# Contracting Practice Notes forPublic Construction Procurement

These Contracting Practice Notes provide guidance when using the following contracts:

* Standards Australia General Conditions of Contract AS 2124-1992 used with Victorian Public Sector – Annexure part B Special Conditions of Contract for use in association with AS 2124-1992
* Standards Australia General Conditions of Contract for Design and Construct AS 4300-1995 used with Victorian Public Sector – Annexure part B Special Conditions of Contract for use in association with AS 4300-1995

The principles noted here has general application to other Victorian Public Construction Contracts.

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# Confidentiality and disclosure

Contracting Practice Note
Effective date 1 July 2018

## Context and Purpose

Government is subject to various requirements and policies concerning internal and external scrutiny of its tendering and contracting processes to ensure transparency, accountability and value-for-money. Consistent with these principles, the confidentiality and disclosure provisions in the Contract prescribe circumstances in which "Confidential Information" can be disclosed.

## Key Considerations

**What is "Confidential Information"?**

Confidential information includes the following information described in clause 8.6 *(Confidential Information)*:

* drawings, specifications and other information, samples, models, patterns and the like, supplied by either the Contractor or the Principal and marked or otherwise identified as confidential;
* trade secrets, know-how, scientific and technical information;
* information in relation to the Contract or the work under the Contract; and
* any other information which a party notifies the other is confidential, or which the other party knows or ought to know is confidential,

**(Confidential Information)**

The Contractor may request that other information, for example information which is commercially sensitive to the Contractor, be included in the definition of Confidential Information. The Principal should always consider its disclosure obligations under legislation and policy before agreeing to broaden the scope of Confidential Information.

**Limitations on Disclosure of Confidential Information**

Under clause 8.6 *(Confidential Information)*, neither the Principal nor the Contractor can disclose Confidential Information without the prior written consent of the other party.

**Exceptions**

*Disclosure of Information*

Under clause 8.6 *(Confidential Information)*, the Principal may publish the name of the Contractor and Contract Sum, together with the general conditions of Contract (including its Annexures and Schedules).

*Disclosure of Confidential Information*

Under clause 8.6 *(Confidential Information)*, the Principal may disclose Confidential Information without the Contractor's consent where such disclosure is:

* in accordance with laws (including any law (including the *Freedom of Information Act 1982* (Vic)) or policy of the Victorian Government), to satisfy the disclosure requirements of the Auditor-General, the Ombudsman, Independent Broad-based Anti-corruption Commission, Victorian Information Commissioner or parliamentary accountability;
* prudent or desirable in order to facilitate and support transparent open governance;
* in accordance with the Principal's annual report or other reporting requirements;
* in accordance with the duties of a Minister of the Crown, the secretary or deputy secretary of a government department or the chief officer (or equivalent) of a government agency;
* to any contractor, consultant or employee of the Principal to the extent necessary and for the purposes of the Works (provided that it is agreed that confidentiality will be maintained); or
* to another government department or agency or a municipal, public or statutory authority (provided that it is agreed that confidentiality will be maintained).

Under the same clause, the Contractor may disclose Confidential Information without the Principal's consent where such disclosure is:

* required as part of discovery of documents and/or court/tribunal proceedings;
* to a contractor, consultant or employee of the Contractor, for the purposes of carrying out the work under the Contract (provided that it is agreed that confidentiality will be maintained); or
* required by law, government policy, court order or the listing rules of the Australian Stock Exchange.

The Contractor has an obligation to notify the Principal of the requirement to disclose such information as soon as possible after becoming aware of the requirement.

# DataVic access policy

**Contracting Practice Note
Effective date 1 July 2018**

## Context and Purpose

Clauses 13.3 *(Background IP)* and 13.4 *(Data)* are required for conformity with the Victorian Government's DataVic Access Policy (**Policy**). The Policy aims to make a range of government-generated and government-owned data, ranging from demographic and economic data to geospatial data, available to the public, with the aim of:

* stimulating economic activity and driving innovation and new services;
* increasing productivity and improving personal and business decision making;
* improving research outcomes; and
* improving the efficiency and effectiveness of government.

The clauses support publication of data which is covered by the Policy by vesting ownership of such data in the Principal and providing the Principal with certain Intellectual Property Rights for publication of that data.

## Key Considerations

**What "Data" is covered?**

Data is defined in clause 13.4 *(Data)* as all point and array information, text, drawings, statistics, tests, analysis and other materials (including geological, geotechnical and environmental information, reports, maps, images, survey results and drill core and cutting samples) embodied in any form which is:

* supplied by or on behalf of the Principal in connection with the Contract (**Input Data**); or
* generated, recorded, placed, stored, processed, retrieved, printed, accessed or produced utilising the Input Data or for the purpose of the Contract.

The Contractor may request that certain information, for example information which is commercially sensitive to the Contractor, be excluded from the definition of Data. The Principal should be mindful that this clause has been drafted in accordance with the Policy, and any departures from this drafting may not be consistent with the Policy.

**Data vested in Principal**

Clause 13.4 *(Data)* provides that all Data is owned by the Principal.

However, the Contractor retains ownership of Intellectual Property Rights in any Background IP. Background IP is Intellectual Property Rights developed by a party independent of this Contract or prior to the date of this Contract that is used for the work under the Contract. The Contractor must licence this to the Principal to the extent necessary for the Principal to access, use, publish or store any Data.

**Principal's use of Contractor's Background IP**

Under clause 13.3 *(Background IP)*, the Principal can use the Contractor's Background IP (which includes all Intellectual Property Rights developed by a third party or prior to the date of Contract and used for the work under the Contract) to the extent necessary for the Principal to access, use, publish or store any Data vested in the Principal in accordance with clause 13.4 *(Data)*.

# Dispute Resolution

**Contracting Practice Note
Effective date 1 July 2018**

## Dispute Resolution Process

All disputes between the Contractor and the Principal that relate to the Contract must be progressed in accordance with the process set out in clause 47 *(Dispute Resolution)*.

The dispute resolution process in the Contract is:

* a party gives a notice to the other party of a dispute;
* the parties meet to attempt to resolve the dispute;
* mediation and / or expert determination;
* the determination of the expert is final and binding and the dispute process concludes here if this dispute resolution option is selected;
* if there is no expert determination and the dispute is not resolved at mediation, arbitration.

## Key Considerations See diagram in Attachment 1

**When should the mediation clause be included?**

Whether or not clause 47.2A *(Resolution of Disputes – Mediation)* should be included in the Contract, and whether disputes are referred to mediation, is a matter of personal preference for the Principal and previous experience with mediation, having regard to the nature and scale of the Works and any relevant Government requirements or policies and risks associated with dispute procedures.

**When should an expert determination clause be included?**

Whether or not clause 47.2B *(Expert Determination)* should be included in the Contract, and whether disputes are referred to expert determination, is a matter of personal preference for the Principal and previous experience with expert determination, having regard to the nature and scale of the Works and any relevant Government requirements or policies and risks associated with dispute procedures.

Often a dispute is referred to expert determination where the dispute is a technical issue and therefore an independent expert is preferred to an arbitrator or judge.

**Arbitration final and binding**

The Contract presents two alternatives in relation to the nature of the decision of the arbitrator. The decision is either:

* final and binding, with no ability of either party to appeal the decision of the arbitrator; or
* not final and binding, and the parties have the ability to bring an appeal to the Supreme Court on limited grounds.

Whether the decision of the arbitrator should be final and binding is a matter of personal preference and policy for the Principal.

**Attachment 1 - Dispute Process**



# Early termination

**Contracting Practice Note
Effective date 1 July 2018**

## Right to Terminate and Payment

Clause 44A *(Early Termination)* gives the Principal a right to terminate the Contract early on a 'no fault' basis. This right is often known as a right to terminate for the Principal's convenience.

Where this right is exercised, the Contractor is entitled to payment in accordance with Clause 44B *(Costs)* (such payment not to exceed the Contract Sum) for:

* work carried out prior to the date of termination, the amount which would have been payable if the Contract had not been terminated – in other words, what the Principal would have had to pay them if they have submitted a payment claim for work done to date;
* the cost of plant or materials reasonably ordered by the Contractor for the Works which the Contractor is legally bound to pay (provided that title in the plant and materials shall vest in the Principal upon payment);
* the reasonable cost of removing from the Site all labour, Constructional Plant and other things used in connection with work under the Contract; and
* an amount for overhead and profit in respect of the work carried out to that point which would normally be included in payment claims.

## Key Considerations

**Timeframe for Notice of Early Termination**

The Principal is required to insert in the Contract a minimum number of days for notice of early termination (ie, before such termination takes effect) - see Annexure Part A. Ideally, this should be inserted in the draft Contract which is included with the Request for Tender documents. The minimum number of days specified is likely to depend upon the nature and scale of a particular project and the Contractor's ability to cease undertaking the work under the Contract. Generally, the period will be between 30 and 60 days.

**Percentage for Overhead and Profit**

The Principal must determine and insert a percentage in Annexure Part A which is used to calculate the amount for overhead and profit in Clause 44B(a)(iv) *(Costs)* that the Contractor will be entitled to if the Principal terminates the Contract early. Generally, this percentage should be the same as the overhead and profit percentage that the Contractor would have expected to achieve if the Contractor had completed all the work under the Contract. There is no legal requirement to provide an amount for overhead and profit therefore it is open to the Principal to insert "0%".

**Other Consequences**

There may be other consequences of early termination (stated elsewhere in the Contract or otherwise), e.g., in the event of early termination the Contractor is required to assign or novate subcontracts, see clause 9.2 *(Subcontracting (including work performed by Consultants))* in AS 4300 - 1995 and clause 9.2 *(Subcontracting)* in AS 2124 - 1992.

# Environment

**Contracting Practice Note
Effective date 1 July 2018**

## Contractor's environmental obligations

The Contractor has obligations under clause 55 *(Environment)* of the Contract to comply with all environmental obligations and Environmental Laws.

Environmental Law is defined as any law regulating or otherwise relating to the Environment including any law relating to land use, planning, pollution of air, water, soil or groundwater, chemicals, waste, the use of transport, storage and handling of dangerous goods, the health or safety of any person or any other matters relating to, but not limited to, the protection of the Environment, health or property.

## Compliance and reporting

What must the Contractor do?

The Contractor is required to:

* comply with, and demonstrate that it has in place, an environmental management system;
* comply with, supervise and monitor the performance of all environmental obligations under the Contract and applicable Environmental Law;
* report to the Principal on all matters relating to the performance / non-performance of the Contractor's obligations under the Contract. The reporting requirements must be stated in Annexure Part A; and
* ensure that the Principal does not become liable in connection with any environmental pollution, breach of an Environmental Law or like matter.

## Principal's rights

The Principal has the following contractual rights if the Contractor does not comply with the environmental obligations under the Contract:

* the Principal may take whatever action is necessary to remedy such failure on the part of the Contractor and, if it does so, any cost, loss or expense suffered or incurred by the Principal in doing so will be a debt due by the Contractor to the Principal; or
* the Principal may enforce the indemnity in clause 55 (Environment), under which the Contractor indemnifies the Principal in respect of any liability arising in connection with a statutory obligation relating to clause 55 (Environment).

# Indemnities

**Contracting Practice Note
Effective date 1 July 2018**

## Context and Purpose

An indemnity creates a primary obligation on the party giving the indemnity to reimburse the indemnified party for loss it suffers as a result of the specified event.

An indemnity gives the indemnified party specific contractual rights of recovery against the indemnifier, allowing the indemnified party to recover losses without having to sue the indemnifier for breach of contract.

The Contract includes a number of broad indemnities in favour of the Principal, including against:

* Clause 13 (*Patents, copyright and other intellectual property rights*) – any design, materials, documents and methods of working provided by the Contractor infringing any Intellectual Property Rights.
* Clause 17 (*Damage to persons and property*) – any:
	+ loss or damage to property of the Principal; and
	+ claims against the Principal in respect of personal injury of 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, reduced to the extent of any contribution by the Principal.

* Clause 54 (*Security of Payment Act*) – all damage, expense, loss or liability arising out of suspension by a subcontractor (of work which forms part of the Work) pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Security of Payment Act**).
* Clause 55 (*Occupational Health and Safety*) – loss which may arise as a result of any breach by the Contractor of the *Occupational Health and Safety Act 2004* (Vic) or the *Occupational Health and Safety Regulations 2017* (Vic) (**OHS Legislation**).
* Clause 56 (*Environment*) – any liability arising in connection with an environmental pollution statutory obligation that arises in connection with the work under the Contract.

## Key Considerations

**Extent of Contractor's Indemnities**

Contractors may seek to remove or negotiate the scope of the contractual indemnities. As a general guide, when negotiating indemnities the Principal should consider:

* the nature and extent of potential loss or damage under the Contract;
* whether the liability is supported by insurance taken out by a party to the Contract;
* the ability of the indemnifying party to meet the obligation the subject of the indemnity; and
* whether the indemnifying party's liability should be limited in any way.

**Limitation of Liability and Exclusion of Liability**

The Contractor's liability (including under any indemnity) may be limited by the optional clause 49A (*Limitation of Liability*) (see Practice Note on Limitation / Exclusion of Liability).

Further, both the Contractor's and the Principal's liability may be limited by the optional clause 49B (*Exclusion of Liability)* which states that neither party is liable to the other for any:

* loss of business or production;
* loss of actual or anticipated profit or revenue; and
* loss of business reputation,

(see Practice Note on Limitation / Exclusion of Liability).

## AS 2124-1992 General Conditions of Contract

Similar indemnities exist in the amended form of AS 2124-1992 general conditions of contract with the following exceptions:

* Clause 13 (*Patents, copyright and other intellectual property rights*) – there is no indemnity in relation to design, materials, documents and methods of working provided by the Contractor infringing any Intellectual Property Rights; and
* there are different clause references for the following indemnities:
	+ Clause 53 (Security of Payment Act);
	+ Clause 54 (Occupational Health and Safety); and
	+ Clause 55 (Environment).

# Insurance

Contracting Practice Note
Effective date 1 July 2018

## Types of Insurance Required

The Contract includes clauses requiring the following insurance:

* insurance of the work under the Contract (clause 18);
* public liability insurance (clause 19);
* insurance of employees (clause 20); and
* professional indemnity insurance (clause 21).

To determine the amount of each type of insurance required under the Contract (to be inserted into Annexure Part A) and its duration, the Principal should seek advice from VMIA or the Principal's insurance experts.

Where additional types of insurance are required, this can be specified in Annexure Part A.

## Who obtains the insurance and other options

Insurance of the work under the Contract

There are two alternatives for the contract works insurance in the Contract:

* Alternative 1 – the Contractor takes out insurance of the work under the Contract; and
* Alternative 2 – the Principal takes out insurance of the work under the Contract.

The decision as to the preferred alternative is merely a matter of personal preference for each Principal.

Alternative 1 (Contractor insures) has two options:

* Option A – the insurance policy is in the joint names of the Principal and the Contractor; and
* Option B – must cover the Principal, the Contractor and all Consultants.

Option B is in line with the market expectations of contractors and the insurance industry, as contractors generally have a global (and not project specific) policy. This means that it will be difficult for them to have the Principal as a joint named insured.

## Public liability insurance

There are two alternatives for public liability insurance:

* Alternative 1 – the Contractor takes out the public liability insurance for the work under the Contract; and
* Alternative 2 – the Principal takes out the public liability insurance for the work under the Contract.

Alternative 1 has two options as follows:

* Option A – the insurance policy is in the joint names of the Principal and the Contractor; and
* Option B – must cover the Principal, the Contractor, the Superintendent and all Consultants.

The comments made above in relation to contract works insurance equally apply to public liability insurance.

## AS 2124-1992 General Conditions of Contract

Similar insurance provisions exist in the amended form of AS 2124-1992 general conditions of contract except that due to the nature of the work being undertaken (e.g., no design component), there is no professional indemnity insurance requirement in the Contract.

# Industrial relations

Contracting Practice Note
Effective date 1 July 2018

## Contractor's industrial relations obligations

The Contractor is responsible for managing employees and industrial relations matters in connection with the work under the Contract. This includes prompt payment of salaries and wages for employees.

Similarly, the Contractor is responsible for the resolution of all Industrial Action relating to the Contract. Industrial Action is defined as employee and industrial relations matters affecting the Site or the work under the Contract, including:

* a strike, lockout, demarcation, ban, limitation on work or industrial dispute; and
* any claim relating to employment or industrial arrangements of the Contractor or a subcontractor.

## Contractor's plan and reporting requirements

In accordance with clause 61*(Industrial Relations)*, the Contractor must:

* prepare an Industrial Relations Management Plan. This must be done prior to accessing the Site; and
* prepare and submit a report to the Principal monthly detailing compliance with the Industrial Relations Management Plan.

## Contractor assumes risk

Under the Contract, the Contractor assumes all time and cost consequences arising from industrial relations. The only exceptions are:

* a change in Legislative Requirements that occurs after the date of closing of tenders and that could not have been reasonably foreseen; and
* industrial conditions that are not limited to the Contractor, the Contractor's employees or subcontractors, or the Site.

# Key personnel

Contracting Practice Note
Effective date 1 July 2018

## Contractor's employees and Key Personnel

Where the Contractor has identified key personnel necessary to undertake the work under the Contract, and the Contractor has been engaged on the basis of the ongoing involvement of those key personnel, clause 26 *(Control of Contractor's employees and subcontractors)* and clause 26A *(Key Personnel)* set out specific requirements for their ongoing involvement in the project.

## Obligations in relation to Key Personnel

Key Personnel are specified in Annexure Part A. Once the Key Personnel are specified in Annexure Part A, the Contractor:

* must use the Key Personnel; and
* must not replace the Key Personnel without the prior consent of the Principal except where the any Key Personnel are no longer available to perform the work under the Contract due to resignation, illness or death.

Failure to comply with the Key Personnel requirements may give rise to a termination right for the Principal.

# Legislative requirements and policies

Contracting Practice Note
Effective date 1 July 2018

## Contractor must comply with Legislative Requirements

The Contractor is required to carry out the work under the Contract in accordance with all laws, regulations and the Principal's Policies and Procedures (clause 14.1 *(Complying with Legislative Requirements)*) and to obtain and maintain all approvals except those set out in the Annexure Part A or as directed by the Superintendent. Where there is a change in one of these requirements, the Contractor may be entitled to cost and time relief in accordance with clause 14.2 *(Changes in requirements)*.

## Key Considerations

**Threshold for relief**

Under clause 14.2 *(Changes in requirements)*, where a change in Legislative Requirement or an addition or change to the Principal's Policies and Procedures occurs after the date of closing of tenders, which:

* necessitates:
	+ a change to the Works;
	+ a change, being the provision or expansion of services of a municipal, public or statutory authority in connection with the Works or Temporary Works; or
	+ an increase or decrease in a fee or charge or payment of a new fee or charge; and
* could not reasonably have been anticipated by an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works at that prior date,

the Contractor must notify the Principal and the Superintendent prior to performing the change.

Any policies and procedures to be included in the definition of Principal's Policies and Procedures should be identified at item 27A of the Annexure Part A as should any Legislative Requirements with which the Contractor is not required to comply, or approvals which the Contractor is not required to obtain (item 27 of the Annexure Part A). For example, planning approval is often obtained by the Principal and carved out of approvals the Contractor is required to obtain.

**Principal to Direct the Contractor**

After the Contractor notifies the Principal of the change in Legislative Requirement, the Principal may direct the Contractor (to the extent permitted by law) to:

* perform the whole or part of the change, in the manner directed by the Principal; or
* not perform the change.

While the Principal has a contractual discretion as to the directing or not directing the Contractor to perform the change, the relevant law may be mandatory and may not allow the Principal to exempt itself.

**Consequences**

Where the Principal directs the Contractor to perform the change, to the extent that complying with a direction from the Principal causes the Contractor to incur more or less cost than otherwise would have been incurred, a valuation of additional/reduction in costs will need to be made.

Where the Contractor is directed not to perform the change, the Contractor is relieved of its obligations under the Contract, to the extent agreed to or determined by the Principal.

## AS 2124-1992 General Conditions of Contract

Similar provisions exist in the amended form of AS 2124-1992 general conditions of contract with the following exceptions:

* the Legislative Requirement provisions are contained in clause 14.1 *(Compliance with Legislative Requirements)*; and
* the test for whether the Contractor is entitled to relief for a change in a Legislative Requirement is slightly different, e.g., under clause 14.1 *(Changes in Legislative Requirements)* of AS 2124-1992 the only a change in Legislative Requirement or an addition or change to the Principal's Policies and Procedures where the Contractor is entitled to relief is where that change necessitates a change to the Works and not, as is the case with AS 4300-1995, a general change or an increase in a fee or a charge.

# Native title and artefacts

Contracting Practice Note
Effective date 1 July 2018

## Key Contractor Obligations

Artefacts found on or under the Site remain the property of the Principal, in accordance with clause 27A *(Artefacts)*. As such, the Contractor must:

* notify the Principal if it discovers an Artefact;
* take all reasonable precautions to prevent the relevant Artefact from being damaged or removed until directed by a relevant Authority or the Principal; and
* comply with any directions or orders imposed by any relevant authority upon the Principal or the Contractor or any direction of the Principal in respect of such Artefact.

If there is a Native Title Application in connection with the Site, the Principal has an ability to direct the Contractor in relation to the performance of the Works.

Where a Native Title Application is made after the Date of Contract, the Contractor may be entitled to extra time to complete the work under the Contract and costs.

## Key Considerations

What are Artefacts?

Artefacts are minerals, fossils, bones, coins, artefacts, articles, structures, other remains or objects of antiquity or of anthropological, scientific, geological, historical, aboriginal or archaeological interest or value (Artefacts) found on or under the surface of the Site.

What is a Native Title Application?

A Native Title Application is any claim or application under any Legislative Requirement or future Legislative Requirement relating to native title, including any application under Section 61 of the *Native Title Act 1993* (Cth), except for any such claim or application which is in any way materially based or reliant upon the existence of Artefacts on, under, near or around the Site.

The Principal should ideally carry out due diligence (including engaging relevant experts) prior to the issue of the Request for Tender, so that both the Principal and Tenderers can make an informed assessment as to the risk of discovering any Artefacts or a Native Title Application being made.

# Occupational health and safety

Contracting Practice Note
Effective date 1 July 2018

## Contractor's Occupational Health and Safety obligations

During the period that the Contractor is performing the Contractor's obligations under the Contract, the Contractor is required to comply with all OHS Law. This includes notifying the Principal of incidents or "near misses" that are required to be reported under OHS Law. The Contract also provides an option for the Contractor to be appointed as the Principal Contractor under the OHS Regulations.

OHS Law is defined as the *Occupational Health & Safety Act 2004* (Vic), the *Occupational Health and Safety Regulations 2017* (Vic) and all other applicable occupational health and safety legislation, regulations, rules, Codes of Practice and Australian Standards as amended from time to time.

## Will the Contractor be Principal Contractor?

There are two options in clause 54 *(Occupational Health and Safety):*

* the Contractor is appointed Principal Contractor in accordance with regulation 333(1)(a) of the *Occupational Health and Safety Regulations 2017* (Vic) (or under the Commonwealth legislation where applicable); or
* the Contractor is not appointed Principal Contractor.

Where the Contractor is not appointed Principal Contractor, this must be specified in Annexure Part A.

The Contractor must be appointed as the Principal Contractor unless there are exceptional circumstances and legal advice has been obtained which confirms that it is not appropriate for the Contractor to be appointed. For example, the work to be performed by the Contractor is being carried out on a site where another contractor is carrying out construction work and has already been appointed as the Principal Contractor for the duration that the Contractor will be carrying out all of its work. If the Contractor is not being appointed as the Principal Contractor, it will nevertheless have an obligation under the Contract to co-operate with the person appointed as the Principal Contractor to discharge those functions and duties.

# Payment claims

Contracting Practice Note
Effective date 1 July 2018

## Payment process

The process for payment under the Contract, set out in clause 42 *(Certificates and payment)*, is:

* the Contractor makes a claim for payment progressively at the dates or stages that are inserted into Annexure Part A;
* the Superintendent must assess the payment claim within 10 Business Days of receipt and issue a response being a payment schedule (this timeframe is mandated by the Building and Construction Industry Security of Payment Act 2002 (Vic));
* within 5 Business Days of receipt of a payment schedule, the Contractor must issue a tax invoice for the amount stated in the payment schedule;
* within 5 Business Days of receipt by the Superintendent of a tax invoice the Principal must pay the Contractor the amount shown in the payment schedule; and
* at the completion of the Contract, the Contractor provides a final payment claim (within 28 days after the expiry of the Defects Liability Period) and the final payment schedule is issued within 10 Business Days of receipt.[[1]](#footnote-1)

## Payment claims and schedule requirements

**Conditions precedent to making a payment claim**

Before the Contractor can make a payment claim the Contractor must comply with the conditions in clause 42.1A.

There are different conditions for the first payment claim and all subsequent payment claims.

To be effective under the *Building and Construction Industry Security of Payment Act 2002* (Vic), the conditions should remain conditions to the Contractor's right to make a payment claim rather than being a condition to payment.

**Requirements for a payment claim**

The requirements for what information must be included in a payment claim are set out in clause 42.1 *(Payment claims, schedules, calculations and time for payment)* these include:

* the Contractor’s Australian Business Number;
* the amount claimed by the Contractor and the basis for calculation of that amount;
* the amount of any GST paid or payable by the Contractor with respect to the amount claimed;
* the Contractor’s address for payment; and
* the Principal’s Reference number.

**Requirements for a payment schedule**

The requirements for a payment schedule are set out in clause 42.1 *(Payment claims, schedules, calculations and time for payment)* these include:

* the amount of the payment which is to be made by the Principal to the Contractor or by the Contractor to the Principal;
* the calculations employed to arrive at the amount;
* the value of work carried out by the Contractor in the performance of the Contract to the date of the claim;
* amounts otherwise due under the Contract from the Principal to the Contractor and the Contractor to the Principal; and
* any other amount which the Principal is entitled to retain, deduct, withhold or set-off under the Contract.

Caution should be taken if there are any changes proposed to this list of requirements by a Contractor.

The Superintendent must always issue a payment schedule that complies with these requirements within 10 Business Days of receiving the payment claim. If the Superintendent fails to do so, the Contractor can go to court and obtain payment of the amount it claimed in the payment claim.

**Unfixed plant and material**

Where the Principal agrees to pay for any item of unfixed plant and materials, the relevant item should be listed in Annexure Part A. The Contractor's entitlement to payment for any such item of unfixed plant and material is subject to the Contractor:

* providing additional Security (where such Security is stated in Annexure Part A);
* establishes to the satisfaction of the Superintendent that the Contractor has paid for the item, the item has been insured, the item is properly stored, labelled the property of the Principal and is adequately protected; and
* providing evidence that title in the item will vest in the Principal free of any security interest upon payment.

## AS 2124-1992 General Conditions of Contract

Similar payment provisions exist in the amended form of AS 2124-1992 general conditions of contract with the exception of the unfixed plant and material regime. In the AS 2124-1992 there are three alternatives, the alternative applying must be stated in Annexure Part A.

* Alternative 1 – where the Contractor claims payment for unfixed plant and materials, the Contractor must provide additional Security for an amount equal to the value of the relevant item.
* Alternative 2 – the Contractor is entitled to payment for unfixed plant and materials subject to satisfying certain conditions such as paying for the relevant item and transferring title to the Principal.
* Alternative 3 – the Contractor is not entitled to payment for unfixed plant and materials.

# Payment structures

Contracting Practice Note
Effective date 1 July 2018

## Performance and Payment

The Contractor is paid a fee for its performance of the work under the Contract (Contract Sum).

The Contract Sum is determined and included in the Contract prior to execution by the parties.

The Contract Sum is either:

* a lump sum – a set fee payable to the Contractor for the work under the Contract;
* rates – in this scenario a schedule of rates is included setting out the rates and quantities for the work under the Contract; or
* a combination of a lump sum and rates – whereby the fee paid for the work under the Contract is a combination of both a set fee and a schedule of rates included in the Contract.

The Principal must choose an option and include either the lump sum amount and / or the schedule of rates in the final Contract.

## Contract Sum adjustment and warranties regarding Contract Sum

The Contract Sum is only adjusted in a limited number of circumstances which are expressly set out in the Contract, e.g., where there is a variation directed under clause 40 *(Variations)*. This gives the Principal greater price certainty.

To reinforce that certainty, the Contractor is required to provide a number of warranties in relation to the Contract Sum, including that:

* the Contract Sum represents the full and complete payment and includes an allowance for all of the things necessary to complete the Works and all of the Contractor's obligations under the Contract;
* except as expressly stated in the Contract, the Contractor is not entitled to any adjustment in the Contract Sum;
* the Contractor has examined the Contract, Site (including the Environment) and all other information relevant or necessary to determine the Contract Sum; and
* the Contractor has relied upon its own assessments in determining the Contract Sum.

## Key Considerations for the Principal

The Principal should proceed with caution where Contractors try to amend clause 3 *(Nature of Contract)* to remove or reduce any of the warranties given by the Contractor in relation to the nature and calculation of the Contract Sum. For example, where a Contractor tries to narrow or change, in some way, the warranty from the Contractor that the Contract Sum is a full and complete payment and includes allowance for all matters and things necessary for the performance of the Works. Such a change could be an indication that the Contractor's proposed Contract Sum is not full and complete thus leaving the Principal with cost uncertainty.

## AS 2124-1992 General Conditions of Contract

Similar payment structures exist in the amended form of AS 2124-1992 general conditions of contract except that there is a Bill of Quantities regime.

A Bill of Quantities is a document issued to tenderers by or on behalf of the Principal, stating estimated quantities of work to be carried out.

# Practical Completion and Defects Liability Period

Contracting Practice Note
Effective date 1 July 2018

## Practical Completion Process

Once the work under the Contract has reached completion (Practical Completion), the following process must occur under clause 42.3 *(Certificate of Practical Completion)*:[[2]](#footnote-2)

* the Contractor must notify the Principal of the date when it anticipates Practical Completion will be achieved; and
* the Superintendent (if it agrees that Practical Completion has been achieved) will issue a certificate to this effect (**Certificate of Practical Completion**) or give the Contractor reasons for not issuing the Certificate of Practical Completion.

The Superintendent must state in the Certificate of Practical Completion the date that Practical Completion was achieved (**Date of Practical Completion**). This date has implications for several clauses in the Contract e.g., clause 37 *(Defects liability)* the start of the Defects Liability Period.

After Practical Completion, the Contractor hands back the Site to the Principal and the risk of the Site transfers back to the Principal.

Further, the Defects Lability Period commences on the Date of Practical Completion.

## What is Practical Completion?

Practical Completion is defined as:

* when the Works are complete except for minor omissions and defects which do not prevent the Works from being reasonably capable of being used for their Stated Purpose;
* all tests required for the Works have been carried out and passed;
* the Contractor has supplied all documents and drawings (including draft as built drawings);
* the Contractor has provided all original warranties;
* the Contractor has provided evidence of compliance with the quality assurance system; and
* the Contractor has provided all operating manuals and all notices, permits and certificates from relevant authorities.

The Principal should consider if there are any other requirements for Practical Completion that are specific to the project and include them directly into the definition of Practical Completion by including a new subclause in the definition of 'Practical Completion' in clause 2 *(Interpretation)*.

## Determining if Practical Completion has been reached

The Superintendent determines if Practical Completion has been reached. This is a technical determination of whether the Works can be used for their Stated Purpose and whether all of the conditions for Practical Completion have been met, e.g., the Principal is in a position, and equipped with all relevant information, to occupy and use the Site or take back care of the work under the Contract.

Given the implications for the determination of Practical Completion under the Contract, it is an important determination. For instance, as stated above the Defects Lability Period commences on the Date of Practical Completion and the Contractor is no longer responsible for the control of the Site.

Release of Security at Practical Completion is discussed in Practice Note on Security.

## Separable Portions

Where there are Separable Portions for the work under the Contract, the Principal must insert details of the Separable Portion in Annexure Part A. This includes a separate Date for Practical Completion for each Separable Portion and accordingly the processes in clause 42.3 *(Certificate of Practical Completion)* apply to each Separable Portion separately.[[3]](#footnote-3)

## Defects Liability Period

After the Date of Practical Completion, the Contractor must rectify any defects or omissions in the work under the Contract that exist at Practical Completion or are notified to the Contractor up to the end of the period stated in Annexure Part A. This period is called the Defects Liability Period and is typically 12 months from the Date of Practical Completion.

The Principal may also specify a separate Defects Liability Period for rectification work done during the original Defects Liability Period. This period is also stated in Annexure Part A, and is also typically 12 months. There is optional drafting in Clause 37 *(Defects liability)* that makes the separate Defects Liability Period specified in Annexure Part A automatic.

# Programming of the Works, Extensions of Time and Liquidated Damages

Contracting Practice Note
Effective date 1 July 2018

## Primary Contractor Obligations – Date for Practical Completion

The Contractor must:

* complete the work under the Contract (reach Practical Completion) by the Date for Practical Completion; and
* complete and handover to the Principal the final form of as-built drawings within the timeframe specified in Annexure Part A after the date that Practical Completion is achieved.

Where the Contractor's progress of the work under the Contract is delayed, and the Contractor will not reach Practical Completion by the Date for Practical Completion specified in the Contract, the Contractor may be entitled to an extension of time to that date[[4]](#footnote-4). Any such entitlement is dependent upon:

* whether the Contractor has complied with the process for making a claim by the Contractor for an extension of time; and
* if the delay was caused by one of the events identified in the Contract.

The Contract also includes a set amount of money (Liquidated Damages) that is payable by the Contractor for each day the Contractor is late in achieving Practical Completion.

Partial release of the Security provided by the Contractor does not occur until after the final form of as built drawings is submitted to the Principal. The Contract requires those drawings to be submitted within the timeframe specified in Annexure Part A after the date that Practical Completion is achieved.

## Other Contractor Obligations, EOTs and Optional Clauses

**Contractor's Program**

Under clause 33.2 (*Contractor's Program*) the Contractor must prepare a program showing:

* the major activities in the work under the Contract;
* the dates by which or the times within which key decisions are to be made and information is to be provided, and the various stages or parts of the work under the Contract are to be executed or completed,

(**Contractor's Program**).

The Contractor's Program:

* must be approved by the Superintendent in accordance with clause 33.2 *(Contractor's Program)*;
* must not be departed from by the Contractor without reasonable cause or where the departure is necessary to comply with another clause of the Contract; and
* does not form part of the Contract but it may be used by the Superintendent and the Principal to monitor and assess the progress of the work under the Contract.

The Principal will need to list in the Annexure Part A, any information which the Superintendent must provide the Contractor and the times by which it must be provided (See third paragraph of clause 33.1).

**Entitlement to Extensions of Time**

Only where the Contractor is delayed by reason of one of the causes set out in clause 35.5 will the Contractor be entitled to an extension of time (provided the Contractor has complied with the claims process in clause 35.5 (*Extension of time for Practical Completion*).

Some input into the qualifying causes of delay in clause 35.5 will be required including:

* the number of working days of inclement weather which need to occur in one calendar month before an entitlement to an extension of time arises, need to be nominated. This will naturally vary from project to project and depend on the duration of the project, in particular whether work will be carried out during the winter/early spring period. The number of days will need to form part of each tenderer's response to the Request for Tender and may need to be negotiated with the successful tenderer;
* any qualifying causes of delay occurring on or before the Date for Practical Completion and which are beyond the reasonable control of the Contractor, which the Principal wishes to add to the existing causes, need to be described in the Annexure Part A. Again, each tenderer will need to propose such causes of delay in its tender submission; and
* any qualifying causes of delay occurring before, on or after the Date for Practical Completion, which the Principal wishes to add to the existing causes, need to be described in the Annexure Part A. Again, each tenderer will need to propose such causes of delay in its tender submission.

**Who owns the float / contingency**

Clause 35.5 contains optional drafting to transfer ownership of the float/contingency in the Contractor's program from the Contractor to the Principal. The Contractor's program will include some float/contingency to allow for the inevitable delays which often occur on a construction project. The float/contingency that is relevant here is not the float in the duration of particular activities but rather if the Contractor's program indicates that the Contractor is scheduled to achieve Practical Completion before the Date for Practical Completion -ie, has it planned to finish early.

The current Australian Standard wording (Alternative 1) provides that the Contractor is entitled to an extension of time if it experiences a qualifying cause of delay and is delayed in reaching Practical Completion. This means that each time any contingency is eaten up by a delay, and despite the fact that the delay would not prevent the Contractor in reaching Practical Completion by the Date for Practical Completion, the Contractor is still entitled to an extension of time.

Alternative 2 drafting provides that the Contractor is only entitled to an extension of time where it experiences a qualifying cause of delay and is delayed in reaching Practical Completion by the Date for Practical Completion. The effect of this is that only delays which impact the critical path to the extent that Practical Completion is delayed to a date after the Date for Practical Completion, give rise to an entitlement to an extension of time.

**Acceleration**

There are two optional clauses providing for acceleration. The first (Clause 33.5) provides that where the Contractor is entitled to an extension to the Date for Practical Completion, the Principal may choose instead to issue an acceleration direction, and the costs of complying with that direction shall be valued under clause 40.5. This clause may be desirable on projects where the date the project is completed is of critical importance. For example, a school being completed before the start of the school year. In those circumstances, the Principal may wish to pay for the work to be accelerated instead of granting an extension of time to the Contractor and, therefore, avoid pushing out the Date of Practical Completion.

The second optional clause (Clause 33.6) provides for the Superintendent to direct the Contractor to provide an acceleration proposal setting out the projected impacts of the acceleration including an estimate of the costs that will be incurred, ie, a direction to finish early. The Superintendent may then accept that proposal and the Contractor will be entitled to the adjustments to the Contract Sum, set out in the proposal. This optional clause should be included where the Principal requires ultimately flexibility as to the timing and completion of the project and where there is value in the project being completed early from the Principal's perspective.

While the two optional clauses are designed to address to two slightly different situations, they are not inconsistent with one another and, therefore, depending on the particular circumstances, both can be included in the Contract.

**Bonus**

If the Principal wishes to incentivise the Contractor to complete the works early, it can use clause 35.8 and input a bonus amount, or a method for calculating the bonus amount, into the Annexure Part A. A cap on the bonus can also be inserted.

**Liquidated Damages**

Liquidated Damages are a set amount of money (specific to each project or part of the project) due from the Contractor to the Principal for each day the Contractor is late in achieving Practical Completion.

The amount of Liquidated Damages for each project must be specified in Item 39. The amount must be a genuine pre-estimate of the Principal's loss in the event that Practical Completion is not achieved by the Date for Practical Completion. In other words, they must represent, at the time the contract is signed, the amount the Principal genuinely estimates to be the loss it will suffer if the Contractor is late in achieving Practical Completion. Common types of losses included in the amount are the additional costs of project staff, external project managers and consultants and amounts payable to third parties with which the government department/agency has agreed the project will be complete and ready for use by a certain date.

If the Liquidated Damages amount is not a genuine pre-estimate of that loss, the Principal runs the risk of a court finding that the Liquidated Damages are actually a penalty and therefore not enforceable.

Where the Principal is a government agency, the loss included in a liquidated damages amount may include the loss which will be 'suffered' if the infrastructure is not available to the public (assuming that a reasonable estimate can be attributed to that loss). This may require input/advice from the finance department and/or external financial advisors.

If the parties wish to limit the Liquidated Damages payable under the Contract, optional clause 35.7 can be inserted and the amount of any such limit may be inserted into Annexure Part A. If the Contractor's liability reaches the capped amount, the Principal has, subject to certain steps being followed, a right to terminate the Contract.

## AS 2124-1992 General Conditions of Contract

Similar provisions exist in the amended form of AS 2124-1992 general conditions of contract with the following exceptions:

* the defined term for the Contractor's Program in AS 2124-1992 is construction program; and
* there are some different causes set out in clause 35.5 for which the Contractor may be entitled to an extension of time, e.g., repudiation or abandonment by a Nominated Subcontractor and actual quantities of work being greater than the quantities in the Bill of Quantities.

# Security

Contracting Practice Note
Effective date 1 July 2018

## Performance Security and Parent Company Guarantee

As security for the performance of its obligations, the Contractor is required to provide to the Principal one of the following:

* an unconditional undertaking in a form approved by the Principal; or
* retention moneys, being retention of a percentage of each payment due to the Contractor up to a maximum amount.

The form of parent company guarantee annexed at Annexure Part N in AS 4300-1995 and Annexure Part G in AS 2124-1992.

## Key Considerations

**What type of security should be given?**

The Principal may seek to have the Contractor provide an unconditional undertaking or retention moneys or combination of the two types of security stated in the Contract.

The type of security required will depend on market conditions (including the cost of obtaining an unconditional undertaking) and the personal preference of the Principal. Whether a parent company guarantee is required will depend on whether the Contractor is a subsidiary of another company and whether it itself has a sound balance sheet and assets. The Principal will need to seek financial records and other relevant information from Contractors to determine the financial strength and whether a parent company guarantee is necessary.

**Amount of Security**

Ordinarily the amount of security provided is 5% of the Contract Sum, being:

* two unconditional undertakings each for 2.5% of the Contract Sum; or
* retention moneys of 10% of the value of the work incorporated into the Works until 5% of the Contract Sum is reached.

**Principal's discretion to approve unconditional undertaking**

The unconditional undertaking in Annexure Part C is approved (no specific Annexure Part number is used for the undertaking annexed to AS 2124-1992). Any departure from that form of document should be carefully considered by the Principal. Potential issues with the form of any other unconditional undertaking are:

* any restrictions on the ability of the Principal to call on the undertaking that do not align with the rights of the Principal in clause 5.6 *(Conversion of Security and recourse to retention moneys)*;
* whether the financial institution giving the undertaking has the Required Rating;
* any limitations on the location where the undertaking must be presented when the Principal is calling on the Security. The Principal must be able to do so at any branch of the financial instructionand one that is in Victoria; and
* expiry of the undertaking prior to the completion of the Works without replacement security being provided.

**Reduction and release of Security and retention moneys**

There is optional drafting in the Contract in clause 5.8 *(reduction and release of Security and retention moneys)* in relation to the timing of the reduction of the Principal's entitlement to Security and retention moneys.[[5]](#footnote-5)

Security and / or retention moneys held are reduced (ordinarily this reduction is by 50% of the Security / retention moneys held) once both Practical Completion is reached and the final as built diagrams are provided by the Contractor.

Alternatively, there is optional drafting in clause 5.7 *(Reduction and release of Security and retention moneys)* allows the Superintendent to reduce the Security and / or retention moneys held at any time after both Practical Completion is reached and the final as built diagrams are provided by the Contractor to any percentage that the Superintendent considers just and equitable.

**Security for Separable Portions**

There is optional drafting in clause 5.2 *(Provision of Security),* Security is usually provided for each Separable Portion. The Principal has the option to apply Security for one Separable Portion against other Separable Portions. This option could be enlivened where the project or the Contractor is high risk.

Further, the Principal will ordinarily reduce Security for each Separable Portion at the relevant time for that Separable Portion pursuant to clause 5.8 *(Reduction and release of Security and retention moneys).[[6]](#footnote-6)*  For instance, reduction within the timeframe specified in Annexure Part A after the date that Practical Completion is reached for each Separable Portion.

# Site conditions and Latent Conditions

Contracting Practice Note
Effective date 1 July 2018

## Contractor assumes risk subject to exceptions

Under the Contract, the responsibility for Site Conditions encountered while the Contractor is undertaking the work under the Contract lies with the Contractor. While the Principal may provide the Contractor with information in relation to the Site Conditions, the Principal disclaims responsibility for such information (to the extent this is legally possible) to minimise the risk to the Principal of any reliance on that information by the Contractor.

The exception to the Contractor's responsibility for Site Conditions is where the Contractor encounters certain physical conditions that an experienced, prudent and competent contractor would not have foreseen at the time of the Contractor's tender (**Latent Conditions**). For example, that may include contamination that was not identifiable through examination of the Site and testing.

## Key Considerations

**Site Conditions**

The Contractor is responsible for all physical conditions on the Site (**Site Conditions**) with the exception of Latent Conditions, even where the Principal has provided the Contractor with relevant information in relation to the Site Conditions.

Under clause 12A.4 *(Site Conditions)*, the Contractor warrants that it has examined the Site and fully informed itself as to the Site Conditions and obtained all appropriate advice prior to submitting its tender. It warrants that the Contract Sum includes an amount to compensate the Contractor for all risks associated with Site Conditions and the program contains contingency to ensure Practical Completion is achieved by the Date for Practical Completion.

Further, under clause 12A *(Information)* where the Principal provides the Contractor with information about the Site, it does so for the information only of the Contractor and clause 12A *(Information)* contains express warranties from the Contractor that it has not relied on any such documents and has entered into the Contract on the basis of its own investigations. Information about site conditions provided prior to the Date of Contract should be marked as Site Information or 'for information purposes only' to ensure that it falls within the ambit of the Contractor's warranty as to no reliance.

**What are "Latent Conditions"?**

Under clause 12.1 *(Definition)* Latent Conditions are defined as physical conditions that differ materially from the physical conditions that should reasonably have been anticipated by an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works at the time of the Contractor's tender if that contractor had:

* examined all information made available in writing by the Principal to the Contractor for the purpose of tendering;
* examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries;
* examined the Site and its surroundings; and
* obtained appropriate professional and technical advice.

Physical conditions specific to the project that are to be at the Contractor's risk (and priced into the tender accordingly), can be excluded from the definition of Latent Conditions by listing them in Annexure Part A. For example, the presence of rock (which is known) is often excluded. If no physical conditions are there listed, all Latent Conditions are at the Principal's risk.

**What happens if the Contractor encounters a Latent Condition?**

The Contractor must give written notice to the Principal followed by a written statement, where it becomes aware of a Latent Condition in accordance with clause 12.2 *(Notification)*.

Where urgent action is necessary to protect the work under the Contract, other property or people as a result of a Latent Condition, then the Contractor shall carry out such action without delay.

Delay caused by a Latent Condition may give rise to an entitlement to an extension of time under clause 35.5 *(Extension of time for Practical Completion and Administrative Completion)*.

If a Latent Condition causes the Contractor to:

* carry out more work;
* use more Constructional Plant; or
* incur more cost,

than an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works could reasonably have anticipated at the time of tendering, the Contractor may also be entitled to extra costs.

# Subcontracting

Contracting Practice Note
Effective date 1 July 2018

## Subcontracting Requirements

The Contractor is responsible for the whole of the work under the Contract regardless of the acts or omissions of its subcontractors. Notwithstanding this, the Contract provides the Principal with appropriate control of, and input into, the Contractor's subcontracting arrangements.

Clause 9 *(Assignment and subcontracting)* provides the Principal with visibility over the contractual arrangements by:

* restricting the Contractor from assigning or transferring the Contract without the Principal's consent; and
* requiring compliance with the Subcontracting Commercial Principles for all subcontracts.

## Key Considerations

Subcontractors (Clause 9.2 *(Subcontracting (including work performed by Consultants)*)

Unless otherwise notified by the Principal before the Date of Contract or otherwise directed by the Superintendent in writing, the Contractor is required to subcontract to the Subcontractors identified in the Contractor's tender. If the Principal does not agree to or approve any subcontractors listed in the Contractor's tender, it must notify the Contractor before the Date of Contract.

Subcontracting Commercial Principles (Clause 9.2 *(Subcontracting (including work performed by Consultants)*)

The Contractor must follow the Subcontracting Commercial Principles, a standard set of principles that set parameters for the terms and conditions included in any subcontract.

Where any of the Subcontracting Commercial Principles are not relevant for the project or for certain subcontracts, the Principal may state this in the Request for Tender. For instance, for low value, or low risk, subcontracts, some of the Subcontracting Commercial Principles may not be necessary or relevant. If this is the case, the Request for Tender should include a statement that some or all of the Subcontracting Commercial Principles do not apply and clearly identify those exceptions. The Contractor always has the opportunity following the award of the Contract to exempt itself by obtaining the prior written approval of the Superintendent.

While the Contract requires the Contractor to ensure any Subcontract is consistent with the Subcontracting Commercial Principles, it does not require the Principal or the Superintendent to approve the terms of each individual Subcontract.

Selected Subcontractors

Principals may choose to nominate 'Selected Subcontractors'.

Selected Subcontractors, where specified in Annexure Part A of the Contract, must be used by the Contractor. Selected Subcontractors are pre-approved subcontractors that may be used by the Contractor for a specified portion of the Works (Selected Subcontract Work).

Selected Subcontractors (if any) will either be:

* identified by the Principal in the Request for Tender; or
* nominated by the Contractor in its tender.

Where a Selected Subcontractor is nominated (and included in Annexure Part A of the Contract) the specific portion of the Works to be undertaken by the Selected Subcontractor must be stated in Annexure Part A of the Contract.

**Secondary Subcontracts (Clause 9.2 *(Subcontracting (including work performed by Consultants)*)**

'Secondary Subcontract' is a subcontract entered into by a subcontractor of the Contractor.

Given that a subcontractor of the Contractor is further removed from the main Contract, the Contractor is not required to obtain approval (to subcontract or in relation to the conditions of such a subcontract) unless specified in the Request for Tender. If review or approval of sub-subcontractors or the terms of the Secondary Subcontract are required, this will need to be specified in the Request for Tender. Generally, this will only be required where the Secondary Subcontract involves a critical component of the Works.

**Warranties (Clause 29.4 *(Warranties)*)**

The Contractor must procure warranties from subcontractors and suppliers, in the name of the Principal, where specified in the Contract. If they are required, they need to be included in the specification (Annexure Part F) or the documents forming the Principal's Project Requirements (listed in Annexure Part A).

## AS 2124-1992 General Conditions of Contract

Similar subcontracting provisions exist in the amended form of AS 2124-1992 general conditions of contract with the following exceptions:

* Selected Subcontract provisions are in Clause 10 (Select and nominated subcontractors); and
* there are additional provisions with respect to Nominated Subcontractors.

**Nominated Subcontractors (Clause 10 *(Selected and nominated subcontractors)*)**

'Nominated Subcontractors' are:

* subcontractors that the Principal directs the Contractor to subcontract Nominated Subcontract Work to; or
* subcontractors named in the Contract and engaged by the Principal that will be assigned or novated to the Contractor, and a copy of the subcontract was included in the Request for Tender.

# Performance reporting

Contracting Practice Note
Effective date 1 July 2018

## Context and Purpose

The recording and reporting provisions enable early detection and management of potential issues or delays in the work under the Contract.

Performance information about the Contractor can also be used and reviewed for the purposes of determining the suitability of the Contractor for future Government tenders.

To this end, the Contractor must:

* keep sufficient records relating to the performance of the work under the Contract; and
* submit reports to the Principal regarding the Contractor's performance of the works at least monthly while the work under the Contract is being undertaken.

## Key Considerations

**Regular Performance Reports and information for government sharing**

In Clause 57 *(Records and Reporting)*,a distinction is made between:

* regular reporting which is undertaken as usual practice, covering matters such as management and progress of the Works, any incidents or issues, and compliance with policies and plans required by the Contract (referred to in the Contract as the 'Regular Performance Reports'); and
* reporting for the purposes of shared performance reporting amongst government agencies to allow for assessment of the Contractor for future tendering and contracting opportunities, in accordance with Victorian Government policy (referred to in the Contract as the 'Shared Reporting Regime').

The parts of the clause relating to the Shared Reporting Regime only come into operation if the value of the Contract exceeds a financial threshold which is set out in Annexure Part A. This item in Annexure Part A is pre-populated to reflect the Victorian Government's policy position on what value of Contract should be subject to such shared reporting requirements. Accordingly, it is not necessary to amend this item in Annexure Part A unless there has been a change in policy position. It is also not necessary to amend clause 57 to include or not include the Shared Reporting Regime, as the relevant contractual clauses either automatically come into effect or are dormant based on the value of the Contract Sum.

The requirements for Regular Performance Reports are unaffected by the Shared Reporting Regime, with regular reports to be submitted as a matter of course.

**Project-Specific Performance Information**

The requirements of the Regular Performance Report can be expanded where there is information required that is specific to the particular project. This can be done by inserting the additional project specific requirements in Annexure Part A. However, where the Contract is a Shared Reporting Contract the Contractor agrees to:

* cooperate with, and provide and any assistance required by, the Superintendent in relation to the Shared Reporting Process; and
* provide to the Superintendent any information required by the Superintendent from time to time, within the time requested, for the purposes of the Shared Reporting Process.

# Probity and conflict of Interest

Contracting Practice Note
Effective date 1 July 2018

## Context and Purpose

Government procurement is subject to various probity requirements and policies concerning standards of behaviour and actions in the conduct of procurement processes, including equity, confidentiality, avoiding conflicts of interest, and consumer/supplier confidence in the integrity of government procurement processes.

As a general proposition, those probity obligations apply to the Contractor during the period that the Contractor is undertaking the work under the Contract.

The probity regime under the Contract consists of:

* the Contractor warranting that the representations made in its tender are true; and
* ongoing conflict of interest reporting obligations for the Contractor.

## Key Considerations

**Contractor's tender**

Under clause 6.3 *(Contractor's Tender)* the Contractor warrants that all representations made in the Contractor's tender are true.

Any breach of the warranty given by the Contractor under clause 6.3 *(Contractor's Tender)* is a substantial breach for the purposes of clause 44.2 *(Default by the Contractor)*. Under clause 44.2 *(Default by the Contractor)* where the Contractor commits a substantial breach:

* the Principal may give the Contractor a notice requiring the Contractor to remedy the breach; and
* if the Contractor does not remedy the breach by the time specified in the notice from the Principal, the Principal may either take the work out of the hands of the Contractor or terminate the Contract.

**Contractor's ongoing conflict of interest obligations**

Clause 6.4 *(Conflict of Interest)* codifies the Contractor's conflict of interest obligations from the time of release of the request for tender and extends those obligations to period during which the Contractor is undertaking the work under the Contract.

The Contractor:

* warrants that it does not have (and did not have between release of the request for tender and the Date of Contract) any actual, potential or perceived conflict of interest or duty; and
* must immediately notify the Principal if it becomes aware of any conflict of interest or duty (actual, potential, or perceived).

The Principal may direct the Contractor with respect to a conflict of interest or duty. The Contractor must comply with that direction at its cost.

**Actual, potential and perceived conflict of interest**

An actual conflict of interest refers to a real conflict that any contractor, consultant or employee of the Contractor has in relation to the work under the Contract.

A potential conflict of interest refers to circumstances where there is a foreseeable risk that a conflict may arise in the future.

A perceived conflict of interest refers to a scenario where the public or a third party could form the view any contractor, consultant or employee of the Contractor has a conflict of interest in relation to the work under the Contract.

**Managing a conflict of interest**

The management of risk associated with conflict of interest is fundamental to ensuring high levels of integrity and public trust in the Government.

The Principal should consider any relevant Government policies in relation to managing an actual, potential or perceived conflict of interest, such measures may include removal of relevant contractor, consultant or employee from the performance of the work under the Contract.

# Variations

Contracting Practice Note
Effective date 1 July 2018

## Varying the work under the Contract

The work under the Contract which is agreed and set out in the Contract, may be varied by direction from the Superintendent in one of the following ways:

* increasing, decreasing or omitting any part of the work under the Contract;
* changing the character or quality of any material or work or of anything described in the Principal's Project Requirements or the Design Documents;[[7]](#footnote-7)
* changing the levels, lines, positions or dimensions of anything described in the Principal's Project Requirements, the Design Documents or any part of the work under the Contract;
* executing additional work; or
* demolishing or removing material or work no longer required by the Principal.

Variations are likely to have implications for the Contract Sum and the Date for Practical Completion. Under clause 40 *(Variations)*,the Contractor must notify of the effect on the Contractor's Program and the time for Practical Completion after receipt of a notice from the Superintendent regarding a proposed variation.

## Key Considerations

Directing a variation

Variations or what the Contractor perceives as a variation, have the potential to be contentious and result in protracted claims. For this reason, the Principal and the Superintendent should exercise caution when giving directions and maintain accurate records of any relevant correspondence.

Procurement considerations

Prior to directing any Variations, the Principal/Superintendent should consider the implication of any additional work on the approvals (procurement and otherwise) currently in place for the project and whether the variation is work that needs a new approval.

**Pricing a variation**

Variations are priced in the following way:

* by agreement of the parties;
* if the Contract states specific rates or prices to be applied in determining the value, those rates or prices are used;
* where there are no specific rates or prices, the rates or prices in a Schedule of Rates will be used to the extent that it is reasonable to use them;[[8]](#footnote-8)
* where there are no specific rate or prices and no Schedule of Rates apply, reasonable rates or prices are used.

The Superintendent also has the ability to request the Contractor to provide a quotation for the work prior to the variation being directed. Time permitting, this is the preferred approach as it allows the consequences of the variation to be agreed before the variation is directed by the Superintendent. This may assist to agree a price and avoid the process in clause 40.5 *(Valuation)*.

# Warranties

Contracting Practice Note
Effective date 1 July 2018

## Warranties provided by Contractor

The Contract requires the Contractor to provide certain warranties in relation to the design and quality of the work under the Contract clause 4 *(Warranties)*.

The warranties include that the Contractor:

* will be suitably qualified and experienced, and shall exercise due skill, care and diligence in the execution and completion of the work under the Contract;
* has examined and carefully checked any Preliminary Design included in the Principal's Project Requirements and that such Preliminary Design is suitable, appropriate and adequate for the Stated Purpose; and
* shall execute and complete the work under the Contract so that the Works, when completed, shall be fit for their Stated Purpose.

## Key Considerations

What is the Stated Purpose?

The Stated Purpose is defined as the intended purpose of the whole or the relevant component of the Works:

(a) as stated by the Principal in the Contract (including performance, design, functional and operational requirements); and

(b) includes any purpose which, having regard to the requirements of paragraph (a), could be reasonably ascertained by an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works.

The definition of Stated Purpose is broad. The Principal should be mindful of any departure proposed by Contractors to amend the definition of 'Stated Purpose', in particular restricting the Stated Purpose to the first limb of the definition, e.g., what is stated in the Contract. The Principal should also ensure, given paragraph (a) of the definition, that there is a section in the technical documents which clearly sets out the purpose.

Dilution of Contractor warranties

The Principal should proceed with caution where a Contractor seeks to amend any of the warranties in clause 4 *(Warranties)* and obtain appropriate legal advice.

## AS 2124-1992 General Conditions of Contract

These warranty provisions do not exist in the amended form of AS 2124-1992 general conditions of contract given that the nature of the work being undertaken under that form of Contract does not include a design component.

1. The timeframe in AS 2124-1992 for the provision of the final payment claim by the Contractor is 20 Business Days. [↑](#footnote-ref-1)
2. Clause 42.5 *(Certificate of Practical Completion)* in AS 2124-1992. [↑](#footnote-ref-2)
3. Clause 42.5 *(Certificate of Practical Completion)* in AS 2124-1992. [↑](#footnote-ref-3)
4. Whether the Contractor is entitled to an extension of time will depend on who owns the float/contingency in the program - ie, which optional clause has been inserted in clause 35.5. Please see below for guidance on the optional clauses in relation to the ownership of the float/contingency. [↑](#footnote-ref-4)
5. Clause 5.7 *(Reduction and release of Security and retention moneys)* in AS 2124-1992. [↑](#footnote-ref-5)
6. Clause 5.7 *(Reduction and release of Security and retention moneys)* in AS 2124-1992. [↑](#footnote-ref-6)
7. Principal's Project Requirements and Design Documents are not relevant for AS 2124-1992. [↑](#footnote-ref-7)
8. For AS 2124-1992 this includes using any Bill of Quantities. [↑](#footnote-ref-8)