



TOMAGO ALUMINIUM Company Pty Limited
A.B.N. 68 001 862 228

PART 3
GENERAL CONDITIONS OF CONTRACT

GENERAL CONDITIONS OF CONTRACT

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ANNEXURES:

ANNEXURE PART A – GENERAL CONDITIONS OF CONTRACT
APPROVED FORM OF UNCONDITIONAL UNDERTAKING
APPROVED FORM OF PARENT COMPANY GUARANTEE
RELEASE

GENERAL CONDITIONS OF CONTRACT

1.0 CONSTRUCTION OF CONTRACT

The Contract shall be governed by the construed with reference to the laws for the time being in force in New South Wales.

Unless otherwise provided, prices are in Australian currency and payments shall be made in Australian currency at the place named in the Annexure.

Communications between the Principal, the Superintendent and the Contractor shall be in the English language.

Measurements of physical quantities shall be in Australian legal units of measurement within the meaning of the Weights and Measures (National Standards) Act 1960 as amended from time to time.

Where provisions in the General conditions of Contract are expressed to be alternatives and the Contract fails to state which alternative applies, the first alternative shall apply.

2.0 INTERPRETATION

In the Contract, except where the context otherwise requires –

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

‘Contract Sum means –

- (a) where the Principal accepted a lump sum, the lump sum;
- (b) where the Principal accepted rates, the sum ascertained by calculating the products of the rates and the corresponding quantities in the Bill of Quantities or Schedule of Rates;
- (c) where the Principal accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (a) and (b),

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

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

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

‘Date of Practical Completion’ means

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

but if an extension of time for Practical Completion is granted by Superintendent, it means the date resulting from the extension of time.

‘Date of Practical Completion’ means the date certified by the Superintendent in a Certificate of Practical Completion under Clause 41.5 to be the date upon which the Works reached Practical Completion;

‘day’ means calendar day;

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

‘material’ means any raw, manufactured or fabricated material, goods, machine, equipment, plant (other than Constructional Plant) item or thing required for incorporation in Works;

‘month’ means calendar month;

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

‘Practical Completion’ is the stage in the execution of the work under the Contract or a Separable Portion generally when:

- (a) the Works are complete and the Contractor has completed all the work, except for minor omissions or minor defects:
 - (i) which, in the Superintendent’s opinion, do not prevent the Works from being used for its intended purpose;
 - (ii) in relation to which the Superintendent determines that there are reasonable grounds for not rectifying them; and Rectification of which will not, in the Superintendent’s opinion, prejudice the convenient use of the Works;
- (b) those tests which are required under the Contract to be carried out and passed before the Works reach Practical Completion have been carried out and passed; and
- (c) such documents and other information required under the Contract have been supplied to the Superintendent including, but not limited to:
 - (i) all final ‘as built’ drawings, and
 - (i) all final documentation as required in the technical specification, and
 - (ii) all final VTF and VTC forms, and

(iii) if required by the Contract all POV and NOV forms.

'Principal' means the Principal stated in the Annexure;

'provisional sum' includes monetary sum, contingency sum and prime cost item;

'Schedule of Rates' means any schedule included in the Contract which, in respect of any section or item of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices;

'Separable Portions' means a portion of work under the Contract described in the Contract as a Separable Portion or made a Separable Portion under Clause 34.4;

'Site' means the land and other places to be made available and any other lands and places made available to the Contractor by the Principal for the purpose of the Contract;

'Specification' means the specification or specifications for work to be carried out as existing at the Date of Acceptance of Tender and any modification of such Specification thereafter directed or the use of which has been permitted by the superintendent pursuant to powers contained in the Contract;

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

'Superintendent Representative' means a person appointed in writing by the Superintendent under Clause 23;

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

'work under the Contract' means the work which the Contractor is or may be required to execute under the Contract and includes variations, remedial work, constructional Plant and Temporary Works, the supply of goods and materials, production of designs, preparation and/or submissions of drawings and performance of services;

'Works' means the whole of the work to be executed in accordance with the Contract generally, but not exclusively, as described in the Scope of Work, including variations provided for by the Contract, which by the Contract is to be handed over to the Principal;

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

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

Words importing a gender include every gender.

3.0 NATURE OF CONTRACT

3.1 Performance and Payment

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

The Principal shall pay the contractor:

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

adjusted by any additions or deductions pursuant to the Contract.

3.2 Quantities

Quantities in a Schedule of Rates are estimated quantities only.

3.3 Omitted items

The Schedule of Rates includes the cost of the whole of the Works and other incidentals associated with or necessary for the execution of the work under the Contract. Where an item does not appear in the Schedule of Rates, the cost shall be deemed to have been included elsewhere in the rated or prices and no adjustments shall be made to the rates or prices, the schedule or the Contract Sum, for that item.

3.4 Joint and Several Liability

Where the Contractor comprises more than one person, each such person shall be jointly and severally liable to the Principal in respect of the contractor's obligations under the Contract.

4.0 SECURITY, RETENTION MONEYS AND PERFORMANCE UNDERTAKINGS

4.1 Purpose

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

4.2 Provision of Security

If it is provided in the Annexure that a party shall provide security then the party shall provide security in the amount stated in the Annexure and in accordance with the clause.

4.3 Form of Security

The security shall be in the form of cash, or an unconditional irrevocable bank undertaking.

The party having the benefit of the security shall have discretion to approve or disapprove of the form of an unconditional undertaking and the financial institution or insurance company giving it or other form of security offered. The form of unconditional undertaking attached to these General Conditions is approved.

If the security is not transferable by delivery it shall be accompanied by an executed transfer. The costs (including all stamp duty or other taxes) of an incidental to the transfer and retransfer shall be borne by the party providing the security.

4.4 Time for Lodgement of Security

Security shall be lodged within 28 days of the Date of Acceptance of Tender. Failure to lodge security within that period shall be a substantial breach of Contract within the meaning of Clause 44.

4.5 Substitution of Security for Retention Moneys

The Contractor shall be at liberty at any time to provide in lieu of retention moneys additional security in any of the forms permitted by Clause 4.3. To the extent that additional security is provided the Principal shall not deduct retention moneys and shall forthwith release retention moneys.

4.6 Reduction of Security and Retention Moneys

Upon issue of the Certificate of Practical Completion, or if there is more than one Separable Portion, then upon the issue of the last Certificate of Practical Completion, the Principal's entitlement to security and retention moneys shall be reduced to the percentage thereof stated in the Annexure or, if no percentage is stated, by one-half.

If in the opinion of the Superintendent it is reasonable to further reduce the Principal's entitlement to moneys or security, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.

The Principal shall release security and retention moneys in excess of the entitlement.

4.7 Release of Security

If the Contractor has provided additional security pursuant to Clause 4.4, the Principal shall release that additional security upon incorporation into the Works of the unfixed plant or materials in respect of which the additional security was furnished.

If the Principal has provided security, then when the Contractor has been paid all moneys due to the Contractor under the contract or a Separable Portion the Contractor shall account to the Principal for security lodged by the Principal in respect of the Contract or the Separable Portion, as the case may be.

If the Contractor has provided security then the Principal shall release it when required by Clause 4.8.

4.8 Interest on Security and Retention Moneys

The party holding retention moneys or cash security shall own any interest earned on the retention moneys or security.

5.0 EVIDENCE OF CONTRACT

5.1 Contract in Absence of Formal Instrument of Agreement

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

5.2 Formal Instrument of Agreement

If the conditions of tendering require that a Formal Instrument of Agreement be executed:

- (a) Within 28 days after the Date of Acceptance of Tender the Principal shall prepare in duplicate a Formal Instrument of Agreement and request the Contractor to execute it;
- (b) Immediately upon being requested in writing by the Principal so to do the Contractor shall execute both copies of the Formal Instrument of Agreement in the manner directed in writing by the Principal and return them to the Principal;
- (c) Within 28 days after receipt from the Contractor of the two copies of the Formal Instrument of Agreement duly executed by the Contractor the Principal shall execute both copies, have them stamped (unless they are exempt from duty) and forward one copy to the Contractor.

The Superintendent may extend the periods.

6.0 SERVICE OF NOTICES

A notice shall be deemed to have been given when it is received by the person to whom it is addressed or is delivered to the address of the person last communicated by the person to the person giving the notice, whichever is the earlier.

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

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

7.0 CONTRACT DOCUMENTS

7.1 Discrepancies

In the event of any discrepancy, contradiction or ambiguity between anything contained in the Contract documents, the following order of precedence shall apply:

- (a) the Formal Instrument of Agreement;
- (b) the Special Conditions;
- (c) the Tender Form, Commercial Terms and Schedules (except Schedule G);
- (d) the General Conditions of Contract;
- (e) the Technical Specification;
- (f) the Specifications other than the Technical Specification and the Standard Specifications;
- (g) the Drawings other than the Standard Drawings;
- (h) the Standard Drawings;
- (i) the Standard Specifications and Reference Drawings;
- (j) the other Contract Documents; and
- (j) Schedule G to the Commercial Terms and Schedules.

Annexures and appendices shall be accorded the respective authority of the document incorporating them into the Contract. In the event of any difference between any document and its annexure or appendix, the document shall prevail.

The Contractor shall notify the Superintendent of any ambiguity or discrepancy discovered by the Contractor. In the event of any ambiguity or discrepancy being discovered and brought to the attention of the Superintendent, the Superintendent shall direct the Contractor as to the interpretation to be followed by the Contractor in carrying out the work.

In the event that any ambiguity or discrepancy relates to a standard of quality or finish of work, unless otherwise directed by the Superintendent, the highest standard is required.

The Contractor shall be deemed to have carefully checked all documents comprising the Contract for ambiguities or discrepancies before commencing to carry out the Works and the failure to the Contractor immediately to refer any such ambiguity or discrepancy to the Superintendent in due time before incurring any associated expense or delay shall prohibit the contractor from claiming for any additional expenses or extension of time arising from any such ambiguity, discrepancy or inconsistency.

If the direction causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 39.2.

7.2 Dimensions

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

7.3 Supply of Documents by Principal

The Principal shall supply to the Contractor two (2) copies of the Contract documents (in addition to the one (1) executed copy) and three (3) copies of the Drawings, Specification, and other documents required by the Contract to be supplied to the Contractor by the Principal. With the exception of the original issue upon execution of the Contract, all subsequent issues will be transmitted to the Contractor's Site office.

All drawings supplied by the Principal or the Superintendent shall, unless stamped 'Approved for Construction' by the Superintendent, be deemed to be marked 'Hold' and the provisions of Clause 7.8 shall apply.

An 'Approved for Construction' stamp on drawings shall not override a 'Hold' making on any part of the drawing.

Documents supplied to the Contractor shall remain the property of the Principal and shall be returned by the Contractor to the Principal on demand in writing.

7.4 Supply of Documents by Contractor

If the Contract requires the Contractor to supply documents, the contractor shall supply three (3) copies unless otherwise specified elsewhere. The Superintendent will advise the Contractor the place for delivery of such documents.

If the contract provides that the Contractor must obtain the Superintendent's approval to the use of documents supplied by the Contractor then:

- (a) The Superintendent shall not be bound to check the documents for errors, omissions or compliance with the requirements of the Contract;
- (b) Notwithstanding the provisions of Clause 22, the Superintendent's approval shall not relieve the Contractor from responsibility for the Contractor's errors or omissions or compliance with the requirements of the Contract;
- (c) Within the time stated in the Annexure (or if no time is stated then within 14 days) after receipt of the documents the Superintendent shall advise the Contractor that the documents are suitable or are not suitable;
- (d) If the Superintendent advises the Contractor that the documents are not suitable, the Contractor shall submit new or amended documents;
- (e) The Superintendent shall not reject documents which are in accordance with the requirements of the Contract;

Copies of documents supplied by the Contractor shall be the property of the Principal.

7.5 Availability of Documents

During the execution of the work under the Contract one complete set of Drawings, Specification and other written information supplied by the Principal, the Superintendent and the Contractor shall be kept by the Contractor at the Site or other location approved in writing by the Principal and shall be available at all times for reference by the Principal, the Superintendent and any person nominated in writing by either of them.

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

7.6 Confidential Information

All specifications, drawings, samples, models, patterns, calculations, data, flowsheets, know-how, reports, notes, proposals, commercial data and other information or things developed by the Principal or the Superintendent or provided to the contractor by the Principal or Superintendent shall be confidential and shall not be disclosed by the Contractor to a third party, except with the Principal's prior, written consent.

If required in writing by a party, the other party shall enter into a separate agreement not to disclose to anyone else any confidential matter even after the expiry of the Contract.

The Contractor shall not, and shall ensure that its subcontractors and suppliers do not:

- (a) take any photographs or sketches of the Works or the installations, buildings, equipment or any part of or activity related to the project; or
- (b) disclose to any other person any information relating to the Works, the work under the contract or the project, without the Principal's prior, written consent.

7.7 Media Release

The Contractor shall not, and shall ensure that its subcontractors and suppliers do not, issue any information, publication, document, photograph, text or article for publication concerning the Works, the work under the Contract or the project in any media without the prior, written approval of the Principal.

7.8 Holds on Documents

'Hold' marked by the Principal, Superintendent or those producing documents for either on any drawing, specification or other data indicates that the information or section so marked is tentative only. The Contractor shall not proceed with the work shown in that area or section before being advised in writing by the Superintendent that the 'Hold' no longer applies. If 'Hold' markings will delay progress or commencement and completion dates or cause extra cost to be incurred, the Contractor shall report in writing such likely delay or cost to the Superintendent as soon as it becomes apparent to the Contractor, but not less than five (5) days prior to the anticipated start of the delay and before any extra cost is incurred.

The failure of the Contractor so to report such likely delay or cost to the Superintendent in due time before suffering or incurring the cost or delay shall prohibit the contractor from being entitled to claim any such cost or extension of time arising from such 'Hold' markings.

8.0 ASSIGNMENT AND SUBCONTRACTING

8.1 Assignment

The Contractor shall not, without the prior, written approval of the Principal, and except on such terms and conditions as are determined in writing by the Principal, assign, mortgage, charge or encumber the contract or any part thereof or any benefit, moneys or interest thereunder. The Principal may, without the prior approval of the Contractor, assign, mortgage, charge or encumber the Contract or any part thereof or any benefit, moneys or interest thereunder.

8.2 Subcontracting

The Contractor shall not without the written approval of the Superintendent, which approval shall not be unreasonably withheld, subcontract or allow a subcontractor to assign or subcontract work described in the Annexure.

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

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

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

Approval may be conditional upon the subcontract including:-

- (a) provision that the subcontractor shall not assign or subcontract without the consent in writing of the Contractor;
- (b) provision which may be reasonably necessary to enable the Contractor to fulfil the Contractor's obligations to the Principal;
- (c) terms and conditions similar to or identical with the terms and conditions of the Contract.

8.3 Contractor's Responsibility

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

9.0 DESIGNATED, SELECTED AND NOMINATED SUBCONTRACTORS

9.1 Definitions

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

- (a) 'Designated Subcontractor' means a subcontractor named in the Contract or chosen jointly by the Contractor and the Principal or the Superintendent on the Principal's behalf and may include persons with whom the Principal has entered a contract before this Contract on terms that the prior contract will be assigned by the Principal to the Contractor;
- (b) 'Selected Subcontractor' means a subcontractor selected by the Contractor from a list of subcontractors approved for Selected Subcontracted Work;
- (c) 'Nominated Subcontractor' means a subcontractor to whom the Contractor is directed by the Superintendent to subcontract Nominated Subcontract Work.

9.2 Designated Subcontract

If the Contract includes Designated Subcontract Work, the Contractor shall subcontract the Designated Subcontract Work to the Designated Subcontractor.

If the Contract provides that the Principal may assign to the Contractor a prior contract between the Principal and a Designated Subcontractor, the Contractor shall accept the assignment and, unless the Contract otherwise provides, the Contractor shall give the Principal credit for payments made by the Principal to the Designated Subcontractor in respect of the Designated Subcontract Work.

If the Contract does not name a Designated Subcontractor and the Contractor and the Principal cannot agree upon a Designated Subcontractor, the Superintendent shall nominate a Nominated Subcontractor.

9.3 Selected Subcontract

If the Contract includes Selected Subcontract Work the Contractor shall subcontract the Selected Subcontract work to a Selected Subcontractor.

If the Contract does not include a list of approved subcontractors, the Contractor shall provide a list for the approval of the Superintendent. The Superintendent shall not unreasonably refuse to approve any subcontractor on the list.

If the Superintendent does not approve of any subcontractor on the list provided by the Contractor or if no subcontractor on the list included in the Contract or provided by the Contractor will subcontract to perform the Selected Subcontract Work, the Selected Subcontract Work shall be regarded as Nominated Subcontract Work and the Superintendent shall nominate a Nominated Subcontractor.

9.4 Nominated Subcontract

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

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

- (a) that in respect of the Nominated Subcontract Work the Nominated Subcontractor will undertake towards the Contractor obligations and liabilities which will enable the Contractor to discharge the Contractor's obligations and liabilities to the Principal under the terms and Contract;
- (b) that the Nominated Subcontractor will indemnify the Contractor against loss resulting from any failure by the Nominated Subcontractor and the Nominated Subcontractor's servants and agents and against any misuse by them of any Constructional Plant or Temporary Works provided by the Contractor for the purpose of the Contract;
- (c) that the Nominated Subcontractor will lodge security in a form provided by Clause 5.3 and that security and retention moneys shall be calculated on the same scale and on the same basis respectively as apply in the contract between the Principal and the Contractor;
- (d) equivalent to those in Clause 43;
- (e) such other terms and conditions similar to or identical with the terms and conditions of the Contract, as the Superintendent requires.

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

Provided that the Contractor's program or proposed program is reasonable, 'reasonable objection' includes the ground that the Nominated Subcontractor will not be able to or refuses to contract to carry out the Nominated Subcontract Work in the sequence and at the times shown in the program

If the contractor declines to enter into a subcontract with the Nominated Subcontractor on the ground that the Nominated Subcontractor refuses to enter into a subcontract containing provisions in paragraphs (a) to (e) of Clause 9.4 the Superintendent shall nominate another Nominated Subcontractor or direct the Contractor to enter into a subcontract with the Nominated Subcontractor on such other terms as the Superintendent specifies. In the latter event;

- (f) the Contractor shall not be bound to discharge obligations and liabilities under the Contract to the extent that the subcontract terms so specified by the Superintendent are inconsistent with the discharge;

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- (g) if the Contractor suffers loss arising out of the refusal of Nominated Subcontractor to accept such provisions the Principal shall pay to the Contractor the amount of the loss which the contractor could not reasonably avoid subject to the Contractor providing proof of such loss to the reasonable satisfaction of the Principal.

The Contractor shall not be required to enter a subcontract on terms which, bearing in mind the provisions of sub-paragraphs (f) and (g), are reasonable.

9.5 Provisions applying generally to Designated, Selected and Nominated Subcontract Work

If the Contractor is required by Clause 9 to enter into a subcontract, the Contractor shall proceed promptly to do so and shall notify the Superintendent in writing as soon as the subcontract has been effected.

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

Where the Designated, Selected and/or Nominated Subcontract Work includes design then, in respect to that work:

- (a) the Contractor shall be responsible for the design, design development and documentation and for the suitability for its intended purpose, integrity and effectiveness of the subject work and the design; and
- (b) the Contractor warrants to the Principal that proper professional skill and care has and will be exercised in the carrying out and finalisation of the subject work and the design work and in all relevant calculations, so as to ensure that the Works, or relevant part of the Work, is suitable and fit for its intended purpose and is designed to the Principal's satisfaction and in accordance with the Contract.

9.6 Termination of Designated and Nominated Subcontracts

The Contractor shall not unreasonably terminate a subcontractor for Designated or Nominated Subcontractor Work and as early as possible the Contractor shall notify the Superintendent of the Contractor's intention to terminate and the reasons. If a Designated or Nominated Subcontractor repudiates or abandons the subcontract or it is terminated, the Contractor shall forthwith notify the Superintendent in writing and the Superintendent shall proceed under Clause 9.4 to nominate a Nominated Subcontractor to complete the subcontract work and Clause 10(b) shall apply.

10.0 PROVISIONAL SUMS

A provisional sum or provisional item included in the Contract shall not itself be payable by the Principal but:

- (a) where at the direction of the Superintendent the work or item to which the provisional sum relates is performed or supplied by the Contractor, the work or item shall be valued under Clause 39.2;
- (b) where at the direction of the Superintendent the work or item to which the provisional sum relates is performed or supplied by a subcontractor to the Contractor the Principal shall pay the Contractor the amount payable to the subcontractor for the work or item, disregarding any damages payable by the Contractor to the subcontractor or vice versa, plus the amount or percentage thereon for profit and attendance stated in the Annexure or elsewhere in the Contract;
- (c) where at the option of the Principal the work covered by a provisional sum or a provisional item is omitted, the Contractor shall not be entitled to any compensation arising from such omission notwithstanding that the amount omitted may have been included in the Contract Sum.

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

11.0 LATENT CONDITIONS

11.1 The Contractor to Inform Itself

The Contractor shall be deemed to have;

- (a) examined carefully and acquired actual knowledge of the contents of the Contract, including the schedules, and any other information made available by the Principal or the Superintendent to the Contractor for the purpose of execution of the work under the Contract;
- (b) examined all information relevant to the risks, contingencies and other circumstances having an effect on the work under the Contract;
- (c) examined the Site, the buildings presently comprising the Tomago Smelter, the surroundings of the Site and all physical conditions and characteristics connected with the Site, including all relevant physical conditions on and below the surface of the Site;
- (d) informed itself of the nature of the work and materials necessary for the execution of the work under Contract, the means of access to the facilities at the Site, and transport facilities for deliveries to the Site;
- (e) inform itself of the availability of professional services and labour and the terms and conditions on which those services and labour can be engaged for the work under the Contract; and
- (f) satisfied itself as to any correctness and sufficiency of the Contract Sum and that the process and rates (if any) in the Contract cover all of the costs of complying with its obligations under the Contract.

11.2 Failure by Contractor to inform itself

Failure by the Contractor to do all or any of the things that it is deemed to have done under Clause 11.1 will not relieve it of its liability to carry out and complete the work under the Contract in accordance with the terms and conditions of the Contract.

12.0 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

The Principal warrants that unless otherwise provided in the Contract:

- (d) design;
- (e) materials;
- (f) documents; and
- (g) methods of working,

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

All payments for royalties or fees in respect of letters patent, registered designs, trademarks or names, copyright or other protected rights due or payable for or in connection with any matter or thing used or required to be used in performance of the Contract or to be supplied under the Contract, whether payable in one sum or by instalment or otherwise shall be deemed to have been included by the Contractor in the Contract Sum and shall be paid by it to those to whom they may be due or payable. Such payments shall not include continuing payments arising out of the use by the Principal of any part of the Works, provided that details of the liability for such continuing payments and any relevant conditions as to the use have been notified in writing to the Principal by the Contractor and accepted in writing by the Principal.

The Contractor shall indemnify the Principal and Superintendent against any action claim or demand costs or expenses from or incurred by reason of any infringement or alleged infringement of letters patent, registered design, trademark or name, copyright or other protected right in respect of any design, document, machine, equipment, work material or thing, system or method of using, fixing, working or arrangement used or fixed or supplied by the Contractor.

13.0 STATUTORY REQUIREMENTS

13.1 Complying with Statutory Requirements

The Contractor shall comply and shall ensure that its subcontractors and suppliers comply with the requirements of:

- (a) Acts of the Commonwealth;
- (b) Acts and Ordinances of the State or Territory in which the work under the Contract or any part thereof is carried out;
- (c) Ordinances, regulations, by-laws, orders and proclamations under the Acts and Ordinances;
- (d) Persons acting in the exercise of statutory powers enabling them to give directions affecting the work under the Contract or the work of other contractors on the Site.
- (e) The Superintendent may approve or not approve workers nominated for commencement on Site based upon the appropriateness of the workers skills and experience.

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

If a requirement necessitates a change in the Works or so much of the Temporary Works or method of working as may be specified in the Contract, the Superintendent shall order a variation under Clause 39.1.

Except to the extent that Clause 13.1 or another provision of the Contract provides reimbursement in respect of a requirement referred to in Clause 13.1 the Contractor shall bear the cost of complying with the requirement, irrespective of whether the requirement existed at the time of tendering or not.

Without affecting the generality of the provisions of this Clause 13.1, the Contractor assumes full and exclusive responsibility and liability for withholding and paying as may be required by law, all Federal, State and local taxes and contributions with respect to, assessed against, or measured by the Contractor's earnings hereunder or the Contractor's employees, all sales and use taxes, and all other taxes or contributions applicable to the work under the Contract and the Works (including taxes measured by the value of personal property, Payroll Tax and Work Care Levy) and shall make all returns and/or reports required in connection with any and all such laws, taxes and contributions.

13.2 Notices and Fees

The Contractor shall give the notices and pay the fees necessary to comply with the requirements referred to in Clause 13.1.

If, after the 28th day prior to the date of closing of tenders, there is an increase or a decrease in a fee required to be paid by the Contractor to a municipal or statutory authority in relation to the Works or the Temporary Works the difference shall be valued under Clause 39.2.

13.3 Documents Evidencing Approvals of Authorities

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

14.0 PROTECTION OF PEOPLE AND PROPERTY

14.1 Persons, Property and Traffic

In executing the work under the Contract, in relation to the Site and the Tomago Smelter, the Contractor shall:

- (a) Obstruction

Avoid, and shall ensure that its subcontractors avoid, obstruction of or damage to drains, watercourses, public utilities, air conditioning, light and power supply and other services on or adjacent to the Site which are visible or the location of which can be ascertained by the Contractor from the Appropriate Authority or from this Contract and shall have any obstruction removed immediately and shall have made good all damage caused by the Contractor, its employees, agents or subcontractors. In the event of the Contractor's failure to so do, the Superintendent may have the remedial work carried out and the cost incurred shall be a debt due from the Contractor to the Principal or may be deducted from any payment to the Contractor under Clause 41.

(b) Interference

Avoid, and shall ensure that its subcontractors avoid, interference with or damage to property on or adjacent to the Site, and ensure the provision of temporary protection for, and shall make good all damage caused to, such property of the Principal, the Superintendent, their employees, professional consultants or agents, either directly or indirectly. In the event of the Contractor's failure to so do, the Superintendent may provide the temporary protection and have the remedial work carried out and the cost incurred shall be a debt due from the Contractor to the Principal or may be deducted from any payment to the Contractor under Clause 41.

(c) Nuisance

Prevent, and ensure that its subcontractors prevent, nuisance to Principal's and Superintendent's employees, agents and visitors and of properties adjacent to the Site and to the public generally.

Without limiting the generality of the Contractor's obligations, they include the provision of barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, removal of obstructions and protection of services.

In addition to the abovementioned obligations, if the Contractor or the employees or agents of the Contractor damage property, including but not limited to public utilities and services and property on or adjacent to the Site, the Contractor shall promptly make good the damage and pay any compensation which the law requires the Contractor to pay.

If the Contractor fails to comply with an obligation under Clause 14 the Principal may, in addition to any other remedy, perform the obligation on the Contractor's behalf and the cost incurred by the Principal shall be a debt due from the Contractor to the Principal.

14.2 Safe-Working Practices

The Contractor shall indemnify and keep indemnified the Principal, the Superintendent or their employees and agents from and against any claim, action, loss, damage or penalty that may be brought against or imposed on any of them for a breach of any Act, regulation or by-law relating to health or safety that may be a direct or indirect consequence of an act or omission of the Contractor, its subcontractors and its or their employees or agents.

15.0 CARE OF THE WORK AND REINSTATEMENT OF DAMAGE

15.1 Care of the Work Under the Contract

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

Without limiting the generality of the Contractor's obligations, the Contractor shall be responsible for the care of unfixed items the value of which has been included in a payment certificate under Clause 41.1, things entrusted to the Contractor by the Principal for the purpose of carrying out the work under the Contract, things brought on the Site by subcontractors for that purpose, the Works, the Temporary Works and Constructional Plant and the Contractor shall provide the storage and protection necessary to preserve these things.

After 4 p.m. on the Date of Practical Completion the Contractor shall remain responsible for the care of outstanding work and items to be removed from the Site by the Contractor and shall be liable for damage occasioned by the Contractor in the course of completing outstanding work or complying with obligations under Clauses 30.1 and 36.

15.2 Reinstatement

If loss or damage (except loss or damage which is the direct consequence, without fault or omission on the part of the Contractor, of an Excepted Risk defined in Clause 15.3) occurs to anything while the Contractor is responsible for its care, the Contractor, to the extent that such loss or damage is not covered by the insurance policies effected under the Contract, shall at the Contractor's own cost promptly make good the loss or damage.

15.3 Excepted Risks

The Excepted Risks are:

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

15.4 Underground Services

The location of some underground services may vary from positions indicated on the Drawings and the Contractor shall ensure that all reasonable care is exercised during the excavation. The Contractor shall repair any damage caused by it, its subcontractors or its workers at its own expense. The Contractor shall not undertake any excavation work prior to obtaining from the Superintendent an 'Excavation Permit'.

16.0 DAMAGE TO PERSONS AND PROPERTY OTHER THAN THE WORKS

16.1 Indemnity by Contractor

The Contractor shall indemnify the Principal against:

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

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

Clause 16.1 shall not apply to:

- (c) the extent that the liability of the Contract is limited by another provision of the Contract;
- (d) excluded any other right of the Principal to be indemnified by the Contractor;
- (e) things for the care of which the Contractor is responsible under Clause 15.1; and
- (f) claims in respect of the right of the Principal to construct the work under the Contract on the Site.

16.2 Indemnity by the Principal

The Principal shall indemnify the Contractor in respect of claims referred to in Clause 16.1(f).

17.0 INSURANCE OF THE WORKS

Before the Contractor commences work, the Contractor shall take out an insurance policy covering the things referred to in Clause 15.1 against loss or damage resulting from any cause whatsoever until the Contractor ceases to be responsible for their care. Without limiting the generality of the obligation to insure, the policy shall cover the Contractor's liabilities under Clause 15.2 and things in storage off Site and in transit to the Site.

The insurance cover may exclude-

- (a) the cost of making good fair wear and tear or gradual deterioration but shall not exclude the loss or damage resulting therefrom;
- (b) the cost of making good faulty design, workmanship and materials but shall not exclude the loss or damage resulting therefrom;
- (c) consequential loss of any kind, but shall not exclude loss of or damage to the Works;
- (d) damages for delay in completing or for the failure to complete work;
- (e) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion or nuclear fuel resulting from any cause;
- (f) loss or damage resulting from the Excepted Risks (b) and (c) in Clause 15.3.

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

- (g) the Contract Sum;
- (h) the amount stated in the Annexure to provide for costs of demolition and removal of debris;
- (i) the amount stated in the Annexure to cover fees of consultants;
- (j) the value stated in the Annexure of any materials or things to be supplied by the Principal for the purposes of the work under the Contract; and
- (k) the additional amount or percentage stated in the Annexure of the total of the items referred to in sub-paragraphs (g) to (k) of this paragraph.

The insurance policy shall be in the joint names of the Principal and the Contractor and shall cover all subcontractors employed from time to time in relation to the work under the Contract for their respective rights, interests and liabilities and, unless otherwise specified elsewhere in the Contract, shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Contractor ceases to be responsible under Clause 15.1 for the care of anything.

18.0 PUBLIC LIABILITY INSURANCE

Before the Contractor commences work, the Contractor shall take out a Public Liability Policy of insurance nominating the Principal as an interested party and shall cover the Principal, the Contractor, the Superintendent and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights and interests and covers their liabilities to third parties. The policy must also cover the Contractor's liability to the Principal and Principal's liability to the Contractor for loss of or damage to property (other than property required to be insured by Clause 17) and the death of or injury to any person (other than liability which is required by law to be insured under a Workers Compensation Policy of insurance).

The Public Liability Policy of insurance shall include a cross-liability clause in which the insurer agrees to waive all rights of subrogation or action against any of the persons comprising the insured and for the purpose of which the insurer accepts the term 'insured' as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

The Public Liability Policy of insurance shall be for an amount in respect of any one occurrence not less than the sum stated in Annexure and, unless otherwise specified elsewhere in the Contract, shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Final Payment Certificate is issued under Clause 41.8.

19.0 INSURANCES TO BE EFFECTED BY THE CONTRACTOR

19.1 Insurance of Employees

Before commencing the work under the Contract, the Contractor shall ensure that a suitable insurance policy is effected covering liability, loss, damage, claims, demand, actions, suit or proceedings and all costs and expenses whatever arising at common law or under any statute or other legislative provision, including any statute or such provision relating to Workers' Compensation insurance, as a result of personal injury to or the death of any person employed by the Contractor in or about the execution of the Works.

Such insurance shall be for the maximum amount permitted by law, shall extend to indemnify the Principal for the Principal's statutory liability to persons employed by the Contractor and shall be maintained in full force and effect until all work, including remedial work, is properly completed.

The Contractor shall ensure that every subcontractor is similarly insured.

19.2 Motor Vehicle Third Party Insurance

Before commencing the work under the Contract, the Contractor shall effect motor vehicle Third Party Liability insurance for an amount of not less than five million dollars (\$5,000,000) in respect of all motor vehicles (which expression shall include any item of plant or equipment which is licensed as a motor vehicle or which is required to be so licensed in accordance with requirements of any statute) belonging to or under the physical or legal care, custody or control of the Contractor and used in connection with the execution of the work under the Contract, obligations under the Contract or any activity directly or indirectly connected therewith.

The Contractor shall ensure that each of its subcontractors is similarly insured in accordance with this Clause 19.2.

Insurance effected by the Contractor and/or its subcontractors pursuant to this clause shall be extended to include the Principal as a joint insured.

The Contractor, in addition to complying with the requirements hereof, shall comply with all statutory requirements concerning the arrangement of motor vehicle Third Party Liability insurance in respect of the ownership, possession, operation, or use of such motor vehicles and shall ensure that each of its subcontractors similarly complies with this clause.

20.0 INSPECTION AND PROVISION OF INSURANCE POLICIES

20.1 Proof of Insurance

Before the Contractor or a subcontractor commences work and whenever requested in writing by the Principal, the Contractor shall produce evidence to the satisfaction and approval of the Superintendent of the insurance effected and maintained.

The effecting of insurance by the Contractor or approval of the Contractor's insurance shall not limit the liabilities or obligations of the Contractor under other provisions of the Contract.

20.2 Failure to Produce Proof of Insurance

If, after being requested in writing by the Principal so to do, the Contractor fails to produce evidence of compliance it's insurance obligations under Clauses 17, 18 and 19, which is to the satisfaction and approval of the Principal, the Principal may effect and maintain the insurance and pay the premiums. The amount so paid shall be a debt due from the Contractor to the Principal. Until evidence of compliance with it's insurance obligations under Clauses 17, 18 and 19 is produced by the Contractor to the satisfaction and approval of the Principal, the Principal may refuse the Contractor permission to enter the Site or may refuse payment under the Contract. The rights given by the Clause 20.2 are in addition to any other rights.

20.3 Subrogation

Unless prohibited by statute, all policies effected by the Contractor shall be endorsed to provide that insurers shall not have any right of subrogation against the Principal and the Superintendent.

21.0 CLERK OF WORKS AND INSPECTORS

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

22.0 SUPERINTENDENT

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

In Clause 22 'direction' includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, formal request or formal requirement.

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

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

23.0 SUPERINTENDENT'S REPRESENTATIVE

The Superintendent may from time to time appoint individuals to exercise any functions of the Superintendent under the Contract but not more than one Superintendent's Representative shall be delegated the same function at the same time. The appointment of a Superintendent's Representative shall not prevent the Superintendent from exercising any function.

The Superintendent shall forthwith notify the Contractor in writing of:

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

The Contractor may in writing request the Superintendent's Representative to refer to the Superintendent any direction of the Superintendent's Representative with which the Contractor is dissatisfied.

24.0 CONTRACTOR'S REPRESENTATIVE

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

The Contractor shall notify the Superintendent in writing of the name of the representative and of any subsequent changes. Any direction defined in Clause 22 shall:-

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

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

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

25.0 CONTRACTOR'S EMPLOYEES AND SUBCONTRACTORS

25.1 Control of Employees

- (a) The Superintendent may direct the Contractor to have removed from the Site or from any activity connected with the work under the Contract, within such time as the Superintendent directs, any person employed in connection with the work under the Contract who, in the opinion of the Superintendent, is guilty of misconduct or is incompetent or negligent. The person shall not be employed on the Site or on activities connected with the work under the Contract without the prior approval of the Superintendent.
- (b) The Superintendent may approve or not approve workers nominated for commencement on Site based upon the appropriateness of the workers skills and experience.
- (c) The Contractor shall ensure that before any person enters Site or commences work on Site, that such persons receive and successfully complete a Plant Induction Program and any other required Business Unit Induction Program.
- (d) The Contractor shall ensure that its employees and subcontractors and subcontractors' employees to not use or interfere with any of Principal's plant and equipment, amenities or other facilities, unless under specific instruction from the Principal to do so.
- (e) The Contractor shall ensure that personnel engaged on the work under the Contract do not move to other parts of the Principal's premises unless approved or agreed by the Principal.

25.2 Industrial Relations

- (a) The Contractor shall be responsible for all day to day management of industrial relations matters, problems and issues on and off the Site (including in respect of any actual or proposed actions, matters, bans, limitations, restrictions or disputes) as they relate to the Works, the Site or the Contractor's employees, agents, subcontractors, suppliers or other invitees. The Contractor shall keep the Superintendent fully and promptly informed of all such industrial relations matters, problems and issues.
- (b) The Contractor must take all necessary action to ensure that all industrial relations issues relating to the Works or the Site are managed by the Contractor according to sound, good and proper industrial relations principles and practices and otherwise to the satisfaction of the Superintendent (acting reasonably).

26.0 SITE

26.1 Possession of Site

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

Notwithstanding the provisions of Clause 26.1, if the Contractor is in breach of Clause 20.1, the Principal may refuse to give the Contractor non-exclusive possession of the Site or any part of the Site until the Contractor has complied with the requirements of Clause 20.1.

Non-exclusive possession of the Site is subject to Clause 26.2 and shall confer on the Contractor a right to only such use and control as is necessary to enable the Contractor to execute the work under the Contract.

26.2 Access for the Principal and Others

The Principal and its employees, agents and consultants at any time may have access to any part of the Site for any purpose.

The Contractor acknowledges the Principal will operate the Tomago Smelter upon and adjacent to the Site during the progress of the work under the Contract.

The Contractor shall use its best endeavours, and ensure that its subcontractors and suppliers use their best endeavours, to execute the work under the Contract in such a manner as not unreasonably to interfere with or disrupt, delay or hinder the operation of the Tomago Smelter or any part of it. The Contractor shall be responsible for any cost, loss, expense or damage resulting from a breach of this obligation.

The Contractor shall co-operate with other contractors engaged by the Principal and integrate its work with their work, so as not to cause any unreasonable interference with or disruption, delay or hindrance to those other contractors. The Contractor shall be responsible for any cost, loss, expense or damage resulting from a breach of this obligation.

The Contractor shall be deemed to have allowed for delays and disruptions to the work under the Contract that could reasonably be anticipated by a contractor experienced and competent in carrying out work of the type to which the Contract relates, as a result of the continuing operation of the Tomago Smelter and the concurrent activities of the other contractors. Such delays and disruptions shall not constitute acts, defaults or omissions of the Principal and shall not entitle the Contractor to any extra costs, increases to the Contract Sum or extensions of time.

The Contractor at all reasonable times shall give the Principal, the Superintendent, the Clerk of Works and Inspectors appointed under Clause 21 and other persons authorised in writing by the Principal or by the Superintendent, access to the work under the Contract at any place where the work is being carried out or materials are being prepared or stored.

26.3 Delivery of Materials to and Work on Site Before Possession

Until possession of the Site or part of the Site is given to the Contractor under Clause 26.1, the Contractor shall not deliver materials to or perform work on the Site or part of the Site, as the case may be, unless approval is given by the Superintendent.

26.4 Use of Site by Contractor

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

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

26.5 Finding of Minerals, Fossils and Relics

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

If compliance with obligations under Clause 26.5 causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 39.2.

27.0 SETTING OUT THE WORKS

27.1 Setting out

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

27.2 Care of Survey Marks

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

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

If the disturbance or obliteration is caused by a person referred to in Clause 26.2, other than the Contractor, the cost incurred by the Contractor in reinstating the survey mark shall be valued under Clause 39.2.

27.3 Errors in Setting Out

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

If the error has been caused by incorrect data supplied by the Superintendent, the cost incurred by the Contractor in rectifying the error shall be valued under Clause 39.2.

The Contractor, as soon as practicable and before commencing any work under the Contract or part thereof, including work on foundations, structures or any other work by others or thing provided by the Principal or Superintendent (including the Site), shall check all levels, dimensions and measurements and satisfy itself that they are correct for the specified purpose and that they conform to the requirements of the Contract. Failure of the Contractor to so check such levels, dimensions or measurements or to inform the Superintendent of his discovery of an error in due time before incurring any associated expense or delay, shall prohibit the Contractor from claiming for any additional expenses or extension of time from such error. If the Contractor commences work on the Site or part thereof or on existing foundations, structures or any other work by others or thing, the Contractor shall be deemed to have accepted such as conforming to requirements.

27.4 Survey Mark Defined

'Survey mark' in Clause 27 means a survey peg, bench mark, reference mark, signal alignment, level mark or any other mark for the purpose of setting out, checking or measuring work under the Contract.

28.0 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT

28.1 Provision of Materials, Labour and Constructional Plant

Except to the extent that the Contract otherwise provides the Contractor shall supply everything necessary for the execution and completion of the Contractor's obligations under the Contract.

28.2 Removal of Materials and Constructional Plant

The Contractor shall not remove the materials or the Constructional Plant without the prior written approval of the Superintendent, which approval shall not be unreasonably withheld.

28.3 Manufacture and Supply of Materials

The Superintendent may direct the Contractor to supply particulars of:

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

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

29.0 MATERIALS AND WORK

29.1 Quality of Design, Materials and Workmanship

The Contractor shall use the materials and standards of workmanship required by the Contract and perform the Works in strict compliance and conformity with the provisions of the Contract.

The Contractor shall ensure that the execution of the Works is carried out with due diligence and efficiency and in accordance with sound engineering practice and all referenced codes, without being entitled to any reward or payment other than specifically provided for in the Contract.

The Contractor warrants to the Principal that:

- (a) the Works will be free from all defects, of merchantable quality and fit for its intended purpose and capable of operating satisfactorily in the environment to which it is to be exposed including, without limitation, conditions of weather, locality, altitude and operational conditions such as exposure to cold, heat, dust, corrosive chemicals and fluids and rough handling;
- (b) the Works will be strictly in accordance with the Specification and Drawings and at all times comply with the relevant Standards and Codes published by the Standards Association of Australia, the relevant statutory authorities and the law;
- (c) the Works will be free of all liens, charges and encumbrances;
- (d) the Contractor has title to all materials, equipment and other items to be incorporated into the Works; and
- (e) any special warranty or service guarantee stated in the Contract is not revoked or varied by this clause.

Unless otherwise specified in the Contract, materials shall be new. The Contractor, if so required by the Principal or the Superintendent, shall submit samples of materials and workmanship for approval.

29.2 Removal of Defects

The Superintendent at any time may reject any material (whether fixed or not) or work including designs which are not in accordance with the Contract and may direct its replacement, demolition, correction or removal, whether it has been the subject of a payment or not. If the Superintendent directs the Contractor to replace or correct any such material or work including design, the Contractor shall commence the work of replacement or correction within three (3) days, or such other period as the Superintendent directs, after the receipt by it of the direction and shall complete the work and/or design promptly so that it complies with the requirements of the Contract.

If the Superintendent directs the Contractor to remove from the Site any such material which is not in accordance with the Contract, the Contractor shall do so promptly. All such replacements, corrections and removals shall be at the Contractor's cost.

If the Contractor fails to comply with this Clause within a reasonable time from the receipt of a direction so to do -

- (a) the Superintendent may have the work of replacement, correction or removal carried out by other persons and the cost shall be borne by the Contractor; or

(b) the Principal may give the Contractor a notice pursuant to Clause 43.2.

29.3 Repairs and Remedial Work

Remedial work of replacement, correction or removal shall include -

- (a) the replacing of a defective part of the Work where, in the opinion of the Superintendent, that part cannot be effectively repaired;
- (b) the repairing of any defect or damage where such may effectively be done;
- (c) the redesigning, altering or amending the whole or any part of the Work so as to remove therefrom any fault in design for which the Contractor is responsible under the Contract; and
- (d) the making good of damage to the Work caused by or resulting from such replacement, repairing, redesigning, altering or amending.

The Contractor shall advise the Superintendent whether it intends to carry out such remedial work at the Site or elsewhere, and shall obtain approval together with any directions which the Superintendent considers proper. Remedial work subsequent to the Date of Practical Completion shall be in accordance with Clause 36.

29.4 Variations Due to Defective Materials or Work

Instead of a direction under Clause 29.2, the Superintendent may direct a variation of the kind referred to in Clause 39.1. The variation shall be valued under Clause 39.2 and -

- (a) if the variation causes an increase or decrease in the value to the Principal of the Works, regard shall also be had to the increase or decrease; and
- (b) if the variation results in the Contractor incurring more or less cost than would reasonably have been incurred had the Contractor been given a direction under Clause 29.2, regard shall also be had to the difference.

29.5 Acceptance of Defective Material or Work

Instead of a direction under Clause 29.2 or 29.4, the Superintendent may notify the Contractor that the Principal elects to accept the material or work notwithstanding that it is not in accordance with the Contract. In that event, the resulting increase or decrease in the value to the Principal of the Works and any other loss suffered by the Principal shall be valued under Clause 39.2.

29.6 Generally

The Superintendent shall give either a direction under Clause 29.2 or 29.4 or a notice under Clause 29.5 as soon as practicable after the Superintendent becomes aware material or Work is not in accordance with the Contract. The Superintendent may give the direction or notice at any time before the issue of the Final Payment Certificate under Clause 41.8.

Except to the extent that to do so would be inconsistent with a direction under Clause 29.4 or a notice under Clause 29.5 and notwithstanding that the Superintendent has not given a direction under Clause 29.2, the Contractor shall promptly remove, demolish, replace or correct material or work that is not in accordance with the Contract.

A progress payment, test or failure by the Superintendent or anyone else to disapprove any material or work shall not prejudice the power of the Superintendent to subsequently give a direction under Clause 29.2 or Clause 29.4 or a notice under Clause 29.5.

Nothing in Clause 29 shall prejudice any other right which the Principal may have against the Contractor arising out of the failure of the Contractor to provide material or work in accordance with the Contract.

The Superintendent shall not be obliged to give a direction under Clause 29.4 or a notice under Clause 29.5 to assist the Contractor.

30.0 EXAMINATION AND TESTING

30.1 Materials and Work to be Subject to Examination and Testing

The Contractor shall carry out all inspection and testing on the Work, including component parts of the Work including that of its subcontractors at least as and when required under the Contract and as otherwise required by law.

The Superintendent may from time to time and at any time prior to the Final Payment Certificate require inspection, witnessing and testing of any part of the Work during manufacture or assembly at the Site or the premises of the Contractor or any subcontractors and during construction and commissioning at Site and the Contractor shall ensure that the Superintendent is given free and unrestricted access to any such place. Where the Superintendent gives any such direction the Contractor shall promptly prepare and make available for examination or testing the materials or Work stated in the said direction and shall give the Superintendent prompt notice that the same are so available. Any costs incurred by the Contractor in carrying out such direction shall be deemed to be part of the costs of the tests for the purpose of Clause 30.7.

All work to be performed shall be subject to supervision and checking by the Superintendent for compliance with the Contract. The Superintendent shall have the right at any time to reject all or any materials or Work that is defective in quality or workmanship or which in any other aspect does not comply with the Contract. The Superintendent may at any time inspect the Contractor's plant and equipment.

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

30.2 Opening Up for Examination and Testing

For the purpose of inspecting any part of the Work already assembled or covered up, the Superintendent, at any time during the currency of the Contract, may direct the Contractor to dismantle or uncover any part of the Work. The Superintendent may also direct that any part of the Work shall not be covered or made inaccessible without the Superintendent's prior approval. If it be found upon inspection that the Work so dismantled

or uncovered is in accordance with the Contract, the whole of the expense incurred in dismantling or uncovering the Work and again making it good shall be born by the Principal, except as stated in the last paragraph of Clause 30.3, but if the Work is not in accordance with the Contract the Contractor shall make good the defect and bear all such cost involved.

Where any work is found not to be in accordance with the Contract, the Superintendent may at its sole discretion order that all work of a similar nature be dismantled or uncovered and tested or retested at the Contractor's sole cost regardless of whether such work is or is not in accordance with the Contract and notwithstanding any other provisions of this Clause 30.

30.3 Notice and Witness of Tests and Inspections

The Contractor shall give to the Superintendent in writing reasonable (but not less than fourteen (14) days) notice of the time, date and place on and at which inspection or testing is to commence. The Superintendent will inspect material and work that is specifically identified in the Contract as items to be inspected by the Superintendent or may waive such inspection. Inspection or non-inspection witnessing or non-witnessing by the Superintendent shall not be construed as acceptance of any part of the Works nor as relieving the Contractor of its responsibility for said items complying with the Contract and being free from defects and capable of performing their respective functions.

If any part of the Works is closed or covered before the required inspection or witnessing has been performed by the Superintendent, it shall, if required by the Superintendent, be opened or uncovered for inspection or witnessing and reclosed or recovered, both at the Contractor's expense.

30.4 Procedure if Tests Delayed Unduly

If the Contractor unduly delays making a test for which the Contractor is responsible, the Superintendent may, by notice in writing, call upon the Contractor to commence the test within two (2) days of the date of service of such notice and complete it within the period stipulated in that notice. If the Contractor neglects to comply with the notice the Superintendent may proceed to make the test at the Contractor's expense and risk.

30.5 Retesting of Work Failing Under Test and Altered, Renewed or Replaced

If under a test any part of the Works Fails to fulfil the requirements of the Contract, tests on the remedial work of that part and tests on all other parts of the Works affected by the remedial work shall be repeated in accordance with the requirements of the Contract if so directed by the Superintendent.

30.6 Tests on Remedial Work

If any remedial work required during the Defects Liability Period pursuant to Clause 36 is of such a character as may affect the efficiency of the Works the Principal or Superintendent may within one month after completion of that remedial work, direct the Contractor that appropriate tests of remedial work are to be made in accordance with the Contract. Such tests may be carried out by the Principal or the Superintendent pursuant to Clause 36.

30.7 Costs of Testing

The costs of testing shall comprise the costs of the tests, the costs of taking samples and specimens and the preparation of materials and Work for testing, the cost of packaging, handling and transporting samples and specimens to the place where they are to be tested, and all other costs related thereto.

The costs of testing in respect of tests specified in the Contract shall be borne by the Contractor. The cost of such tests directed by the Superintendent in accordance with Clauses 30.1, 30.5 and 30.6 which are to be carried out by the Contractor shall be borne by the Contractor. The Contractor shall pay the costs of any additional tests or retests not required as aforesaid or not required otherwise in the Contract which are directed by the Superintendent to be done, only if the results of such tests or retests show that any part of the Works so tested does not conform to the requirements of the Contract.

30.8 Results of Tests

Results of tests shall be promptly made available by the party responsible for conducting the tests, to the other party.

30.9 Principal's Right Maintained

The Superintendent's approval or the failure of the Superintendent to approve or disapprove any part of the Works shall not prejudice the right of the Principal subsequently to disapprove any part of the Works or to exercise any rights it has under the Contract or otherwise with respect to the Works.

31.0 WORKING HOURS

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

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

32.0 PROGRESS AND PROGRAMMING OF THE WORKS

32.1 Rate of Progress

The Contractor shall be responsible for programming, progress reporting, forecasting, updating and controlling the Works in accordance with the requirements of the Contract and the construction program submitted and approved under Clause 32.2.

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

The Contractor shall not suspend the progress of the whole or any part of the work under the Contract except where the suspension is under Clause 43.9 or is directed or approved by the Superintendent under Clause 33.

The Contractor shall give the Superintendent reasonable advance notice of any information, documents or instructions required by the Contractor.

If progress on any item on the construction program falls behind schedule or if progress is not being maintained on any item which would affect the critical dates or the commencement and completion dates set down in the Construction Program if no action were taken, the Contractor shall, at its own initiative and expense, take measures to eliminate delay. Such measures may consist of working overtime, shift work, using additional Construction Plant and/or labour or different measures as may be necessary to eliminate the delay.

Should the Contractor fail to take the necessary measures to eliminate any delay the Superintendent may direct the Contractor to take such measures as the Superintendent deems necessary and all costs related thereto are to be borne by the Contractor.

If the Contractor fails to carry out any direction of the Superintendent pursuant to this clause the Principal may, in addition to any other rights which the Principal may have under the Contract, withhold the whole or a portion of any payment until such time as these directions are performed by the Contractor.

32.2 Construction Program

Within ten (10) days from the Date of Acceptance of Tender, the Contractor shall submit to the Superintendent in a form approved by the Superintendent, a detailed Construction Program which shall incorporate critical dates required by the Contractor and all commencement and completion dates set down in the Contract and shall reflect and incorporate any preliminary program previously agreed by the Superintendent or the Principal.

Where in the opinion of the Superintendent the program does not comply with above requirements, the Contractor shall re-submit the construction program as required by the Superintendent until it complies. No payments will be made by the Principal to the Contractor under the Contract before approval of the Construction Program is obtained, the which approval shall not be unreasonably withheld.

Upon approval of the construction program the Contractor shall perform the Works in accordance with the Construction Program, subject to any approved revisions resulting from the granting of an extension of time pursuant to Clause 34.5.

The Contractor shall not, without the Superintendent's prior, written approval, depart from the approved Construction Program.

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

33.0 SUSPENSION OF THE WORKS

33.1 Suspension by Superintendent

The Superintendent, by written notice, may direct the Contractor to suspend the progress of the whole or part of the work under the Contract for such time as the Superintendent thinks fit. Upon receipt of such a direction, the Contractor shall promptly cease the work under the Contract and, during the period of suspension properly care for and protect the work under the Contract and all work in progress, materials, supplies and equipment over which it has custody or control for the performance of the Contract. The Contractor shall resume the work under the Contract on the date specified in the Superintendent's direction to suspend or in any subsequent written notice.

33.2 Suspension by Contractor

If the Contractor wishes to suspend the whole or part of the work under the Contract, otherwise than under Clause 43.9, the Contractor shall obtain the prior approval of the Superintendent. The Superintendent may approve of the suspension and may impose conditions of approval.

33.3 Recommencement of Work

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

If work is suspended pursuant to Clause 33.2 or 43.9, the Contractor may recommence work at any time after reasonable advance notice to the Superintendent.

33.4 Cost of Suspension

Any cost incurred by the Contractor by reason of a suspension under Clause 33.1 or Clause 33.2 shall be borne by the Contractor but if the suspension is necessary because of an act or omission of the Principal, the Superintendent or an employee, consultant or agent of the Principal and the suspension causes the Contractor to incur more or less cost than otherwise would have been incurred, the difference shall be valued under Clause 39.2.

33.5 Effect of Suspension

Suspension shall not affect the Date for Practical Completion but the cause of suspension may be a ground for extension of time under Clause 34.5.

34.0 TIMES FOR COMMENCEMENT AND PRACTICAL COMPLETION

34.1 Time for Commencement of Work on the Site

The Contractor shall commence work under the Contract in accordance with the agreed Construction Program, or such other date as the Superintendent may direct the Contractor in writing.

34.2 Time for Practical Completion

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

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

34.3 Separable Portions

The interpretations of:

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

and Clauses 4.6, 15, 34, 36, 37, 41.3 and 41.5 shall apply separately to each Separable Portion and references therein to the Works and to work under the Contract shall mean so much of the Works and the work under the Contract as is comprised in the relevant Separable Portion.

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

34.4 Use of Partly Completed Works

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

In using the Separable Portion that has reached Practical Completion, subject to Clause 26.2, the Principal shall not hinder the Contractor in the performance of the work under the Contract.

34.5 Extension of Time for Practical Completion

Promptly upon it becoming evident to the Contractor that completion of the work under the Contract has been or is being delayed by any cause whatever, the Contractor shall:

- (a) immediately take all necessary measures towards the preservation of work in progress, the prevention of any accident and safekeeping of all material, equipment and facilities related to the work under the Contract, until resumption of work;
- (b) notify the Superintendent in writing of such interruption or suspension of work giving, when known, the probable cause and expected duration of such interruption or suspension;
- (c) implement any additional measures deemed necessary by the Superintendent; and
- (d) as soon as practicable, submit to the Superintendent a written report describing the cause, anticipated duration, as the case may be, and impact of the delay upon the Construction Program for the work under the Contract.

If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and the delay is subsequent to the delays constituting the Variation Allowance in Clause 39.3, and within 14 days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion, the Contractor shall be entitled to an extension of time for Practical Completion.

The causes are:-

- (e) events occurring on or before the Date for Practical Completion which delay work on the critical path and which constitute:
 - (i) industrial disputes that are national or state wide but excluding any other industrial disputes; and
 - (ii) adverse weather conditions which prevent all work under the Contract from being carried out on the Site and differ materially from those weather conditions which could have been expected, based on a review of historical meteorological records for the Williamstown RAAF Base for the three (3) years immediately prior to the date of the Contract, and the Contractor doing all the things that it is deemed to have done under Clause 11;
- (f) any of the following events whether occurring before, on or after the Date for Practical Completion which delay work on the critical path and which constitute:
 - (i) delays caused by:
 - the Principal;
 - the Superintendent;
 - subject to Clause 26.2, the Principal's employees, consultants, other contractors or agents;
 - (ii) latent conditions;
 - (iii) variations directed under Clause 39.1;
 - (iv) changes in the law;
 - (v) directions by public authorities but not where the direction arose from the failure of the Contractor to comply with a requirement referred to in Clause 13.1;
 - (vi) claims referred to in Clause 16.1(e);
 - (vii) any other cause which is expressly stated in the Contract to be a cause for extension of time for Practical Completion.

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

- (g) whether the Contractor can reach Practical Completion by the Date for Practical Completion without an extension of time;
- (h) whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

If the Contractor desires an extension of time for Practical Completion, the Contractor shall within 14 days after a delay occurs give the Superintendent a written claim setting out the facts on which the claim is based.

With the claim, or as soon as practical after giving the claim, the Contractor shall give the Superintendent written notice of the number of days extension claimed.

If the Contractor is entitled to an extension of time for Practical Completion the Superintendent shall, within 14 days after receipt of the number of days extension claimed, grant a reasonable extension of time. If within the 14 days the Superintendent does not grant the full extension of time claimed, the Superintendent shall before the expiration of the 14 days give the Contractor notice in writing of the reason.

Notwithstanding that the Contractor is not entitled to an extension of time the Principal may at any time before the issue of the Final Payment Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.

A delay by the Principal or the failure of the Superintendent to grant a reasonable extension of time or to grant an extension of time within 14 days shall not cause the Date for Practical Completion to be set at large but nothing in this paragraph shall prejudice any right of the Contractor to damages.

34.6 Liquidated Damages for Delay in Reaching Practical Completion

If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal, by way of pre-estimated and liquidated damages and not as a penalty, at the rate stated in the Annexure for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 43, whichever first occurs.

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

34.7 Limit on Liquidated Damages

The Contractor's liability under Clause 34.6 is limited to the amount stated in the Annexure.

34.8 Reduction in Time for Practical Completion

Any reduction in the time for Practical Completion of the work under the Contract arising in connection with a variation shall be dealt with as follows:

- (a) where a variation is likely to result in a reduction of the actual time required for the execution of the work under the Contract, the Superintendent may by written notice request the Contractor to agree the extent of any such reduction. Such notice shall detail the proposed variation and state the reduction in time which the Superintendent considers fair and reasonable;
- (b) the Contractor shall, within ten (10) days after receiving such notice, inform the Superintendent by written notice either that it agrees with the stated reduction or that it considers that the reduction should be as stated in the Contractor's notice;
- (c) where the Superintendent and the Contractor have agreed the reduction in time, the Superintendent shall adjust the Date for Practical Completion accordingly;
- (d) where the Superintendent and the Contractor have not agreed the reduction in time, and the Superintendent nonetheless issues a direction in respect of the particular variation, the time for Practical Completion shall, subject to paragraph (e), be deemed reduced by the time stated in the Contractor's notice under paragraph (b) and the Superintendent shall adjust the Date for Practical Completion accordingly; and
- (e) where the Superintendent and the Contractor have not agreed the reduction in time, and the Superintendent nonetheless issues a direction in respect of the particular variation, the Superintendent may at any time require that the reduction in time be treated as a dispute between the Principal and the Contractor and be resolved in accordance with Clause 45, provided that the Superintendent prior to or at the time of issuing such direction shall give to the Contractor written notice of the intention so to refer such question.

34.9 Condition Precedent to Extension of Time

Notwithstanding the preceding provisions of Clause 34, the Contractor shall not be entitled to any extension of time for Practical Completion unless it shall have taken proper and reasonable steps to both preclude the occurrence of the cause of the delay and/or to avoid or minimise the consequences thereof.

35.0 DELAY COSTS

35.1 Contractor's Delay Costs

Notwithstanding any extension of time for Practical Completion, whether under Clause 34.5 or otherwise, the Contractor shall not be entitled to any compensation by the Principal in connection with any delay or disruption to the work under the Contract.

35.2 Principal's Delay Costs

Otherwise than for the Date for Practical Completion and where liquidated damages are payable by the Contractor under Clause 34.6, the Contractor shall reimburse the Principal for any compensation paid by the Principal to others as a direct or indirect result of failure by the Contractor to meet those milestone dates in the performance of the work under the Contract.

Moneys due to the Principal under this clause shall be a debt due to the Principal from the Contractor and may be recovered under Clause 41.10.

The rights given in this clause are in addition to any other rights the Principal may have.

36.0 DEFECTS LIABILITY

The Defects Liability period stated in the Annexure shall commence on the Date of Practical Completion.

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

At any time prior to the 14th day after the expiration of the Defects Liability Period, the Superintendent may direct the Contractor to rectify any omission or defects in the work under the Contract which exists at Practical Completion or becomes apparent prior to the expiration of the Defects Liability Period. The direction shall identify the omission or defects and state a date by which the Contractor shall complete rectification. The direction may provide that in respect of the work of rectification there shall be a separate Defects Liability Period of a stated duration not exceeding the period stated in the Annexure. The separate Defects Liability Period shall commence on the date the Contractor completes the work of rectification. Clause 36 shall apply in respect of the work of rectification and the Defects Liability Period for that work.

If it is necessary for the Contractor to carry out rectification, the Contractor shall do so at times and in a manner which causes as little inconvenience to the occupants of the Works and the Tomago Smelter and to other contractors working on the Site as is reasonably possible.

Further to the above:

- (a) The Contractor shall provide in favour of the Principal all guarantees and warranties set forth herein and/or implied by law in respect of the Works and shall ensure that the Principal has the benefit of all guarantees or warranties obtained by the Contractor from any supplier, subcontractor or other person for work under the Contract and such guarantees and warranties shall be applicable for the full duration of the Defects Liability Period.
- (b) The Contractor warrants that during a Defects Liability Period the Works, or a Separable Portion of the Works, as the case may be, including all design, material and workmanship for which the Contractor is responsible, shall comply with the Contract and further guarantees that it shall remedy any defects, omission or failures which develop or become apparent under proper use during a Defects Liability Period and perform any necessary tests, irrespective of whether or not the remedy of the defect, omission or failure is made after expiration of the Defects Liability Period for that part of the Works to which the defect, omission or failure relates.
- (c) Pursuant to the above warranty, the Contractor guarantees that it shall, after receipt of notice from the Principal or the Superintendent, promptly repair or replace, at the Principal's or Superintendent's option, any omissions, deviations from the Contract or any defective materials or workmanship, including all work of removal, and that such repairs, tests or replacement shall comply with the Contract. The aforesaid work shall be accomplished at no cost to the Principal.
- (d) If any such omission or defects, or any such deviation, defective materials or workmanship is not remedied within such time, if any, specified in the direction or notice by the Principal or the Superintendent, the Principal or Superintendent may perform such remedial work as may be necessary including all work of removal, engineering, procurement and refabrication and testing and the cost of all such remedial work shall be recoverable by the Principal as a debt due to the Principal by the Contractor. Such remedial work undertaken by the Superintendent shall be without prejudice to any other rights that the Principal may have against the Contractor in respect of deviations from the Contract and effective design, materials or workmanship.

37.0 CLEANING UP

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

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

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

38.0 URGENT PROTECTION

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

If time permits, the Superintendent shall give the Contractor prior written notice of the Principal's intention to take action under Clause 38.

39.0 VARIATIONS

39.1 Variations to the Work

The Contractor shall not vary the work under the Contract except as directed by the Superintendent.

The Superintendent may direct the Contractor to:

- (a) increase, decrease or omit any part of the work under the Contract;
- (b) change the character or quality of any material or work;
- (c) change the levels, lines, positions or dimensions of any part of the work under the Contract;
- (d) execute additional work;

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- (e) demolish or remove material or work no longer required by the Principal.
 - (f) change any order or dates for the performance or completion of the Works, including accelerate the construction program or completion of the Works.

Where the Principal requires a variation to the work under the Contract;

- (g) the Superintendent shall notify the Contractor of the variation and, as soon as practicable thereafter, the Contractor shall submit to the Superintendent a report, in writing, specifying the effect the variation will have on the Date for Practical Completion of the work under the Contract and, where appropriate, each Separable Portion, and the cost of the work under the Contract;
- (h) as soon as practicable thereafter, the Superintendent shall inform the Contractor in writing whether the Principal:
 - (i) approves;
 - (ii) approves, but subject to alterations which shall be noted in writing by the Superintendent; or
 - (iii) disapproves,the variations;
- (i) where the Principal approves the variation, the Contractor shall so vary the work under the Contract and otherwise carry out or cause the variation to be carried out;
- (j) where the Principal approves the variation, but with alterations, the Contractor shall re-submit its report, incorporating the Principal's proposed alterations, to the Superintendent and the terms of this Clause 39.1 shall re-apply; and
- (k) where the Principal disapproves the variation, it shall not be carried out.

No variation shall invalidate the Contract.

If the Contractor requests the Superintendent to approve a variation for the convenience of the Contractor, the Superintendent may do so in writing. The approval may be conditional. The conditions may include but shall not be limited to a condition that the Contractor shall not be entitled to any extension of time for Practical Completion or extra remuneration in respect of the variation or anything arising out of the variation which would not have arisen had the variation not been approved. The Superintendent shall not be obliged to approve a variation for the convenience of the Contractor.

Unless the Superintendent and the Contractor agree upon the price for the variation, the variation directed or approved under Clause 39.1 shall be valued under Clause 39.2.

If the Contractor considers that any work constitutes a variation and a variation has not been directed or approved under Clause 39.1, the Contractor shall not commence the work until it has either notified the Superintendent in writing that it claims that the work constitutes a variation and a variation is directed or approved under Clause 39.1 or received the Superintendent's written confirmation that it should commence that work notwithstanding that a variation has yet to be directed or approved. If the Contractor fails to comply with this provision, it shall not be entitled to payment for the relevant work.

39.2 Valuation

Where the Contract provides that a valuation shall be made under Clause 39.2, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount ascertained, as follows:-

- (a) if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;
- (b) if Clause 39.2(a) does not apply, the rates or prices in a Priced Bill of Quantities or Schedule of Rates shall be used to the extent that it is reasonable to use them;
- (c) to the extent that neither Clause 39.2(a) or 39.2(b) apply, reasonable rates or prices shall be used;
- (d) in determining the deduction to be made for work which is taken out of the Contract, the amount of the deduction shall include a reasonable amount for profit and overheads;
- (e) if the valuation is of an increase or decrease in a fee under Clause 13.2, the value shall be the actual increase or decrease without regard to overheads or profit;
- (f) the valuation of the variation shall not include costs of or in connection with any delay or disruption to the work under the Contract;
- (g) if Clause 10(b) applies, the percentage referred to in Clause 10(b) shall be used for valuing the Contractor's profit and attendance; and
- (h) daywork shall be valued in accordance with Clause 40.

39.3 Variation Allowance

In this clause, 'Variation Allowance' means the aggregate of delays caused by the carrying out of variations in accordance with Clause 39.1, which variations increases the Contract Sum, in total, by up to 20% and are the result of an increase in or addition to the quantity of work and not a change to the quality or nature of materials used in the work.

The times or periods allowed by the Contractor for the purpose of achieving Milestone Dates or the Date for Practical Completion of the Works or a Separable Portion shall include the Variation Allowance such that the Contractor shall not be entitled to an extension of time for variations which cause a delay to the progress of the Works within the Variation Allowance.

40.0 DAYWORK

The Superintendent may direct that variations directed by the Superintendent under Clause 39.1 shall be carried out as Daywork. The Contractor shall thereafter each day record particulars of all resources used by the Contractor for the execution of the Daywork and each day furnish to the Superintendent the particulars and copies of time sheets, wages sheets, invoices, receipts and other documents evidencing the cost of the Daywork. The Superintendent may direct the manner in which matters are to be recorded.

41.0 CERTIFICATES AND PAYMENTS

41.1 Payment Claims, Payment Certificates and Time for Payment

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 41.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include all amounts then due in the Contractor's opinion under the Contract or for breach thereof. If the Contractor fails to claim under the Contract or for breach thereof, the Contractor shall give written notice and reasons therefore. Where the claim is for an alleged breach, details of the claim shall be submitted within at least 28 days after the submission of the claim or the written notice of failure to claim.

Within 14 days after receipt of a claim for payment the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference.

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

Within 30 days after receipt by the Superintendent of a claim for payment, the Principal shall pay to the Contractor the amount due to the Contractor and shall with the payment provide written particular of how the payment was calculated.

Payment of moneys shall not be evidence of the value of work or an admission of liability or that work has been executed satisfactorily but shall be a payment on account only.

41.2 The Calculation of Payment

The amount due to the Contractor at the time for a claim for payment shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due to the Contractor under any other provision of the Contract or for breach of contract less:

- (a) amounts already paid under the Contract;
- (b) amounts which the Principal is entitled to deduct under Clause 41.3 or 41.10; and
- (c) at the Principal's election, amounts referred to in Clause 42(d) as having been claimed but not paid to subcontractors and suppliers.

Where work is defective or omitted, the estimated cost to rectifying the defect or omission shall be taken into account.

If the Contract provides that before payment or payment exceeding a certain value is made, a test must be passed or insurance must be effected by the Contractor or some other requirement must be fulfilled, then notwithstanding Clause 41.2 effect shall be given to the provision.

The Principal shall not be obliged to pay for an item to be imported into Australia if the Contractor has not given the Principal a clean on board bill of lading for the item drawn or endorsed to the order of the Principal and a Customs invoice for the item.

With the exception of items to be imported into Australia and items listed in the Annexure, the Principal shall not be obliged to pay for unfixed plant and materials which plant or materials are not on the Site.

41.3 Retention Moneys

The Principal may deduct from moneys otherwise due to the Contractor amounts up to the limit of the percentages, if any, stated in the Annexure of so much of the value of the respective items stated in the Annexure as is included in the calculation of a payment.

41.4 Unfixed Plant and Materials

If the Contractor claims payment for plant or materials intended for incorporation in the Works but not yet incorporated, the Contractor shall establish to the satisfaction of the Superintendent that:

- (a) ownership of the plant or materials will pass to the Principal upon the making of the payment claimed; and
- (b) the plant or materials are properly stored, labelled the property of the Principal and insured in the name of the Principal and the contractor.

If the Superintendent is not satisfied, the Principal shall not be obliged to make payment for the plant or materials. The Principal, in its sole discretion, may agree that payment for the plant or materials will be made upon receipt of additional security in the form of cash or an unconditional, irrevocable bank undertaking in an amount and form determined by the Principal.

Upon payment the plant or materials shall be the property of the Principal free of any lien or charge.

41.5 Certificate of Practical Completion

At least fifteen (14) days before the anticipated Date of Practical Completion of the Works or a Separable Portion, the Contractor shall give to the Superintendent written notice of the anticipated Date of Practical Completion.

Within ten (14) days after service of the Contractor's notice, the Superintendent shall inspect the Works or the Separable Portion and issue to the Contractor a written notice listing all items requiring attention before issue of the certificate of Practical Completion. The Contractor shall comply

with that notice and thereafter shall give to the Superintendent a further written notice of the anticipated Date of Practical Completion, upon which the provisions of this Clause 41.5 shall re-apply.

When the Superintendent is satisfied that Practical Completion has been achieved, it shall issue to the Contractor a Certificate of Practical Completion of the Works or the Separable Portion, which shall state the date on which the Works, or the Separable Portion, reached Practical Completion.

41.6 Effect of Certificates

The issue of a payment certificate or a Certificate of Practical Completion shall not constitute approval of any work or other matter nor shall it prejudice any claim by the Principal.

41.7 Final Payment Claim

Within twenty eight (28) days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Superintendent a final payment claim and endorse it 'Final Payment Claim'.

The Contractor shall include in that claim all moneys which the Contractor considers to be due from the Principal under or arising out of the Contract or any alleged breach thereof or on any other basis whatever in connection with the Works.

After the expiration of the period for lodging a final payment claim any claim which the Contractor should have made against the Principal and has not made shall be barred.

41.8 Final Payment Certificate

Within fourteen (14) days after receipt of the Contractor's Final Payment Claim, the Superintendent shall issue to the Contractor and to the Principal a Final Payment Certificate endorsed 'Final Payment Certificate'. In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contract or any alleged breach thereof.

Within 20 days after the issue of the certificate, the Principal shall release to the Contractor any retention moneys or security then held by the Principal.

As a condition precedent to the release to the Contractor of any retention moneys or security then held by the Principal, the Contractor shall execute a Release to the Principal and Superintendent in the form attached hereto from all claims, demands, debts, accounts, actions and proceedings arising under or by virtue of the Contract or out of its performance. Within 14 days after receipt of the Release, the Principal shall release to the Contractor all retention moneys or security then held by the Principal.

41.9 Interest on Overdue Payments

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the rate prescribed in the Annexure. Interest shall be compounded at six monthly intervals.

41.10 Set Offs by the Principal

Without limiting the Principal's rights under any other provision in the Contract, any moneys due from the Contractor to the Principal under or by virtue of any provision of the Contract may be deducted by the Principal from any moneys which may be or become payable to the Contractor by the Principal and if those moneys are insufficient, the Principal can have recourse to retention moneys and, if they are insufficient, to security under the Contract. Nothing in the Clause shall affect the rights of the Principal to recover from the Contractor the whole of the debt or any balance that remains owing after such deductions.

42.0 PAYMENT OF WORKERS AND SUBCONTRACTORS

With each claim for payment under Clause 41.1, the Contractor shall give to the Principal a statutory declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts attested to, that:-

- (a) all workers who have at any time been engaged on work under the Contract have been paid all moneys payable to them, whether by the Contractor or a subcontractor, in respect of their employment on the work under the Contract;
- (b) all subcontractors have been paid all moneys payable to them in respect of work under the Contract for the period of the claim for payment, showing the names of all such subcontractors;
- (c) all suppliers of the Contractor have been paid all moneys payable to them in respect of the work under the Contract for the period of the claim for payment, showing the names of all the suppliers; and
- (d) in the event that any subcontractor or supplier has not been paid all moneys claimed by it for the period of the claim for payment then the Contractor shall include the following information in the statutory declaration in respect of such subcontractor or supplier:
 - (i) the name of the subcontractor or supplier;
 - (ii) the amount claimed by the subcontractor or supplier;
 - (iii) the date and amount of each payment made to the subcontractor or supplier for the period of the claim for payment; and
 - (iv) the reason for the non-payment.

If the Contractor fails to provide the statutory declaration, the Principal may withhold payment of moneys due to the Contractor until the statutory declaration is received.

At the request of the Contractor and out of moneys payable to the Contractor the Principal may on behalf of the Contractor make payments directly to a worker or subcontractor.

If the Contractor provides satisfactory proof of the maximum amount which may be payable to workers and subcontractors, the suspension of payment shall not apply to amounts in excess of the maximum amount.

If a worker, subcontractor or supplier obtains a court order in respect of moneys referred to in the first paragraph of this Clause, and produces to the Principal the court order and a statutory declaration that it remains unpaid, the Principal may pay the amount of the order, and costs included in the order, to the work, subcontractor or supplier and the amount paid shall be a debt due from the Contractor to the Principal.

After the making of a sequestration order or a winding up order in respect of the Contractor, the Principal shall not make any payment to a worker or Subcontractor without the concurrence of the official receiver or trustee of the estate of the bankrupt or the liquidator as the case may be.

43.0 DEFAULT OR INSOLVENCY

43.1 Preservation of Rights

If a party breaches or repudiates a substantial breach of contract, nothing in Clause 43 shall prejudice the right of the other party to recover damages or exercise any other right.

43.2 Default by the Contractor

If the Contractor commits a substantial breach of contract and the Principal considers that damages may not be adequate remedy, the Principal may give the Contractor a written notice to show cause.

Substantial breaches include but are not limited to:

- (a) suspension of work, in breach of Clause 32.1;
- (b) failing to proceed with due expedition and without delay, in breach of Clause 32.1;
- (c) failing to use the materials or stands of workmanship required by the Contract, in breach of Clause 29.1;
- (d) failing to comply with a direction of the Superintendent under Clause 29.2, in breach of Clause 22;
- (e) failing or provide evidence of insurance, in breach of Clause 20.1; and
- (f) unreasonably interfering with or disrupting, delaying or hindering the operation of the Tomago Smelter or any part of it or failing to co-operate with other contractors on the Site or to integrate its work and their work, in breach of Clause 26.2.

43.3 Requirements of a Notice by the Principal to Show Cause

A notice under Clause 43.2 shall:

- (a) state that it is a notice under Clause 43 of the General Conditions of Contract;
- (b) specify the alleged substantial breach;
- (c) require the Contractor to show cause in writing why the Principal should not exercise a right referred to in Clause 43.4;
- (d) specify the time and date by which the Contractor must show cause (which time shall not be less than 7 days after the notice is given to the Contractor);
- (e) specify the place at which cause must be shown.

43.4 Rights of the Principal

If by the time specified in a notice under Clause 43.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 43.4, the Principal may by notice in writing to the Contractor:

take out of the hands of the Contractor the whole or part of the work remaining to be completed; or

terminate the contract.

Upon giving a notice under Clause 43.2 the Principal may suspend payments to the Contractor until the expiration of the earlier of:

the date upon which the Contractor shown reasonable cause;

the date upon which the Principal takes action under Clause 43.4(a) or (b);

the date which is 7 days after the last day for showing cause in the notice under Clause 43.2.

If the Principal exercises the right under Clause 43.4(a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 43.6

43.5 Procedure When the Principal Takes Over Work

If the Principal takes work out of the hands of the Contractor under Clause 43.4(a) the Principal shall complete that work and the Principal may without payment of compensation take possession of such of the Constructional Plant and other things on or in the vicinity of the Site as are owned by the Contractor and are reasonably required by the Principal to facilitate completion of the work.

If the Principal takes possession of Constructional Plant or other things, the Principal shall maintain the Constructional Plant, and subject to Clause 43.6, on completion of the work the Principal shall return to the Contractor the Constructional Plant and any things taken under this Clause which are surplus.

43.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor

When work taken out of the hands of the Contractor under Clause 43.4(a) is completed the Superintendent shall ascertain the cost incurred by the Principal in completing the work and shall issue a certificate certifying the amount.

If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Principal.

If the Contractor is indebted to the Principal, the Principal may retain Constructional Plant or other things taken under Clause 43.5 until the debt is met. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the Constructional Plant or other things and apply the proceeds to satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor.

43.7 Default of the Principal

If the Principal commits a substantial breach of contract and the Contractor considers that damages may not be adequate remedy, the Contractor may give the Principal a written notice to show cause.

Substantial breaches include but are not limited to:

- (a) failing to make payment, in breach of Clause 41.1;
- (b) failure by the Superintendent to issue a Certificate of Practical Completion, in breach of Clause 41.5;
- (c) failing to give the Contractor possession of sufficient of the Site, in breach of Clause 26.1, subject to Clause 26.2, but only if the failure continues for longer than the period stated in the Annexure.

43.8 Requirements of a Notice by the Contractor to Show Cause

A notice under Clause 43.7 shall:

- (a) state that it is a notice under Clause 43 of the General Conditions of Contract;
- (b) specify the alleged substantial breach;
- (c) require the Principal to show cause in writing why the Contractor should not exercise a right referred to in Clause 43.9;
- (d) specify the time and date by which the Principal must show cause (which shall not be less than 7 clear days after the notice given to the Principal);
- (e) specify the place at which cause must be shown.

43.9 Rights of Contractor

If by the time specified in a notice under Clause 43.7 the Principal fails to show reasonable cause why the Contractor should not exercise a right referred to in Clause 43.9, the Contractor may by notice in writing to the Principal suspend the whole or any part of the work under the Contract.

The Contractor shall lift the suspension if the Principal remedies the breach but if within 28 days after the date of suspension under Clause 43.9, the Principal fails to remedy the breach or, if the breach is not capable of remedy, fails to make other arrangement to the reasonable satisfaction of the Contractor, the Contractor may by notice in writing to the Principal terminate the Contract.

The Contractor shall be entitled to recover from the Principal any damages flowing from the suspension.

43.10 Rights of the Parties on Termination

If the Contract is terminated under Clause 43.4(b) or Clause 43.9 the rights and liabilities of the parties shall be the same as they would be at common law if the defaulting party had wrongfully repudiated the Contract and the other party had elected to treat the Contract as at an end and recover damages.

43.11 Insolvency

If:

- (a) a party informs the other party in writing or creditors generally that the party is insolvent;
- (b) a party commits an act of bankruptcy;
- (c) a bankruptcy petition is presented against a party;
- (d) a party is made bankrupt;
- (e) a meeting of creditors of a party is called with a view to:
 - (i) entering a scheme of arrangement or composition with creditors; or
 - (ii) placing the party under official management;

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- (f) a party enters a scheme of arrangement or composition with creditors;
 - (g) a resolution is passed at a meeting of creditors to place a party under official management;
 - (h) a party is placed under official management;
 - (i) a receiver of the property or part of the property of a party is appointed;
 - (j) an application is made to a court for the winding up of a party;
 - (k) a winding up order is made in respect of a party;
 - (l) execution is levied against a party by creditors, debenture holders or trustees or under a floating charge;
 - (i) where the other party is the Principal, the Principal may, without giving a notice to show cause, exercise the right under Clause 43.4(a);
 - (ii) where the other party is the Contractor, the Contractor may, without giving a notice to show cause, exercise the right under Clause 43.9.

The rights given by Clause 43.11 are in addition to any other rights and may be exercised notwithstanding that there has been no breach of contract. The rights in Clause 43.11 are subject to any limitations under the Bankruptcy Act or any other act.

44.0 TERMINATION BY FRUSTRATION

If, under the law governing the Contract, the Contract is frustrated, the Principal shall pay the Contractor:

- (a) for work executed prior to the date of frustration, the amount which would have been payable if the Contract had not been frustrated and the Contractor had made a progress claim on the date of frustration;
- (b) the cost of materials reasonably ordered by the Contractor for the work under the Contract, which the Contractor is legally liable to accept, but only if the materials become the property of the Principal upon payment;
- (c) costs reasonably incurred by the Contractor in the expectations of completing the whole of the work under the Contract and not included in any payment by the Principal;
- (d) all retention moneys and security;
- (e) the reasonable cost of removal of Constructional Plant;
- (f) the reasonable cost of return to their place of recruitment of the Contractor's employees engaged in the work under the contract at the date of frustration.

45.0 DISPUTES

45.1 Submission to the Superintendent

In the event of any dispute or difference arising between the Principal and the Contractor as to the work under the Contract or the construction of the Contract or as to any matter or thing or whatever nature arising thereunder or in connection therewith then:

- (a) each party shall furnish in writing to the Superintendent details of that party's claim or, where the other party is the claimant, the reasons for rejecting the other party's claim and shall request the Superintendent to make a decision under Clause 47;
- (b) within 28 days after receipt from each party of the information referred to in Clause 45.1(a), the Superintendent shall give each party a written decision on the dispute.

Notwithstanding the existence of a dispute, each party shall continue to perform the Contract. In particular, the Contractor shall continue with the work and the Principal shall continue to comply with Clause 41.1.

45.2 Alternative Dispute Resolution

If either party is dissatisfied with the decision of the Superintendent or the Superintendent fails to make a decision within 28 days or the party required by Clause 45.1(a) to furnish to the Superintendent reasons for rejecting the other party's claim fails to provide the reasons within 28 days after request by the other party to do so, the parties shall then employ alternative dispute resolution procedures in a good faith attempt to resolve the dispute. The procedure may include negotiation, discussions, mediation, conciliation or mini-trial and, if the parties agree to do so, the assistance of a mediator nominated by the Australian Commercial Disputes Centre. It shall be commenced by written notice by each party to the other designating a person with the appropriate authority to be its representative in negotiations concerning the dispute.

45.3 Arbitration

If, after twenty (20) days from the date of receipt of the last of the notices referred to in Clause 45.2, the dispute has not been settled, either party may:

- (a) deposit with the New South Wales Chapter of the Institute of Arbitrators, Australia the sum of twenty thousand dollars (\$20,000) by way of security for costs of the arbitration proceedings; and
- (b) by written notice to the other party, terminate the procedure in Clause 45.2, provide evidence that it has made the deposit referred to in Clause 45.3(a), and require that the dispute be referred to arbitration.

Such dispute (unless meanwhile settled) shall upon receipt by the other party of the notice given under Clause 45.3(b) be referred to arbitration pursuant to the succeeding clause of this Clause 45. The parties shall request The Institute to deposit any sum held by it in an interest bearing deposit, such interest earned to be paid at the discretion of the arbitrator. The venue of the arbitration shall be in Sydney.

45.4 Identity of Arbitrator

Any arbitration under this clause shall be effected:

- (a) by a single arbitrator agreed upon in writing between the parties; and
- (b) failing such agreement within ten (10) days after receipt by the other party of the notice given under Clause 45.3, by a single arbitrator selected by the President or Acting President for the time being of the NSW Chapter of the Institute of Arbitrators, Australia.

45.5 Rules of Evidence and Representation

With respect to any arbitration:

- (a) the rules of evidence shall apply; and
- (b) either party may be represented by a duly qualified legal practitioner or other representative.

45.6 Security

The arbitrator shall have the power from time to time to make any order in relation to the provision of further security for the costs of the arbitration proceedings and to direct the manner in which any security for costs of the arbitration proceedings shall be applied.

45.7 Consolidation of Disputes

In any such arbitration proceedings, either party may raise by way of a further claim, set-off, defence or cross-claim and subject to any conditions as to costs or otherwise that may be imposed by the arbitrator, any dispute whatever relating to the construction of the Contract or as to any matter or thing of whatever nature arising thereunder or in connection therewith and whether or not a notice of dispute as referred to in Clause 45.1 in respect thereof has been given.

45.8 Costs

The costs of a submission, reference and award under this Clause and the apportionment thereof shall be in the discretion of the said arbitrator.

45.9 Proceeding with the Work Under the Contract

Notwithstanding the foregoing provisions of this Clause, the Contractor shall, if the work under the Contract (including the making good of any defects) has not been completed, at all times (subject as otherwise may be provided for in the Contract) proceed without delay to continue to execute the work under the Contract and in so doing shall comply with all instructions of the Superintendent provided that the same shall not touch upon or involve the subject nature of the dispute in respect of which notice has been given under Clause 45.1.

46.0 TERMINATION BY THE PRINCIPAL

The Principal may terminate the Contract at any time by giving the Contractor fifteen (15) days written notice of its intention to do so.

Upon receive of the Contractor of such notice, the Contractor shall comply forthwith with any and all reasonable directions given by the Principal regarding the cessation of work and shall not place any further order, nor enter into any further agreements in relation to work under the Contract, or part thereof, as the case may be. Further, the Contractor, if required by the Principal, shall assign or cancel any order or agreement and do all things possible to reduce any expense or cost consequent upon the termination and otherwise take all action relating to the termination which the Principal may require.

Upon termination under this Clause, the Principal shall pay to the Contractor:

- (a) for work executed prior to the date of termination, less any payments previously made for that work;
- (b) the cost of materials reasonably held or ordered by the Contractor for the work under the Contract, which the Contractor is legally liable to accept, plus the Contractor's reasonable costs of transportation to Site, but only if the materials become the Property of the Principal upon payment;
- (c) all retention moneys and security;
- (d) the reasonable cost of removal of Constructional Plant; and
- (e) the reasonable cost of return to their place of recruitment of the Contractor's employees engaged in the work under the Contract at the date of termination,

less any sums that may be deducted, set off or withheld by the Principal under the Contract, but the Contractor shall not be entitled to any lost profit or any other compensation and shall submit its claim for payment as a progress claim under Clause 41.

The Principal may exercise its powers under this Clause 46 notwithstanding any default by the Principal or any right which the Contractor may have generally or under the Contract to terminate the Contract or give a notice to show cause under Clause 43.

47.0 WAIVER OF CONDITIONS

None of the terms and conditions of the Contract shall be varied, waived, discharged or released either at law or in equity except with the Principal's prior, written consent.

It is understood and agreed that any delay, waiver or omission by the Principal to exercise any right or power arising from any breach or default by the Contractor of any of the terms, provisions or covenants of the Contract shall not be construed to be a waiver by the Principal of any subsequent breach or default of the same or other terms, provisions or covenants on the part of the Contractor.

48.0 LIMITATION OF PRINCIPAL'S LIABILITY

The Principal shall not be liable upon any claim by the Contractor in respect of any matter in connection with the work under the Contract unless a claim, together with the full particulars thereof, is lodged in writing with the Superintendent within the period specified in the Contract or, where a period is not specified, not later than fourteen (14) days after the date of occurrence of the event or circumstances on which the claim is based.

49.0 PARENT COMPANY GUARANTEE

Where the Contractor is a corporation that is a subsidiary of or related to another corporation, the Contractor shall, if so directed by the Superintendent, lodge with the Superintendent a guarantee from that other Corporation (the 'Parent Company') for the performance of the obligations and the discharge of the liabilities of the Contractor under the Contract in the form attached to these General Conditions of Contract, duly executed by the Parent Company.

For the purpose of this Clause:

- (a) a corporation is a subsidiary of another corporation if, under the law of the country, state or territory in which the first mentioned corporation is incorporated or registered, it is or is deemed to be, for the purposes of that law, a subsidiary of that other corporation; and
- (b) a corporation is related to another corporation, if under the law of the country, state or territory in which the first mentioned corporation is incorporated or registered, it and the other corporation are deemed to be, for the purposes of that law, related to each other.

The guarantee referred to in the preceding sub-clause shall be lodged by the Contractor with the Superintendent within 28 days after the Date of Acceptance of Tender. Failure to lodge this guarantee within this period will constitute a breach pursuant to Clause 43.