the *Domestic Building Contracts Act 1995*.
- 5.2 Except in so far as this Sub-Contract expressly states otherwise, the Sub-Contractor shall also
- 5.2.1 provide at its own cost and expense all labour, materials, tools, implements and plant and all other things and matters necessary for the proper carrying out and completion of all of its obligations under the Sub-Contract; and
- 5.2.2 hereby indemnify and hold harmless the Builder from and against all breaches by the Sub-Contractor of any of its obligations under or pursuant to the Sub-Contract.
- 5.3 The Builder will, so far as it lawfully can, upon the written request and at the cost of the Sub-Contractor obtain for the Sub-Contractor any rights or benefits of the Head Contract so far as the same are applicable to the Sub-Contract Works but not further or otherwise; and shall, when requested in writing by the Sub-Contractor so to do, in like manner inform the Sub-Contractor of the actions taken by him in this regard.

6. VARIATIONS

- 6.1 No variation ordered up by the Builder shall vitiate this agreement.
- 6.2 Without affecting any other provision of this Sub-Contract, either of the parties may at any time prior to the completion of the Sub-Contract Works, request to formally record the details of all work, or all work of a particular description, carried out by the Sub-Contractor. Whenever such a request is made, the details of the work in question shall be entered daily in a Work Record Book.
- 6.2.1 Both the Builder and the Sub-Contractor (or their respective authorised representatives) shall sign these records each day to verify that such work was carried out by the Sub-Contractor on that day.
- 6.2.2 Such records and verifications shall not of themselves constitute an instruction or confirmation by the Builder of a variation, but shall be evidence
- of the fact that the work was carried out by the Sub-Contractor; and
 - of the particulars recorded.
- 6.3 At any time and from time to time during this Sub-Contract the Builder may in its absolute discretion:
- 6.3.1 order up material or work of a different type quality or description; or
- 6.3.2 increase or decrease the extent or scope of the Works; or
- 6.3.3 alter the situation or vary the dimensions of the Works, or of any part of the Works; or
- 6.3.4 substitute one class of work or material for another; or
- 6.3.5 make any other change whatsoever to the scope, quality, nature or any other aspect of the Works of the Sub-Contract.
- 6.4 The Builder may give these instructions either verbally or in writing; but all verbal instructions must be promptly confirmed by the Builder in writing.
- 6.5 The Sub-Contractor must comply with all such instructions. Without limitation, it must
- 6.5.1 carry out and/or omit and/or modify (as the case may be) all requisite or affected work; and
- 6.5.2 do so in the manner, and in accordance with the timing constraints required by the Builder
- 6.6 In the event that a section of the Sub-Contract Works is omitted or the scope of the Sub-Contract Works is otherwise changed so that the relevant material or labour content is reduced or substituted; and such omission, reduction or substitution is accepted by the Builder; it shall constitute a variation whether or not a written instruction or a written confirmation exists. Unless otherwise agreed, the resulting variation shall be valued in accordance with Sub-Clause 6.9 or 6.10 (whichever applies).
- 6.7 The determination and/or the acceptance of a variation price shall not be a condition precedent to implementation of that variation; which must proceed as and when required by the Builder.

6.8 Claims/quotations to adjust the Sub-Contract Price

- 6.8.1 Whenever the Builder so requests in writing, the Sub-Contractor shall provide a quotation for any variation requested or ordered up by the Builder. The Sub-Contractor shall comply with each such written request within the period specified in Clause 1.3.
- 6.8.2 Where circumstances make compliance with the above deadline impracticable the Sub-Contractor must promptly give notice of this to the Builder, giving reasons. This notice must be given before the expiry of the period specified in Clause 1.3.
- 6.8.3 Whenever the Builder makes no such request but the Sub-Contractor forms the view that compliance with an instruction requires adjustments to the Sub-Contract Price, or to the Sub-Contract period or to both, it must promptly give written notice of this to the Builder, together with details of:
- the extra amount that the Sub-Contractor claims to require and be entitled to (or, where appropriate, the amount of credit that the Sub-Contractor offers); and
 - any extension of the Sub-Contract period that the Sub-Contractor requires and claims to be entitled to as a result of complying with the instruction.
- 6.8.4 Should the Sub-Contractor fail to respond to a request made under Clause 6.8.1 within the time required by that Clause (or within any extended time), and continue the default for a further seven days following service of a written reminder by the Builder, it will be deemed that no extra charge is involved. In the event that the variation in question is an omission, the Builder may then value it in accordance with Clause 6.9.1 where applicable. Such valuation shall be final.
- 6.8.5 Any time limits contemplated by Sub-clauses 6.8.1 and 6.8.2 shall not prejudicially affect the Sub-Contractor unless and to the extent that the Builder is prejudiced under the Head Contract by reason of delay beyond such limits.

6.9 Variations affecting the Head Contract

- 6.9.1 Variations affecting the Head Contract shall generally be valued in accordance with the appropriate provisions of the Head Contract. [refer also to Clause 6.8.5]
- Despite the above, the Sub-Contractor is also entitled to a margin (for overheads and profit) on all such variations. This margin is specified in Clause 1.2 (a)
 - At the same time, no provision in the Head Contract concerning Builder's margins (by whatever name) shall apply to this Sub-Contract.
- 6.9.2 Whenever a claimed adjustment to the Sub-Contract Price affects – or is claimed to affect - the Head Contract Price, the Builder shall submit a claim under the Head Contract for such adjustment. Without limitation, such claim must
- (a) include for the Sub-Contractor's relevant price and any other terms; and
 - (b) be submitted with due diligence and in any case within the time stated in Clause 1.2 (b) (i).
- 6.9.3 If the Builder fails to comply with any of its obligations under Clause 6.9.2 then - save where it can be shown that the Sub-Contractor's relevant claims are manifestly unreasonable - the Sub-Contract is hereby varied on the terms submitted by the Sub-Contractor.
- 6.9.4 Claims submitted by the Contractor to the Principal pursuant to Clause 6.9.2 will be assessed and determined by the Principal (or its agent) in accordance with the relevant provisions of the Head Contract. Those provisions – including the assessment procedures and the determinations - are binding on the Sub-Contractor. Consequently the Sub-Contract Price shall be adjusted only if, and to the extent, approved by the Principal under the Head Contract.
- 6.9.5 Where the Head Contract refers to priced Bill of Quantities, for the purposes of this Sub-Contract such reference shall mean the rated extract from the Bill of Quantities submitted for this Sub-Contract by the Sub-Contractor to the Builder.
- 6.9.6 Where the Head Contract permits adjustments for errors in the Bills of Quantities, corresponding consideration will apply to the Sub-Contract, **always providing that**
- (a) where the Head Contract limits such adjustments relative to the Head Contract Price, a similar proportional limitation shall be applied relative to the Sub-Contract Price; and

- (b) Should there be a residual amount available to the Builder at the end of the Head Contract such amount should be distributed proportionally to those Sub-Contractors whose loss has been in excess of the limitation herein stated.

6.10 Other Variations

- 6.10.1 Where Clause 6.9 does not or cannot apply, a fair price shall be agreed in writing by the parties to this Sub-Contract prior to proceeding with any part of the variation concerned.
- 6.10.2 Failing such agreement, the Sub-Contractor shall keep records of labour and materials. These records shall
- (a) be kept on site; and
 - (b) be signed daily by the Builder's representative; and
 - (c) form the basis for the variation price.

6.11 Adjusting the Sub-Contract Price

All variation prices agreed or otherwise determined under this Sub-Contract shall be added to or deducted from the

- the Sub-Contract Price (as specified in Clause 1.1); or
- the adjusted Sub-Contract Price (being the Sub-Contract Price as previously adjusted pursuant to this Sub-Contract);

all as the case may be.

6.12 Variations disallowed or reduced by the Principal

- 6.12.1 The Builder shall notify the Sub-Contractor promptly [but no later than the time stated in Clause 1.2 (b) (ii)] whenever it is determined under the Head Contract that a sub-contract variation claim, submitted by the Builder to the Principal pursuant to Clause 6.9, is disallowed or reduced.
- 6.12.2 Except as provided in Clauses 6.12.3 and 6.12.4, the Sub-Contractor shall accept such reduction or rejection as a limitation under this Sub-Contract of any and all rights that it may otherwise have or have had in this respect.
- 6.12.3 The Sub-Contractor may request the Builder to submit the reduction or rejection of its variation price to any dispute resolution process selected by the Sub-Contractor from those available under the Head Contract, provided that:
- (a) such request must be made within ten days of receipt of the notification referred to in Clause 6.12.1 (or within such longer time as may be accepted or granted under the Head Contract); and
 - (b) the request must be accompanied by the Security Deposit (if any) specified in the Head Contract, and
 - (c) the Sub-Contractor must indemnify Builder against all costs, legal and otherwise, of and incidental to the dispute resolution process selected by the Sub-Contractor.
- 6.12.4 On receipt of the material as specified in Clause 6.12.3 the Builder must submit the matter to the selected method of dispute resolution under and in accordance with the Head Contract. The Sub-Contractor hereby accepts that any adjustment to the Sub-Contract price with respect to the variation or variations submitted to this process will be limited to
- the amount (if any) awarded by the decision maker,
 - less that component of the amount awarded which represents the Builder's margin.

6.13 Cost of supplies made redundant

In all cases where materials have already been bought in or work has already been undertaken prior to notification of a variation to the Sub-Contractor, and such materials or such work become redundant as a consequence of the variation, the Sub-Contractor's costs incurred in obtaining such materials or in providing such work shall be included in the valuation of the variation; together with

- the costs involved in removing or altering them; and
- a reasonable allowance for the Sub-Contractor's margin (overheads and profit) on all costs.

less any credits that may be reasonably obtainable for unused or salvaged materials.

6.14 GST-inclusive

All amounts nominated or otherwise dealt with in connection with variations are and shall be **GST-inclusive**.

7. PROGRESS PAYMENTS

- 7.1 The respective entitlements and obligations of the parties under this Sub-Contract concerning and relating to payment claims and payments are as set out below; subject to such limitations and variations and to such other or additional provisions as may be imported or implied by statute; in particular by the ***Building and Construction Industry Security of Payment Act 2002*** ["the SOPA"].
- 7.2 The Builder shall pay the Sub-Contract Price (as it may be adjusted pursuant to this Agreement) to the Sub-Contractor by means of progress payments; until the Builder's full liability is discharged.
- 7.3 The Sub-Contractor may serve periodic progress payment claims containing adequate details and such related supporting information as the Builder may reasonably require for the materials, work and other services that the Sub-Contractor claims to have provided up to the date of the claim in full and proper compliance with the Sub-Contract.
- 7.4 The first of these payment claims shall be submitted on or after
- the date; or
 - the expiry of the period
- specified in Clause 1.4. This date is referred to as "the first Reference Date"
- 7.5 Subsequent payment claims shall be submitted on or after
- the specific dates; or
 - the expiry of the intervals
- specified in Clause 1.5. These dates are referred to as "Reference Dates."
- 7.6 Unless otherwise agreed in writing, whenever the Sub-Contractor has failed to serve a payment claim on any Reference Date or Dates, all such missed Reference Dates are deemed to have been utilised for the purposes of ascertaining the timing Sub-Contractor's next entitlement to submit a payment claim.
- 7.7 The final Payment Claim shall not be submitted earlier than the date specified therefor in Clause 1.6
- 7.8 The Builder must make a payment to the Sub-Contractor in response to each payment claim on or before the relevant Due Date as specified in Clause 1.7
- 7.9 Unless Clause 7.16 applies, each amount payable under Clause 7.8 shall be the relevant claimed amount, subject only to the following adjustments, where they apply:
- 7.9.1 the withholding of any cash retention to which the Builder may be entitled under and subject to this Agreement;
- and/or
- 7.9.2 the reduction of the claimed amount in respect of work included in the claim but which, in the Builder's opinion, has not been carried out
- (a) to the extent claimed; or
 - (b) in full and proper compliance with the Sub-Contract;
- and/or
- 7.9.3 any other amount that the Builder is entitled to withhold from, or to be paid by, the Sub-Contractor under and subject to this Agreement;
- and/or
- 7.9.4 any other amount that the Builder may be entitled to withhold or retain pursuant to law.
- 7.10. Whenever the Builder makes adjustments pursuant to Clause 7.9, it must provide to the Sub-Contractor a written statement setting out
- 7.10.1 the method used to assess; and
- 7.10.2 the grounds on which the Builder claims to justify each adjustment.
- 7.11 The making by the Builder of any progressive interim payment is without prejudice to any of the Builder's rights entitlements or remedies. Without limitation, it does not constitute any waiver of any of those rights entitlements or remedies, nor does it constitute any acknowledgement or admission that:

- 7.11.1 the work and other supplies forming the basis of the claim upon which the payment is made complies with the provisions hereof in all respects or at all; or that
- 7.11.2 the Sub-Contractor has complied with all of its other obligations under this Agreement.
- 7.12 Whenever the Builder fails or refuses to make a progress payment on or before due date therefor, the Sub-Contractor shall, without prejudice to any of its other rights or remedies, be entitled to interest on and with respect to such debt at the rate specified in Clause 1.12. This interest shall compound weekly and apply to the whole of the unpaid amount from the due date until the debt is paid in full.
- 7.13 If such default continues for seven days after service of notice from the Sub-Contractor demanding such payment then the Sub-Contractor may suspend execution of the Works until payment and the Builder shall be liable for any additional expense arising therefrom without prejudice to any other right the Sub-Contractor may have hereunder.
- 7.14 If the nature of the Contract is "Schedule of Rates" then as the work proceeds it shall be measured by the Builder's representative together with the Sub-Contractor's representative and recorded in a book provided for this purpose and signed by both parties or it shall be recorded otherwise as the parties may agree.
- 7.15 If the nature of the Contract is "Lump sum" and if a Bill of Quantities is provided the Sub-Contractor shall submit a priced Bill of Quantities adding up to the total value of the Sub-Contract in order that Progress Payments can be valued. The dissection of the Lump Sum shall be made to the approval of the Builder and he will supply to the Sub-Contractor an unpriced Bill of Quantities or an extract from the unpriced Bill relating to the Works to enable the Sub-Contractor to price the same and return to the Builder.
- 7.16 Despite anything else in this Agreement where a valid payment claim is made under the SOPA, the Builder's entitlement to vary the claimed amount is subject to the applicable provisions of the SOPA.

All amounts nominated or otherwise dealt with in connection with payment claims and payments shall be **GST-inclusive**.

8. SECURITY FOR PERFORMANCE

- 8.1 The Sub-Contractor shall provide to the Builder a Security for its performance of all of its obligations under and in accordance with this Agreement.
- 8.2 Unless otherwise agreed, the Security will be provided by a cash Retention Fund, established and operated in accordance with the following provisions
- 8.2.1 From the amount of each progress payment to which the Builder would otherwise be entitled the Builder may deduct and withhold a percentage of that amount. The percentage so withheld shall be that specified in Clause 1.9 (a).
- 8.2.2 Once the total amount thus withheld has reached the upper limit specified in Clause 1.9 (b), the Builder may not withhold any further amounts under this Clause from any payment.
- 8.2.3 Moneys from the Retention Fund may, and may only, be applied by the Builder for
- (a) ensuring the proper performance of the Sub-Contractor's obligations under this Agreement; and
- (b) deducting any sum of money referred to in this Sub-Contract as a debt from the Sub-Contractor to the Builder.
- 8.2.4 Before the Builder may apply any amount held in the Retention Fund,
- (a) it must first serve on the Sub-Contractor a written notice stating
- i) its intention so to do; and
- ii) the extent thereof; and
- iii) the reasons for this intended action;
- (b) and the Sub-Contractor shall be entitled to serve on the Builder, no later than on the fifth working day after the service of the Builder's Notice, a written notice of its intention to dispute the Builder's intended action.
- 8.2.5 If the Sub-Contractor fails to exercise its rights under, and in accordance with, Clause 8.2.4(b), the Builder may proceed as indicated in its Notice.

- 8.2.6 Otherwise a dispute will have arisen; and
- (a) the Builder may not apply any part of the Retention Fund; and
 - (b) the Sub-Contractor is not entitled to the release of any part of the Retention Fund pending resolution of that dispute under this Agreement.
- 8.2.7 On the occurrence of the event specified in Clause 1.10(a) the amount then held in the Retention Fund shall be reduced by the amount specified in Clause 1.10(b); and that amount shall be immediately released to the Sub-Contractor.
- 8.2.8 The Builder shall continue to hold the balance (if any) then remaining in the Retention Fund until the occurrence of the event specified in Clause 1.11; at which time that balance (or such part of it as may still remain) must be released to the Sub-Contractor.
- 8.2.9 The Builder's interest in any Retention Money
- (a) held by the Builder or the Principal; or
 - (b) received by the Builder from the Principal; or
 - (c) owing to the Builder by the Principal or
 - (d) held by Principal (whether in a joint account with the Builder or otherwise howsoever) for the benefit of the Builder
 - * in respect of this Sub-Contract or
 - * the performance of the Sub-Contract Works
- shall be fiduciary only. Such funds, together with any income generated by them, are held by the Builder as trustee for the Sub-Contractor.
- 8.2.10 The Sub-Contractor's beneficial interest in the funds specified in Clause 8.2.9 is subject only to the rights of the Builder to deal with them under and in accordance with the provisions of this Sub-Contract.
- 8.3 Whenever the Builder provides a Bank Guarantee or some other type of security to the Principal – instead of cash retention – for the performance of its obligations under the Head Contract, then the Sub-Contractor shall also be entitled (at the Sub-Contractor's option) to provide a Bank Guarantee or other security to the Builder in lieu of the cash retention fund specified in Clause 8.2. The details of any such alternative type of security shall be agreed by the parties and specified in a Special Condition.
- 8.4 Unless expressly agreed otherwise in writing, upon the determination of this Sub-Contract for the Builder's default under Clause 10, any Bank Guarantees or other securities provided pursuant to Clause 8.3 shall automatically become unenforceable by the Builder; and they shall be delivered up to the Sub-Contractor and cancelled.

9. INSOLVENCY

For the purposes of this Agreement, a person is or becomes insolvent whenever and as soon as he, she or it commits or suffers an insolvency event. An insolvency event is any action taken by or against a person that indicates they are, or are likely to become, unable to meet their payment obligations as and when they fall due. This includes:

- 9.1. Whenever the person is a natural person or a partnership and
- 9.1.1 has a creditor levy execution against him / her / it;
 - 9.1.2 is declared, made or becomes insolvent or bankrupt;
 - 9.1.3 commits an act of bankruptcy;
 - 9.1.4 has any execution or distress process levied against his / her / its assets and / or income;
 - 9.1.5 has any bankruptcy petition presented against him / her / it;
 - 9.1.6 proposes any composition or scheme of arrangement, or has it proposed by others;
 - 9.1.7 has a trustee in bankruptcy, interim receiver, controlling trustee or any other such administrator appointed;
- 9.2 Whenever the person is a corporation or incorporated association and it:
- 9.2.1 makes a company arrangement with its creditor(s);
 - 9.2.2 enters into a deed of arrangement with its creditor(s);
 - 9.2.3 commits an act of insolvency according to the Corporations Act;

- 9.2.4 fails to comply with a bankruptcy notice or statutory demand under the Corporations Act;
- 9.2.5 has an application made to a Court for its winding up and
 (a) either the application is not stayed within 14 days; or
 (b) the Court makes a winding up order;
- 9.2.6 appoints, or has appointed, a provisional liquidator, liquidator, receiver, receiver - and - manager, administrator, controller or manager;
- 9.2.7 has any of its property taken into possession by a mortgagee or by any other secured creditor.
- 9.3 Whenever the person is a corporation or incorporated association, and a scheme administrator, manager-and-administrator, receiver-and-administrator, or any other such administrator initiates or proceeds with any voluntary administration or winding up (other than for a member's voluntary winding up) of that person.

10. DEFAULT BY THE BUILDER

- 10.1 If the Builder
- 10.1.1 becomes or has become insolvent; or
- 10.1.2 breaches any of its substantial obligations under the Sub-Contract Agreement then and in each such case the Builder shall be in default.
- 10.2 Whenever Clause 10.1.1 applies the Sub-Contractor may determine the Sub-Contract immediately by notice; and the Sub-Contractor shall be entitled to all such payments and/or damages as if the Sub-Contract had been rescinded by the Sub-Contractor at common law for breach or repudiation by the Builder.
- 10.3 Without limitation, the following acts or omissions by the Builder will constitute relevant breaches under Clause 10.1.2:
- 10.3.1 losing (for whatever reason) its eligibility or entitlement under the law to carry out the Works, or work of the kind, comprising the Head Contract;
- 10.3.2 (save as may be required by the Head Contract) assigning or subletting, or attempting to assign or sublet the Head Contract without the written consent of the Sub-Contractor; or
- 10.3.3 failure to make any payment to the Sub-Contractor as and when due; or
- 10.3.4 any failure to
- (a) give access to the site; or
- (b) make available plant in accordance with; Clauses 18 and 19, or
- (c) provide appropriate working conditions and facilities essential for the Sub-Contractor's operations, so that the Sub-Contractor's operations are wholly or substantially impeded,
- excepting**
- where such failure is caused by matters for which the Builder would be eligible for an extension of time under the Head Contract in respect of the Sub-Contract Works; and
 - the Builder grants an appropriate extension to the Sub-Contractor.
- 10.4 Whenever the Builder is in default the Sub-Contractor may, without prejudice to any of its other rights or remedies, give the Builder a written Notice
- 10.4.1 stating that it is a "Notice of Intention" given under this Clause; and
- 10.4.2 specifying the nature of the default or defaults; and
- 10.4.3 directing the Builder to
- (a) either remedy the default or defaults to the Sub-Contractor's satisfaction; or
- (b) provide satisfactory written reasons why the Sub-Contractor should not exercise its relevant rights; and
- 10.4.4 advising the Sub-Contractor's intention to exercise its rights under this Clause unless the Builder has complied with one of the options in Clause 10.4.3 no later than the reasonable period specified in the Notice; and
- 10.4.5 specifying the right that the Sub-Contractor intends to exercise in the event that the Builder fails to so comply.

- 10.5 If the Builder fails to comply with the directions in the Notice of Intention within the specified deadline, the Sub-Contractor may, without prejudice to any of its other rights or remedies :
- 10.5.1 suspend the whole or part of the Sub-Contract Works for the period such default continues, and the period of such suspension shall automatically operate as an extension of the date, time or times for completion of the Sub-Contract Works; or
- 10.5.2 determine this Sub-Contract, and in that case the Sub-Contractor shall be entitled to all such payments and/or damages as if this Sub-Contract had been rescinded by the Sub-Contractor at common law for breach or repudiation by the Builder.
- 10.6 Subject to Clause 10.7, whenever the Sub-Contractor has given Notice of its intention to exercise its right pursuant to Clause 10.5.1 to suspend, it may, at any time thereafter (also) exercise its right pursuant Clause 10.5.2 to determine this Sub-Contract.
- 10.7 The Sub-Contractor may not determine this Sub-Contract under Clause 10.6
- 10.7.1 until and unless the circumstances set out as pre-conditions to the operation of Clause 10 and 10.5 have arisen;
- and
- 10.7.2 the Sub-Contractor has given the Builder a second Notice advising it of the termination.
- 10.8 All Notices referred to in this Clause must be served either by hand or by certified post.
- 10.9 Despite any other provisions, none of the Sub-Contractor's rights of suspension and/or determination under this Agreement apply in respect of a default under Clause 10.1.2 if the Sub-Contractor has previously committed a breach of any of its substantial obligations under the Sub-Contract Agreement.

11. DEFAULT BY THE SUB-CONTRACTOR

- 11.1 If the Sub-Contractor
- 11.1.1 becomes or has become insolvent; or
- 11.1.2 breaches any of its substantial obligations under the Sub-Contract Agreement
- then and in each such case the Sub-Contractor shall be in default.
- 11.2 Whenever Clause 11.1.1 applies the Builder may determine the Sub-Contract immediately by notice; and the Builder shall be entitled to all such payments and/or damages as if the Sub-Contract had been rescinded by the Builder at common law for breach or repudiation by the Sub-Contractor.
- 11.3 Without limitation, the following acts or omissions by the Sub-Contractor will constitute relevant breaches under Clause 11.1.2:
- * (save as may be required by the Head Contract) assigning or subletting, or attempting to assign or sublet the Sub-contract written consent of the Builder;
 - * failure to comply with any of its obligations pursuant to Clause 5 of the Sub-Contract; or
- 11.4 Whenever the Sub-Contractor is in default the Builder may, without prejudice to any of its other rights or remedies, give the Sub-Contractor a written Notice
- 11.4.1 stating that it is a "Notice of Intention" given under this Clause; and
- 11.4.2 specifying the nature of the default or defaults; and
- 11.4.3 directing the Sub-Contractor to
- (a) either remedy the default or defaults to the Builder's satisfaction; or
 - (b) provide satisfactory written reasons why the Builder should not exercise its rights under this Clause;
- and
- 11.4.4 stating the Builder's intention to exercise its rights under this Clause unless the Sub-Contractor has complied with one of the options in Clause 11.4.3 no later than the reasonable period specified in the Notice, and
- 11.4.5 specifying the right that the Builder intends to exercise in the event that the Sub-Contractor fails to so comply.

- 11.5 If the Sub-Contractor fails to comply with the directions in the Notice of Intention within the specified deadline, the Builder may, without prejudice to any of its other rights or remedies:
- 11.5.1 determine the employment of the Sub-Contractor under this Sub-Contract, or
- 11.5.2 take the Sub-Contract Works wholly or partially out of the control of the Sub-Contractor and have them completed by other means
- 11.6 Subject to Clause 11.7 if the Builder has exercised or given notice its intention to exercise its right of taking the Sub-Contract Works wholly or partially out of the control of the Sub-Contractor, it may at any time thereafter exercise
- 11.6.1 its right of determination; or
- 11.6.2 its right of taking the Sub-Contract Works wholly or partially (as to some other part) out of the Sub-Contractor's control,
- 11.7 The Builder may not proceed under Clause 11.6
- 11.7.1 unless and until the circumstances set out as pre-conditions to the operation of Clause 11.5 have arisen; and
- 11.7.2 the Builder has given the Sub-Contractor a second Notice advising it of exercising one of the rights referred to in Clause 11.6 and specifying the right it in question, together with relevant details.
- 11.8 For either of the purposes stated in Clause 11.6
- 11.8.1 the Builder may ensure the proper execution and completion of the Works of this Sub-Contract in the manner to best serve the reasonable interests of the Builder and all costs created thereby shall become a debt due to the Builder from the Sub-Contractor always provided that the Builder does not expend more moneys than is reasonable having regard to all the relevant circumstances;
- 11.8.2 the Sub-Contractor shall, on receiving a written request to that effect from the Builder, assign or hand over forthwith to the Builder, without further payment:
- (a) the benefit of all agreements and arrangements for and with respect to the provision of materials, labour and other supplies and services that Sub-Contractor has entered; and
- (b) all plant, equipment and other facilities; together with all drawings, shop drawings, computations, specifications and other documentary material, owned or obtained by it
- for the purposes of complying with its obligations under this Sub-Contract or for the furtherance of those purposes.
- 11.8.3 No further payment shall be due or payable to the Sub-Contractor under this Agreement until
- (a) completion of the Works of this Sub-Contract; and
- (b) the proper compilation of accounts for same; and
- (c) either
- the Builder and the Sub-Contractor agree on those accounts; or
 - any dispute concerning those accounts has been resolved under this Sub-Contract or by law.
- 11.8.4 If, following compliance with Clause 11.8.3, the total cost to the Builder is less than the adjusted Sub-Contract Price was at the time that the Sub-Contract was terminated or taken out of the Sub-Contractor's control (as the case may be), then the balance shall become due and payable to the Sub-Contractor.
- 11.8.5 If, following compliance with Clause 11.8.3, the total cost to the Builder exceeds the adjusted Sub-Contract Price as it was at the time that the Sub-Contract was terminated or taken out of the Sub-Contractor's control (as the case may be), the excess shall become a debt due and payable to the Builder from the Sub-Contractor. The Builder may then
- (a) apply towards the liquidation of this debt any funds (including any securities) which it may hold; and
- (b) retain for that purpose any amount or amounts to which it may be entitled (including any securities) from any third party for or with respect to this Sub-Contract.
- 11.8.6 Any debt referred to in Clause 11 shall be subject to interest at the rate and of the nature specified in Clause 1.12, commencing on the fifteenth (15) working day after Clause 11.8.3 has been complied with and ending when the debt has been fully discharged
- 11.8.7 All Notices referred to in this Clause must be served either by hand or by certified post.
- 11.8.8 Despite any other provisions, none of the Builder's rights under Clause 11.2 shall apply if the Builder has previously committed a breach of any of its substantial obligations under the Sub-Contract Agreement.

12 DEATH OF BUILDER

- 12.1 Subject to Clause 12.5 if the Builder, being an individual natural person, shall die before the completion of the Works of the Subcontract then, unless the Agreement has already been terminated by operation of law, the Sub-Contractor may terminate this Agreement by serving a written Notice on the Personal Representatives, or on the Executors or Administrators of the Will or Estate (as the case may be) of the deceased Builder. This Notice must be served
- by hand or by certified post; and
 - at
 - * the Builder's address set out in this Agreement; or
 - * any other address of the Builder, or of his or her Personal Representatives, Executors or Administrators known to the Sub-Contractor at the time of death.
- 12.2 Following such termination the Sub-Contract Price shall be adjusted to equal
- the contractual value of all of the materials, labour and services already provided by the Sub-Contractor under and in accordance with the Agreement up to the date of termination; plus
 - all costs and expenses incurred or to be incurred and all losses and damages suffered or to be suffered by the Sub-Contractor arising from and associated with the premature termination of this Sub-Contract;
- 12.3 The above adjusted Sub-Contract Price shall be
- as agreed between the deceased Builder's Personal Representatives, Executors or Administrators and Sub-Contractor ("the affected parties")
- or, in default,
- as determined pursuant to the dispute resolution provisions of this Agreement.
- 12.4 The Sub-Contractor shall then be entitled to immediate payment of the adjusted Sub-Contract Price – as agreed or otherwise determined – less the aggregate of the following:
- all amounts previously received by the Sub-Contractor under this Agreement; plus
 - as may be lawfully set off by the Builder's Estate against moneys otherwise payable to the Sub-Contractor.
- 12.5 Despite any other provision, the Sub-Contractor shall not terminate the Sub-Contract under the preceding provisions if (and only if), within fourteen calendar days after the date of the death,
- lawful arrangements are made
 - which are satisfactory to the Sub-Contractor
 - by or with some person
- for continuing and completing the balance of the Sub-Contract and its Works.

13. DEATH OF SUB-CONTRACTOR

- 13.1 Subject to Clause 13.6 if the Sub-Contractor, being an individual natural person, shall die before the completion of the Works of the Sub-contract then, unless the Agreement has already been terminated by operation of law, the Builder may terminate this Agreement by serving a written Notice on the Personal Representatives, or on the Executors or Administrators of the Will or Estate (as the case may be) of the deceased Sub-Contractor. This Notice must be served
- by hand or by certified post; and
 - at
 - * the Sub-Contractor's address set out in this Agreement; or
 - * any other address of the Sub-Contractor, or of his or her Personal Representatives, Executors or Administrators known to the Builder at the time of death.
- 13.2 Following such termination the Builder may have the Works of this Sub-Contract completed by others; on substantially the same terms and conditions as apply to this Agreement.

- 13.3 Without limitation, the scope of the works to be carried out and completed under Clause 13.2 shall include :
- 13.3.1 the rectification or replacement of all defective materials supplied; and
 - 13.3.2 the rectification of all defective work carried out; and
 - 13.3.3 the completion of all work not brought to completion
- by the deceased Sub-Contractor.
- 13.4 Unless agreed otherwise, the financial position between the Builder and the Estate of the Sub-Contractor ("the affected parties") shall be adjusted promptly following the completion of the Works pursuant to Clauses 13.2 and 13.3; and as follows:
- 13.4.1 The Sub-Contract Price shall be adjusted for the extras and/or credits that apply to all variations called up prior to the termination of the Sub-Contract;
- 13.4.2 From the above adjusted price the aggregate of the following amounts shall be deducted:
- (a) all amounts previously paid by the Builder to the Sub-Contractor under this Sub-Contract; plus
 - (b) the cost of completing the Sub-Contract Works pursuant to Clauses 13.2 and 13.3; plus
 - (c) all costs and expenses incurred and all losses and damages suffered by the Builder arising from and associated with the termination this Sub-Contract and having it completed by other means; plus
 - (d) all such amounts as may be lawfully set off by the Builder against moneys otherwise payable to the Sub-Contractor or to his or her estate.
- 13.5 The adjustment amount resulting from the calculations in Clause 13.4 shall be dealt with as follows:
- It shall be presented to the affected parties within five (5) business days of its preparation; and
 - Unless, within five (5) business days of the presentation date one (or both) of the affected parties serves a written objection on the other affected party concerning the adjustment amount or its derivation, the adjustment amount will become a debt due and payable within a further five (5) business days.
 - if it is a positive number, then it will be a debt payable by the Builder to the Estate of the Sub-Contractor; and
 - If it is a negative number, then it will be a debt payable by the Estate of the Sub-Contractor to the Builder.
 - If any written objection is made to the adjustment amount or its derivation within the deadline specified, the financial position between the affected parties shall be determined pursuant to the dispute resolution provisions of this Agreement.
- 13.6 Despite any other provision, the Builder shall not terminate the Sub-Contract under the preceding provisions of this Clause if (and only if), within fourteen calendar days after the date of the death,
- other lawful arrangements are made
 - which are satisfactory to the Builder
 - by or with some person
- for continuing and completing the balance of the Sub-Contract and its Works.
- 13.7 All amounts dealt with under this clause are and shall be **GST-inclusive**.

14. DEFECTS

- 14.1 The Sub-Contractor is responsible and liable, at no cost to the Builder or to the Principal, or to any beneficiary of the Sub-Contractor's warranties under Clause 5.1.6 and 14.3 (where either or both of these apply), for
- the rectification of all defective materials and all defective work provided by the Sub-Contractor under this Sub-Contract; and
 - the rectification of all consequential damage caused by or arising from any such defective materials and/or defective work.
- 14.2 Subject to 14.3, the Sub-Contractor's obligations in this respect apply to all defects notified to it by the Builder in writing on or before the expiry of the Defects Liability Period specified in Clause 1.14; until those defects have been effectively and satisfactorily rectified.

- 13.3 Without limitation, the scope of the works to be carried out and completed under Clause 13.2 shall include :
- 13.3.1 the rectification or replacement of all defective materials supplied; and
 - 13.3.2 the rectification of all defective work carried out; and
 - 13.3.3 the completion of all work not brought to completion
- by the deceased Sub-Contractor.
- 13.4 Unless agreed otherwise, the financial position between the Builder and the Estate of the Sub-Contractor ("the affected parties") shall be adjusted promptly following the completion of the Works pursuant to Clauses 13.2 and 13.3; and as follows:
- 13.4.1 The Sub-Contract Price shall be adjusted for the extras and/or credits that apply to all variations called up prior to the termination of the Sub-Contract;
 - 13.4.2 From the above adjusted price the aggregate of the following amounts shall be deducted:
 - (a) all amounts previously paid by the Builder to the Sub-Contractor under this Sub-Contract; plus
 - (b) the cost of completing the Sub-Contract Works pursuant to Clauses 13.2 and 13.3; plus
 - (c) all costs and expenses incurred and all losses and damages suffered by the Builder arising from and associated with the termination this Sub-Contract and having it completed by other means; plus
 - (d) all such amounts as may be lawfully set off by the Builder against moneys otherwise payable to the Sub-Contractor or to his or her estate.
- 13.5 The adjustment amount resulting from the calculations in Clause 13.4 shall be dealt with as follows:
- It shall be presented to the affected parties within five (5) business days of its preparation; and
 - Unless, within five (5) business days of the presentation date one (or both) of the affected parties serves a written objection on the other affected party concerning the adjustment amount or its derivation, the adjustment amount will become a debt due and payable within a further five (5) business days.
 - if it is a positive number, then it will be a debt payable by the Builder to the Estate of the Sub-Contractor; and
 - If it is a negative number, then it will be a debt payable by the Estate of the Sub-Contractor to the Builder.
 - If any written objection is made to the adjustment amount or its derivation within the deadline specified, the financial position between the affected parties shall be determined pursuant to the dispute resolution provisions of this Agreement.
- 13.6 Despite any other provision, the Builder shall not terminate the Sub-Contract under the preceding provisions of this Clause if (and only if), within fourteen calendar days after the date of the death,
- other lawful arrangements are made
 - which are satisfactory to the Builder
 - by or with some person
- for continuing and completing the balance of the Sub-Contract and its Works.
- 13.7 All amounts dealt with under this clause are and shall be **GST-inclusive**.

14. DEFECTS

- 14.1 The Sub-Contractor is responsible and liable, at no cost to the Builder or to the Principal, or to any beneficiary of the Sub-Contractor's warranties under Clause 5.1.6 and 14.3 (where either or both of these apply), for
- the rectification of all defective materials and all defective work provided by the Sub-Contractor under this Sub-Contract; and
 - the rectification of all consequential damage caused by or arising from any such defective materials and/or defective work.
- 14.2 Subject to 14.3, the Sub-Contractor's obligations in this respect apply to all defects notified to it by the Builder in writing on or before the expiry of the Defects Liability Period specified in Clause 1.14; until those defects have been effectively and satisfactorily rectified.

- 14.3 Whenever the Head Contract is a **Major Domestic Building Contract**; the duration, extent and content of the Sub-Contractor's obligations with respect to defects in the Works of this Sub-Contract shall be the same as the Builder's obligations under the Head Contract. Without limitation:
- those obligations are not restricted to defects notified within the period referred to in Clause 14.2; but extend to all defects notified within the warranty periods that apply to the Builder's work under the **Domestic Building Contracts Act 1995**; and
 - the meanings of "defect" and "defective" shall be as defined in, or by reference to, the **Domestic Building Contracts Act 1995**.
- 14.4 The Builder may, at any relevant time, give written directions to the Sub-Contractor by notice; specifying
- 14.4.1 any defect or defects and the consequential damage (if any) that have come to the Builder's attention; and
- 14.4.2 the remedial action or actions required to be carried out by the Sub-Contractor; and
- 14.4.3 the dates whereby the Sub-Contractor must start and satisfactorily complete the rectifications; and advising that, in the event of the Sub-Contractor's failure to fully comply with the above directions, it may exercise its rights under Clause 14.5 without any further notice.
- 14.5 If the Sub-Contractor fails or refuses to comply with any directions under Clause 14.4 in any particular or at all, then the Builder shall be entitled, without prejudice to any of its other rights or remedies, to have the aforesaid defects or defects together with any consequential damage remedied by other means; and all costs of and associated with such action shall become a debt due to the Builder from the Sub-Contractor.

15. EXTENSION OF TIME

- 15.1 If, for any reason, it shall become likely that completion of the Sub-Contract Works or completion of any stage thereof may be delayed the Sub-Contractor shall notify the Builder of this circumstance forthwith in writing.
- 15.2 The due making of such notification shall be a condition precedent to any entitlement for the Sub-Contractor to claim an extension of time with respect to any relevant delay that does eventuate; **whenever** the Sub-Contractor's failure to make the said notification promptly or at all results in prejudicing the Builder's position under the Head Contract.
- 15.3 Without limiting the Builder's obligations concerning timely provision of relevant information it must, during the tender period for this Sub-Contract, provide to the Sub-Contractor a copy of the full details of the basis upon which the Builder may be entitled to extensions of time under the Head Contract.
- 15.4 Whenever the Sub-Contractor is delayed or impeded in the execution of the Sub-Contract Works by reason of any matter or circumstance entitling the Builder to an extension of time for the performance of the Head Contract,
- 15.4.1 the Sub-Contractor may make written application to the Builder for an extension of time for the performance of this Sub-Contract.
- 15.4.2 Such application
- shall be made as soon as practicable after the matters or circumstances causing the delay or impediment become known to the Sub-Contractor; and
 - shall contain such information as may be necessary for the Builder to claim an extension of time under the Head Contract - and the Sub-Contractor shall promptly furnish to the Builder any further information the Builder may request as being necessary for that purpose.
- 15.5 Upon receipt of an application by the Sub-Contractor for extension of time pursuant to Clause 15.4 the Builder shall promptly apply for and use its best endeavours to obtain an appropriate corresponding extension of time for the performance of the Head Contract.
- 15.6 The Builder shall grant to the Sub-Contractor an extension of time for the performance of the Sub-Contract commensurate with the relevant extension of time granted to the Builder by the Principal in response to its application pursuant to Clause 15.5.

- 15.7 In the event that
- 15.7.1 the Principal lawfully refuses to grant any extension of time in response to an application made by the Builder pursuant to Clause 15.5; and
- 15.7.2 such refusal is by reason of acts or omissions of the Sub-Contractor,
- then the Sub-Contractor shall forfeit any right to an extension of time with respect to its relevant application.
- 15.8 In the event that the Builder fails to obtain any extension of time from, or has its claim reduced by, the Principal with respect to an application made by the Sub-Contractor under Clause 15.4 by reason of
- 15.8.1 any neglect or delay on the part of the Builder in applying for an extension of time under the Head Contract; or
- 15.8.2 any acts or omissions on the part of the Builder or on the part of any one or more of its other Sub-Contractors in or about the performance of the Head Contract,
- the Sub-Contractor shall be entitled to a fair extension of time from the Builder for the performance of this Sub-Contract.
- 15.9 Any other delay affecting the Sub-Contractor not covered by Clause 15.4 and caused by any act or omission on the part of the Builder or of any one or more of its other Sub-Contractors may form the basis of a written claim by the Sub-Contractor for an extension of time for performance of this Sub-Contract; as follows:
- 15.9.1 The Sub-Contractor must take all practical steps to avoid or minimise the delay arising from the said acts or omissions; and
- 15.9.2 The Sub-Contractor must submit the claim soon as practicable after the extent of the delay becomes known to the Sub-Contractor;

The Sub-Contractor shall be entitled to a fair extension of time in response to such a claim, but such extension shall not exceed the actual delay caused to the Sub-Contractor by the Builder or its other Sub-Contractors.

16. LATE COMPLETION

16.1 ENTITLEMENT TO DAMAGES

Damages against Builder

In case of any delay entitling the Sub-Contractor to an extension of time under Clause 15.9, the Builder shall be liable to pay or allow to the Sub-Contractors liquidated and ascertained damages at the rate specified in Clause 1.14 (c).

In the event that no rate is specified in Clause 1.14 (c), or if said rate is specified to be "nil", "not applicable" or any similar expression, then the Sub-Contractor will be entitled to damages (if any) established at Common Law.

Damages against Sub-Contractor

Whenever

- the Works of the Sub-Contract are not completed on or before the Date for Completion specified in the First Schedule (or by such later date as may result from extensions of time to which the Sub-Contractor is entitled pursuant to this Sub-Contract); and
- the failure to so complete is due to
 - * the Builder exercising its rights, under Clause 11, to take over the whole or part of the Works; or
 - * any other delay caused or countenanced by the Sub-Contractor,

then the Sub-Contractor shall be liable to pay or allow to the Builder liquidated and ascertained damages at the rate specified in Clause 1.14 (b) or Clause 1.14 (a).

In the event that no rate is specified in Clause 1.14 (b) or 1.14 (a), or if said rate is specified to be "nil", "not applicable" or any similar expression, then the Builder will be entitled to such damages against the Sub-Contractor as it may establish at Common Law.

16.2 LIQUIDATED AND ASCERTAINED DAMAGES ["L/D"]

(a) TYPES

Liquidated and ascertained damages referred to in Clause 16.1 may be one of the following three types:

"Principal's Damages"

- This term applies when delays attributable to the Sub-Contractor form any part of a claim made by the Principal against the Builder for delay damages (whether liquidated or otherwise) under or arising from the Head Contract.
- These L/D's shall only be payable or allowable by the Sub-Contractor to the Builder if and to the extent that the Principal actually obtains such damages against the Builder.

"Builder's Damages"

- These L/D's are hereby agreed to apply in full satisfaction of any and all other costs and losses that the Builder may suffer by reason of any delays caused or countenanced by the Sub-Contractor.

"Sub-Contractor's Damages"

- These L/D's are hereby agreed to apply in full satisfaction of any and all other costs and losses that the Sub-Contractor may suffer by reason of any delays caused or countenanced by the Builder.

(b) CALCULATION OF L/D

Subject to the limitations in Clause 16.2 (c) L/D shall be calculated by multiplying the applicable daily rate set out in Clause 1.14 (if any) with the number of relevant delay days.

Delay Days

- In the case of *Builder's Damages*, the number of delay days shall be the number of calendar days expired between the specified date for completion (as it may be extended under this Agreement) and the date on which completion of the Sub-Contract Works was actually achieved.
- In the case of *Sub-Contractor's Damages* the number of delay days shall be the number of working days of extension to which the Sub-Contractor is entitled under Clause 15.6, 15.8 or 15.9,
- In the case of *Principal's Damages* the number of delay days shall be the number of calendar days whereby the Head Contract Works have been delayed by or due to any acts or omissions of the Sub-Contractor, provided that those days form part of a successful claim made by the Principal against the Builder for delay damages (whether liquidated or otherwise) under or arising from the Head Contract.

Daily Rate

the rate for each type of the above delay days shall be the amount specified for that type in **Clause 1.14** These rates are GST-inclusive.

(c) LIMITATIONS

Despite any other provision of this Agreement

- (i) whenever others beside the Sub-Contractor contribute to a delay giving rise to a *Builder's Damages* type of L/D, the Builder shall only recover from the Sub-Contractor an amount that is proportionate to the Sub-Contractor's contribution to the said delay; and
- (ii) whenever others beside the Sub-Contractor contribute to a delay giving rise to a *Principal's Damages* type of L/D,
 - the total amount recoverable by the Builder from all persons that had contributed to the relevant L/D may not exceed the L/D actually recovered by the Principal from the Builder, and
 - the Builder shall not recover from the Sub-Contractor any amount in excess of the Sub-Contractor's share of the liability for the said L/D;

and; in both of the above cases, the total daily rate recoverable by the Builder from all persons that had contributed to the relevant L/D may not exceed the sum of the individual daily rates specified in the Builder's respective agreements with those persons.

(d) OPPORTUNITY TO MITIGATE

Notwithstanding the foregoing where any damage, for which the Sub-Contractor is or would be wholly or partly liable, can be mitigated by some action of the Builder (which would otherwise be outside the scope of the Builder's obligations), such action shall be taken by the Builder. Provided that the Sub-Contractor has given agreement to, and accepted the costs involved in, such action, the Sub-Contractor shall only be liable in respect of such reduced amount of damages.

17. ERRORS & DISCREPANCIES

In case the Sub-Contractor shall find any ambiguity, error, omission, inconsistency or discrepancy in any document, or between any two or more documents, forming part of this Sub-Contract, it shall immediately give notice in writing thereof to the Builder specifying the same and requesting written instructions. The Sub-Contractor shall not proceed with any work that depends on the outcome of those instructions until they are received.

The Builder shall issue the requested instructions and the Sub-Contractor shall comply with and observe the same. Any necessary change or correction to the Sub-Contract Works shall be a variation and shall not vitiate this Agreement. Any adjustment to the Sub-Contract Price shall be contingent on and limited to the corresponding adjustment (if any) made to the Head Contract Price pursuant to the Head Contract.

All delays to the Sub-Contract Works caused or necessitated by above process, including the time required to comply with the instructions, shall entitle the Sub-Contractor to

- a corresponding extension of the Sub-Contract period; and
- the applicable damages for the delays in question from the Builder,

without reference to the Builder's position under the Head Contract.

18. SCAFFOLDING

Where the Builder provides any scaffolding in connection with the Head Contract Works it shall strictly comply with all relevant

- legislated provisions; and
- agreed industrial codes and practices; and
- OH & S requirements

dealing with scaffolding generally and, where applicable, with scaffolding used for the specific purposes contemplated by the Builder.

Unless otherwise specified, the Builder will permit the use by the Sub-Contractor of such scaffolding, subject to the following conditions:

- the Sub-Contractor shall notify the Builder in writing of the nature of its intended use of the scaffolding and of the intended starting date of such use in sufficient time to enable the Builder to modify the scaffolding if and to the extent necessary to meet the Sub-Contractor's requirements; and
- the Sub-Contractor shall not use the scaffolding until notified by the Builder in writing that it is suitable for the Sub-Contractor's operations; and
- the Sub-Contractor shall comply strictly with all requirements and directions of the Builder and of all relevant authorities concerning or affecting the use of the scaffolding.

Where the Sub-Contractor provides its own scaffolding for use in the carrying out of the Sub-Contract Works; it shall strictly comply with all relevant

- legislated provisions; and
- agreed industrial codes and practices; and
- OH & S requirements

dealing with scaffolding generally and with scaffolding used for the Sub-Contractor's specific purposes. In addition, the Sub-Contractor shall also comply strictly with all requirements and directions of the Builder and of all relevant authorities concerning or affecting the use of the scaffolding.

19. OTHER SITE FACILITIES

The Sub-Contractor may be permitted, subject to and on the terms of any agreement to that effect with the Builder, the use or benefit of any of the following facilities for the performance of its on-site obligations under the Sub-Contract:

- single phase electricity (other than for any single piece of equipment drawing in excess of 15 amps),
- water,
- toilet facilities,
- lifting and hoisting facilities,
- mechanical conveyor facilities,
- any other facilities as may be agreed and listed in the Second Schedule

that may be in position for the Builder's own use. The fees or charges (if any) to be paid for the foregoing by the Sub-Contractor to the Builder shall be as set out in the said Schedule.

It is the Sub-Contractor's responsibility to ascertain what facilities the Builder will have available at the time(s) that the Sub-Contract Works are to be carried out.

Should the Sub-Contractor require any other, different or greater facilities than those specified in the previous paragraph, it shall make its own arrangements at its own cost, but subject to the approval of the Builder.

Regardless of the origin of any lifting, hoisting or mechanical conveyor facilities, the Sub-Contractor shall at all times provide its own labour at its own cost for the loading and unloading of items to be moved by these facilities.

Land line telephone, where installed, will be made available provided that the Sub-Contractor shall pay for its outgoing calls.

The Sub-Contractor shall be responsible and liable for all costs, expenses, losses and damages flowing from its neglect or abuse of any of the aforesaid facilities.

20. ACCEPTANCE OF BASE WORK

- 20.1 Subject to Clause 20.3, the Sub-Contractor shall not proceed to carry out any work forming part of the Subcontract over any pre-existing materials or work (whether provided by others under the Head Contract or otherwise), unless and until the Subcontractor is satisfied that the said previous work is satisfactory and suitable.
- 20.2 Whenever the Sub-Contractor forms the view that any such pre-existing material or work is not satisfactory and suitable for receiving the relevant part of the Subcontract Works, it must promptly notify the Builder in writing and
- advise that it is compelled to defer or stop the relevant work (as the case may be); and
 - if applicable, advise that it is compelled to defer and/or stop other parts of the Subcontract Works and specify same; and
 - notify the Builder of a delay (pursuant to Clause 15.1) and
 - seek the Builder's urgent written directions.
- 20.3 Whenever the Builder's response to the above notice contains a direction to proceed with the work in question despite the Sub-Contractor's misgivings or objections, and without effecting or directing any corrective change to either the pre-existing work or to the Sub-Contractor's work, the Builder must accept full responsibility and liability for all adverse consequences of having ignored or overridden the Sub-Contractor's misgivings and objections. The Builder hereby indemnifies the Sub-Contractor with respect to all such adverse consequences. Without limitation, those adverse consequences include all relevant delays, as well as all costs, expenses, losses and damages; together with consequential loss and damage.

21. DAMAGE

21.1 Prevention and Protection

Whenever the nature of the Sub-Contract Works makes it likely that it will damage or soil other parts of the Head Contract Works or any existing structures, services, surfaces etc, it shall take all reasonable steps to prevent such damage or soiling, and to protect the relevant work, structures, services and surfaces during the relevant activities.

21.2 Liability and Indemnity

The Sub-Contractor is responsible and liable, and hereby indemnifies the Builder, for all costs and expenses that do arise and result from any such damage caused by it, and all by persons for whom it is responsible.

The Builder is responsible and liable, and hereby indemnifies the Sub-Contractor, for all costs and expenses that arise from damage to the Sub-Contract Works by the Builder and/or by others.

21.3 Notification

Whenever such damage has occurred, the Sub-Contractor must immediately notify the Builder and vice-versa; as the case may be.

In the event of the Sub-Contract Works being damaged by the Builder or others the Sub-Contractor shall also notify the Builder of the source of such damage (when it is known); or use his best endeavours to identify such source (in all other cases).

22. RESPONSIBILITIES DURING CONSTRUCTION

22.1 Subject to Clause 22.2, until the Builder shall take over the Sub-Contract Works the Sub-Contractor shall be responsible for the care and maintenance of all portions of the Sub-Contract Works except in the case of damage or loss arising from any act or omission on the part of the Builder or of persons for whom the Builder is responsible.

22.2 If any portion or portions of the Sub-Contract Works are taken over by the Builder before completion of the whole of the Sub-Contract Works, Clause 22.1 shall continue to apply only to the balance of the Sub-Contract Works remaining in the control of the Sub-Contractor.

22.3 When the Sub-Contract Works have been completed the Sub-Contractor may serve a written notice on the Builder stating that the Sub-Contract Works have been completed and that it requires the Builder to take over same. Unless, within seven days of the service of this notice, the Builder serves a notice of dispute on the Sub-Contractor, it shall be deemed to have taken over as requested as of the date of service of the Sub-Contractor's notice.

22.4 Such taking over of the Sub-Contract Works shall be for the purpose of responsibility only and shall be without prejudice to any later determination regarding quality, quantity, compliance with the Head Contract, payments and Defects Liability Period, all of which are separately dealt with elsewhere.

23. CLEANING

23.1 During the period of its responsibilities under Clause 22, the Sub-Contractor shall, at its own cost and to the satisfaction of the Builder, clean up, remove and cart away all debris, rubbish, etc from the site within its control. These clean-ups shall be performed at frequent intervals and as reasonably directed by the Builder.

23.2 It shall also clean up remove and cart away all debris, rubbish, etc created by its own operations from other parts of the site, as and when directed.

23.3 At the completion of the Sub-Contract Works the Sub-Contractor shall thoroughly clean those Works and the site of those Works and leave them in a condition suitable for handing over to the Principal and/or as required for any following trades. Including but not restricted to the removal and carting away of all its plant, equipment, tools and other items, together with all debris, rubbish, surplus materials etc.

- 23.4 Should the Sub-Contractor fail to fully comply with this Clause and such failure continue after the expiry of a reasonable written notice from the Builder requiring compliance, the Builder may make other arrangements for having the work carried out and any costs and expenses created thereby shall become a debt to the Builder from the Sub-Contractor.

24. SAFETY

- 24.1 The Sub-Contractor shall carry out the Sub-Contract Works in a safe and satisfactory manner and without limiting the generality of the foregoing shall:
- (a) strictly conform to all applicable provisions of all laws relating to Occupational Health and Safety (OHS); and
 - (b) strictly conform to all OHS and other safety and security measures practices and procedures put in place by the Builder; and
 - (c) ensure that all tackle, gear, stagings, scaffolding, ladders, hoists, winding arrangements and other equipment used for and in conjunction with the Sub-Contract Works shall not only conform to the requirements of all relevant statutory or other regulator provisions but also to those of the Builder; and
 - (d) immediately discontinue any practice or remove any equipment considered by the Builder to be dangerous notwithstanding that the Builder may have previously approved such practice or equipment; and
 - (e) ensure that all persons entering or on the site for whom the Sub-Contractor is responsible are appropriately instructed concerning these matters and that they comply with all of their relevant obligations at all times while on the site;
 - (f) provide, at its own cost, all requisite personal safety clothing and other protective gear and equipment for all persons for whom it is responsible whenever those persons enter the site and as long as they remain there;
 - (g) ensure that all such protective items are in fact appropriately and adequately used by the persons concerned, as required for their own protection and for that of others.
 - (h) remove from the site promptly any person employed by the Sub-Contractor or any person for whom the Sub-Contractor is otherwise responsible, who in the reasonable opinion of the Builder
 - i) creates any danger on or about the Works, or
 - ii) misconducts him- or herself, or
 - iii) is incompetent or negligentand such action shall in no way affect the time schedule.
- 24.2 Unless otherwise agreed,
- (a) the Sub-Contractor must immediately and unconditionally comply with all directions and instructions properly given by the Builder respecting safety and/or security matters.
 - (b) Such compliance is without prejudice to any of the rights of the Sub-Contractor or of the Sub-Contractor's employees and Sub-Contractors.
 - (c) If the Sub-Contractor disagrees with the lawfulness or appropriateness of any such direction or instruction (or any aspect of same), or is of the opinion that compliance involves varying the Sub-Contract Price, the Date for Completion or both, this must be dealt with as a separate issue, to be resolved between the parties independently of the obligation to comply.
 - (d) Subject to sub-clause (e) the Builder hereby indemnifies the Sub-Contractor with respect to all adverse consequences arising from, connected with and with respect to the Sub-Contractor's unconditional compliance with such directions or instructions.
 - (e) Despite sub-clause (d) the Builder's liability to the Sub-Contractor shall be limited to the extent that the adverse consequences referred to are not attributable to any unreasonableness, unlawfulness or negligence of the Builder's.

25. SITE FOREMAN

At all times while actually engaged on the Works the Sub-Contractor must have a competent foreman or other competent employee present and in charge on the site. This person shall be authorised and able

- to receive and to implement such instructions as the Builder may be entitled to give regarding those of the Sub-Contract Works that are being carried out; and
- to make such incidental arrangements (not amounting to variations) as may be necessary or expedient for carrying out the Sub-Contract Works.

26. INDUSTRIAL RELATIONS (IR) MATTERS

The Sub-Contractor shall, in all of its dealings with its employees, its sub-subcontractors and suppliers, be bound by and comply with

- all relevant statutory provisions in and under the *Building and Construction Industry Improvement Act 2005* and the *Fair Work Act 2009* – as they may be amended or superseded by subsequent enactments; and
- all relevant subordinate legislation, rules, regulations, codes, approved practices and the like; and
- all applicable lawfully made industrial agreements;
- the lawful requirements of all authorities having jurisdiction over or relevant to the Sub-Contract Works;
- all relevant provisions of the Head Contract in so far as they may apply to the Sub-Contract, and provided that those are not prohibited or declared unenforceable by law;

The Sub-Contractor shall be responsible and liable for all delays to the Works arising from any failure by it to comply with any of these obligations. It will be similarly liable for delays and associated costs that may flow to the Builder from other lawful consequences (such as lawful industrial action affecting a supplier) arising from any failure of the Sub-Contractor to comply with any of its statutory IR obligations.

27. REMOVAL OF WORKERS

27.1 The Sub-Contractor shall remove from the site and cease henceforth to employ upon the site any worker or workers for whom the Sub-Contractor is responsible and against whom the Builder shall make reasonable written objection with regard to his or her

- quality of workmanship; or
- compliance with lawful directions; or
- compliance with OHS obligations; or
- unlawful acts or conduct; or
- acts, attitude or conduct, being detrimental to
 - * the rights, safety, morale, or discipline of others; or
 - * the proper execution of the Sub-Contract, the Head Contract or both.

27.2 Such removals shall not affect the time schedule.

27.3 Subject to Clause 27.4 the Builder hereby indemnifies the Sub-Contractor with respect to all adverse consequences arising from, connected with and with respect to the Sub-Contractor's compliance with Clause 27.1

27.4 Despite Clause 27.3 the Builder's liability to the Sub-Contractor shall be limited to the extent that the adverse consequences referred to are not attributable to any unreasonableness, unlawfulness or negligence of the Builder's.

28. WORKING HOURS

No part of the Sub-Contract Works shall be executed on site outside of the Builder's normal working hours, except by prior agreement with the Builder. Consent to such agreements is at the Builder's discretion and subject to any reasonable

conditions that the Builder may insist on; including a requirement that the Sub-Contractor pay (or contribute to) the Builder's costs in supervising the site and the Works at such times.

Whenever the Sub-Contractor is failing to maintain the rate of progress specified, or implicit in the Construction Schedule, the Builder may direct the Sub-Contractor to work overtime to remedy the position. Unless the Sub-Contractor's failure had been caused by circumstances outside the Sub-Contractor's control, the Sub-Contractor shall not be entitled to any variation to the Sub-Contract Price or to any extension of time for the performance of the Sub-Contract Works on these grounds.

The Builder may also, from time to time, request the Sub-Contractor to work overtime for the Builder's own benefit. The Sub-Contractor is not obliged to comply with such requests; but whenever it agrees to do so the Builder shall be liable to the Sub-Contractor for the additional costs of carrying out the work in overtime rather than during normal working hours.

29. SITE MEASUREMENTS

Wherever it is necessary and appropriate for the proper execution and building-in of the Sub-Contract Works, the Sub-Contractor shall take all measurements from the structure as it proceeds on the site.

Where the Builder instructs the Sub-Contractor in writing to proceed prior to the structure being available for measurement, the Builder must also specify the relevant dimensions that will be achieved by it and the maximum permissible tolerances (if any). If the Sub-Contractor complies with these instructions, its work will be deemed to comply with the Sub-Contract.

The Builder shall bear the full costs, expenses, damages and losses caused by, arising from or associated with any necessity for additional work or re-work (by the Builder, by the Sub-Contractor and/or by any other person or persons) if subsequently the relevant structure fails to meet the above-specified dimensions (subject to the specified tolerances, if any).

30. PERMITS AND FEES

Unless expressly agreed otherwise, the Sub-Contractor shall apply for, obtain and pay for all permits, fees, licences, royalties etc. as are specially and specifically required for and applicable to the execution of its own work, as distinct from general or comprehensive permits fees or charges (such as the Building Permit, scaffold fees etc) which are the Builder's responsibility. Similarly for all requisite inspections, tests, clearances, compliance certificates etc. that apply with respect to the Sub-Contract Works.

31. DOCUMENTS AND DRAWINGS

31.1 With the exception of the Builder's unit rates, any and all documents forming part of the Head Contract shall be made available to the Sub-Contractor for inspection at the Builder's Registered Office, PROVIDED THAT

- the Sub-Contractor first makes a written request for such inspection; and
- gives at least two working days' notice of such an intention.

A full set of the Head Contract and the Sub-Contract working drawings and specifications shall also be available on site during all normal working hours for the Sub-Contractor's inspection and use, whenever it is required, in the carrying out of the Sub-Contract Works. These sets shall be kept up-to-date by the Builder and neither set (nor any part of either) may be removed from the site office without the Builder's permission.

The Builder shall immediately notify the Sub-Contractor of all amendments made to the drawings and to the specifications from and after the date on which the Sub-Contractor's tender price was first submitted. The Sub-Contractor may, at any time, ask the Builder to confirm that that the drawings and specifications on which it is relying at the time are, in fact, the currently applicable issue.

31.2 There is to be no charge to the Sub-Contractor for any of the above services. Should the Sub-Contractor request, during the Works of the Sub-Contract, a copy of the whole or any part or parts of the General or Special Conditions of the Head Contract or of any other documents forming part of the Head Contract, the Builder shall supply the same at cost to the Sub-Contractor.

32. INSURANCES

32.1 Employees (Worksafe)

- (a) The Sub-Contractor shall insure against all legal liability, loss, claim or proceeding whatsoever relating to any injury to or the death of any or all of the Sub-Contractor's employees and of all other persons for whom the Sub-Contractor is or may become responsible [note that this also includes all self-employed sole-operator Sub-Contractors] where such liability arises from the employee's or other person's participation in or about the execution of the Sub-Contract Works.

This insurance must be in full accordance with the relevant statutory regime in force at the time.

The Sub-Contractor must also ensure that all its own sub-sub-contractors and suppliers have done likewise.

- (b) The Sub-Contractor must also take out common law liability insurance policies covering personal injury to or death of all persons employed by the Sub-Contractor and all other persons to whom the Sub-Contractor may be or become liable.

To the extent permitted by law, the above policies are to be extended to cover any liability the Builder may have to the persons insured.

- (c) Before commencing the Sub-Contract Works the Sub-Contractor must furnish to the Builder satisfactory documentary evidence that such insurances have been affected and supply particulars thereof.

32.2 Sub-Contractors' all risk insurance

- (a) Prior to the commencement of any work under the Sub-Contract, the Sub-Contractor must take out a Sub-Contractor's all risk insurance policy in respect of accident, storm, fire etc damage to the Sub-Contract Works or any part thereof; and also covering loss of or damage to the Sub-Contractor's own property and the property of its employees, suppliers and sub-sub-contractors. Such property includes, without limitation:

- all items of material, fittings, components and/or equipment in the Sub-Contractor's possession or control, but not yet permanently fixed to the land;
- all other items of material, fittings, components and/or equipment intended and ascertained for inclusion in the Sub-Contract Works which are in the possession or control of its sub-sub-contractors or suppliers;
- all the above items in transit; and
- all relevant plant, tools, vehicles and equipment.

- (b) The Sub-Contractor must maintain this policy until the completion of the Sub-Contract Works, or until the Builder, the Principal or any person or persons for whom the either of them is responsible take control, occupation or possession of the Sub-Contract Works, whichever is the earlier.

The minimum cover required is the amount specified in Clause 1.18 (d). If no amount is specified in that item, the minimum cover is to be 150% of the Sub-Contract Price.

- (c) Insurance to cover the above risks in respect of any and all existing buildings - whether or not these are being modified, altered, renovated, extended or added to under the Head Contract - must normally be provided by the Principal and/or the Head Contractor. Should the Sub-Contractor be required to take out any such cover for any reason whatsoever, the obtaining of such additional insurance shall be a variation to the Sub-Contract.

32.3 Third Party Personal Injury and Property Damage [Public Liability]

- (a) The Sub-Contractor shall take out a policy to insure the Sub-Contractor, the Builder and the Principal in respect of their respective liabilities to one another and to other parties for the following risks:

- personal injury to or death of any person; and
- loss of or damage to property

which arises out of, associated with, or with respect to, the performance of the Sub-Contract or the Works of the Sub-Contract. The amount insured for each event under this policy shall be not less than that specified in Clause 1.18 (c). If nothing is specified under that item, the minimum amount is to be \$5 million.

32.4 Evidence of compliance by Sub-Contractor

Prior to commencing any work under the Sub-Contract, the Sub-Contractor must provide to the Builder satisfactory evidence of the existence and details of the above insurance policies; and it must ensure that the policies are kept current and during the currency of this Sub-Contract (or such other period as may be specified herein). Any failure or refusal by the Sub-Contractor to fully comply with any of these obligations will entitle the Builder to withhold payment of any amount(s) to which the Sub-Contractor may otherwise be entitled until

- either the Sub-Contractor complies; or
- in default, the Builder takes out the relevant policy or policies.

In the latter event all associated costs, expenses, losses and damages become a debt to the Builder by the Sub-Contractor and may (inter alia) be deducted from moneys to which the Sub-Contractor is otherwise entitled.

32.5 Limitations on liability

Despite any other provisions in this Agreement, the Sub-Contractor's responsibility and liability are hereby excluded to the maximum extent permitted by law, for and with respect to death of or personal injury to any person, or loss of or damage to any property caused by, arising from or as a result of, any act or omission of

- the Principal or of any persons for whom the Principal is responsible; and
- the Builder or of any persons for whom the Builder is responsible.

32.6 Indemnity for the Sub-Contractor

The Builder hereby indemnifies the Sub-Contractor in respect of all costs, expenses, losses and damages the *builder* may suffer or incur associated with claims arising from any of the excluded risks or events referred to in Clause 32.5.

32.7 Evidence of insurances (generally)

Each party must, within seven (7) days of receiving a written request by the other party, provide satisfactory evidence of all insurance policies which the (first) party is required to take out under the Sub-Contract.

33. INSPECTION OF SUB-CONTRACT WORKS IN PROGRESS

Whenever so requested by the Builder, the Sub-Contractor shall allow or arrange reasonable access, during working hours, for the Builder's or the Proprietor's nominated agents or representatives to inspect any Sub-Contract Works being carried out off-site, at the place of manufacture, fabrication or assembly.

34. ACCESS TO THE PRINCIPAL

The Sub-Contractor is expressly forbidden to approach, or communicate with, the Principal, its employees or any of its agents in connection with any matter concerned with the Sub-Contract or its Works, except:

- with the Builder's prior written consent; or
- in the presence of the Builder or the Builder's site foreman
- if and as provided by statute.

35. INSTRUCTIONS

Save for emergency instructions issued by authorised persons, the Sub-Contractor shall not accept any instructions with respect to the Sub-Contract Works from any person or persons other than the Builder (or the Builder's representative authorised to give such instructions). The Builder will not accept and will not pay for any work carried out or any supplies obtained in compliance with or in reliance on, such unauthorised instructions. The Sub-Contractor will also be wholly responsible and liable for all consequential costs and delays arising from the carrying out of such unauthorised work or obtaining such unauthorised supplier.

36. DOCUMENTS ON COMPLETION

The Sub-Contractor's final payment claim must be accompanied by the following:

- All permits, certificates, approvals, test results, inspection reports, clearances and the like required for and by the authorities with respect to the Sub-Contract Works or any part of same; and
- Manufacturers' and installers' written guarantees and warranties where applicable; and
- Operating manuals, as built drawings, diagrams and the like as and where applicable; and
- All documents it has been issued for the execution of the Sub-Contract Works.

The above list is not exhaustive.

The Sub-Contractor will not be considered to have completed all of its obligations under the Sub-Contract and therefore will not be entitled to final payment unless and until it has fully complied with these provisions.

37. SITE MEETINGS

The Sub-Contractor shall, whenever requested by the Builder, participate at site meetings. The person representing the Sub-Contractor at any site meeting must be a person capable of making decisions for and on behalf of, and must be authorised to bind, the Sub-Contractor.

38. SCHEDULING

The Sub-Contractor shall co-operate with the Builder by providing sufficient detailed information to enable the Builder to implement any form of planning and control desired by the Builder for the Head Contract.

39. ORDERING OF MATERIALS etc

- (a) The Sub-Contractor shall, as soon as practicable after the signing of this Sub-Contract take all reasonable steps, including ordering where necessary, to secure the delivery of all materials, components, fabrications, services and other items so as not to adversely affect the performance of this Sub-Contract. The Sub-Contractor shall thereafter monitor, by reasonable checks and follow-up with his suppliers, the progress of the orders placed.
- (b) Where, in spite of the proper placing of orders as required in sub-clause (a), the monitoring discloses that deliveries may not happen on the date or dates necessary for the Sub-Contractor to meet its contractual obligations, the Sub-Contractor shall immediately notify the Builder in writing; describing the full circumstances and requesting the Builder to seek instructions from the Principal.
- (c) Subject to sub-clauses (d) and (e), the failure by any of the Sub-Contractor's suppliers to meet the Sub-Contractor's required delivery dates does not remove or reduce the Sub-Contractor's obligations responsibilities or liabilities with respect to the agreed construction schedules.
- (d) Despite sub-clause (c) if and when the Principal gives relief to the Builder in response to a request made under sub-clause (b); the Sub-Contractor shall be entitled to similar relief under this Agreement.
- (e) Whenever the supplier of some material or component that has been specified by the Principal and ordered by Sub-Contractor within a reasonable time after the signing of this Sub-Contract, notifies the Sub-Contractor at the time of receiving the Sub-Contractor's order of a delivery period which is such as to cause delays in the execution of the Sub-Contract, the Sub-Contractor shall promptly notify the Builder accordingly.
In such an event the Sub-Contractor shall be entitled to an extension of time for the Sub-Contract Works to the extent of the delay attributable to the excess delivery period indicated by the supplier in question.
- (f) The Sub-Contractor may, from time to time, notify the Builder in writing that it intends to store certain materials or other items for use in the Sub-Contract Works on some part or parts of the Head Contract site. Unless the Builder has reasonable grounds to refuse consent, it shall take such steps as it is reasonably able to make the premises in

question secured and to protect the said materials or articles from theft. However, any such arrangements are always subject to the following conditions:

- the Builder will not be responsible or liable in any way for any of the items so stored; and
 - the Sub-Contractor hereby undertakes to meet the cost of any work necessary to achieve the security referred to above.
- (g) In the event that the Builder is behind schedule, the Sub-Contractor shall be entitled to claim and receive payment for any unfixed materials and other items that are ready for use in accordance with the Construction Schedule, together with the costs of storage until the said items may be incorporated in the Works. Payment of these claims shall be due on or before the 21st calendar day following the service of the claim.
- (h) The Sub-Contractor may also request in writing pre-payment for materials and other items fabricated or acquired for the Sub-Contract Works and stored off-site in readiness for incorporation in the Sub-Contract Works in circumstances other than those specified in sub-clause (g). The Builder shall not be obliged to make any such payment or payments; except
- i) if and to the extent that the Builder is or becomes entitled to obtain pre-payment in respect of such materials and other items under the Head Contract; and
 - ii) subject to such reasonable conditions as the Builder may stipulate concerning property in the said materials or items, cost and security of storage, insurances and other relevant matters.

40. INTELLECTUAL PROPERTY

The Sub-Contractor hereby indemnifies the Builder against any action, claim, suit or demand, cost, expense, loss or damage arising from or with respect to any alleged or actual infringement by the Sub-Contractor of letters, patents, designs, trade marks, names or other protected intellectual property rights in respect of any article, service, product, thing or method provided or used by the Sub-Contractor in connection with the Works **PROVIDED THAT** this indemnity does not apply to any object, article, service, product, thing or method provided or used in compliance with the drawings, specifications or directions issued, supplied or given by the Builder.

41. DISPUTE RESOLUTION

41.1 GENERALLY

The existence of a dispute or difference, or the fact that proceedings are afoot in relation thereto, shall not of itself justify suspension of any work or withholding of any payment. The parties hereby acknowledge that such suspension of work or withholding of payment may constitute a default unless justified under the relevant provisions of this Sub-Contract.

It is hereby agreed that in all cases of dispute or difference the parties will make every reasonable endeavour to resolve the same without resort to arbitration or litigation. In case the Principal (or its authorised representative) shall be concerned in or affected by such dispute or difference, the Builder will use its best endeavours to arrange for the Sub-Contractor to be present at all relevant discussions between the Builder and the Principal (or its authorised representative) and will in any case keep the Sub-Contractor reasonably informed of such discussions and of all negotiations conducted by the Principal in relation to the subject matter of such dispute or difference.

41.2 DOMESTIC BUILDING DISPUTES

Save for any disputes under Clause 41.3 below, all disputes between a Head Contractor carrying out domestic building work and its Sub-Contractor on that work, which arise from under or with respect to that Sub-Contract or the Works of that Sub-Contract, are "*domestic building disputes*" pursuant to the ***Domestic Building Contracts Act 1995***; and they must be dealt with accordingly.

The primary forum for resolution of domestic building disputes is the Victorian Civil and Administrative Tribunal ["VCAT"].

The parties may, at the time that a domestic building dispute arises, wish to submit it to some alternative dispute resolution ["ADR"] process – such as conciliation, mediation or expert determination. Any resolution, compromise or settlement the parties may reach through an ADR process needs to be made the subject of a legally enforceable Deed or an order of a Court or of the VCAT. Before embarking on such a course, each party should first obtain independent legal advice.

41.3 CLAIMS MADE UNDER THE SECURITY OF PAYMENT ACT

Sub-Contractors are entitled to make and pursue payment claims under and in accordance with the **Building and Construction Industry Security of Payment Act 2002** ["the SOPA"].

The exercise of this right is optional, additional and separate to any other legal or contractual rights the Sub-Contractor may have to make ordinary payment claims; and to the rights and obligations the parties have to deal with those claims.

Whenever this right is exercised by the Sub-Contractor, the parties become subject to the applicable provisions of the SOPA with respect to that claim; including various provisions dealing with the *temporary resolution* (via adjudication or Court action) of any disputes concerning the amounts payable and the timing of the payments. Note that such *temporary resolution* processes and determinations are always without prejudice to the substantive legal rights of the parties.

41.4 OTHER DISPUTES

(a) Matters in dispute between the Builder and the Sub-Contractor, which do not involve the Principal

Whenever a dispute or difference shall arise between the Builder and the Sub-Contractor either during the progress of the Sub-Contract Works or after the completion, discharge, determination, abandonment or breach of this Sub-Contract as to the construction, or as to any matter or thing whatsoever under or in connection with, of same then either party may serve on the other a written Notice of Dispute; clearly setting out the subjects and details of the dispute or difference.

At the expiration of seven (7) clear days following the date of service of the Notice of Dispute (unless it shall have been otherwise settled) such dispute or difference shall be and is hereby submitted to arbitration to be effected in the following manner;

- i) by a single Arbitrator nominated by the parties in Clause 1.18 or
- ii) in the event that no Arbitrator is nominated in Clause 1.18, by a single Arbitrator appointed at the written request of either party by the President for the time being of the Master Builders Association of Victoria ["MBAV"].

Whenever option (ii) applies, the party serving a Notice of Dispute shall enclose with the Notice evidence that it has deposited with MBAV the sum of TWO HUNDRED AND FIFTY DOLLARS (\$250.00)² for itself and a further TWO HUNDRED AND FIFTY DOLLARS (\$250.00)³ on behalf of each of the other prospective parties to the proposed arbitration. These payments are by way of a non-refundable fee to MBAV for the nomination process and, where applicable, for the management of the ensuing arbitration process.

The above amounts - and any further amounts that the Arbitrator may, from time to time, order the parties to pay to the MBAV Trust Account as security for the costs and expenses of the arbitral proceedings and awards - shall be, and shall only be, applied in strict accordance with the Arbitrator's written directions in this respect.

The award made by the Arbitrator shall be final and binding on both the Builder and the Sub-Contractor. No party shall be entitled to commence or maintain any other action upon any such dispute or difference until the matters in dispute have been referred to and determined by the Arbitrator as herein provided.

² Or such other amount as the Board of Management of MBAV may, from time to time, determine.

³ As above.

(b) Disputed Matters within the jurisdiction of the Head Contract.

Whenever a dispute or difference shall arise between the Builder and the Principal (which includes, where applicable, the Principal's Agent) in relation to matters falling within the jurisdiction of the Head Contract and which also include or involve the Sub-Contract or the Sub-Contract Works **AND** where on occasion it may be necessary to apportion between the Builder and the Sub-Contractor

- the benefit that may accrue; or
- the liability that may attach

to the Builder consequent upon the determination of the dispute or difference including legal and other expenses incidental thereto such dispute or difference shall be effected in the following manner:

i) **Where the Builder and the Sub-Contractor are both interested**

If the Builder and the Sub-Contractor each have an interest in the result of a dispute or difference between the Builder and the Principal arising from or under the Head Contract, then the Builder may proceed to resolve such dispute or difference in such a manner as may be appropriate between itself and the Principal.

The benefit or liability (as the case may be) resulting from the determination or other resolution of the dispute or difference, together with all costs expenses and other outgoings of the Builder incidental thereto, shall belong to or be borne by (as the case may be) the Builder and the Sub-Contractor in the proportions in which they are interested in the subject matter of the dispute or difference.

In the event that the Builder and the Sub-Contractor fail to agree as to the said proportions, or in any other way regarding the above process, then such disagreement or dispute shall be resolved pursuant to Clause 41.4(a).

ii) **Where only the Sub-Contractor is interested**

Option 1

Save and except for the Builder's entitlement to its margin for profit and overhead provided under the Head Contract, if the Sub-Contractor is the only one of the parties to this Sub-Contract interested in the result of the said dispute or difference then the Builder shall, at the written request of the Sub-Contractor, promptly submit to the Principal on behalf of the Sub-Contractor, all those issues as the Sub-Contractor may specify for dispute resolution under the relevant provisions of the Head Contract, or as the Sub-Contractor may otherwise direct.

Option 2

Despite the above, on receipt of the Sub-Contractor's written request, the Builder may notify the Sub-Contractor in writing that instead of the Builder proceeding as set out in Option 1, the Sub-Contractor may proceed in its own right using the name of the Builder but at the Sub-Contractor's own cost.

PROVIDED THAT as a condition of the Builder proceeding (in **Option 1**) or of allowing the Sub-Contractor to proceed using the name of the Builder (in **Option 2**) the Sub-Contractor must:

- first present to the Builder satisfactory documentation detailing the matters in dispute; and
- indemnify the Builder against any costs expenses and other loss or outgoings that the Builder may pay incur or become liable to bear arising out of any such dispute resolution process; and
- lodge with the Builder at the same time and from time to time thereafter as may appear necessary adequate cash or security against such cost expenses loss or outgoings

The parties hereby accept the determination or determinations made under the relevant dispute resolution processes to which any matters are submitted pursuant to this Clause. This includes accepting the determination as applying to the same issues as between the parties themselves, and any damages awarded shall be accounted for to the Sub-Contractor.

42. NOTICES

42.1 Notices from authorities

The Builder hereby undertakes to promptly provide to the Sub-Contractor a copy of any notice, report, order or other document given to or served on the Builder by any authority, or by any person registered or authorised under the Building Act 1993 to issue or give or serve such documents, in relation to the Sub-Contract Works, as well as any such notice in relation to the Head Contract or to any other matters; which may affect the Sub-Contract or the Sub-Contractor in any way.

The Sub-Contractor hereby undertakes to promptly provide to the Builder a copy of any notice, report, order or other document given to or served on the Sub-Contractor by any of the aforesaid authorities or persons in relation to the Sub-Contract Works or to the Works of the Head Contract.

42.2 Statutory notices

Despite any other provision in the Sub-Contract all notices, reports, orders and other documents required by, or issued under legislation must comply in all respects with the conditions and circumstances (if any) specified under the relevant legislation.

42.3 Methods of Service

Written notices, reports, orders or other documents required or permitted by the Sub-Contract to be given or served (whether by the Builder to the Sub-Contractor or vice-versa), must be given or served in accordance with this clause.

Whenever the Builder gives to or serves on any party any notice, report, order or other document relevant to any part of the Works of the Head Contract, the Builder must also give to or serve on the Principal such notice, report, order or other document.

Unless otherwise stated elsewhere in the Sub-Contract all written notices, reports, orders or other documents required or permitted by the Sub-Contract to be given to or served on the other party may, and may only, be given or served:

- (a) by hand (which may include messenger delivery) to the party to whom it is required to be given; or
- (b) by pre-paid or registered post to the address (stated in the Form of Agreement) of the party to whom it is required to be given; or
- (c) by facsimile to the facsimile number (stated in the Form of Agreement) of the person to whom it is required to be given.

Service by email, SMS or any similar electronic method is not acceptable.

Where a party has given written notice to the other party of any change to their address or facsimile number from that specified in the Form of Agreement (or from that similarly notified on a previous occasion), then all notices (etc) to that first party shall be served to the latest address or facsimile number so notified.

Where a party has failed or refused to notify the other party of any change to its address, facsimile number or other particulars in accordance with the provisions of this Clause, the validity of service by the other party will not be prejudiced as long as the document (etc) is posted or delivered to the last officially notified address, or faxed to the last officially notified facsimile number.

42.4 Time of service

The notices, reports, orders or other documents referred to in Clause 42.3 are deemed to have been given or served as follows:

- (a) If served by hand, they are deemed to have been served on, and received by, the addressee on the date of actual delivery;
- (b) If sent by pre-paid or registered post, they are deemed to have been served on, and received by, the addressee on the second business day after the day of posting;

- (c) If sent by registered post with a confirmed delivery advice signed by or on behalf of the addressee, they are deemed to have been served
- in accordance with that delivery advice; or
 - in accordance with sub-clause (b) - whichever is earlier.
- (d) If sent by facsimile transmission, they are deemed to have been served on and received by the addressee on the date of transmission, if satisfactory confirmation of transmission can be produced by the sender.
- (e) Despite the sub-clause (d), any facsimile message transmitted on a non-business day or after 4.00 pm on a business *day*, will be deemed to have been served on and received by the addressee on the next following business day.

43. AGENTS

Any reference to the Principal, the Builder, the Sub-Contractor or a party shall embrace their respective properly and duly appointed agents and such employees as may reasonably appear to be their agents.

44. SUPERSEDES PREVIOUS OFFERS etc

The Sub-Contract supersedes and/or cancels all previous letters, offers, quotations and negotiations sent or received, **except** in so far as any of them may have been expressly agreed to form part of the Sub-Contract and have been included in or appended to this document.

45. GOODS AND SERVICES TAX (GST)

45.1 Meanings of certain terms

Capitalised expressions in bold type set out in this clause bear the same meanings as the meanings given to those expressions in the *A New Tax System (Goods and Services Tax) Act 1999*. ["the GST Act"]

45.2 Generally

Unless this Sub-Contract provides otherwise, and subject to this clause, any **Consideration** that may be provided for under the Sub-Contract is exclusive of **GST**.

If a party makes a **Taxable Supply** in connection with this Contract 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 clause is subject to a valid **Tax Invoice** being delivered to the **Recipient** of the **Taxable Supply**.

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**.

To the extent that any **Consideration** payable to a party under this Contract is determined by reference to another amount, the **GST-exclusive** amount of the other amount must be used.

46. MISCELLANEOUS

46.1 Unfixed and Demolished Materials

Unless other arrangements are made and documented as a Special Condition of the Sub-Contract, all materials demolished, and all materials supplied, by or on behalf of the Sub-Contractor are and remain the property of the Sub-Contractor for all purposes relevant to the Sub-Contract, until and unless they are permanently fixed to the land as part of the Works of the Sub-Contract.

46.2 Sub-Contractor's Right To Sublet

Subject to the Builder's approval (which may not be unreasonably withheld) the Sub-Contractor may at all times further sublet any part (but not the whole) of the Sub-Contract Works. However, this does not relieve the Sub-Contractor from any obligation or liability under the Sub-Contract or at law.

46.3 Assignment

Neither party may assign the Sub-Contract, any obligation, any payment, or any other right, benefit, interest or cause of action arising from or under the Sub-Contract, without the prior written approval of the other party. Such approval may not be unreasonably withheld.

46.4 Third Party Intellectual Property Rights

The Builder hereby warrants that

- the Principal and/or the Builder have the legal right to use the plans, designs and other materials provided to the Sub-Contractor in the manner that the Builder requires them to be used; and
- there is no breach of copyright or of any other intellectual property right or interest involved in incorporating or otherwise using any such designs in any of the Sub-Contractor's plans, or using any such material in the Sub-Contractor's specifications or constructing the Subcontract Works in accordance with any of the said designs, plans and specifications.

The Builder hereby fully indemnifies the Sub-Contractor against all suits, actions, causes of actions, proceedings, claims and demands for and in respect of any actual or alleged infringement by the Principal, the Builder or the Sub-Contractor of any copyright or of any other intellectual property right, and against all associated costs, expenses, losses or damages that the Sub-Contractor may incur or suffer, in so far as any of these arise from or with respect to the Sub-Contractor reliance on the above warranty.

46.5 Governing Laws

In all respects, the Sub-Contract is governed by and interpreted in accordance with the laws that apply in the State of Victoria.

FIRST SCHEDULE [refer to Clause 5.1]

The Works of the Sub-Contract shall be carried out in accordance with the relevant parts of the following documents:

◆ DRAWINGS

◆ SPECIFICATIONS

◆ CONSTRUCTION SCHEDULE

A set of these documents is attached to, and forms part of the Sub-Contract.

SECOND SCHEDULE [refer to Clause 19]

The following site facilities will be made available by the Builder to the Sub-Contractor on the terms, conditions and prices (or rates) indicated below.

ITEM	TERMS / CONDITIONS	PRICE / RATE
electricity	<ul style="list-style-type: none"> single phase only; and maximum 15 Amp for any one piece of equipment 	
water		
toilets		
lifts / hoists		
mechanical conveyors		

