



**New South Wales Government
Procurement System for Construction**

Procurement Practice Guide

MW21 clause commentary

Last Update January 2024

Important notices

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Introduction

The MW21 General Conditions of Contract and Contract Information is an update of the Minor Works General Conditions of Contract. It is suitable for works valued up to \$2 million if the construction building works is simple (limited milestones), single Trade or repetitive in nature,

MW21 general conditions of contract are supported by a suite of documents that react and interact to form a complete contract package for tendering and complying with NSW government policies. Please see the [buy.nsw](https://www.buy.nsw.gov.au) website for a guide on how the suite of documents together form the contract document for the Request for Tender

It is not suitable for contracts that involve complex stakeholder arrangements, significant risk or extensive design by the Contractor.

The risk profile within the contract is deemed acceptable to the NSW Procurement board and hence the NSW government. The document used in its' standard un-amended form should not require a legal review to be an effective tool in delivering smaller capital works projects.

The MW21 General Conditions are in flow chart format. They incorporate terms and concepts that are consistent with those in GC21, including:

- An Authorised Person and Senior Executive
- An obligation on the Contractor to complete the Principal's design
- A 'fitness for purpose' obligation on the Contractor
- A retention after the Works are 50% complete
- Delay cost rate(s)
- Defect-free Completion
- A Post Completion Period
- Contract Information

It also makes provision for:

- Design and design development by the Contractor – the extent to be specified in the Contract Information
- an option to include Milestones
- Payment monthly and in accordance with the NSW Security of Payments act
- Provisional Amounts (Provisional Sums and Provisional Rate Amounts)
- An entitlement to extra costs and an extension of time for site conditions that are materially adverse where no Variation is instructed.
- An in built effective dispute resolution process

This user guidance is provided to assist in understanding and administering the provisions of a Contract based on the MW21 standard form Contract. The rights and obligations of the parties to such a Contract are governed by the Contract Documents. The material contained in this commentary does not affect those rights and obligations and should not be relied on to interpret the Contract.

[buy.nsw](https://www.buy.nsw.gov.au) offers comprehensive [training](#) packages for the administration and management of the MW21

GENERAL CONDITIONS OF CONTRACT

CLAUSE 1 – DEFINITIONS

The contract defines certain terms so they are used in the context of the contract and not what might be general interpretations or interpretations in other construction Contract forms

Authorised Person

The Principal acts through the Authorised Person. (AP) The Authorised Person is appointed by the Principal and has full authority to act for the Principal with respect to administration of the Contract. However, the Authorised Person must always act within their delegated authority and may need to obtain agreement or approval from a senior person before taking some actions, particularly where the actions involve the expenditure of funds.

The Authorised Person manages the Contract and deals directly with the Contractor. The Authorised Person:

- manages the actions the Principal is required to take under the Contract correctly and in a timely way,
- ensures the Contractor complies with the Contract,
- cooperates with the Contractor, and
- liaises with stakeholders and deals with enquiries.

The name and title of the Authorised Person are stated in **Item 1** of the Contract Information. There should be record of the appointment of the Authorised Person for the Contract. Refer to **Letters from the Principal Sample Letter 1a** (letter from Principal to the AP). This should be done before tenders are called so details can be included in the tender documents. Where the Authorised Person is replaced, use **Letters from the Principal Sample Letter 1b** to record the appointment and **Principal Sample Letter 1C** to inform the Contractor of the new Authorised Person.

The contractor can use **Letters from the Contractor 1a** to inform the Principal of a change in the Contractors Authorised Person

Business Day

Any day other than a Saturday, Sunday, Public Holiday in NSW or 27, 28, 29, 30 or 31 December. When counting Business Days, the first day of any stated time frame is the first Business Day after a Contract event occurs.

A Business Day ends at 5pm.

If a request is made for a response to be made in 5 business days was made on a Wednesday, Thursday is day 1 of those 5 business days.

Completion

The state of the work under the Contract or any Milestone when:

- (a) it is capable of use for the purpose stated in the Contract Information.
- (b) it has passed all required tests and is free from any known Defects or omissions;
- (c) the Contractor has provided all the required documents; and
- (d) the Contractor has made good the Site and surroundings.

The Works are **not complete**, nor is any Milestone, until it is capable of use for its purpose and there are **no known defects**. The works are either **finished** or they **are not**, there is

no concept of Practical Completion in this form of Contract. Completion is not reached if there are outstanding documents, warranties, It is therefore important, the purpose of the Works is clear in the Contract to avoid having a difference of opinion with the Contractor, .

Item 2 of the Contract Information (CI) is where the purpose of the Works is stated. For example, if the stated purpose of the Works is to provide disabled access, then Completion of the Works will not be reached until the Works complies with the relevant codes. **CI Item 2** contains a default position in that, if no other purpose is stated, the intended purpose is to be 'reasonably inferred' from the Contract Documents.,

For Example, if the Contract is for the construction of school classrooms that comply with the Schools Infrastructure Facilities Standards, completion has not been reached until a complying security system is operational or, if a hot water system is required in a health facility a tempering valve is required by the Health Infrastructure code even though it is not shown on the hydraulics drawing.

Contract

The agreement between the Parties for the carrying out of the work under the Contract, as set out in the Contract Documents and accepted in writing by the Principal. Unless otherwise stated, the Contract commences on the date of acceptance of the tender.

Parties to the contract are the Principal set out in the CI-5 and the accepted tenderers offer set out in the letter of award which nominates the Contractor (Offer and Acceptance)

The Tenderers offer is the tendered documentation in response to a request for tender

Contract Documents

- (a) the documents prepared by the Principal for the Contract and provided to the Contractor;
- (b) the tender submitted by the Contractor as accepted by the Principal; and
- (c) any variations to the documents in (a) and (b) agreed to by the Parties in writing or made under the Contract.

The Contract Documents include the Request for Tender (RFT) documents (excluding the Conditions of Tendering), any Addenda, the tender lodged by the Contractor, the letter of award and any post-tender correspondence it references, Variations and other instructions that change the work required under the Contract.

Note any tender clarifications or other communications before close of Tender that have not been confirmed with an addendum should not be included in the contract documentation. If they are required, then they need to be confirmed and clarified in post tender correspondence.

Contract Price

- (a) where the Principal accepted only a lump sum, the lump sum; or
- (b) where the Principal accepted rates, the sum of the products of the quantity and the relevant rate for each item in the Schedule of Rates, plus any lump sums in the Schedule of Rates.

as adjusted in accordance with the Contract.

The contract price will adjusted for variations or other contractual matters as the Contract Proceeds

Note, For Lump Sum Tenders you are accepting the Contract price is identified from the Tender Form

For Schedule Rate you are accepting individual Schedule of rate item price. the Contract Price is the actual Schedule of Rate item price extended by the actual quantity used of that price

Contractor

The entity that is to carry out the work under the Contract. Identified in the Letter of Award

Day

A period of 24 hours or a calendar day. A calendar day commences at twelve o'clock midnight and ends at twelve o'clock on the following midnight. A week is a period of 7 days. When counting days, the first day of any stated time frame is the first day after a Contract event occurs or notice given of the event whichever is appropriate in the contract.

Weeks are calculated relative to the event and not traditional calendar weeks.

Defect

Any aspect of the work under the Contract that does not conform with the Contract.

This may include such things as Work as Executed drawings, Warrantees from suppliers and sub-contractors, operating manuals/instructions, facility staff training, asset registers/data bases environmental records and the like. It is not just limited to physical things.

Direct Costs

These are the costs incurred by the Contractor to physically carry out work, being subcontractor costs or equipment, materials or the labour of the individuals who undertook the work. They exclude the contractors' costs of supervision, site establishment, general tools, administration, overheads, fees, delay, disruption and profit.

Final Payment Summary

A payment summary given by the Principal to the Contractor under clause 13.10 stating the amount payable by one party to the other.

This Payment summary ends the contract, so it is not the completion of the works it is completion of the contract and all its obligations. It resolves all outstanding claims and payment of retentions.

This is further dealt with under clause 13 but the intent is to clarify what the parties believe is the final amount to be received/owed to the contractor or for the contractor to pay the Principal.

Margin

Is an amount which is defined and specified in the contract

It is intended to represent:

- the applicable costs of the contractors supervision (including any required additional supervision), site establishment, general tools, administration, overheads, fees, delay, disruption and profit where additional costs are incurred under clauses 2.2, 7.5, 9.4, 9.11 and 10.3; and
- profit and applicable overheads where reduced costs are incurred under clause 9.4.

Overheads include an allowance for the utilisation of personnel, plant and services, either on-Site or off-Site, that are normally engaged in the Works.

The Margin is calculated as the specified percentage and applied to the Direct Costs as calculated under the relevant clause.

The Margin applies irrespective of whether the applicable additional work or unavoidable circumstances causes a delay.

Milestone

A part of the work under the Contract that is specified as a Milestone in Contract Information - Item 3

Milestones are useful when it is necessary for the Principal to control the order of work. However, using Milestones increases the complexity of contract administration and requires additional care. If, for example, there is an extension of time or Variation to one Milestone, it may affect others. Any change needs to be correctly determined and documented and relevant people (including the client agency) informed.

Parties

The Principal and the Contractor

As described in the contract information and the letter of award.

Post Completion Period

The period(s) stated in Contract Information - Item 4.

Note there is no defects liability period (DLP) in a MW21 contract, the Post Completion Period should allow sufficient time for any defect to be identified after *Completion*.

This is usually for a period of time after the last milestone is completed (or the whole contract Works being completed). At the end of the post completion period the Final Payment Summary is created. Retention amount or Unconditional Undertaking, (which is sometimes called a Bank Guarantee) is returned to the contractor. The Retention is kept as an incentive for the contractor to return and make good any defects found after completion, but before the post completion period expires.

Principal

The entity stated in Contract Information - Item 5.

The Principal has a number of obligations under the Contract including:

- making progress payments;
- dealing with matters raised under the Contract, such as providing instructions to resolve discrepancies in the Contract Documents; and
- taking action if the Contractor fails to properly carry out the work required by the Contract.

If the Contractor makes a valid claim under the Contract, it is the Principal (who may not be the client or funding party) that is legally/contractually liable to pay the appropriate amount.

Provisional Rate Amount

An amount included in the Contract Price, based on a rate tendered for a provisional item of work and the associated estimated quantity included in the Schedule of Provisional Rate Amounts. The item may be referred to as a 'provisional rate item'.

A provision rate amount is different to a schedule of rate as the Contractor can only use it when instructed and may end up not being used at all in the contract if not required

Provisional rate items are usually priced by the contractor at tender. The Principal may set an estimate quantity for the rate item to help the contractor to price the rate item

A 'Provisional Rate Amount' is used in a lump sum contract for a type of work (for example rock excavation or piling) for which the quantity can only be estimated at tender time. It is therefore more appropriate to pay for the actual quantity carried out at a rate that is tendered, rather than to require tenderers to guess the quantity and tender a fixed amount. Using Provisional Rate Amounts allows tenderers to provide appropriate rates and for the Contract to be awarded for a lump sum Contract Price that includes an allowance based on anticipated quantities of the relevant work. The Contract Price is then adjusted under Clause 13.8.

Where Provisional Rate Amounts are used, it is important to specify how the actual quantities are to be measured, e.g. linear metres of piers measured from pre-existing ground level or rock meeting the specified definition within a specified maximum trench width. Include in the Preliminaries clause, "Application of the Schedule of Rates" to explain how the item is to be measured and what the contractor must allow for in the pricing of rate item

Provisional Sum

An amount included in the Contract Price, which is identified as a provision for the work specified in the Contract against that Provisional Sum.

The provisional sum value is set by the Principal.

A 'Provisional Sum' is used for a particular item of work for which the details, eg the dimensions or the manufacturer, cannot be specified when tenders are called. The documenter inserts the estimated value of that item in the Schedule of Provisional Sums, and this forms part of the Contract Price. The amount eventually paid for the item is determined under Clause 13.8, based on the actual Direct Cost of that item, and may be significantly different from the estimated value

Provisional Allowances

This is a general industry term that refers to either Provisional Sums and Provisional Rate Amounts.

The term Provisional Allowance has no standing in the contract

Senior Executive

The person stated in Contract Information - Item 6.

The Senior Executive becomes involved if there is a dispute, and is required to talk to the Contractor to try to resolve the dispute by negotiation before it becomes necessary to refer it to an external expert for resolution.

The Senior Executive does not have any authority to give instructions under the contract. They are in a position to direct the AP to act or give instructions in a particular way

The name and title of the Senior Executive are stated in **Item 6** of the Contract Information. There should be a record of the appointment of the Senior Executive for the Contract. Use **Letters from the Principal Sample Letter 1a** . Where the Senior Executive is replaced, use **Letters from the Principal Sample Letter 1b** to record the appointment and **Letters from the Principal Sample Letter 1D** to inform the Contractor of the new Senior Executive.

Clause 16.1 provides for the Contractor to notify both the Principals' Authorised Person and Senior Executive if it is dissatisfied with an act or omission of the Principal in connection with the Contract. Similarly, Clause 16.2 provides for the Principals Authorised Person to advise the contractor they are dissatisfied with a matter such as the Contractor's poor performance. Sample

letter 16A. Before issuing letter discuss the issue with the Senior Executive, to allow the Senior Executives to confer before formal notification is sent to the Contractor.

Site

The lands and other places made available to the Contractor by the Principal for the purpose of the Contract.

It would not include locations such as manufacturing factories or storage facilities where items are produced stored before being incorporated into the works.

Site Conditions

The physical conditions on, about or below the Site, excluding conditions resulting from weather. There is more on this under clause 7 and the preliminaries

SoPA

The version of the Building and Construction Industry Security of Payment Act 1999 (NSW) current at the date the Contract commenced, except where otherwise required by the relevant Regulations.

Statutory Requirements

Requirements which are applicable to the Works, the Site, the Contract and those connected with the Contract by virtue of the law or the lawful requirements of any authority having applicable jurisdiction.

You cannot be exempt from or exclude from the contract statutory requirements.

Supporting Statement (Schedule 2)

The Supporting Statement is a statement that the Contractor is required to sign and submit with all payment claims 13.2 (SoPA). The Statement is required under SoPA and provides the Principal with assurance that the Contractor has complied with its obligations regarding payment of subcontractors.

Subcontractor Statement (Schedule 2)

The Subcontractor Statement is a statement that the Contractor is required to sign and submit with all payment claims. 13.2 The Statement provides the Principal with assurance that the Contractor has complied with its obligations regarding payment of employees, industrial relation matters and workers compensation.

Note that the definition of 'Subcontractor' in the Subcontractor's Statement is derived from the Workers Compensation Act 1987 (NSW), Payroll Tax Act 2007 (NSW) and Industrial Relations Act 1996 (NSW) and means the person (or company) that is carrying out the work – i.e. the 'Contractor' in this MW21 standard form contract. Similarly, the 'principal contractor' referred to in the Subcontractor's Statement is the 'Principal' in this MW21 contract.

The Contractor is required in turn to obtain similar Subcontractor's Statements from its subcontractors. In these cases, the 'Subcontractor' in the Subcontractor's Statement would be the subcontractor and the 'principal contractor' would be the Contractor in this MW21 contract.

Variation

Any change to the character, form, quality and extent of the work under the Contract As instructed or accepted in writing by the Principal .

Works

The works to be designed and constructed under the Contract, including the supply of all items (incorporated or otherwise) necessary to meet the requirements of the Contract.

The Works is the physical asset that will be constructed under the Contract.

The Contractor is also required to carry out a range of activities that are not part of the 'Works', including preparing and implementing management plans, complying with Government guidelines and statutory requirements, carrying out temporary work, undertaking commissioning activities and preparing documentation such as reports and manuals. In an MW21 contract, these activities are included in the 'work under the Contract'.

CLAUSE 2 – THE CONTRACT

Clause 2.1

The Contract Documents are required to be read as a whole and are Mutually Explanatory. Anything contained in any one of the documents is part of the Contract. For example, an item mentioned in the specification but not shown on the drawings is considered to be included in the Contract. Similarly, if the Schools Infrastructure Facilities Standards are stated to be part of the Contract Documents, then the Contractor is obliged to comply with any applicable requirement in those standards even though they were not prepared specifically for the particular contract and may not be attached.

The Contract does not define an order of precedence for the Contract Documents. This allows for a reasonable interpretation to be made if a discrepancy is found. A precedence order can have unintended consequence such as an Australian Standard being lower than a contract drawing that implies meeting the standard is not required.

Clause 2.2

The Contractor is to check the contract documents and notify the principal of any inconsistency, discrepancy, or ambiguity at least 5 days before commencing the affected works. **Letter from the Contractor sample letter C02a** The intent is that if there is some confusion about what is required the Contractor informs the Principal and seeks direction to clarify the issue by issuing a notice, before the contractor actually undertakes the Works. If the contractor does undertake the Works and does not provide the advice 5 business days beforehand then the contractor will not receive any cost for the aborted work, if any. Additionally, if the correct notice was not given then the contractors margin on the actual variation under Clause 9 is reduced to a maximum of 10% instead of the usual maximum of 15%.

It is in both party's interest to resolve the matter as early as possible, so the Works are not delayed or wasted effort undertaken. Undue delay in responding to the contractors notice may lead to a claim from the contractor under both clause 12 or Clause 9.

The Contractor will often advise of inconsistencies, ambiguities or discrepancies by way of a 'Request for Information' or 'RFI'.

The contract does not recognise an RFI only a Notice from the Contractor, but a notice from the contractor (C02a) can include the term RFI.

The contractor is to provide this advice in accordance with Clause 2.2 being 5 Business days before they intend to commence that part of the work

Depending on how well the contractor has programmed the work, it may claim delay if Notices are not answered within a shorter period then nominated in 2.2. you are not obligated to extend the contract due to poor organisation of the Contractor.

The Principal should act as quickly as possible in providing this advice to ensure better project delivery.

Clause 2.3

If the contractor finds an error in the Contract Documents it is to inform the principal. Please note an error is not the same as an ambiguity, inconsistency or discrepancy under clause 2.2 .

Letter from the Contractor sample letter C02b

An error could be that the design specifies a window lintel as 50 x 100 where the building code for that size window opening nominates a larger size . The error is the lintel is too small and may compromise the integrity of the works.

Note that under Clause 3.1 the Contractor has an obligation to complete the Principal's design and under Clause 3.9, the Contractor is to provide minor items not shown in the design but necessary for the Works.

For example, if the lintel size was not specified, this would be covered under clause 3.1, and the contractor is responsible for sizing and supplying the lintel.

The concept here is, if either party finds an error it should be corrected for the benefit of the asset, or project, as soon as possible.

Clause 2.4

This clause requires the Contractor to comply with instructions given by the Principal. If the Contractor refuses to comply with an instruction from the Principal within a reasonable time (depending on all the circumstances) this is a breach of contract and action can be taken under Clause 17.1.

When issuing an instruction, the Authorised Person should include a time for compliance, or a time for the Contractor to respond. If no time is stated in the instruction, the Contractor is to comply within a reasonable time.

Letters from the Principal Sample Letter 2A provides for a general instruction to be issued under the Contract and makes it clear that such an instruction should not automatically be interpreted as a Variation instruction.

The Authorised Person should only give an instruction that is within the authority that has been delegated by the Principal. For example, the Authorised Person will have limited financial authority to instruct Variations.

Before instructing a Variation valued at more than the applicable delegated authority, the Authorised Person needs to obtain prior approval in principle from the appropriate senior officer and funding approval from the client.

Clause 2.5 Notices

All notices are to be in writing and if sent to a street address must also be forwarded electronically to the relevant party it was addressed to.

As the contract is covered by the electronic communications act this should not be a burden on either party.

Both parties should address correspondence to the appropriate party by using the correct contractual term and not on a first name basis.

It is in the interest of both parties to receive notices promptly so they can be acted upon.

See a sample email format under the standard letters on [buy.NSW](https://www.buy.nsw.gov.au)

Clause 2.6 Subcontractors

The Contractor is solely responsible for all subcontractors and for their acts and omissions. The contractor cannot pass fault/blame onto the subcontractor, if the subcontractor fails to perform for any reason. It is the contractor's responsibility to remedy the matter at the contractor's cost. How the contractor and subcontractor reach consensus is for them to deal with.

Clause 2.7

The Contractor must not:

- (a) subcontract all the work under the Contract; or

- (b) enter into a single subcontract for the majority of the work under the Contract without first obtaining the Principal's written consent **Letter from the Contractor sample letter C02c**

The Principal has employed the contractor to carry out the Works and not the subcontractor and therefore expects the contractor to perform the Works.

Clause 2.8 Statutory Requirements

Should there be a change in statutory requirements that were not known at the close of tender the contractor may make a claim for additional costs or time if it can demonstrate that the change in statutory requirements affected the contract.

If the change in statutory requirements has been known for some time before award and would affect the contract after award, then this would not be accepted as the contractor should have made allowance for the change.

For example if the carry capacity of Bogie drive trucks was to be downgraded and this had been known before tenders closed and come into effect during the term of the contract then the contractor should have known about this change and allowed for its' contract Price.

Letter from the Contractor sample letter C02d

Clause 2.9

The Contract provides comprehensive mechanisms for dealing with disagreements and disputes so that work can continue to progress while issues are resolved. It is a breach of contract if the Contractor does not continue working at a reasonable rate, and action can be taken under Clause 17.1. Initially use **Letter from the Principal Sample Letter 2B** where the Contractor is unwilling to continue working because, for example, there is a difference of opinion over an entitlement.

If the contractor disagrees with the actions of the Authorised Person, they should raise the matter under clause 16.1 Disputes with the Senior Executive **Letter from the Contractor sample letter C16a**. The contract is designed for this process and allows the work to proceed and the parties not to get caught up in personalities. It is a breach of contract if the contractor refuses to follow instructions and may lead to further actions.

Clause 2.10 Time limits

There are time limits within the contract which require both parties to respond and that both parties are required to adhere to. They can only be changed by Mutual agreement which must be done so in writing.

Clause 2.11 Laws Governing the Contract

The contract is governed by the laws of NSW. It does not matter the contractor is from outside NSW as any legal proceeding will be dealt with under the NSW legislation and legal system.

CLAUSE 3 – DESIGN AND CONSTRUCTION

Clause 3.1

The Contractor is required to complete the Works in accordance with the design provided by the Principal.

However, MW21 recognises the design and documentation provided by the Principal for a construction contract will never include every detail the Contractor needs to construct the Works. The Contractor is always required to carry out some design or design development in order to complete the Principal's design and construct the Works.

This commonly involves preparing shop detailing to enable fabrication of building components. Similarly, for example, even if door hinges are not shown or specified, the Contractor is required to install appropriate hinges on all doors. The Contractor cannot claim that a door is fit for its purpose, or the Works are satisfactorily completed, if the doors do not swing. Note the Contractor is only required to provide hinges that meet the minimum requirements inferred from the Contract Documents.

However, if, for example, the Contract Documents do not mention wire screen security doors, the Contractor cannot be not expected to design and install these, regardless of whether the Authorised Person thinks they are needed.

The extent of design by the Contractor is stated in Contract Information **Item 7**, which provides for the following three options:

- Option 1 reflects the minimum requirements outlined above, when the Principal's design includes all elements of the Works (although it will not be complete in all details). The Contractor is still required to develop shop detailing that clearly shows how the building components are to be fabricated.
- Option 2 requires the Contractor to design the specified elements of the Works and ensure they fit in with the Principal's design, without changing the Principal's design. This option is appropriate, for example, if the Contractor is required to design an air conditioning system or process equipment to achieve specified performance requirements.
- Option 3 provides for the Contractor to carry out almost all of the design so that the completed Works comply with Clause 3.4, i.e. are fit for purpose. As a minimum, the design is required to meet the requirements specified in the Contract Documents and any legal or appropriate standards.

Clause 3.2

The Principal's design is the design shown in the RFT documents and any agreed changes included in the Contract Documents. It includes any design provided by the Principal in instructing a Variation.

Because the Principal is responsible for the Principal's design, the Contractor is entitled to additional costs if the Principal's design is changed to correct an error or resolve an ambiguity or discrepancy. Even if the design was undertaken by a consultant under a different contractual arrangement the design within the RFT is the design the principal wants built and therefore is the Principal's design

The Contractor is not allowed to change the Principal's design without an instruction from the Principal. This means that, if the Contractor discovers a flaw in the Principal's documents, the

Contractor has to notify the Principal **Letter from the Contractor sample letter C02a or C02b** and wait for a response. **Letters from the Principal Sample Letter 2A** provides for a general instruction to be issued where no Variation is required. **Letters from the Principal Sample Letter 9B** allows the Principal to seek a price for a proposed Variation, if required. **Letters from the Principal Sample Letter 9D** allows the Principal simply to instruct a Variation if that is necessary to maintain progress.

Clauses 3.3 and 3.4

The Contractor's design is all the design, other than the Principal's design, that is required in order to construct the Works.

Any design prepared by the Contractor is to conform to the Contract and be fit for the purpose of the Works stated in **Item 2** of the Contract Information. If the Contractor submits a design that is not fit for purpose, then the Principal can request changes and the Contractor is required to carry them out at no additional cost. For example, the materials designed for use in a public facility are to be suitably robust and not result in a safety hazard.

The purpose of the Works may be specifically stated in **Item 2** but if it is not, then the Contract Documents need to be read as a whole to determine the purpose. If changes to the Contractor's design are requested to suit a purpose that is not clear from the Contract Documents, then the Contractor may be entitled to claim for any additional costs incurred. For example, if the Contract is for a new building with a security system meeting current standards, the Contractor is not required to upgrade the old security system in existing buildings in the same facility unless this is specified.

Clause 3.5

If the Contractor is required to submit the completed design to the Principal, the documents are to be submitted progressively. **Item 8** specifies whether or not the Contractor is required to submit the design.

The Contractor is required to submit the completed design before construction work starts **Letter from the Contractor C03a**. The required timing may be stated in **Item 8** but if it is not, then **Item 8** specifies a default time of 5 business days before the particular design document is to be used.

Clause 3.6

The Principal does not have to check the submitted design. However, the Principal should respond when the Contractor submits its design, regardless of whether any errors, omissions or non-conformances are found. The response notifies any errors or omissions that have been found or advises that the Principal has no objection to the Contractor proceeding with the design. Use **Letters from the Principal Sample Letter 3A or 3B**, as applicable.

Neither the Authorised Person, nor any other person working on behalf of the Principal, should ever 'approve' any of the Contractor's design.

To avoid potential re-work if errors or omissions are found, the Principal should respond within the period specified in **Item 8**.

The Contractor retains full responsibility for the adequacy and accuracy of the completed design, whether or not the Principal notifies any errors or omissions. The Contractor is not entitled to make a claim against the Principal because the Principal did not detect or notify a deficiency in the completed design.

Clause 3.7

The Contractor does not have the right to refuse to give the Principal the intellectual property rights to any design produced for the Contract or a licence to use any other design necessary for the Works. This ensures the Principal has the right to operate, maintain, repair and alter the Works after Completion.

Where the Contractor attempts to do this, refer the matter to the appropriate senior manager.

Clause 3.8

The Contractor is not to change the completed design without approval of the Principal. Clause 9.1. If the contractor wishes to change the completed design, to incorporate an innovation, alternate construction method or any other reason, the contractor is to propose a variation to the works. **letters from the Contractor sample letter C09a** This gives the Principal an opportunity to consider whether the proposed change affects the Principal's intentions for the Works and to notify agreement or otherwise. It would be reasonable for the Principal to respond within a time period similar to that specified in **Item 8**. If the Principal does not respond the contractor should remind the Principal of the proposal

Clause 3.9

The Contractor is required to provide minor items that are needed to satisfactorily complete the Works.

As an example, if a door is specified but door hinges are not detailed, the Contractor is required to provide hinges suitable for the door. If 180-degree hinges are preferred but are not necessary for the door to be fit for the purpose stated or inferred from the Contract Documents, and such hinges were not specified, they are not required under the Contract. To obtain 180 degree hinges, a Variation would need to be instructed, changing the requirement for hinges from standard ones suitable for the door, to specialised ones. Use **letter from the Principal Sample Letter 2A** if the Contractor seeks an instruction or queries its responsibility to provide minor items.

Clause 3.10

Where there is work for which, a Provisional sum or rate is specified, the Contractor only carries out that work after the Contractor has an instruction from the Principal. The instruction may include conditions relating to the work.

For a Provisional Sum, the Contractor needs an instruction clearly specifying what is required (e.g. details of the type of item or the performance required). Prior to issuing an instruction, the Principal can request a price for a Provisional Sum work. Use **Letter from the Principal Sample Letter 3C** to request the relevant information. The Principal is obliged to pay the reasonable Direct Costs of the work plus 10% so it is advisable to ascertain these costs before issuing an instruction. **Letter from the Contractor Sample Letter C03b**

For work payable as a Provisional Rate Amount, the Contractor is to advise the Principal before starting the work **Letter from the Contractor Sample Letter C03c** and obtain an instruction verifying the need for the work. Arrangements need to be made to measure the quantity of work that is actually carried out. Note that the extent of work and method of measurement for payment should have been clearly specified in the Contract Documents (see Preliminaries). It can also be useful to establish a witness point at the start of such work to reinforce the notification requirement.

Use **Principal Sample Letter 3D** to instruct the Contractor to carry out work for which a Provisional Sum or Rate is specified.

CLAUSE 4 – CARE OF THE WORKS AND OTHER PROPERTY

Clause 4.1

The Contractor is responsible for the care of the Works, at its own cost, from the date the Site is made available until Completion. This includes responsibility for construction plant and materials provided by the Principal.

If the Contractor causes any loss or damage while making good Defects, even after Completion, the Contractor is liable to reimburse the Principal for that loss and to meet the cost of repairing any damage.

Clause 4.2

The Contract obliges the Contractor to 'indemnify' the Principal against any claims, including claims from third parties, for loss or damage that arise as a result of the Contractor carrying out the work under the Contract. This means the Contractor is to meet the costs of such claims. The indemnity covers the Principal's legal liability for injury, death or harm to the environment, breach of intellectual property rights and damage to property.

For example, if a Contractor installed sediment control measures that resulted in flooding of adjacent property, the Contractor would be liable for the cost of rectifying the damage even if the property owner made a claim directly against the Principal.

However, the Contractor is not responsible for loss or damage caused by the Principal's actions.

The Civil Liability Act 2002 allows contracting parties to include provisions in a contract that exclude or modify the application of Part 4, and the proportionate liability regime that it creates. NSW Government agencies are entitled to make use of this facility to contract out of proportionate liability provisions when undertaking procurement.

Because Part 4 of the *Civil Liability Act* does not apply to the Contract, the Contractor is fully responsible for the actions of subcontractors, consultants and suppliers. This means the Principal need only claim from one party – the Contractor – if the Principal suffers loss or damage as a result of the Contractor or any subcontractor carrying out the Works.

If the *Civil Liability Act* did apply, the Principal would have to identify which entity caused which part of any loss suffered and sue all the relevant entities in order to recover the loss.

If a complaint is received of damage or loss that is possibly due to the actions of the Contractor, use **letter from the Principal Sample Letter 4A** to request a response from the Contractor, contractors' response use **Letter from the Contractor Sample Letter C04a**.

Use **Letter from the Principal Sample Letter 4B** to acknowledge the complainant's letter.

Clauses 4.3 and 4.4

The Contractor is required to set reasonable standards of conduct to be met by those carrying out the work under the Contract. The Principal may instruct the Contractor to remove a person from the Site or its surroundings if that person fails to meet reasonable standards of conduct. For example, the Principal can instruct the Contractor to remove a male worker from a School Site for repeatedly using women's toilet facilities when the worker has been instructed not to do so.

However, before issuing formal notification requiring the Contractor to remove a person from the Site, the Authorised Person needs to have given at least one formal warning, detailing the unsatisfactory conduct and requiring the Contractor to demonstrate how it intends to prevent that conduct from recurring. Use **Letter from the Principal Sample Letter 4C** to notify the

Contractor of unsatisfactory conduct by a person on the Site. Use **Letter from the Principal Sample Letter 4D** to instruct the Contractor to remove a person from the Site. The contractor is to respond to the request with **Letter from the Contractor Sample Letter C04b**

Clause 4.5

The Principal remains responsible for its own actions and has the liability for those actions.

Clause 4.6

If action is required urgently in order to avoid injury, death, harm to the environment or property damage, and the Contractor does not take the action when instructed by the Principal, the Principal may step in and take the action. This does not relieve the Contractor of its obligations or liabilities, including liability for the costs incurred, but it enables the Principal to take necessary action to remove the risk.

If urgent action is required, the Principal should try to contact the Contractor to instruct that the required action be taken. Use **Letter from the Principal Sample Letter 4E** –

- Option 1 to instruct the Contractor to take immediate action. If the Contractor is unable or unwilling to act immediately, then the Principal should take the required urgent action and advise the Contractor promptly
- Option 2. The Principal should not do more than what is required to prevent injury, death, harm or damage. The Contractor should be given the opportunity to undertake any consequent rectification or re-work.

The Principal should keep detailed records of the costs incurred when the Principal steps in to undertake urgent action because these costs become a 'debt due' from the Contractor to the Principal. A 'debt due' can be deducted from payments due to the Contractor under Clause 13.7. However the amount needs to be reasonable and the debt should be supported by itemised evidence of the Principal's costs. Before making the deduction, advise the Contractor of the amount of the debt and notify a Variation deduction. Use **Letter from the Principal Sample Letter 13D**.

CLAUSE 5 – INSURANCE

Clause 5.1 – Insurance of Workers (Workers Compensation)

Before starting any work in connection with the Contract, the Contractor is to have an insurance policy covering workers compensation in the State of NSW.

In New South Wales, the *Workplace Injury Management and Workers Compensation Act 1998*, administered by NSW Fair Trading makes it compulsory for employers to obtain and maintain insurance cover in respect of all employees. The Principal cannot take out workers compensation insurance for the Contractor. Refer to the commentary on Clause 5.5 for sample letters and procedures for [checking workers compensation insurance](#).

If the Contractor does not have satisfactory workers compensation insurance, it is a breach of contract. It is also against the law. If you find out that the Contractor does not have workers compensation insurance, you should suspend the Works under Clause 10.1. and notify NSW State Insurance Regulatory Authority (SIRA) that the contractor does not have workers' compensation insurance [What happens if I fail to take out workers compensation insurance?](#)

If the person performing work is a 'worker' or 'deemed worker', then the employer, has to include their wages in your wages declaration.

Worker or Contractor Tool.

Simply calling someone a 'contractor', a 'subcontractor' or an 'independent contractor' in a contract, or if the person performing work has an Australian Business Number (ABN), then this does not make the person a contractor for the purposes of workers compensation insurance premiums.

A person may be a contractor for tax purposes and yet may be a deemed worker (that is, not be a contractor) for workers compensation insurance premium purposes (because different legislation and legal tests apply).

As per Section 175B (2) of the Workers Compensation Act 1987, a principal contractor is liable for the payment of any workers compensation insurance premiums payable by its sub-contractor. However, the principal contractor's liability will not arise if they receive a written statement from the sub-contractor. That statement must say the sub-contractor has covered its workers and deemed workers with workers compensation insurance, for the period of the contract.

[Worker or contractor Tool](#)

Clause 5.2 – Insurance of the Works and public liability insurance arranged by the Principal (PAI)

Insurance of the Works and public liability insurance can be arranged by either the Principal or the Contractor. **Item 9** of the Contract Information indicates whether the Principal has chosen to arrange this insurance.

There are two options for Principal-arranged insurance of the Works and public liability:

1. Procurement System insurance arranged through iCare; or
2. Other insurance arranged by the agency responsible for the Contract.

Procurement System Insurance through iCare

Policies for Works and public liability insurance have been arranged for NSW Government construction contracts. The applicable policy depends on the date the Contract was initiated, i.e. the date of contract award. The policies are available through the NSW Government Procurement System for Construction on the NSW Buy Website.

Advantages of Procurement System Insurance are that the terms of the insurance cover are known and satisfactory and that the Principal can ensure the premium is paid. The Contractor cannot cancel payment of the premium or the insurance.

The policies are available to:

- NSW Government agencies;
- Other agencies (including local government authorities) where the contract is being managed by an accredited construction agency such as NSW Public Works, Infrastructure NSW .

See the section of the policy on 'Insured'.

The current (October 2011 – September 2013) standard policy is not automatically available:

- where the Contract Price at award is greater than \$30M,
- where the period from contract award to Completion of construction work exceeds 18 months; and
- where the Works involve predominantly wet work, tunnelling, bridges, earthworks, horizontal directional drilling, pipelines, dams, off-shore works, underground mining or similar works.

Restricted coverage also applies to piling foundations, retaining wall works and dewatering activities.

If in doubt as to whether the Procurement System insurance would apply for a particular contract, contact the [Insurance Broker](#)..

For a contract in the exception categories listed above, it is possible to arrange a separate project-specific policy with similar terms to the standard policy, through the Procurement System insurance broker. For such contracts, details of the insurance cover and premium will be advised by the insurance broker.

Details of the [operation of the policy](#) and the procedures for [managing the insurance](#)

Managing Procurement System Insurance

If the Contract states that Procurement System insurance is to apply, the agency or its project manager is required to pay the required premium. The premium is payable by the client agency/Council as a project cost. To arrange payment:

1. After contract award, the project manager / Authorised Person registers the Contract the insurance broker through; iCare
2. The Broker calculates the premium and issues an invoice; and
3. The project manager / Authorised Person [arranges payment](#) on behalf of the agency.

To ensure the insurance cover is in place from the start of the work under the Contract, the premium is to be paid within 60 days after contract award. This is a requirement of the policy. If the Contract states that the Principal will arrange insurance, and insurance is not in place, and loss or damage occurs, the Principal may be liable to pay for the loss or damage.

The insurance premium paid for Procurement System insurance needs to be adjusted if the final Contract Price exceeds the Contract Price (at contract award) by 15% or more. Similarly, the

premium is adjusted if the assessed or certified value of the final payment is less than Contract Price (at contract award) by 15% or more. In either case, the Authorised Person is to arrange for the insurance broker to be advised, through the nominated agency contact person, of the Contract Price upon Completion. The premium is adjusted by an amount equal to the premium rate multiplied by the difference between the final Contract Price and the Contract Price at award. The broker will either issue an invoice (if the Contract Price increased) or a refund (if the Contract Price decreased). The project manager needs to promptly seek reimbursement of the additional payment from the client agency, while project funds are still available.

Duration of Procurement System Insurance

Provided the premium is paid within 60 days, the insurance policy is in place from the date of contract award:

- until the end of the specified Post Completion Period (coverage is available for a maximum Post Completion Period and/or maintenance period of 12 months following Completion of construction); or
- until Completion, if there is no Post Completion Period.

If the Contractor is required to rectify Defects or to undertake other work after the insurance expires, the Contractor is to arrange separate Works and public liability insurance and provide evidence to the responsible agency prior to carrying out the work.

The owner/ agency is responsible for the insurance of the facilities/ asset from the earlier of the date of Completion or the date the Works is taken over or put into operation. If only part of the Works is occupied or taken into use, the owner is required to arrange insurance for that part but not the remainder of the incomplete Works. The project manager should advise the responsible agency of this requirement in sufficient time to allow the required insurance to be arranged.

Alternative insurance arranged by an agency/Council

Some agencies are required to use the Procurement System insurance. The Procurement Practice Guide Construction insurance provides details of which NSW Government agencies are required to do so. Other agencies may choose to arrange Works and public liability insurance themselves, rather than using the Procurement System insurance.

If the agency has arranged, or will arrange, the insurance, this is stated in **Item 9** of the Contract Information. Details of the insurance policy are to be provided to the Contractor for information. This should be done at the time tenders are called, because tenderers may choose to arrange additional 'gap' insurance coverage and would need to include the cost in the tender prices.

Duration of Insurance

If insurance is arranged by an agency, the Contractor is to be advised whether or not the policy covers work undertaken during the Post Completion Period. If work is required when agency-arranged insurance is not in place, the Contractor will need to arrange insurance of the Works and public liability insurance and provide evidence to the agency prior to carrying out the work.

The owner / agency is responsible for the insurance of the facilities / asset from the time the construction insurance policies cease to apply.

Clause 5.3 – Insurance of the Works and public liability insurance arranged by the Contractor.

If specified in Contract Information **Item 9**, the Contractor is required to arrange insurance for the Works and public liability insurance. The insurance policies are to be in the name of the Contractor, with the Principal named as an additional insured party, and are to cover the Contractor, the Principal, the Principal's agents and all subcontractors employed on work under the Contract.

Refer to [Checking insurance policies](#) below for the procedures to follow to approve, or reject, the insurers and terms proposed by the Contractor.

Clause 5.4 – Additional policies of insurance

Marine liability insurance

If work under the Contract includes the use of water-borne craft that are more than 8 metres long, the work is not covered by Procurement System insurance (or other standard Principal-arranged Works insurance) and the Contractor is required to take out additional Marine Liability Insurance.

Professional indemnity insurance

If specified in Contract Information **Item 10**, the Contractor is required to take out professional indemnity insurance.

Clause 5.5 – Where Insurance is Arranged by the Contractor

Duration of insurance

The Contractor is to take out the specified insurance before starting the associated work.

For workers compensation insurance and professional indemnity insurance (if required by the Contract) this means the insurance is to be in place before the Contractor starts any work under the Contract.

For insurance of the Works and public liability insurance, the cover is to be in place before work starts on the Site. Marine liability insurance is not required until the work involving waterborne craft over 8 metres in length starts.

The policies (apart from professional indemnity) are to be maintained until the work under the Contract reaches Completion or the end of the Post Completion Period, if there is one.

Professional indemnity insurance is to be held for a period of 1 year after the work under the Contract reaches Completion.

Checking insurance policies

Before starting the relevant work, the Contractor is to provide evidence of the currency of any insurance policies and copies of the policies it is required to provide. The Authorised Person is required to check the adequacy of that insurance.

The Authorised Person should request evidence of all relevant insurance policies as soon as the Contract is awarded. Note that copies of professional indemnity and workers compensation policies are not required to be provided.

Use **Letter from the Principal Sample Letter 5A** – Option 1 to obtain evidence of currency for workers compensation insurance and use **Letter from the Principal Sample Letter 5B**– Option 1 to obtain evidence of other relevant insurance policies. Contractor to respond with **Letter from the Contractor Sample Letter C05A**

If the Contractor does not have the necessary insurance in place, the Principal can take the following action, as applicable:

1. Refuse to allow the Contractor to start work on the Site (Clause 6.2); or
2. Suspend the work (Clause 10.1).

Workers Compensation insurance

For workers compensation insurance, the Contractor is to give the Authorised Person evidence that the policy is current. Note that workers compensation insurance policies last for a limited period and may terminate at any time during the Contract, depending on the date they were taken out. The Authorised Person is to record the expiry date of the policy and ensure that an up-to-date certificate of currency is obtained before the insurance expires.

The Authorised Person needs to check that the 'industry' and 'nature of business' stated in the policy are applicable to the work being carried out. For example, if the coverage is for residential building work the policy is not applicable to educational facilities. The work category is identified by a number shown on the policy. To find the work category represented by the number, refer to the icare [website](#).

Use the [Checklist](#) for workers compensation insurance (on the buy.nsw website) to determine if the insurance is adequate. This is required for every construction contract, even where the Principal has arranged Works and public liability insurance. If the certificate of currency provided by the Contractor does not confirm that the workers compensation insurance is satisfactory, issue **Letter from the Sample Letter 5A** – Option 2.

If the Contractor fails to provide proof that it has satisfactory workers compensation insurance in place at any time, the work under the Contract should be suspended under Clause 10.1. Safework NSW should be notified if the Contractor does not have satisfactory workers compensation insurance.

Works and Public Liability Insurance

If the Contractor is required to provide Works and public liability insurance, the Authorised Person should check that the policies are in place and that they comply with the detailed requirements of Clause 5.3. Use the [Checklist](#) for Works and public liability insurance on the buy.nsw website as a basis for assessing whether the policies are suitable.

Under Clause 5.3, the policies are to be with insurers and in terms approved by the Principal. Approvals are not to be withheld unreasonably.

To determine whether an insurer is acceptable, check the Australian Prudential Regulation Authority (APRA) website at www.apra.gov.au. APRA is a central body that carries out prudential supervision in accordance with Treasury's criteria for acceptable financial institutions including insurance companies. A register of organisations who are currently Authorised Insurers, authorised to carry on insurance business under the *Insurance Act 1973* (Cth), is available under the 'General Insurance' section of the website.

Other insurance

If the Contractor is to provide professional indemnity or marine liability insurance, use the Checklist for professional indemnity insurance or the [Checklist](#) for other forms of insurance (which is suitable for checking marine liability insurance) available on the buy.nsw website as a basis for assessing whether the policies comply with the detailed requirements of Clause 5.3.

If the evidence provided by the Contractor for Works, public liability or other required insurance is unsatisfactory or incomplete, issue **letter from the Sample Letter 5B** – Option 2.

Clause 5.6 – Paying premiums on the Contractor’s behalf

The Authorised Person has the right to ask the Contractor for evidence of compliance with insurance obligations at any time during the course of the Contract. To do so, use **letter from the Principal Sample Letter 5A** – Option 1 or **letter from the Principal Sample Letter 5B**– Option 1 as appropriate.

If the Contractor does not provide evidence, within 5 Business days after a request, that the required insurance is in place, the Principal has the right to arrange the insurance and pay the premium. This would only apply to Works and public liability insurance and marine liability insurance.

The Principal can then deduct from progress payments an amount equal to the premium plus \$500. This should not be done until the Contractor has been notified of the amounts due. The notification should include evidence of the amount of the premium paid by the Principal. Use **letter from the Principal Sample Letter 5C**.

Clause 5.7 – Making and managing insurance claims

The Contract requires the Contractor to make claims directly to the insurance broker even if Principal arranged insurance is used. The Contractor is also responsible for meeting any excess or deductible under the policy. The Procurement System insurance requires the Contractor to notify the insurance broker immediately of any accident or circumstance which might give rise to a claim under the policy.

I iCare may advise the Principal of an anticipated insurance payment to the contractor to ensure there is no double payment for the same work i.e. the contractor has claimed a variation for the work as well as an insurance claim.

CLAUSE 6 – SITE ACCESS

Clause 6.1

The contractor is to be provided site access within the time frame stated Contract Information **Item 11**. The contractor becomes responsible for the site (or part of the site provided) from the time access is provided.

Clause 6.2

The Principal should be reasonable in giving the Contractor access to enough of the Site to proceed with the work under the Contract. This should be in accordance with any agreed program or in consultation with the Contractor.

The Contractor is not promised 'sole' access, that is there may be others working on the Site, including occupiers or other contractors. Similarly, the Contractor's access may be interrupted by the requirements of others.

Clause 6.3 – Necessary requirements prior to starting work

Irrespective of any time(s) specified in Contract Information **Item 11**, the Contractor is not to start work on the Site before satisfying 'all necessary requirements'. These include:

- provision of evidence that all the insurance requirements in the Contract have been satisfied.
- submission of specified management plans complying with Contract requirements, including the Safety Management Plan and the Environmental Management Plan.
- provision of evidence of payment of the Long Service Levy.
- evidence of development approvals, if applicable.
- provision of a contract program, if applicable.
- provision of relevant ITPs; and
- any other requirements specific to the Contract.

If the Contractor attempts to start work before satisfying the necessary requirements, immediately instruct the Contractor to stop work. Use **letter from the Principal Sample Letter 6A**. Prior to issuing the letter, ensure that the relevant contract requirements have clearly not been met.

The Contractor's management plans.

The Principal has no obligation to respond to management plans submitted by the Contractor and the Contractor always retains responsibility for their adequacy. However, the Contractor is permitted to start work when the relevant specified times for submission of the plans have expired. The Principal should therefore respond as soon as practicable, and within the specified time, identifying any non-compliances.

If there are any non-compliances in a submitted management plan, the Contractor is not permitted to start construction. The Contractor is to rectify the non-compliances and resubmit the plan. The Contract does not permit the Contractor to start construction until the specified time after any required plan has been resubmitted. However, unless there are still identified non-compliances in the resubmitted plans, the Authorised Person can assist in avoiding delays by notifying the Contractor that the Principal has no objection to the Contractor starting at an earlier time.

Where the Principal has not responded within the relevant specified time and identifies non-compliance(s) after the Contractor has started work, the Contractor is to be instructed to immediately rectify the non-compliance(s). The Principal may have the right to suspend the work affected by the non-compliance(s), but the Authorised Person should not take this action without obtaining advice from the appropriate senior manager.

The suggested minimum requirement of giving access to the site is 5 business days as this allows time for the contractor to organise themselves appropriately. However, safety management plans and environment management plans are often not required for 10 Business days. Principals should consider if longer contract durations and longer access to site durations might lead to a better managed and organised site. Where access to the site may not be available 10 Business days, the contract may be extended. Contractors may be able to use this additional time to better plan and coordinate sub-contractors check the documents for ambiguities, inconsistencies and discrepancies and set pragmatic program in place .

Failure to start work on time

If the Contractor does not start work on the Site as soon as practicable after being given access, this should be raised with the Contractor. Ask the Contractor to demonstrate, for example using a construction program, that the Works will be completed on time. Use **letter from the Principal Sample Letter 6B**. contractor responds with **letter from the Contractor Sample Letter C06a**

If the Contractor fails to do so and fails to start work within a reasonable time, this would be grounds for the Principal to issue a notice under Clause 16.2 asking the Contractor to give reasons why further action should not be taken. Use **letter from the Principal Sample Letter 17A**. The Authorised Person should not do this without obtaining advice from the appropriate senior manager.

Clause 6.4

The Contractor is required to give anyone authorised by the Principal, including client agency representatives, third party inspectors and other contractors working for the Principal, reasonable access to the Site for any purpose. However, such people should comply with the reasonable requirements of the Contractor and the relevant provisions of the Contractor's Safety Management Plan including, for example, signing a Site Register, wearing the required personal protective equipment (PPE) or being accompanied by a person who has attended a site induction.

CLAUSE 7 – SITE CONDITIONS

This clause gives the Contractor some entitlements if unexpected physical site conditions are encountered, under certain circumstances.

The clause is about allocating risk between the parties for things that could not be known or should be known of a person with reasonable knowledge and skill for the work to be undertaken by the contract. Consider what could reasonable be interpreted from the information given at tender and what the contractor could have reasonably observed on site at tender when quoting the work

Note **Hazardous Substances discovered unexpectedly on Site**

refer to the Preliminaries section **Site** for **Response to unexpected discovery** as the site conditions clause does not apply. In such circumstances.

Work is to be suspended under clause 10.3

The Principal may engage others to decontaminate the site or instruct the contractor to decontaminate the site.

The contractor should advise the Principal of the Hazardous Substance immediately on discovery. The contractor must stop works that may cause further exposure and isolated the discovery area. See **letter from the contractors sample letter C07a** option 2

Clause 7.1

'Site Conditions' are defined in Clause 1.21 namely, "The physical conditions on, about or below the Site, excluding conditions resulting from weather".

Clause 7.1 states that the contractor before close of tenders has:

- (a) examined the Site and surrounds.
- (b) made enquiries concerning the Site; and
- (c) not relied on the completeness of information provided by the Principal.

Even if the contractor does not do these things the contractor is deemed to have accepted the risk of what is on site by looking for themselves or making suitable enquires. There is significant data available online that may inform the contractor of risks on the site that are not apparent from the contract documentation alone. Note the requirements of clause 7.1(a) require the contractor to have "examined the site and surrounds" and it would be difficult to argue that the site could be examined without actually physically attending the site during tender time, although the clause does not directly say so.

Making inquiries is a broad term clause 7.1(b) and is generally about ascertaining information about the site from other sources, or seeking out local knowledge about the site from other parties or users in regard to the site.

The Principal may have provided information about the site in various reports, investigations, past records, photographs and data base information however the contract has to recognise that this information may not be complete or fully describe the whole site and the contractor is to make its own interpretations as to the extent and application of the information.

Clause 7.2

If the contractor believes it has encountered site conditions that differ materially and adversely from what could have been reasonably expected at the close of tenders the contractor is promptly notify the principal. See **letter from the contractor sample letter C07a**, Option 1 The contractor is to provide an estimate of the addition time and costs to deal with the site conditions. This is not a quote but a genuine estimate in dealing with the encountered site

conditions. The Principal will use this information to assist in determining a solution to the site condition that best meets the needs of the Principal.

If the contractor does not notify the Principal within 3 business days on encountering the suspected site conditions the contractor under clause 7.5 does not receive any recompense for costs incurred before giving the notice. It is in all parties interests to deal with site conditions as soon as possible in order to meet the projects' aims. The time limit is to encourage early reporting of the site conditions so a solution can be found.

The words materially and adversely are to be used together. Materially means they are significantly different, not just different. It is material to the works. Just because the conditions are different does not make them worse, less favourable, or harder to do. You may not claim a site condition but it is different.

A scenario of a site condition might be, if the rock level was expected at 2m deep but found at 200mm deep with no other identifying features (different from what should reasonably have been expected), this would be considered materially different and adverse.

A scenario of when it is not a site condition might be, that for a trench 100m long, rock is indicated at 1 deep at one end and 1.5 deep at the other end the trench is 2m deep along the entire length. The contractor encounters rock at the surface at the middle of the trench and requests the Principal confirm that this is a site condition. The rock at the surface in the middle of the trench is observable from the road and has been on site before tenders closed (should reasonably have been expected). The rock in the middle of trench, even though not identified in a report is a risk the contractor could have identified under clause 7.1(a), and therefore is not a site condition and would be rejected.

Often contractors will argue that they did not allow for the event and therefore are entitled to receive additional payment above their own allowance. This should be looked at through a lens of what is a reasonable interpretation of the information. Provided at tender and what could be reasonably understood from visiting site at tender.

Clause 7.3

The key concepts in determining whether the Contractor has entitlements to price or time adjustments are that the Site Conditions are:

- different from the physical conditions that the Contractor should have expected at close of tenders, based on information available when the Contractor priced the work, including from any inspection of the Site.
- materially different, i.e. having a significant and tangible impact on the carrying out of the Works; and
- adverse, i.e. causing the Contractor to incur additional cost or time.

A test of reasonableness is to be applied when assessing what the Contractor should have expected, but it should be assumed that tenderers:

- examined all information made available in writing by the Principal for the purpose of tendering.
- examined all information relevant to the Site Conditions that was obtainable by making reasonable enquiries; and
- inspected the Site and its surroundings (unless specifically prevented from doing so).

To reduce the risk of wasted time and effort, it is important for the Principal to act promptly after receiving a notification under Clause 7.2 to:

- verify that the Site Conditions are materially adverse, compared to what the Contractor should have expected when preparing the tender.
- confirm the extent of unavoidable additional work and delays; and
- give any necessary instructions.

In relation to the first two items, the Principal should be reasonable. However, if the Principal can demonstrate that the Contractor has not carried out the additional work efficiently, then this should be taken into account in assessing the entitlements.

Use **letter from the Principal Sample Letter 7A** to advise the Contractor that the Principal does not agree with the Contractor's claim that adverse Site Conditions exist.

If contractor disagrees, they use **letter from the Contractor Sample Letter C07b**

Use **letter from the Principal Sample Letter 7B** to advise the Contractor that its notice provided insufficient information to comply with the requirements of Clause 7.2.

Use **letter from the Principal Sample Letter 7C** to advise the Contractor that the Principal agrees with the Contractor's claim that adverse Site Conditions exist but that no Variation is required. Also use this letter to confirm the initial arrangements for determining and recording the additional costs that are likely to be incurred in dealing with adverse Site Conditions.

Refer to the commentary on Clause 7.5 if a Variation is required.

MW21 provides a simplified method of determining the value of price increases, avoiding separate calculations for delay costs. The adjustment is calculated as:

- the Direct Costs (as defined in Clause 1.10); plus.
- 15% to cover the cost of off-site and on-site overheads, profit and any delays.

The Contractor has no entitlements on account of materially adverse Site Conditions before notice of those conditions is given under Clause 7.2. This encourages the Contractor to notify the Principal as soon as possible so that the Principal may decide the most appropriate course of action.

The specified 3 days is considered a reasonable maximum time for the notice to be provided with the required details. A failure to notify within the 3 day period does not prevent the Contractor from claiming subsequent entitlements under this clause. However, under Clause 7.3, the Contractor has no entitlement for costs and delays incurred before it gives the required notice. Accordingly, the Contractor should be encouraged, for example at site meetings, to contact the Authorised Person immediately it considers that "materially adverse" site conditions have been encountered, even before the information required for the notice is available. The Authorised Person is then able to promptly inspect the site and investigate the site conditions.

The Authorised Person should be reasonable in assessing the adequacy and timing of a Site Conditions notice. For example, if the Contractor telephoned to notify materially adverse Site Conditions, and the Principal agreed to exploratory work on the basis that the formal notice would be provided as soon as possible after the exploratory work was completed, then it would not be reasonable to deny the Contractor's entitlements between the time when the phone call was made and the time the formal notice was received. However, if additional investigations

were not required by the Authorised Person, the Contractor should be advised to comply with the requirements of the notification, based on the information available, as soon as possible to avoid the constraint imposed by Clause 7.3.

Clause 7.4

The Contractor is required to deal with Site Conditions clause 7.4 and construct the Works. However, only the Principal has the right to change the Works. In the absence of an instruction, the Contractor has to proceed without varying the Works, although it still has an obligation to minimise any additional time and cost. This may not be in the best solution for dealing with the Site Conditions.

Clause 7.5

If materially adverse Site Conditions exist and they cause unavoidable additional cost or delay, the Contractor has entitlements to price and time adjustments, under Clause 7.5, from the time the Principal receives a notification under Clause 7.2. These entitlements continue until the Principal instructs the Contractor otherwise. The Principal could, for example, instruct a Variation under Clause 9.8. The adjustments for the Variation would then be dealt with under Clause 9. The Contractor's entitlements under Clause 7.5 cease at the time a Variation is instructed.

Clause 7.6

If the Contractor fails to make a claim for additional Direct Costs and extensions of time within the specified period of 10 days after completing the relevant work, the Contractor does not lose its entitlement altogether. The Contractor is only not entitled to any lost interest.

Clause 15.2 sets out the information that the Contractor is required to submit with a claim. **letter from the Contractor Sample Letter C07c** If a claim does not include the specified information, the Authorised Person should promptly request the missing details. Use **letter from the Principal Sample Letter 15A** to advise the Contractor that its claim provided insufficient information for assessment.

Clause 7.7

If a Variation is instructed as a result of materially adverse Site Conditions, the Contractor may be entitled to adjustments under two different provisions of the Contract. Firstly, Clause 7 entitles the Contractor to the unavoidable costs and time incurred in dealing with the Site Conditions from the time of the notice until the Variation is instructed. From the time the Variation is instructed, the Contractor is only entitled to adjustments under Clause 9.

If it is decided to instruct a Variation to overcome Site Conditions that are accepted as being materially adverse, this should be done promptly to avoid incurring unnecessary additional costs under Clause 7.3. Use **letter from the Principal Sample Letter 9B** if there is time to request and assess a Variation proposal from the Contractor, and **letter from the Principal Sample Letter 9D** to instruct a Variation if action is urgently required.

CLAUSE 8 – MATERIALS AND WORK

Clause 8.1

All materials supplied by the Contractor are to be fit (i.e. suitable) for their purpose and new unless otherwise specified (for example, if reuse of salvaged materials is specified).

In constructing the Works, the Contractor is required to meet relevant codes and standards and good industry practice applicable to the work.

If notices and fees are required to be provided in order to comply with the Acts, Regulations, Ordinances and By-laws that are applicable to the work under the Contract, the Contractor is to provide them. Installations such as water, sewerage, drainage, electricity and gas will commonly give rise to requirements for notices and fees. The Contract may require the Contractor to provide the Authorised Person with documents demonstrating compliance with these requirements. Unless the Contract specifies otherwise, planning approval from local government authorities is normally obtained by the Principal and is not the Contractor's responsibility.

The Contractor is also required to comply with all statutory safety and environmental protection regulations during the construction of the Works, although these requirements are not all detailed in the Contract. The Contractor is fully responsible by law for the provision and maintenance of all necessary fences, hoardings, warning signs, lighting and other temporary works that are necessary for the safety of persons and property in the vicinity of the Works. In addition, the Contractor is required to comply with the other safety requirements set out in the Contract (e.g. in the Preliminaries).

Clause 8.2

If the Authorised Person has reason to suspect defective work and there is no other way to verify compliance, the Contractor can be instructed to uncover the suspected defective work, or to engage an independent party to carry out additional testing. Use **letter from the Principal Sample Letter 8A** to instruct the Contractor to carry out additional testing or uncover suspected defective work.

Clause 8.3

If work that was uncovered or tested in accordance with an instruction given under Clause 8.2 conforms to the Contract, the instruction is to be dealt with as a Variation instruction under Clause 9. The Contractor may be entitled to claim additional payment (Contract Price Adjustment under Clause 9) and/or an extension of time (under Clause 11) in relation to the instruction.

If the uncovered or tested work does not conform to the Contract, it is a Defect which the Contractor is required to rectify. The Contractor should be instructed to identify the full extent of the defective work, by uncovering or testing additional parts of the work. Use **letter from the Principal Sample Letter 8B** to instruct the Contractor to rectify the identified defective work. The Contractor is to bear the cost of uncovering, re-covering and testing non-conforming work. Use **letter from the Contractor Sample Letter C08a**

The Contractor is not entitled to additional costs, even if a test shows compliance with the Contract, if:

- the test is one which the Contractor was required to conduct under the Contract and did not carry out.

- the test was on work that was covered up or made inaccessible without the approval of the Authorised Person, where the Contract required such approval; ie a hold point, authority certification/inspection, or
- the test resulted from an earlier failure of the Contractor comply with a requirement of the Contract.

Prior to any suspected defective work being uncovered or tested, the Contractor should be asked to give the Principal reasonable notice of the time and place of the uncovering or testing. Any test results should be made available to both parties promptly after the completion of the tests.

Clause 8.4

A 'Defect' is anything the Contractor does that does not conform to the Contract. This includes poor workmanship, non-complying management plans, inadequate management of the work (e.g. in relation to safety) and incomplete Work as Executed drawings.

It is the Contractor's responsibility to progressively identify and make good Defects as work proceeds. It is **not** up to the Principal to develop a list of Defects and monitor their rectification. Nevertheless, the Authorised Person should notify the Contractor of identified or suspected Defects in the spirit of cooperation to achieve the project's goals. If the contractor has a certified quality system, the contractor should be directed to issue itself a Corrective Action Request (CAR) using the general Instruction **letter from the Principal Sample letter 2A** and the Authorised Person should ensure that any follow up action or system improvement notice is actioned so the defect is not repeated. A 3rd party audit should show the results of the CAR and what system improvements have been implemented to avoid the same or similar defect again.

The Authorised Person should not specify or approve Defect rectification methods or procedures. These are the Contractor's responsibility. If the Authorised Person specifies or approves rectification methods or procedures and these do not satisfactorily rectify the Defect, the Principal may become liable for any further work and the associated costs.

The Contractor is obliged under the Contract to rectify Defects within a reasonable time after they become apparent. Prompt rectification avoids the risk that a Defect may be covered up or affect other work before it is rectified.

However, the Contractor may provide acceptable reasons for delaying rectification for specific defects, e.g. where the involvement of a specialist subcontractor is required. The Contractor is obliged under the Contract to rectify all Defects before Completion.

Where a Defect requires rectification to ensure the protection of people, property or the environment, the Principal is entitled to require immediate rectification. **letter from the Principal Sample Letter 4E** may be used for this notification.

Acceptance of Defective Work

The Principal may, but is not obliged to, propose to accept defective work. In the proposal to accept such work, the Principal is to specify the Defect that need not be made good, and terms on which it will be accepted. For example, if brickwork exceeds specified tolerances but still appears structurally sound, it may be reasonable to accept that work on the basis that a deduction will be made from the Contract Price and that the Contractor retains responsibility for rectifying any consequential problems. Where there is a possibility that the useful life of asset will be reduced or early deterioration may occur, an additional retention and extended warranty or post completion period could be required as part of any acceptance proposal.

Use **letter from the Principal Sample Letter 8C** where the Principal proposes to accept defective work.

Note that advice should be sought from the designer (where the Contractor is not responsible for the design), and concurrence obtained from the client before accepting any Defective work.

If the Contractor does not accept the Principal's proposal and terms in writing, the Contractor is required to make good the Defect.

Clause 8.5

The Contractor's responsibility for the work under the Contract is not affected by rectification work or whether testing or re-testing specific parts of the Works shows conformity with the Contract. Where a specified Defect is accepted by the Principal, the Contractor's liability may be reduced by the terms of the agreement to accept that Defect.

CLAUSE 9 – VARIATIONS

When is a Contractor entitled to a variation

The contractor has entitlements to a variation when instructed by the Principal under clauses 2.2, 7.7, 8.3, 9.3, & 9.8.

The contractor cannot claim any variation cost unless directed by the Principal.

Clause 9.1

This clause recognises that the Principal may change the scope of the work under the Contract, i.e. instruct a Variation.

The Contractor does not have the right to change the scope without the Principal's written instruction (see Clause 3.2). It is important the Authorised Person confirm any oral agreement immediately in writing.

There is a distinction between a *Variation* and a *Claim* made by the Contractor.

Note that Variations should be consistent with the general scope of the original work under the Contract. Unrelated works should not automatically be varied into a contract for the convenience of the client / agency. A fair dealings test should be applied to any additional scope to confirm a variation will provide the best value for money. Consult your internal delegation to determine if you can consider a variation for additional scope.

Variations may result from:

- a) an error, ambiguity or discrepancy in the Contract Documents (see Clause 2.2).
- b) a change in legislation requiring a change to the Principal's design.
- c) a discrepancy between the requirements of the Contract and a legislative requirement.
- d) materially adverse Site Conditions (see Clause 7.1), or
- e) design changes, requested by the client or the Contractor.
- f) Minor additions and or deletions to the contract scope

In principle, it is undesirable to instruct a Variation to the Works. Any Variation is likely to increase the costs and time involved in constructing the Works. Before instructing a Variation, the Authorised Person should verify that:

- it is essential or offers benefits to the Principal (Client).
- the Principal has been advised of its implications and accepts them, and
- the agency has confirmed that the required funds are available and the appropriate agency governance.

There are additional risks involved where the Contractor is instructed to omit work, because the Contractor may claim additional costs for associated work that is affected by the omission. The Principal should not delete work from the Contract with the aim of arranging others to undertake that work without the Contractor's agreement.

Note that the price reduction for omitted work is not the same as the cost of carrying out that work (see the comments on Clause 9.11 below).

The contract allows the Principal to seek a proposal for a variation from the contractor or direct the contractor to carry out a variation at the Principals estimate.

Clause 9.2

Any Variation can have an impact on time and therefore cost. Where the Contractor claims that a Variation will delay Completion, the Contractor should be requested to demonstrate why the Variation cannot be carried out concurrently with other work on the critical path, to minimise delays. Just because there is extra work required does not always mean that additional time is needed. For example the contractor is requested to add an extra bay to a prefabricated garage, and the garage is programmed to be completed 6 weeks before the main building, the extra garage car space will have no effect on the contractor completing the work within the original contract duration, providing suitable notice is provided for the extra garage bay. Further discussion can be found on clause 12.

Clause 9.3

The contract allows the Contractor to propose a Variation ("a variation for the Contractor's convenience"). If this occurs, the Principal may reject the proposal or, with the concurrence of the Principal or internal governance process, accept it on specified terms. Contractually, the acceptance of a proposed Variation is similar to the Principal instructing a Variation. To protect the Principal, unless the circumstances are exceptional, the terms should always include that:

- the Contractor will not be entitled to any increase in the Contract Price.
- the Contractor will not be entitled to an extension of time.
- the work under the Variation will be fit for purpose.
- the Variation will not result in any other variations being required, and
- the Contractor will not make any claim due to the Variation.

Often Contractors will request a variation for their convenience related to providing a lesser quality product or a defective item in order to not repair/replace it and the principal should receive some recompense for not receiving what was specified or will not last as long, require earlier replacement in the future at a cost to the future owner.

The above terms should be agreed in writing. Use **Letter from the Principal Sample Letter 9A** – Option 1 to accept the Contractor's proposed Variation. Use **Sample Letter from the Contractor Letter C09a** – Option 2 if the Contractor's proposed Variation is not accepted.

Clause 9.4

Except where it is urgently required, a Variation should not be instructed before agreement has been reached with the Contractor on the price and time effects.

If the Principal is considering instructing a Variation to suit the agency's request, the Contractor should be provided with the details and asked to provide a 'proposal'. The Contractor's proposal is to include the effect on the Contract Price, the time to complete the Works and any other aspect of the Contract Use **letter from the Contractor Sample Letter C09b**. This allows the implications of the Variation to be considered and funding to be approved, if necessary, before instructing the Variation and incurring any extra expense. Use **letter from the Principal Sample Letter 9B** to request the Contractor to submit a proposal for a possible Variation.

Where the Principal requests a variation arising from an event under clause 2.2 different margins are applicable to the assessment of those variations and are dealt with under clause 9.11.

Clause 9.11 indicates the valuation principles for determining the amount the contract price should be adjusted. Please refer to the later section on clause 9.11.

Clauses 9.5 and 9.6

The Principal can accept or reject the Contractor's proposal for a Variation. The Principal should respond to the Contractor's proposal within 10 Business days, whether or not it is accepted. Use **letter from the Principal Sample Letter 9C – Option 1** to accept the Contractor's proposal. Use **letter from the Principal Sample Letter 9C – Option 2** if the Contractor's proposal is not to be accepted or an amended proposal is requested.

Note that, until a Variation is approved, the Contractor has no right to claim any costs of delay or disruption caused by waiting on a decision on a Variation proposal and should not alter its work program. The contract requires the Principal to respond to a Contractor's proposal within 10 Business days. To engender cooperation and timely resolution by both parties are required to meet these deadlines. If further time is required, this should be negotiated well before the 10 Business days. Note if both parties take the full 10 Business days each the matter will take four (4) weeks, which maybe a significant impediment in reaching Completion.

If the Principal does not accept a Variation proposal within 10 Business days, and later wished to proceed with it, further confirmation from the contractor is to be obtained. The inference being the opportunity window to incorporate into the contractor's program may have changed therefore changing the impacts of time and price.

Where negotiation is required for any aspect of the proposal, this needs to be dealt with promptly, within the 10 business day period, to avoid the proposal lapsing.

If an amended proposal is negotiated, this should be submitted in writing by the Contractor and would be formally accepted under Clause 9.5.

Clause 9.7

If it is not possible to negotiate a proposal that is satisfactory to the Principal (e.g. because the price or time effects are not considered reasonable) but the variation work is required, the Principal may instruct a Variation under Clause 9.8. This is even if it has rejected a proposal under clause 9.6.

Clause 9.8

The Principal may instruct the Contractor to carry out a Variation. A Variation instruction may be given *whether or not a Variation proposal has been requested from the Contractor*. Under Clause 2.4 the Contractor is required to comply with an instruction given by the Principal, Use **letter from the principal Sample Letter 9D** to instruct the Contractor to carry out a Variation.

A Variation instruction may be given under Clause 9.8 if:

- there is insufficient time to obtain and assess a proposal from the Contractor.
- agreement cannot be reached with the Contractor on reasonable price, but it is essential that the Variation work proceed, or
- an instruction has been given under another clause in the Contract and it is found that the instruction constitutes a Variation.

If there has not been agreement to the price and time effects of a Variation under Clauses 9.4 and 9.5, these adjustments can be assessed under Clause 9.11.

Note before instructing a variation you should have a firm understanding of the estimate costs, your client has agreed to instruct the work and you have met your internal authority delegations to instruct the works

The Contractor's notification of the price and time effects of a Variation instructed under Clause 9.8 needs to include sufficient detail to demonstrate how the amount is calculated and how the effect on the time has been determined. The calculation is to be in accordance with the valuation principles under clause 9.11 i.e. direct cost plus appropriate margin. The Contractor may determine the delay cost using the principles in Clause 9.10 or by other means. If the total price is reasonable, it can be accepted by the Principal irrespective of the mechanism used. However, if insufficient detail is provided, the Authorised Person cannot assess the entitlements and should promptly request the Contractor to provide the necessary additional information. Use **letter from the Principal Sample Letter 9E** to request the Contractor to provide additional information in order to comply with Clause 9.8.

Clause 9.9

The principles in Clause 9.11 need to be considered in assessing whether the price and time effects notified by the Contractor are reasonable.

If the price and time effects notified by the Contractor are reasonable, acceptance should be advised promptly. Use **letter from the Principal Sample Letter 9F** – Option 1 where the Principal accepts the price and effect on Completion notified by the Contractor when a Variation has been instructed.

The Principal has 10 business days to assess whether the amount and effect on time notified by the Contractor are reasonable. This period would start from when the Principal receives sufficient detail to demonstrate the entitlements.

Until acceptance is advised in writing, the Contractor can notify an amended price or effect on time. If acceptance is not advised within 10 Business days, this is technically a breach of contract by the Principal and the Contractor should be asked to confirm the notified price and time effects. It is in the interest of the Principal to fix the price as soon as possible to prevent changing costs and time to integrate the variation into the works

Clause 9.10

If the Principal does not accept that the price or time effects notified by the Contractor are reasonable, then the Principal is to make an assessment of the Contractor's entitlements and notify the Contractor of that assessment in writing. The Principal's notification is to be provided within 10 Business days after the Contractor's notification is received. Use **letter from the Principal Sample Letter 9F** – Option 2 where a Variation has been instructed and the Principal does not accept the price or effect on Completion notified by the Contractor and has assessed the Contractor's entitlements.

If the Contractor does not accept the net Direct Cost or extension of time assessed under Clause 9.11, then the Contractor is to make a claim in accordance with Clause 15.2

The Contractor may disagree with the Principal's assessment of Direct Costs, but the percentage margins specified in Clause 9.10 form part of the Contract and cannot be changed if challenged by the Contractor.

Clause 9.11

There is a distinction between a *Variation* and a *Claim* made by the Contractor.

Clause 9 only deals with Variation

Check Contractor's entitled to a variation

The contractor has entitlements to a variation when instructed by the Principal under clauses 2.2, 7.7, 8.3, 9.3, & 9.8.

The contractor cannot claim any variation cost unless directed by the Principal.

If the Principal has not instructed a variation, then you are dealing with a claim made under clause 15.2, refer to commentary on clause 15

Principles for valuing and assessing variations

The variation is to be valued and assessed based on the following principles.

- The direct cost of the work (Including GST)
- plus an appropriate "margin" which includes
 - profit,
 - offsite & onsite overheads
 - and any effects for delay and disruption.
- change to the completion date is to be addressed at the same time as a claim for an increase in the contract price see clause 9.11(a).

(simply margin for assessment purposes is deemed to be 5% overheads and indirect costs, 5% for Delay and 5% for profit = 15% Margin)

Early Notice

The contract rewards proactive contractors in regard to identifying ambiguities, inconsistencies and discrepancies under clause 2.2 by allowing for a margin of 15% if a timely notice is provided. Where at timely notice is not provided, the contractor only receives a 10% margin only.

Extra work

When early notice is given Clause 2.2 (a) "does not apply" or direction for **New Works** by the Principal

If the Contractor incurs additional Direct Costs to carry out a Variation, the Contractor is entitled to those additional Direct Costs plus a margin of 15%. This amount is deemed to fully compensate the Contractor for all costs and losses connected with the Variation, including supervision, overheads, delay, disruption and interference to work.

There are no other monetary entitlements in relation to the Variation. The Contractor is not entitled to claim additional costs for delay or disruption caused by the Variation instruction including the time taken to obtain necessary materials and resources.

When using a tendered provisional rate item to determine part of the costs (b i), it is deemed to have overhead, and profit in the rate, so only an additional 5% of that rate item is added for time (delay costs), the remainder of the variations direct costs are assessed with a margin of 15%

No early notice given Clause 2.2 (a) "applies"

If the Contractor incurs additional Direct Costs to carry out a Variation, the Contractor is entitled to those additional Direct Costs plus a margin of 10%. This amount is deemed to fully compensate the Contractor for all costs and losses connected with the Variation, including supervision, overheads, delay, disruption and interference to work

When using a tendered provisional rate item to determine part of the costs (c i), it is deemed to have overhead, and profit in the rate, and no margin to that rate item is added for time (delay costs), the remainder of the variations direct costs are assessed with a margin of 10%

Deleted work

If the Variation reduces the scope of the work under the Contract, the Contractor will not incur the Direct Costs of the deleted work and is not to profit from the deleted work. The profit included in the Contract Price is deemed to be 5% of the Direct Cost of the whole of the work. The amount of the deduction from the Contract Price is therefore 5% greater than the assessed Direct Costs of the deleted work.

Note, however, if the Contract includes an identified tendered price for the work that is deleted, the amount deducted should be less than that tendered price.

This is because the tendered price for the deleted work is assumed to also include some overhead and indirect costs that will still be incurred by the Contractor. These are typically in the order of 5% of the Direct Costs.

Accordingly, the tendered price is considered to comprise the Direct Costs plus 5% overheads and indirect costs and 5% for profit.

To demonstrate how to calculate the deduction applicable to an item of work with an identified tendered price, consider the following example.

If the tendered price for the item of work is \$100,000,

the price is deemed to contain direct cost, overhead and profit

To get to direct costs the overhead and profit is assessed as 10% so divide price by 110 and multiply by 100

Therefore, the Direct Costs would be in the order of \$90,909

Add back in the margin less the administration would be 5%

So the deduction would be \$95,454.55.

	Percentage Margin in total		Add back percentage
	10%		5%
\$100,000.00	\$909.09	\$90,909.09	\$95,454.55

Note that where a Schedule of Prices is included in a Lump Sum contract, the prices in that Schedule do not form part of the Contract and it may not always be appropriate to use them to determine the deduction price for the deleted work.

Extensions of time

To assess the Contractor’s entitlement to an extension of time on account of a Variation, consideration should be given to whether the time to reach Completion was affected and whether there were any concurrent delays caused by the Contractor.

CLAUSE 10 – SUSPENSION

Clause 10.1

The Principal may instruct a suspension of any part of the work under the Contract, for any reason. The impact of a suspension on contract time and therefore cost can be significant. Use **letter from the Principal Sample Letter 10A** – Option 1 to instruct the Contractor to suspend a part of the work where the need for the suspension is due to the Principal's act or omission. Use **letter from the Principal Sample Letter 10A** – Option 2 where the need for the suspension is due to other reasons. Contractors' response use **letter from the Contractor C10a**

Although the Authorised Person may be the person to issue the instruction, authority to suspend work is generally delegated to an experienced senior manager and is not to be used indiscriminately. The Authorised Person should consult the appropriate senior manager (or Senior Executive) before suspending any part of the work, unless the suspension is necessary as a result of safety or environmental protection issues that require urgent action. If a suspension is instructed as a matter of urgency due to such issues, the senior manager should be consulted as soon as possible after the instruction is given.

Suspending work will cause the Contractor to incur additional costs, through disruption. It may also lead to disestablishment and re-establishment on the Site. Caution should be exercised in using this power, even if the Contractor's actions led to the suspension, because the Contractor may seek to recover the additional costs by arguing that the Contractor was not responsible for the situation. In addition, the Principal may have to compensate the Contractor for any unnecessary additional costs if the extent of the work suspended was greater than was required to deal with the issue.

The Principal is particularly exposed to claims if a suspension is instructed to accommodate something for which the Principal is responsible, such as an interface with another contract, late approvals from other authorities (which the Principal undertook to obtain) or late provision of information or materials which the Principal was required to provide. It may be preferable in such circumstances to simply grant an extension of time for the delays. Consider also whether suspending the whole of the Works is necessary.

The Contract treats the cost impact differently depending on whether the need for suspension was caused by the Principal or the Contractor.

Clause 10.2

If the suspension was instructed to suit the Principal's needs, then the Principal is to issue a formal instruction for the Contractor to restart the suspended work. This should be done as soon as the need for the suspension ceases, in order to reduce the time and cost impacts. Use **letter from the Principal Sample Letter 10B** to instruct the Contractor to resume suspended work.

Clause 10.3

Where Clause 10.2 applies, the Contractor's entitlements, if any, to an extension of time, are determined under Clause 12.

The Contractor is also entitled to the reasonable, unavoidably incurred Direct Costs arising from the suspension plus a margin of 15%. The Contractor is required to take all reasonable steps to minimise the costs arising from the suspension, for example by continuing with work that is not affected by the suspension or by disestablishing plant and equipment if the suspension is lengthy. The 'period of the suspension' is the time between the suspension instruction was

given and when the work could reasonably restart after the Principal instructs this. The Contractor is entitled to, demonstrated Direct Costs (not including supervision as this is an overhead in the margin), limited to a maximum amount calculated as follows.

Suspension counted in days multiplied by 1.5% of the original Contract Price, (date of acceptance of the tender not adjusted price), divided by the original contract duration, (as at the date of acceptance of the tender, not extended date), in weeks This limit applies irrespective of whether the suspension delays activities on the critical path, entitling the Contractor to an extension of time.

As the calculation above relies on the suspension days this is a maximum entitlement for each occurrence.

Example

Original Contract price	Original contract duration weeks	Suspension in days
\$600,000.00	26	7
1.50% of contract price	divide by duration in weeks	multiply by days for maximum entitlement
\$9,000.00	\$346.15	\$2,423.08

Therefore in the above example of a 7 day suspension the contractor could not claim more than \$2,423.08 including margin for the suspension

If the Contractor does not make a claim, including the information required under Clause 15.2, within 10 Business days after suspended work restarts, the Contractor still has a valid entitlement for the Direct Costs and the margin, but is not entitled to any interest prior to the date the Contractor made a claim that complied with Clause 15.2.

Clause 10.4

If the suspension instruction did not arise as a result of the Principal's needs but was due to the Contractor's actions, for example a safety breach or as a result of the requirements of a statutory authority, the Principal is not required to instruct the Contractor to resume work. It is the Contractor's responsibility to determine when the cause of the suspension has been resolved and to restart the suspended work and notify the Principal accordingly. use **letter from the Contractor C10a** It may be necessary to re-issue a notice under 10.1 if the contractor has not resolved the matter or made it worse.

Clause 10.5

The Contractor is not entitled to claim additional costs for a suspension under Clause 10.4 and the Contractor is not entitled to claim Delay Costs under Clause 12.

The contractor is to make a claim under Clause 15.2 for an adjustment to the contract price and duration citing the entitlement under clause 10.3 but will need to demonstrate that it has not exceeded the maximum entitlement.

CLAUSE 11 – COMPLETION

Clause 11.1

The 'time for Completion' is a period of time, usually stated in weeks. It is not specified as a date because the date of contract award is not known when the time for Completion is specified. The initial date for Completion is calculated from the date of award and the time for Completion. Note completion is to be free on any known identified defects and the provision of all documentation and training required under the contract

Clause 11.2

The contractor has to notify the Principal (via the Authorised Person) when it considers that the contractor has reached Completion or a Milestone Completion, using the form in **schedule 3**. Contractor notification This is so the Authorised Person can plan for a handover with end users and the Contractor is able to demonstrate that all the contractual obligations are met (including documentation & Training) and that no **defects** (as defined by clause 1.9) are outstanding.

Clause 11.3

When the Contractor advises that Completion has been reached, the Authorised Person should inspect the relevant work and examine the documents provided and determine whether they have achieved compliance with Clause 11.3. Inspections of the Works should be carried out with the Contractor's representative so that the Contractor fully understands why the Authorised Person has made the determination, including the nature and types of any outstanding Defects if Completion has not been reached.

As noted in the commentary on Clause 8.4, the Contractor is responsible for identifying and rectifying defects. Accordingly, the Authorised Person need only inspect the relevant work to the extent necessary to determine that Completion has not been reached. The Authorised Person is not obliged to identify all Defects-

If Completion has not been reached

The Authorised Person's inspection frequently results in a list of identified Defects and omitted items, for example documents not provided or Site and surroundings not made-good. If this is the case, Completion cannot be granted, and the Authorised Person should promptly notify the Contractor of this determination. To assist the Contractor in promptly addressing the Defects, the Authorised Person should include the reasons for the determination in the notification and should attach the list of identified Defects, (and photos if available) although the Contract does not specifically require it. The notification should request the Contractor to re -notify the Authorised Person under clause 11.2 when the outstanding matters have been dealt with and re issue the schedule 3 notice. Use **letter from the Principal Sample Letter 11A** – Option 1 where the Principal determines that Completion has not been reached.

A re-inspection by the Authorised Person then be required. If additional Defects are identified at the re-inspection, the process described above should be repeated. Note the contractor's performance report should indicate the contractors inability to identify defects on its own and then remedy those that have been clearly identified by either party.

When Completion is reached

The Authorised Person is required to issue formal written notification stating the date of Completion of any Milestone or the whole of the Works. Use **letter from the Principal Sample Letter 11A** – Option 2 where the Principal determines that Completion has been reached.

Clause 11.4

If the Principal needs to occupy part or all of the Works before Completion (as defined in Clause 11.3) is reached, the Principal can do so. This type of occupation is termed 'early use'. Before doing this, the Principal should confirm that the part of the Works to be occupied is sufficiently complete. This means that:

- (a) the relevant certifications have been received (e.g. building occupation certificates).
- (b) the Contractor will be physically able to make good outstanding Defects and complete other Contract requirements; and
- (c) it will be possible to obtain the necessary insurance cover.

Seek advice from the client or the client's insurance broker as to whether any additional insurance is required for the early use or occupation of part of the Works. Note that while construction insurance will continue to cover the Contractor, it does not provide the necessary cover for the occupiers of a facility. NSW Government agencies may be covered by the Treasury Managed Fund (TMF) on handover of the Works but should seek clarification from the TMF agent iCare.

The Principal's notice of the intention to use or occupy before Completion is to identify the part or parts of the Works that are to be used or occupied so that the Contractor can reallocate resources and arrange to provide documents and other things required for the use or occupation. Use **letter from the Principal Sample Letter 11B** to notify early use of the Works by the Principal.

The specified 5 Business days' notice before use or occupation and the 10 Business days allowed for the Contractor to provide relevant documents etc **letter from the Contractor Sample Letter C11a** this can be reduced by agreement with the Contractor.

If there is early use or occupation, the Contractor is still required to achieve Completion of Milestones and the Works as defined under Clause 11.3. However, occupation of the facility may hinder the Contractor's work. It may be physically impossible for the Contractor to make good some Defects, or rectification work may be delayed due to access constraints. If the Contractor's work is hindered by the occupation, the provisions of the Contract need to be applied, for example:

- (a) where Defects are not accessible, it may be necessary to accept the works with Defects not made good, under Clause 8.4.
- (b) where work is required outside normal working hours, the Contractor may be entitled to claim additional labour costs; or
- (c) the Contractor may be entitled to an extension of time under Clause 12.3. This could apply even if the need for early use or occupation was due to the Contractor's lateness.

An alternative to using the contract provisions for early use or occupation is to establish, by agreement with the Contractor, an additional Milestone that includes outstanding work and rectification of specific Defects. The client would occupy the facility when the work under the Contract is completed except for work in that Milestone.

Clause 11.5

If the Contractor fails to provide notification when the Works or a Milestone has reached Completion, the Principal can notify the Contractor that Completion has been reached. **Letter from the Principal Sample Letter 11A** – Option 3 can be used for this purpose.

It may be necessary for the Principal to notify Completion, for example to allow a following contractor to commence work on the Site. In such circumstances, the Principal and the Contractor could agree that remaining Defects be made good, and any outstanding documents be provided within a specified period. Alternatively, the Principal could propose to accept Defects not made good, on specified terms.

CLAUSE 12 – DELAY TO COMPLETION

If there is a delay to Completion, the Contractor's entitlements depend on whether the delay is caused.

- by the Principal
- or the Contractor
- or is beyond the control of both.

Clause 12.1

The Contractor is required to promptly notify the Authorised Person if it anticipates not reaching Completion of the Works or a Milestone by the time(s) stated in the Contract Information. The notification should be in writing. The purpose of the notification is to forewarn the Principal and the client, so action can be taken to minimise the consequences. –This is not a notification of an actual delay it is merely information that something may affect the completion of the contract or milestone. **letter from the Contractor Sample Letter C12a** option 1

Clause 12.2

If the Contractor is actually delayed in reaching Completion, the Contractor is required to immediately provide a separate notification. A further notice is required within 5 Business days after the delay started, providing details. Again, there is no contractual penalty for the Contractor if these notifications are not given but the failure should be reflected in the ratings given in Contractor Performance Reports.

The contractor should issue a notice under **letter from the Contractor Sample Letter C11a** option 2

Clause 12.3

This clause sets out the Contractor's entitlements arising from delay to Completion. A delay can occur due to:

- (a) the actions of the Contractor.
- (b) the actions of the Principal, or
- (c) causes beyond the control of both parties, including actions of third parties.

Delay caused by the Contractor.

If the actions of the Contractor cause delay, the Contractor has no entitlement to an extension of time or delay costs even if there is also a delay, on the same day(s), due to other causes (concurrent Delay). Similarly, the Contractor's entitlement to extensions of time for other causes is reduced to the extent that the Contractor contributed to the delay. In other words, if the Contractor is delayed by its own (or sub-contractors) action/inaction the contractor is not able to use this as an entitlement to extend the time for Completion.

Example 1, (concurrent Delay)

Wet weather has occurred on a Tuesday and Wednesday however the contractor was not on site as it was awaiting structural steel to be supplied and installed, on the Monday. The steel was not delivered till the following Monday, as it was not ready, so there would be no entitlement to wet weather if the structural steel was on the critical path as the contractor was unable to work without the steel.

Delay caused by the Principal

If a delay is caused by a breach of contract by the Principal, the Contractor is entitled to an extension of time and delay costs under Clause 12.3. The Principal may breach the Contract by failing to obtain approvals that the Principal undertook to obtain or to respond or act within a specified or reasonable time period.

For example, if the Contractor notifies an ambiguity in the Contract Documents and the Principal does not instruct a necessary Variation within a reasonable period, causing delays to activities on the critical path, the Contractor may be entitled to claim an extension of time and delay costs for the period before the Variation is instructed.

If a delay is caused by the Principal, the Contractor is entitled to an extension of time and delay costs under Clause 12.3 unless the delay is caused by an instruction to.

- (a) carry out a Variation (because the time and cost entitlements of a Variation are addressed in full under Clause 9).
- (b) uncover work or carryout additional testing under Clause 8.2 (because the entitlements related to any additional work are dealt with as a Variation under Clause 9), or
- (c) suspend the work (because the time and cost entitlements are dealt with under Clause 10).

Delay beyond the control of both parties

For delays caused by events beyond the control of both parties, for example inclement weather conditions, a requirement of a statutory authority, an earthquake or other similar event, the Contractor is entitled to an extension of time but not delay costs.

Clause 12.4

Delay costs are there to compensate the contractor for the delay and disruption in undertaking the works where changes are made to the contract duration, or the Principal causes the contractor to be on site for a longer time. It not used for relocation or disestablish and re-establish of equipment to and from the site.

Clause 7-Site conditions, clause 8 -Materials and work, Clause 9-Variations clause 10-Suspension, all have the delay costs built into the margin applicable to the situation. If the contractor is delayed by an instruction to the contractor or a breach of contract by the Principal the contractor may be entitled to receive delay costs at the rate stated in contract information 13. Note that if the breach of contract by the Principal was under clause 19.1, no delay costs are payable. (Please see commentary on clause 19).

Delay costs are never payable for events the Principal has no control over, i.e. they are not payable for wet weather and its effects or actions the contractor has control over, such as delays to shipping of goods, subcontractor program.

The delay costs are calculated on calendar days, **not** Business days and therefore are payable for weekends, public holidays and the other days identified as not being Business days.

Clause 12.5

If the Contractor submits a claim more than 10 Business days after a delay ends, it is still a valid claim that needs to be assessed however the poor administration of the contract should be notified in the contractor performance report and it could affect the contractors' future opportunities

If a claim does not include the details set out in Clause 15.2, the Authorised Person should advise the Contractor that the claim cannot be assessed until the required information is provided. Use **letter from the Principal Sample Letter 12A** to request the Contractor to provide additional information in order to comply with Clause 15.2.

An extension of time should only be granted if the date for Completion of a Milestone or the Works is affected by the events giving rise to the claim. The Contractor's entitlement should be determined by reference to the effect of the delaying event(s) on activities on the critical path of the relevant Milestone or the Works. The extension is to relate to the actual delay at the time the delaying event occurred. It is not to be reduced because the Contractor could still reach Completion on time by using float in the Contractor's program.

When assessing extensions to the period for Completion, always consider the number of Business days for which an entitlement exists, taking into account rostered days off (RDOs), where applicable, and public holidays

In calculating the revised date for Completion, Business days and RDOs beyond the original period for Completion need to be taken into account. For example, if the current date for Completion is Thursday 9 June and the extension of time is 4 working days, the new date for Completion would be Wednesday 15 June. However, if Monday 13 June is a public holiday, the new date for Completion would be Thursday 16 June. Moreover if Tuesday 14 June was an RDO the new date for completion would be Friday the 17th of June.

The Principal should advise the Contractor of the assessment promptly in writing, giving reasons. Use **letter from the Principal Sample Letter 12B – Option 1** to advise the Contractor of the Principal's assessment of the Contractor's claim for an extension of time. Use **letter from the Principal Sample Letter 12B – Option 2** to reject the Contractor's claim for an extension of time.

As best practice contract management, the Authorised Person should also keep a record of extensions of time claimed and granted, including the date of the claim, the number of days claimed, the date of the response and the number of days granted.

If the Principal has not responded within 15 Business days, the Contractor's entitlements are deemed to be nil, and the Contractor may take action under this Clause 12.6.

Clause 12.6

If the Contractor does not accept the entitlements assessed by the Authorised Person, or if no assessment is made and the entitlements are deemed to be nil, the Contractor can require that the parties confer, in accordance with Clause 15.3. If agreement cannot be reached, the Contractor can then initiate a formal dispute.

Clause 12.7

'Liquidated damages' are amounts that are payable by the Contractor to the Principal if Completion of a Milestone or the Works is not reached by the relevant date for Completion, as extended. The term 'liquidated' is used to indicate that the damages have been set at a monetary amount (usually per day) and have been agreed (by virtue of tender and award process) and by the parties as part of the Contract.

Liquidated damages are not a penalty for late completion but a genuine pre-assessment of the cost to the Principal in the works not being operational on time such as, paying for rent on other

premises, additional supervision, additional interest on borrowings, loss of income, any relocation costs to temporary premises and so forth.

Liquidated damages are applicable if rate(s) are specified in Contract Information **Item 14**. The amount payable is calculated by multiplying the daily rate(s) by the number of days that have elapsed from, but excluding, the extended date for Completion up to and including the date the Milestone or Works reach Completion. Note liquidated damages applies to calendar days **not** Business days.

Payment is made by deduction from progress payments, in accordance with Clause 13.1. A deduction can only be made after the relevant date for Completion has passed. Note that this may be before the work under the Contract actually reaches completion. If liquidated damages are payable, the Authorised Person is **required** to deduct them from progress payments and clearly advise the contractor in the progress payment how the liquidated damages have been calculated.

The Contractor may request that liquidated damages be remitted (i.e. reimbursed to the Contractor or not deducted from payments). If so, the request should be referred to the appropriate senior manager for consideration. Liquidated damages may be reduced or remitted if the Contractor can demonstrate that it is unreasonable to withhold them. The additional costs incurred by the Principal and client agency due the Contractor's delay should be taken into account when considering the Contractor's request for remission. Sometimes it may be decided to reduce or reimburse liquidated damages in settlement or part settlement of a claim, but this should only be undertaken with advice from senior management or Senior Executive.

If no rate for liquidated damages is stated in the Contract Information, common law damages (rather than 'liquidated' damages) may be applied. To obtain payment from the Contractor the Principal will need to initiate, and be successful in, a dispute resolution process or the court system.

Clause 12.8

The Principal (Authorised Person) may extend the period for Completion for any reason at any time. This should not be done without consulting the appropriate senior manager and carefully considering both:

- the effects of such an extension, and
- the implications of failing to grant the extension.

For example, it would not be reasonable to deduct liquidated damages from the Contractor for a delay that was caused by the Principal's act or omission. To ensure the Contract provisions can continue to be applied, including deducting liquidated damages for delays caused by the Contractor, it may be necessary to separate the different delays. This can be done by extending the period for Completion by the extent of delay caused by the Principal without waiting for a notification from the Contractor. **letter from the Principal Sample Letter 12C** can be used for this purpose.

The granting of an extension of time effectively remits the liquidated damages and does not encourage the contractor to complete the Works within the agreed contract duration. The Principal should not extend the contract merely to avoid an uncomfortable conversation with the contractor in regard to application of liquidated damages. Similarly, the contractor should not expect to have the liquidated damages waived as they tried hard, but did not deliver, the

Contract Works within the contract duration as extended. A Contractor Performance Report should indicate that the contractor did not Complete the works within the agreed contract period and the Principal extended the contract duration for its own reasons.

CLAUSE 13 – PAYMENT AND RETENTION

The contractor is entitled to be paid for the work it has undertaken and it is a Prime responsibility of the Principal to do so. Construction contracts in NSW are governed by the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SoPA) that also binds the crown. All NSW Government agencies, state owned corporations, other authorities and local government entities are also bound by the SOP act.

The Security of Payments act cannot be contracted out of, as the law will apply even if the contract says something different. The payment clauses within MW21 comply with SoPA and have been drafted to ensure compliance with the law. This may impose some time deadlines on agencies that are different to other procurement processes or individual agencies own payment terms.

The preliminaries clause 3 attempts to assist agencies with payment systems that cannot produce an RCTI. You may consider a process with the contractor where you agree on progress before they make a claim. This is not a draft payment claim as any payment claim being draft or not is seen under the SoPA as a claim. This would be a review of progress, where agreement is reached on the actual progress of the works, and a payment claim is made by the contractor based on that agreed progress.

If you receive a complaint from an employee, Subcontractor or Supplier of non payment of monies due, use **letter from the Principal letter 13i option 1** to respond to the complainant and **letter from the Principal letter 13i option 2** to notify the Contractor of the complaint

Clause 13.1

The Contractor is entitled to progressively claim payment for work completed. The timing for payment claims is to be minimum of monthly or in accordance with contract Information Item 15. This is usually the last business day at the end of the month but can be more frequent or earlier in the month if stated in Contract Information item 15.

In each payment claim, the Contractor is entitled to claim the cumulative value of all the work carried out up to the date of the payment claim, including amounts assessed or agreed in writing for additional entitlements claimed by the Contractor and amounts determined by an expert, less amounts previously paid. This allows for adjustment of the Contract Price as the work proceeds.

The Contractor's payment claims are to be in writing and are to identify the work carried out and how the claimed amount is calculated. This is commonly called works in ground and relates to items actually incorporated into the works. The minor works contract does not cater for payments for deposits or advance payments and only recognises works actually done.

Clause 13.2

With the payment claim, the Contractor is required to give the Principal the conformance records and other information required under the Contract, as well as the original of a supporting statement and Subcontractor's Statement.

Schedule 2 has a Supporting Statement & Subcontractors Statement to be completed. Note the statements can be requested at any time if there is a concern in regard to payment of subcontractors and suppliers. There are legal penalties (fines and prison sentences) for false, misleading, or non-supply of a Supporting Statement & Subcontractors Statement. The Department of Customer Service has roles under SoPA in regard Supporting Statement &

Subcontractors Statement which are delegated to officers of NSW Fair Trading to investigate. See web site (current as of June 2023)

<https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/security-of-payment> .

Or direct your enquires to Securityofpayment@customerservice.nsw.gov.au or go to https://www.fairtrading.nsw.gov.au/_data/assets/word_doc/0015/400623/SOPA_breach_reporting_form.docx using the form provided.

If contractors do not supply these documents this should also be recorded in their Contractor Performance reports which may affect future opportunities for work. However, a reminder phone call may be all that is required to have the correct supporting documents provided by the contractor. Consistent failure to supply these documents may be indicative of other issues that may require action under clause 17.

Issue **letter from the Principal letter 13B option 2** to the contractor indicating that a subcontractor statement has not been provided or is incomplete.

Liability for workers compensation falls on the Principal if a contractor is not insured, to prevent this liability a suitably signed subcontractor statement under the workers compensation act relieves the principal of this payment. If you cannot get a suitable signed statement, you should withhold payment to the value of the cost of the insurance premium should the liability fall on the principal to pay.

Clause 13.3

Irrespective of when the payment claim was made and what information was provided with it, the Principal is to issue a payment schedule within 10 business days after receiving the payment claim. To comply with SOPa the payment schedule is to identify the payment claim it relates to, state the amount to be paid and also state the reasons for paying less than the Contractor claimed, if that is the case. Use **letter from the Principal Sample Letter 13A** for the payment schedule unless you are using a Contract Management System that automatically generates a payment schedule meeting the requirements of the *Security of Payment Act*. You may need to modify system generated payment schedules to include adequate explanation of why you are not paying the whole of the payment claim. The contractor is to be paid no later than 15 days of the date of the payment claim see clause 13.4 and SoPA

In calculating the amount to be paid, the Principal should consider the value of work completed to the date of the payment claim. This would include the value of any Variation, as assessed by the Authorised Person, even if the Variation has not been formally approved. The Principal is entitled to make deductions for the estimated cost of rectifying defective work, the actual cost of urgent work carried out by the Principal, retentions and liquidated damages.

Any deduction for defective work should take into account the cost of the Principal having the rectification carried out. It is particularly important to make an appropriate deduction if the amount remaining to be paid under the Contract is insufficient to have the rectification work carried out or there is a risk that the Contractor will not complete all the required rectification work in an expeditious manner.

If the Contractor makes payment claims more frequently than specified, a payment schedule should be provided for each, within the specified 10 days. However, the payment schedules in response to payment claims made more frequently than specified may state that no payment is due because the Contractor is not entitled to make that claim on that particular date. Keep in mind the period being claimed. Potentially a claim for a given period may be late and it could

appear you have received 2 payment claims in the one period. The second claim in the period may actually be due for the current period and a nil payment might not be appropriate.

If the payment claim states that it is being made under the *Security of Payment Act* and the Principal does not give the Contractor a payment schedule within 10 business days after receipt of the Contractor's payment claim or does not pay the full amount claimed within 15 business days of receipt of the contractor's claim, the Contractor may apply for adjudication of the claim under the Act. The Contractor is required to notify the Principal of the application and the Principal needs to ensure that a payment schedule is issued within 5 business days after receiving that notification. Note that if payment is not made by the due date, the Contractor may commence legal proceedings as an alternative to adjudication.

It is important for a payment schedule to state the reasons why payment is not being made as claimed for each relevant item in the claim. The Principal cannot introduce any further reasons during the adjudication process so the reasons within the payment schedule need to be clear. The independent adjudicator is required to determine the amount payable on the basis of the reasons given in the payment schedule and may determine a higher amount than would have been the case had the Principal provided comprehensive reasons within the issued Payment Schedule. If the Principal fails to issue a payment schedule, there is a risk that the Contractor will be found to be entitled to the full amount claimed. If this occurs towards the end of the Contract, it may not be possible for the Principal to deduct the amount of any overpayment from subsequent payments. The Principal may be forced to initiate a formal dispute resolution process to recover any excess payments.

Be aware if a claim is made that has previously been rejected, the reasons for the rejection must be included each time the item is claimed. You cannot rely on your previous rejection being considered should the matter go to adjudication as they are viewed in isolation.

Reasons for withholding payment

The reasons for withholding payment need to be specific, quantifiable and justified under the Contract and should refer to each item that is not being paid in full. Any attachments to the payment schedule should be clearly referenced in the schedule. The reasons should refer to the provisions of the Contract where possible. Examples of 'reasons' for common situations are:

- I have assessed the value of work required to carry out Variation No 3 for relocating the doorway to Room 6 as \$6,850, not \$8,500 as claimed. Details of this assessment were provided in my letter dated 4 August 2023 I have not included any amount for Variation No 14, for reasons provided in the Payment Schedule dated 6 October 2023.
- I have withheld a retention amount of 4% of the Contract Price, in accordance with Clause 13.9 of the General Conditions of Contract, because your entitlement to payment now exceeds 50% of the Contract Price.
- You have not provided sufficient information, as required by Clause 15.2 of the General Conditions of Contract, for the Principal to fully assess your claim of \$8,600 for the cleaning of brickwork under Variation No 20. In the absence of evidence of the value of the work, I have allowed \$4,000 because, in my opinion, this is a reasonable price for the work involved.
- I have included an amount of \$4,380 for Variation No 23, which is not shown in your payment claim, because this amount was included in previous payments.
- In accordance with Clause 8.3 of the General Conditions of Contract, I have not included any amount for re-testing of the air conditioning system (your Variation No 26). The re-testing was required because the installation failed to meet the specified output during

initial testing and required modification. Your company is responsible for design of this system, under clause # of the Mechanical Services Specification.

- I have deducted an amount of \$4,500 (Variation No 28) for urgent repairs carried out to the security gate, since your company caused the damage and failed to repair it within the time requested. This is in accordance with the provisions of Clause 4.6 of the General Conditions of Contract. Please refer to my letter dated 22 July 2023.
- I have deducted an amount of \$10,000 in respect of liquidated damages for late completion of Milestone 1 (being 5 days at \$2,000 per day), in accordance with Clause 12.7 of the General Conditions of Contract.

DO NOT give 'reasons' in terms such as:

- Variation No 36 has not been approved.
- The claim for Variation No 39 was received three days before the payment claim and has not yet been evaluated.
- I have not included any amount for Variation No 22 for costs related to the alleged suspension of work on Building C, because you have not provided sufficient information for the Principal to assess the claim.

If a payment claim does not include the required compliance records or Subcontractor's Statement, the payment schedule should still be issued within 10 business days after the payment claim is received. The amount of the payment can be affected by the absence of these documents under clause 13.4—issue **letter from the Principal letter 13b** option 2 advising the contractor of the ramifications.

As stated above, a current Subcontractor's Statement is required with each payment claim. It may be necessary to clarify for the Contractor that:

- in the Subcontractor's Statement that the Contractor provides to the Principal, the term 'Subcontractor' refers to the Contractor and the term 'Principal Contractor' refers to the 'Principal'; and
- in the Subcontractor's Statement that a Subcontractor provides to the Contractor, the term 'Subcontractor' refers to the relevant subcontractor and the term 'Principal Contractor' refers to the 'Contractor'.

Note also that:

- the Subcontractor's Statement requires the Contractor to declare that all due payments have been made to employees carrying out the work under the Contract for the period referenced in the Statement. It does not provide for the Contractor to declare amounts that have not been paid to employees. Thus the Statement can only be completed and provided by the Contractor after these payments have been made.
- the Subcontractor's Statement does not require the Contractor to declare that it has paid all its subcontractors what is due and payable. Accordingly, if a subcontractor claims it has not been paid, the subcontractor should be advised to consider action under the Security of Payment Act.
- section (b) of the Subcontractor's Statement requires a currency certificate for workers compensation insurance to be attached. This certificate needs to be requested if it has not been provided separately.

- Subcontractor's Statements and workers compensation insurance currency certificates provided by subcontractors to the Contractor do not have to be provided to the Authorised Person.

Clause 13.5– Manner of payment

All payments are to be made via Electronic Funds Transfer (EFT). The Authorised Person should make the Contractor aware of its responsibility to advise EFT account details, if these have not been made available before payment is due. Use **Letter from the Principal Sample Letter 13C** to advise the Contractor to provide sufficient account details. The contractor may advise of a change of account, see **Letter from the Contractor Sample Letter 13a** The contractor is to give a minimum of 5 Business days' notice of a change of bank account details.

The authorised person should satisfy themselves the change of bank account details is genuine, (incidents have occurred where companies have had their invoices hijacked and account details changed), or are experiencing other financial issues. See the commentary on clause 17.3, insolvency. It is suggested that the contractor forward a signed letter with a copy of the new bank account statement attached, so the account details are verified. Your finance and payment team should be contacted to establish the protocol for your Agency/ Council.

Clause 13.6– Payment is on account only

Making a payment is not evidence of the value of the work done or that the work complies with the Contract. It is money paid 'on account' for work done by the Contractor for the Principal, pending the final payment for all the work under the Contract.

A deduction can be made for Defects (non-compliances) in an element of work for which full payment has already been made. Similarly, if payment is made for a Variation based on the Authorised Person's initial assessment, pending agreement, the amount paid can be adjusted either up or down when its value is determined.

Clause 13.7 – Principal can withhold, deduct or set-off

The Principal is entitled to set-off (deduct) from payments due to a Contractor a sum equivalent to any debt due from the Contractor to the Principal, arising under the Contract or any other contract between the Contractor and the Principal.

A 'debt due' can arise under Clauses 4.6, 5.6, 12.7, 13.7, 13.8, 13.11, 14.3, 16.8, 16.14 or 17.7 of the General Conditions of Contract. A 'debt due' can also arise where an overpayment has been made or a 'defect not made good' has been accepted.

Use **Letter from the Principal Sample Letter 13D** to advise the Contractor that an amount is going to be deducted from a payment that is due under the Contract. This should not be done without the debt having been established and without concurrence from the appropriate senior manager or senior executive.

It is convenient to process a deduction Price adjustment (negative) to account for the set-off. Note that the reason for the deduction also needs to be included in the applicable payment schedule(s). This ensures records are maintained and avoids a discrepancy between the payment claim and the amount to be paid. Note, this is only a variation if it is a change to the works (work not done) otherwise it is only a change to the contract price to account for the debt owed

A deduction can be made from payments due under an MW21 contract for a debt that is legally due under another contract, even if that other contract does not contain a set-off clause because the MW21 contract has a set-off clause.

For example, the Principal has three contracts with the one contractor and on the 2nd contract the contractor owes the Principal money for liquidated damages and has not paid them. There is insufficient money left in the 2nd Contract to pay the LD's. The Principal can deduct the money owed on contract 2 from either contract 1 or 3 and if necessary, both contracts, as long as each contract where a deduction is made has an appropriate set-off clause.

For example, liquidated damages of \$4,000 may be owed on contract 2012-zyxzyx and under contract 2023-00456 the set off occurs so the comment may need to be "name of Company under contract 2012-zyxzyx owes the Principal \$4,000 in liquidated damages and has not forwarded the required amount in accordance with final payment summary therefore \$4,000 is being deducted from this contract no 2023-00456."

Clause 13.8 Provisional Sums and Rates

This clause provides for the adjustments to be made to the Contract Price if the Principal instructs the Contractor to do work that is the subject of a Provisional Sum or rate 1.17 & 1.18 Refer to the commentary on Clause 3.10 for advice on instructing work payable as a Provisional sum or rate. If the Principal does not instruct such work, then the amount of the Provisional Allowance is to be deducted from the Contract Price.

Where an item of work identified as a Provisional Sum is carried out, the Provisional Sum amount is deducted from the Contract Price and the Principal pays the Direct Costs of the work plus 10%. It is important to ensure that the calculated Direct Costs do not include the costs excluded under the definition of Direct Costs in Clause 1.10. It is also important to ensure that the Direct Costs used in the calculation are limited to the cost of work that is specifically described as being covered by that Provisional Sum. For example, if the Contract included the construction of a kitchen and the Provisional Sum item is the 'supply of kitchen unit', then the Direct Costs are not to include the cost of installation of the kitchen. This would be included in the Contract Price.

Where there is a provisional rate, the contractor tenders the rate, but the quantity is undefined or unknown. Like other provisional items the contractor is not allowed to undertake work associated with a provisional rate unless instructed to do so. (Use **Letter from the Principal sample letter 3d**). This is different to a schedule of rate where the contractor measures the work undertaken and claims the quantity installed as work progresses

Clause 13.9 Retention

An amount of 4% of the Contract Price is retained (i.e. not paid to the Contractor) in case the Contractor fails to properly perform the Works. This provides the Principal with monies to rectify Defects or complete the Works during any Post Completion Period, if the Contractor is unwilling or unable to do so.

The retention is not deducted during the first 50% of the work in order to assist the Contractor's cash flow. The Authorised Person is to ensure that the retention is made from the appropriate progress payment.

An unconditional undertaking may be accepted, in lieu of a retention, but it is required to be:

- (a) from one of the listed types of acceptable organisations. (An organisation is 'acceptable' if it is registered with APRA. The Australian Prudential Regulation Authority (APRA) website is at www.apra.gov.au.)
- (b) in **exactly the form detailed in Schedule 1**, which allows the Principal to call on the Undertaking without reference to the Contractor and without giving reasons to either the Contractor or the financial institution; and
- (c) the original signed by the financial organisation.

Unconditional undertakings are to be checked for compliance, and any that do not comply need to be returned to the Contractor, with an instruction to provide a complying Undertaking. The original of the unconditional undertaking is to be registered and held securely, preferably in a safe, with a copy kept on file. Use **Letter from the Principal Sample Letter 13E** – Option 1 to acknowledge receipt of a satisfactory unconditional undertaking. Use **Letter from the Principal Sample Letter 13E** – Option 2 to advise the Contractor that the unconditional undertaking provided does not comply with the Contract.

The undertaking can be used to reimburse the Principal for debts due if the Contractor does not pay the Principal a debt due and there are insufficient monies available to deduct the amount owing from payments due to the Contractor. This should not be done without the debt having been established and without concurrence from the appropriate senior manager or senior executive. Use **Letter from the Principal Sample Letter 13F** to make a demand on an undertaking.

Clause 13.10 – Final payment Summary

Even if the Contractor does not submit a final payment claim, the Principal has the ability to finalise the Contract by issuing a final payment schedule. For certainty, this payment schedule should be clearly identified as the 'final payment schedule'.

The final payment schedule is required to be issued by the latest of the times specified in Clause 13.10. Before issuing a final payment schedule, the Authorised Person should visit the Site and contact the client to determine whether there are any outstanding Defects. If there are, the procedure in Clause 14 should be followed.

If the Contractor does not make good Defects within the time specified, they can either be rectified under Clause 14.3 or resolved (by accepting the work with the Defect) under Clause 8.4. The cost of rectifying outstanding Defects should be included in calculating the amounts owing by one party to the other. Retentions also need to be included in calculating the amounts payable.

Note that claims made under Clause 15 can be resolved by agreement or through an expert determination. As Clause 15.4 bars new claims after the specified times, there should be no outstanding claims when the final payment schedule is issued.

The final payment summary may show that:

- (a) the Principal owes the Contractor money.
- (b) the Contractor owes the Principal money, or
- (c) neither party owes any money to the other.

Use **Letter from the Principal Sample Letter 13G** for the Final Payment Summary unless you are using a Contract Management System that automatically generates a payment summary meeting the requirements of the *Security of Payment Act*.

If the Principal owes the Contractor money, the Contractor is required to give the Principal a current Subcontractor's Statement before the Principal makes the payment or releases any unconditional undertaking.

If the Contractor owes the Principal money and does not pay within the specified 20 Business Days, the amount is a debt due from the Contractor to the Principal and may be recovered from

the unconditional undertaking (if any) using **Letter from the Principal Sample Letter 13F** or using the set-off provisions in another contract. If neither of these options is suitable, the dispute resolution provisions in the Contract may be initiated. The NSW Government's Contractor Performance Management system may also be of assistance. The Principal is not obliged to release any unconditional undertakings until after payment is received.

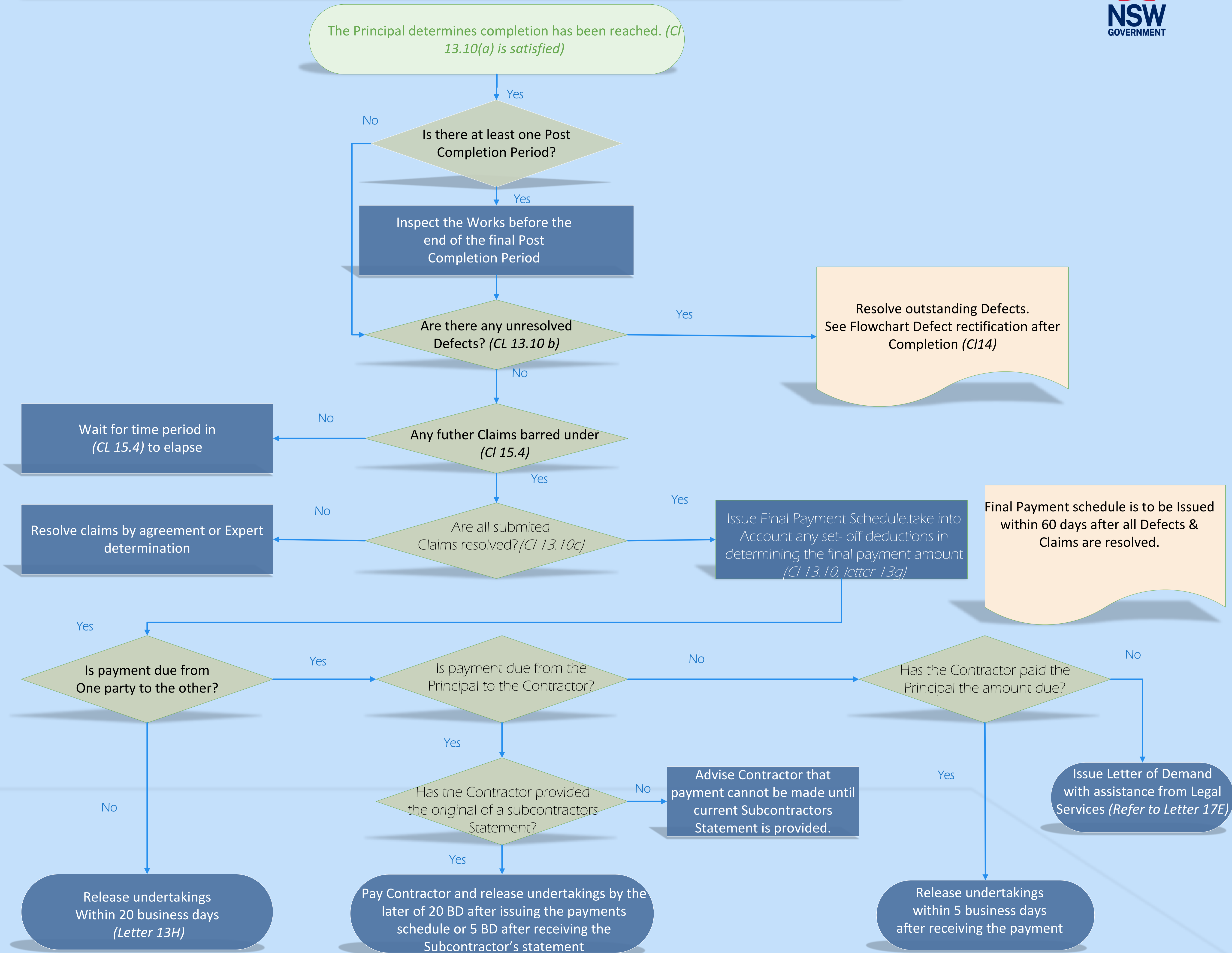
If neither party owes the other money, the Principal is to release any unconditional undertakings no later than 20 days after the date of issue of the final payment summary. To release the whole of an unconditional undertaking, the original undertaking is endorsed with the following words:

'The Principal no longer requires this unconditional undertaking'

The endorsement should be signed by a person with appropriate authority from the Principal, and the original of the unconditional undertaking returned to an appropriate authorised person in the financial institution with a copy of the letter and endorsed undertaking sent to the Contractor. Use **letter from the Principal Sample Letter 13H**.

Alternatively, the contractor can claim the unconditional undertaking in person but it still is suitably endorsed and a file note kept that the contractor claimed the Undertaking at a date and time. A signature which identifies and records the collection by hand from the contractor on a copy of the undertaking and filed may be appropriate.

Issue of Final Payment Summary (Clause 13.10)



CLAUSE 14 – AFTER COMPLETION

Defects are defined in Clause 1.9

Clause 14.1

At any time after Completion is reached, the Principal may instruct the Contractor to correct any Defect. Under the *Statute of Limitations* (NSW), the cost of rectifying Defects cannot be recovered through a court action that commences more than 6 years after the Defect should reasonably have been identified. This effectively limits the period of time during which the Contractor is required, under the law, to comply with an instruction to rectify a Defect.

It is important to clearly establish that any 'Defects' are not fair wear and tear or the result of damage caused by those occupying the facility, third parties or faulty design for which the Principal was responsible. The Contractor is not liable for the costs of rectifying such 'Defects'.

Where a possible Defect has been identified, the Authorised Person should meet the Contractor on the Site and investigate before giving an instruction to the Contractor.

After confirming the existence of a Defect, the Authorised Person is to give the Contractor a written instruction to make good the Defect. Use **Letter from the Principal Sample Letter 14A** to instruct the Contractor to rectify the Defect. The instruction is to advise:

- what the Defect is.
- the time by which it is to be rectified.
- any constraints on when rectification work can be carried out at the facility, and
- any preconditions that need to be satisfied before work is carried out.

A reasonable amount of time should be given for the Contractor to comply with the instruction, considering the nature of the Defect and the problems it may cause. The time given should allow for the Contractor to gain access to suit the client's needs, to obtain any necessary insurance, to prepare safety management procedures and to arrange suitable resources. Note that insurance arranged through the Procurement System for Construction provides Works and public liability insurance cover for 12 months after Completion.

While the Principal has an obligation to be reasonable in allowing the Contractor access in order to rectify the defective work, the Contractor must bear the additional costs due to any constraints on when rectification work can be carried out.

Clauses 14.2 and 14.3

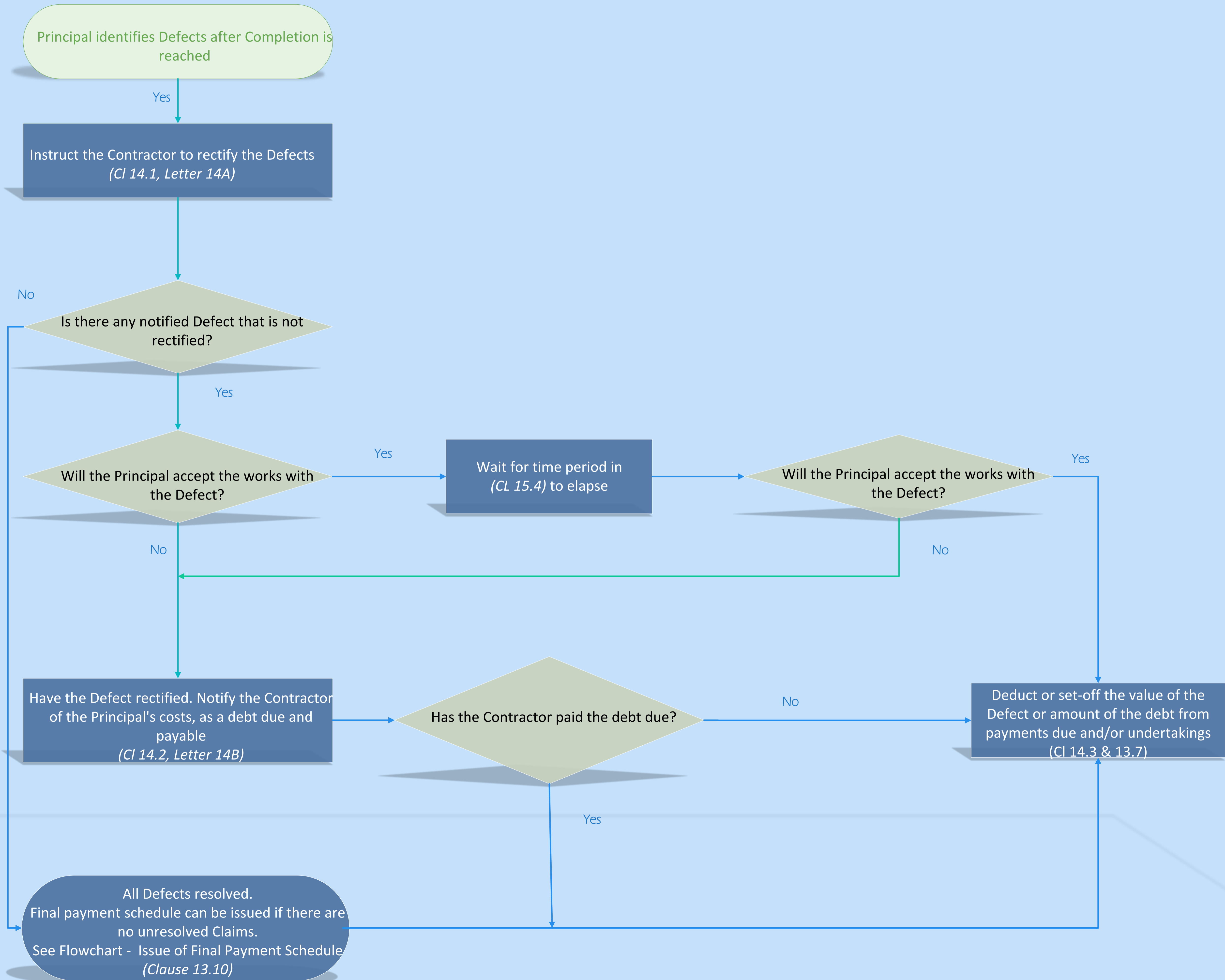
If the Contractor fails to comply with an instruction under Clause 14.1 within the time stated, the Authorised Person should arrange for the work to be done by others and advise the Contractor accordingly. It is not recommended to send a further instruction with a new time to rectify the Defect. This delays rectification and suggests that the Principal does not seriously intend to have the work done by others. It may also affect the Principal's rights.

If the Principal intends to rectify a Defect, it is recommended that quotations be called to demonstrate that the costs incurred are reasonable.

The costs needs to be recorded and evidence kept supporting the Principal's assessment of the reasonable costs. The assessment should include all the Principal's costs, including administration and management costs. The Contractor has to be notified of the costs, which become a debt due from the Contractor to the Principal. This debt may be recovered from retention moneys or security, if available. Otherwise, it may be recovered using the set-off provisions in another contract or through a court process. Use **Letter from the Principal Sample Letter 14B** to advise the Contractor of the costs incurred to rectify the defect.

The Contractor still remains responsible for the work under the Contract after Defect rectification arranged by the Principal. However, if that rectification work is defective, this would be the Principal's responsibility.

Defect Rectification after Completion (Clause 14)



CLAUSE 15 – CLAIMS

The contractor is allowed to make claims under the contract and needs to justify those claims in accordance with this clause 15.

Clause 15.1

This clause sets out the procedure to be followed by the Contractor in relation to claims arising from:

- an instruction given under Clause 2.3 or Clause 2.4 unless it is a Variation instruction where Clause 9.8 applies, and the parties agree on the effects.
- Variations instructed under Clause 3.2 (to change the Principal’s design).
- the Principal’s failure to provide access in accordance with Clause 6.
- materially adverse Site Conditions, where a Variation has not been instructed (Clause 7).
- materially adverse Site Conditions where a Variation has been instructed but agreement on the effects has not been reached under Clause 9.
- instructions under Clause 8.2 to uncover work or carry out additional tests on work that is found to conform with the Contract and where agreement on the effects has not been reached under Clause 9.
- Variation instructions where agreement on the effects has not been reached under Clause 9.
- a suspension instruction from the Principal under Clause 10, arising from the Principal’s own act or omission.
- delays to Completion (Clause 12);
- instructions under Clause 14 to rectify Defects, where the Contractor disputes the contractual obligation to rectify.
- termination of the Contract or the Principal’s assessment of the associated costs, where the Contractor disputes the action or assessment (Clauses 17-19).
- instructions under the applicable Preliminaries clause to deal with unidentified hazardous material, where the Contractor disputes the action or assessment; and
- any other breach of contract by the Principal that the Contractor considers has resulted in additional costs to the Contractor.

The procedure does not apply to:

- Variation proposals provided in accordance with Clause 9.4.
- Variations instructed under Clause 9.8 where the Principal accepts the Contractor’s price, or the Contractor accepts the Principal’s assessment.
- payment claims made under Clause 13; or
- claims for adjustments to the Contract Price in relation to work covered by Provisional Sum or Rate.

When making a claim the Contractor should use **Letter from the Contractor Sample letter C15a**

Clause 15.2

When a claim is received, the Authorised Person should promptly review the information provided and determine whether it complies with Clause 15.2. If not, the Authorised Person should respond by requesting the required additional information. The claim needs to:

- identify the provision of the Contract which the Contractor says gives an entitlement (the legal basis).
- specify what happened to trigger the entitlement (the factual basis).
- include a breakup of the amount claimed, based on Direct Costs plus the applicable margin and dealing appropriately with GST, to allow the Authorised Person to calculate the entitlement, and
- be supported by documents proving the Direct Costs, such as relevant dockets, invoices, subcontractor claims and calculations of quantities and amounts.

Use **letter from the Principal Sample Letter 15A** to advise the Contractor to provide the information necessary for the claim to be assessed.

Clause 15.3

The Authorised Person should not advise an assessment of the claim until all the information required under Clause 15.2 has been received. If the assessment cannot be determined within the specified 10 Business days after the all the information is received, the Authorised Person should seek agreement from the Contractor to a revised assessment time. Failing agreement, the Contractor would be entitled to claim interest for late payment, if the claim is valid. Use **letter from the Principal Sample Letter 15B** to advise the Contractor of the Principal's assessment of the Contractor's claim.

If the Contractor does not consider the Principal's assessment as reasonable, it is up to the Contractor to advise the Authorised Person use **letter from the Contractor C15b**, who should arrange to discuss the points of disagreement and try to reach agreement. Again, the time period for discussion can be extended by agreement but this is recommended only where it appears likely that agreement can be reached.

If conferring does not achieve agreement, the Contractor may notify a dispute under Clause 16.

Where the Authorised Person considers that the Contractor is likely to notify a dispute under Clause 16, the Authorised Person should advise the Senior Executive and seek advice to try to resolve the matter. The agency governance process should be kept informed of the financial & other risks.

Note that, until agreement is reached on the value of a claim, the Contractor may revise the claim.

Clause 15.4

This clause seeks to ensure timely finalisation of the Contract, to assist the client in obtaining the funds necessary to resolve any claims.

If the Contractor wishes to make a claim for anything that occurred before Completion of the whole of the Works, it must be made within 20 Business days after the Authorised Person's notice of Completion. If the claim is not made by that time, the claim is barred. Note that this time bar does not apply to a claim that was made before Completion but is not resolved at Completion.

The Contractor may claim for things that occurred during any Post Completion Period, for example if the Principal instructs the Contractor to rectify a Defect and the Contractor disputes that the work is required. However, claims made more than 20 Business days after the end of the final Post Completion Period are barred.

Use **Letter from the Principal Sample Letter 15C** (Option 1 or 2 as applicable) to advise the Contractor that its claim is barred.

CLAUSE 16 – DISPUTES

The aim of this clause is to encourage the parties to meet and resolve any issues between themselves in a timely manner.

It also provides procedure which is designed to avoid the parties going through a protracted and/or a costly legal process for what is intended to be a simple contract. The process allows the parties to be heard, identify the facts, apply some logic to the events, for each party to have time to review the merits of their argument and identify possible means to settle any disputes within the contract frame work. The MW21 contract is, for industry to have a plain English cooperative contract framework, to complete low risk construction works.

Clause 16.1

The disputes clause is triggered if the Contractor is dissatisfied with an act or omission of the Principal in connection with the Contract. Such acts or omissions could include:

- a claim that has not been resolved under Clause 15.
- disagreement with the Principal's assessment of a price or time adjustment.
- disagreement about the amount of a progress payment.
- unable to reach agreement on a final payment claim or
- an action that does not affect the Contract Price or time, for example an instruction that the Contractor claims the Principal is not entitled to give under the Contract.

The timing of notification of a dispute is important. If it is notified later than the specified 10 Business Days after the event giving rise to the claim, the Contractor's entitlement to interest is affected by the date of notification. Use **Letter from the Contractor Sample Letter C16a**

Clause 16.2

The Principal also has a right to notify a dispute after an act or omission of the Contractor in connection with the Contract. The notification is required to be made within 10 Business Days after the act or omission and to set out the legal and factual basis for the dispute. See the commentary on Clause 15.2. Use **Letter from the Principal Sample Letter 16A** to notify the Contractor and the Senior Executive of a dispute.

Clause 16.3

Within 10 Business Days after either party gives written notice to the other of a dispute (under Clause 16.1 or 16.2), the Contractor and the Senior Executive are to meet to attempt to resolve the dispute. The meeting should be face to face and all efforts should be made to resolve the dispute. The Authorised Person and the Contractor's Project Manager/Site Manager should also attend to ensure all facts can be identified and circumstances clarified. If an extension is required to the nominated 10 Business Days, this needs to be agreed by both parties. Use **Letter from the Principal Sample Letter 16B** to confirm agreement to extend the time within which the Senior Executive and the Contract are to meet.

Clause 16.4

If the dispute is not resolved within 30 Business Days after notification, the Contract requires the parties to appoint an independent expert. NSW Procurement can provide a list of suitable persons. The likely availability of these persons to carry out the expert determination needs to be confirmed prior to establishing a short-list for selection.

Note that the situation often arises where further information or investigation is required, and the dispute cannot be resolved or adequately responded to within the nominated 30 Business Days. In this situation there should be an agreement to formally extend the time for resolution to avoid triggering the contractual requirement to appoint an expert. Use **Letter from the Principal Sample Letter 16B** to confirm agreement on an extension to the time for resolution.

Time may also be required to obtain concurrence of the client agency to proceed to expert determination as client agency funding would be required.

Clause 16.5

The Contract provides a mechanism for an expert to be appointed even if the parties cannot agree on the person. Where agreement cannot be reached within 20 Business days through an exchange of correspondence, then either party may contact Chief Executive Officer of the Australian Disputes Centre (tel. 02 9239 0700) to nominate an expert.

Clause 16.6

The Principal is to appoint the expert, by issuing a letter that addresses the matters set out in this clause. Use **Letter from the Principal Sample Letter 16C** to appoint the expert.

Before doing so, the parties need to agree on a description of the dispute and the selected expert needs to be contacted to confirm his or her availability and advise the fees that will be payable. Difficulties can occur in attempting to agree on a narrow description of the dispute and, in any case, this may not be effective in limiting the scope of the dispute. It is recommended that the dispute be described in neutral terms that cover the area of claim but discourage the introduction of other claims, e.g. 'cost of removal of asbestos', 'adverse site condition due to rock on site'.

The expert nominates an independent organisation to hold in trust the amounts provided by the parties as security for the expert's fees (\$15,000 each).

Clause 16.7

Irrespective of what the expert finally determines, each party is required to meet its own costs of the expert determination process and share equally any fees charged by the expert.

Clause 16.8

If one party fails to lodge its initial security of \$15,000 within 15 Business days after appointment of the expert, then the other party has the option of providing the security and it becomes a debt due from the defaulting party to the other. Alternatively, a party may rely on time elapsing under Clause 16.9.

Clause 16.9

A dispute is deemed to be abandoned if the expert has :

- not been agreed or nominated within the time allowed of 70 business days from when the dispute it was first notified under 16.1 or 16.2.
- or the initial security for the expert's fees has not been fully lodged within the times specified of 20 Business days after expert was appointed.

Use **Letter from the Principal Sample Letter 16D** to notify the Contractor that the dispute is deemed to be abandoned.

Clause 16.10

The expert determination process is all written submissions to the expert. It is important to comply with the times set out in this clause, because the expert has limited powers to give a determination if they are not met. Nor is the expert allowed to take account of late submissions .

If a party is unable to comply with the time limits in this clause, it should request the other party to agree to an extension of time (but it does not have to do so) and apply to the expert for an extension.

Clause 16.11

The submissions made by the parties should address the issues the expert is required to determine. The expert is to determine :

- if the claim or event did occur
- the term of the contract or legal obligation requires one party to pay the other party.
- the merits on law of any defence or cross claim raised by the other party.
- an amount, if any, one party is legally bound to pay the other party.
- any other question which was referred to it by the parties.

Clause 16.12

The determination is made on the basis of written submissions only. To avoid unnecessary costs being incurred in a dispute that may be deemed abandoned, Subclause 16.12 (c) requires the expert to only incur costs once the required security has been lodged in full.

The determination is to be made within the later of, 20 Business days of receiving all submissions or after the security has been lodged.

Clause 16.13

Either party may take action in court if the expert determines that either party is to pay the other more than \$500,000 (without including any interest found to be owing). Notice of this intention is to be given by the dissatisfied party within 10 Business days after receiving the expert's determination.

Clause 16.14

If the expert determines that one party is to pay the other \$500,000 or less, then the determination is final and binding on both parties.

If the expert decides that the Contractor owes money to the Principal, the amount is payable within 20 business days after the expert's determination is provided. If the

Contractor is to be paid, a Subcontractor's Statement needs to be received before the Principal makes the payment. The Principal is to pay the Contractor by the later of:

- 20 days after the expert determination is received, or
- 5 days after the original of a Subcontractor's Statement is received.

CLAUSE 17 – CONTRACTOR’S DEFAULT AND INSOLVENCY

Action should not be taken under this clause without concurrence from the client agency governance arrangement, in consultation with the appropriate senior manager (Senior Executive).

The appropriate action may be for the Principal to:

- terminate the Contract under Clause 17.4 and seek ‘damages’ (payment for losses, costs, expenses etc.) from the Contractor.
- take over the Site and use its own resources to complete the remaining work, under Clause 17.5, or
- as an alternative, terminate the Contract for the Principal’s convenience under Clause 18. (This option is dealt with in the commentary on Clause 18.)

Seek advice from procurement specialists and legal advisors as to the appropriate action, in the particular circumstances.

Clause 17.1

Contractor’s default

The Contractor is ‘in default’ if it commits a ‘substantial’ breach of contract, that is, if it does not meet an essential contractual requirement, for example if it fails to:

- carry out an instruction of the Authorised Person.
 - such as, provide evidence of insurance that the Principal is unable to provide on the Contractor’s behalf (e.g. workers compensation insurance). Note the principal cannot take out workers compensation insurance unlike some of the other insurances the Principal may arrange under clause 5.6
- progress the works at a reasonable rate; or

Seek confirmation from the appropriate senior manager or procurement specialist that a particular act or omission by the Contractor is, in the circumstances, a substantial breach.

The circumstances of the substantial breach(es), including exchanges of correspondence, verbal discussions, site records, minutes etc. need to be documented before action is taken under Clause 17.1. It can also be useful to prepare a report describing the breach(es) of contract, the options available to remedy the breach(es), the risks associated with each option and reasons for recommending taking action under this clause.

Before taking action under Clause 17.1, the Authorised Person and Senior Executive should attempt to meet with the Contractor to discuss the consequences of the Contractor’s breach.

If a substantial breach has been committed and the Contractor does not take prompt action to resolve the breach following discussions with the Senior Executive, the Principal may issue a ‘show cause’ notice to the Contractor, specifying the breach and asking the Contractor to give reasons why the Principal should not take further action. Use **Letter from the Principal Sample Letter 17A** to issue a ‘show cause’ notice to the Contractor.

The further action could be to terminate the Contract or take over the work under the Contract. These options are discussed in more detail here. The option of terminating the Contract for the Principal's convenience is discussed in the commentary on Clause 18.

Termination or taking over the work under the Contract due to the Contractor's default has very high risks and will always require a detailed recommendation to be prepared, support from legal advisors, concurrence from the client agency and senior managers and the necessary management approval.

However, if it is decided to take such action, it should not be unnecessarily delayed because any delay will further increase the cost and time impacts and associated risk.

Note that, although the Contract or the Contractor's engagement under the Contract has been terminated, the terms of the Contract continue to govern the relationship between the Contractor (or administrator) and the Principal. Termination does not extinguish the Contractor's obligations for work carried out prior to termination. However, it would not be possible to obtain rectification or damages from a contracting company that has gone into liquidation or otherwise ceased to exist.

Clause 17.2

Substantial Breach

The Contractor is required to respond to a 'show cause' notice within 5 Business days use **Letter from the Contractor Sample Letter C17a** A satisfactory response would include giving reasons, supported by facts, for the breach(es) of contract and proposing action to remedy or resolve the issues.

Before taking action to terminate the Contract, all efforts should be made to resolve the issues, since termination will inevitably result in extra costs and loss of time.

Clause 17.3

Contractor's Insolvency

If the Contractor is wound up or declared insolvent, has an administrator (or receiver or liquidator) appointed or notifies the Principal that it is unable to perform its obligations under the Contract, the Principal may either take over the work under the Contract or terminate the Contract. Use **Letter from the Principal Sample Letter 17B** to request the Contractor to confirm its financial position.

It is not necessary to wait for formal notification from the Contractor. If there are strong indications that the Contractor is in financial difficulties, the Contractor should be requested to confirm its financial situation in writing within 24 or 48 hours. The ASIC website should also be checked to ascertain whether there have been changes in the status of the company. BuyNSW should be contacted if the Contractor is prequalified..

If the Contractor advises **Letter from the Contractor Sample Letter C17b** option 1, it is willing and able to continue with the Contract, it is advisable to obtain independent evidence to support this advice. This could be by banker's letter or financial assessment.

If the Contractor advises, **Letter from the Contractor Sample Letter C17b** option 3, or it is confirmed from other sources, that the Contractor is unable to continue with the work under the Contract, is being wound up or has had an administrator appointed, promptly advise the agency governance structure and obtain the services of a legal advisor to advise on procedures, options and risks. Take the following steps to prepare for terminating the Contract or taking over the work under the Contract:

- Ensure that the Contractor or administrator is aware that it remains responsible for security and safety at the Site.
- Suspend (with Senior Manager/Senior Executive agreement) any payments being processed and do not make any payments to the administrator, the Contractor or an employee, subcontractor or supplier at this stage.
- Ensure that systems are in place to record relevant correspondence and all costs incurred by the Principal, as these will need to be itemized in any later claim to recover the Principal's costs. Keep a written record of any verbal discussions with relevant parties, as this may be required if issues arise later.
- Inspect the Site as soon as possible. If action is required to ensure safety or security, notify the Contractor or administrator, as appropriate, to take immediate action. If no action is taken within an appropriate time, proceed in accordance with Clause 4.6.
- If access is available to the Site, make a photographic and documentary record of the extent of work completed. Where possible, determine the value of work completed. (make an assessment as you would for a progress payment as of that date and include the estimated cost of rectifying defects known at that time). You may consider utilising a QS to value the works in progress as an independent valuation of the works at termination of contract.

Note that the *Security of Payment Act* does not make exceptions for insolvent companies. Thus, a subcontractor can obtain an adjudication stating that the subcontractor is entitled to payment from the Contractor or administrator. The subcontractor may then seek a court order for payment and issue a withholding notice to the Principal. The Principal should comply with the withholding notice and follow legal advice on making any subsequent payment. Where an administrator, receiver or liquidator has been appointed and the subcontractor applies to the courts to obtain payment, the court is likely to defer granting a court order pending resolution of the insolvency.

Clause 17.4

Terminate the Contract

This option may be appropriate at the beginning of a Contract or where the client agency prefers a monetary settlement to completing the Works.

Termination discharges both parties from further obligations to perform the Contract. However, both parties still retain other obligations, including with respect to their liability for payment. The Contractor can still claim for work completed and the Principal can claim for costs incurred as a result of the Contractor's default.

The clause provides for the Principal's common law right to recover damages on the same basis as if the Contractor had wrongfully repudiated the Contract, i.e. was unwilling or unable to perform an essential requirement of the Contract.

'Damages' are compensation for costs and losses suffered, i.e. a monetary sum that will place the Principal in the same position, so far as money can do so, as it would have been in if the Contractor's default not occurred. The assessment of an appropriate amount for damages can be complicated and requires input from legal advisors. It involves determining the type of damages that are applicable, interest, issues of remoteness and the date applying to the assessment.

Considering the three general grounds for termination under the Contract:

Substantial Breach by the Contractor

Should the Principal decide to terminate the Contract under Clause 17.4 because the Contractor failed to respond satisfactorily to a notice under Clause 17.1, the Principal is required to give the Contractor a further notice in writing. Use **Letter from the Principal Sample Letter 17C** - Option 1 to terminate the Contract.

Administrator (or Receiver) Appointed

Should the Principal intend to terminate the Contract under Clause 17.4 because an administrator has been appointed (see the commentary on Clause 17.3), it may be beneficial to give the administrator the opportunity to propose continuing with the Contract. This would be appropriate where there had been no previous correspondence with the administrator. Use **Letter from the Principal Sample Letter 17C** - Option 2 to notify the termination of the Contract while providing the administrator with an opportunity to submit a proposal for continuing with the Contract.

A response that 'the administrator does not have the resources to perform the Contract' provides the Principal with a clear and sufficient basis to terminate the Contract. If the administrator advises it intends to complete the work under the Contract, details need to be sought on proposed resources and program, amendments to the Safety Management Plan, proposed subcontractors and relevant insurance. The Principal should consider, but does not have to accept, such a proposal. The Principal may also require additional security as a condition of agreeing to have the administrator complete the Works. Note that, unless the Contractor or administrator has the necessary skilled management and technical resources available, it is unlikely that it would be able to satisfactorily complete the Works.

Contractor Unable to Perform its Obligations.

Should the Principal decide to terminate the Contract under Clause 17.4 because the Contractor advised it was unable to perform (see the commentary on Clause 17.3), the Principal is required to give the Contractor a notice in writing. Use **Letter from the Principal Sample Letter 17C** - Option 3 to notify the termination of the Contract.

Letter from the Principal Sample Letter 17C – Option 3, with amendment, can also be used to terminate the Contract under Clause 17.4 if the Contractor advises (or it is confirmed) that the Contractor is being wound up or declared insolvent (and is thus unable to perform its obligations).

Note that any of the options for the Letter from the Principal Sample Letter 17C may require modification to suit specific circumstances.

Irrespective of the above grounds for termination, the Principal has an obligation to minimize any losses and needs to take reasonable action in this regard. The Principal also becomes responsible for the Site from the date in the notice of termination. Subject to the specific circumstances, the Principal should carry out the following actions:

1. Complete the actions outlined above in the commentary on Clause 17.3.
2. Estimate the value of work completed, taking into account a deduction to cover the cost of rectifying any identified defective work. The use of an independent quantity surveyor is recommended.
3. Obtain management approval to terminate the Contract.
4. With legal advice and assistance, prepare and issue the termination notice.
5. Secure the Site, have all access keys returned or change locks and carry out (with the Contractor or administrator if possible) a detailed inventory of materials, plant, tools and equipment and documents on the Site, including any items not yet incorporated into the Works. Agree with the Contractor or administrator on the ownership of the listed items and arrange removal of items owned by the Contractor. Make and keep a signed record of all items removed.

Following termination, the Principal may engage others to complete the Works.

Clause 17.5

Take over the work under the Contract

This clause provides a mechanism for the Principal to take over the Site and use resources of its choosing to complete the remaining work under the Contract. This option may be appropriate where a substantial portion of the Works has been completed and/ or where a Contractor or administrator appears unable to complete the work expeditiously. Taking over the work allows the Principal to manage the completion of the Works and to make a financial reconciliation when the work is completed.

The actions required and comments on the three general grounds that give the Principal the right to take over the work under the Contract are similar to the actions outlined above in the commentary on Clause 17.4. The relevant Sample Letters are:

Substantial Breach by the Contractor

Use **Letter from the Principal Sample Letter 17D** - Option 1 to terminate the Contractor's engagement under the Contract.

Administrator (or Receiver) Appointed

Use **Letter from the Principal Sample Letter 17D** - Option 2. Note that this letter provides the administrator with an opportunity to submit a proposal for continuing with the Contract.

Contractor Unable to Perform its Obligations

Use **Letter from the Principal Sample Letter 17D** - Option 3.

Note that any of the options for the Letter from the Principal Sample Letter 17C may require modification to suit specific circumstances.

If the Principal chooses to take action under Clause 17.5, the Principal takes over the uncompleted work from a date specified, suspends payments under Clause 13 and has the Works completed by others at the Contractor's expense. Subject to specific circumstances, the procedure would generally involve the following steps.

1. Carry out the actions outlined above under Clause 17.3.
2. Estimate the value of work to be completed including rectification of any identified defective work. The use of an independent quantity surveyor is recommended to itemize and value the elements of outstanding work. Include the Principal's estimated additional costs (over and above the costs originally allowed to administer the Contract). Allow for contingencies and risks.
3. Inform the Contractor or administrator of the extent of work required and the estimated cost.
4. Obtain management approval to terminate the Contractor's engagement under the Contract and issue the termination notice. Note that the Principal becomes responsible for the Site from the date stated in the notice.
5. Secure the Site, have all access keys returned or change locks and carry out (with the Contractor or administrator if possible) a detailed inventory of materials, plant, tools and equipment and documents on the Site, including any items not yet incorporated into the Works. Agree with the Contractor or administrator on the ownership of the listed items and arrange removal, take-over or rehire, as applicable. Make and keep a signed record of any items removed from the Site. The Contractor or administrator is entitled to retain its contract documents that are on Site but is required to hand over all warranties, inspection reports and other documents that the Principal would be entitled to under the Contract.
6. Obtain, if possible, a list of subcontractors employed on the Contract to allow possible re-engagement. Note that the Principal's primary obligation is to have the remaining work completed economically and without delay. The Principal is not obliged to use the same resources as the Contractor would have, but should consider selective re-engagement, where appropriate, at prices that can be justified as value for money. The same principles apply to any off-site materials offered by the Contractor or administrator. Note that the Principal cannot make payment directly or indirectly for work carried out or materials supplied prior to any re-engagement.
7. Keep the Contractor or administrator informed and updated on the extent of work required, the current estimate and the reasons for any changes.

Clause 17.6

Clauses 17.6 to 17.8 apply where the work under the Contract was taken over by the Principal under clause 17.5.

After Completion and when all likely costs are known, prepare a Contract reconciliation statement that includes:

- the difference between what it cost the Principal to complete the Works and the amount that would have been paid to the Contractor to complete the work outstanding at termination.

- costs incurred by the Principal and third parties to manage completion of the outstanding works and dealing with the administrator or Contractor that are additional to the costs originally allowed to administer the Contract, and
- the amount of suspended payments and retention moneys.

If other parties are involved, seek their confirmation of final costs, because the Contract reconciliation provided to the Contractor or administrator should be final.

It is appropriate to provide the administrator or Contractor with the Contract reconciliation before it is formally issued, so any disagreements can be resolved. It is preferable, but not essential, to obtain agreement on the reconciliation amount.

The Contractor or administrator may request substantiation of costs incurred and determinations made by the Principal. This is easier to provide if a cost recording system and document records system was initially established, as described above. Issues raised in substantiation requests may include:

- consideration of off-Site materials supplied at no charge: records showing what materials were used and what materials were not suitable, and their respective values, allow this to be addressed.
- preliminaries/ overhead costs: diary records for project staff, and perhaps a list of correspondence between the project manager and Contractor or administrator, recording the time taken to respond to each, allow this to be addressed. Any costs not claimed, e.g. for senior managers and procurement & legal advisors, should be noted.
- work and items not included in the Principal's design but that were, nonetheless, the Contractor's responsibility to provide: list references to the Contract (e.g. Clauses 3.4 & 3.9) and, where possible, to previous advice that highlighted the unforeseen additional costs.
- variations required or requested after taking over the work: these should not be included in the Contract reconciliation.
- date of Completion: the date of Completion and thus commencement of the Post Completion Period is the date when all work undertaken by the Principal is completed.
- request for return of any unconditional undertaking on Completion rather than at end of the Post Completion Period: the conditions of the original Contract still apply and should determine when undertakings can be returned. If the undertakings are returned earlier, the Principal may have difficulty obtaining payment for any Defect rectification.

Clause 17.7

This clause applies if there is a shortfall to the Principal, ie if the cost of having the Works completed is greater than the amount that would have been paid to the Contractor to complete the work under the Contract, including any suspended payments and retention moneys held by the Principal. The shortfall becomes a debt due which the Contractor or administrator is required to pay within 10 Business days after receiving a written demand. A formal letter of demand needs to be issued. **Letter from the Principal Sample Letter 17E** can be used if the demand is simple. Legal advice should be sought in drafting this letter if there are complications. The Authorised Person should ensure that the amount is accurate and can be justified.

If the Contractor or administrator does not make the full payment within the specified 10 Business days or an agreed alternative time, Clause 13.8 provides for the Principal to make a demand on an undertaking. Additionally, Clause 13.6 provides the Principal with the right to deduct the amount owed from any other payments due to the Contractor, including suspended payments under the terminated Contract and payments due under other contracts.

If these amounts are insufficient, the Principal can commence legal action to recover the debt. Seek legal advice on options available.

Clause 17.8

If the cost of having the Works completed is less than the amount that would have been paid to the Contractor to complete the work under the Contract, including any suspended payments and retention moneys held by the Principal, then the difference is to be paid to the Contractor or administrator. Use **Letter from the Principal Sample Letter 17F** to advise the Contractor of the amount payable.

An issue arises where termination was due to insolvency because the Contractor or administrator cannot comply with the Contract and provide a Subcontractor's Statement or other evidence that all subcontractors and suppliers have been paid. An alternative arrangement is to require a deed of indemnity releasing the Principal and the client from any future claims from subcontractors. Legal advice should be sought as to whether a deed of indemnity is required to deal with this risk for the particular Contract.

CLAUSE 18 – TERMINATION FOR THE PRINCIPAL'S CONVENIENCE

Clause 18.1

This clause empowers the Principal, at any time, to take out of the hands of the Contractor the whole of the work remaining to be completed. Note that if it is necessary to terminate the Contract due to unforeseen circumstances, it is preferable for the Principal to negotiate termination by agreement with the Contractor, rather than take unilateral action under this clause.

No Authorised Person has authority to take this action without the concurrence of the Principal (client agency governance requirements), the support of legal advisors and the necessary management approval.

Letter from the Principal Sample Letter 18A can be used to prepare an initial draft of a notice of termination for the Principal's convenience.

After termination for the Principal's convenience, the Principal is required to pay the Contractor:

- the value of all work carried out up to the date the termination takes effect;
AND
- 2% of remaining balance of the then current Contract Price.

The works are to be valued as per Clause 13.

To avoid a dispute, the value of work carried out up to the date the termination takes effect should either be agreed with the Contractor or determined by an independent person agreed by the parties.

Letter from the Contractor Sample Letter C18a

The 2% balance of the current contract sum is all the compensation the contractor receives under this contract for termination for the Principal's convenience.

The Principal should be aware it takes responsibility for the site including security, safety, fencing, insurances etc once the contract is terminated on the date in the notice. The contractor is still responsible for the work it has undertaken until the date indicated in the termination notice for any defective work taking into account completeness or otherwise of, the works containing the defect.

CLAUSE 19 – TERMINATION FOR THE PRINCIPAL'S DEFAULT

The main obligation the Principal has under the Contract is the obligation to pay the Contractor for carrying out the work. The NSW Government is bound by the law to make payments within the Security of Payment Act.

Clause 19.1

In the event that the Principal fails to make payments on time, the Contractor may take action under the Security of Payment (SOP) legislation section 16 2(b) and section 27 to suspend the works. If the contractor uses SOP the Principal will need to extend the contract duration in the same duration as the legal suspension however, the Contractor does not receive any delay costs or other reimbursement under the contract.

The Principal should immediately take steps to remedy the default. If it is not possible to make the payment within the specified 20 Business days, the Principal should seek the Contractor's agreement to an alternative arrangement and wherever possible avoid the contractor suspending work under the Security of Payments act .

Clause 19.2

It is not reasonable for a contractor to terminate a payment for very small payment discrepancies. Hence the words a nontrivial amount. Non trivial will be determined in the circumstances, the value of the whole contract, the value of the actual progress payment in question, the value of work remaining and generally the quantum involved.

The contractor can issue a notice to the Principal **Letter from the Contractor Sample Letter C19a** for an amount that is not in dispute to remedy the default within 20 days. The contractor is to state the amount due and the alleged breach.

If there is a breach the Principal should attempt to remedy the breach within the time frame or earlier.

Letter from the Principal Sample Letter 19A provides options for the Principal to respond to the Contractor's 'show cause' notice where:

- the Principal does not agree there has been a default.
- the Principal has remedied the default, or
- the Principal cannot immediately remedy the default and proposes steps in order to remedy the default:-

The Principal should seek legal advice if a notice has been issued under this clause 19.2.

Clause 19.3

In the event that the Principal does not remedy the default within the 20 Business day period, the Contractor may issue a notice terminating the Contract. **Letter from the Contractor sample letter C19b**

Letter from the Principal Sample Letter 19A provides options for the Principal to respond to the Contractor `

Clause 19.4

This clause sets out the Contractor's entitlement to its lost bargain if the Contract is terminated due to the Principal's default. The Contractor has no other entitlements, including for loss of expected profits. This clause works in a similar way to clause 18.1 in the contractor is entitled to a valuation as of the date of the notice of termination and 4% of the value of the remaining contract value as compensation for the Principals' default, **Letter from the Contractor sample letter C19c**

Clause 19.5

The contractor has no other right to terminate the contract under this clause i.e. for non-payment of non-trivial amount.

This clause seeks to limit any right the Contractor may have to terminate the Contract other than under Clause 19 in the Contract. If the Contractor attempts to terminate the Contract for other reasons, seek legal advice.

Clause 19.6

The contractor is to have similar clauses within its subcontracts.

Note that pay when paid arrangements are illegal in NSW under the Security of Payments act so having a matching clause with the subcontract should not be an impost on the contractor.

Additional Commentary for MW21 Preliminaries

The Preliminaries further defines how the Contractor is to act and what they are to do while undertaking the works.

Generally these action do not form part of the built structure and are not covered by the specification. They may however impose a cost on the contractor which forms part of their tendered price and therefore should be understood by the Authorised Person to ensure the Preliminaries are delivered.

Following are some items from the Preliminaries that can influence how the Authorised Person acts in a given situation.

Inspection and Test Plans, Conformance records, WHS Reporting and Environmental Reporting

The Authorised Person should receive the conformance records and reports as stated in the Preliminaries. Payment cannot be withheld if these records and reports are not provided.

You can however reduce a payment claim based on the estimated cost to produce these records if not provided.

An instruction to provide the information under the General Conditions of Contract that is not acted on by the Contractor can trigger Termination of the Contract.

Discuss with your manager on the best way to encourage the Contractor to provide the documentation required before starting any Termination process.

Hazardous Substances discovered unexpectedly on Site

The key element here is "*unexpected*", if the find was part of a register and provided to the Contractor at tender than any find is not unexpected and the Contractor is to manage/remediate the material as part of the Contract works.

If the find is unexpected, the Authorised Person is to decide how the hazard is to be remediated.

The remediation work is not automatically given to the Contractor, so a variation to the Contractor is not guaranteed, the Authorised Person could engage a third party to undertake the remediation work.

Each situation should be judged on its merits, and the most economical remediation approach adopted.

It is always a good idea for the Authorised Person to engage the Hygienist/specialist responsible for determining how the remediation will be done, to ensure the scope created is reasonable.

Mandatory proprietary items

In some instances a proprietary item might be mandatory, this happens when an existing system is required to be matched for maintenance or life cycle reasons.

Contractors often offer equivalent alternatives to a specified item, if the item is mandatory than the alternate should be rejected.