

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

**Procurement Practice Guide**

**GC21 Edition 2**

**Clause Commentary**

**June 2012 (amended 28 June 2013)**

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# Preface

The GC21 Edition 2 General Conditions of Contract and Contract Information is a new edition of GC21. It is suitable for works valued at $1 million or more, or of lower value with complex contractual requirements

The GC21 Edition 2 General Conditions of Contract build on the experience and project success delivered with Edition 1, which had a highly effective emphasis on co-operative contracting and enhanced communication between the parties. Edition 2 focuses on streamlining, updating and improving the operation of the contract to reflect experience and practice.

This user guidance is provided to assist in understanding and administering the provisions of a Contract based on the GC21 Edition 2 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.

Support for general issues is available through the NSW Procurement Client Support Centre.

# Contractual framework

## Roles and relationships

### Clause 1 – General responsibilities

#### 1.1 Contractor's responsibilities

The Contractor’s obligations are:

* to meet its design responsibilities described in the section on Design (Clause 39) and in the Contract Information (Item 38);
* construct the Works (Clause 43) as described in the Contract Information (item 3) and the *Contract Documents*; and
* perform its obligations in accordance with the Contract.

The Contractor's primary obligation is to perform any Design activities specified in Contract Information item 38 and construct the Works to *Completion* in accordance with the requirements of the Contract.

The Contractor’s design responsibilities may arise as:

* developing a design provided by the Principal for the Works (Contract Information item 38A.1); or
* fully designing the Works (Contract Information item 38A.2).

Either way, it is important that the Principal accurately describes in item 38 the extent of the Design activities to be performed by the Contractor.

The Contractor must not depart from the design provided by the Principal unless the conditions and notification requirements described in clause 39.7 have been satisfied. The works are then described in Contract Information item 38A.3.

#### 1.2 Principal's responsibilities

Clause 1.2 states the obligations of the Principal to pay the Contractor and perform its other obligations, in accordance with the contract.

#### 1.3 Principal's instructions

Clause 1.3 obliges the Contractor to comply with any instructions given by the Principal concerning the Works and anything connected with the Works. This is extensive power for the Principal.

Unless the Contract expressly provides for additional payment to the Contractor, the Contractor must comply with the instruction at the Contractor's own cost. Sample letter 01 is intended for use in situations where the Principal does not believe there is an express entitlement to additional payment or an extension of time, for example where the instruction clarifies a requirement of the *Contract Documents* or requires the Contractor to address an identified *Defect*.

Clauses expressly providing for additional payments are:

* 8 Scope of the Works, Temporary Work and work methods,
* 37 Site Conditions,
* 38 Faults in Contract Documents,
* 41 Innovation,
* 48 Variations,
* 49 Changes in Statutory Requirements
* 52 Acceleration; and
* 53 Principal’s Suspension

Clauses providing for a reduction in payments are:

* 41 Innovation,
* 46 Acceptance with Defects not made good
* 48 Variations,
* 55 Contract Variations, Provisional Sums, Provisional Allowances

### Clause 2 – Authorised persons

Clause 2 places an obligation on both the Principal and the Contractor to appoint a person to act on their behalf in relation to the Contract.

Each party informs the other party of the name and contact details of its authorised person at the commencement of the Contract by stating the names in *Contract Information* item 5 (*Principal's Authorised Person*) or item 9 (*Contractor's Authorised Person*).

The Principal must formally appoint the *Principal’s Authorised Person*. (Sample letter 02A).

The completed *Contract Information* is issued to the Contractor with the *Letter of Award*.

Each party must keep the other informed of the name of that person and their contact details. Any change to the *Principal's Authorised Person* should be in the form of written notice to both the new *Principal’s Authorised Person* (Sample letter 2B) and the Contractor (Sample letter 2C). The current Principal’s Authorised Person can notify the Contractor of the replacement, or another representative of the Principal can do so.

If at any time there is no appointed *Contractor’s Authorised Person*, for example because the person nominated in the Contract Information becomes unavailable, the Principal should request the Contractor to nominate a replacement (Sample letter 02D).

An authorised person can appoint agents, delegates or representatives. This is usually only done in order to facilitate some specialist function, such as inspection of manufactured equipment at a distant site, where corrective instructions are required to be issued without reference to the authorised person. It is preferable to avoid the appointment of such agents, if possible.

The authorised persons and other persons appointed as agents, delegates or representatives are to be natural persons, not corporate entities.

The Contract states specifically that the *Principal’s Authorised Person* is excluded from acting independently (as certifier, assessor or valuer). That person must not assume the role given to the “Superintendent”, or similar, in other forms of contract.

Note that if the Principal “reasonably” objects to the Contractor’s appointee, the Contractor must replace that person. The Contract does not provide similar rights of objection to the Contractor.

### Clause 3 – Co-operation

### Clause 4 – Duty not to hinder performance

### Clause 5 – Early warning

### Clause 6 – Evaluation and monitoring

This Clause sets out the requirement for the Principal and Contractor to hold regular meetings with agreed participants, to evaluate and monitor the performance of the Contract, and clarifies that the evaluations do not change the contractual rights and responsibilities of the parties to the Contract.

#### 6.1 Regular meetings

Clause 6.1 requires the Principal and the Contractor to meet regularly to evaluate and monitor their performance under the Contract. These evaluation and monitoring meetings (meetings) are different from site meetings held to discuss matters related to the work being carried out. Their purpose is to enable the parties and invited participants to evaluate performance against specific agreed topics (also known as KPIs) and to work together to achieve improvements, particularly in contract communication and management. Note that, although the specified requirement to evaluate and monitor performance is related to the ‘Contract’, the focus of the meetings should be on evaluating the performance of the people involved in delivering the project as a whole, ie the Contract plus all the associated activities that need to be carried out in order to achieve the desired outcomes, and to make improvements where necessary.

**Attachments to the Contract**

Attachments 2, 2A and 3 to the General Conditions of Contract provide a suggested structure for evaluation and discussion during the meeting. Note that these attachments do not form part of the Contract. The parties may use other procedures and mechanisms to satisfy their contractual obligation to monitor and evaluate performance.

Attachment 2 suggests topics that may be suitable for assessing and monitoring performance as the Contract proceeds. They are intended to be used as guidance. Each evaluation team should choose its own topics to reflect issues specific to its project.

Attachment 2A is intended to be used to develop a Contract/project-specific Performance Evaluation form. The topic of ‘Communication’ is shown in the model form, because it should always be included in the evaluations. Effective communication is an essential component of every Contract and project.

The Performance Evaluation record form (Attachment 3) should be completed during the regular evaluation meetings, to monitor performance trends over time for each of the agreed topics.

**Holding evaluation meetings**

An evaluation meeting should occur approximately every month. It should be separate from normal site meetings, because the participants and the subject matter will be different. The timing of the meetings is usually agreed at the start-up workshop for the Contract (see the commentary on Clause 32).

The evaluation topics should be selected and agreed at the first meeting. The number of topics is up to the team, but five to six topics are usually sufficient for a standard project. The agreed topics can be refined during later meetings, for example in response to *Issues* that arise under the Contract or if a topic as originally defined is found to be inappropriate or ineffective for developing project improvements. Be aware, however, that changing the topic can make performance trends less clear.

To obtain the maximum benefit, the length of meetings should be kept short with a strong focus on specific issues related to the agreed topics. An evaluation meeting can be expected to take between 20 and 40 minutes.

Prior to each evaluation meeting, each participant usually completes the column headed ‘your rating this period’ in the Performance Evaluation form (Attachment 2A) and makes a note of any identified issues or concerns.

At the meeting, the chairperson should ask each participant in turn to advise their rating assessment, the reasons for the assessment and any issues or concerns in relation to the first topic, ‘Communication’. After discussing all the concerns and any suggestions for improvement, the evaluation team should all agree on the ‘team rating this period’ for that topic and on any agreed actions to improve performance.

This process is repeated for the remaining topics.

The plan of agreed actions should be completed by the Chairperson and provided to all participants at the meeting or immediately afterwards, together with a marked up copy to the Performance Evaluation record (Attachment 3). Copies should also be forwarded to any agreed participants who did not attend the meeting.

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| **IMPORTANT:** * The main purpose of determining performance ratings is to promote discussion and develop strategies for future improvement. The greatest benefit comes from actively involved participants who identify issues or concerns that others are not aware of or do not consider significant. These can then be discussed, actions can be planned in an open forum that includes affected stakeholders, and the planned actions can be allocated to those best able to resolve the issues. For example, in a hospital refurbishment project, some affected staff may be legitimately annoyed at the lack of notice provided to clear a ward or the apparent inadequate coordination in arranging alternative facilities for patients. This would be a ‘Communication’ issue. Resolution could require action by the Contractor, Hospital Administration, Nursing and possibly Hospital Maintenance. The effects of the agreed actions would be assessed in the next evaluation meeting. They would be confirmed as adequate, or adjustments would be agreed to achieve a satisfactory resolution.
* There will be little improvement if participants are reluctant to highlight issues for fear of offending others or because they feel intimidated by other team members. To overcome these potential impediments, it is necessary for all participants to focus solely on the ‘neutral’ goal of improving the performance and outcomes of the project.
* Experience shows that unresolved issues fester rather than disappear. If issues are unresolved after *Completion* of a GC21 contract, senior management could legitimately criticise the authorised persons (and others involved) for not using the specified evaluation and monitoring meetings to address and resolve the issues during the course of the Contract. The expectation is that no issue should exist for more than one month before action is taken to resolve it. If the initial agreed action is not successful, the following meeting offers an opportunity to fine-tune the response.
* What is being evaluated during these meetings is the performance of the team that was formed to deliver the outcomes required by the Contract and the related project. The question that should be repeatedly asked is ‘How are we doing as a team in improving performance and addressing issues raised about our chosen topics?’
* The evaluations undertaken in an evaluation and monitoring meeting must not be confused with Contractor Performance Reporting. The evaluation ratings do not represent the Contractor’s performance and must not be used to prepare Contractor Performance Reports.
* The evaluation ratings are also not to be used as a means of judging the performance of any one individual or stakeholder group. The primary aim of allocating ratings is to determine trends in performance in relation to the selected topics. Accordingly, the value of an individual rating is not as important as the trend it indicates. The team should ask: ‘Do we consider that performance is improving, or is it deteriorating? If it is not improving what can we do to improve it?’
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1. The Procurement Practice Guide *GC21 meetings and workshops* provides further guidance for conducting meetings. Refer to the commentary on Clause 32 - Start-up workshops, for a link to the Guide.

#### 6.2 Participation by third parties

Client representatives, end users, Consultants, *Subcontractors, Suppliers*, local community representatives (if appropriate) and others concerned with the project may be invited to participate in the evaluation and monitoring meetings, but only if both the Principal and the Contractor agree. The organisations to be represented at the meetings are usually agreed at the start-up workshop.

1. Under Clause 6.2, the Principal and the Contractor agree that the fact that third parties participate in the meetings will not give them any rights or responsibilities additional to those which they already have, for example under separate agreements. If the *Principal’s Authorised Person* brings his or her line manager along to the meeting, for example, that does not give the manager the right to issue instructions to the Contractor.
2. The aim of inviting other stakeholders is to allow other people concerned with or affected by the Contract and related project to be involved in a constructive manner. However, it is also important to ensure that an evaluation and monitoring team is manageable. If other stakeholders who have not been invited to participate in the meetings wish to have their views or concerns noted, it is recommended they discuss their concerns with an appropriate team member who can raise them on their behalf.

#### 6.3 Rights of parties not affected

Clause 6.3 states that neither the completed Performance Evaluation forms, nor the discussions held at the meetings, nor the actions carried out as a result of the meetings change the rights and responsibilities of the Principal or the Contractor under the Contract. None of these things can be relied on or used by one party against the other party in ‘any proceedings’ such as arbitration, *Expert Determination* or litigation. This provision encourages open and frank discussions without the risk that comments made in evaluation meetings will be used later to pursue *Issues* under the Contract or other legal action.

Nevertheless, if one party is significantly misled or deceived by the other party in connection with any of the Attachments to GC21, then the party suffering loss or damage may have an entitlement to compensation under the Competition and Consumer Act or fair trading legislation.

#### 6.4 Parties to meet their own costs

The Principal, the Contractor and others who participate in evaluation and monitoring meetings ‘must meet their own costs for attendance at the meetings’. The Principal and the Contractor ‘will share equally’ all other costs, which might include hire of the venue, catering or facilitation services.

## The Contract

### Clause 7 – The contract

See Sample letter 07 – Letter of Award. Refer also to the attachment covering administrative matters.

### Clause 8 – Scope of the works, temporary work and work methods

This Clause details the extent of the Contractor’s obligations in relation to:

* the ‘Works’ that will ultimately be handed over to the Principal;
* other work and items of work that must be carried out in connection with the Contract, in order to deliver the ‘Works’;
* *Temporary Work*; and
* work methods.

#### 8.1 The Works

The ‘Works’ is defined in clause 79. It is the physical asset or product that the Contractor is required to provide to the Principal. The Works should be broadly described in Contract Information Item 3.

Note that the Contractor’s obligations include completing the Principal’s design for the Works and constructing the completed design such that the Works complies with the Contract. Clause 39 sets out the Contractor’s design obligations.

The Contractor is required to carry out and complete more than just the work and items of work that are shown or described or otherwise specifically mentioned in the *Contract Documents*. Under Clause 8.1, the scope of the Works also includes work and items of work that are:

* contemplated (ie envisaged or foreseen) by the Contract, even if not actually described in the *Contract Documents*;
* necessary to achieve the effective and efficient use and operation of the Works, meaning that the Contractor must ensure that the asset is totally finished at *Completion* so that it can be effectively and efficiently used and operated; and
* necessary for the Works to be fit for the purposes required by the Contract.

The scope of the Works can be extensive but it is not without limits. Note the following observations about Clause 8.1:

* The scope of the Works does not include work that is not ‘contemplated’ by the Contract. The Contract may give no indication that particular work is required or envisaged. This would apply to work that cannot be carried out without varying the Principal’s design found in the *Principal’s Documents*, or may apply where the *Principal’s Documents* contain ambiguities or inconsistencies.
* In the absence of clear specifications, the work and items of work provided by the Contractor need only meet the minimum requirements necessary for the Works to operate efficiently and effectively.
* The requirement for the Works to be fit for purpose also limits the Contractor’s obligations. Unless they are specified, the Principal cannot demand that the Contractor provide work or *Materials* that exceed the minimum required for fitness for purpose unless the Principal meets the additional costs. It is therefore important that, where the purposes are not clear, Contract Information Item 3 clearly describes the particular purposes that the Works are required to achieve. This provides a basis for determining what the Contractor is obliged to provide.

The *Principal’s Authorised Person* should apply a test of reasonableness in assessing whether work and items of work that are not specifically referred to in the *Contract Documents* are included in the scope of the Works. Consider the following examples, based on actual situations. Use Sample letter 8A to respond to a *Claim* from the Contractor that certain work or items are not included in the specified scope of the work.

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| * The Works included the construction of a building using a variety of different concrete beam and column connections. The *Contract Documents* did not provide details for all the required connections. However, it was obviously necessary for the connections to be designed and constructed in order for the Works to be fit for purpose. The design work was therefore contemplated by the Contract. It was considered that the scope of the Works included engaging a competent designer and completing the design for all the connections.
* The Works included the construction of an emergency water storage for fire-fighting purposes. The storage tank was remote from the main building. The *Contract Documents* did not detail a hardstand area or man-proof fencing with lockable gate. However, these were necessary for security and operation. They were therefore considered necessary for the Works to be fit for purpose and part of the scope of the Works.

Conversely, a contract drawing showed a new access road to the emergency water storage with the notation "Proposed Rural Fire Brigade access road". Access was available to the storage area from an adjacent public road which also connected to the main building. The new access road was not necessary for the Works to be fit for purpose. In addition, the fact that the new road was noted as “proposed” meant the *Principal’s Documents* were ambiguous. They could be interpreted to mean that the road would be constructed by others at a later date. The Contract did not clearly contemplate that the Contractor would construct the new access road and it was not considered to be part of the scope of the Works. * The Works included the construction of a carpark and adjacent school buildings with a significant difference in level between the facilities. The specified purpose of the facility included use by disabled students, but no detail was provided for the interface between the carpark and buildings. It was considered that the scope of the Works included design and construction of disabled access from the carpark to the school because this was necessary for the effective and efficient use and operation of the Works.

Note that, in another similar situation, the general arrangement provided by the Principal in the *Principal’s Documents* did not include sufficient area to construct a disabled ramp at an allowable grade. If disabled access was required, the Principal would have had to change the Principal’s design and instruct a *Variation* to the Works. In this instance, it was considered that the Contract did not contemplate construction of a disabled access ramp and that this was not within the scope of the Works.* The Works included the supply of stainless steel mortuary tables but did not specify that they should be proprietary items. The Contractor arranged for the tables to be locally fabricated. The design and fabrication details supplied by the Contractor showed that the fabricated tables would comply with the technical specification. The Principal expected that one of the usual proprietary brand tables would be supplied but this was not contemplated by the Contract. The fabricated tables were fit for the purposes required by the Contract. A *Variation* would have been necessary to obtain tables of a proprietary brand.
* The Works included the replacement and extension of electrical services to various identified buildings. The Principal also wanted electrical services to be extended to an existing adjacent equipment store which was separate from other buildings, but this extension was not shown in the *Contract Documents*. It was agreed that the extension of the electrical services to the store was not part of the scope of the Works. It was not essential for the effective and efficient use and operation of the Works (which did not expressly include services to the store) and was not necessary for the Works to be fit for the purposes set out in the Contract*.*
 |

#### 8.2 Other work in connection with the Contract

This clause defines the extent of the Contractor’s contractual obligations for ‘other work’ required by the Contract that is associated with the design and construction of the Works but not part of the Works. Such ‘other work’ may include *Temporary Work*, safety and environmental management activities, testing, rectifying *Defects*, obtaining statutory approvals, attending inspections and meetings, reporting and providing necessary documentation such as the information listed in the definition of *Completion*.

The scope of the ‘other work’ to be carried out and completed by the Contractor is more than what is expressly mentioned in the Contract. It includes work and items of work:

* contemplated by the Contract, even though the work or item is not actually referred to in the *Contract Documents*;
* necessary to carry out and complete the Works properly; and
* reasonably inferred from the *Contract Documents* as necessary to perform properly the Contractor’s obligations under the Contract.

The *Contract Documents* often only specify these other works in general terms. The Contractor’s obligations can vary depending on the Contract. The Contractor must do what is required in order to carry out properly the particular Works and perform its obligations under the particular Contract.

Consider the following examples, based on actual situations.

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| --- |
| * The Works included refurbishment of wards within an operating hospital. The hospital manager insisted that the Contractor attend weekly meetings and provide a day by day work program in order to inform staff and co-ordinate the availability of work areas with the hospital’s operational requirements. The Contractor claimed that these requirements were in excess of its obligations. The Principal considered that they were necessary to carry out and complete the Works properly and were therefore work required in connection with the particular Contract.
* The *Contract Documents* required the Works to comply with BCA. The question was whether this meant that the Contractor had to obtain a BCA compliance certificate. It was considered that it was not necessary for the Contractor to obtain the certificate in order to carry out and complete the Works properly. Whether or not the Works actually complied with BCA did not depend on whether the Contractor provided a certificate. In the absence of any express contractual requirement or statutory obligation for the Contractor to obtain a compliance certificate, the Contract could reasonably be interpreted not to include this obligation.
 |

#### 8.3 Contractor’s experience and expertise

The Contractor’s acknowledgements in Clause 8.3 are made in the Principal's interests.

If the Contractor has experience and expertise in work of the type to be carried out under the Contract, it is assumed that the Contractor is well able to understand the implications of Clauses 8.1 and 8.2 and assess the extent of work that is not expressly mentioned in the *Contract Documents*. The Contract makes it clear that the Principal is relying on the Contractor’s acknowledged experience and expertise in the contract work. This is intended to prevent the Contractor from complaining, at a later date, that it did not understand the degree of difficulty involved in delivering the Works.

By submitting a tender for the work, and then accepting and acting upon the Principal’s *Letter of Award*, the Contractor agrees that the *Contract Price* allows for the full the scope of the Works and other items of work. That is, the tendered price makes allowance for all the work and items of work that are contemplated by the Contract, necessary for the efficient and effective use of the Works and necessary for the Works to be fit for purpose. The Contractor in effect undertakes not to make *Payment Claims* for more than the *Contract Price* for work that is included in the scope described in Clauses 8.1 and 8.2. Unless the Contract provides a specific entitlement under another clause, the Contractor must complete the Works, and carry out all the other work required to do so, for the *Contract Price*.

#### 8.4 Variations

This Clause serves a number of purposes, including:

* causing the Contractor to acknowledge that the Principal has a right to change the scope of the Works by instructing a *Variation*;
* clarifying that the scope of the Works as defined in Clauses 8.1 and 8.2 does not include work associated with *Variations* (*Variations* entitle the Contractor to additional payment under other provisions of the Contract); and
* confirming that the price that the Contractor tendered for the Works is not expected to include *Variations* that may be instructed by the Principal.

#### 8.5 Temporary Work & work methods

*‘Temporary Work’* is defined in Clause 79 as temporary structures, amenities, physical services and other work, including *Materials*, plant and equipment used to carry out the Works but not forming part of the Works. Examples are scaffolding, formwork, Site amenities, fencing and environmental protection measures.

A ‘work method’ is how the Contractor carries out a particular work activity.

The *Contract Documents* normally specify the finished product. It is up to the Contractor to design and construct any *Temporary Work* and to use appropriate work methods to construct the Works.

For example, to protect adjacent waterways from construction pollution, the Contractor may choose to provide suitably located silt fences. These would be considered to be *Temporary Work* under Clause 8.5. Fixing the fence to star pickets and burying the bottom of the fence into the ground would be the ‘work method’.

The *Contract Documents* sometimes specify that the Contractor must carry out particular *Temporary Work* or use a particular work method. This could be because of the environmental sensitivity of the Site, to comply with a Development Application or other statutory requirement or to manage a significant risk.

Because *Temporary Work* does not form part of the final Works, there is a tendency for contractors to propose alternatives to specified *Temporary Work*. Any proposed alternative should be considered with caution. The *Principal’s Authorized Person* may not be fully aware of the background to the specified requirement. If the Contractor’s alternative proposal is accepted and proves to be unsuitable, this can expose the Principal to the consequences.

There are significant risks associated with specifying a work method. The Contractor is not responsible for the consequences if a specified work method is unsuitable. If the Contract specifies both a work method and a performance standard or finished product, it can cause costly problems. If the specified work method is followed and a specified performance standard is not achieved, this indicates an inconsistency in the *Principal’s Documents*. The Principal will have to bear the cost of any extra work required to ensure the Works meet the performance standard. (Also see the commentary on Clause 38.) On the other hand, if performance standards are specified and it is left to the Contractor to determine the work method, the adequacy of the work method and the effort required to meet the specified performance are the Contractor’s responsibility.

If a particular work method is specified but it is not possible to use that method, the Contractor may request the Principal to instruct an alternative work method and would be entitled to claim for any additional costs and time resulting from the change to the work method. However, if a work method for which the Contractor is responsible is impractical and the Contractor, with or without the instruction of the Principal, uses another work method by necessity to complete the Works, the Contractor would not be entitled to any adjustments to the *Contract Price* or *Contractual Completion Dates*.

#### 8.6 Principal-initiated changes to Temporary Work or a work method

After the *Letter of Award* is issued, the Principal may instruct the Contractor to carry out specific *Temporary Work* or use a particular work method. If these differ from what the Contractor was planning to do, this may require adjustments to the *Contract Price* and affect the *Contractual Completion Dates*.

Such an instruction would NOT be a *Variation* instruction as there would not be a change to the Works as defined in Clause 79.

In general, an instruction should only be issued to the Contractor in relation to *Temporary Work* or work methods if it is essential. The instruction should focus on the desired performance to be achieved rather than the details of carrying out the work.

The purpose of Clause 8.6 is to provide the Principal with information about the cost and time effects of a proposed change to *Temporary Work* or a particular work method, to assist in deciding whether to instruct the change. Use Sample letter 08B to ask the Contractor to advise the effects. The Contractor’s price is required to exclude the costs of delay or disruption as these costs are calculated as delay costs under Clause 51.

Even if the adjustments advised by the Contractor are reasonable, the *Principal’s Authorised Person* will usually need to obtain concurrence and approval to any additional required funding before proceeding to instruct the change.

#### 8.7 If the effects of changes to Temporary Work or a work method are agreed

If the Principal decides to instruct the changes to *Temporary Work* or a work method on the basis of the price and time effects agreed in writing with the Contractor (see Sample letter 08C, Option 1), then the *Contractual Completion Dates* and *Contract Price* must be adjusted accordingly.

#### 8.8 If the effects of changes to Temporary Work or a work method are not agreed

Clause 8.8 specifies the mechanism for determining the Contractor’s entitlements in the situation where the Principal instructs the Contractor to carry out particular *Temporary Work* or use a particular work method, or to change specified *Temporary Work* or a specified work method, without first agreeing to appropriate price and time adjustments. This could happen if:

* the instruction is given as a matter of urgency; or
* agreement cannot be reached on the effects advised by the Contractor under Clause 8.6 and the change is considered to be essential.

If the Principal does not agree with the Contractor’s assessed effects of the proposed changed work method or *Temporary Work*, the Principal may choose not to go ahead with the change or may enter into negotiations with the Contractor. This could involve requesting the Contractor to reconsider the effects, taking into account matters raised by the Principal. Alternatively, the Principal could advise the Contractor of the Principal’s assessment of the effects and ask for a response. Even if negotiations do not result in agreement, the Principal can still instruct the Contractor to adopt specific work methods or particular *Temporary Work*. Sample letter 08C, Option 2 includes text that is suitable for each of these options.

In this situation, the Contractor is entitled to make a *Claim* under Clauses 47.7 and 47.8 for ‘unavoidable costs incurred’. A claim under these Clauses does not require the Contractor to calculate its claim as its direct costs plus the specified margin. Accordingly the Contractor may obtain a better result under this Clause than to negotiate its claim under Clauses 8.6 and 8.7.

#### 8.9 Instructing changes due to Contractor’s act or omission

The Principal may need to instruct the Contractor to construct *Temporary Work* or use a particular work method as a result of the Contractor’s act or omission. This could occur where:

* the Contractor fails to comply fully with a contractual or statutory requirement such as protecting the partially completed work from stormwater run-off; or
* the Contractor’s actions result in an unacceptable risk to the Principal, such as lack of sufficient support for a vertical excavation adjacent to a road or building.

In these cases the Contractor would have no entitlement to additional costs or adjustments to any *Contractual Completion Dates* due to the Principal’s instruction, provided the instruction only required the Contractor to carry out work to appropriate industry standards.

Where the Contractor fails to provide specified *Temporary Work* or use a specified work method, it is not necessary for the Principal to give an instruction under Clause 8. Instead, a *Defect Notice* should be issued under Clause 45.

### Clause 9 – Assignment

### Clause 10 – Governing law of the contract

### Clause 11 – Notices and instructions

#### 11.1 Delivery of Notices

Clause 11.1 requires all notices (whether originating from the Principal or the Contractor) to be sent to the relevant persons and to the correct addresses.

Notices from the Contractor to the Principal must always be sent to the *Principal's Authorised Person* (item 5 of the *Contract Information*) at the address provided at Item 6 or at the address for service most recently notified in writing by the addressee.

A notification given under clause 69.1 or 69.2 should be copied to the *Principal’s senior executive* (item 7 of the *Contract Information*).

Notices from the Principal to the Contractor must be sent to the *Contractor's Authorised Person* (item 9 of the *Contract Information*) at the address provided at item 10 or at the address for service most recently notified in writing by the addressee.

A notification given under clause 69.2 should be copied to the *Contractor’s senior executive* (item 11 of the *Contract Information*).

An email or facsimile would generally be regarded as notice in writing.

#### 11.2 Oral instructions

Although clause 11.2 requires all notices between the parties to be in writing, clause 11.2 distinguishes "notices" from "instructions" by acknowledging that there may be occasions where the Principal needs to instruct the Contractor orally. Circumstances where, for example, safety or environmental management is threatened. Oral instructions by the Principal are permitted under clause 11.2, so long as they are "confirmed in writing as soon as practicable".

## Statutory and Government Requirements

### Clause 12 – Statutory requirements

### Clause 13 – Compliance with codes of practice for procurement

### Clause 14 – No collusive arrangements

Clause 14 deals with collusive arrangements amongst tenderers. By agreeing to be bound by this clause the Contractor is giving a formal assurance (warranting) that no collusive or anti-competitive conduct was engaged in that with respect to the tender submitted or the contract executed.

The Principal is entitled to recover from the Contractor the amount of any payment made by the Contractor, which is found to be in contravention of this clause. Taking such action would usually be taken subject to obtaining legal advice.

The NSW Government Code of Practice for Procurement (see Clause 13) prohibits the Contractor from participating in collusive or anti-competitive tendering practices. Commercial sanctions are applicable to a contractor found to be in breach of those Code provisions.

### Clause 15 – Compliance with NSW Government requirements

See Sample letter 15A, Options 1 and 2 and Sample letter 15B.

### Clause 16 – Appointment of principal contractor for WHS

#### 16.1 Contractor as Principal Contractor

Chapter 6 - Construction work - of the *Work Health and Safety Regulation 2011 (NSW)*, sets out the duties of a principal contractor on construction projects. Clause 16 deals with one important aspect of the Chapter, identifying who will undertake the responsibilities of principal contractor.

The Contractor is appointed  “principal contractor” as defined in Clause 293 of the *Work Health and Safety Regulation 2011* (NSW) unless specifically excluded from that role at Contract Information item 17.

In accordance with the Regulation, there must be one, and only one, principal contractor appointed for each construction project. Thus, where more than one Contractor is operating at a project, only one must be principal contractor for the purposes of the WHS Regulation.

### Clause 17 – Commonwealth OHS accreditation

### Clause 18 – Working hours and working days

The Principal will nominate at Contract Informationitem 18 if the work is to be performed during specified hours and specified days. Otherwise, the Contractor must observe *Statutory Requirements* in regard to working hours and working days.

The Principal would only be able to specify extended hours at Contract Informationitem 18 if allowed under the conditions of approval of an environmental assessment or Development Consent.

If the Contractor requests agreement to vary the specified hours of work, then the Principal may agree, subject to conditions (Sample letter 18). The conditions might include:

* restricting the type of work carried out during the additional hours to work that does not require supervision;
* requiring the Contractor to meet any additional costs, including the Principal’s supervision costs, for example if the work is proposed on weekends.

### Clause 19 – Authorisation to release and use information

#### 19.1 Release and use of information

The NSW Government wishes to share, amongst its agencies, information relating to the Contractor and the Contractor’s performance. The Government does not wish to be constrained in its opportunity to share such information, and through this clause, makes the Contractor aware of this intention.

The Contractor is made aware that information about the Contractor, including reports of unsatisfactory performance from any government agency or other reputable source, could lead to loss of future opportunities to do business with the Contractor.

#### 19.2 Qualified privilege

If the Principal provides to another party information, such as an unsatisfactory performance report, which is critical of the Contractor, the Contractor could seek damages under the law of defamation. By agreeing to this clause the Contractor acknowledges that the Principal may rely on the defence of qualified privilege if such an action was brought.

#### 19.3 Release and indemnity

This clause provides the Principal with further protection from legal action by having the Contractor indemnify the Principal against claims arising out of:

* making available the information in a contractor performance report; and
* the use, by another party, of the information in a contractor performance report.

Despite the safeguards written into the above clauses, the Government’s objective in sharing contractor performance information among agencies will fail unless the procedures for performance reporting are carefully followed.

### Clause 20 – Long service levy

The Contractor is required to pay the amount of the Long Service Levy. Details of the amount of the levy can be obtained from the Long Service Payments Corporation website at [www.lspc.nsw.gov.au](http://www.lspc.nsw.gov.au).

The Contractor is required to provide evidence that the levy has been paid (see Sample letter 07 - Letter of Award).

### Clause 21 – Registration and licences

The Contractor’s quality management system will include a register of plant, including details of plant registration and drivers licensed to operate the plant.

If any doubt arises about licences or registration, the Principal may request evidence of the Contractor’s registrations and licences.

## Management duties

### Clause 22 – Time management

It is the Contractor’s responsibility to manage the progress of the work and respond to changing circumstances so that the Works and any *Milestones* reach *Completion* by the required dates. This involves starting activities on time and maintaining the appropriate rate of progress, as described in the *Contract Program.* Note that a *Contract Program* is a program complying with Clause 22.2*.*

This Clause sets out detailed requirements for the Contractor to meet in relation to:

* preparing and updating the *Contract Program*;
* maintaining *Scheduled Progress*; and
* minimising delays.

These requirements are consistent with the Contractor’s obligation to manage time effectively and ensures that the Principal is able to obtain evidence that will provide reassurance that the Works will be completed on time.

#### 22.1 Contractor to submit a Contract Program

Until the Contractor submits a *Contract Program*, the project may suffer from a lack of planning and the Principal will be unable to determine whether progress is adequate.

The Principal can instruct that the tendered program (if one has been provided) will become the default *Contract Program* (see Sample letter 22A). This may be necessary if the Contractor fails to submit a *Contract Program* within the specified 14 days after the Date of Contract. Alternatively, the Principal may choose to give this instruction as soon as the Contract is awarded, in the initial letter dealing with administrative matters (see the attachment to Sample letter 07). Before issuing such an instruction, the Principal should carefully scrutinise the tendered program to ensure that it does not compromise any of the provisions of the Contract and that it is consistent with any adjustments resulting from post-tender negotiations. Note that a program submitted with a tender cannot comply with the requirements of Clause 22.2 and, if the Principal gives this instruction, it should be made clear that a complying program is still required.

Managing time is one of the more difficult tasks in a contract and there are limited options available to make up lost time. Accordingly, the Principal needs to take steps early in the contract to emphasise to the Contractor the importance of providing a *Contract Program* that demonstrates how *Scheduled Progress* is being met and will continue to be achieved. Accepting a non-complying program undermines the Principal’s ability to use the tools available in the General Conditions to compel the Contractor manage time effectively.

The Contractor is required to provide a *Contract Program* within 14 days after the Date of Contract. Note that the Date of Contract is not included in counting the 14 days. Failure to meet this time requirement indicates a lack of ability on the part of the Contractor to plan and manage the progress of the Works and/or a lack of the co-operation required by Clause 3. If the Contractor fails to provide a *Contract Program*, there is a range of actions available to the Principal.

The Principal should raise the matter at the initial contract meetings and also at Performance Evaluation and Monitoring meetings, particularly when senior representatives of the Contractor are in attendance. In addition, unsatisfactory Contractor Performance Reports can be issued at any time, and can affect the Contractor’s selective tendering opportunities and prequalification status.

If these avenues do not achieve an improvement, the Principal may choose to raise the failure to comply with Clause 22.1 with the Contractor’s senior executive as an *Issue* under Clause 69.2.

The Contract includes a specific ‘penalty’ attached to failure to prepare and submit a *Contract Program,* in that the Contractor is not entitled to any extension of time under Clause 50.1.2 until an updated *Contract Program* is provided. Since the Principal is not obliged to use the tendered program to assess extension of time claims, this provides an incentive for the Contractor to provide a *Contract Program* or risk the ramifications of late *Completion* including, if applicable, liquidated damages.

#### 22.2 Contract Program requirements

This Clause sets out in detail the requirements for a *Contract Program*. To check whether a submitted program meets these requirements, some key questions are:

* Does it identify all *Milestones*, showing their start and finish dates?
* Are the programmed *Completion* date(s) consistent with the requirements of the Contract?
* Does it take into account all the constraints identified in the *Contract Documents* or that should be known to the Contractor? These could include dates for provision of Principal-supplied *Materials* or development consents or dates by which it is essential to occupy the completed facility.
* Does it include sufficient activities to manage the work, show the status of current activities and demonstrate whether *Scheduled Progress* (as defined) is being achieved?
* Does it show the relationships between activities that are predecessors and successors?
* Does it show the critical path?
* Does it show lead times and float?
* Does it show actions the Principal will be required to carry out?
* Is it in a format acceptable to the Principal (if one is specified or negotiated)?
* Does it meet the requirements specified elsewhere in the Contract? Note that, if the Principal has any requirements additional to those listed in Clause 22.2, they should be specified elsewhere in the *Contract Documents*.

If the Contractor submits a program that complies with all these requirements, the Principal can confirm that it will be considered the *Contract Program*. Use Sample letter 22B.

If the submitted program does not comply with all the specified requirements, the Principal should promptly advise the Contractor and request a complying program. Use Sample letter 22C. An instruction can also be included to the effect that the tender program will be the *Contract Program* until a complying program is submitted, or that a defective program will be used to monitor progress in the interim.

#### 22.3 Updates required

The Contractor is required to update the *Contract Program* as the work progresses.

Updates are required monthly as a minimum. An updated *Contract Program* is usually presented at a monthly progress meeting to demonstrate that the Contractor is on track to meet the required *Contractual Completion Dates*. It would also be used to assess the Contractor’s performance at Performance Evaluation and Monitoring meetings.

Updates are also required whenever there is ‘a significant change in scheduling’. This could occur due to a delay or a *Variation* that affects the program or a decision to reorganise work activities to suit changing circumstances.

Under Clause 50.1, when the Contractor submits a notice of delay it is required to provide an updated *Contract Program* showing the expected effects of the delay. In addition, Clause 50.4 requires an updated *Contract Program* showing the effects of the delay to activities on the critical path to be provided, as a precondition for the Principal to consider a *Claim* for an extension of time. The effect of these conditions is that an extension of time cannot be given until the Contractor submits the updates to the *Contract Program.* This gives the Contractor a strong incentive to provide a *Contract Program* and update it as required.

A further updated *Contract Program* is required after any *Contractual Completion Date* is extended.

Depending on the timing of the particular events, it may be reasonable for the Contractor to combine the monthly updates to the *Contract Program* with updates required for the other purposes listed in this Clause.

The Principal can request an update, if the Contractor fails to respond to the circumstances listed in clause 22.3, using Sample letter 22D.

#### 22.4 Updates to reflect actual progress

Updating a *Contract Program* is not the same as ‘statusing’ a program, which shows progress to date for activities on a pre-existing program. Updated *Contract Programs* are required to reflect actual progress. This involves re-scheduling activities to show what has taken place to date and the changes that are necessary to future activities as a result. The updates must show the effects of changes to the Works, work activities, re-scheduling and past delays.

Updated versions must have at least the same level of detail as the original accepted *Contract Program*. They must be provided to the Principal promptly after the date on which they are produced.

#### 22.5 Contract Program must comply

Whenever the Contractor submits a program, the Principal should check whether it meets the requirements of Clause 22.2. Although the Contractor is responsible for compliance with the *Contract Program*, it is in the Principal’s interests to ensure that the submitted program complies with Clause 22.2 and is realistic. The *Contract Program* needs to be used by the Principal to monitor *Scheduled Progress* and can be an effective tool for managing the Contractor’s performance of the Contract.

If the submitted program does not comply with Clause 22.2, the Principal should promptly advise the Contractor. The advice should identify the areas of non-compliance, in terms of the requirements of Clause 22.2 and other relevant parts of the Contract. Use Sample letter 22C, adapted to suit the circumstances. The Contractor is required to submit a revised program rectifying the non-compliances within 7 days after receiving the Principal’s advice, even if the advice is not specifically identified as an ‘instruction’. Note that the Principal may rely on a previously submitted complying program as the *Contract Program* until a complying program is submitted, but this may not always be feasible. Unless the non-complying program is the first program submitted during the course of the Contract, it is not appropriate to instruct that the tender program will be the *Contract Program*.

If the Principal finds no shortcomings in a submitted program (or a revised one), the Principal should confirm the compliance in writing, using Sample letter 22B. This will ensure that there is no doubt that the submitted program has become the *Contract Program* (until it is superseded as required by clause 22.3).

The Principal is not obliged to review and accept a submitted program. If the Principal does not give a written response to a submitted program, then it would be reasonable for the Contractor to treat the submitted program as the *Contract Program*. The Principal is still able to notify any non-compliances at any time, and the Contractor is required to remedy them.

#### 22.6 Contractor must achieve Scheduled Progress

*Scheduled Progress* is defined as ‘the rate of progress consistent with carrying out the work required by the Contract expeditiously and without undue delay, so that the Works and all *Milestones* will be completed by their respective *Contractual Completion Dates*’, that is the dates stated in Contract Information item 13.

This means the Contractor must start work at the time shown in the accepted *Contract Program* and continue to start and finish activities identified in the program at the times shown. Because the *Contract Program* is required to reflect *Scheduled Progress* (Clause 22.2.1) it should show how the Contractor plans to achieve the specified *Contractual Completion Dates*.

The Contractor is required by Clause 22.6 to maintain *Scheduled Progress*, in other words, the rate of production necessary to finish the Works and *Milestones* on time.

#### 22.7 Demonstrating progress

If the Contractor fails to start work on time or to start or finish activities within a reasonable period of the dates shown in the *Contract Program*, the Principal needs to seek a written explanation from the Contractor.

Clause 22.7 gives the Principal the express power to require the Contractor to demonstrate that the Contractor is achieving *Scheduled Progress* (Sample letter 22E). The Contractor must be able to demonstrate that the rate of progress being achieved will meet the time requirements of the Contract.

The Contractor would normally do this by submitting an updated *Contract Program* that compares actual progress with planned progress and shows how the re-scheduling of future activities will correct any variances. This is why it is essential to have a *Contract Program,* ie a program complying with Clause 22.2, at an early stage of the Contract.

Note that where delays have occurred and *Claims* for extensions of time have not yet been submitted or responded to, the Contractor may need to qualify its demonstration of *Scheduled Progress,* subject to the relevant extensions of time being granted.

However, an updated program should not be accepted if it attempts to demonstrate *Scheduled Progress* by simply compressing future activities without detailing the extra resources or other actions required to achieve the required *Contractual Completion Date(s)*. Above all, the Contractor’s program needs to be accurate and realistic. The earlier the Principal is aware of the Contractor’s difficulties in achieving *Scheduled Progress,* the more options are available to improve progress.

#### 22.8 Instruction to achieve Scheduled Progress

If the Contractor is unable to demonstrate that it is achieving *Scheduled Progress* and will complete the work on time, the Principal has the right under Clause 22.8 to instruct the Contractor to ‘take all reasonable steps to achieve *Scheduled Progress*’ (Sample letter 22F). This may require the Contractor to commit additional resources and/or reschedule activities. Although the responsibility lies with the Contractor to achieve *Scheduled Progress,* there may also be opportunities for the Principal to amend the program for its own activities. Any costs incurred by the Contractor in complying with such an instruction will be at the Contractor's expense.

The parties acknowledge under Clause 22.8 that an instruction given by the Principal under this Clause is not an *Acceleration Notice* as defined in Clause 79. There is an important difference between instructing the Contractor to work faster to achieve *Scheduled Progress* under Clause 22 and telling the Contractor to accelerate the work under Clause 52. Steps taken by the Contractor to achieve *Scheduled Progress* are at the Contractor's cost. However, if the Principal requires accelerated progress of the Works and issues an *Acceleration Notice* under Clause 52, this would be at the Principal’s cost. An instruction under Clause 52 is not appropriate if the intention is to direct the Contractor to achieve *Scheduled Progress*.

It is important that any instruction by the Principal under Clause 22.8 state clearly that it is an instruction under Clause 22.8 and not an instruction under Clause 52.1. It is recommended that the instruction be entitled ‘Instruction under Clause 22.8’.

An instruction to achieve *Scheduled Progress* may refer to the Principal’s right to claim damages if the Contractor does not achieve *Completion* by the *Contractual Completion Dates*. Sample letter 22F, Option 1 applies if the Contract makes provision for liquidated damages. Sample letter22F, Option 2 is suitable when there are no liquidated damages but the Principal wishes to advise the it may claim damages under the common law.

‘Significantly failing to achieve *Scheduled Progress*’ is specifically defined as a *Contractor’s Default* in Clause 79. This may give the Principal cause to take action under Clause 73. What would be regarded as ‘significantly’ failing would depend on the circumstances, but a comparison with the *Contract Program* is an essential first step in assessing this. Ultimately, Clause 73 gives the Principal the right to terminate the Contractor's employment under the Contract if the Contractor falls significantly behind the rate of progress required to achieve the specified *Contractual Completion Dates* and cannot provide a satisfactory explanation and proposal to remedy the situation.

#### 22.9 Contractor to minimise delay

The Contractor has an express obligation to minimise delays caused by:

* any change in the work required by the Contract, including a *Variation* or changed work method or similar; or
* any change to the program or the sequence of activities, whether instructed by the Principal or resulting from circumstances arising in the course of carrying out the work.

This is consistent with the requirement in Clause 50.2 for the Contractor to ‘take all reasonable steps to avoid delay and its effects’. It is taken into account when assessing claims for extensions of time under Clause 50.

The Contractor is specifically required to carry out additional work concurrently with other work. Note, however, that the requirement only applies to the extent that it is reasonable for the Contractor to do this, for example by re-scheduling work activities. One factor in determining whether it is reasonable for the Contractor to take action to minimise the effects of delay is whether there is additional expense involved. For example, the Contractor is not required to pay higher overtime rates at its own expense in order to maintain *Scheduled Progress,* if the Principal has instructed a *Variation* that delays an activity on the critical path of the *Contract Program* that was current at the time the instruction was issued.

### Clause 23 – Intellectual property

**Assignment of Intellectual Property Rights**

Once any *Data* is created specifically for the Contract, Clause 23.1 requires the Contractor to assign (or transfer) the *Intellectual Property Rights* in such *Data* to the Principal.

*Intellectual Property Rights* are defined at Clause 79 and include “copyright, patent right, registered design, or other protected rights”. The premise is that if the Principal has paid the Contractor to develop, say, designs or software in order to complete the work under the Contract, then the Principal, not the Contractor, should own the rights to that *Data*. The Principal needs to retain these rights in case the opportunity arises for further application of the *Data*, perhaps in another, similar facility.

**Provisions in subcontracts**

Clause 23.2 requires the Contractor to include provisions in all Subcontracts and agreements with Consultants to ensure that the Principal owns the rights in all *Data* created specifically for the Contract.

**License to use data**

Even though the Principal is to own such rights, clause 23.3 grants licences to the Contractor, Subcontractors and Consultants to use the *Data*, but only for the purposes of the Contract.

**Irrevocable licenses**

In respect of *Data* provided by or for the Contractor in connection with the Contract, but not created specifically for the Contract (eg. a computer program or motor vibration monitoring system created by others and not connected with the Contract), the Contractor is obliged by clause 27.4 to obtain irrevocable licences (licences that cannot be withdrawn) from the owner of the particular intellectual property to permit the Principal to "use, operate, maintain, modify and decommission the Works". That is, for the useful life of the constructed facility.

This clause eliminates the possibility of the finished Works becoming inoperable, or partially so, because the Principal lacks a continuing licence to use an inbuilt component of the facility.

**Licence period**

Clause 23.5 ensures that licences granted under clause 27.3 are required to apply in perpetuity (never-ending).

**License payment**

Clause 23.6 makes the Contractor responsible for payment of all licenses referred to in the preceding sub-clauses.

**Indemnity against intellectual property breaches**

Clause 23.7 makes the Contractor indemnify the Principal (take responsibility for, usually by taking out insurance) for any:

• claims and actions; and

• loss or damage,

arising out of any infringement of *Intellectual Property Rights* in relation to the *Data*

provided by or for the Contractor which is:

• used under the Contract; or

• used to operate the Works, for its lifetime.

**Sole use of Data**

Clause 23.9 makes the Contractor responsible for ensuring that *Data* created specifically for the Contract, by or for the Contractor, is used solely for the purposes of the Contract. The Contractor’s responsibility extends to ensuring that subcontractors do not use *Data*, which they have created for this Contract, on another project.

### Clause 24 – Confidentiality

A Principal would not wish the *Design* information for some facilities (eg a corrective facility or police station) to be widely disclosed. This is also the case for security software for any public (or private) building. Thus, the Contractor is required to maintain confidentiality in relation to all *Data* (except *Data* which is generally available to the public or which is required to be disclosed by law).

*Data* which must be maintained secret and confidential should be disclosed only to those persons to whom disclosure is reasonably necessary for the purposes of the Contract.

### Clause 25 – Media releases and enquiries

The Principal wishes to exercise control over the release of any information regarding the Contract, the Principal or the Works. This includes any promotional material that the Contractor seeks to publish, or any press releases or responses to enquiries from the media.

The Contractor must refer the information to the Principal for written consent to the release. These constraints apply also to the Contractor’s consultants and subcontractors.

### Clause 26 – Care of people, property and the environment, indemnities and limitations

See Sample letters 26A (Options 1 and 2), 26B and 26C.

### Clause 27 – Insurance

See Sample letters 27A, 27B and 27C.

## Subcontractors, Suppliers and Consultants

### Clause 28 – Subcontractor relationships

### Clause 29 – Engaging subcontractors

### Clause 30 – Subcontractor warranties

### Clause 31 – Consultant and supplier relationships

# Carrying out the Works

## Starting

### Clause 32 – Start-up workshop

This Clause sets out:

* the requirement for the Principal to arrange a start-up workshop;
* the obligation for the Principal and Contractor to attend; and
* the objective of the start-up workshop.

#### 32.1 Convening the workshop

It is the Principal’s responsibility to arrange a start-up workshop involving the Principal and the Contractor. Sample letter 32 can be used to invite the agreed participants (see the commentary on clause 32.2).

The workshop is required to be held within 28 days after the Date of Contract unless the parties agree on a longer period. The workshop should be held as soon as practically possible after the Contract has been awarded and prior to work commencing on-site. This allows the requirements and priorities of stakeholders to be taken into account early in the Contract. The workshop can be expected to take up to four hours.

Attachment 1 is provided as a guide to start-up workshops. It includes a link to the Procurement Practice Guide *GC21 meetings and workshops*, found in the NSW Government Procurement System for Construction website. The Procurement System also includes an extensive range of forms, sample handouts and team exercises to assist in preparing for, and running, the start-up workshop.

The practice guide and other documents can be obtained from:

<http://www.procurepoint.nsw.gov.au/before-you-buy/procurement-system-construction/contract-management/contract-management-gc21-edition>

Note that Attachment 1 and the guidance material found in the NSW Government Procurement System for Construction do not form part of the Contract. The parties may use an alternative agenda and other forms to satisfy their contractual obligation to arrange, attend and record the outcomes of a start-up workshop.

#### 32.2 Attendees at the workshop

The Principal and the Contractor are both obliged to attend the start-up workshop and they must jointly decide who else attends.

In order for the Principal to convene the workshop early in the Contract period on a date that suits all invitees, the authorised persons need to meet shortly after the Date of Contract and agree on the participants. These would usually include the senior executives who are to be involved in resolving *Issues* under the Contract (or other senior representatives of the parties), people involved with planning the project, client representatives, end users of the proposed Works and affected stakeholders. It can be particularly beneficial also to include maintenance staff, who have an intimate knowledge of the Site and local services. In addition, depending on the Contract, representatives of authorities, the local community, security personnel, Consultants, *Subcontractors* and *Suppliers* may also be invited if their attendance is likely to enhance the prospects of a successful project.

As stated in the referenced Clause 6.4, the Principal and the Contractor must bear their own costs of attending the start-up workshop. Other participants are also required to bear the costs they incur, such as travelling expenses. The joint costs of holding the workshop (eg hire of premises and equipment, the provision of food and beverages and perhaps the engagement of an independent facilitator) are to be shared between the parties.

As an alternative, the parties may agree for one party to meet the cost of holding the start-up workshop (hire of premises, provision of food etc) while the other pays the equivalent costs for the close-out workshop.

#### 32.3 Workshop objective

The aim of the start-up workshop is to encourage the Principal, the Contractor and other participants to work within ‘a culture of co-operation and teamwork for the management of the Contract’ and thus successfully achieve the desired Contract outcomes. The meeting should be conducted with this objective in mind, and the free and open discussion of all stakeholders’ concerns and priorities should be encouraged.

The suggested agenda in Attachment 1 provides a structured approach to meet this objective, by addressing the following topics:

* **introduction of participants** - allowing each person to introduce themself, explain their role in the project and outline their priorities or hopes for the outcomes. This important step initiates open and honest communication by encouraging interaction on a personal level in a non-adversarial environment.
* **workshop purpose** - assisting participants who are unfamiliar with GC21 to understand that its intent is to work co-operatively towards achieving successful Contract and project outcomes.
* **overview of the Contract/project** - providing opportunities for the client representative and the senior executives of both Contractor and Principal (or other senior representatives) to make opening statements outlining their aspirations for the project and commitment to its outcomes.
* **co-operative contracting** - introducing (or reinforcing, for those with previous experience) the fundamentals of co-operative contracting embodied in the GC21 Contract, ie:
	+ co-operation (commitment, trust, respect, open communication and timely responsiveness);
	+ duty not to hinder performance;
	+ early warning; and
	+ evaluation and monitoring.
* **monitoring and evaluation** - outlining the purpose of the evaluation and monitoring requirements of the Contract and the recommended process involving meeting regularly to assess performance. Refer to the commentary on Clause 6 - Evaluation and monitoring
* **communications framework and directory** - explaining the proposed communication framework for the Contract, setting out communication pathways and allocating associated roles and responsibilities. The arrangements for the evaluation and monitoring meetings are also agreed, including agreeing on participants. The following two essential elements of communication under the Contract should be emphasised:
	+ the Principal’s Authorised Person is the only person (ie management position) who can issue instructions to the Contractor and from whom the Contractor is obliged to accept instructions; and
	+ each stakeholder will have a pathway within the communication framework through which requests and concerns can be raised.
* **identification of key concerns and solutions** - a very useful item allowing discussion of risks and concerns raised by participants and providing for actions to be agreed to address these. This activity harnesses the knowledge of all participants and ensures everyone is aware of both the key risks and the proposed management mechanisms.
* **opportunities for innovation** – emphasising the invitation, contained in the Contract, for the Contractor to improve the product through innovation. Note that other stakeholders can also suggest innovations for consideration. Refer to the commentary on Clause 41 – Innovation.

### Clause 33 – Undertakings

An *Undertaking* is the term used to describe the form of security required under the Contract. It is a promise by a recognised financial institution, such as a bank or insurance company, to pay an amount of money, up to the specified value of the *Undertaking*, to the Principal on demand. *Undertakings* are held as security for the Contractor’s performance of the Contract.

This Clause sets out details of:

* the Contractor’s obligation to provide *Undertakings*;
* the Principal’s obligations for returning *Undertakings*; and
* the Principal’s right to call upon *Undertakings*.

#### 33.1 Requirements for Undertakings

The Contractor arranges for a financial institution to provide the *Undertakings* and pays a fee to the institution. The financial institution secures its financial risk against the assets of the Contractor. If a Contractor advises it is having difficulty obtaining an *Undertaking* for the specified amount, this may indicate it is over-extended financially. Further investigations may need to be undertaken if this occurs.

Rather than having the Principal receive one *Undertaking* and then have the problem of reducing the value of that *Undertaking* when *Completion* is achieved, Clause 33.1 requires the Contractor to provide two *Undertakings* within 14 days after the Date of Contract, namely:

* the *Completion Undertaking* - for the percentage of the *Contract Price* (at the Date of Contract) specified in Contract Information item 33; and
* the *Post-Completion Undertaking* - for the percentage of the *Contract Price* (at the Date of Contract) specified in Contract Information item 34.

The Contractor should be requested to provide the *Undertaking*s promptly upon award of the Contract (see the letter attached to Sample letter 07, the Letter of Award).

The *Undertaking* is an agreement between the financial institution and the Principal. It requires the financial institution to pay the Principal any amount up to the value of the *Undertaking* immediately upon receipt of a written demand from the Principal. There are no conditions on the Principal’s right to call up the security. The Principal is not required to give reasons to the financial institution, and the Principal is allowed to call upon an *Undertaking* without any reference or notice to the Contractor.

If the financial institution does not pay immediately, the delay may enable the Contractor to obtain an injunction from the court before payment is made*.* An injunction may prevent the Principal from making demands against the *Undertaking* or prevent the financial institution from paying on such demands. Even if the Principal successfully argues in court that it has the right to make the demands, this will delay payment.

There are numerous reported cases where Contractors have sought or obtained injunctions from the courts. Ultimately, the courts have supported the Principal’s unconditional right to call upon security, providing the *Undertaking* is unconditional and the Contract does not impose conditions on the Principal’s rights. GC21 Edition 2 does not include any conditions that affect the Principal’s right to call upon the *Undertakings* without reference to the Contractor.

Clause 33.1 requires the *Undertaking*s to be in the form of Schedule 2. The wording of Schedule 2 has been developed in consultation with the major financial institutions. It is important that the Principal insist that the *Undertakings* adopt the wording in Schedule 2. A financial institution will sometimes offer its own form of undertaking, and this may include conditions. For example, if the *Undertaking* states that payment will be made ‘upon default of the Contractor’, this effectively requires the Principal to prove the *Contractor’s Default* before the institution will pay the Principal the amount demanded. No condition is acceptable if it denies the Principal immediate access to payment upon a demand made directly to the financial institution.

*Undertakings* received from the Contractor 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 Principal should always acknowledge receipt of the *Undertakings.* Use Sample letter 33A, Option 1 if the *Undertakings* comply fully with the Contract and Sample letter 33A, Option 2 if they do not.

The originals of the *Undertakings* are to be registered and held securely, preferably in a safe, with a copy kept on file.

#### 33.2 Return of Undertakings generally

This clause sets out the Principal’s obligations to return the *Undertakings*, effectively releasing the financial institution from its obligation to pay the Principal on demand. The Contractor will wish to have the *Undertakings* returned as soon as possible, because that will reduce the Contractor’s liability to pay the financial institution for providing them.

The Principal is under an obligation to return the undertakings to the Contractor as follows:

* the *Completion Undertaking* within 14 days after the *Actual Completion Date* of the whole of the Works (Sample letter 33C); and
* the *Post-Completion Undertaking* – after the further period stated in *Contract Information* item 35, provided the conditions set out in Clauses 33.3 and 61.5 are met.

The Principal is required to return the *Completion Undertaking* within the specified time after the *Completion* is reached. The Principal cannot retain this *Undertaking* pending resolution of *Issues* or other matters. However, if the Principal has a firm intention to make a demand on the *Completion Undertaking*, but has not done so, it can delay returning the *Undertaking*, or the balance remaining, for a short period of time. Note that if a demand has already been made against the *Completion Undertaking*, the amount of money that is released upon its return will be reduced.

To return the *Undertaking*, the original of the *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 *Undertaking* returned to an appropriate authorised person in the financial institution. This avoids the *Undertaking* being mislaid by the financial institution*.* A copy of the covering letter and the endorsed *Undertaking* should be sent to the Contractor. Use Sample letter 33B, Option 1.

Note, the *Undertaking* does not need to be replaced if a demand has been made against it and the same words can be used when it is released.

Occasionally the original of the *Undertaking* cannot be located. In this situation use Sample letter 33B, Option 2*.*

#### 33.3 Return of the Post-Completion Undertaking

Clause 33.2.2 allows the Principal to retain this *Undertaking* until there are no outstanding matters for which the Principal might need to call upon it, including:

* *Defects* that have not been rectified;
* *Claims* and *Issues* that have not been resolved; or
* outstanding moneys that are payable by the Contractor to the Principal.

The Principal should not return the *Post-Completion Undertaking* when any of the circumstances listed in Clause 33.2.2 apply. Use Sample letter 33C to advise the Contractor of the reasons for retaining the *Undertaking* for a period longer than specified in Clause 33.2.2 and Contract Information item 35.

It should be returned promptly, say within 14 days, after all matters relating to the Contract have been resolved. See the commentary on Clause 61.5.

#### 33.4 Reduction in the amount held as Undertakings

The Principal has the absolute discretionary right to agree to a request from the Contractor for a proportionate reduction in the amount of security held by the Principal upon the *Completion* of a *Milestone*. Where the Contract includes a maintenance *Milestone* that commences after construction works are completed, it is appropriate to consider favourably a return of the *Completion Undertaking* on *Completion* of the construction work.

In these circumstances, Sample letter 33D is sent to the financial institution, advising that the Principal will not call upon more than a reduced amount. A copy of the letter is forwarded to the Contractor. This has the potential to benefit the Contractor in two ways. Firstly, it reduces the cost of maintaining the *Undertaking*. Secondly, a financial institution will usually restrict the total amount of security available to a customer (the Contractor). Reducing the amount of an *Undertaking* held for a particular contract may free up security that is available to the Contractor, enabling the Contractor to take on another project.

The calculation of the appropriate reduced amount would usually be based on the proportionate values of the Works and the completed *Milestone*.

#### 33.5 Providers of Undertakings

Clause 33.5 limits the types of financial institutions that can provide *Undertakings.* Banks, building societies, credit unions and insurance companies may be acceptable.

NSW Treasury requires that security for contracts undertaken by NSW Government agencies be provided by a bank, building society, credit union or insurance company that is registered with the Australian Prudential Regulation Authority (APRA). Up to date listings of financial institutions registered with APRA are available at [www.apra.gov.au](http://www.apra.gov.au)*.*

*Undertakings* from overseas financial institutions are not accepted. They expose the Principal to a risk that the overseas institution's Australian agents may delay in paying a demand on the *Undertaking*, while seeking authority or confirmation from the overseas institution. The time may be brief, but it may be sufficient for a Contractor who is in dispute with the Principal to seek an injunction from the courts preventing the payment of the demand. A court action could, at the least, delay payment to the Principal.

Sample letter 33A, Option 2 can be used to reject an *Undertaking* on the basis that it is not provided by an accepted financial institution.

#### 33.6 Contractor not to prevent a demand

An *Undertaking* can be called upon to reimburse the Principal if the Contractor does not pay the Principal a debt due and the payments that will be due from the Principal to the Contractor are insufficient to deduct the amount owing. This should not be done without the debt having been established and without concurrence from the appropriate senior manager. Use Sample letter 33E to make a demand against an *Undertaking*.

The Contractor has no right to prevent the Principal making any demand against the *Undertakings* or to prevent the provider of an *Undertaking* from complying with any demand by the Principal. This Clause confirms the unconditional nature of the *Undertakings*.

#### 33.7 Subcontractor retentions to be held in trust

If the Contractor holds security provided by Subcontractors in cash, the money must be held in a trust account managed as specified in clause 33.9. This applies if the Contractor makes retentions from payments due to a Subcontractor, or converts security to cash, or if a Subcontractor elects to pay security in cash.

#### 33.8 Payments withheld from Subcontractors to be held in trust

If the Principal pays for work done, or *Materials* supplied, by a Subcontractor and the Contractor does not pass the full payment on to that Subcontractor, the amount not passed on must be held in a trust account that complies with clause 33.9.

#### 33.9 Requirements for trust accounts for Subcontractor payments

This clause sets out the requirements for the trust accounts required under clauses 33.7 and 33.8. The Contractor is obliged to maintain appropriate records of monies held in trust and make these available to Subcontractors on request.

Clauses 33.7 to 33.9 attempt to protect monies belonging to Subcontractors, particularly if the Contractor experiences financial difficulties. Although the Principal cannot request copies of the records of trust accounts held for Subcontractors, it can request that the Contractor confirm that it is complying with its obligations under clauses 33.7 to 33.9 of the Contract.

### Clause 34 – Site access

#### 34.1 The Principal’s obligation to give access

Subject to complying with relevant obligations, the Contractor can start off-Site work at any time after the Date of Contract. However, the Contractor cannot start work on the Site until the Principal has given the Contractor access to enough of the Site for that purpose.

The Principal has an express obligation to give the Contractor access to enough of the Site to start work within the period stated in Contract Information item 13 unless the Contractor has not yet complied with all the relevant requirements of the Contract.

‘Relevant requirements of the Contract’ may include provision of:

* specified management plans, for example for WHS, environmental management, industrial relations, quality, training and aboriginal participation;
* evidence that the Contractor has taken out the necessary insurance;
* *Undertakings*;
* evidence of payment of the levy under the *Building and Construction Industry Long Service Payments Act 1986 (NSW)*;
* a *Contract Program* complying with Clause 22; and
* other specific requirements in the Contract.

If the Contractor attempts to start work before satisfying the relevant requirements, the Contractor should immediately be instructed to stop work. Use Sample letter 15A. The instruction should be supported by clear evidence of the Contractor’s failure.

For example, the *Contract Documents* may require that the specified WHS Management Plan be submitted 14 days prior to construction work commencing and that construction work cannot start until a complying plan has been submitted. The following situations may arise:

* The Principal may identify that the submitted WHS plan does not comply with the WHS Regulation or the OHS Management System guidelines and advise the Contractor. The Contractor must amend the plan to rectify all non-compliances (not just those identified by the Principal) and resubmit the plan. The Principal has up to 14 days to review the resubmitted plan because the initial plan submitted did not meet the requirements of the Contract. This process continues until the Contractor provides a complying plan. The Principal should, of course, respond to submissions in a shorter period of time, where practical.

The Contractor cannot start any work on the Site, including Site fencing or other Site establishment activities, until a complying plan has been submitted (subject to other obligations being met). The Contractor is not entitled to any extension of time for any associated delay.

* If the Principal does not respond to the submitted WHS plan then, provided the Contractor complies with other Contract requirements, the Contractor may start work on the Site 14 days after the plan was submitted. If it is subsequently found that the plan does not comply, the Contractor is in breach of Contract and must rectify the breach as soon as possible. If this can be done speedily and without jeopardizing safety, it may not be necessary to stop work.
* If the Contractor starts work either without submitting a WHS plan or earlier than 14 days after submitting its plan, without any instruction from, or agreement by, the Principal, the Principal must immediately instruct the Contractor to stop work, make the Site safe and leave the Site until the Contract requirements are met.

The *Letter of Award* (Sample letter 07) includes a default instruction providing Site access:

*Subject to compliance with all relevant requirements of the Contract, Site access is given at the relevant times stated in Contract Information item 13.*

Due to the various pre-requisites that need to be satisfied prior to starting work on Site, it is quite common for the Contractor to be unable to start initial work on Site until after the time period for giving Site access has elapsed. However, where the Contractor has met all the relevant requirements, the Principal can, acting reasonably, grant access to the Site or part of the Site at an earlier time. This should be in accordance with the *Contract Program* or in consultation with the Contractor.

If the Site will not be available at the times specified in Contract Information item 13, and it is essential to award the Contract, the *Letter of Award* (Sample letter 07) should state this. Before awarding a Contract in this situation, take into account the cost risks, discussed below. Note that a lengthy delay would be a breach of Contract.

#### 34.2 If access is not given within the specified time

If the Principal does not give the necessary access to the Site when it is due under Clause 34.1, the Contractor may be inconvenienced or delayed in performing the Contract. In these circumstances, Clause 34.2 provides for the Contractor to claim an extension of time under Clause 50 and delay costs under Clause 51. Note that the delay costs rate in Contract Information item 49A1 applies when the Contractor is delayed in accessing the Site. The rate or rates in Contract Information item 49A2 apply after the Contractor has established on the Site and started the work.

Consider the following scenarios:

* The ‘Time Period for giving Site access’ specified in Contract Information item 13 is 14 days after Date of Contract. The Contractor has satisfied all the relevant pre-conditions by 21 days after the Date of Contract and the *Contract Program* shows that work is planned to start in area A of the Site. However, the Principal cannot give access to area A until 28 days after the Date of Contract even though access is available to other areas.

The Contractor is entitled to an extension of time and delay costs at the 49A1 rate for 7 days, provided it can demonstrate that it could not reasonably avoid delay.

* There are *Milestones* and Contract Information item 13 specifies a Time Period for giving Site access for *Milestone* 3 of 5 days after the *Completion* for *Milestone* 2. However, the Principal is unable to give access to *Milestone* 3 until 10 days after the *Completion* of *Milestone* 2.
* The Contractor is entitled to an extension of time and delay costs at the 49A2 rate for 5 days provided it can demonstrate that it was not reasonable for it to avoid delay. Note the 49A1 rate would apply if the delay in access related to the first *Milestone* requiring work to be carried out on the Site.

If the Principal cannot give the Contractor sufficient access for the Contractor to start the work within 3 months after the Date of Contract, or within a longer specified or agreed period, the Principal is in default of its contractual obligations and the Contractor has a right to terminate the Contract under Clause 75.

#### 34.3 Principal’s right of access

The Principal and its ‘authorised’ employees and agents must be permitted to access the Site for the purposes of the Contract. The Principal should advise the Contractor who will be attending the Site on the Principal’s behalf. This also applies to the premises of the Contractor and its Subcontractors, Suppliers and Consultants. The Principal is to be reasonable about the times and extent of access required, particularly to premises other than the area where the Works is being constructed.

However the Principal’s employees and agents will be required to comply with the Contractor’s Site management requirements, particularly its WHS Management Plan, to a reasonable extent. The Contractor cannot impose onerous conditions on the Principal that restrict it from being able to carry out its obligations.

The Contractor is not promised sole access to the Site. There may be others working on the Site, including occupiers of the Site or other contractors, whose requirements may interrupt the Contractor’s access. The Principal should advise the Contractor if others will require access and the extent of these requirements. This is best done in the *Contract Documents*, so the Contractor can allow for any additional costs. Otherwise, negotiation and agreement may be required during the course of the work if the extent of occupation by others is significant.

### Clause 35 – Engagement and role of valuer

#### 35.1 Is a Valuer required?

If Contract Information item 50A indicates that a Valuer must be engaged, the Contract does not allow for the respective authorised persons to decide not to engage a Valuer. Whether a matter subsequently is referred to the Valuer will depend upon circumstances.

If Contract Information item 50A does require the engagement of a Valuer, then Clause 35.1 requires the parties (ie the Principal and the Contractor) to try to come to an agreement within 21 days as to who should be appointed as Valuer.

The Valuer should be requested to disclose their fees and hourly rates payable for the valuation services before the engagement is formalised. With the request for a fee proposal, provide a copy of Schedule 4 – Agreement with Valuer so the Valuer is aware of the nature of the services (see Sample letter 35A).

If the parties cannot agree on the Valuer, then the Principal is responsible for requesting the person nominated in Contract Information item 50B to make a selection (see Sample letter 35B).

The parties jointly engage the Valuer, within a further 21 days, using the form of Agreement at Schedule 4 (see Sample letter 35C).

The Valuer makes determinations, but only under the circumstances and conditions arising under clauses. The parties must accept the Valuer’s determination as final and binding unless it exceeds the amount nominated at *Contract Information* item 50C.

The Valuer determines adjustments to the *Contract Price* and *Contract Completion Dates* (as applicable) when:

* agreement cannot be reached on the value of a proposed deduction for *Defects* not made good under clause 46 and the Principal requests the Valuer determine the adjustment; or
* the Contractor does not agree with the Principal’s assessment of a *Claim* under clause 47 (including a *Claim* following a *Variation* instruction under clause 48) and either party requests the Valuer to determine the adjustment.

The parties must accept the Valuer’s determination as final and binding unless it exceeds the amount nominated at Contract Information item 50C.

Note the time bar that is applicable to the commencement of litigation under Clause 35.1.3. For further information on the role of the Valuer, refer to clauses 47 and 50.

#### 35.2 When there is no Valuer

If Contract Information item 50A does not say that a Valuer **must** be engaged, this does not preclude the parties from nevertheless proceeding to engage a Valuer. If, say, the value of a *Variation* is in dispute between the parties, the price adjustment being the only sticking point, the parties may well agree to resolve the issue by engaging a Valuer and referring only the disputed value of the specific adjustment to the Valuer for determination.

If a Valuer is not engaged, then:

* for a disagreement over the value of a proposed deduction under clause 46, the Principal has no alternative but instruct the Contractor to make good the *Defect* if the disagreement cannot be resolved; and
* for a disagreement over the value of a *Claim* under clause 47, the Principal would assess the value of the proposed adjustments.

## The Site

### Clause 36 – Site information

This Clause sets out:

* the extent to which the Principal takes responsibility for specified information made available to the Contractor; and
* the Contractor’s responsibility for interpreting that information.

#### 36.1 Information made available by the Principal

The aim of Clause 36.1 is to clarify the status of any information specified in Contract Information items 36A and 36B. This information might include investigation reports or Site surveys. Note that drawings prepared for the purpose of constructing the Works would not be listed here. Similarly information that the Principal requires to be part of the Contract should not be identified in items 36A and 36B.

The information identified in Contract Information items 36A and 36B does not form part of the Contract. However it is likely to be used by tenderers in preparing their tenders and by the Contractor in completing the Works. The disclaimers in this clause allow the Principal to inform the Contractor without requiring the Principal to check carefully and guarantee all the information made available.

Without these disclaimers, the Contractor could argue that it relied on this information when pricing the work. If the information is misleading and, as a result, the Contractor incurs more cost than expected, the Contractor could make a *Claim* against the Principal. Silence or omission may also be misleading. Thus the Principal could mislead the Contractor by failing to make available relevant information that it has in its possession. The Principal cannot assume that all the Site risks can be transferred to the Contractor simply by not making available the information that it has.

A *Claim*, under this clause could be based on:

* the Principal’s duty under the common law to take care when providing information on which it knows the Contractor may rely; or
* legislation that provides for compensation if one party in a business relationship is damaged by false or misleading information provided by the other party. The obligation under Section 18(1) of the Competition and Consumer Act 2010 is:

*"A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."*

The Principal should therefore conscientiously investigate what information is available concerning the Site and not withhold relevant information of which it is aware. Note that the Principal is not required to hand over physically all the information to tenderers or the Contractor. Information may be made available for inspection at a convenient location.

Clause 36.1 ensures that both the Contractor and the Principal share a common understanding of the status of information listed in Contract Information items 36A and 36B. The extent to which the Contractor can rely on that information is clearly expressed. Importantly, the parties acknowledge that:

* the Principal made the information available in good faith when the parties entered into the Contract; and
* the Principal does not:
	+ guarantee the completeness of the information listed in item 36A; or
	+ guarantee the accuracy, quality or completeness of the information listed at item 36B; or
	+ accept any duty of care in connection with the information listed in item 36B or with having provided it.

The Principal makes information about the Site available to assist the tenderers and the Contractor to assess and allow for the associated risks. This is done in ‘good faith’. Contract Information items 36A and 36B allow the Principal to indicate how much confidence the Principal has in the information provided.

Note the distinction drawn between the status of information listed in item 36A and that listed in 36B.

The Principal is prepared to guarantee the accuracy and quality of the information listed in 36A, although that information may not necessarily be complete. That is, the Principal accepts a ‘duty of care’ in respect of the information in 36A and the Contractor is entitled to rely upon the accuracy of that information. If the information is not correct, the Contractor may make a *Claim* for additional unexpected costs incurred as a result. The Principal should act reasonably when listing information in item 36A and include information that should be accurate, such as survey plans prepared for the purposes of the Contract, dilapidation reports, photographic records and drilling logs.

The information listed in item 36B is not guaranteed for accuracy or quality. It may also be incomplete. The Principal is effectively saying to the Contractor: ‘I have this information. I can’t vouch for it, but here it is. Use it at your own risk.’ The information listed here might include work as executed drawings prepared by a previous contractor or a report produced by an external service provider. Note that in the latter case, the provider is likely to attach its own disclaimer as well. The majority of information that does not form part of the Contract is usually listed in 36B.

The overall effect of Clause 36.1 is that the Contractor is not entitled to make a *Claim* simply because information identified by the Principal about the Site is incomplete or, in the case of information listed in item 36B, incorrect.

Consider the following examples, based on actual situations:

|  |
| --- |
| The Works included cutting through the concrete floor of a school toilet block constructed in the 1960s. The floor, including benching, was found to be 250mm thick not the 120mm that the Contractor advised it expected. The floor thickness was not apparent from an inspection of the Site. The Principal argued the floor/ benching thickness was typical of construction practices at the time. The Contractor then complained that the Principal had not made available a work-as–executed drawing that showed the thicker floor. This had been subsequently provided to the Contractor by the School. The Contractor could now argue that it was misled by the Principal. The misleading conduct would be the Principal’s failure to make information available that would assist the Contractor in assessing and allowing for the risks associated with the thicker floor. A settlement was reached on the Contractor’s additional costs.The Contract expressly required the Contractor to take responsibility for the removal and disposal of hazardous substances identified in the *Contract Documents*. The hazardous substances on the Site were only identified in an Environmental Assessment report, attached to the *Contract Documents* but listed in item 36B. As information identified in items 36A or 36B does not form part of the Contract, the Contractor argued successfully the hazardous substances were not identified in the *Contract Documents* and that it was reasonable not to allow for their removal and disposal. This error by the Principal could have been avoided by either:* identifying the hazardous materials and their locations separately in the *Contract Documents*; or
* expressly excluding the pages of the report that contained the identified hazardous materials from the information identified in item 36B.
 |

Note that the provisions of Clause 36.1 imply that the Principal does guarantee the quality, accuracy and completeness of information that is NOT listed in Contract Information item 36A or 36B. This is consistent with the Principal taking responsibility for the Principal’s *Design* and for *Faults* in the *Principal’s Documents*. However, no guarantee can be implied where the *Contract Documents* state otherwise. For example, Clause 8 states that the Works include more than the work specifically referred to in the Contract and Clause 39 states that the Contractor must complete the Principal’s *Design*.

#### 36.2 The Contractor’s investigations

The Contractor is warned not to rely upon the information made available by the Principal that is indentified in items 36A and 36B. This includes any interpretations included in the information, such as findings set out in a geotechnical investigation report. Under the provisions of Clause 36.2 the Contractor confirms, when it enters into the Contract, that it will not rely on this information.

The Contractor is expected to make its own inquiries and interpretations in relation to the Site. This explicitly includes a requirement physically to visit and examine the Site and the areas around it. The Contractor is also required to check the information made available by the Principal. The Contractor would be well advised to check carefully aspects of the Site that are related to the information listed in Contract Information item 36.

The Contractor should have sufficiently investigated the Site to be aware of the working conditions and risks associated with the Site. The Contractor is expected to have assessed the risks and fully provided for them in the *Contract Price*. For example if the Works are in an area with a history of prior use, there is a greater risk that buried services, buried structures and contaminated material will be found. The Contractor would be expected to allow for these *Site Conditions* to a reasonable extent.

Under Clause 36.2, the Contractor provides a warranty that it has carried out its own investigations and checked the information made available. The Contractor confirms that it did not rely on the completeness of information listed in Contract Information item 36A or the correctness of information listed in item 36B.

However, the Contractor’s obligations only extend to what is reasonable in the circumstances. If the Contractor claims, under Clause 37, that it has an entitlement on account of unexpected, materially adverse *Site Conditions,* the warranties in Clause 36.2 are used to determine what investigations and enquiries the Contractor should reasonably have carried out, what those actions would have revealed and what would therefore have been a reasonable assessment of the risks associated with the Site. The Contractor is entitled to recover its additional costs if the conditions found on the Site are significantly different from what should have been expected if the Contractor had carried out all the investigations listed in Clause 36.2, to an extent that was reasonable in the circumstances.

Consider the following examples:

|  |
| --- |
| The Works involved constructing a concrete weir across a river. The Principal provided a geotechnical investigation report that showed weathered rock several metres below the top water level. In the event, the Contractor found boulders protruding above the bedrock in several locations. The Contractor had visited the Site to assess the risks but the boulders were not visible from the riverbank and there was no indication of their existence in the surrounding floodplain. The local council had no information on sub-surface conditions in that area. The Contractor was not expected or able to carry out further geotechnical investigations during the tendering period and based its construction method on the Principal’s investigation reports. The unexpected foundation conditions were accepted by the Principal as being materially adverse *Site Conditions*.The Works involved construction of a pipeline. Outcrops of granite and granite boulders were visible along the pipeline route, but the Principal’s borelogs did not find rock above the expected depth of excavation. The Contract required the Contractor to excavate in any material. The Contractor assumed in pricing the work that excavation would not be in rock, but found hard rock in some sections of the trench. The Contractor had no entitlement to additional payment because the risk of finding rock was high, given the conditions on the Site and the Contractor should have included a reasonable allowance for this in the *Contract Price*. An experienced pipelayer who inspected the Site would have expected that significant rock would be found.  |

### Clause 37 – Site conditions

This Clause provides for the Contractor to be recompensed when unforeseeable, materially adverse *Site Conditions* are encountered, under certain circumstances. *‘Site Conditions’* are defined in Clause 79. *Site Conditions* that are materially adverse in comparison with what the Contractor should have expected are called ‘Latent Conditions’ in some other forms of contract. If the Contractor considers it has a legitimate claim on account of the *Site Conditions* encountered, it must prove that claim in terms of the provisions of this Clause unless another Clause of the contract specifically applies.

#### 37.1 Contractor’s responsibility

1. The Contractor is required to deal with any *Site Conditions* it finds, and to construct the Works as specified. In the absence of an instruction from the Principal, the Contractor has to proceed without varying the Works,because only the Principal has the right to change the Works. The Works are defined in Clause 79.
2. Adverse *Site Conditions* do not necessarily change the Works or warrant a *Variation* instruction. For example, if the Works includes the construction of a pipeline, there is no *Variation* if the ground conditions through which the pipeline is laid are more difficult than expected. Nevertheless, the Contractor may be entitled to recompense for the ‘extra effort’ required. However, if the Principal changes the route of the pipeline from that specified, in order to avoid the costs that would be incurred if it were constructed in the difficult ground conditions, that is a *Variation*.
3. The Contractor also has an obligation to minimise any additional costs and delays, without varying the Works. If the Principal determines that the Contractor breached the contract by not complying with this requirement then, under Clause 47.8, the Principal must not include the (unnecessary) costs or delays incurred due to the Contractor’s breach of contract in any adjustments to the *Contract Price* or extensions of time.
4. The Principal may instruct the Contractor what action to take. The instruction may be for a *Variation*, a suspension or some other purpose. The relevant provisions of the Contract would then apply.

#### 37.2 Contractor’s risk

1. ThePrincipal may wish the Contractor to bear all risks of adverse *Site Conditions*. This option is activated by way of a selection in *Contract Information* item 37. If the Contractor bears the risk of adverse *Site Conditons,* it is still responsible for dealing efficiently with any *Site Conditions* encountered, as required by Clause 37.1, but Clauses 37.3 to 37.8 have no effect. That is, these clauses are not part of the Contract and cannot be used by either party in any claim or assessment. Accordingly, if *Contract Information* item 37 states that the Contractor is to bear the full risk of *Site Conditions*, the Contractor has no entitlement to additional costs or an extension of time as a result of encountering adverse conditions unless a *Variation* is instructed.
2. If the Principal requires a change to the Worksdue to the *Site Conditions* encountered, the Principal instructs a *Variation*. Under Clauses 47 & 48 the Contractor has entitlements related to the additional costs and delays incurred in carrying out the *Variation.* These entitlements apply even if there are no entitlements to recompense for ‘extra effort’ under Clauses 37.3 to 37.8.

#### 37.3 Materially adverse Site Conditions

If a Contractor discovers *Site Conditions* that it considers to be ‘materially adverse’, the Contractor must notify the Principal as soon as those conditions become apparent. The early warning provisions of Clause 5 also obligate the Contractor to inform the Principal promptly.

The Contract specifies that the notice is to be provided within 7 days after the materially adverse *Site Conditions* are encountered. This is considered a reasonable maximum time for the details required in the notice to be obtained. If the Contractor fails to give notice within the 7 day period, this does not prevent the Contractor from claiming some entitlements under this Clause. However, Clause 37.8 provides that the Contractor has no entitlement for costs and delays incurred before it gives the required notice. This gives the Contractor an incentive to provide the notice promptly, ensuring that the Principal has the opportunity to inspect the Site, investigate the situation and determine appropriate action promptly, before the *Site Conditions* are significantly altered and without unnecessary costs being incurred.

It is recommended that, at site meetings, the Principal’s Authorised Person encourage the Contractor to provide early warning to the Principal immediately it considers materially adverse *Site Conditions* have been encountered, even before all the information required for the notice under Clause 37.3 is available. On receiving early warning, the. Principal should inspect the Site with the Contractor in order to discuss and decide on appropriate action to be taken, if any. The Principal’s Authorised Person can also take this opportunity to remind the Contractor of the effect of Clause 37.8 and the importance of providing formal notification with the required details as soon as possible.

Clause 37.3 lists the details required in a notice given under that Clause. Significantly, the Contractor is required to justify its contention that the *Site Conditions* are significantly (‘materially’) worse (‘adverse’) than it should have expected at close of tenders, and that they will have a detrimental effect on the Works or *Scheduled Progress*. To do this, the Contractor must:

* describe what conditions should reasonably have been expected if the Contractor had:
	+ made its own inquiries concerning the Site (Clause 36.2.1),
	+ checked, but not relied upon, information provided by the Principal, including the completeness of information identified in *Contract Information* item 36A and the accuracy, quality or completeness of information identified in *Contract Information* item 36B (Clauses 36.2.4 & 36.2.5 respectively),
	+ made its own interpretations from information provided by the Principal (Clause 36.2.6),
	+ examined the Site and surrounds and assessed its characteristics, including sub-surface conditions (Clause 36.2.2), and
	+ assessed the risks and contingencies that might affect the Works (Clause 36.2.3);
* demonstrate how the actual *Site Conditions* are ‘materially adverse’ in comparison with the expected conditions, that is that they:
	+ will have a significant and tangible impact on the carrying out of the Works; and
	+ will cause the Contractor to incur additional costs and/or delay the progress of the work.
* show that the actual conditions were beyond the limits of the degree of risk that would reasonably have been priced into a competitive tender. This assessment of the Contractor’s risk is based on what the Contractor should reasonably have expected at close of tenders, because that is the last opportunity the Contractor had to make an allowance in its price for the risk and likely cost of adverse *Site Conditions*. It needs to take into account the warranty at Clause 36.2.3, that the Contractor had ‘allowed fully’ in the *Contract Price* for the ‘risks, contingencies and other circumstances which might affect the work’.

The Contractor must also provide, in this first formal notice, an estimate of the effect that dealing with the materially adverse *Site Conditions* will have on the Contract Price and time, and ‘all other relevant matters’.

If the information provided in the notice is insufficient to comply with the requirements of Clause 37.3, the Principal’s Authorised Person should advise the Contractor promptly.

The Principal’s Authorised Person should apply a test of reasonableness when considering whether the information the Contractor was able to provide in the notice complied sufficiently with Clause 37.3. It may be sufficient for the Contractor to provide estimates of the additional time, cost and resources likely to be involved, based on the apparent extent of any additional work.

#### 37.4 Further Information

If the Principal requests further information, additional to that required under Clause 37.3, this does not affect the operation of Clause 37.8, which restricts the Contractor’s entitlements on the basis of the timely provision of the information specified in Clause 37.3. If the Principal requests further information that requires investigations to be carried out or external service providers to be engaged, the reasonable costs of these activities would be a claimable additional cost, provided that:

* Clause 37.2 does not entirely extinguish the Contractor’s entitlements for *Site Conditions*; and
* the Contractor establishes an entitlement under Clause 37.6.

Note that the cost of any investigations carried out by the Contractor before notification is given under Clause 37.2 would not be included in the valuation of the costs associated with the materially adverse *Site Conditions*.

#### 37.5 Principal’s obligation to respond

The Principal should promptly respond to a notice given by the Contractor under Clause 37.3. An unreasonable delay by the Principal could be a breach of contract.

In the response, it needs to be clearly stated whether the Principal agrees that the *Site Conditions* encountered are materially adverse compared to what should have been expected at close of tenders. The response needs to address all the Contractor’s claims and contentions. Consider the points listed in the commentary on Clause 37.3 noted above in preparing the response

The Principal’s Authorised Person should apply a test of reasonableness in assessing what conditions the Contractor should have expected. Consider the following examples, based on actual situations.

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| --- |
| The Works included the construction of a new facility. The Contractor notified the Principal of adverse *Site Conditions*, beingthe existence of a fibre-optic cable beneath the location of the proposed facility. The cable was not shown on the drawings or identified in the *Contract Documents.*It was agreed that the location of the cable constituted adverse *Site Conditions,* in that the existence of the cable made the work more difficult.However, an inspection of the Site revealed that there were cable pits, visible and accessible from the surface, along the route of the cable in the vicinity of the proposed new facility. It was therefore determined that a tenderer who visited and inspected the Site during the tendering period should have expected to find a cable in the location where it was found.The Principal’s Authorised Person concluded that the Contractor’s expectation that there would not be a fibre optic cable beneath the proposed facility was not reasonable and that the existence of the cable did not give the Contractor an entitlement under Clause 37. |

Comment: Contractors may argue that tenderers are not able to examine every aspect of the Site and determine all potential *Site Conditions* during the tendering period. However, that is not the point. Contracts allocate risks and under a GC21 contract, the Contractor takes the risk that, depending on the extent of investigations it carries out, it may or may not identify all the possible adverse *Site Conditions*. The Principal is entitled to assess expected *Site Conditions* on the basis that tenderers should have carried out a reasonably thorough investigation, including inspecting the Site (unless access was not possible) and noting obvious features.

|  |
| --- |
| The Works included the construction of a new facility. The Contractor notified the Principal of adverse *Site Conditions,* beingthat the Contractor expected the material on the Site to be virgin excavated natural material (VENM) rather than the ‘inert’ contaminated material that was found.It had been assumed that the Site had previously been built on. However investigations of previous uses, which included contacting the local council, determined that the Site had only ever been used for farming and that enquiries made during the tendering period could not have identified that contaminated material was likely to be present on the Site.Accordingly, it was agreed that the presence of ‘inert’ contaminated material constituted materially adverse *Site Conditions* that it would not have been reasonable to expect. Because the Contractor, as a tenderer, had made a reasonable assessment of the conditions on the Site, the Contractor had entitlements under Clause 37. |

Note: The contaminated material, in this example, was not a ‘hazardous material’ under the definition of the term. In some contracts defined hazardous materials, which can constitute adverse *Site Conditions*, are specifically dealt with under separate Clauses. Usually, a Clause that deals specifically with a type of site condition would take precedence over a Clause that deals generally with various types of S*ite Conditions*.

If the Principal agrees with the Contractor that the *Site Conditions* encountered are materially adverse, Clause 37.6 applies. If the Principal does not agree with the Contractor, the Contractor must nevertheless continue to deal with *Site Conditions.* Under these circumstances, Clause 37.7 provides for the Contractor to notify an *Issue* under Clause 69.

#### 37.6 Adjustment to Contract Price & Contractual Completion Dates

The Contractor has an entitlement to price and time adjustments if a complying notice has been provided under Clause 37.3 and the Contractor is able to demonstrate to the Principal’s satisfaction that:

* some or all of the *Site Conditions* encountered are materially adverse; and
* it would not have been reasonable for the Contractor to expect these conditions at the close of tenders.

Where the Principal agrees that an entitlement exists, there are three mechanisms for assessing the adjustments.

1. Agreed adjustments (Clause 37.6.1)

The Principal and Contractor may reach agreement on all effects of the adverse *Site Conditions*. The agreement would include price and time adjustments for dealing with the adverse *Site Conditions*, based on costs and delay incurredafter the Contractor gave the the Principal a complying notice under Clause 37.3. The adjustments would include payment for any agreed change to the Works, ie *Variation*, whether or not the Principal issued a formal *Variation* instruction, and any applicable delay costs. This situation could occur where there is agreement on the method of dealing with the *Site Conditions*, the extent of delay and the associated additional costs. The Principal’s Authorised Person would usually need to seek approval to this type of agreement. Any agreement should be formalised as a ‘full and final settlement’ for specific *Site Conditions* that were notified on an identified date or dates.

2. Adjustments for an instructed Variation (Clauses 37.6.2 and 37.6.3)

Where the Principal decides that a change to the Works is required to respond effectively to the *Site Conditions*,the Principal may issue a *Variation* instruction. In the absence of an agreement as described in (1) above, the price and time effects of the *Variation* instruction would be dealt with in accordance with Clause 48. Until the Contractor is able to start carrying out the *Variation*, it is entitled to claim for ‘unavoidable’ additional costs and delays caused by the agreed materially adverse *Site Conditions,* incurred after the date it provided a complying notice, under clause 37.3. Clause 37.1 needs to be applied when determining what additional costs were unavoidable.

Under Clause 48.2, unless a specific instruction is given by the Principal, the Contractor cannot start *Variation* work until either its value and effect on time have been agreed or the necessary adjustment has been assessed or determined in accordance with Clause 47. If the latter situation occurs, one of the following valuation methods will apply:

* if a Valuer has been engaged and one of the parties requests that the Valuer be used, or if the parties agree to engage a Valuer for this purpose, the Valuer determines the value of the *Variation*. If the extent of work required to deal with the *Site Conditions* is unclear, it may not be possible for the Valuer to do this before the work is carried out;
* if no Valuer is engaged, the Principal assesses the value of the *Variation*. If the extent of work is unclear, it may not be possible to do this before the work is carried out; or
* the Principal instructs the additional work to be carried out as *Daywork*. This will require arrangements to be made for the Contractor to furnish all time sheets, wages sheets, invoices, receipts and other vouchers necessary to support its claim. This method is resource-intensive and requires clear directions from the Principal on what is required and agreement between the parties on the way costs are to be recorded and assessed.

Obtaining a valuation using one of these methods could delay the progress of the work. If it is unlikely that agreement on the effects of the *Variation* will be obtained promptly then, to avoid delay, the Principal’s Authorised Person should consider instructing the Contractor to proceed, as permitted under Clause 48.2, with the *Variation* before its value is determined or assessed.

3. Adjustments for additional work other than a Variation (Clause 37.6.4)

Where additional work or effort is required due to *Site Conditions* that are agreed to be materially adverse, but that additional work does not involve a change to the specified Works, a *Variation* is not required and should not be instructed. The Contractor is entitled to claim for ‘unavoidable’ additional costs and delay caused by the *Site Conditions* incurred after the date it provided a complying notice under Clause 37.3.Clause 37.1 applies when determining the additional costs that were unavoidable.

Consider the following example.

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| The Works included the construction of a new facility. The Contractor notified the Principal of adverse *Site Conditions*, beingthe presence of unexpected sub-surface material including sheet metal, reinforced concrete rubble and other building debris that had apparently been used as fill and had not been identified by geotechnical investigations on the Site.The Contractor detailed the extra costs required to construct the specified 4m piers to rock through this unexpected material.The Principal accepted that the subsurface material constituted materially adverse *Site Conditions* that the Contractor, when tendering, could not reasonably have expected, despite a thorough investigation.The Contractor requested a *Variation* instruction. However the Principal’s Authorised Person determined that no *Variation* instruction was required as the Workshad not been changed. The entitlement lay in the unexpected difficulty and ‘extra effort’ required to carry out the specified work. The additional costs were valued under Clause 47. |

#### 37.7 Contractor’s right to raise an Issue

If the Principal does not agree with the Contractor that *Site Conditions* encountered are materially adverse in comparison with what should reasonably have been expected at the close of tenders, the Contractor has a right to raise an *Issue* under Clause 69 for the senior executives to try to resolve. Prior to raising an *Issue*, it is common for the parties to meet to ensure that all relevant facts have been provided and each party’s points of view have been presented to, and understood by, the other party. These discussions often involve senior executives, procurement advisors and senior project managers.

#### 37.8 Restriction on Contractor’s entitlements

As noted above, the Contractor’s entitlements are conditional upon the giving of a notice complying with the requirements of Clause 37.3. The Contractor has no entitlement for costs and delays incurred before it gives that complying notice. This can reduce the claimable costs incurred by the Contractor in identifying the *Site Conditions*.

The aim of the limitation in Clause 37.8 is to give the Principal an early opportunity to decide the appropriate course of action to deal with the *Site Conditions.* Its intention is not to provide the Principal with a means of reducing the recompense due to the Contractor for costs and delays incurred in dealing with materially adverse *Site Conditions*. Accordingly, the Principal’s Authorised Person should be reasonable in determining whether the Contractor has complied with its obligations with regard to the notice. This may avoid a finding by an *Expert* or a court that the Principal received ‘constructive notice’ in the circumstances and that the Principal acted unreasonably in denying the Contractor its entitlements.

Note that the legal doctrine of ‘Constructive Notice’ applies where a person who knows certain facts deliberately refuses to make the enquiries a normal person would make, so as to avoid discovering something adverse to their interests. Such a person is not able to benefit from deliberate ignorance.

The doctrine has been applied in an *Expert Determination*, where the *Expert* decided that the Contractor was entitled to payment for materially adverse *Site Conditions* on the basis of informal notice that did not comply with the requirements of Clause 37.3. The Principal knew of the adverse *Site Conditions*, through early warning and discussions held at site meetings, well before receiving a formal notice complying with Clause 37.3. The Principal’s Authorised Person did not remind the Contractor of the obligation to give notice, but strictly applied Clause 37.8 when calculating the Contractor’s entitlements. The *Expert* did not consider this to be reasonable in the circumstances. The *Issue* is open to debate, as the responsibility for the adequacy of the notice lies solely with the Contractor. However, when the Principal is aware of *Site Conditions* and the Contractor has provided a notice that the Principal’s Authorised Person determines is incomplete, the Principal’s Authorised Person should promptly request the required information and not stay silent with the intent of denying the Contractor its entitlements.

## Design

### Clause 38 – Faults in contract documents

This Clause sets out the obligations of both parties when a *Fault* is found in the *Contract Documents* including:

* the Contractor’s obligation to provide timely notification;
* the Principal’s obligation to resolve the matter;
* how to deal with any effects of the resolution on price and time; and
* the implications if the Contractor fails to notify in time.

#### 38.1 Contractor to notify *Faults*

**Definitions**

A ‘*Fault*’ is defined in Clause 79 as an ambigutiy, inconsistency or discrepancy. Note that this definition differs from the definition of a ‘Fault’ in GC21 Edition 1.

* An **ambiguity** is where the meaning is open to different interpretations.
* An **inconsistency** is where information in one part of the *Contract Documents* contradicts what is found elsewhere (eg two different specifications for the same item).
* A **discrepancy** is where information in one part of the *Contract Documents* is not in keeping with what is found elsewhere (eg a reference that does not provide the information intended).

Essentially, a *Fault* occurs where:

* the *Contract Documents* contain two or more requirements that cannot both be complied with, or
* there are two or more reasonable but conflicting interpretations of an item or requirement in the *Contract Documents*.

Consider the following example, based on an actual situation:

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| The concept drawings in the *Contract Documents* showed overland flow paths for storm water between school buildings. However, the School Facility Standards (SFS), also in the *Contract Documents,* contained the requirement ‘*Design drainage to channel stormwater away from buildings’.* The Principal’s *Design* and the SFS could not both be complied with. The Contractor identified an inconsistency which the Principal resolved by instructing a *Variation*. |

Note that a *Fault* does not arise where the *Contract Documents* contain related requirements that can all be complied with.

*Faults* do not include:

* + **works included in the scope of the Contract but not expressly mentioned**: if the *Contract Documents* do not specifically mention something that is required under the the scope of work defined in Clauses 8.1 and 8.2, the Contractor is responsible for dealing with this at its cost. For example, the Contractor is required to complete the *Design* provided by the Principal, including providing items that are not specifically detailed in the *Contract Documents* but necessary for the Works to operate effectively.
	+ **omissions:** if the Principal wants the Contractor to carry out work that is not within the scope defined in Clause 8, the Principalmust instruct a *Variation* and adjust the *Contract Price* and time accordingly.
	+ **errors**: an error is where there is a mistake or inaccuracy in the *Principal’s Documents* (eg a structural member of the wrong size is specified). Note that it is not an ‘error’ if there is a mistake in one document but the correct requirement or accurate information appears elsewhere in the *Contract Documents*. That would be a *Fault*.

The Contractor is not required to search for errors in the *Contract Documents.* However, the Contractor has obligations under Clause 5 (early warning) to inform the Principal if it becomes aware of anything that might affect time, cost or quality. It also has an obligation under Clause 47 to minimize costs. The Contractor therefore cannot ignore errors that it identifies.

If the Contractor finds an error in the Principal’s *Design*, this should be corrected when the Contractor is completing the *Design* in accordance with Clause 39. Correcting an error will require a change to the Principal’s *Design*. This requires an instruction by the Principal under Clause 39.

Consider the following:

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| If the *Contract Documents* for construction of a government office building show swinging doors to all rooms, the Contractor should have anticipated at tender time that the doors would require hinges of a suitable size, type and number for each door.Unless specified, the Contractor would not be expected to anticipate that the doors required security access or nameplates. These are not required for the doors to operate effectively. |

**Notifying *Faults***

The purpose of requiring *Faults* to be notified is to encourage the Contractor to review carefully the *Contract Documents* before using them for any work connected with the Contract. This is a management responsibility that falls to the Contractor. The Contractor is not responsible for correcting *Faults* but must point them out to the Principal for action.

Note the distinction drawn between the *Contract Documents* (all of the documents listed in Clause 7.1) and the *Principal’s Documents*, which are primarily the Principal’s *Design*. The Contractor’s responsibility under Clause 38.1 is to check for *Faults* not only in the Principal’s *Design*, but in all of the *Contract Documents*. For example the Contractor is expected to check for ambiguities or discrepancies in the requirements for health and safety or working hours.

Clause 38.1 requires the Contractor to notify the Principal of *Faults* in *Contract Documents* at least 21 days before it intends using those documents for the purposes of the Contract. This involves checking all the documents that refer to the relevant part of the work, such as related drawings and the specification requirements.

In this context, ‘using’ means any relevant use by the Contractor including design, procurement, manufacture, fabrication or construction. The Clause allows for the Contractor to examine documents progressively as the work proceeds.

Whether a *Fault* was notified earlier than 21 days before it was proposed to use the relevant *Contract Document* would usually be assessed using the *Contract Program*, if current. Note that in GC21, a ‘day’ is a ‘calendar day’.

#### 38.2 Principal to resolve Faults

The Principal has an obligation to resolve any notified *Fault*. It is in the Principal’s interests to respond promptly to notification of a *Fault* in order to minimise any disruption and maintain cooperative relationships.

The Principal should respond by way of an instruction. If the instruction is to carry out a *Variation*, ie a change to the *Works*, it should be given under Clause 48. If not, the instruction should be given under Clause 1.3. If the Principal does not agree there is a *Fault*, the instruction would state the reasons for the Principal’s position and instruct the Contractor to proceed with the work under the Contract.

Where a *Fault* involves the Principal’s *Design*, The Contractor cannot take the initiative to resolve the *Fault* and proceed with the affected work. This would be a departure from the Principal’s *Design* and a breach of Clause 39.5 unless Clause 39.7 allows such a departure.

For *Faults* in the *Contract Documents* that do not involve the Principal’s *Design*, the Contractor may decide how to resolve them and proceed. If the Contractor proceeds with the affected work less than 21 days after giving notification or provides no notification, Clause 38.4 applies if the Principal subsequently resolves the *Fault.*

#### 38.3 The effects of resolution of a Fault

Under a GC21 contract, the Principal accepts the risk of *Faults* in the *Contract Documents* (subject to the Contractor giving the required notification). The Principal is liable to pay the additional costs to which the Contractor is entitled and to allow for delays incurred as a result of resolving a *Fault*. If there is a reduction in costs, the Principal receives the benefit.

**Resolution by Variation**

If the Principal resolves a *Fault* by instructing a *Variation*, the provisions of Clause 48 apply. Note that Clause 48 requires a valuation under Clause 47, which takes into account the limitations on entitlements imposed by Clause 38.4. If the resolution occurs within the specified 21 day notification period, the extension of time and delay cost entitlements under Clauses 50 and 51 respectively would only apply to the extra time required to carry out the *Variation*. There will be no entitlement to payment for aborted work because the Contractor should not have used the affected document until at least 21 days after notifying the *Fault*.

If there is sufficient time before the work is scheduled to start, the Principal should request the Contractor to advise the effects of the proposed *Variation* in accordance with Clause 48.3. Where a *Fault* is involved, this may not be possible and it may be necessary simply to instruct the *Variation* under Clause 48.5.

Resolution not requiring a Variation

Even if the resolution of a *Fault* does not involve a *Variation*, it may still delay the Contractor or cause additional costs. In some situations, it may reduce costs or time.

If resolution of a *Fault* causes the Contractor to incur additional costs, or reduces the Contractor’s costs, then the *Contract Price* is adjusted in accordance with the provisions of Clause 47. If the costs are reduced, the Contractor will not make a *Claim*, but the Contract provides for the *Principal’s Authorised Person* to assess the reduction and adjust the *Contract Price*.

The adjustment to the *Contract Price* is based on a comparison with the costs the Contractor should have anticipated at the time tenders closed*.* This risk allocation is consistent with the Contractor’s acknowledgement in Clause 8.3. That is, the *Contract Price* tendered by the Contractor allowed for everything that the Contractor should have anticipated to be within the scope of the work, based on the documents provided by the Principal.

However, the Contractor’s tender price was not required to allow for the correction of *Faults* in the documents provided by the Principal. Where the *Fault* relates to inconsistent or ambiguous requirements, the Contractor’s tender needed only to allow for the least expensive option that satisfied the Contract.

Consider the following based on an actual situation:

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| The Works included preparing the existing 700m2 vertical wall of a concrete dam for the placement of a 600mm wide doweled reinforced thickening. The Principal’s documents specified the profile required for the existing wall and the method to be used to carry out the scabbling. The Contractor was not able to achieve the required profile using the specified scabbling method and identified an inconsistency in the *Contract Documents*. The Contractor argued that it had only allowed for the specified method of scabbling and not for the work required to achieve the specified profile. The Principal’s instruction therefore resulted in unanticipated additional cost. The adjustment to the *Contract Price* was assessed in accordance with Clause 47. |

Where the Contractor has notified a *Fault* in accordance with the Contract, Clause 38.1 effectively gives the Principal at least 21 days to seek the necessary advice, possibly from the designers or the client, and have the *Fault* resolved before the Contractor’s program is disrupted and progress is delayed. If the resolution occurs within 21 days after notification, the entitlement to extension of time and delay costs would only apply to the extra time required to carry out the extra work.

For example, assume the Contractor notified a *Fault* that affected the Contractor’s *Design* (a critical path activity) 25 days before the Contractor’s program showed completion of *Design*. If the Principal does not resolve the *Fault* until 28 days after the notification and it then takes the Contractor 3 days to complete the *Design*, the Contractor would be entitled to an extension of time of 6 days. This includes 3 days of delay to the program by the time the Principal responded and 3 days for the Contractor to complete the *Design*. The Contractor would also be entitled to delay costs for that period.

If the time to reach *Completion* is reduced on account of resolution of a *Fault*, it will be up to the Principal’s Authorised Person to assess the reduction and adjust the affected *Contractual Completion Dates*.

#### 38.4 Failure to notify within time

The purpose of this provision is to ensure the Contractor has an incentive to meet the 21 day deadline for notifying a *Fault*. If the Contractor notifies a *Fault* less than 21 days before it proposes to use the relevant *Contract Documents*, then the Principal does not have the anticipated amount of time to resolve the matter.

Failure to notify within the specified time is a breach of contract by the Contractor. This breach occurs even if the Contractor claims it was not feasible to provide the 21 day notification.

If the Contractor breaches the Contract in this way, the Contractor is not entitled to ANY delay costs or the cost of ANY aborted work, regardless of how long it takes the Principal to resolve the particular *Fault*. Nevertheless, the Principal should resolve the *Fault* in a timely manner so as to avoid the possibility of a claim for breach of an implied contractual obligation to respond in a reasonable time and to minimisee any extension of time entitlement.

Note that the Contractor is still entitled to an adjustment to the *Contract Price* due to the additional direct costs incurred as a result of resolution of the *Fault*. These costs are considered the Principal’s responsibility. They are agreed by the parties or valued in accordance with Clause 47. The Contractor may also be entitled to an extension of time if the Principal.

Consider the following scenario:

The Contractor notifies a *Fault* in the Principal’s drawings that affects the Contractor’s *Design* (a critical path activity) 14 days before it intends to use the drawings. It takes the Principal 28 days to respond and the Contractor requires 3 days to complete the *Design*. Taking into account the Contractor’s obligation under Clause 38.1, the Contractor is entitled to 10 days extension of time because it took the Principal 7 days longer to respond than the 21 days provided by the Contract and then the Contractor required 3 days to complete the *Design*.

However, the Contractor is not entitled to the cost of aborted work or any delay costs related to:

* the time taken to resolve the *Fault*; or
* any extra time taken to carry out the Principal’s instruction to resolve the *Fault*.

### Clause 39 – Design by contractor and contractor’s documents

This clause describes the Contractor’s *Design* responsibilities, including:

* the extent of the *Design* the Contractor is required to carry out;
* the circumstances under which the Contractor’s *Design* may depart from the *Design* provided by the Principal;
* *Design* review requirements; and
* the requirements for the *Contractor’s Documents*.

#### 39.1 Extent of design by the Contractor

The Contractor has a fundamental obligation, under Clause 1.1, to ‘design and construct the Works in accordance with the Contract’. The extent of the Contractor’s *Design* obligations is described in detail in Clause 39.1 and Contract Information item 38. These obligations could range from preparing shop drawings to designing fully the whole of the Works.

General design responsbilities

GC21 recognises that the Contractor is always required to carry out some amount of design work. These responsibilities apply regardless of whether the nature of the Contract is described as fully documented; construct only; design, development and construct; design and construct, lump sum or other type.

The Principal’s *Design*, provided in the *Principal’s Documents*, will never include every detail of every item that is required to construct the Works. Clause 8 requires the Contractor to carry out ‘all work … necessary to properly carry out and complete the Works’. *Completion* of the *Design* is work that is necessary to complete the Works. In essence, the Contractor is required to design every item required for the Works that has not been designed by the Principal.

However, there are limits to the Contractor’s *Design* obligations. The Contractor is not obliged to design for work or items that are beyond the requirements of Clause 8 without an instruction from the Principal.

Consider the following example, based on an actual situation:

|  |
| --- |
| The *Contract Documents* showed a concrete road to a parking area for a Facility. The road crossed a drainage path. A Facility Standard was referenced as being part of the contract. Minimal specific detail was provided in the *Principal’s Documents.* The Contractor was required to design the road to the minimum standard required for such a road and to comply with the specified requirements of the Facility Standard. It was also required to design a suitable drainage system under the road.The Contractor’s *Design* provided for light traffic only and was not adequate for heavy traffic. There was no detail, requirement or purpose stated in the *Principal’s Documents*, or that could be inferred from them, that obliged the Contractor to design a heavy duty road. The Principal would need to issue a *Variation* instruction if it wished the Contractor provide a road suitable for more than light traffic. |

Clause 39.1.1 describes the general design responsibilities the Contractor will always have. The extent of design development, detailing and coordination the Contractor is required to carry out will depend on the completeness of the Principal’s *Design*. Even when the Principal has provided designs for all the elements of the Works, the Contractor will need to design minor items and ensure that they are properly integrated into the Works. Such items could include window fixtures, cornices and skirting boards, or fittings and downpipes for roof guttering. The Contractor will commonly be required to prepare shop drawings for the fabrication of building components.

The Contractor will always be responsible for coordinating the activities required to complete the *Design*.

Design development

If the Contractor is required to ‘develop’ the Principal’s *Design* for some elements of the Works, those elements are specified in Contract Information item 38A.1. The default entry in Contract Information item 38A.1 is ‘‘the whole of the Works’’, meaning that the Contractor may have to undertake some development of all aspects of the Principal’s *Design*.

Certain contracts will require the Contractor to undertake significant development of a *Design* that has been partially carried out by the Principal.

Contracts for the construction of school facilities are often termed ‘design development and construct’ contracts. The Principal prepares general arrangements and site layout drawings and provides the Contractor with facilities standards which the Contractor has to follow in preparing detailed designs.

A similar strategy has been used for some hospital developments. The Principal produces a concept design and the required standards are defined by reference to an existing facility. The Contractor is required to engage design specialists to develop the Principal’s concept into a fully detailed *Design* and prepare for-construction documents that will ensure the new facility is the same standard as the reference facility.

Consider the following example, based on an actual situation:

|  |
| --- |
| The *Principal’s Documents* for the construction of a multi-storey reinforced concrete framed building showed section details for beam and column interconnections. However, a number of connection types were not shown. The Contractor was required to engage a design consultant and produce designs for the missing connections at its cost under its ‘design develoment’ obligations. |

Full design by the Contractor

The Contractor is required to design fully any elements of the Works listed in Contract Information item 38A.2.

Where the nature of the Contract is described as a ‘design and construct’ contract, ‘the whole of the Works’ may be entered against this item.

If the Contract includes the provision process equipment, then specific items of equipment may be listed here. For example, the Contractor is often required to take full design responsibility for air conditioning or lift systems. Where the Contractor is required to undertake full, detailed design, the Principal would normally specify performance standards and provide minimal detail in the *Principal’s Documents*.

The default entry in Contract Information item 38A.2 is ‘none’, meaning that no elements of the Works have been identified as requiring a full design.

The purpose of items 38A.1 and 38A.2 is to provide guidance to tenderers and the Contractor on the extent of design required under the Contract. Irrespective of the nature of the Contract, there is no clear distinction between ‘design development’ and ‘full design’. ‘Design development’ can also apply where only minimal detail has been provided in the *Principal’s Documents*. The Contractor still has the obligation to carry out all the design that is necessary to bring the Works to *Completion*, including completing the *Design* provided by the Principal and any other design work specified in Clause 39.1.

#### 39.2 Compliance of the Contractor’s design

The design undertaken by the Contractor is work required by the Contract. The Contract states that the Works must be fit for the purposes required by the Contract and must operate effectively and efficiently. In order to comply with the Contract, the Contractor’s *Design* must ensure that this is the case.

Even without the express obligation under Clause 39.2, there is an implication under common law that a Contractor that agrees to do work and supply *Materials* is undertaking:

1. to carry out the work (including design work) with care and skill, ie in a competent, professional manner;
2. to use *Materials* of good quality; and
3. that both the work and the *Materials* will be reasonably fit for the purpose for which they are required, unless the circumstances of the Contract exclude any such obligation.

The ‘purposes required by the Contract’ are determined by reading the Contract as a whole. In addition, particular purposes of the Contract may be specified in Contract Information item 3 or elsewhere in the *Contract Documents*.

If the Contractor’s *Design* does not provide for the Works to be fit for purpose, the Principal can request changes and the Contractor is required to carry them out at no additional cost. For example, the Contractor is required to propose *Materials* in its *Design* that are suitably robust for the uses to which the facility will be put.

However, if the Principal requests a change to the Contractor’s *Design* to suit a purpose that the Contractor considers is not required by the Contract, the Contractor is required to notify the Principal under Clause 48.8 that a *Variation* is necessary on account of the changed requirements.

The Contractor’s *Design* is required to meet all the requirements of the Contract. This could include things that are not specified but are encompassed by other contractual requirements, for example the obligation to comply with Work Health and Safety legislation or the Building Code of Australia.

Note that the Contractor’s liability for the adequacy of the completed *Design* is reduced by the operation of Clause 39.3 which details the Principal’s design responsibilities.

#### 39.3 Principal’s design responsibilities

The *Design* provided by the Principal includes the *Design* in the *Principal’s Documents* and the *Design* included in *Variations* instructed by the Principal. The Principal is responsible for the adequacy of that *Design* and for the consequences of any *Faults* and errors it includes.

Nevertheless, the Contractor still has obligations to notify promptly the Principal of any *Faults* and errors it identifies, under Clause 38 and Clause 5 respectively.

#### 39.4 Design and design development

This Clause clarifies that the Contractor cannot claim that design or design development cause a *Variation*.

A *Variation* is defined in Clause 79 as a change to the Works, ie the finished asset or facility. Like Clause 39.4, the definition emphasises that necessary items of work that are not shown in the *Principal’s Documents* but are identified in completing the Principal’s *Design* are not *Variations*. Under Clause 8, the scope of the work the Contractor is required to carry out includes all the work and items of work necessary for the Works:

* to be fit for the purposes required by the Contract; and
* to operate efficiently and effectively.

Nothing that is required under Clause 8 can be a *Variation*.

#### 39.5 No unauthorised departure from the Principal’s design

The Contractor must not alter the *Design* provided by the Principal when completing the Principal’s *Design*, and designing the elements of the work listed in Contract Information item 38, except:

* if instructed to by the Principal; or
* as allowed under Clause 39.7.

Even if the Contractor discovers a flaw in the Principal’s *Design*, the Contractor is required to notify the Principal and wait for a response.

Consider the following example, based on an actual situation:

|  |
| --- |
| The *Principal’s Documents* for the construction of a school hall included a roof design where the roof trusses spanned the length of the hall rather than its width. The purpose of this more costly arrangement was to provide better natural light. However, this purpose was not expressly stated. The Contractor assumed the roof design was an error and altered the Principal’s *Design*, without prior notice or authorisation, to provide a more economical design. The Contractor was required to change its design to meet the Principal’s requirements at its cost and take responsibility for the consequent delay. |

#### 39.6 Departures proposed by the Contractor

The Contractor may realise, when carrying out the design work required under the Contract, that a departure from the Principal’s *Design* is necessary or an alternative design may be beneficial.

Departure considered necessary by the Contractor

If a departure, such as the rectification of an error in the Principal’s *Design* or a change following a design review, is necessary for the Works to be fit for the purposes required by the Contract, the Contractor is required to notify the Principal and should propose the necessary changes. The Principal would need to respond by agreeing on a means of overcoming the error or dealing with the required change and instructing a *Variation*, if necessary.

Consistent with the Principal’s responsibility under Clause 39.3, the Principal would be liable for the additional costs and any delays incurred by the Contractor on account of the Principal’s error.

Departure considered beneficial by the Contractor

The Contractor can propose a change to the Principal’s *Design*.

Where the change is likely to offer significant value-added benefits to the Principal, the Contractor may submit an innovation proposal under Clause 41.

Where the change is primarily of benefit to the Contractor, the proposal must be made in writing under Clause 48.6 and should include:

* details of how the change would improve the efficiency or effectiveness of the Works or the other benefits it would offer;
* any effects on the *Contract Price* and the time to reach *Completion*; and
* any effects on other aspects of the Works.

Refer to the commentary on Clause 48.7 for information about the Principal’s options if the Contractor proposes a *Variation* for its convenience.

#### 39.7 Departures allowed for specified elements

The provisions of Clause 39.7 only apply to the elements of the Works listed in Contract Information item 38A.3. These could include items of a proprietary nature, or elements of the Works that do not impact on other aspects of the Principal’s design.

The Contractor is permitted to depart from the design provided by the Principal, for these specific elements, only if the Principal has been given written notification. After giving the notification, the Contractor must wait 7 days before implementing the proposed departure. Generally, the Principal would only be concerned about the performance and fitness for purpose of elements included in item 38A.

This Clause imposes a slight risk on the Principal. If the Principal does not respond to a proposed departure within 7 days AND the Contractor’s proposed departure complies with Clause 39.7.1, the Contractor is allowed to proceed. The Contractor must ensure that the departure does not adversely affect the Works, but there may be some consequences that are undesirable to the Principal. If, for example, the Principal does not like the appearance of that element, the Principal does not have a right to demand that the Contractor amend the completed design without instructing a *Variation*. The new design proposed by the Contractor would have become part of the Contract when the Principal failed to respond within 7 days.

#### 39.8 Design review

If the Contractor has obligations to undertake design reviews in conjunction with end users or other people nominated by the Principal, and to respond appropriately to their findings, these will be specified elsewhere in the Contract. This Clause merely highlights that the obligations may exist. The obligations may be extensive and can apply to the whole of the *Design* or only certain specified parts.

Some agencies will establish groups with specific knowledge or expertise to carry out design reviews, to help ensure the developed design is fit for purpose. For a hospital project, for example, medical and maintenance staff may be invited to provide input into the Contractor’s design. The design process, managed by the Contractor, will then commonly involve:

* holding workshop(s) to verify the detailed design requirements;
* developing the draft design and incorporating it into the draft *Contractor’s Documents*;
* requesting the nominated people or groups to review and comment on the draft *Contractor’s Documents*;
* identifying any changes necessary to the Principal’s *Design* in order to meet the requirements of the review;
* submitting proposed changes to the Principal for consideration; and
* finalising and submitting the *Contractor’s Documents*, taking into account the Principal’s responses to the proposed changes.

The provisions of the Contract, and particularly Clause 8, will apply when determining whether the requirements identified during design reviews are part of the scope of the work.

#### 39.9 Compliance of Contractor’s Documents

In addition to ensuring that the Works are fit for purpose, which is a fundamental requirement the Contractor’s *Design* must meet, the documents produced by the Contractor must comply with the requirements of the documents, Codes, Regulations etc listed in this Clause.

Note that:

* the Building Code of Australia is a required standard only if this is stated in Contract Information item 38B; and
* in the absence of specified relevant standards, ‘good industry standards’ are required to be followed.

‘Industry standards’ are sometimes difficult to define. In order to avoid a dispute over the acceptable quality of work, designs for elements not covered by a formal standard should specifically describe quality requirements.

#### 39.10 Effect of Variations

Even if the Principal instructs a *Variation*, the *Contractor’s Documents* must ensure that, ultimately, the Works are fit for the purposes required by the Contract. That is, the Contractor is required to complete the design inherent in the *Variation* and produce the documents necessary to construct the Works such that they are fit for purpose.

### Clause 40 – Submitting contractor’s documents

This Clause describes the procedure for submission of the *Contractor’s Documents* and the significance of comments from the Principal. It reaffirms the Contractor’s responsibility for the quality of the completed *Design*.

#### 40.1 Progressive submission of documents

The Principal must be given the opportunity to review the documents that are produced by the Contractor for the purpose of undertaking the Works.

The wide definition of *Contractor's Documents* (‘drawings, specifications, calculations and other documents and information’) will require the Contractor to give the Principal all the documents that the Contractor needs to produce in order to design and construct the Works. It will be in the Contractor's interests for all design (including sketches, drawings and fabrication details) to be brought to the Principal’s attention. If the Principal identifies areas where the documents do not comply with the Contract, the Contractor will be able to rectify them before they are used. It should always be less costly to change a drawing than to rectify defective work.

The *Contractor's Documents* must be submitted to the Principal progressively, as they are developed. Each document must be submitted at least 21 days before the date that the Contractor proposes to use it for any purpose related to the Contract.

The Contractor will be in breach of the Contract if the Contractor orders any items to be incorporated in the Works (such as mechanical equipment or *Materials*) unless the associated *Contractor's Documents* have been submitted to the Principal at least 21 days prior to the time that the Contractor proposes to use them for construction. However, the only penalty likely to be suffered by the Contractor for not complying within this timeframe is the cost (and delay) of any aborted work, in the event of the Principal discovering a non-conformance in the submitted documents.

The Principal will not be able to review properly the *Contractor’s Documents* if they are submitted in a haphazard fashion. The Contractor is required to submit the documents in manageable numbers and in packages that contain enough detail to provide context and for the Principal’s review to be meaningful. The Principal will most likely review the packages successively, and not reconsider documents previously reviewed. It is in the Contractor’s interests to provide packages of documents that show interfaces and the interactions between different elements of work. This will avoid rework where the Principal has commented on a later submission that interfaces or affects an earlier submission.

Although the Contractor must assume that the Principal will require the number of copies stated in *Contract Information* item 28 for all documents, the parties could mutually agree to a different arrangement, such as an electronic copy, for convenience.

#### 40.2 Principal need not respond

Note that GC21 requires the *Contractor’s Documents* to be submitted for review, not for ‘approval’. There is no obligation on the Principal to make any response to the Contractor about the *Contractor's Documents* submitted under Clause 40.1. However, any response by the Principal must clearly detail any objections and ensure that the Contractor retains all responsibility for the *Contractor’s Documents*. Appropriate responses are detailed in Sample Letter 40).

Consider the following example, based on an actual situation:

|  |
| --- |
| The *Contract Documents,* prepared by a Consultant unfamiliar with the GC21 General Conditions of Contract, stated that workshop drawings were to be submitted for approval. The *Principal’s Documents* contained an inconsistency and the workshop drawings detailed the Contractor’s preferred interpretation. The Principal returned the *Contract Documents* with no comments or objections.When the Principal later sought to rectify the incorrect interpretation, Clause 38.4 could not be applied to deny the Contractor an entitlement to the costs of delay or aborted work. The Principal had effectively accepted the Contractor’s design under the specified ‘submit for approval’ requirement. The inconsistency between the GC21 General Conditions and the requirements of the technical specification changed the risk allocation in the Contract as a whole. |

The Principal should check the *Contract Documents* carefully before they are issued to ensure that they do not include any requirement for the Principal to ‘approve’ *Contractor’s Documents*. The Principal should also expressly reject any request from the Contractor to have the submitted documents approved. If the Principal accepts or approves the *Contractor’s Documents*, any errors or *Faults* in the documents can become the Principal’s responsibility.

#### 40.3 If the Principal objects

The Principal has the right under Clause 40.3 to object to the *Contractor's Documents* (Sample Letter 40). If the Principal advises an objection, the Contractor is obliged to take it into account in completing the design. This may involve discussing the ramifications and agreeing on a satisfactory resolution. It may require changes to the *Contractor’s Documents*.

If the Principal’s objections demonstrate that the *Contractor's Documents* do not conform with the Contract in any respect, then the Contractor is obliged to correct the non-conformance at its own cost.

If the *Contractor’s Documents* conform with the Contract but the Principal has an objection to something in them, then the Principal will need to instruct a *Variation*. The provisions of Clause 48 will apply.

The Principal’s objections may relate to *Faults*, errors and omissions in the *Contractor’s Documents*. It should be noted that the term ‘omission’ in this clause may refer to either:

* a failure of the *Contractor’s Documents* to include all the relevant requirements of the Contract, or
* the situation where the Principal wants the Contractor to carry out work that is not within the scope defined in Clause 8.

*Faults*, errors and omissions are discussed in more detail in the commentary on Clause 38.

#### 40.4 Contractor retains responbility

Clause 40.4 states that, despite the Principal having received the *Contractor’s Documents* and whether or not the Principal has objected to them, the Principal does not become liable for those documents. The fact that the Principal has received a document, or has reviewed a document and failed to find or notify a *Defect*, does not affect any of the Principal’s rights to compensation for the impacts of the *Defect*.

### Clause 41 – Innovation

Clause 41 invites innovation proposals from the Contractor with the prospect of sharing in any savings accruing to the Principal. Despite acceptance by the Principal of any proposed changes, the Contractor remains fully responsible for the compliance of the changed Works and any consequences flowing from the changes.

#### 41.1 Proposals by the Contractor

The Contractor is invited to put detailed proposals to the Principal for changes to the Works (*Materials* or Design or both) which are likely to offer “significant benefits” to the Principal. The significant benefits test includes “long-term or repeated benefits” to the Principal.

#### 41.2 No adverse effect

As any adverse effects might not be immediately apparent, it would be prudent for the Principal to include, as a condition of acceptance of the innovation proposal, that it will not adversely affect the quality of design or construction or operation or maintenance of the Works and is consistent with the purpose and intent of the Contract and the Works.

#### 41.3 No Claims to arise

Although the Principal is obliged to consider any such proposal, no *Claim* can arise out of either:

* the Principal's consideration of a proposal; or
* the Principal's failure to accept any proposal.

#### 41.4 Financial benefits

Before any proposal proceeds there must be agreement between Principal and Constractor on:

* the :”financial benefits” accruing to the Principal from the proposed innovation; and
* if shared, the Contractor’s entitlement to those “financial benefits”.

The Principal does this by making a financial assessment of the benefits projected for both paties in the proposal and completing *Contract Information* item 39.

## Construction

### Clause 42 – Setting out the works and survey

### Clause 43 – Construction

#### 43.1 Supply Materials and construct the Works

The Contractor is required to supply all *Materials* and construct the Works. Unless the Contract provides otherwise, the Contractor is required, therefore, to do everything necessary for the carrying out and *Completion* of the Contractor's obligations under the Contract. It is not necessary to stipulate that the Contractor “supply all labour, plant and *Materials*, *Temporary Work* etc, etc.”

Clause 43.1 provides a list of the sources of the obligations that require the Contractor to meet in constructing the Works. This list includes the *Contractor’s Documents* (41.1.2), which in turn, must comply with relevant standards and *Statutory Requirements* (41.1.6). If no standards are specified, then the Works must be constructed to “good industry standards”. The clause aims to ensure that the Contractor is in no doubt as to what is required in constructing the Works.

Although the Contractor must comply with the Principal's instructions (Clause 43.1.4), the Principal must be careful not to be so prescriptive and interfere to such an extent with the Contractor's obligations that the Principal could be said to have assumed the Contractor’s responsibility for the *Design*, the method of working or the functionality of the Works. In addition, the Principal should not expose itself to an argument that its instructions intervene excessively and require additional time and cost to implement.

### Clause 44 – Testing

### Clause 45 – Defects

A *Defect* occurs when the Contractor fails to comply with the requirements of the Contract and this results in a *Fault* in the Works or which affects the Works. See the definition of *Defect* in Clause 79. This clause clarifies the rights and obligations of the Principal and the Contractor when there is a *Defect*. The focus of the clause is *Defects* discovered prior to *Completion.*

Note that the term ‘fault’ in the definition of a *Defect* has its usual dictionary meaning. A fault could be an error, mistake, blemish, imperfection, flaw, omission or shrinkage. It is different from the term ‘*Fault*’ which is defined in Clause 79. As well as physical deficiencies in the Works, deficiencies such as flawed designs are also *Defects*, since they affect the Works.

Inadequate documentation such as WHS Management Plans is more appropriately described as ‘non-complying’ work. The Contractor is required to rectify non-complying work and should be instructed to do so by reference to the clause setting out the relevant requirements. For example, Clause 15.3 requires the Contractor to produce complying management plans.

#### 45.1 Rectification of Defects

It is the Contractor's responsibility – not the Principal’s – to ensure that the Works comply with the Contract.

Clause 45.1 requires the Contractor to identify progressively and promptly make good (rectify) any *Defect* as the Works proceed. The Contractor is not to wait until work is nearly finished before checking for *Defects.*

The Contractor must not rely on the Principal to prepare lists of *Defects* and monitor their rectification. Nevertheless, if the Principalidentifies a *Defect*, the Contractor should be notified promptly. This is consistent with the Principal’s early warning obligations set out in Clause 5.

*Defects* should be rectified within a reasonable time after they are identified. It is in the Contractor’s interests to rectify *Defects* promptly. Early rectification reduces the risk that a *Defect* may be covered up or affect other work before it is rectified, which makes rectification more difficult and costly and potentially delays progress.

Clause 45 applies to defective designby the Contractor as well as defective construction, as implied by the introductory note to Clause 45 (which forms part of the Contract). In particular, the note states that the Principal ‘holds the Contractor responsible for its work’ and that *Completion* must be defect-free. The objective of Clause 45 is for the Works to be designedand constructed such that it fully complies with the requirements of the Contract. All *Defects* must be rectified before a notice of *Completion* is given under Clause 65.

#### 45.2 Principal’s instruction to make good

At any time before *Completion*, the Principal has the right to instruct the Contractor to make good a *Defect*; by giving the Contractor a *Defect Notice*. (Sample letter 45)

Note that this clause specifically refers to *Defects* discovered before *Completion*. Clause 67.1 gives the Principal similar rights after *Completion*.

Where a possible *Defect* is identified, the Principal should meet the Contractor on the Site and confirm that the definition in the Contract applies. Before the Contractor is given a written instruction to make good the *Defect*, the rectification strategy should be discussed in order to determine a reasonable time for rectification.

The Principal may issue a *Defect Notice* for any identified *Defect.* Where the Contractor plans to rectify the *Defect* in accordance with its procedures, it may not be necessary to issue a *Defect Notice.* However, where the *Defect* may be covered over or built on, hidden or could result in a safety or environmental issue, the Principal should promptly issue a *Defect Notice*. The *Defect Notice* is to:

* advise what the *Defect* is, preferably with a reference to the contract requirement that has not been met;
* specify the time by which the *Defect* is to be rectified;
* advise any constraints on when rectification work can be carried out at the facility;
* advise any preconditions that need to be satisfied before the rectification work is carried out; and
* except in an emergency situation, request the Contractor to advise how the Contractor intends to make good the *Defec*t and when the rectification work will be undertaken.

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

The *Defect Notice* should specify a reasonable amount of time for the Contractor to comply, considering the nature of the *Defect* and the problems it may cause.

#### 45.3 Making good by the Principal

The Principal has the right to have a *Defect* made good by others if the Contractor does not rectify the *Defect* within the time specified in a *Defect Notice*. (Sample letter 45)

The Principal should arrange for the work to be done 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 is not serious about having the work carried out by others. It may also affect the Principal’s rights.

However, the Principal should be reasonable in determining when to take this action. The Contractor may have good reasons for deferring rectification of a specific *Defect*, for example if a specialist subcontractor is involved.

If the Principal exercises its right under Clause 45.3, then the cost of making good the *Defect* is a debt due from the Contractor to the Principal, unless the *Defect* is not the Contractor’s responsibility (see Clause 45.5). The Principal should call quotations for the rectification work, if possible, or take other measures to demonstrate that the costs incurred are reasonable.

The rectification costs need to be recorded and evidence kept to support a subsequent claim by the Principal. The amount claimed should include all the Principal’s costs, including administration and management costs. The Contractor must be notified of the costs incurred to rectify the *Defect* and advised of the debt due (use Sample letter 45).

This debt may be recovered from subsequent payments, as a deduction *Variation*, or it may be called up against one of the *Undertakings.* Otherwise, it may be recovered using the set-off provisions in another contract or through a court process.

The Contractor is responsible for work carried out by others under Clause 45.3 as if the Contractor had carried out the work itself. If further *Defects* are discovered in work previously made good by others under this clause, even though the Principal instructed those others, the Contractor remains liable to make good the new *Defects*. This is part of the risk accepted by the Contractor in failing to make good the original *Defect* when instructed to.

However, the Principal cannot rely solely on the Contractor’s liability to rectify these further *Defects*. If the *Defects* are primarily due to the actions or omissions of the contractor carrying out the remedial work, it should be initially pursued.

Note that the Principal is entitled to immediate rectification of a *Defect* if urgent action is required to ensure the protection of people, property or the environment. This entitlement arises under Clause 26.2. The Principal should refer to that clause when instructing such urgent action.

#### 45.4 No change to rights and obligations

Whether *Defects* are made good by the Contractor or by others, the Contractor's warranties, other liabilities and obligations under the Contract are not reduced by Clause 45. Likewise, the Principal's common law right to damages is preserved.

Neither the Contractor's obligations nor the Principal’s actions under Clause 45 affect any other remedy or right the Principal has, such as:

* the right to accept the Works with *Defects* (Clause 46.1);
* the right to propose deductions from the *Contract Price* and other conditions and, if they are agreed, accept the Works with *Defects* (Clause 46.2);
* the right to deduct the cost of rectifying *Defects* from the Contractor’s payment entitlements (Clause 63);
* the right to terminate the Contractor's employment because of *Contractor's Default* (Clause 73); or
* the right to make good *Defects* after *Completion* and deduct the cost from the *Contract Price* (Clause 67).

#### 45.5 Defects that are not the Contractor’s responsibility

This clause deals with defective work for which the Contractor is not responsible, such as defective *Materials* supplied by the Principal or defects resulting from the Principal’s design.

The Contractor’s obligation in this case is to report the *Defect* to the Principal as soon as it becomes apparent to the Contractor, so as to mitigate the Principal’s cost in making good the *Defect*. This is early warning, as required by Clause 5.

If the Principal agrees with the Contractor’s assessment and wants the Contractor to make good the *Defect*, the Principal needs to issue a *Variation* instruction. The Contractor must comply with any *Variation* instruction. The effect on the *Contract Price* would be valued in accordance with Clause 47 and any effect on the time to reach *Completion* would be assessed under Clause 50. Delay costs would apply if the rectification work delays *Completion.*

If there is any disagreement about whether a *Defect* results from the Principal’s design or other work for which the Contractor is not responsible, and the matter cannot be resolved through discussions, Clause 69 provides a mechanism for commencing resolution.

### Clause 46 – Acceptance with defects not made good

This Clause sets out the options for both parties if the Principal agrees to accept the Works with specified *Defects* not made good.

#### 46.1 Acceptance of Defects

The Principal may choose to accept defective work but is not obliged to do so. The Principal may accept defective work at any time. It is entirely up to the Principal.

The Principal may agree to accept defective work:

* to avoid a delay in completing the Works;
* to avoid disruption to the occupants of completed Works;
* because there is limited benefit to be gained from making good the *Defect*;
* because of changed requirements;
* because it is not clear who is liable for making good the *Defect* and there is a risk of disproportionate costs arising from resolution of the *Issue*; or
* other budgetary or commercial reasons.

Note that advice should be sought from the designer (where the Contractor is not responsible for the design) and concurrence obtained from the owner of the facility or the client (as applicable) before accepting any defective work.

#### 46.2 Principal’s proposed deduction and terms

Before agreeing to accept defective work, the Principal should issue a proposal in writing to the Contractor indicating that the Contractor may not be required to make good a specified *Defect* provided that:

* the *Contract Price* is reduced by a reasonable amount; and/or
* the Contractor accepts the other conditions (terms) in the Principal’s proposal (Sample letter 46).

In a proposal to accept defective work, the Principal needs to specify clearly the particular *Defect* and basis on which it will be accepted. The proposal could require such conditions as:

* a specified deduction to be made from the *Contract Price*;
* additional work to be undertaken to provide an acceptable product;
* the Contractor to remain fully liable for the Works as constructed;
* the Contractor to release the Principal from any claim made as a result of the Principal’s acceptance of the defective work;
* no *Contractual Completion Date* to be extended.

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 the 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 the agreement to accept the defective work.

#### 46.3 If the Contractor agrees with the proposal

If the Contractor advises, in writing, that it agrees with the value of the deduction and all the terms proposed by the Principal, the Principal should then confirm in writing that the *Defect* is accepted. The Principal would adjust the *Contract Price* by the agreed amount.

#### 46.4 If agreement is not reached on the deduction

The Contractor may disagree with the quantum of the deduction but agree to all the terms proposed by the Principal. If it is not possible to reach agreement, even after negotiation, the Principal may simply instruct the Contractor to rectify the *Defect*.

Alternatively, the Principal can have the amount of the deduction decided by the Valuer. If a Valuer has not yet been engaged, the parties could agree to engage one for this purpose. The Valuer is required to apply the principles in Clause 47.6 and to take into account the effect of the defective work on future costs, including operation, maintenance and any reduction in the life of the facility.

#### 46.5 If agreement is not reached on the terms

If the Contractor does not accept the Principal’s terms in writing, the Contractor is required to make good the *Defect*. There may be scope to negotiate the terms, but the initiative is with the Principal. The Contractor has no right to have defective work accepted.

Using the example above, if the Contractor refuses to accept responsibility for the consequences of the brick wall not meeting specified tolerances, the Contractor would be required to demolish the wall. Alternatively, the Contractor may be able to propose remedial work that is acceptable to the Principal. In this case, it could be structural reinforcement of the brickwork. If accepted, the remedial work must be instructed as a *Variation* for the convenience of the Contractor. Any additional work would be carried out at no cost to the Principal and on terms acceptable to the Principal (see the commentary on Clause 48).

#### 46.6 Liability for Defects

Although the Principal may accept under Clause 46 that certain *Defects* need not be made good, the Contractor remains liable for all other *Defects*. This includes other *Defects* in the part of the Work that has been accepted by the Principal and any *Defect* that has not been discovered.

In the above example, even if the Principal has accepted the defective wall, if it is not possible to install fittings such as downpipes due to the *Defects*, the Contractor is required to make whatever adjustments are necessary and to ensure the Works as constructed fulfils its intended purpose.

## Change to work and time

### Clause 47 – Valuation of changes

Clause 47 sets out:

* the procedures for valuing adjustments to the *Contract Price* and *Contractual Completion Dates* when the Contractor makes a *Claim*; and
* the principles for valuing adjustments to the *Contract Price*.

The following Clauses in the Contract refer the parties to Clause 47 for a valuation:

* Clause 8 – Scope of the work;
* Clause 37 – Site Conditions;
* Clause 38 – Faults;
* Clause 44 – Testing;
* Clause 46 – Accepting Defects;
* Clause 48 – Variations;
* Clause 49 – Changes to Statutory Requirements;
* Clause 52 – Acceleration;
* Clause 53 – Principal’s Suspension; and
* Clause 68 – Claims.

**Procedures**

The provisions of Clauses 47.1 to 47.4 apply when the Contractor has made a *Claim*. They apply to price adjustments and to extensions of time. They do not apply when the Principal has accepted a proposal from the Contractor for changes to the work, for example under Clause 8 or Clause 48.

Clauses 47.1 to 47.3 apply if the Principal agrees that the Contractor has an entitlement to adjustments but there has been no prior agreement on their values. Clause 47.4 applies if the Principal does not agree there is an entitlement.

#### 47.1 If the Principal agrees there is an entitlement

Negotiation

If the parties agree the Contractor has an entitlement, the most efficient and cost-effective method of valuing the appropriate adjustments is for the parties to reach agreement.

When the Contractor submits a Claim for adjustments, the Principal should first determine whether the Claim includes all the information required by clause 68.3 (see also clause 47.2). If the required information is provided, the Principal assesses whether the claimed adjustments are reasonable. If they are, the Principal notifies the Contractor and clause 47.11 applies.

If the Principal does not consider the claimed adjustments reasonable, the Principal should advise the Contractor promptly. The Principal should also note the date when the Principal will be required to provide a formal assessment under clause 47.1.3, if agreement is not reached. It is the Principal’s contractual obligation to meet this timeframe.

The Principal should then initiate negotiations, with a view to reaching agreement with the Contractor on reasonable adjustments. The Principal may ask for more details of the Contractor’s calculations, or query specific aspects of the Claim. Use Sample letter 47D. Another option is for the Principal to propose adjustments that it considers reasonable.

The negotiations may involve meeting to discuss the details. If the two Authorised Persons are having difficulty reaching agreement, it is often useful to involve others in the negotiations. More senior personnel may be able to reach agreement by applying a more commercial approach to the negotiations.

If agreement is reached on the appropriate adjustments, the Principal confirms the agreement in writing and Clause 47.11 applies.

If agreement cannot be reached by negotiation, there are three options available:

* Option 1: If a Valuer has been engaged under the Contract, either party can break the deadlock by referring the matter to the Valuer.
* Option 2: If a Valuer is not engaged at the time and both parties agree to do so, a Valuer can be engaged to resolve the matter (see Clause 35). Note that, if the Valuer is only required for a single valuation, this must be made clear when entering into the engagement with the Valuer, in accordance with Clause 35.2.
* Option 3: The Principal may assess the adjustments to the Contract Price. The price adjustment must be assessed in accordance with the principles set out in Clauses 47.6 to 47.10 and any extension of time must be assessed in accordance with Clause 50. Note that, if a Valuer has previously been previously engaged on an ongoing basis, option 3 is only available if both parties agree to it being used.

The options are discussed in more detail below.

Referral to the Valuer

Either the Contractor or the Principal can request the Valuer to decide the value of appropriate price and/or time adjustments (see Sample letter 47A). Even if no Valuer has been engaged at the start of the Contract, a Valuer can be engaged to determine the adjustments applicable for a specific Claim or set of Claims. Sample letter 47B can be used to suggest this option to the Contractor, if agreement cannot be reached through negotiation.

If a Valuer is engaged at any time, the parties are bound by the conditions in Clause 35. The Valuer provides an independent determination of the value and time effects using the principles set out in Clauses 47 and 50, in accordance with the procedure in Schedule 4 (Agreement with Valuer).

The Contractor’s submission to the Valuer should include the information required by Clause 68.3 and explain how the quantum of the claimed adjustments was reached. The Principal’s submission must explain why the claimed adjustments are not considered reasonable. It must also state the Principal’s assessment of the appropriate adjustments.

Either party can justify its valuation of price adjustments by:

* referring to rates or prices in the Contract (eg in a *Schedule of Rates* or Schedule of Prices);
* using measured quantities and rates or prices previously agreed for valuing adjustments;
* reference to typical industry costs for the particular items of work (eg bricklaying, excavation or supply of piping *Materials*); or
* using a valuation report from an independent quantity surveyor; or
* in terms of actual time spent on the variation work and typical industry hourly rates.

Evidence supporting the assessment should be provided. This could include:

* copies of the relevant tender schedules;
* copies of previously agreed valuations of variations;
* copies of estimating handbooks;
* a valuation from an independent quantity surveyor; or
* copies of site records and evidence that the rates adopted are reasonable.

Note that it is not the Valuer’s role to decide whether or not the Contract provides an entitlement. The Valuer’s role is only to assess the value and time effects of additional or decreased work when both parties acknowledge that there is an entitlement but they cannot agree on the appropriate adjustments. Thus it is not appropriate for the Contractor to refer a *Claim* to the Valuer if the Principal does not agree there is an entitlement. Refer to Clause 47.4. If the Contractor refers such a *Claim* to the Valuer, the Principal should advise the Valuer and the Contractor that it cannot proceed with a valuation because the preconditions in Clause 47.1 have not been met. The Contractor will need to escalate the ‘*Unresolved Claim*’ for resolution to the senior executives under Clause 69.1.

Assessment by the Principal

If agreement is not reached by negotiation or using a Valuer, the Principal is required to make an assessment of the appropriate adjustments. The principles for valuation are set out in Clauses 47.7 to 47.10. The principles for calculating time are in set out in Clause 50. The Principal is to advise the Contractor in writing of the assessment within 28 days after all the details of the Claim are received (see Sample letter 47C). The advice should include the quantum of the assessment and the rationale behind it in sufficient detail to explain why it differs from the Contractor’s Claim.

If the Contractor disagrees with the Principal’s assessment, it can seek resolution by notifying the disagreement as an *Issue* under Clause 69.1.

When the Principal makes an assessment, this either resolves the matter (if the Contractor accepts the assessment) or results in the matter being escalated to a higher level, allowing the Works to proceed while the matter is resolved ‘off-Site’. This ensures that the matter does not become an ongoing source of friction between the *Authorised Persons*. It is in keeping with the co-operative nature of GC21, moving the matter on towards resolution using the mechanisms in the Contract and preventing it from damaging relationships on the Site.

#### 47.2 Information required for a valuation

Clause 68.3 specifies the information the Contractor is required to provide in support of a *Claim*.

When a *Claim* is submitted, the Principal should check promptly whether it complies with Clause 68.3. If the *Claim* is not complete, the Principal is not required to assess the adjustments immediately but should not delay in advising the Contractor of the missing information (see Sample letter 47D). Refer to the commentary on Clause 68.3 for advice as to how to respond to a *Claim* that does not include the specified information.

A *Claim* cannot be referred to the Valuer until all the specified supporting information is provided. This is intended to expedite the resolution of *Claims.* It ensures that the Principal has sufficient information to prepare an adequate response and that the Valuer has sufficient information to make a reasoned determination. If the Contractor refers an unsupported *Claim* to the Valuer, the Principal should advise the Valuer that it cannot proceed with a valuation until the Contractor has provided the information required under this Clause.

#### 47.3 Price and time adjustments to be dealt with together

If a *Claim* involves both price and time adjustments, they are to be dealt with together, whether they are negotiated, referred to the Valuer or assessed by the Principal.

If the Contractor submits a *Claim* indicating, for example, that the time effects will be advised later, the Principal is entitled to refuse to assess the *Claim*. Further, the *Claim* cannot be referred to the Valuer until the time effects are advised. The Principal could also refer the Contractor to Clause 50.1 and the risk it takes by not promptly advising the details of a delay. Where it is difficult to quantify the total delay likely to be caused by a *Claim*, the Contractor should provide a reasonable estimate based on its current knowledge and supported by a current *Contract Program*.

One objective of this provision is to ensure the Principal knows the full impacts of a *Claim* promptly, to assist in controlling the project budget and making decisions about the Contract work and related matters.

#### 47.4 If the Principal does not agree there is an entitlement

If the Principal does not agree that the Contractor is entitled to any adjustment to the *Contract Price* or any extension of time, the Principal must advise the Contractor in writing (see Sample letter 47E). Note that if the *Claim* involves both cost and time, Clause 47.4 only applies if the Principal does not agree that there is any entitlement at all. If the Principal agrees that there is some entitlement to either time or cost adjustments, then Clause 47.1 applies.

The Principal’s advice should be given within 28 days after all the required information has been received (see Clause 68.3), and should include written reasons that are based on the provisions of the Contract.

For example, if the Contractor claims that an instruction of the Principal resulted in a *Variation* and the Principal disagrees, the Principal’s reasons could refer to provisions of the Contract that show the work does not meet the definition of a *Variation* or to the technical specification or drawings that demonstrate the work was shown in the Request for Tender Documents.

The Principal’s advice that there is no entitlement would constitute an ‘assessment’ which would entitle the Contractor to notify an *Issue* under Clause 69.1.

#### 47.5 Daywork may be instructed

If the parties are unable to agree on appropriate adjustments for agreed additional work (almost always *Variations)*, the Principal may instruct that work to be carried out as *Daywork* (Sample letter 47).

Instructing a *Variation* to be carried out as *Daywork* allows the work to proceed without delay and the Contractor to be recompensed for actual costs incurred. Schedule 8 (Daywork) sets out the procedures that apply when *Daywork* is instructed and specifies how payment for *Daywork* is calculated.

When *Daywork* is carried out, it involves both parties in significant additional administration.

The Contractor is required to record, on a daily basis, the resources used for the work, including plant and personnel hours. The Contractor is also required to collate and provide evidence of the cost of resources and *Materials* used, in the form of records such as time sheets, invoices, receipts and other documents. This includes evidence of the wages and allowances paid.

The Principal will need to endorse the records of resources used for the work, and will often need to provide additional supervision on the Site. The Principal is required to check all the records provided as evidence of the Contractor’s costs, including timesheets, plant hire dockets and *Materials* invoices. The Principal must then make detailed assessments of the Contractor’s entitlements, including a 22.5% loading for overheads and administrative costs.

There is considerable scope for disagreements to arise when *Daywork* is carried out. There may be disagreements over which personnel are ‘employed on the *Variation*’ and therefore included in calculating the ‘labour’ component. Note that Schedule 8 specifies that supervisory staff who are ‘normally engaged on the Works’ are included in the 22.5% overhead allocation. Further, the Principal is required to approve the rates paid for labour, which may result in disagreements.

Note that when *Daywork* is undertaken, most of the risk associated with inefficient execution of the work is allocated to the Principal. For example, if wet weather affects the work and causes delays or requires re-work, the Principal will still have to pay for the labour, plant and *Materials* actually used. It is sometimes said that when *Daywork* is instructed,the Principal stands the shoes of the Contractor. *Daywork* should only be considered if it is not possible for the Contractor to provide a lump sum price the work involved in a *Variation* and that price would include an unacceptable amount for risks that might not eventuate.

The principles for valuing *Daywork* are set out in Schedule 8. Note that they are different from the principles set out in Clauses 47.6 to 47.9.

For example, the amount payable to the Contractor for ‘overheads, administrative costs, site supervision, establishment costs, attendance and profit’ are calculated as 22.5% of the costs directly attributable to the work. For other adjustments to the *Contract Price*, these costs are recompensed by paying delay costs and the *Contractor’s Margin* specified in Contract Information item 44 for ‘on site overheads including attendance and administration’.

Valuation principles

#### 47.6 Application to Contract Price adjustments

The provisions of Clauses 47.7 to 47.10 apply when valuing adjustments to the *Contract Price*. Clauses 47.7 and 47.9 deal with adjustments for additional work and unavoidable additional costs. Additional work could result from a *Variation* instruction. Unavoidable additional costs incurred by the Contractor could be a result of:

* an instruction from the Principal to change the Contractor’s work methods or *Temporary Work* (Clause 8.8.2);
* dealing with materially adverse *Site Conditions* (Clauses 37.6.3.2 or 37.6.4.2);
* an instruction to carry out additional *Tests* which then show compliance with the Contract (Clause 44.3);
* changes in *Statutory Requirements* (Clause 49.4.4.2);
* an instruction to accelerate, where the adjustment has not been agreed (Clause 52.4); or
* suspension of the work by the Principal (Clause 53.3).

The principles for assessing extensions of time are set out in Clause 50.

#### 47.7 Valuation of additional work or costs

The value of the additional work or unavoidable additional costs is calculated by adding:

* the Contractor’s direct costs for labour, *Materials* and plant;
* the costs of necessary Subcontractor and Consultant work,

and applying the *Contractor’s Margin* to the total. The *Contractor’s Margin* is the percentage specified in Contract Information item 44.

Delay costs calculated in accordance with Clause 51 are added to the value of the additional work and included in the adjustment to the *Contract Price*. Refer to the commentary on Clause 51 for a discussion of what costs are included in the delay costs rate.

The Contractor’s ‘direct costs’ include the costs of personnel who actually carry out the work, ie are ‘on the tools’. This may include a leading hand but would not include the Site foreman, *Contractor’s Authorised Person*, project manager, or personnel allocated specifically to Site safety, quality or environmental management. These personnel would generally be located on the Site throughout the work and their involvement in additional work will not cause the Contractor to incur additional costs unless the time to reach *Completion* is extended. Any additional costs for these management personnel would be recompensed in the delay costs rate, which is payable if an extension of time is applicable.

More guidance on differentiating direct and indirect costs is provided in the NSW Procurement Practice Guide: *Handling prolongation and disruption claims*, which is available from the Procurement System for Construction website, in the section on Contract management.

#### 47.8 Decreased work

Where a *Variation* reduces the scope of work required under the Contract, the Principal is entitled to reduce the *Contract Price* by an appropriate amount. The following factors are relevant in calculating this amount:

* the Contractor will not incur the direct costs associated with the omitted work;
* the Contractor will not incur some associated overhead costs;
* the Contractor is not entitled to any profit on account of the omitted work; but
* the amount the Contractor recovers under the Contract, to pay for general overheads incurred in carrying out the work, will be reduced if the Contractor does not receive payment for some of the work that was included in the original scope.

In practical terms, unless the deduction *Variation* reduces the Contract period, the amount of the deduction should be the direct cost of the omitted work plus the profit on the omitted work, because some overhead and indirect costs will still be incurred by the Contractor.

If it is assumed that the profit included in the *Contract Price* is 5% of the direct cost of the whole of the work, then the amount deducted from the *Contract Price* should be at least 5% more than the assessed direct costs of the deleted work.

Note, however, that if the Contract includes an identified tendered price for the deleted work, that price is assumed to include the direct costs plus overheads and indirect costs (say 5%) and profit (5%). Thus the amount deducted from the *Contract Price* would be less than the price tendered for the deleted work.

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 direct costs would be assumed to be in the order of $91,000. Based on the principles stated above, if this work were deleted, the deduction would be $91,000 plus 5% (for expected profit), ie $95,500.

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 be appropriate to use them to determine the deduction price for deleted work.

#### 47.9 Limitations to entitlements

The Contractor is only entitled to the ‘reasonable’ direct costs. This means the claimed hourly rates and supply costs must be comparable to industry rates current at the time the work is carried out. The first option for assessing whether the costs are ‘reasonable’ is to compare them with any rates and prices included in the Contract, for example in a *Schedule of Rates*. If the Contract does not include suitable rates or prices, or the rates and prices in the Contract are not applicable, industry rates can be determined by using standard estimating *Materials*. Note that where a *Schedule of Rates* is available, care needs to be taken to ensure the relevant rate is reasonable and to avoid double counting the Contractor’s site, off-site and time dependent costs which are usually included in the Contract rate.

If the Principal is not confident in carrying out the assessment, a quantity surveyor could be engaged to do this.

The Principal is not required to meet additional costs, losses or expenses that would not have been incurred if the Contractor had carried out the relevant additional work efficiently and competently. This includes an obligation on the Contractor’s part to minimise the additional costs. For example, the Contractor may not be entitled to the whole of the costs incurred in carrying out additional work if the Contractor:

* hired equipment at higher than market rates when there were alternatives available;
* caused delays by not responding promptly to an instruction to proceed; or
* damaged existing services when carrying out the additional work because it failed to contact relevant authorities, as required under the Contract.

The Principal is entitled to take these things into account when assessing the value of additional work. Similarly, the Contractor is required by Clause 50.2 to minimise delay and its effects.

The Contractor is not entitled to payment for costs that should have been anticipated when tenders closed, that is, costs that would have been incurred even if the Works had not been changed.

In assessing the Contractor’s entitlements for additional work, the Principal is not to include amounts the Contractor is not entitled to claim as follows:

* costs and delay incurred before the Contractor gave notice of unexpected adverse *Site Conditions* (Clause 37.8);
* costs for delay and aborted work occurring as a result of a *Fault* that was not notified 21 days before the Contractor proposed to use the relevant *Contract Documents* (Clause 38.4);
* costs and delay incurred before the Contractor gave notice of changes to *Statutory Requirements* (Clause 49.6); and
* interest on payments related to the period before the Contractor made a *Claim* if the Contractor did not make the *Claim* within the 28 day period (Clause 68.2).

#### 47.10 Valuations for instructions under Clause 46

Clause 46 requires that the valuation of a *Defect* not made good takes into account the impact of the *Defect* on the whole of life costs of the Works. See Clause 46.2.2.

#### 47.11 Adjustment to Contract Price

It is the Principal’s responsibility to document any adjustments to the *Contract Price* and *Contractual Completion Dates*.

Once the value of any adjustments to the *Contract Price* or *Contractual Completion Date(s)* have been either agreed in writing between the parties or determined by the Valuer, the Principal must update the contract records to incorporate the adjustments to:

* the *Contract Price*, either increasing or decreasing it to reflect the value of the additional or deleted work and any delay costs; and
* any affected *Contractual Completion Dates*.

Written confirmation should be provided to the Contractor. This may be in the form of a letter or an updated schedule of adjustments.

The adjustments must be taken into account in calculating progress payments and the final payment, in calculating liquidated damages (if applicable) and in preparing Contractor Performance Reports.

### Clause 48 – Variations

This Clause sets out:

* the Principal’s right to instruct a *Variation*;
* the Principal’s right to obtain a proposal from the Contractor before instructing a *Variation*;
* the Principal’s options if the parties cannot agree on the adjustments applicable to a proposed *Variation*;
* the Contractor’s right to propose a *Variation*;
* the Contractor’s options if there is disagreement about whether an instruction from the Principal constitutes a *Variation*; and
* that development of the Principal’s design differs from a *Variation*.

Only the Principal can instruct a *Variation* and change the Works. The Contractor does not have the right to change the Works without the Principal’s written agreement.

Note that a *Variation* is fundamentally different from a *Claim.* *Claims* are defined in Clause 79. The Contractor may make a *Claim* in a number of circumstances where there is no *Variation* to the Works, for example if materially adverse conditions are encountered on the Site or the Principal suspends the progress of the work. Clauses 47 and 68 set out how *Claims* are to be dealt with. A Contractor will often refer to a *Claim* for additional costsas a ‘variation’ because it is seeking to ‘vary’ the *Contract Price*. This is a misnomer and the Principal should respond using the correct expression.

**Definition**

A *Variation* is defined in Clause 79 as

*any change to the Works including additions, increases, omissions and reductions to and from the Works,*

except for changes made to the design as part of the Contractor’s obligation to develop the Principal’s design such that it is fit for purpose.

Clause 8 further clarifies the definition of a *Variation*. The scope of the work as defined in Clause 8 includes items that are not specifically mentioned in the *Contract Documents* but are necessary to allow the Works to fulfil their functions. Such items are not *Variations*. If the Principal instructs changes to the Contractor’s design when it is submitted for consideration, these are not *Variations* if the changed design is consistent with the Principal’s design and the intent of the *Contract Documents*.

For example, if the *Contract Documents* require a door to be painted red and the Principal subsequently directs that the door be painted green, then that is a *Variation*. If the *Contract Documents* require the door to be painted but a colour is not specified, the Principal’s direction to paint the door green is not a *Variation*. Even if the Contract does not state that the door is to be painted, but painting is implied (because of the nature of the *Materials* used, or because every other surface is painted, or because it is industry practice) then the Principal’s direction regarding colour is not a *Variation*.

Refer to the commentary on Clause 8 which includes further examples to explain the difference between changes to the Works and the scope of the work under the Contract.

**Procedure**

#### 48.1 The Principal’s Options

The Principal can either:

* instruct a *Variation* which the Contractor must then carry it out; or
* request the Contractor to advise the price adjustment and the extension of time that would arise from a proposed *Variation*. If the Principal requests a *Variation* proposal, the Contractor is not permitted to start carrying out the work until the Principal and Contractor have agreed on the price adjustment and effect on *Contractual Completion Dates*, and/ or the Principal instructs the Contractor to proceed. If the Contractor does start a proposed *Variation* without a clear instruction to proceed, the Contractor is not entitled to any additional costs or an extension of time on account of any resulting delays.

This second option allows the implications of a *Variation* to be considered and funding to be approved, if necessary, before the *Variation* is instructed and additional costs are incurred.

#### 48.2The Principal’s right to instruct

The Principal has the right to change the Works at any time before *Completion* by instructing a *Variation*. Under Clause 67.1.3, the Principal may also instruct a *Variation* after *Completion*, instead of insisting that a *Defect* be made good.

A *Variation* instruction must be in writing. An oral instruction may be given in an emergency situation, but it must be followed up with written confirmation. A *Variation* can be instructed after the effects have been agreed with the Contractor (see Sample letter 48B, Option 1) or without agreement being reached (see Sample letters 48B, Option 2 or 48C). The commentary below explains when the different options will apply.

Note that when instructing a *Variation*, the *Principal’s Authorised Perso*n should always be sure to act within the relevant delegated authority and, where applicable, with the agreement of the client. Where urgent action is required, verbal approval should be obtained at least.

*Variations* fall into two general categories:

* necessary (non-discretionary) *Variations*, which are required in order for the Contract to be performed; and
* discretionary *Variations*, which are instructed to suit changes in the client’s requirements.

A ‘necessary’ *Variation* may be instructed because, for example:

* materially adverse *Site Conditions* are encountered (Clause 37);
* there is an ambiguity, inconsistency or discrepancy in the *Contract Documents* (Clause 38);
* an error in the Principal’s design necessitates a design change (Clause 39);
* an error is found that affects the setting out of the Works (Clause 42);
* a *Variation* is the most effective method of resolving a *Defect* in the Contractor’s work (Clause 45); or
* a change in *Statutory Requirements* requires a change to the Principal’s design (see Clause 49).

A ‘discretionary’ *Variation* might be instructed:

* to implement a change requested by the client or facility owner;
* to omit work that is no longer required, or to save costs; or
* if a decision is made to accept the Works with a *Defect* not made good (Clauses 46 or 67).

In principle, it is undesirable to instruct a *Variation* until its effects are known on the cost of the Works and time involved in constructing them. This is particularly relevant for discretionary *Variations*, because the client should have an opportunity to consider the effects on price and time before deciding to go ahead with what is in essence an optional change.

It should also be noted that there are significant and sometimes unexpected risks involved where the Contractor is instructed to omit work. This is because the Contractor may claim additional costs related to other parts of the work that are affected by the omission. In particular, the Principal should not delete work from the Contract with the aim of arranging others to undertake that work without the Contractor’s agreement. This can lead to complex contractual disputes.

Note that the price reduction for omitted work is not the same as the cost of carrying out that work (see the commentary on Clause 47.9).

The procedure set out in Clause 48.3 manages the risks associated with instructing a *Variation*, and should be used wherever time and circumstances permit.

For guidance on managing *Variations* and associated *Claims* from the Contractor, refer to the Procurement Practice Guide - Managing variations, which is available at:

<http://www.procurepoint.nsw.gov.au/documents/psc-managing-variations>

#### 48.3 The Contractor to advise price and time effects

If the Principal is considering instructing a *Variation*, especially a discretionary *Variation*, the Contractor should be provided with the details and requested in writing to provide a ‘proposal’ which includes:

* a proposed price adjustment for the proposed *Variation*;
* any anticipated effect on *Contractual Completion Dates*; and
* the effect on any other matter specified by the Principal.

Note that delay costs are dealt with under Clause 51. ‘Any other matter’ might include the effect the *Variation* will have on the design or functionality of the Works.

The Principal’s request for a proposal should specify a time by which the above information is to be provided.

This provision allows the implications of a *Variation* to be considered and funding to be approved, if necessary, before the *Variation* is instructed and additional costs are incurred. Use Sample letter 48A to request the Contractor to submit a proposal for a possible *Variation*.

Before instructing a discretionary *Variation* due to a client request, the Principal should verify that:

* the *Variation* offers benefits to the client;
* the client has been advised of its implications and accepts them; and
* the client has confirmed that the required funds are available.

The implications of a *Variation* can include:

* price;
* extension of time;
* delay costs; and
* Project Management fees (including additional insurance costs where applicable).

In considering the effect of a proposed *Variation* on *Contractual Completion Dates*, it is necessary to take into account the requirement under Clause 50.2 for the Contractor to take all reasonable steps to avoid delay and its effects. The Contractor is obliged to undertake the *Variation* work in such a way as to integrate the work into the *Contract Program* and minimise any delay. 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.

Note that a request for advice on the effects of a proposed *Variation* does not constitute an instruction to carry out a *Variation*. The Principal’s written request should make this clear. The Contractor must not start *Variation* work until it receives a clear instruction.

#### 48.4 If the parties agree

The Principal can decide whether or not to proceed with a *Variation* on the basis of the Contractor’s proposal. The principles set out in Clauses 47 (price adjustments) and 50 (time adjustments) can be used to assess the proposed adjustments.

If the adjustments and any other implications are considered to be reasonable, and the Principal decides to proceed with the *Variation*, the Principal should promptly advise acceptance. The Principal is required to:

* instruct the Contractor in writing to proceed with the *Variation*, recording the details of the accepted proposal; and
* adjust the *Contract Price* and affected *Contractual Completion Date(s)* and advise the Contractor in writing.

Sample Letter 48B, Option 1 incorporates both of these requirements.

If the Principal does not consider the claimed adjustments reasonable and the parties can not agree on the effect of a proposed *Variation*, Clause 48.5 applies.

Note that until a *Variation* is instructed, 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. It is desirable for the Principal to respond to a Contractor’s proposal promptly, because the opportunity to carry out the *Variation* with minimal disruption may be lost. The Principal should respond within, say, 10 *Business Days* after the proposal is received. This applies whether or not the proposal is accepted. Use Sample Letter 48B, Option 1 to accept the Contractor’s proposal. Sample letter 48B, Option 2 can be used to attempt to negotiate acceptable adjustments or to reject the Contractor’s proposal.

If the Principal does not accept a *Variation* proposal within a reasonable time (say 6 to 8 weeks), the proposal would require confirmation if the Principal wished to proceed with it.

Where negotiation is required for any aspect of the proposal, this needs to be dealt with promptly to avoid the risk of losing the opportunity to undertake the work expeditiously or of 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 48.4.

#### 48.5 Variation instruction

Clause 48.5 applies where the parties don not agree on the effects of a proposed *Variation* or no proposal was requested and the Principal wishes to proceed with the *Variation*.

Where a *Variation* is instructed without an agreement on the associated adjustments to the *Contract Price* and *Contractual Completion Date(s)*, there is the risk of extra costs due to unforeseen implications. Where practical, discussions should always be held with the Contractor to try to agree on the appropriate price and time adjustments or, at least, a mechanism to determine the reasonable costs and applicable extensions of time.

However it may sometimes be necessary to instruct *Variation* work to start without agreement being reached. This may happen if:

* the work is urgently required and there is insufficient time available to obtain and assess a *Variation* proposal from the Contractor; or
* it has not been possible to negotiate a proposal that is satisfactory to the Principal, but it is essential that the *Variation* work proceed without further delaying progress of the work.

In the latter case, it may be necessary for the Principal to reject the Contractor’s proposal and issue a separate instruction for the *Variation* work. Use Sample letter 48B, Option 2 to advise that the Contractor’s proposal is not accepted and Sample letter 48C to instruct the Contractor to carry out the required *Variation*. Sample letter 48C may also be used if, due to the urgency of the circumstances, there is insufficient time to request a proposal from the Contractor before instructing the *Variation*.

If the parties have not agreed on the effects of a Variation before it is instructed, the Contractor is required to make a *Claim* for the associated price and time adjustments and the provisions of Clause 47 apply. This process seeks to manage the risks associated with instructing a *Variation* to start without agreement, by providing for expeditious resolution of any disagreement. The *Claim* needs to include sufficient detail to demonstrate how the amount is calculated and how the effect on time has been determined, to enable assessment by the Principal. The price adjustment needs to include the cost of any delay.

Note that until the Contractor makes a *Claim*, no payment can be made for work associated with a *Variation* that has been instructed. Refer to the commentary on Clause 59 for the principles for making payment where agreement has not been reached on the final adjustment applicable to a valid *Claim*, but the Principal has made, or can make, an assessment of the minimum appropriate adjustment.

#### 48.6 Proposed Variation for the Contractor’s convenience

The Contractor may wish to amend the Principal’s design for reasons of its own, for example to make some element of the Works easier to construct. If this provides a significant benefit to the Principal, it might be considered an innovation under Clause 41. Otherwise, it is regarded as a *Variation* for the Contractor’s convenience.

The Contractor has the right to propose a *Variation* for its convenience, but in doing so must provide sufficient information to enable the Principal to consider the proposal, including:

* details of the proposed change;
* impacts on the remainder of the Works and the *Contract Program*; and
* if applicable, a time by which the proposal needs to be accepted in order to suit the Contractor’s purposes.

#### 48.7 The Principal’s acceptance

The Principal is not obliged to agree to vary the Works for the Contractor’s convenience but may do so, with the agreement of the client or facility owner, if the change will have no detrimental effect on the Works or its operation.

The Contract provides for the Principal to impose conditions if the Principal agrees to the Contractor’s proposal. The conditions should include the following, as a minimum:

* the Contractor will not be entitled to any increase in the *Contract Price* as a result of the *Variation*;
* the Contractor will not be entitled to an extension of time as a result of the *Variation*;
* 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*.

If the *Variation* will clearly save the Contractor significant costs, the conditions could include a reduction in the *Contract Price*.

Use Sample letter 48E, Option 1 to accept the Contractor’s proposal for a *Variation* for the Contractor’s convenience. Use Sample Letter 48E, Option 2 if the Contractor’s proposed *Variation* is not accepted.

The Contractor is not permitted to start any *Variation* work without receiving the Principal’s written acceptance. In effect, the Principal’s acceptance would be a *Variation* instruction that includes any conditions imposed by the Principal.

Consider the following example, based on an actual situation.

|  |
| --- |
| • The Principal’s design included the off-Site manufacture of a demountable building incorporating an integrated covered walkway. Upon installation, it was identified that the Contractor had failed to have the walkway incorporated into the building. In an attempt to act cooperatively, the Principal suggested alternative designs for a walkway that would be suitable for retro-fitting. The Contractor constructed one of the Principal’s alternative designs and then claimed for additional costs incurred, over and above what it would have cost to manufacture the walkway to the original design in the *Contract Documents*. The Contractor claimed that the Principal had instructed a *Variation*.The Principal had not imposed any conditions on the Contractor’s acceptance of the suggested alternative designs. They were not presented as proposed *Variations* or *Variations* for the Contractor’s convenience. Therefore the Principal was required to pay the additional costs*,* on the basis that the Contractor was responding to a *Variation* instruction, notwithstanding that the Contractor’s failure to provide the specified walkway was a *Defect*.The lessons for the *Principal’s Authorised Person* were that:* *Defects* should be dealt with in accordance with the Contract,
* the Principal should generally avoid proposing solutions to resolve *Defects* or design issues unless it is obliged to do so under the Contract.
* Any *Variation* for the Contractor’s convenience, whether proposed by the Contractor, or by the Principal, or generated through discussions, should only be accepted with conditions to minimise the Principal’s cost and risk.
 |

#### 48.8 The Contractor may claim that work is a Variation

During the course of the design and construction activities, the Contractor may consider that an instruction or other action of the Principal causes a change to the scope of the Works. For example, the Principal may consider that it has clarified an ambiguity or a statutory authority may issue a direction and the Contractor may consider that the resulting work is a *Variation*.

Clause 48.8 allows the Contractor to notify the Principal that it considers that a *Variation* applies even if the Principal has not issued a formal *Variation* instruction. The notice must be given within 7 days after the Contractor should have known that the circumstances gave rise to a *Variation*. A delay in providing the notice does not bar the Contractor’s right to make a *Claim*, unless Clause 61.1 applies. However, a delay may reduce the Contractor’s entitlements for costs that the Contractor would not have incurred if the notice had been provided within the specified 7 days.

#### 48.9 If the Principal does not agree

If the Contractor notifies the Principal under Clause 48.9 that it considers a *Variation* is necessary and the Principal does not agree, the Principal should notify the Contractor of the disagreement. See Sample letter 48F. The Principal’s disagreement should be notified promptly.

The Contractor has the right to pursue the matter under Clause 68. The Contractor would need to lodge a *Claim* supported by all the information specified in Clause 68.3. The *Claim* should be lodged within 28 days after the Contractor receives notice of the Principal’s disagreement, which is ‘the event giving rise to the *Claim*’ (see Clause 68.1).

As set out in Clause 68.2, the Contractor’s failure to lodge a *Claim* within the specified time does not bar the *Claim*. However, it does deny the Contractor an entitlement to interest on any amount involved in the *Claim* for the entire period before the Contractor made the *Claim*.

#### 48.10 Design development is not a Variation

As outlined in the introduction to the commentary on Clause 48, the Contractor has an obligation to develop the Principal’s design such that it is fit for the purposes required under the Contract.

The Contractor will always be required to perform some design work, including development of the Principal’s design. The extent of this design work should be identified in Contract Information item 38. Such design work is part of the scope of work under the Contract and is not a *Variation*.

If the Contractor changes a part of the Contractor’s design, whether before or after the Principal’s acceptance of that part of the design that is not a *Variation*. However, if the Principal instructs a change to the Contractor’s design, other than for a reason of non-compliance, that may give rise to a *Variation* if it changes the Principal’s design shown in the *Principal’s Documents*.

### Clause 49 – Changes to statutory requirements

The Contractor is not required to carry the risk of changes to *Statutory Requirements* to the extent that such changes necessitate a change to the Works. If the Contractor is of the opinion that a change in *Statutory Requirements* may affect the Principal’s *Design*, the Contractor’s obligation is to notify the Principal. The Principal decides whether the scope of Work is to be changed and, if so, must order a *Variation*.

If, for example, a change in Work Health & Safety (WHS) Regulations requires that an access to the Works, having been designed as a ladder, must now be installed as a stairway, the Contractor is obliged to build the stairway but entitled to claim a *Variation*. A Contractor, when tendering for the Contract, not able to anticipate this change in a *Statutory Requirement* will have the opportunity to be reimbursed by the Principal for the *Variation*.

If the same change in WHS Regulations requires that the builder’s scaffolding (why is scaffolding a different example to access?) now be erected with stairs instead of ladders, this would not oblige the Principal to instruct a *Variation* to the Works and thus would not entitle the Contractor to extra payment under this clause.

This Clause specifically provides the Contractor an entitlement to an adjustement to the *Contract Price* if there is a change to the Works. Changes to *Statutory Requirements* can also affect the Contractor in ways that do not necessitate a change to the Works. For example, changes to WHS Regulations may require administrative changes in the operation of the Contractor’s business and on the company’s construction sites. Property and Industrial Relations levies may change. Clause 49 places no obligation on the Principal if such matters arise during the course of the Contract and affect the Contractor.

Except where a change to the Works is required, the Contractor is responsible, under Clause 12, for compliance with all *Statutory Requirements* and is not entitled to any adjustment to the *Contract Price*.

Note also that under Clause 55, the *Contract Price* is not adjusted for new, changed or increased taxes, duties or other imposts, unless expressly stated in the Contract.

### Clause 50 – Changes to contractual completion dates

This Clause sets out:

* procedures for the Contractor to follow when seeking an extension of time, including requirements for documentation and timing of notices;
* the Principal’s rights and obligations to extend time; and
* the mechanism for the Principal to reduce the contract period, if applicable.

The ‘time’ or ‘period’ for the Contractor to achieve *Completion* is usually stated in weeks. The *Contractual Completion Dates* are not specified in the Contract Information because they depend on the Date of Contract, which is not known when Contract Information item 13 is filled in. The initial *Contractual Completion Dates* are calculated from the Date of Contract and the time period(s) stated in Contract Information item 13.

An ‘extension’ to the time allocated for the Contractor to achieve *Completion* is calculated in days. Note that a ‘day’ is a ‘calendar day’ as defined in Clause 78. Once additional time is agreed, the affected *Contractual Completion Dates* are extended.

This Clause applies when the Contractor makes a *Claim* for an extension of time for any reason.

#### 50.1 Conditions for an entitlement

The Contractor is entitled to an extension of time if it shows that:

* progress of the work has been delayed, or the program of work will be delayed in the future;
* the delaying event affects activities on the critical path of the work;
* the delay was caused by something beyond the Contractor’s control, which may include something the Principal did or did not do;
* the delay was not caused by something that the Contract specifically states will not be considered a reason for an extension of time;
* the required initial notice has been provided, including the specified information and the current *Contract Program*;
* at the time the delaying event occurred, the work was proceeding in accordance with the *Contract Program* submitted with the initial notice; and
* the *Claim* required by Clause 50.3 has been submitted.

The Principal is required to assess the number of days by which the time for *Completion* is to be extended, but the Principal is not required to find the information specified in this Clause. If the Contractor has not provided adequate evidence, this can affect the Principal’s assessment. It is in the interests of the Contractor, as well as being the Contractor’s obligation, to give the Principal all the information necessary to demonstrate that there is an entitlement and verify the quantum of the extra time claimed.

Cause of the delay

A delay can be caused by something within the Contractor’s control, or an act or omission of the Principal, or something that is beyond the control of both parties.

If the Contractor’s actions cause delay on a particular day, the Contractor has no entitlement to an extension of time or delay costs on that day, irrespective of any other events that caused delays on that day. See the commentary on Clause 50.6.

If a delay is caused by the Principal, the Contractor is entitled to an extension of time. The Principal may cause delay through a breach of the Contract such as 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 a *Fault* in the *Contract Documents* within the specified period and the Principal fails to resolve the *Fault* until after the Contractor has started the affected work, the Principal may cause a delay to the critical path.

The Contractor is entitled to extensions of time for delays caused by events beyond the control of both parties. These could include inclement weather conditions, a requirement of a statutory authority or an event such as an earthquake.

Assessing the Contractor’s entitlement

The quantum of the Contractor’s entitlement is based on an analysis of the effect of the delaying event on the critical path shown in the *Contract Program*. The time required to reach *Completion* must be shown to be delayed by the event. However, the extension is not to be reduced because the Contractor could still reach *Completion* by using the ‘float’ in the Contractor’s program. ‘Float’ belongs to the Contractor.

The extension is to reflect the actual delay at the time the delaying event occurred. The program used to assess the extent of the delay must be the one that is current at the time the event occurred. See the commentary on Clause 50.4.

Extensions of time are assessed in terms of the number of working days for which an entitlement exists, taking into account rostered days off (RDOs), where applicable, and public holidays. In a GC21 contract, the working days are stated in the Contract Information.

The adjusted *Contractual Completion Date(s)* are determined by adding the assessed number of days of extension to the previous dates. Non-working days including public holidays and RDOs beyond the original *Contractual Completion Date(s)* are taken into account. For example, if the current *Contractual Completion Date* is Thursday 9 June and the extension of time is 4 working days, the new date would be Wednesday 15 June. However, if Monday 13 June is a public holiday, the new date would be Thursday 16 June.

This calculation method also applies where the Contractor is late and the current extended *Contractual Completion Date* has passed. The result in the above example would be the same if the actual delay started on say Monday 16 May or Monday 20 June.

If the Contract includes *Milestones*, the effect of a delaying event needs to be considered for each *Milestone*. The *Contractual Completion Date* for every *Milestone* whose progress is delayed needs to be extended by the appropriate amount.

Consider the following scenario:

|  |  |  |  |
| --- | --- | --- | --- |
| **Milestone number** | **Description** | **Time for giving Site access** | **Time Period for Completion** |
| 1 | Completion of Pumphouse A  | 14 days after the Date of Contract | 100 weeks after the Date of Contract |
| 2 | Completion of Pipelines | 4 weeks after the Date of Contract | 50 weeks after the Date of Contract |
| 3 | Completion of Pumphouse B  | 5 days after *Completion* of *Milestone 2* | 10 weeks after *Completion* of *Milestone 2* |
| 4 | Completion of all Pump Testing. | 1 day after *Completion* of *Milestone 3* | 4 weeks after *Completion* of *Milestone 3* |

Example 1:

If wet weather occurs 3 weeks after the Date of Contract, this would result in an extension of time entitlement only for *Milestone 1*.

Example 2:

If wet weather occurs 6 weeks after the Date of Contract, this would result in an extension of time entitlement for *Milestone 1* and *Milestone 2*. Note that an extension of time for *Milestone 2* will cause *Milestone 3* to start later because the ‘Time for giving Site access’ for *Milestone 3* is linked to *Completion* of *Milestone 2*. However there is no extension of time required for *Milestone 3*, and no entitlement to delay costs. This is because the time period for *Completion* of that *Milestone* has not been affected. Similarly, there is no extension of time required for *Milestone 4*.

However, the situation in Example 2 would be different if *Milestone 3* were shown as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| 3 | Completion of Pumphouse B  | 5 days after *Completion* of *Milestone* *2* | 60 weeks after the Date of Contract |

In this case there would also be an entitlement to an extension of time for *Milestone 3*. *Milestone 3* can only start after *Milestone 2* reaches *Completion*, but the time period for *Completion* for *Milestone 3* starts at the Date of Contract. Consequently, if the *Contractual Completion Date* for *Milestone 2* is extended due to wet weather, the period available to complete *Milestone 3* will be reduced unless an extension is given.

This arrangement is sometimes used to increase the incentive for the Contractor to complete the Works on time. The time available to complete a later *Milestone* is reduced if the Contractor completes a preceding *Milestone* late due to causes within its control. This strategy is most effective if used in combination with the application of liquidated damages. However, this more complicated administrative arrangement is not recommended if there is a likelihood of the Principal causing delays.

Guidance on evaluating extension of time claims and a discussion of some of the events which commonly give rise to such claims are provided in the [Managing extensions of time](http://www.procurepoint.nsw.gov.au/documents/psc-managing-extensions-time) Procurement Practice Guide.

#### 50.2 Contractor’s obligation to minimise delay

The Contractor is expected to take whatever action is reasonable to avoid delay and to minimise its effects. This might include re-scheduling activities or adopting alternative work methods to mitigate the effects of the delaying event. The particular circumstances will determine what actions are reasonable in a given situation. It is good practice to discuss opportunities to minimise the effects of a delay or potential delay as soon as the parties become aware of it.

The Contractor is expected to continue to focus on progressing the work and attempting to meet the specified *Contractual Completion Dates*. A delay should not be seen as an opportunity to offset delays caused by the Contractor itself, or to obtain a windfall in the form of delay costs.

#### 50.3 Documentation required from the Contractor

Initial notice

The Contractor is required to give notice within 7 days after the start of an event causing delay. Note that this time requirement is not related to the end of the period of delay. The purpose of the initial notice is to give the Principal warning of possible delays so action can be taken to minimise the consequences. For example, early warning may be given to affected stakeholders or the Principal may elect to give an instruction to ‘work around’ the delay. The latter could include giving early access to another part of the Site or omitting an element of the work.

The Contractor is not required to wait until the impact of the delay can be quantified before giving the initial notice. In practice, it would be sensible for the Contractor to give the initial notice to the Principal as soon as it becomes aware that a delay is possible. In order to protect its possible entitlement, the Contractor should give notice of an event even if, at the time the event occurs, the Contractor is unsure whether it will affect the time for *Completion*.

The initial notice must include the information specified in Clause 50.1.1.3, including a copy of the *Contract Program* as at the time the delay started. The program shows the anticipated effect on the critical path at the time, and may assist the parties to explore opportunities to reduce the effects of the delay.

If the Contractor fails to provide an initial notice, supported by the specified information, within the specified time period, part of the entitlement to an extension of time is lost. For example, if a delay commences on Monday 16 May and continues for 5 days but the Contractor does not submit the notice, including all the specified information, until Thursday 26 May, ie 3 days later than required, the entitlement to an extension of time is reduced from 5 days to 2 days.

Claim for extension of time

The Contractor is required to submit a formal *Claim* for an extension of time within 28 days after the delay starts. This *Claim* must be accompanied by the information the Principal needs to assess the claim. Such information could include rainfall records, photographs showing the condition of the Site or documentation evidencing delays by others that were beyond the Contractor’s control.

The purpose of having time requirements for *Claims* is to enable them to be dealt with progressively during the course of the Contract, so they do not accumulate into an unmanageable mass after *Completion*.

If the Contractor submits a *Claim* without all the required information, the Principal should advise the Contractor that the claim is incomplete and cannot be assessed until the missing information has been provided. Under Clause 50.3.1, the Contractor has not established an entitlement until it provides a *Claim* with all the required information. The *Claim* should only be recorded as received when all the required information is provided.

If the Contractor submits a *Claim*, with the required information, later than 28 days after the start of the delay, Clause 68.2 applies. This Clause would affect any interest entitlement related to delay costs. The Contractor is still entitled to have the *Claim* assessed and the relevant *Contractual Completion Date(s)* extended.

Follow-up Claims

Where a delaying event lasts more than 28 days, the Contractor must continue to update the formal *Claim* at 28 day intervals after the date of the initial *Claim*. This means the Principal is progressively informed of the likely effect on *Contractual Completion Date(s)*, in case it is necessary to reschedule arrangements that depend on progress of the work.

If the Contractor does not submit an updated *Claim* within 28 days after the relevant earlier *Claim*, Clause 68.2 would again apply and the effect would be to lose the entitlement to interest on any related delay costs.

#### 50.4 Current Contract Program to be provided

With every *Claim* for an extension of time, the Contractor is required to provide a copy of the *Contract Program* that was current at the time the delay started.

To be a *‘Contract Program’* as defined in the Contract, the program must comply with the requirements of Clause 22. The Principal should insist that a *Claim* for an extension of time is accompanied by a complying program and not attempt to assess the *Claim* before that program is received. A detailed, realistic program provides the best means of assessing delays and determining appropriate extensions of time. However, the Principal should not demand more than what is reasonable to comply with Clause 22.

If it is to be used to assess an extension of time, the program must also reflect the status of construction activities on the Site at the time the delay occurred. If it does not, the Principal should respond by requesting the Contractor to submit an accurate, complying *Contract Program* before carrying out the assessment. A previously submitted program should not be used to assess entitlements as it may not accurately reflect progress up to the time of the delaying event.

#### 50.5 Working days

The Contractor is not entitled to claim an extension of time for an event that occurs on a day that is not normally a working day for the Contractor. For example, if the Contractor normally only works on Monday through Friday and is delayed by a rain event that extends from Friday through Saturday and Sunday until Monday, the Contractor is entitled to 2 days extension of time. This includes the delays on Friday and Monday.

Even if the Contractor usually works a five day week and has arranged to work one Saturday but is delayed by rain on that day, there is no entitlement to an extension of time. However, if it was impractical or unsafe to work on the Site on the following Monday as a result of that rain, the Contractor may have an entitlement to an extension of time for the Monday.

#### 50.6 Concurrent events

The Contractor is responsible for managing time under the Contract. If the Contractor fails to manage properly work activities and this causes a specific delay (for example a strike over a safety issue where the responsibility lies with the Contractor – Delay #1) there is no entitlement to an extension of time. Under Clause 50.6, the Contractor is also not entitled to an extension for another delay (Delay #2) that occurs on the same day(s) as Delay #1 occurred. This is the case even if Delay #2 is due to a cause that is eligible for an extension of time or if the event causing Delay #1 occurs after the cause for Delay #2 has arisen. The Contractor has lost the opportunity to claim for Delay #2 because of the Contractor’s mismanagement.

The situation where one of the concurrent delaying events is a neutral event, such as wet weather, and the other is a cause that would entitle the Contractor to delay costs, is dealt with in the commentary on Clause 51.

Even if a delaying event is partially outside the Contractor’s control, the Contractor’s entitlement to extensions of time is reduced to the extent that the Contractor contributed to the delay.

This Clause cannot be used to deny an entitlement where the Principal considers the Contractor should provide additional resources to carry out the Works in order to reach *Completion* on time.

Note that, even if the Contractor is late in achieving *Completion*, ie the relevant *Contractual Completion Date* has passed, the Contractor is entitled to extensions of time if the work is delayed by an event beyond the Contractor’s control. This is important to the Contractor in terms of performance reporting and in situations where liquidated damages apply.

#### 50.7 Effects of other specific Contract provisions

This sub-clause specifically notes that the Contractor’s entitlement to extensions of time is reduced where the Contractor has not provided timely notice of:

* *Site Conditions* (Clause 37.8); or
* Changes to *Statutory Requirements* (Clause 49.6).

#### 50.8 Principal’s discretion

The Principal has the discretion to extend any *Contractual Completion Date* at any time, if it suits the Principal to do so. Under some circumstances, it may suit the Principal to extend time even if the Contractor has not submitted a *Claim* or an incomplete *Claim* was submitted.

Assume, for example, that the Contract provides for liquidated damages, the Principal has delayed progress and the Contractor is late in completing the Works. Before the Principal can determine the applicable liquidated damages, it needs to assess the delays caused by the Principal and the delays caused by the Contractor, and to differentiate between the two. To ensure the Contract provisions can continue to be applied (ie liquidated damages can be deducted), it may be practical for the Principal to extend the relevant *Contractual Completion Date(s)* to take into account the delays caused by the Principal, even if there is not a valid *Claim* from the Contractor. Sample Letter 50 can be used for this purpose.

The Principal can also utilise its discretion in reaching an agreement to extend time as part of an adjustment for a cause such as a *Variation* or *Site Conditions* where no *Claim* is made.

The Principal should not grant discretionary extensions of time without consulting the appropriate senior manager and carefully considering both:

* *the effects of such an extension, such as delay costs; and*
* *the implications of failing to grant the extension.*

Note that the Contractor has no right to request the Principal to extend the time under this Clause.

#### 50.9 Principal may assess reductions in time

If the time required for the Contractor to achieve *Completion* is reduced by a deduction *Variation*, due to the resolution of a *Fault* under Clause 38 or for some other reason, the Principal is entitled to assess a reduction in the time for *Completion* and adjust the *Contractual Completion Date(s)* accordingly. This provision is included in the Principal’s interests, because the Contractor is not likely to submit a ‘*Claim*’ for a reduction in time. However, it is preferable that any such reduction be discussed with the Contractor before it is put into effect, as there may be other factors that affect the time to reach *Completion*.

#### 50.10 Adjustment to Contractual Completion Dates

It is the Principal’s responsibility to adjust the affected *Contractual Completion Dates* when the Contractor is entitled to an extension of time or the Principal assesses a reduction.

The Principal should deal with the Contractor’s *Claims* for extensions of time progressively as they are submitted. If insufficient information is submitted with a *Claim,* the Principal should respond promptly, identifying the additional information required and giving the Contractor a time within which to comply with the request. The Principal is not required to assess an extension of time claim until it is supported by the specified information.

The Principal should advise the Contractor in writing of each assessed extension of time and the resulting adjusted *Contractual Completion Date(s)*. If the assessed extension is less than the extension claimed by the Contractor, the Principal’s advice should include the reasons.

The *Principal’s Authorised Person* should keep a record of extensions of time granted and assessed, including the date of the claim, the number of days claimed, the date of the response, the number of days assessed and the adjusted *Contractual Completion Date(s)*.

### Clause 51 – Delay costs and liquidated damages

This Clause sets out provisions relating to:

* the Contractor’s entitlements to compensation for delays resulting from the Principal’s acts and omissions; and
* the Principal’s entitlements to compensation for the Contractor’s failure to achieve *Contractual Completion Date(s)*.

Delay costs

Delay costs are payable by the Principal to the Contractor when the Principal delays the progress of the work by the causes specified in Clause 51 and the Contractor is entitled to an extension of time.

#### 51.1 Conditions for an entitlement

The Contractor is only entitled to additional payment at the daily delay costs rate for delay, disruption or interference caused by the eight events listed in this Clause. The first seven events are clearly defined and supported by other GC21 Clauses which refer to Clause 51. In addition, the last item listed in Clause 51 gives the Contractor an entitlement to delay costs if the Principal breaches the Contract. The Principal could breach the Contract in a number of ways, depending on the specific requirements of the Contract. For example, if the Principal is responsible for supplying certain *Materials* or approvals by a specified time and fails to do so, this may be a breach of the Contract. The Contractor cannot claim delay costs at the rate(s) specified in Contract Information item 49A for any reason not listed in Clause 51.1.

#### 51.2 Delay costs

The daily rates specified in Contract Information item 49A are used to compensate the Contractor for delays to progress of the Works or *Milestones* (as applicable).

The Contract Information provides for different delay costs rates to be specified, as follows:

* The rate at item 49A1 is paid where the delay is caused by the Principal’s failure to provide initial access to the Site, before the Contractor establishes a presence on the Site.
* The rate(s) at item 49A2 are paid when delays occur to the Works or the applicable *Milestone(s)* after the Contractor is established on the Site.

Note that the rate in item 49A1 does not apply where the Principal fails to give Site access for a *Milestone* by the required time, unless that *Milestone* is the first to proceed once the Contractor has established on the Site.

Delay costs only apply when there is an extension of time to an applicable *Contractual Completion Date*. The rates are payable for every day that the Contractor is delayed. The amount is calculated by multiplying the daily rate(s) by the number of days from, but excluding, the previous extended *Contractual Completion Date(s)* up to the new date(s) that take into account the relevant extension of time. It is appropriate to apply pro-rata rates for delays that affect only part of a day. This is usually based on a full day being eight hours of work.

Note that delay costs apply for calendar days, not working days. Assume the Contractor is instructed to carry out additional work that will take three and a half days to complete and the current *Contractual Completion Date* is a Friday. If the Contractor normally works on Saturdays, then the new *Contractual Completion Date* will be the following Wednesday at 11 am (depending on when work usually starts and finishes). The Contractor will be entitled to delay costs for four and a half days. If the Contractor does not normally work on Saturdays, the new *Contractual Completion Date* will be the following Thursday at 11 am and the Contractor will be entitled to delay costs for five and a half days.

Note that the Contractor is not entitled to delay costs:

* for the period before the specified notice of *Site Conditions* was given (Clause 37.8);
* if notice of a *Fault* was not given at least 21 days before the Contractor planned to use the relevant document (Clause 38.4)
* for the period before the Contractor gave the specified notice of changes to *Statutory Requirements* (Clause 49.6); or
* for the period 7 days prior to the date the specified initial notice of delay was given (see Clause 50.9).

Note also that if an adjustment to the *Contract Price* has been agreed under another provision of the Contract, for example when a *Variation* proposal is accepted or agreement is reached on the effect of *Site Conditions*, the delay costs Clauses may not be applicable. This will depend on whether the price adjustment includes all the related costs.

#### 51.3 Effect of concurrent events

The Contractor is not entitled to delay costs for an event that occurs on the same day as another event for which delay costs are not payable. This is a broader restriction on entitlement than the provisions applying to extensions of time when there are concurrent delays (see Clause 50.6).

Clause 50.6 deals only with concurrent events where one event is within the control of the Contractor. Clause 51.3 applies to any two concurrent events. For example, if the Principal delayed supplying an item of equipment to the Contractor and this affected progress on the critical path of the Contract, the Contractor would normally be entitled to an extension of time and delay costs for the days of delay. However, if it rained during the period of delay that was caused by the Principal and, due to this wet weather, the Contractor could not have installed the equipment even if it was available, then the Contractor is not entitled to delay costs for the days when the wet weather would have prevented installation of the equipment.

The Contractor may argue that, but for the delay caused by the Principal, the equipment would have been installed before the wet weather occurred. This argument misses the point. As the Clause states, each day of delay is considered separately with respect to any entitlement to delay costs.

#### 51.4 Reduction in rates

If part of the Works is occupied or in use, the delay costs rate or rates are reduced. Note that, for reduced delay cost rates to apply, the occupation or use must first be arranged in accordance with the ‘early use’ requirements of Clause 64. The reduced rates are calculated by dividing the value of the unoccupied part of the Works by the current *Contract Price*, and multiplying the result by the original delay costs rates. For example, if a part of the Works that is valued at 40% of the current *Contract Price* is occupied, then the reduced delay costs rates will be 60% of the original delay costs rates.

The value of the unoccupied part of the Works is assessed by the Principal. The calculations should be documented to demonstrate, if necessary, that the value is reasonable. Note that the value of a proportion of the Works may differ significantly from the size of that proportion of the Works.

#### 51.5 Limited remedies

The rates specified in Contract Information item 49A and referred to in Clause 51.2 are the only monetary compensation that is available to the Contractor if the Principal breaches the Contract or interferes in any way with the carrying out of the Works, unless the Principal:

* terminates the Contract for the Principal’s convenience under Clause 74; or
* commits a default and fails to remedy it, so that the Contractor is entitled to take action under Clause 75.

An extension of time is the only other form of remedy available to the Contractor for delaying actions by the Principal and the other events listed in Clause 51.1.

For any other events that cause delay, an extension of time may apply under Clause 50, but there is no entitlement to monetary compensation under the Contract.

GC21 does not recognise a claim for ‘delay and disruption’ except to the extent that it can be resolved by payment using the rates at Contract Information item 51A. The Contractor cannot, for example, demand to be paid actual costs incurred as a result of disruption caused by the Principal.

The rates for delay costs are agreed before the Contract is awarded, by virtue of the Contractor submitting a tender based on RFT Documents which specify those rates. This reduces the requirement for evidence, the complexity of the issues and the potential for disagreement when assessing the compensation to which the Contractor is entitled for delays caused by the Principal.

Liquidated damages

‘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 the parties as part of the Contract.

#### 51.6 If liquidated damages do not apply

If liquidated damages do not apply to the Contract and the Contractor fails to reach a *Contractual Completion Date* on time, the Principal is entitled under the common law to claim compensation for damages (costs and losses) incurred as a result of the Contractor’s failure.

However, the Principal cannot simply deduct its costs from payments due to the Contractor. To obtain payment from the Contractor the Principal would need to initiate, and be successful in, a dispute resolution process or the court system. The Principal would be required to prove that it incurred additional costs as a result of the Contractor’s lateness and to demonstrate the amount of those costs. Accordingly, the Principal usually only takes action to claim general damages in exceptional circumstances.

#### 51.7 If liquidated damages are not specified

Note that this is the default position if Contract Information item 49B is not filled in. Although deducting liquidated damages from payments due to the Contractor can be a straightforward process and may provide an incentive for the Contractor to achieve *Completion* on time, it can be considered inconsistent with the cooperative principles underlying the GC21 Contract. In contracts where liquidated damages apply, considerable contract management effort is often expended in argument over extensions of time. Often this distracts attention from quality and cost issues. As an alternative, if the mechanisms available under Clause 22 are used properly, these can be effective in ensuring that *Scheduled Progress* is achieved.

#### 51.8 If liquidated damages are specified

GC21 provides an option to include liquidated damages if the Principal so desires.

Liquidated damages are applicable only if daily rate(s) are specified in Contract Information item 49B. Separate amounts can be identified for each *Milestone*. The provisions of Clauses 51.7 to 51.12 apply equally to liquidated damages for the whole of the Works or for *Milestones*.

The Principal is entitled to liquidated damages at the daily rate stated in Contract Information item 49B for every day that the Contractor is late in achieving *Completion*. The amount of liquidated damages is calculated by multiplying the daily rate(s) by the number of days that have elapsed from, but excluding, the extended *Contractual Completion Date* up to and including the date the *Milestone* or the *Works* actually reach *Completion*.

The Principal may progressively deduct the liquidated damages to which it is entitled from payments due to the Contractor. A deduction can only be made after the relevant date for *Completion* has passed. Note that this may be before the associated work actually reaches *Completion*.

Note that liquidated damages apply to calendar days, not working days. If the Contractor is due to reach *Completion* on Friday but does not do so until the Tuesday in the following week, the Principal is entitled to liquidated damages for 4 days, regardless of the defined working days. As with delay costs, liquidated damages can be applied on a pro-rata basis for where a delay lasts for part of a day.

By including liquidated damages in the Contract, irrespective of the rate specified or agreed, the Principal foregoes its right to claim actual damages from the Contractor if the Contractor fails to achieve *Completion* by the relevant *Contractual Completion Date*. This limits the Principal’s entitlement to damages for the Contractor’s lateness.

#### 51.9 Effect of termination

If the Contract is terminated, the Principal’s entitlement to claim liquidated damages ceases at the date of termination.

If the Contract is terminated under Clause 77 and completed by others, then the Principal may wish to recover the additional damages it suffers as a result of the delay up to and including the *Actual Completion Date*.

#### 51.10 Principal’s rights not affected

If the Principal does not deduct liquidated damages from payments as soon as they become payable, this does not affect the Principal’s right to deduct them later.

Nevertheless, if liquidated damages are specified, they should be deducted progressively as they accrue. The incentive to achieve *Scheduled Progress* will not be as effective if it is only used as a threat of future action. Further, there is a risk that there will be insufficient money owing to the Contractor to make the deduction from later payments.

#### 51.11 Return of liquidated damages

It is possible that the Contractor will make a *Claim* for an extension of time after the Principal has deducted liquidated damages. If the Contractor is entitled to the extension of time, the Principal’s entitlement to liquidated damages is reduced.

If at any time the Principal finds it has deducted liquidated damages in excess of its entitlement, the Principal must return the excess amount. It is convenient to do this through a monthly payment.

The Contractor may request that liquidated damages be remitted (ie reimbursed to the Contractor or not deducted from payments). Although there is no obligation on the Principal to consider such a request, it is appropriate that the request be referred to the relevant senior manager before any response is given. 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.

#### 51.12 Reduction in rate(s)

If the Principal occupies or uses part of the Works before *Completion*, as provided by Clause 64, the Principal will not be entitled to deduct the full rate of liquidated damages per day in the event that the Contractor reaches *Completion* late.

The reduced rate is calculated pro rata, based on comparing the value of the occupied part of the Works with the current *Contract Price*. The revised rate should reflect the proportional value of the part of the Works that is not being occupied. If a part of the Works that is valued at 20% of the current *Contract Price* is being occupied, then the reduced rate for liquidated damages would be 80% of the rate originally specified for the Works. It is up to the Principal to determine a reasonable rate.

#### 51.13 Liquidated damages not a penalty

Contractors have sometimes attempted to challenge the application of liquidated damages on the basis that the amount is a penalty and not representative of the Principal’s estimated costs. Clause 51.12 operates to obtain an acknowledgement from the Contractor that the rate(s) for liquidated damages are a genuine pre-estimate of the damages the Principal will suffer if the Contractor fails to reach *Completion* by the due date(s). The Contractor also undertakes not to challenge the specified rates.

### Clause 52 – Acceleration

This Clause sets out:

* the Contractor’s obligations to advise the implications of acceleration and to comply with an *Acceleration Notice*; and
* the Principal’s obligations if acceleration is achieved.

#### 52.1 Acceleration Notice

If the Principal requires the work to finish ahead of the *Contract Program*, the Principal may issue to the Contractor an *Acceleration Notice* requiring the Contractor to accelerate the progress of the work.

It is important to note that issuing an *Acceleration Notice* has significant risks and may result in the Principal incurring significant costs without achieving *Completion* as early as desired. This action should be considered a last resort and only pursued under direction by the client after all the risks have been considered.

To meet the definition in Clause 83, an *Acceleration Notice* must be clearly titled. It will state the required revised *Contractual Completion Date(s)* or the required reduction in the time to reach *Completion*. See Sample letter 52*.* If the Contractor is in doubt as to whether an instruction is an *Acceleration Notice*, confirmation should be sought from the Principal.

The Contractor may be aware of constraints that will preclude achieving the reduction in time that the Principal is seeking. If it is not feasible to achieve the instructed acceleration, the Contractor is required to advise the Principal before taking any steps to accelerate. The Contractor will then not be in breach of the Contract if it fails to comply with the Principal’s instruction to accelerate.

If the Contractor is capable of achieving the reduction in time, the Contractor must comply with the *Acceleration Notice* and achieve *Completion* by the date(s) or within the time specified in the notice.

Note that an *Acceleration Notice* is not required if the Contractor is falling behind the *Contract Program* and appears unlikely to meet the specified *Contractual Completion Date(s)*. In that case, the Principal has the right under Clause 22.9 to instruct the Contractor to take reasonable steps to maintain *Scheduled Progress*. Such an instruction should clearly identify that it is an instruction under Clause 22.9.

#### 52.2 Acceleration proposal

Before issuing an *Acceleration Notice*, the Principal should advise the Contractor of the desired acceleration and request the Contractor to advise the price for the acceleration and its effect on any other matter identified by the Principal.

The price is not to include the cost of delay or disruption. Other matters that may be affected by the acceleration could include associated contracts, community and stakeholder interests, the identity of subcontractors, the availability of equipment and *Materials* and access to occupied premises. It is up to the Principal to identify the matters that could be affected by the acceleration. It is in the Principal’s interests to identify these matters as broadly as possible to ensure the Contractor advises all consequential effects of the *Acceleration Notice.*

#### 52.3 Agreement on steps to be taken and reimbursement

Before the Contractor commences any acceleration measures, the parties must, where possible, attempt to agree on the steps to be taken and the basis for payment of the Contractor if the acceleration is achieved. This may involve a condition that the Contractor is not entitled to any additional payment if the desired acceleration is not achieved. This is because acceleration is usually required to meet a practical or political commitment and the Principal would not obtain the desired benefit if the specified acceleration is not achieved.

Consider the following examples, based on actual situations.

|  |
| --- |
| * A facility was being upgraded and a ceremony to celebrate 100 years of operation was scheduled to occur on the anniversary of the original opening of the facility. However, adverse *Site Conditions* had delayed the work. At the request of the funding agency, an agreement was reached for the Contractor to accelerate the carrying out of critical sections of work by providing additional resources to work 7 days per week and utilizing a second shift. If the critical work items were completed in time, the ceremony could be held on the anniversary date. The Contractor committed to use its best endeavours to complete the required works by the nominated date.

The *Acceleration Notice* described the agreement and detailed the payment that would be made for each manhour of additional work. Importantly, it also set out the equipment and services for which the Contractor would be reimbursed, that were not included in the 10% margin. Because there were still a number of unresolved issues due to the *Site Conditions*, and it was anticipated that *Variations* would need to be instructed, it was agreed that payment would be made for the additional effort, irrespective of whether the critical sections of work were completed in time for the ceremony.* The client required a concrete enclosure for a nuclear medical device to be completed as soon as possible, and before the *Contract Completion Date*. The Contractor was requested to advise whether it was feasible to complete the Works ahead of schedule by three different periods: 4 weeks, 6 weeks and 8 weeks. The Contractor was asked to advise the additional cost and effects on users of the adjacent facilities under the three scenarios.

The Contractor advised that it was not feasible to achieve *Completion* earlier than 6 weeks before the original *Contractual Completion Date*. The Contractor provided an indicative price to complete the Works 4 weeks early and another price to complete 6 weeks early. It also advised that there would be additional noise after normal working hours due to machinery but that noisy work would be restricted to normal working hours where possible. Following consultation with the client and negotiations with the Contractor, an *Acceleration Notice* was issued that included the following agreed terms:* The Contractor would be paid an agreed additional amount if *Completion* (as defined under the Contract) was achieved by a date 6 weeks prior to the *Contractual Completion Date* that was current at the time of the agreement. This date was defined as the ‘Accelerated Completion Date’.
* The agreed payment would be reduced by $10,000 for each day that *Completion* was delayed beyond the ‘Accelerated Completion Date’
* The Principal would consider extension of time claims for delays occurring during the period of acceleration in accordance with the Contract and in good faith.
* Access to the Site would be available 24 hours a day, 7 days per week.
* The Principal would make administrative arrangements to expedite approvals and responses to RFIs.
 |

The above examples outline two different acceleration mechanisms. Other arrangements can be used. For example the agreement may be that, if the Contractor manages to achieve *Completion* four weeks early, the Principal will pay an additional $20,000. However if the four week reduction is not achieved in full, the Contractor will not be entitled to any additional payment.

The preparation and formal acceptance by both parties of a comprehensive agreement covering payment mechanisms, the clear objectives to be obtained, the actions each party will take to facilitate the acceleration and how issues will be dealt with will improve the probability of achieving the desired early *Completion*. However, the Principal should avoid prescribing or agreeing to the steps to be followed by the Contractor to accelerate, in order to avoid the risk of liability for payment if the agreed steps fail to achieve the desired result. If agreement cannot be reached and it is imperative that acceleration be achieved, the Principal may still issue an *Acceleration Notice* and deal with the impacts under clause 52.4.

#### 52.4 Adjustment to the Contract Price

If there is an agreement under Clause 52.3 and the Contractor achieves the acceleration instructed, the Contractor is entitled to the agreed additional payment.

If an *Acceleration Notice* has been issued under Clause 52.1 but there is no agreement under Clause 52.3, the Contractor is entitled to its additional costs, valued in accordance with Clause 47, even if the accelerated outcome is not achieved.

In assessing whether the Contractor achieved the required acceleration, it must be recognised that legitimate reasons for extension of time may arise during the period of accelerated effort. The Contractor cannot be denied these contractual rights, even though they may frustrate the Principal’s attempts to achieve accelerated progress.

For example, there may be an agreement for the Principal to pay an additional $20,000 if the Contractor achieves *Completion* four weeks earlier than scheduled. If the Contractor has taken the agreed steps but it rained for a week since the acceleration agreement was reached, the Contractor may not reach *Completion* by the agreed accelerated *Contractual Completion Date*. However, if *Completion* is reached less than five weeks earlier than agreed, the Contractor will be entitled to the agreed additional payment (Sample letter 52A and Sample letter 52B.)

### Clause 53 – Principal’s suspension

This Clause sets out:

* the Contractor’s obligations and rights if the Principal suspends progress of the Works;
* the Principal’s obligations if the suspension is due to the Principal’s act or omission.

#### 53.1 Principal’s instruction

The Principal may instruct a suspension of any part of the work under the Contract for any reason, and need not advise the reason. The Contractor must stop work if the Principal so instructs.

The impact of a suspension on contract time and therefore cost can be significant. Although the Principal’s Authorised Person will issue the instruction, authority to suspend work is generally delegated to an experienced senior manager and is not to be used lightly. The appropriate senior manager should be consulted 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.

Note, however, that where work on site is not being carried out safely or is not in accordance with the Contractor’s safety or environmental management plans, the Contractor should initially be requested to take the necessary action itself. Only if the Contractor does not take immediate action to resolve the issue and there is a risk of injury or environmental harm should the Principal instruct a suspension.

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. If protracted, it may also lead to disestablishment and re-establishment of equipment 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 simply to grant an Extension of Time for the delays. Careful consideration should also be given to whether it is necessary to suspend the whole of the Works.

Consider the following example, based on an actual situation.

|  |
| --- |
| The Contractor was unable to provide a Safe Work Method Statement for excavation when requested by thePrincipal’s Authorised Person. The Principal suspended all work on the site until a SWMS for the excavation work was prepared. The Contractor argued that the Principal should only have suspended the excavation work and was paid the additional costs incurred due to the suspension of the other works on the Site. |

If the reason for the suspension arises from the Contractor’s actions, for example unsafe work practices, the Principal should state the reason for the suspension in the instruction.

The Principal may also state the conditions under which the work will be permitted to resume. This may be appropriate if the Principal is confident that the decision to resume work can be left to the Contractor or if the suspension is due to directions from an authority that will be responsible for ensuring the matter has been addressed (Sample letter 57).

#### 53.2 Resumption of work

Unless the instruction to suspend work includes conditions for the resumption of work, the Principal must issue another instruction to resume work when the reason for suspension has been resolved. The Contractor would be within its rights not to re-commence the suspended part of the work until the instruction to resume work is issued. The work must then resume without further delay. (Sample letter 57B)

If the suspension was instructed to suit the Principal’s needs, for example because necessary approvals were not in place or the Principal needed time to reconsider an aspect of the design, the Principal would need to issue a formal instruction for the Contractor to resume the suspended work. This should be done as soon as the need for the suspension ceases, to reduce the time and cost impacts.

#### 53.3 Contractor’s entitlements

The Contractor is not entitled to additional payment or an extension of time if the Principal needed to instruct the suspension because of the Contractor’s actions, for example if work practices did not meet safety requirements.

However, the Contractor will be entitled to recompense for the effects of a suspension if the reason for the suspension arises from the Principal’s actions. If the suspension delays the Contractor in reaching *Completion*, the Contractor will be entitled to an Extension of Time and additional payment.

The Extension of Time is assessed in accordance with Clause 50, but the Contractor is not required to provide the initial notice and subsequent formal *Claims* specified in Clause 50.3. The Contractor will need to submit a *Claim* after the suspension has been lifted, stating the quantum of the Extension of Time sought. However the only supporting documentation required is an updated *Contract Program* demonstrating the extent of the delay caused by the suspension to activities on the critical path. The period of the suspension is from when the Contractor suspends the work following the Principal’s instruction to when the work could reasonably restart after the Principal instructs the resumption.

The Contractor is also entitled to delay costs, assessed in accordance with Clause 51, for the period(s) that the *Contractual Completion Date(s)* are extended due to the Principal’s instruction.

The Contractor is also entitled to be paid the unavoidable additional costs that were incurred as a result of the suspension. Note that these costs must be ‘unavoidable’. 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, re-organising work programs and the order of Works or by disestablishing plant and equipment if the suspension is lengthy. In assessing the additional costs, care must be taken not to double count costs included in the delay costs rate. The delay costs rate covers items such as Site establishment, project management, general construction plant, other overheads and financing costs.

#### 53.4 No other remedy

The Contractor is not entitled to claim additional costs related to a suspension other than under Clause 53. Failure to agree on the quantum of time or costs under Clause 53.3 could lead to the notification of an *Issue* under Clause 68.

## Payment

### Clause 54 – Contractor’s suspension

### Clause 55 – The contract price

### Clause 56 – Goods and services tax (GST)

This Clause sets out the requirements for incorporating into the Contract the provisions of the *A New Tax System (Goods and Services Tax) Act 1999* (Commonwealth).

The need for RCTIs:

* The Act requires that a tax invoice be created in respect of every business transaction that occurs between a payee and payer.
* The tax invoice records the amount of GST that is payable in respect of the payment.
* Except for excluded items, the amount of GST is directly related to the invoiced amount (1/11th of that amount).
* Once this tax invoice is raised, it is administratively difficult to adjust it.
* Because of the payment provisions of the Contract, the amount claimed by the Contractor as a progress claim is not necessarily the amount that the Principal will pay in respect of that claim. It may be reduced by the Principal in accordance with various provisions in the Contract including retentions of *Completion Amounts*, deductions of Prepayments, amounts for uncompleted or defective work, or other amounts claimed and set-off by the Principal.
* It is therefore preferable for the Principal to raise the tax invoice after the *Scheduled Amount* has been confirmed.

It is important that the Contractor is aware that a tax invoice must not be raised by the Contractor with the *Payment Claim*.

### Clause 57 – Prepayment

This Clause sets out provisions relating to *Prepayment*.

*Prepayment* is an advance payment made to the Contractor to provide early cash flow. *Prepayment* is intended to assist the Contractor, Subcontractors and Suppliers in meeting the costs involved in preparing for construction, such as purchasing *Materials* and equipment for which payment will not be made until they are incorporated into the Works.

#### 57.1 Conditions for Prepayment

The amount of the *Prepayment* the Contractor can receive is limited to the amount specified in Contract Information item 45.

The Contractor is not obliged to take up any or all of the specified *Prepayment* amount, but may request a portion of the specified amount at any time during the course of the Contract. If *Prepayment* is claimed late in the Contract period, it cannot be more than the unpaid balance of the *Contract Price* and must also take into account any moneys owed by the Contractor to the Principal. The latter could include the cost of urgent work carried out by the Principal or liquidated damages. That is, the Contractor cannot claim more than the amount that will be paid under the Contract in the future.

The *Prepayment* must be used for the purposes of the Contract and this must be established to the Principal’s satisfaction. Appropriate purposes could include payment for work, fees, equipment or *Materials* to be used or related to the work under the Contract.

The Contractor is not allowed to keep more than one-third of the specified *Prepayment* amount for its own use. If more than one-third of the *Prepayment* amount is claimed, the Contractor must assign the balance to Subcontractors, Suppliers and Consultants and must notify the Principal which Subcontractors will receive a prepayment and how much each will receive. The Contract allows the whole of the *Prepayment* amount to be claimed for Subcontractors, Suppliers and Consultants; the Contractor is not obliged to keep one-third for itself.

The *Prepayment* does not represent a risk to the Principal because the Principal receives *Undertakings* from the Contractor of equivalent value to the amount that is prepaid. *Undertakings* are to be in the form of Schedule 2 (Undertaking). Note that the Contract does not require the Contractor to have *Undertakings* from Subcontractors, Suppliers and Consultants. However, this is sometimes required under the Contractor’s own management system. *Undertakings* provided by Subcontractors cannot be handed on to the Principal in lieu of the *Undertakings* required from the Contractor.

#### 57.2 Payment by the Principal

This Clause places an obligation on the Principal to make the *Prepayment* within 14 days after receiving evidence that all the conditions in Clause 57.1 have been met. Before making a *Prepayment*, the *Principal’s Authorised Person* must check that:

* the amount of *Prepayment* claimed is not more than:
	+ the amount specified in Contract Information item 45; or
	+ the amount that will become due to the Contractor under the Contract;
* the Contractor has satisfactorily established that the *Prepayment* will be used for a purpose related to the Contract, eg by providing a schedule of *Materials* or equipment to be purchased;
* the Contractor has:
	+ notified the Principal of the Subcontractors, Suppliers or Consultants to whom amounts in excess of one-third of the *Prepayment* have been allocated,
	+ nominated the amounts to be paid, and
	+ notified that effective written assignments will be in place; and
* the Contractor has provided *Undertakings* in the form of Schedule 2 for the full amount claimed as *Prepayment*.

#### 57.3 Progressive repayment

The Contractor is required to repay progressively the *Prepayment* amount by way of deductions from progress payments. This should be done as the identified *Materials* or equipment or services are incorporated into the Works. For example, if a *Prepayment* of $300,000 was made for the fabrication of structural steelwork and the steelwork is installed over a three-month period, a deduction of $100,000 could be made at the end of each of the months during which the steelwork is installed. However, this process can be cumbersome if taken to the extreme. In this example, if $20,000 of the steelwork will not be installed until later in the Contract, it may be convenient to deduct the full amount at an earlier time, when the majority of the steelwork has been installed, return the relevant *Undertaking* and pay the remaining $20,000 as a normal progress payment when the steelwork is completed.

It is critical that the prepaid amount be deducted early enough from payments due to the Contractor. If it is not, there may eventually be less money remaining to be paid than to be deducted. The Principal will need to ask the Contractor to refund the overpayment or take other action to recover the amount, eg calling upon *Undertakings*.

It is therefore important for the Principal to consider the *Prepayment* amount when valuing each *Payment Claim*. The proportion of the *Prepayment* amount that has not been deducted from progress payments must always be less than remaining portion of the *Contract Price*.

However, it should be borne in mind that it is undesirable to deduct the amount too rapidly and reduce the Contractor’s cash flow too much during the early stages of the work. Taking into account the cooperative principles underlying the GC21 Contract, it may be appropriate to agree with the Contractor on a reasonable timing and rate of deductions.

#### 57.4 Return of Undertakings

The Principal has no right to hold the *Undertakings* after the full amount of the *Prepayment* has been deducted from progress payments. This applies even if the Principal anticipates that it may wish to call upon the *Undertakings* in the future, for example due to the poor performance of the Contractor.

Note that Clause 57 does not prevent the Principal from reaching an agreement with the Contractor that two or three *Undertakings* will be provided, to be returned progressively, at the discretion of the Principal, as the relevant work is completed.

#### 57.5 Principal’s recourse to Undertakings

Under Clause 57.5 the Principal is not obliged to return any of the *Undertakings* until all of the *Prepayment* amount has been deducted from progress payments.

The Principal may call upon the *Undertakings* before they are required to be returned to the Contractor if:

* the amount that is yet to be paid for the work under the Contract is less than the *Prepayment* amount remaining to be deducted from progress payments (ie when the *Prepayment* amount being held is added to the value of progress payments made to date, this shows that the Contractor has been paid more than the *Contract Price*); or
* the Contract or the Contractor’s employment under the Contract have been terminated.

It should also be noted that Clause 63 allows recourse to ‘*Undertakings* provided under the Contract’ for any claimed sums including debts due.

The Principal may also utilise the *Undertakings* as an incentive to have certain *Defects* rectified. If the Principal considers that work for which a *Prepayment* has been made is defective and should not be paid for, the Principal can refrain from deducting the relevant amount of the *Prepayment* from progress payments and retain the *Undertakings* until rectification is carried out.

### Clause 58 – Payment claims

This Clause sets out the Contractor’s obligations for submitting *Payment Claims* for progress payments.

#### 58.1 Timing of Payment Claims

The Contractor is entitled to be paid progressively for work completed, subject to the provisions of this and other relevant Clauses.

The Contract requires the Contractor to make *Payment Claims* monthly. The *Payment Claims* are to be in writing and are to identify the work carried out up to the reference date of the *Payment Claim.* This date is usually specified as the last *Business Day* of the relevant month. As a *Payment Claim* is to be submitted on the specified date and requires time to prepare, it may, in practice, only include work carried out up to say a week before the specified date. The remaining work carried out in that calendar month would be included in the next *Payment Claim.*

Payment for work performed as part of a *Variation* or other agreed adjustment to the *Contract Price* may be claimed progressively. However, unless design is identified as an item of work in its own right, or is the subject of a *Milestone*, payment for design work may only be claimed as the associated components are progressively incorporated into the Works. Under Clause 58.2, special provisions may apply to claims for payment for work included in *Milestones*.

#### 58.2 Payment Claims for Milestones

The value of any *Milestone* identified in Contract Information item 46B is not to be included in *Payment Claims* until the work associated with the *Milestone* is completed. There is no allowance for part payment, or progressive payments, for these identified *Milestones*. This provision is commonly applied to components of the work such as preparation of management plans, design or commissioning.

Monthly claims for progressive payment may be made for *Milestones* that are not identified in Contract Information item 46B.

#### 58.3 Final Payment Claim

Special provisions apply to a *Final Payment Claim*, as set out in Clause 61.

#### 58.4 Form of a Payment Claim

Schedule 3 (Payment Claim Worksheet) is a suggested format for the presentation of *Payment Claims*. The Contractor may have an alternative format that better suits the particular contract. The parties should agree, at the start of the Contract, on the format for *Payment Claims.* The agreed format should include the information identified in Schedule 3 and should be used consistently throughout the Contract.

#### 58.5 Content of a Payment Claim

In each *Payment Claim*, the Contractor must clearly identify the work and *Materials* that are the subject of the claim. The claim must have a ‘bottom line’ stating the amount that the Contractor is claiming for the month. In calculating this amount, the Contractor should take into account the value of:

* work covered by the original *Contract Price*;
* work that is the subject of *Variations*;
* other *Claims* that have been agreed or determined;
* any interest for late payments;
* retention of the *Completion Amount* specified in Clause 60; and
* any amounts payable to the Principal, such as the value of *Defects* not made good, deduction *Variations*, deductions required to repay *Prepayment* amounts, liquidated damages or interest.

To allow progressive *Payment Claims* to be easily reconciled and avoid the risk of ambiguity, all *Payment Claims* should show the total value claimed for all work completed to date, not merely the value of work completed during the past month. This is fundamental to presenting a *Payment Claim* and forms the basis of the Schedule 3 (Payment Claim Worksheet) template.

The Contractor is always entitled to claim the cumulative value of the work carried out up to the date of the *Payment Claim*, less amounts previously paid. This assists in reconciling differences of opinion about the value of work performed up to previous payment dates and allows for adjustment of the *Contract Price* as the work proceeds.

These provisions are consistent with the requirements of the *NSW Building and Construction Industry Security of Payment Act 1999* (NSW) (*Security of Payment Act*).

#### 58.6 Supporting Documentation

With every *Payment Claim*, the Contractor is required to provide the following documents to the Principal:

* calculations showing how the *Claimed Amount* has been calculated;
* a current, completed and true statutory declaration in the form specified in Schedule 6 (Statutory Declaration);
* all specified *Conformance Records* relating to the work for which payment is claimed, eg Quality Management records;
* any other information that the Contract specifies is to be submitted with a *Payment Claim*, eg the WHS and Environmental Management Monthly Reports.

The commentary on Clause 59.2 deals with the situation where any of the above documents are not provided.

Statutory Declaration

The Contractor is required to provide a statutory declaration in the form set out in Schedule 6 (Statutory Declaration). The standard form of statutory declaration requires the Contractor to declare under oath whether or not all workers and Subcontractors have been paid all monies which are due and payable to them by the Contractor at the date of the relevant declaration. Under the *Oaths Act 1900* (NSW), there are penalties for wilfully swearing a false declaration.

Monies due and owing to workers include wages and superannuation, long service leave, awards and entitlements under any applicable enterprise agreement.

The statutory declaration includes a statement from the Contractor that it has met the Contract requirements in relation to payment of Subcontractors, Suppliers and Consultants, including that it:

* has paid monies that are due;
* is holding cash security provided by Subcontractors in trust;
* is holding in a trust account monies that have been paid to the Contractor and to which Subcontractors are entitled;
* deposited such cash and monies in the trust account on the next *Business Day* after receipt; and
* has records available to account for monies held in trust.

The fact that the Contractor has provided a sworn and witnessed statement will be taken by the Principal as evidence that the Contractor has carried out the actions described in the statutory declaration.

It is essential that any statutory declaration be supplied as an original. Photocopies or faxes must be confirmed by originals to ensure against forgeries. Any statutory declaration which is not in the form detailed in Schedule 6, or is not an original, must be rejected.

If a complaint is received, or other evidence arises, to the effect that the statutory declaration is false, this does not entitle the Principal to refuse payment to the Contractor. The Principal’s obligation under the Contract is to pay the Contractor if the Contractor fulfils its obligations, including supplying the statutory declaration.

The process used to investigate complaints, conflicting statutory declarations and possible referral to prosecuting authorities is beyond the scope of this commentary.

Unfixed Materials

#### 58.7 Conditions for payment for Unfixed Materials

The Contractor is generally paid for *Materials* and equipment as they are progressively incorporated into the Works. *Materials* that have been delivered to the Site have not been ‘incorporated into the Works’ until they are fixed in their permanent positions.

However if the conditions set out in Clause 58.7 are met, the Contractor is able to claim payment for *Materials* that have not yet been incorporated into the Works. These provisions are designed to relieve the financial burden on the Contractor where equipment or plant of significant value has been manufactured before the Works are ready for it to be installed. The Contractor may have paid the *Supplier* and would otherwise not be able to recover the cost from the Principal.

If the Contract is terminated and the provisions in this Clause have been applied, it is easier for the Principal to gain possession of unincorporated *Materials* and proceed with the work with a minimum of delay. This is because the Principal has paid for those *Materials*.

Payment must never be made for unincorporated *Materials* unless the Principal has agreed in writing to pay for them and:

* the Contractor has provided evidence that the *Materials* will be the property of the Principal upon payment;
* the Contractor has provided evidence that the *Materials* are insured by the Contractor for their full value;
* the *Materials* are clearly identified as the property of the Principal;
* the Contractor accepts in writing that the *Materials* remain entrusted to it for carrying out the Works and that it is solely liable for their care;
* if the *Materials* are imported or to be imported, the Contractor has given the Principal the documentation specified in Clause 58.7.5; and
* if the value of the *Materials* is greater than $100,000, the Contractor has provided an *Undertaking* in the form of Schedule 7 (Undertaking) for their full value and a statement in the terms of Schedule 11 (Statement regarding *Materials*).

The Contractor must provide this evidence at least 14 days before submitting the *Payment Claim* that includes the unincorporated *Materials.* If this is not done, the Principal need not pay for the *Materials*. The reason for non-payment should be included in the *Payment Schedule*.

The Principal does not require an *Undertaking* for unincorporated *Materials* valued at less than $100,000. This facilitates making payment to the Contractor but it means the Principal bears some financial risk, for example if the Contractor defaults and the *Materials* are unavailable for some reason.

Even after the Principal pays for unincorporated *Materials*, they are entrusted to the Contractor’s care. The Principal accepts no liability, even though ownership is transferred. The Contractor’s obligations to prevent and repair any damage are the same as for any other *Materials* the Contractor procures for the Works.

As an alternative to requesting payment for *Materials* not incorporated into the Works, the Contractor may choose to claim *Prepayment* under Clause 57.

#### 58.8 No encumbrance

By claiming payment for unincorporated *Materials* under this Clause, the Contractor warrants that there is no *Encumbrance* over those *Materials*.

*Encumbrances* are defined in Clause 79. In essence, the Contractor is promising that no-one else can claim ownership of the *Materials*, for example because of an agreement between the Contractor and a financial institution that provided funds for the purchase.

#### 58.9 In the event of termination

If the Contract is terminated, the Contractor is obliged to make arrangements for the Principal to take possession of unincorporated *Materials* for which payment has been made under this Clause. This applies even if the *Materials* are stored at the premises of a third party. In such circumstances, it is recommended that the Principal arranges the transfer of any unincorporated *Materials* to its own storage facilities prior to, or immediately after, the termination.

Any *Undertakings* that the Principal is holding for unincorporated *Materials* should not be released until all unincorporated *Materials* have been securely stored by the Principal.

It should also be noted that Clause 63 allows recourse to ‘*Undertakings* provided under the Contract’ for any claimed sums including debts due.

### Clause 59 – Payments

This Clause sets out the Principal’s obligations after receiving a *Payment Claim* from the Contractor, including provisions governing the timing and method of payment. It clarifies that payments are made ‘on account’.

The commentary includes a brief description of the operation of the *NSW Building and Construction Industry Security of Payment Act 1999* (NSW) and provides recommendations for preparing *Payment Schedules*.

#### 59.1 Requirements for Payment Schedules

Timing of Payment Schedule

When the Contractor ‘serves’ a *Payment Claim* in accordance with Clause 58.1, the Principal has 10 *Business Days* in which to respond. There can be significant consequences if an appropriate response is not provided within time.

It can sometimes be difficult to determine the date of ‘service’ of a *Payment Claim*. This would generally be the time the claim should have been received, in the normal course of events, taking into account the method used to send it. If sent by email, the date of service would be the date the claim was sent. If sent by post, the date could be one or two days after the date of posting. The Principal would be wise to assume the date was the earliest that the *Payment Claim* should have been received.

The appropriate response to a *Payment Claim*, whether or not the Principal agrees with the amount claimed by the Contractor, is to give the Contractor a *Payment Schedule.* This is the case irrespective of when the *Payment Claim* was made and what information was provided with, or omitted from, the *Payment Claim*.

To meet the requirements of the *Building and Construction Industry Security of Payment Act 199*9 (NSW) (*Security of Payment Act*) the *Payment Schedule* must:

* identify the Contract and the relevant *Payment Claim*;
* state the amount that the Principal proposes to pay (the *Scheduled Amount*); and
* indicate (if applicable) the reasons why the amount the Principal proposes to pay is less than the amount the Contractor claimed. This includes reasons for any retentions that need to be held.

Amount payable

The purpose of the *Payment Schedule* is to advise the Contractor of the amount that the Principal proposes to pay and, if that amount is different from the amount claimed, to inform the Contractor of the reasons for the difference.

In calculating the amount to be paid, the Principal should consider the value of work completed to the date of the *Payment Claim*.

Clause 58 (Payment Claims) states that the Contractor can claim for *‘any other Claim that the Principal has agreed…to pay’.* However a *Payment Claim* may include amounts for work that has been carried out in respect of valid *Claims* or *Variations* whose value has not been agreed.In these cases, if the Principal is able to assess the value (or minimum value) of the adjustments, the Principal should include payment for the satisfactorily completed part of the extra work on the basis of the Principal’s current assessments, pending final agreement on the appropriate adjustments.

The Principal is entitled to make deductions for items such as:

* the estimated cost of rectifying defective work;
* the actual cost of urgent work carried out by the Principal;
* retentions; and
* liquidated damages.

A deduction for defective work should take into account what it would cost the Principal to have the rectification carried out, including any demolition and replacement. 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 if 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 *Business Days*. However, the *Payment Schedules* responding to those *Payment Claims* that have been made more frequently than specified may state that no payment is due because the Contractor is not entitled to make that claim. As discussed below, it is essential to provide reasons for not making a payment.

Security of Payment Act

If the *Payment Claim* states that it is being made under the *Security of Payment Act* and the Principal fails to comply with the Act and does not pay the Contractor the amount claimed, the consequences can be serious. The different situations are summarised below:

1. If the Principal does not give the Contractor a *Payment Schedule* within 10 *Business Days* after the *Payment Claim* was served, then:
	* the Principal becomes liable to pay the *Claimed Amount*; and
	* the Contractor can recover the *Claimed Amount* in court as a debt due or may apply to an independent party to have an adjudicator determine the amount to be paid; and
	* the Contractor can serve notice to the Principal that it proposes to suspend work.

Note that if the Principal has not issued a *Payment Schedule* by the date payment was due and the Contractor intends to make an adjudication application, the Contractor must, within 20 *Business Days* after the date on which payment was due, notify the Principal of its intention and allow the Principal 5 *Business Days* to provide a *Payment Schedule.*

1. If the Principal provides a *Payment Schedule* to the Contractor within 10 *Business Days* after the *Payment Claim* was served but fails to pay the *Scheduled Amount* by the due date then:
	* the Contractor can recover the *Scheduled Amount* as a debt due or may apply for adjudication of the *Payment Claim*; and
	* the Contractor can serve notice to the Principal that it proposes to suspend work.
2. If the Principal provides a *Payment Schedule* to the Contractor within 10 *Business Days* after the *Payment Claim* was served which indicates a proposed payment of less than the *Claimed Amount* then:
	* the Contractor may apply for adjudication of the *Payment Claim*.

If the Principal fails to issue a *Payment Schedule* at all (even after the Contractor notifies its intention to make an adjudication application), the Principal loses its opportunity to provide reasons for not paying the amount claimed and there is a risk that an adjudicator will find the Contractor is 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 costly formal dispute resolution process to recover any excess payments. More information about the adjudication process under the *Security of Payment Act* is available in the Procurement Practice Guide [Managing Payment Claims](http://www.procurepoint.nsw.gov.au/documents/psc-managing-payment-claims)and from the Security of Payment website.

Reasons for withholding payment

It is important for a *Payment Schedule* to state the reasons why the Principal is not intending to pay the amount claimed. This must be done for each applicable item in the claim and for any retentions to be made by the Principal. The Principal cannot introduce any further reasons during any subsequent adjudication process. The independent adjudicator is required to determine the amount payable on the basis of the reasons given in the *Payment Schedule*. The adjudicator may determine that the Contractor is entitled to a higher amount than would have been the case had the Principal provided comprehensive reasons.

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 itself. The reasons should refer to the provisions of the Contract where possible. Examples of ‘reasons’ for common situations are:

1. Specified work
	* I do not agree with the claimed percentage of work completed for items 3, 5, 7, 9 & 11 of the *Payment Claim* and have assessed the value as shown in the attached schedule based on the extent of work specified and the site inspection of 3 June.
	* I do not agree with the claimed quantities of work completed for items 3, 5, 7, 9 & 11 of the *Payment Claim* and have calculated the quantities as shown in the attached schedule. Details of my calculations are attached.
	* I do not agree with the claimed quantities of work completed for items 3, 5, 7, 9 & 11 of the *Payment Claim*. I have reviewed your calculations and adjusted them in accordance with the contract. Refer to the attachment.
	* I have reduced the previous amount assessed for item 3 Windows, by $7,400 because the sill flashing for 2 windows has not been installed in accordance with the Contract. Refer to my *Defects Notice* dated 14 August 2011. This amount includes the likely costs to the Principal if the work is completed by others.
2. Variations & Claims
	* 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 my assessment were provided in my letter dated 4 August 2011.
	* I have not included any amount for Variation No 14, for reasons provided in the *Payment Schedule* dated 6 October 2011.
	* You have not provided sufficient information, as required by Clause 15.2 of the General Conditions of Contract, for the Principal to assess fully 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 2011.
3. Other Reasons
	* 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 12.6 of the General Conditions of Contract.
	* I have deducted an amount of $100,000 against item 1 of the *Payment Claim*, in accordance with Clause 57.3 of the General Conditions of Contract, as repayment of the *Prepayment* made against this item.

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.

In practice, due to the cooperative relationship promoted in a GC21 Contract, it is common, and recommended, for both parties to agree on the content and amount of the *Payment Claim* before it is formally submitted. This avoids unnecessary conflict and distraction from the objectives of the project.

Payment

#### 59.2Time for payment

Unless the Contractor has failed to meet specified pre-conditions for payment, the Principal is required to pay the applicable amount within 10 *Business Days* after the *Payment Schedule* is due to be issued. This is 20 *Business Days* after Contractor’s *Payment Claim* was served. Note that the date for payment is not linked to the date the *Payment Schedule* is issued. That is, the Principal is not obliged to make the payment earlier than 20 *Business Days* after the date of the *Payment Claim* even if the *Payment Schedule* was issued earlier than required by the Contract.

The Contract contains provisions that are pre-requisites to the Contractor receiving payment. Some of these provisions are listed in this Clause and others may be found elsewhere. Some of the things that might prevent payment by the date specified in Clause 59.2 could be:

* failure to meet WHS or environmental management obligations, including providing the specified monthly management reports;
* failure to meet specified obligations for quality management, Aboriginal participation or protection of vulnerable people; or
* failure to meet a specific technical requirement such as provision of test certificates prior to payment for mechanical or electrical equipment.

Note that, even if the *Payment Claim* is not supported by the specified documents, the *Payment Schedule* must still be issued within 10 *Business Days* after the *Payment Claim* was received. While the time for payment is affected by the absence of the specified documentation, the amount of the payment is not.

If the Contractor has not met a specified pre-condition for payment, the time for payment becomes the time specified in the Clause that includes the pre-condition. Payment would not be due, for example, until seven days after the Contractor demonstrates compliance with its obligations for WHS or environmental management, Aboriginal participation or protection of vulnerable people. The Principal has an obligation to ensure the Contractor complies with the specified pre-conditions. The Contractor should be advised in writing why payment is not being made within the specified 20 *Business Days*. This advice is separate from the *Payment Schedule* and should be given no later than the date payment would have been due.

Note also that the time for payment can only be deferred where the Contract specifically provides for this. For example, payment cannot be held pending the Contractor’s compliance with an obligation that does not specify an effect on payment, such as provision of a WRAPP report or compliance with an instruction or rectification of *Defects*. The Contract makes other provisions for these situations.

#### 59.3 Method of payment

All payments under the Contract are to be made by electronic funds transfer, unless this requirement is contradicted by another Clause in the Contract. This provision is expressed in such a way that any other Clause can take precedence over Clause 59.3 (Sample letter 59.)

The Principal should make the Contractor aware of the obligation to advise EFT details if they are not available when payment is due.

#### 59.4 Payment on account

Payment by the Principal is ‘payment on account’ only. All payments are interim payments, pending the final payment for all the work under the Contract. Payments made by the Principal are not evidence that the Contractor is meeting its obligations under the Contract.

Payments made by the Principal may be reviewed and amended in later payments. Even if the Contractor has been paid for a particular component of the Works, the Contractor remains liable for its compliance. If a component of work that has been paid for is later found to be defective, not only must the Contractor make good the *Defect*, but the Principal can reduce the amount paid for that component in subsequent payments until the *Defect* is satisfactorily rectified. Similarly, if payment is made for a *Variation* based on the Principal’s initial assessment, the amount paid can be adjusted either up or down when the value has been agreed or determined.

### Clause 60 – Completion amount

This Clause sets out the mechanism for retention and release of the *Completion Amount*.

#### 60.1 Payable on Completion

If there is a *Completion Amount*, it is specified in Contract Information item 47.

The *Completion Amount* provides an incentive for the Contractor to achieve *Completion* as soon as possible. It is a less adversarial and financially detrimental mechanism than imposing liquidated damages on the Contractor for failing to reach *Completion* by the due dates. However, specifying a *Completion Amount* does not preclude also using the liquidated damages option.

Contract Information item 47 specifies when the Contractor may claim the *Completion Amount*. It may be after the whole of the Works reaches *Completion* or after *Completion* of a specified *Milestone*. The latter may apply if, for example, the last *Milestone* involves maintenance or a proving period and the Principal has determined that the *Completion Amount* should be released after the construction work is complete.

To receive the *Completion Amount*, the Contractor must claim it in a *Payment Claim* submitted after the specified date.

Note that the Principal may refuse the Contractor’s claim for payment of the *Completion Amount* if the Principal has a claim against the Contractor and chooses to use the ‘set-off’ provisions in Clause 63. Refer to the commentary on Clause 63 for more detail.

#### 60.2 Provisions for retention

The Principal obtains the *Completion Amount* by making retentions from progress payments due to the Contractor. No such retentions are made until after the total amount paid for work in connection with the Contract is more than 50% of the *Contract Price*. Retentions would not be made in the payment that accounts for 51% or more of the *Contract Price*, but in the next payment.

This provides for the Contractor to receive necessary cash flow in the early stages of the Contract.

Similarly, retaining significant portions of progress payments can deprive the Contractor of necessary cash flow during the course of the work. For this reason, the Contract specifies that no more than 50% of the amount due in a progress payment may be retained from any single payment. It may therefore be necessary to deduct less than the full *Completion Amount* from the first payment made after it is due to be retained. The amount of the retention would increase in following payments, until the specified *Completion Amount* is retained in full.

Consider this example:

* The *Completion Amount* is $100,000.
* As a result of the last payment, the total amount paid to the Contractor under the Contract was more than 50% of the *Contract Price*.
* The current *Payment Schedule* indicates that the value of work undertaken in the payment period is $160,000.

In this case, a maximum amount of $80,000 would be retained from the payment made in relation to the current *Payment Schedule*. The remainder would be retained from the next payment. Alternatively, if the parties agreed, $50,000 could be retained from the current payment and the next one.

Of course, the full *Completion Amount* may be retained from the relevant progress payment if the value of that payment is more than twice the *Completion Amount*.

When calculating the amount payable each month, the retentions made for the *Completion Amount* are deducted from the total value of work completed and the Contractor is paid the difference between that value and the amount previously paid. This continues until the parties have agreed that the Works (or *Milestone*, if applicable) has reached *Completion* and the Contractor is entitled to claim it. Only then can the Principal release the *Completion Amount.*

#### 60.3 Interest earned

The Contractor is not entitled to claim for interest on the *Completion Amount*, although it has been held back from payments. When it is released, it is not a ‘late’ payment to which Clause 62 would apply.

### Clause 61 – Final payment

This Clause sets out requirements for:

* the Contractor’s *Final Payment Claim*;
* the Principal’s *Final Payment Schedule*;
* the parties’ obligations after the *Final Payment Schedule* is issued; and
* the effect of the *Final Payment Schedule* and the final payment.

The provisions in this Clause are in addition to the relevant requirements in Clauses 58 and 59, which apply to all *Payment Claims* and *Payment Schedules*.

#### 61.1 Final Payment Claim

In order to finalise the Contractor's entitlements in respect of the Contract, Clause 61.1 obliges the Contractor to submit a *Final Payment Claim* within 13 weeks after *Completion* of the whole of the Works. The *Final Payment Claim* must include the Contractor’s claims for any entitlement not previously claimed. This is an absolute time bar that prevents the Contractor from making *Claims* for any further Contract entitlements after the 13-week time limit expires, subject to any *Issues* arising out of the *Final Payment Schedule* itself (see Clause 61.5).

The *Final Payment Claim* should not include final amounts in respect of any *Claims* or *Issues* that are:

* still under consideration by the *Principal’s Authorised Person*;
* being resolved by the *Senior Executives*; or
* being determined using other procedures specified in the Contract, for example by the Valuer or an *Expert*.

The provisions of Clause 61.5 recognise and address these matters.

#### 61.2 Final Payment Schedule

This Clause is similar to Clause 59 in relation to the Principal’s response to any *Payment Claim* submitted by the Contractor. The Principal has 10 *Business Days* in which to produce a *Final Payment Schedule*. The consequences of failing to do so are the same as for any *Payment Schedule*. See the commentary on Clause 59.

If the Contractor fails to submit a *Final Payment Claim* within the specified 13 weeks, the Principal still has an obligation to finalise the Contract by issuing a *Final Payment Schedule*. This *Final Payment Schedule* needs to be issued within the 2 weeks following the specified 13-week period, ie within 15 weeks after the whole of the Works has reached *Completion* (Sample letter 61). The *Final Payment Schedule* should be clearly identified as such.

Before issuing a *Final Payment Schedule*, the *Principal’s 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 67 should be followed.

If the Contractor does not make good a *Defect* within the time specified in an instruction under Clause 67, the *Defect* can either be rectified under Clause 45.3 or resolved (by accepting the Works with the *Defect* not made good) under Clause 46. The cost of rectifying outstanding *Defects* should be included in calculating the amounts owed by one party to the other and should be set out in the *Final Payment Schedule*.

If the Contractor submits a *Final Payment Claim* in accordance with the Contract but the Principal does not issue the *Final Payment Schedule* within the specified time, the Principal has breached the contract. The Contractor is entitled to take action under the Contract, for example by raising an *Issue* with the Principal’s senior executive under Clause 69.1 and claiming interest on the amount it should have been paid. Alternatively, the Contractor may choose to make an adjudication application under the *Security of Payment Act*.

If the Contractor did not submit a *Final Payment Claim* and the Principal does not issue the *Final Payment Schedule* within the specified time, the *Final Payment Schedule* will still be valid but the Principal will be in breach of contract. If the Principal owes money to the Contractor, the Contractor would be able to make a claim for interest on that money. Interest would be calculated from the date the money would have been paid, had the Principal issued the *Final Payment Schedule* on time, until the date that the money was actually paid. The amount of interest could be calculated in advance, based on the anticipated date for payment, to finalise the *Contract Price*.

#### 61.3 If the Contractor owes money to the Principal

The *Final Payment Schedule* may state that the Contractor owes the Principal money. This could occur if the Principal rectified *Defects* or accepted the Works with *Defects* not made good, or if the Contractor was in debt to the Principal for other reasons.

If the Contractor owes the Principal money, the requirements for the *Final Payment Schedule* differ slightly from those required for a routine *Payment Schedule* (under Clause 59.1). In this case, the *Final Payment Schedule* must:

* identify the Contract and the *Payment Claim* (if any);
* indicate the amount payable by the Contractor to the Principal;
* include reasons and particulars explaining the Principal’s claims.

The particulars and reasons would include:

* the event that forms the basis of the Principal’s entitlement (eg a breach of Contract such as a defective work);
* evidence that the Principal complied with its contractual obligations (eg by instructing the Contractor to make good the *Defect* and/or by proposing acceptance of the *Defect*);
* the amount of the Principal’s claim;
* details of how that amount was calculated; and
* evidence of the Principal’s costs or agreed deduction (eg invoices or a signed agreement to accept the *Defect*).

#### 61.4 Time for payment

Contractor to pay the Principal

If the *Final Payment Schedule* shows that the Contractor owes money to the Principal, the Contractor must pay within 14 (calendar) days after the *Final Payment Schedule* is provided.

If the Contractor does not pay within the specified time, the Principal may recover the money by calling upon the *Post Completion Undertaking* or using the set-off provisions in another contract. The Principal is not obliged to release any *Undertakings* until after payment is received.

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.

Principal to pay the Contractor

If the Principal owes money to the Contractor, the provisions of Clause 59 apply. This means the Contractor must provide the relevant specified documents, including a Statutory Declaration for the period since the last *Payment Claim*.

#### 61.5 Further adjustments to the Contract Price

The *Final Payment Schedule* is not a statement by the Principal that the Contractor has met all its obligations under the Contract. It is not a statement of the final *Contract Price*. What it represents is a final accounting by the Principal as to the value of the work carried out in connection with the Contract and the Contractor’s other entitlements included in the *Final Payment Claim*.

Even though a *Final Payment Claim* may have been processed in accordance with Clauses 61.1 to 61.4, it is possible that further payments could eventuate as a result of:

* *Claims* or *Issues* that were raised prior to the date of the *Final Payment Claim* but are not yet resolved;
* new *Claims* raised in the *Final Payment Claim*;
* *Issues* that arise from the *Final Payment Schedule*, providing they are notified within 28 days after the date of that schedule; or
* arithmetical errors in the *Final Payment Schedule*.

If these matters result in additional entitlements they may be resolved by agreement or determined by a formal procedure. Once they are resolved, there is no requirement for another *Final Payment Claim.* The parties are required to pay the relevant amounts within a specified time (eg where there has been an *Expert* determination) or after a *Payment Claim* has been submitted under Clause 58 (where a settlement has been negotiated).

#### 61.6 Contractor’s liability not affected

Giving a *Final Payment Schedule* to the Contractor does not affect the Contractor's liability under the Contract or otherwise (eg in tort or under statute). The Contractor is still liable for the quality and compliance of the work under the Contract.

The Contractor’s liability does not end until the end of the limitation period that applies under the relevant statute. For contracts, this is generally 6 years. That is, the Contractor has a legal obligation to rectify a *Defect* in work performed under the Contract if it is notified within a 6 year period (usually from the time the *Defect* should have become apparent). However, note that for certain works, this limitation period can be superseded by a specific warranty, eg for mechanical equipment or control systems.

### Clause 62 – Interest on late payments

#### 62.1 If a payment is late

If either the Principal or the Contractor is late in making a payment to the other party, then the party that is late in making the payment is liable to pay interest on the overdue amount.

Late payments are usually caused by circumstances beyond a party’s control. In practice, interest is only paid if the party that received the late payment makes a claim for the interest. In deciding whether to do so, the party should take into account the likely adverse consequences for the relationship between the parties.

The applicable rate of interest for late payments is stated in Contract Information item 48. It applies for the period that the payment is late.

The rate of interest is quoted ‘per annum’. The default rate is 8%. It is calculated as ‘simple’ interest over the relevant period. That is, if a payment of $240,000 is 2 months late, the interest payable is $240,000 x 0.08 x 2/12 = $3,200.

Interest in a GC21 contract is not compound interest. If it were compounded monthly in the example above, the $1,600 payable for the first month would be added to the $240,000 in order to calculate the interest payable for the second month. The total interest payable would be $1,600 + ($241,600 x 0.08 x 1/12) = $3,210.67.

### Clause 63 – Set-off

#### 63.1 Principal’s rights

The Principal may have a claim against the Contractor for money owed to the Principal, either under the Contract or under another contract between the Principal and the Contractor. This can occur if, for example, the Principal makes good defective work carried out by the Contractor or the Principal erroneously makes an overpayment.

If so, the Principal is entitled to:

* withhold, deduct or set off the amounts claimed by the Principal against any amount to which the Contractor is entitled under or arising out of the Contract; and
* make a demand against either the *Completion Undertaking* or the *Post Completion Undertaking* for any part of those amounts that are in excess of the Contractor’s payment entitlement under the Contract. That is, if the payment due to the Contractor is less than the amount the Principal is claiming, the Principal can call on the *Undertakings*.

Note that the Principal cannot set off a general claim against an *Undertaking* held on account of payment for unincorporated *Materials* (Clause 58.7). A claim can only be made against such an *Undertaking* if the value of the unincorporated *Materials* is affected, for example if they are damaged or otherwise become unavailable for use in the Works. These *Undertakings* must be returned when the *Materials* become part of the Works.

Note also that the Principal can only make a demand against the *Undertakings* provided for *Prepayment* (Clause 57.4) if the *Prepayment* has not been fully repaid and the Principal terminates the Contract or the Contractor’s employment under Clause 73 or 74.

The Principal’s set-off right is a powerful one but for it to be effective, the *Undertakings* must be unconditional. It is essential that the *Principal’s Authorised Person* does not accept *Undertakings* that are not in the form specified in Schedule 2 (Undertaking).

Note that:

* a deduction can be made from payments due under a GC21 contract for a debt that is legally due under another contract, even if that other contract does not contain a set-off Clause; but
* if a debt is legally due under one contract, even if it is incurred under a GC21 contract, the debt cannot be deducted from payments due under another contract unless that other contract contains a set-off Clause similar to this Clause in GC21.

Sample letter 63 can be used to advise the Contractor that an amount is going to be deducted from a payment due under the Contract. This should not be done without the debt having been established and without concurrence from the appropriate senior manager.

It is convenient to process a deduction *Variation* 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.

## Completion

### Clause 64 – Early use

This Clause sets out:

* the Principal’s rights and obligations if early use of the Works is sought; and
* the Contractor’s obligations and reduced responsibilities if early use occurs.

#### 64.1 Principal’s right to occupy

If the Principal or someone authorised by the Principal wishes to occupy all or part of the Works before *Completion* is achieved (as defined in Clause 79), the Contract provides for this to occur. It is up to the Principal to confirm that the part of the Works to be occupied is sufficiently complete for it to be used. This means, for example, that:

* the relevant certifications have been received (eg building occupation certificates); and
* the Contractor will be physically able to make good outstanding *Defects* and complete other Contract requirements after the facility is occupied.

Construction insurance will continue to cover the Contractor after occupation by the Principal, but it does not provide the necessary cover for the occupiers of the facility. The insurance requirements are similar to those that apply after *Completion* is achieved. See Clause 26.4. The Contractor is not responsible for insuring against damage caused by the people using or occupying the facility. The entity that owns the Works (which may or may not be the Principal) will need to take out any additional insurance required.

Before taking action under Clause 64.2, advice should be sought from the client or the client’s insurance broker as to the necessary insurance. Insurance should be arranged before the Works is occupied.

If early use or occupation of the Works occurs, the Contractor's responsibilities under the Contract are not affected except that:

* the Contractor ceases to be responsible for indemnifying the Principal against loss or damage to the occupied part of the Works and associated part of the Site (under Clause 26.3); and
* the Contractor’s responsibilities are reduced to the extent that the Principal (or anyone authorised by the Principal) allows the Contractor's work to be hindered when using or occupying part of the Works.

The Principal may occupy a part of the Works that has outstanding *Defects*. If so, the Principal should undertake a joint inspection with the Contractor to identify and record known *Defects* that do not require immediate rectification. A program should be agreed for any required rectification, taking into account the Contractor’s ability to obtain the necessary resources and the needs of those occupying the premises.

If the incomplete Works are used or occupied by the Principal (or anyone authorised by the Principal) and the Contractor’s performance is hindered, the provisions of the Contract need to be applied. For example:

* if *Defects* are not accessible due to the occupation, it may be necessary to accept the Works with *Defects* not made good, under Clause 46;
* where access restrictions apply, the Contractor may be entitled to claim for additional costs, for example for work required outside normal working hours which causes the Contractor to incur additional labour costs; or
* where progress is delayed, the Contractor may be entitled to claim an extension of time under Clause 50.

These provisions could apply even if the need for early use or occupation was due to the Contractor’s lateness.

If the Principal uses or occupies the Works before *Completion*, this reduces the amount of delay costs payable to the Contractor on account of delay caused by the Principal in proportion to the amount of the Works not occupied (see Clause 51.4). Similarly, if liquidated damages apply, it reduces the amount payable to the Principal if the Contractor fails to achieve *Completion* by the relevant *Contractual Completion Date* (see Clause 51.11).

An alternative to using the provisions of Clause 64 is to establish, by agreement with the Contractor, an additional *Milestone* that includes outstanding work and the rectification of specific *Defects*. The facility would be occupied when all the work under the Contract is completed except for work in that new *Milestone*.

#### 64.2 The Principal’s notice

The Contract specifies that the Principal is to give at least 21 days notice before the date of occupation will commence. This time period allows for the Contractor to make arrangements and provide relevant documents. The 21 days can only be reduced by agreement with the Contractor.

The Principal’s notice should clearly identify the proposed date for occupation and the part or parts of the Works that are to be used or occupied so that the Contractor can determine whether it needs to reallocate resources, relocate *Materials* or expedite the provision of documents and other things required to facilitate the occupation (Sample letter 64).

#### 64.3 The Contractor to cooperate

The Contractor has an obligation under the Contract to assist the Principal in occupying the Works and to cooperate with those who use or occupy the facility. If the Contractor incurs additional unanticipated costs in doing this, then the Contractor may be entitled to make a *Claim* under Clause 68.

#### 64.4 Contractor to provide documentation

By the date notified by the Principal under Clause 64.2, the Contractor is required to provide the documents and other things listed in the definition of *Completion* that apply to the part of the Works to be occupied. This includes:

* relevant warranties, manuals, licences, access codes and work as executed information;
* certificates, authorisations, approvals and consents from statutory authorities;
* certificates required for occupation, such as a BCA compliance;
* spare parts and tools;
* keys and access passes/codes; and
* other requirements specified in the Contract such as test certificates and training.

### Clause 65 – Completion

This Clause sets out:

* the Contractor’s obligations in relation to achieving *Completion* of the Works; and
* the Principal’s obligation to document the *Actual Completion Date(s)*.

#### 65.1 The Contractor’s obligation

*Completion* is defined in Clause 79. The definition applies to the Works and to *Milestones. Completion* is achieved when the Contractor has completed all the work and obligations associated with the relevant part of the Works. All known *Defects* must have been rectified and all required documentation delivered to the Principal.

Other forms of contract use the term ‘practical completion’ to define the point at which the Works may be used or occupied with minimal inconvenience. The Contractor can argue that the Principal has no right to deduct liquidated damages at that time, and should take over responsibility for the care of the Works. There is no concept of ‘practical completion’ in GC21.

Failure to complete the Works by the *Contractual Completion Date* (as extended) is a breach of the Contract by the Contractor. The Principal’s remedies for the breach are to:

* withhold the *Completion Undertaking* until *Completion* is achieved; and
* withhold the *Completion Amount* until *Completion* is achieved; and
* demand payment of liquidated damages under Clause 51, if applicable; and/or
* take action to terminate the Contract under Clause 73.

The Contractor is expected to advise when it considers that *Completion* has been reached. The Principal should then inspect the relevant work and examine the documents provided and determine whether the work meets the definition in Clause 79. Inspections should be carried out with the Contractor, so that the position taken by the Principal is clear and the nature of any outstanding *Defects* is understood, if *Completion* has not been reached.

The Principal need only inspect the relevant work to the extent necessary to determine that *Completion* has not been reached. The Principal is not obliged to identify all *Defects* and should not attempt to do so. That is the Contractor’s responsibility. It is common for Contractors to argue that work that has been inspected by the Principal without a *Defect* being identified has been accepted. This can place the Principal in an uncomfortable position if it does not identify every *Defect.* The Contractor may try to argue that the Principal cannot later identify additional *Defects*. This has no contractual basis.

If a Contractor advises that work is completeand it is not *Complete* due to obvious *Defects* or omissions, including in required documentation, the Principal should instruct the Contractor to meet its contractual obligations. In addition, if the *Defects* are significant, the Principal should prepare and issue a Contractor Performance Report with an unsatisfactory rating against Standard of Work and Quality Management. This action can have the beneficial effect of raising with the Contractor’s management the poor performance of its project managers.

An inspection by the Principal may result in a list of identified *Defects* and omitted items, for example documents not provided or aspects of the Site and surroundings not made good. If this is the case, *Completion* cannot be granted and the Principal should promptly notify the Contractor. The notification should list the identified *Defects*.

However, in circumstances where a Client needs to occupy the Works, the Principal can assist the Contractor to address *Defects* promptly and achieve *Completion* by providing a more comprehensive list of *Defects* and omissions. This cooperative action by the Principal is beyond the requirements of the Contract and does not preclude an adverse Contractor Performance Report being issued.

The Principal’s notification that *Completion* has not been reached should request the Contractor to notify the Principal when the outstanding matters have been dealt with. Use Sample Letter 65 – Option 1 if *Completion* has not been reached.

A re-inspection by the Principal will then be required. If additional *Defects* are identified at the re-inspection, the process described above should be repeated.

#### 65.2 When Completion is reached

*Completion* must be confirmed by way of a formal written notice from the Principal, when both parties have agreed that the Works or a *Milestone* meet the definition of *Completion* (Sample letter 65). Separate notification is required for each *Milestone*.

The parties are required to act ‘reasonably’ in agreeing on whether *Completion* has been achieved, but this does not mean that the Principal must compromise its right to receive all of the Contract deliverables in a finished state. Acting ‘reasonably’ may, for example, involve accepting that there is a dispute over the existence of a particular *Defect* and agreeing to give a notice of *Completion* before that *Defect* is rectified and to deal with the disputed *Defect* after *Completion*. Once issued, a notification of *Completion* cannot be withdrawn.

Even if the Contractor does not advise when the Works or a *Milestone* has reached *Completion*, the Principal can notify the Contractor that *Completion* has been reached. Sample Letter 65 – Option 2 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 the Contractor will make good the remaining *Defects* and provide any outstanding documents within a specified period. Alternatively, the Principal could propose to accept *Defects* not made good, on specified terms.

### Clause 66 – Close-out workshop

This Clause sets out the requirement for the Principal to arrange a close-out workshop and for the Principal and Contractor to attend.

The close-out workshop is intended to finalise the process of working cooperatively to achieve successful outcomes that commenced at the start-up workshop (Clause 32) and was maintained through holding regular evaluation and monitoring meetings and working together to improve performance (Clause 6).

The participants at the workshop should reach consensus as to the effectiveness of the management processes employed on the project and perhaps develop some suggestions for improvement for future contracts.

The close-out workshop is usually shorter than the start-up workshop, taking on average 2 hours to complete.

#### 66.1 Convening the workshop

It is the Principal’s responsibility to arrange a close-out workshop involving the Principal and Contractor. The workshop is required to be held within 21 days after *Completion* is reached for the whole of the Works. This allows for management of the Contract to be reviewed while the relevant aspects of the Contract are still fresh in the minds of the participants.

Note that where a Contract includes a maintenance or proving *Milestone* and *Completion* of the whole of the Works will occur significantly later than *Completion* of construction, it is recommended that the parties agree to hold the close-out workshop at an earlier date, ideally within 21 days after construction is completed and the facility is occupied or placed in operation.

The Procurement Practice Guide *GC21 meetings and workshops* includes guidance on preparing for, and running, the close-out workshop. The NSW Government Procurement System for Construction website also includes a sample Agenda and model forms for obtaining and recording feedback from participants, including learnings from the evaluation and monitoring meetings and the methods used to resolve identified issues.

The practice guide and forms can be obtained from:

<http://www.procurepoint.nsw.gov.au/before-you-buy/procurement-system-construction/contract-management/contract-management-gc21-edition>

Note that the guidance material in the NSW Government Procurement System for Construction website does not form part of the Contract. The parties may use an alternative agenda or document the workshop outcomes in a different format and still satisfy their contractual obligation in relation to the close-out workshop.

#### 66.2 Attendees at the workshop

The Principal and the Contractor are both obliged to attend the close-out workshop and they must jointly decide who else should attend.

The other participants would usually include the senior executives (or other senior representatives of the parties), client representatives, end users of the completed Works and members of the evaluation and monitoring team.

As stated in the referenced Clause 6.4, the arrangements for allocating costs are the same as for the evaluation and monitoring meetings. As discussed in the commentary for Clause 32 – Start-up workshop, if one party has borne the cost of holding the start-up workshop (ie hire of premises and equipment, supply of food etc), then the other party would pay for the costs of holding the close-out workshop.

### Clause 67 – Defects after completion

This Clause sets out:

* the Principal’s rights; and
* the Contractor’s obligations and continuing liability,

if a *Defect* is discovered after *Completion*.

#### 67.1 Rectification

By definition, the Works should be free from known *Defects* at *Completion.* However a *Defect* may become apparent after the Works is in use. If this occurs, the Principal may:

* instruct the Contractor to make good the *Defect* and, if the Contractor fails to do so, have the *Defect* made good by others; or
* accept the *Defect* and instruct a *Variation* to the Works with an appropriate deduction from the *Contract Price*.

GC21 does not have a ‘defects liability period’ like some other forms of contract. The Principal may instruct the Contractor to make good a *Defect* after *Completion* has been notified. The only time limit is imposed by the law. Under the *Limitation Act 1969* (NSW), the cost of rectifying *Defects* cannot be recovered through an action brought in court if the action commences more than six (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*. Note that listing an action in court can take significant time.

If a *Defect* is discovered more than six years after the Works reached *Completion,* the Principal’s rights may depend on when the *Defect* should reasonably have been identified. Legal opinion should be sought as to whether the *Limitation Act* would affect the Contractor’s obligation to rectify the *Defect*.

Consider the following example, based on an actual situation.

|  |
| --- |
| * Defects were identified in a facility after *Completion*. The Contractor denied that there were *Defects*. The *Post-Completion Undertaking* (bank guarantee) was not returned. Investigations were carried out to verify the existence of the *Defects*. Eventually a demand was made against the *Post Completion* undertaking to rectify the *Defects*. The Contractor successfully claimed that the time limit under the *Limitation Act* had expired.
* The *Post-Completion Undertaking* had to be returned, the *Defects* were not rectified and the Principal incurred $40,000 in legal costs.
* The (expensive) lesson learnt was to act swiftly when legitimate Defects are discovered.
 |

It is important for the Principal to establish clearly 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* is identified, the Principal should investigate and confirm its existence before giving a formal notice to the Contractor. It is usually appropriate to meet the Contractor on the Site for a joint inspection. Often the *defect* is not a surprise but the consequence of issues and problems that occurred during the Contract. The Principal should approach possible post completion *Defects* with an open mind.

If a confirmed *Defect* is to be rectified, the Principal should issue a *Defect Notice* to the Contractor. Use Sample Letter 67.

Consider the following examples, based on actual situations.

|  |
| --- |
| * A presumed *Defect* (gate collapse) was identified in a facility after *Completion*. The Contractor repeatedly refused to meet and discuss the issue. The Principal formally notified the Contractor that due to its refusal, a recommendation would be made that it be removed from the list of pre-qualified contractors and be placed on a review (not to be used) list of contractors. The Contractor agreed to meet and acknowledged the *Defect* which it was able to rectify at minimal cost.
* A *Defect* (sewer not laid at correct grade) was notified some 3 years after *Completion*. The sewer had blocked repeatedly but the Client had not notified the Principal or Contractor and had damaged the sewer by trying to clear blockages. An agreement was reached with the Contractor and Client for each to bear 50% of the cost of the rectification works due to the damage caused by the Client.
 |

Refer to the commentary on Clause 45 for information about *Defect Notices* and managing the notification and rectification process in general. In particular, note the recommendation to have the *Defect* rectified by others if the Contractor does not act to rectify the *Defect* within time.

As an alternative to instructing rectification of a *Defect*, the Principal may instruct a *Variation*. If the *Variation* reduces the value of the Works, it may be necessary to reduce the *Contract Price* to reflect this reduced value. A deduction *Variation* may be instructed and the value taken into account when calculating the amount payable to the Contractor.

Recovering the cost of rectification by the Principal, or a deduction from the *Contract Price,* is relatively simple if the Principal has not issued the *Final Payment Schedule* and still holds the *Post Completion Undertaking*. The amount of the Contractor’s debt, or the reduced value of the Works, can be included in the *Final Payment Schedule* and recovered through the final payment process (see Clause 61).

If final payment has been made, the Contractor should be advised that there is a debt due. A debt due may also apply if a deduction variation is instructed in lieu of a rectification instruction (see Sample letter 67).

If the Contractor fails to pay the debt, the amount can be deducted from progress payments for another contract between the Principal and the Contractor, or called up against an *Undertaking* provided under such a contract, provided that contract contains a set-off Clause.

#### 67.2 Contractor’s liability

The Contractor’s liability under the Contract is not reduced when the Principal exercises its options to rectify a *Defect* or to instruct a *Variation* under Clause 67. If another *Defect* is discovered later, even in rectification work arranged by the Principal, the Contractor has a liability to make good the *Defect*. This liability continues to the end of the limitation period in the *Statute of Limitations*. Legal opinion should be sought as to how the *Statute of Limitations* applies to *Defects* identified in the rectification of defective work.

Notwithstanding the Contractor’s continuing liability for defective work as set out in this Clause, the Principal should be able to demonstrate that it provided appropriate instruction and inspection for rectification work that it arranged.

#### 67.3 Principal’s rights

Clause 45 gives the Principal the right to have a *Defect* rectified or to accept that a *Defect* need not be made good. The provisions of Clause 67 do not alter that right. The Principal has absolute discretion to choose whether to accept defective work, on terms, or to instruct that it be made good.

The Principal has the right to claim damages under the common law if the Contractor breaches the contract by failing to rectify a *Defect*.

# Claim and Issue resolution

## Claim resolution

### Clause 68 – Contractor’s claims

Clauses 68 to 72 provide step-by-step procedures for dealing with *Claims* and *Issues*. In general, the approach is to try to resolve disagreements as soon as possible, through discussions and negotiation. If the parties are unable to resolve matters themselves, then further steps are available under these Clauses to resolve the *Claims* so that the Contract work can proceed unhindered.

If the Contractor wishes to make a *Claim* for which procedures are not set out in another Clause in the Contract, this must be done in accordance with Clause 68. However, as noted in Clause 68.7, the requirements of Clauses 68.2 to 68.6 apply to all *Claims*. A *Claim* made under Clause 68 will generally be for an adjustment to the *Contract Price*, since Clause 50 sets out detailed procedures for submitting *Claims* for extensions of time.

Clause 68 does not apply to *Payment Claims*, which are dealt with:

* under Clause 58; and
* if the Contractor elects to use its statutory rights, under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

#### 68.1 Timing of Claims

Some Clauses in the Contract specify a time for making a particular type of *Claim.* For example, *Claims* for unavoidable additional work caused by materially adverse *Site Conditions* (Clause 37) or *Faults* in the *Contract Documents* (Clause 38) must be made in accordance with the procedures set out in the relevant Clauses. Clause 68.1 does not apply to these *Claims*.

Clause 68.1 applies when:

* the relevant Clauses in the Contract do not specify a time for making a *Claim*, for example when the Principal suspends work under Clause 53; or
* the Contractor makes a *Claim* in connection with the Contract but not under a provision of the Contract, for example a *Claim* that the Principal’s conduct has been misleading under the *Competition and Consumer Act 2010* (Cth).

A *Claim* to which Clause 68.1 applies must be submitted within 28 days after the start of the event giving rise to the *Claim.* It may be difficult for the Contractor to identify the ‘start’ of the event, and the Clause therefore provides for the time period to start when it would have been reasonable for the Contractor to have known. For example, if the Contractor has ordered *Materials* from a *Supplier* that subsequently ceases trading and the Contractor is obliged to procure *Materials* from a different company at a higher cost, it may not be reasonable for the Contractor to have known when the original *Supplier* began trading insolvent, or even the date an administrator was appointed, but it would be reasonable to know of the insolvency ‘event’ when an article appeared in the Financial Review or when the *Supplier* ceased answering correspondence.

The objective of setting a time limit is to encourage the Contractor to make *Claims* as soon as practicable, so they can be dealt with when the events are recent and the facts can be investigated relatively easily. Prompt notification facilitates early resolution and also assists the Principal in controlling the project budget and in making informed decisions on related matters.

#### 68.2 Effect of late notification

If the Contractor fails to lodge a *Claim* within the time specified in Clause 68.1, this does not bar the *Claim* unless Clause 61.1 applies. The penalty under Clause 68 is that the Contractor loses any entitlement to interest that might have been payable in the period before the *Claim* was made. In the example of late payment, the Contractor would need to make the *Claim* within 28 days after the payment should have been made in order to obtain full recompense for the Principal’s failure.

Clause 61.1 prohibits the Contractor from making any *Claims* after the *Final Payment Claim* is submitted. Because the *Final Payment Claim* is required to be submitted within 13 weeks after *Completion* of the Works, this operates as a time bar to *Claims* made under the Contract.

Note that there are provisions elsewhere in the Contract that effectively impose time bars on some *Claims*. For example, under Clause 50.9 the Contractor has a reduced entitlement to an extension of time if the prescribed notices have not been provided.

#### 68.3 Content of a Claim

The requirements of Clause 68.3 apply to any *Claim*, even if it is made under another provision of the Contract.

It is the Contractor’s responsibility to provide sufficient information with a *Claim* for the Principal to assess the *Claim*. Such information must include:

* the facts on which the *Claim* is based;
* the legal basis of the Contractor’s entitlement;
* details of how the quantum of the *Claim* is calculated; and
* any effect on critical path activities and hence the time required to reach *Completion*.

The ‘facts’ will explain what happened that resulted in the Contractor making the *Claim*. It may be that the Contractor encountered rock or groundwater unexpectedly. The legal basis of the *Claim* will generally be a provision in the Contract. For example, Clause 37 provides for the Contractor to be recompensed if extra costs are incurred due to unforeseeable adverse *Site Conditions*, subject to the conditions set out in the Clause. The *Claim* should be supported by details of the quantities and calculations of the amounts claimed and evidence of the direct costs incurred by the Contractor, including relevant dockets, timesheets and evidence of payments made to Subcontractors, Suppliers and Consultants. The Contractor may have needed to hire a rock breaker or install a dewatering system, and it may have been necessary to stand down some equipment for a period of time. Invoices would be required to justify the additional hire costs. An updated *Contract Program* showing the length of the delay and evidence of standing costs would be required to justify the latter.

The Contractor must also address the questions set out in paragraphs 1.1.1 and 1.1.2 of Schedule 5 (*Expert Determination* Procedure). That is, the Contractor must identify:

* the event, act or omission that entitles the Contractor to additional payment or time and whether it arises:
	+ under the Contract (eg as a result of *Site Conditions*),
	+ as a result of a breach Contract by the Principal (eg failure to supply necessary *Materials* or approvals by the time the Principal undertook to do this), or
	+ otherwise in law (eg due to misleading representations as to the conditions on the Site).

and:

* the date on which the event occurred,
* what is the legal right from which the entitlement arises (eg a provision of the Contract or legislation),
* whether that right extinguished, barred or reduced by any provision of the Contract, estoppel, waiver, accord and satisfaction, set-off, cross-claim or other legal right.

If delays occurred, the Contractor must also detail how the event that led to the *Claim* affected the critical path of the Contract. An updated *Contract Program* showing the length of any delays caused by the relevant event is essential if the Contractor considers that the *Contractual Completion Date(s)* have been affected.

These provisions are intended to ensure the Principal does not need to request further information to assess the *Claim* properly. This assists the Principal to meet its time commitments and reduces delays in reaching resolution.

#### 68.4 Principal’s assessment

When a *Claim* is received, the Principal should promptly review the information provided and determine whether it complies with Clause 68.3. If there is insufficient information to assess the *Claim*, the Principal should respond to the Contractor by requesting the required additional information and reminding the Contractor of the provisions of Clauses 68.3 and 68.4. The Principal should make it clear in the request that assessment of the *Claim* cannot commence until the required information has been received. Use Sample Letter 68 to request the Contractor to provide the information necessary for a *Claim* to be assessed.

The Principal should not advise the assessment of a *Claim* until all the required information has been received.

Once all the information required under Clause 68.3 has been received, the Principal has limited time to respond to a *Claim*. Refer to the time limits in Clauses 47 and 68.6. The Principal should try to respond in time or, if that is not possible, seek the Contractor’s agreement to extend the period by a reasonable amount. Failing agreement, the Contractor would be entitled to include a *Claim* for interest for late payment, if the original *Claim* is valid.

The process in Clause 47 applies when the Principal is assessing a *Claim*. The preferred method is to agree on the appropriate adjustment. See the commentary on Clause 47 for other options.

If the Principal does not agree there is any entitlement, the Principal should promptly advise the Contractor. If the parties cannot agree on the adjustments and do not engage a Valuer, the Principal should assess the applicable adjustments and advise the Contractor. It is up to the Contractor to decide whether to take the matter further (see Clause 68.6).

Note that, until agreement is reached on the value of a *Claim*, or the *Claim* is determined by a Valuer or *Expert*, the Contractor can revise the *Claim*.

#### 68.5 Payment of Claims

Once the Principal and the Contractor reach agreement on any monetary *Claim*, the Contractor is entitled to claim the agreed amount in a *Payment Claim* under Clause 58.

However, under Clause 58.5.3 the Contractor can also include in a *Payment Claim* any other *Claim* that the Principal is required to pay under Clause 68 or any other provision of the Contract. Accordingly, if the Principal agrees there is an entitlement, the Principal should pay the assessed value, even if the Contractor has not agreed to this amount.

#### 68.6 Unresolved Claims

A *Claim* becomes an *Unresolved Claim* by definition if:

* the Principal rejects the *Claim*;
* the Principal advises an assessment with which the Contractor disagrees;
* the *Claim* has not been referred to a Valuer within the period specified in Clause 68.6 (or an agreed alternative period); or
* the Principal fails to respond to the *Claim* within the period specified under Clause 68.6 (or an agreed alternative period).

The Contractor is entitled to notify the Principal of an *Issue* under Clause 69.1 if a *Claim* becomes an *Unresolved Claim*. If the Contractor decides to notify an *Issue*, it must be done within 28 days after:

* the Principal notifies that the *Claim* is rejected;
* the Principal advises its assessment of the *Claim*; or
* the 28 days specified in Clause 68.4, or other agreed period, expires.

#### 68.7 Applicability of provisions of Clause 68

The provisions of Clause 68 apply to all *Claims* made in connection with the Contract, except to the extent that different procedures are specified for specific types of claim. For example, *Claims* for extensions of time must be made in accordance with the times set out in Clause 50.

Clause 68.7 ensures that all *Claims*, including those made under other provisions of the Contract, are subject to consistent processes and, if unresolved, follow the *Issue* resolution processes set out in Clauses 69 to 71.

## Issue resolution

### Clause 69 – Notification of issue

This Clause sets out the procedure that must be followed when an *Issue* is raised. The prescribed procedure reflects the cooperative nature of the Contract and the Principal’s desire to resolve matters promptly, economically and without damaging the relationship between the parties.

An *Issue* is defined in Clause 79 as ‘any issue, dispute or difference raised by either party under Clause 69’. There are no restrictions on what can be raised as an *Issue* except that it must relate to the Contract (see the commentary on Clause 69.2.

An *Issue* is not considered a ‘dispute’ which a party can refer for *Expert Determination* or litigation until these procedures have been completed.

#### 69.1 Disputed assessments or instructions

The Contractor has the right to raise an *Issue* if it disagrees with:

* an assessment made by the Principal, for example for:
	+ an adjustment to the *Contract Price* under Clause 38, 47 or 48;
	+ an adjustment to a *Contractual Completion Date* under Clause 38, 47 or 50;
	+ the value of the work remaining to be completed, under Clause 51;
* an instruction from the Principal, for example to:
	+ adopt a particular work method or *Temporary Work* under Clause 8;
	+ update or revise the *Contract Program* or achieve *Scheduled Progress* under Clause 22;
	+ accept a novation of a subcontract under Clause 29;
	+ carry out a *Variation* under Clause 37, 38, 45, 47, 48, 49 or 67;
	+ depart from the Principal’s design under Clause 38;
	+ carry out additional *Tests* under Clause 44;
	+ make good a *Defect* under Clause 45 or 67;
	+ suspend the Works under Clause 49;
	+ accelerate progress of the Works under Clause 52;
	+ suspend progress of the Works under Clause 53; or
	+ carry out work that is the subject of a *Provisional Sum* under Clause 55.

The Contractor may also raise an *Issue* if a *Claim* becomes an *Unresolved Claim*. For a discussion of the definition of an *Unresolved Claim*, see the commentary on Clause 68.6.

The Contractor is required to notify an *Issue* within 28 days after the event giving rise to the *Issue*, ie the date on which the assessment or instruction is given or the *Claim* became an *Unresolved Claim*. If this time requirement is not met, Clause 69.4 applies.

The notification must be given to the *Principal’s Authorised Person* (on behalf of the Principal) and to the Principal’s senior executive. It is the responsibility of the latter to attempt to resolve the *Issue*, in accordance with Clause 70.1.

Note that, as stated in Clause 72, raising an *Issue* does not allow the Contractor to refuse to comply fully with an instruction from the Principal.

#### 69.2 Either party may notify an Issue

This Clause provides for:

* the Contractor to notify an *Issue* that arises for a reason other than a disputed assessment, instruction or *Unresolved Claims*; and
* the Principal to notify an *Issue* on account of an act or omission of the Contractor. See Sample letter 69.

The Clause provides a mechanism for the Principal to seek to recover money from the Contractor in circumstances such as:

* an unfavourable determination under the *Building and Construction Industry Security of Payment Act*, for example because the Principal’s *Payment Schedule* failed to provide adequate details of the reasons for withholding payment, when the amount remaining to be paid under the Contract is less than the amount the Principal says was overpaid; or
* when the Principal is unable to recover the cost of rectifying *Defects* from moneys remaining to be paid under the Contract and *Undertakings* held.

However, only the Contractor can raise an *Issue* due to the Principal’s assessment or instruction or due to an *Unresolved Claim*. The Contractor decides if and when it will raise an *Issue* in these circumstances.

The relevant *Authorised Person* notifies the other party of the existence of an *Issue*. The notification must be provided to the other party’s *Authorised Person* and senior executive. A copy of the notification should also be provided to the notifying party’s senior executive. It would be prudent to brief that person before issuing the notification, to obtain a second opinion about the validity of the *Issue* and start preparing for discussions and negotiations with the other party.

An *Issue* is to be notified within 28 days after the notifying party became aware of the *Issue*, but late notice does not bar the entitlement (see the commentary on Clause 69.4).

#### 69.3 Obligation to follow Issue resolution procedures

The procedures in Clauses 69 to 71 must be followed before either party can start legal proceedings (litigation) or other dispute resolution action. Such ‘other’ action could include alternative mechanisms such as arbitration, mediation or facilitated resolution. The agreement of both parties is required before other alternative dispute resolution mechanisms can commence. Refer to the commentary on Clause 70 for more discussion on these mechanisms.

The specified *Issue* resolution procedures are consistent with the cooperative nature of the GC21 Contract. They are intended to ensure that the parties pause in pursuing contentious matters, discuss the situation, seek to understand each other’s position and attempt to reach agreement before resorting to formal resolution procedures. The process seeks to avoid the costs and delays that are inevitably associated with such procedures and to preserve positive, fruitful contractual relationships.

The obligation to follow the *Issue* resolution procedures does not prevent either party from using the court system in an urgent situation. See the commentary on Clause 69.6.

However, if one of the parties does commence proceedings in court, the other party would be able to request a stay (suspension of the proceedings) on the basis that the parties had a contractual agreement to comply with the provisions of Clauses 69 to 71 prior to starting court action to resolve a dispute.

#### 69.4 Effect of late notification

If an *Issue* is not notified within the time specified in Clause 69.1 or 69.2, this does not affect the basis of any entitlement. However it may affect the quantum of the entitlement.

If an *Issue* is resolved in favour of one party, that party may be entitled to interest on the amount owing. The interest would usually be calculated from the date when the party sustained the loss or was wrongly deprived of payment. For example, if a *Payment Schedule* wrongly rejected a claim for a *Variation*, interest would be calculated from the time payment for that *Variation* would have been made if the entitlement had been assessed in accordance with the Contract. If the *Issue* is not raised within the time allowed in Clause 69.1 or 69.2, no interest will be payable for the period before the *Issue* was notified.

The purpose of this provision is to provide an incentive for the parties to raise and resolve matters of disagreement promptly.

Note that the time bar under Clause 61 applies only to making a *Claim*. If a *Claim* was made prior to the deadline in Clause 61.1 and has not been resolved, then the time bar does not apply to the outstanding *Issue*. *Issues* that are not related to *Claims* are not affected by the time bar in Clause 61.

#### 69.5 Damages not payable for an incorrect assessment

Even if the Principal makes an incorrect assessment or instruction, the Contractor cannot claim damages (compensation).

For example, if the Principal makes an assessment that is subsequently overturned in an *Expert Determination*, the Contractor is entitled to any net additional amount payable under the Contract and the applicable interest on that amount. However, the Contractor is not entitled to claim any other form of damages, for example that the Principal acted negligently in making the assessment and thereby caused the Contractor to lose a business opportunity.

This provision does not preclude the possibility of the Principal being required to pay costs arising from litigation if an assessment is successfully challenged.

#### 69.6 Procedure no bar to seeking an injunction or declaration

Clause 69.3 prohibits the parties from circumventing the *Issue* resolution process by going directly to litigation. However, either party is able to seek from the court:

* an urgent declaration (ie a decision of the court on a question of law or rights); or
* an urgent injunction (ie an order requiring a party to do, or refrain from doing, a particular thing).

This may be necessary if it becomes clear that one of the parties intends to damage the other by failing to cooperate and delaying resolution. It may occur even if the specified *Issue* resolution procedures are being followed.

This Clause confirms that the specified *Issue* resolution procedures are not intended to oust the jurisdiction of the courts (ie prevent either party from applying ultimately to the courts for resolution of disputes), so it is not likely that the validity of the procedures will be challenged on this basis.

### Clause 70 – Resolution by senior executives

This Clause obliges the parties to confer and attempt to resolve an *Issue* before they pursue formal dispute resolution processes.

#### 70.1 Senior executives’ role

The term ‘senior executive’ is not defined in the Contract, but the parties are required to identify, in Contract Informationitems 7 and 11, the people who will undertake this role. They are different people from the *Authorised Persons*.

The individuals who are named as senior executives are expected to be senior personnel within their respective organisations who have the knowledge and experience necessary to understand contractual *Issues* and the ability to make commercial decisions and authority to reach agreement on resolution. If the personnel nominated as senior executives are senior management staff without contractual expertise, and alternative management staff with relevant experience are not available, contractual advisors with suitable expertise should be appointed.

The procedure recognises that it is efficient and practical for the parties to resolve differences between themselves, rather than requiring both parties to spend time and effort making submissions to a third party. The process outlined in Clause 70 provides an opportunity for the parties to re-assess the implications of a formal process and attempt to reach agreement.

The senior executives will not have been involved in day to day activities on the Site and should therefore not be entrenched in their views on a specific *Issue*. They can approach *Issues* from a perspective that reflects the broader priorities of the parties.

It is in the interests of the parties for the senior executives to make all possible efforts to resolve *Issues* promptly. They should meet face to face. If an adversarial relationship has developed on the Site, the meeting may be held in another location where the matters can be considered more dispassionately. Before the meeting, the *Authorised Persons* need to brief the senior executives thoroughly on the matters in contention. It is usually beneficial for the *Authorised Persons* to attend the meeting between the senior executives to ensure all relevant facts are identified and the circumstances clarified.

Note that the senior executives do not ‘determine’ or make a ‘determination’ of an *Issue* that is binding on the parties or the agency client. They confer and, if possible, resolve *Issues* by negotiation, subject to concurrence from the client agency or funding provider.

#### 70.2 Time to confer

The *Issue* resolution procedure attempts to ensure that differences of opinion are dealt with promptly, but also to allow sufficient time for the parties to confer.

After an *Issue* is notified, it cannot be referred to *Expert Determination* until a period of 28 days has elapsed. If the *Issue* is not resolved by the senior executives, the party raising the *Issue* has a further time period, normally specified as 28 days, to initiate an *Expert Determination*. This sets a limit on the time period within which the senior executives are required to confer and attempt to reach a resolution.

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 time limits. In this situation the parties can agree in writing to extend the time for resolution, to avoid triggering the contractual requirement to appoint an *Expert*. Time may also be required to obtain concurrence of the client agency to proceed to *Expert Determination* as client agency funding will usually be required. Use Sample Letter 70 to confirm agreement on an extension to the time for resolution.

#### 70.3 Referral to expert determination

After the end of the first 28 day period, referred to in Clause 70.2, the party that raised the *Issue* needs to decide whether to refer the matter to an independent *Expert* for resolution. This decision should not be taken without agreement from the responsible senior manager and/or the senior executive for the Contract. The decision must be notified within the time period specified in Contract Information item 51. The default period is an additional 28 days.

Written notice of the intention to refer an *Issue* to *Expert Determination* must be given to the other party’s *Authorised Person*, with a copy to the senior executive.

Note that alternative mechanisms are available to resolve *Issues*, but these require the agreement of both parties. Successful resolution can be achieved by using:

* a mediator/facilitator who identifies the common ground and areas of disagreement between the parties and employs specialised mechanisms to try to bring the parties to a mutually acceptable position;
* a technical or industry *Expert* who can provide an objective independent assessment of the *Issue*; or
* another senior executive (usually representing the Principal) who can provide an alternative assessment or perspective and suggest other areas of investigation that may clarify aspects of the *Issue*.

If the parties agree to an alternative dispute resolution mechanism, it is preferable that they agree it be non-binding, with the intention of seeking an acceptable resolution of the *Issue*. If the process proves to be unsuccessful, then either party retains its right to initiate an *Expert Determination*.

#### 70.4 Bar to pursuing Issues

If notice is not given within the specified time period that an *Issue* is to be referred to *Expert Determination*, the parties are expressly barred from referring the *Issue* to *Expert Determination*, litigation or any other similar action. ‘Similar actions’ would include arbitration, mediation, facilitated negotiation or other formal resolution process.

A negotiated settlement could still be reached by the parties, but the incentive for the recipient of the claim to settle the matter would be reduced since the Contract does not allow the initiating party for take the matter further.

Notwithstanding the provisions of this Clause, either party could initiate proceedings in court, arguing that the parties cannot oust the jurisdiction of the courts. Whether the court would allow the proceedings is a matter for the court to determine. It could be argued that the parties have agreed their intentions regarding the resolution of disputes and that further court action has been disallowed unless particular circumstances (eg fraud or injustice) demand the court's intervention.

### Clause 71 – Expert determination

This Clause sets out the procedures to be followed when an *Expert Determination* process is initiated by either of the parties, after the senior executives have tried and failed to resolve an *Issue*.

#### 71.1 Principal’s representative for Expert Determination

The Principal is to nominate a person to manage the *Expert Determination* process on its behalf. This person would usually not be the *Principal’s Authorised Person*, who may not have the necessary experience or may be fully occupied in other duties, including administering the Contract.

The Principal’s representative for this purpose is nominated in Contract Information item 52. If a person has not been nominated in the Contract Information, the Principal’s senior executive is initially required to manage the *Expert Determination* process. A new representative may be identified at any time, by written notice from the Principal to the Contractor.

#### 71.2 Selecting the Expert

Once a party has given notice under Clause 70.3 that an *Issue* is to be referred to *Expert Determination*, the parties are required to try to agree on an *Expert*.

If neither party is able to suggest suitable persons, NSW Procurement can provide a list. Whether *Expert(s)* are suggested by one of the parties or provided by NSW Procurement, their likely availability should be confirmed and a short-list produced for the parties to consider. As the hourly rates charged by *Experts* vary, it may be useful to request them at this time also.

The Contract provides a mechanism for an *Expert* to be nominated if the parties cannot reach agreement on the selection. When 28 days has passed since the notification under Clause 70.3, either party can approach the person nominated in Contract Information item 53 to provide a list of possible *Experts.* The request should include a copy of the conditions set out in Clause 71.2, to ensure that the suggested *Experts* are independent and not persons to whom either party has previously objected.

The person named in Contract Information item 53 would usually be someone who has knowledge of *Expert Determination* processes and is in a position of responsibility in relation to matters of dispute resolution, such as the CEO of the Australian Commercial Disputes Centre.

#### 71.3 Engaging the Expert

After the *Expert* is agreed or nominated, he or she is engaged by a letter from the Principal. The letter needs to address the matters set out in Clause 71 and Schedule 5 (*Expert Determination* Procedure). Before issuing the letter, the Principal also needs to ascertain the fees the *Expert* will charge and any conditions. For example, the *Expert* generally nominates an independent organisation to hold in trust the amounts provided by the parties as security for the *Expert’s* fees.

Although it falls to the Principal to forward the letter to the *Expert*, the engagement is a joint engagement by both parties. The Principal should therefore consult with the Contractor when preparing the letter of engagement, to obtain the Contractor’s agreement to the fees charged by the *Expert* and to a description of the *Issues* that are to be determined. There have been instances where the *Expert Determination* has been delayed significantly while the parties debated the description of the *Issue* without achieving any meaningful improvement. If *Issues* are described too narrowly, it can be difficult to reach agreement and in any case, it may not be effective in limiting the scope of the dispute. It is recommended that the *Issues* be described in neutral terms that capture the essence of the matters but discourage the introduction of other *Claims*, eg ‘cost of removal of asbestos’ or ‘adverse *Site Conditions* due to rock on the Site’.

The Principal is to provide a copy of the letter of engagement to the Contractor when it is issued to the *Expert*.

#### 71.4 Costs to be shared

It is the *Expert’s* responsibility to consider the matters in dispute fairly, honestly and without bias and to make a determination about each of the questions set out in Clause 1 of Schedule 5.

Irrespective of what the *Expert* finally determines, each party is required to meet its own costs of the *Expert Determination* process and to share equally any fees charged by the *Expert.* This reflects the independence and neutrality of the *Expert*.

Because each party bears its own costs, each has the ability to decide how much effort to put into preparing the submissions to the *Expert*. This may be influenced by the value of the dispute and the perceived strength of a party’s position. Nevertheless, it is advisable to respond to a submission from the other party by addressing all the matters raised, in similar detail. It is usual to engage legal or other specialist services to assist in the preparation of submissions.

#### 71.5 Expert Determination Procedure

The procedure set out in Schedule 5 has been developed, tested and proved effective through experience. Because the procedure does not involve ‘discovery’ of documents, limited time is allocated to the preparation of submissions, and the determination is made on the basis of written submissions only, the process is relatively expeditious and cost-effective.

The *Expert* and the parties are all required to follow the prescribed procedure.

It is therefore important to comply with the times set out in Schedule 5. The engagement of the *Expert* is a three-way agreement between the *Expert*, the claimant and the respondent. The *Expert* has limited power to give a determination if the specified procedure is not followed. 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 and apply in writing to the *Expert* for an extension.

#### 71.6 Defences and cross-claims

The procedure set out in Schedule 5 allows for both parties to make submissions to the *Expert*. The submissions should address the matters the *Expert* is required to determine under Schedule 5.

The party who initiated the *Expert Determination* makes the first submission. The other party then has the opportunity to respond (refer to Clause 2.2 of Schedule 5). The response may include a cross-claim. The cross-claim need not be related to the *Issue.* For example, if the Principal is responding to a *Claim* for *Variations*, the Principal may cross-claim for losses it suffered due to defective work carried out by the Contractor.

The second submission from the party making the *Claim* is not allowed to raise new matters. Similarly, the final response can only address matters that have already been raised.

As stated in Clause 2.3 of Schedule 5, the *Expert* may request further information from either party. This allows the *Expert* to obtain information on specific points to avoid a possible incorrect determination. However, if this discretion is not exercised properly, it can allow a party to make an additional submission supporting its position, which unnecessarily prolongs the *Expert Determination* without new information being presented. It is up to the parties involved to ensure the *Expert* complies strictly with the process and its role as set out in Schedule 5.

#### 71.7 Finality of determination

Having committed to *Expert Determination*, the parties accept that the determination is final and binding unless litigation is permitted under Clause 71.8. In practice, this means that if the *Expert* determines one party should pay to the other an amount between $0 and the amount in Contract Information item 54 (usually $500,000) then the *Expert Determination* will be the end of the matter.

If one of the parties is liable to pay an amount of money to the other, the payment must be made within the specified time unless:

* the amount is more than the amount specified in Contract Information item 54; and
* the party found to be liable notifies that it will commence litigation under Clause 71.8. In this case, the 28 day time limit stated in Clause 71.7 does not apply.

If the *Expert* decides that the Contractor owes money to the Principal, the Contractor is required to pay within 28 days after receiving the determination. If the Principal is to pay the Contractor, the Principal should request the documents required for a progress or final payment. However, the Principal must also comply with Clause 71.7 and cannot delay payment if these documents are not provided. . The Principal is to pay the Contractor by the later of:

* 28 (calendar) days after the *Expert Determination* is received; or
* 10 *Business Days* after receiving all the information required under Clause 59.2, including the original of a current statutory declaration.

#### 71.8 Commencing litigation

If the parties use the process of *Expert Determination* to resolve their dispute and the *Expert* determines, for example, that the Principal must pay the Contractor an amount exceeding the amount in Contract Informationitem 54, then either party has the right to commence litigation, provided this is done within the time specified in Clause 71.9.

In comparing the amount of the *Expert’s* determination with the amount in Contract Informationitem 54, do not include interest on the amount but do allow for any accepted set-offs.

Clause 71.8.2.2. deals with a special case which arises if the *Expert Determination* was initiated by the Principal, in order to recover money it considers was wrongly paid, following an adjudication under the *Building and Construction Industry Security of Payment Act (Security of Payment Act)*. In this case, the amount paid under the *Security of Payment Act* is not included in the amount to be compared against the threshold amount in Contract Information item 54. This provision is intended to limit the scope for litigation to follow. This is illustrated in the following example.

|  |
| --- |
| * The Contractor submits a *Payment Claim* for $800,000 and the Principal fails to issue an adequate *Payment Schedule*. The Contractor is awarded $750,000 by an adjudicator. If the Principal considers the Contractor has been overpaid, the Principal may initiate an *Expert Determination* and the *Expert* to try to recover some of the money. If the *Expert* determines that the Principal should have paid an amount of $100,000 and the standard limit applies, then the Contractor would have to repay $650,000 and could commence litigation if it were not for the provision in Clause 71.8.2.2. This would put the Principal at a serious disadvantage in any settlement negotiations that took place to avoid the litigation.
 |

Note that, in a landmark case relating to a contract based on GC21 Edition 1, which was eventually considered by the High Court (Shoalhaven City Council v Firedam Civil Engineering Pty Limited [2011] HCA 38), the NSW Supreme Court gave leave to have the dispute litigated despite the fact that the *Expert*’s determination was for an amount less than the specified threshold. Particular circumstances applied to the matters at issue in that particular dispute.

#### 71.9 Time bar to commencing litigation

Litigation of a dispute that has been determined by an *Expert* must be commenced within 56 days after the *Expert’s* determination is provided to the parties. Otherwise the entitlement to commence litigation is lost and the determination becomes final and binding by default.

The litigation should be confined to the relevant *Issue* and the matters determined by the *Expert*, including the amount of the payment.

### Clause 72 – Parties to perform the contract

# Termination

### Clause 73 – Termination for contractor’s default or insolvency

This Clause sets out:

* the circumstances under which the Principal has a right to terminate the Contract for *Contractor’s Default* or *Contractor’s Insolvency*;
* the procedure and conditions for termination;
* the Contractor’s obligations upon termination; and
* the Principal’s rights after termination.

The process detailed in Clause 73 for terminating the Contract results in termination of the Contractor’s employment under the Contract and is sometimes also called ‘taking the work out of the Contractor’s hands’. It is different from termination under the common law (see Clause 73.2).

Terminating a contract has serious consequences. Seek advice from procurement specialists and legal advisors as to the appropriate action, in the particular circumstances. Action should not be taken to terminate a contract without concurrence from the client agency, in consultation with the appropriate senior manager.

Depending on the circumstances, the appropriate action may be for the Principal to:

* terminate the Contractor’s employment under the Contract, take over the Site and use the Principal’s its own resources to complete the remaining work under Clause 73;
* terminate the Contract under the common law and seek ‘damages’ (payment for losses, costs, expenses etc.) from the Contractor; or
* as an alternative, terminate the Contract for the Principal’s convenience under Clause 74 (see the commentary on Clause 74).

#### 73.1 Principal’s right to terminate

This Clause provides for the Principal to terminate the Contractor’s employment under the Contract if the Contractor:

* commits a ‘substantial’ breach of the Contract (*Contractor's Default*); or
* becomes insolvent.

*Contractor’s Insolvency* is defined in Clause 79. The events constituting *Contractor’s Insolvency* can therefore be established objectively and are unlikely to be challenged.

In contrast, the Contractor will often dispute whether a breach of contract was substantial enough to warrant termination for *Contractor's Default*. To avoid such disputes, Clause 79 lists a number of circumstances that are considered ‘substantial breaches’ that can justify termination for *Contractor's Default*.

A ‘substantial’ breach of contract occurs if the Contractor does not meet an essential contractual requirement, for example if it:

* refuses to carry out an instruction issued by the Principal;
* progresses the work at a rate that fails significantly to meet *Scheduled Progress*; or
* fails to provide evidence of insurance that the Principal is unable to provide on the Contractor’s behalf (eg workers compensation insurance).

Before taking action to terminate the Contract for *Contractor's Default*, the Principal needs to be satisfied that such a default has occurred. The circumstances of the substantial breach(es), including exchanges of correspondence, verbal discussions, site records, minutes etc need to be documented. It can also be useful to prepare a report describing the breach(es) of contract, the options available to the Principal, the risks associated with each option and reasons for recommending taking action under this Clause. This will justify the Principal's conclusion. Note that Clause 69.1 provides for the Principal’s conclusion, ie that there has been a *Contractor's Default*, to be raised as an *Issue* and ultimately to be reviewed and revised by an *Expert* or a court.

Seek confirmation from the appropriate senior manager or procurement specialist that a particular act or omission by the Contractor is, in the circumstances, a *Contractor's Default*.

Termination 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 the associated risks.

Termination discharges both parties from further obligations to perform the Contract. However the terms of the Contract continue to govern the relationship between the Contractor (or administrator) and the Principal. Both parties still retain some 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 Contractor remains responsible for the quality of 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.

#### 73.2 Principal’s common law rights not affected

Clause 73 does not affect the Principal's common law right to terminate the Contract due to the Contractor failing to meet an ‘essential’ requirement of the Contract or ‘repudiating’ the Contract. Repudiation is defined as an absence of readiness or willingness to perform contractual obligations to an extent that is sufficiently serious as to give the Principal a right to terminate, eg the Contractor stating that no contract exists.

The Principal has the right to exercise its common law right to terminate if the Contractor fails to perform the Contract to such an extent that it substantially deprives the Principal of the benefits it would have received from the Contract. In these circumstances, the Principal is entitled to claim damages from the Contractor.

‘Damages’ are compensation for costs and losses suffered, ie 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 had performed the Contract. The assessment of an appropriate amount of damages to claim 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.

If the Contractor’s actions have given rise to a right to terminate under common law, then the Principal could proceed to issue a termination notice without taking the preliminary step at Clause 73.3. This common law right should only be exercised if and when the Contractor has clearly repudiated the Contract. Legal advice should be sought before taking such action.

#### 73.3 Notice to remedy a Contractor’s Default

Before the Principal can terminate the Contractor’s employment by reason of a *Contractor’s Default*, the Principal must give the Contractor the opportunity to remedy the breach of contract. This is done by issuing what is called a ‘show cause’ notice.

This form of notice should not be issued without obtaining legal advice and/or advice from a procurement specialist and without the concurrence of the client, after the risks and options have been discussed.

Before issuing a show cause notice, all efforts should be made to resolve the issues, since termination will inevitably result in extra costs and delays. The Principal and senior executive should attempt to meet with the Contractor to discuss the consequences of the Contractor’s breach and how the Contractor can remedy the breach.

If a substantial breach has been committed and the Contractor does not take prompt action to resolve it after discussions with the senior executive, the Principal may issue a show cause notice to the Contractor, specifying the *Contractor’s Default* and asking the Contractor to remedy it. Use Sample letter 73.

The Principal must allow the Contractor 7 full days to provide a response.

Evidence of delivery of the notice should be obtained, to ensure the Contractor cannot deny that it was received. The time that the Contractor receives the notice sets the time by which the Contractor must respond, and the time after which the Principal can take further action.

#### 73.4 Conditions for termination

The Contractor is required to respond to a show cause notice within 7 days.

If the Contractor makes a satisfactory response to the notice to remedy a *Contractor’s Default*, then no further action is taken. A satisfactory response could be:

* evidence of having rectified the *Contractor’s Default*;
* reasons, supported by facts, for the breach(es) of contract and proposed action to resolve the *Issue*s within a specific time; or
* a program of steps to be taken to rectify the breach, for example if the Contractor has not been achieving *Scheduled Progress*.

If the Contractor’s response is not considered satisfactory, or the Contractor does not rectify or resolve the breach within the nominated time, then legal advice on appropriate action should be sought. Note that the Contractor may dispute the Principal’s right to terminate.

If the Contractor does not respond at all to the Principal’s notice, or legal advice supports termination, the Principal may issue a second notice in writing to terminate the Contractor’s employment under the Contract (Sample letter 73). See the commentary on Clause 76 for advice about termination notices.

The Contract is terminated from the date stated in the termination notice. In setting this date, the Principal needs to take into account when it will be possible for the Principal to make the necessary arrangements to take responsibility for the Site, including taking out insurance and ensuring safety and security. The Principal should not take over the work until the date stated in the termination notice.

Note that, as an alternative to termination for *Contractor’s Default*, ie terminating the Contractor’s employment under the Contract, the Principal may choose to terminate the Contract under Clause 74 ‘for the Principal’s convenience’. This option is discussed in the commentary on Clause 74 and may be appropriate in the event of default at the beginning of a Contract or where the client agency prefers a monetary settlement to completing the Works using other means.

#### 73.5 Contractor’s Insolvency

By definition, a *Contractor’s Insolvency* event occurs if any one of the circumstances listed in the definition in Clause 79 applies. It is not necessary to wait for formal notification of insolvency from the Contractor to establish the *Contractor’s Insolvency*.

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. Use Sample letter 73 to request the Contractor to confirm its financial position. If the Contractor is prequalified, NSW Procurement should be contacted.

If the Contractor advises 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, 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 client agency and seek legal advice on procedures, options and risks.

Note that the *NSW Building and Construction Industry Security of Payment Act 1999* (NSW) does not make exceptions for insolvent companies. A Subcontractor can obtain an adjudication stating that the Subcontractor is entitled to payment from an insolvent Contractor or the 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.

If the Principal intends to terminate the Contract (ie terminate the Contractor’s employment under the Contract) under Clause 73.5 because an administrator has been appointed, it may be beneficial to give the administrator the opportunity to propose continuing with the Contract. This would be appropriate where there has been no previous correspondence with the administrator. Use Sample letter 73 - 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 its 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 complete the Works satisfactorily.

Once it has been established that neither the Contractor nor the administrator can continue with the work, the Principal should issue a termination notice. There is no need for a ‘show cause’ notice as in Clause 73.3. The termination notice should not be issued without obtaining legal or specialist procurement advice and without ensuring that the Principal is in a position to take over responsibility for the Site. See the commentary on Clause 73.4. Use Sample letter 73. Note that the Sample letters may require modification to suit the specific circumstances. See the commentary on Clause 76 for advice about termination notices.

#### 73.6 Completion of the Works by others

If the Principal decides to engage other contractors or workers to complete the Works, the Principal takes over the uncompleted work from a date specified in the termination notice. No further payments are made to the Contractor and the Contractor is liable to meet the cost of completing the Works.

Take the following preliminary steps shortly before issuing the termination notice, to prepare for 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 until the date of termination.
* Suspend (with agreement from the appropriate senior manager and procurement specialist) 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 itemised 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 26.2.
* 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.

Subject to the specific circumstances, the procedure after the termination notice is issued would generally involve the following steps.

1. 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 itemise 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.
2. Inform the Contractor or administrator of the extent of work required and the estimated cost.
3. Secure the Site, have all access keys returned or change locks and carry out (together 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. Take into account the unincorporated *Materials* or *Temporary Work* that are required to facilitate completion of the Works. Arrange removal, take-over or rehire of *Materials* and equipment, 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.
4. 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.
5. Arrange for the Contractor to assign to the Principal the rights and benefits specified in Clause 73.6.2.
6. Obtain the necessary insurance for the Works and public liability. Note that the Principal is responsible for insuring the Works from the date specified in the termination notice.
7. Arrange the novation to the Principal of Subcontracts and other contracts (such as supply contracts, service contracts or consultancy agreements) that the Principal decides are required to complete the Works.
8. Keep the Contractor or administrator informed and updated on the extent of work required, the current estimate and the reasons for any changes.

The Principal must carefully account for the cost of completing the Works using others. It may be that the cost of having others complete the Works exceeds the amount that was remaining to be paid to the Contractor under the Contract. In that case, the Principal may recover the excess cost from the *Undertakings* that were lodged under Clause 33.

After *Completion* has been achieved 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 work and to deal 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 *Materials* that were stored off-Site and 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, eg for senior managers and procurement and 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 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*: this is the date when all work undertaken by the Principal is completed.
* request for return of an *Undertaking* on *Completion* rather than in accordance with Clause 33: 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 rectification of *Defects*.

If it costs the Principal more to complete the Works than the Principal would have paid to the Contractor under the Contract, the shortfall becomes a debt due which the Contractor or administrator is required to pay the Principal. The Principal should issue a formal letter of demand. Use Sample letter 73 if the demand is simple. Legal advice should be sought in drafting this letter if there are complications. The Principal should ensure that the amount is accurate and can be justified.

If the Contractor or administrator does not make full payment within the time requested in the letter, Clause 33 provides for the Principal to make a demand on an *Undertaking*. In addition, or alternatively, Clause 63 gives the Principal 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 that include a set-off Clause.

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

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 Sample Letter 73 to advise the Contractor of the amount payable.

An *Issue* arises in making payments to the Contractor where termination was due to *Contractor’s Insolvency* because the Contractor or administrator cannot comply with the Contract and provide a Statutory Declaration or other evidence that all Subcontractors and Suppliers have been paid. An alternative arrangement is to require a deed or letter of indemnity releasing the Principal and the client from any future claims from Subcontractors. Legal advice should be sought as to whether this risk is sufficiently high for the particular Contract to require a deed of indemnity.

### Clause 74 – Termination for principal’s convenience

Under this Clause, the Principal has the right to terminate the Contract for convenience, even if the Contractor is properly performing the work under the Contract. If the Principal does so, the Contractor has a right to the recompense set out in this Clause.

#### 74.1 Principal’s notice

The Principal is entitled to terminate the Contract for its own convenience. In doing so, the Principal effectively takes the whole of the work yet to be completed out of the hands of the Contractor. This right exists without any failure on the part of the Contractor and is in addition to the Principal's rights to terminate under Clause 73 or under the common law.

The power under this provision can be exercised by the Principal at any time, at its sole discretion. The Principal is not required to give reasons to the Contractor. However, it is not a right that should be exercised without good reason. 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.

The Principal should never take this action without the concurrence of the client agency, the support of legal advisors and the necessary management approval.

The termination of the Contract under this Clause takes effect from the date stated in the termination notice (Sample letter 74). It is important to obtain evidence that the notice was delivered. See the commentary on Clause 76 in relation to termination notices.

If the Principal wants any *Materials* or *Temporary Work* to be left on the Site, these must be identified in the termination notice (see the comments on Clause 74.3). The Principal must also ultimately pay for them (see the comments on Clause 74.4.1).

#### 74.2 Contractor required to comply

Because the Principal is not required to give reasons for its decision, the Contractor has no grounds to dispute the Principal’s right to take action under Clause 74 and must stop work.

#### 74.3 Contractor to leave the Site

The Principal may identify *Temporary Work* that must be left in place. All other *Temporary Work* must be removed by the Contractor and the Contractor must vacate the Site. For example, the Principal may require that temporary environmental controls remain operational. Note that it may be unreasonable to require the Contractor to leave some things in place unless the Principal proposes to pay for them in addition to the payment obligations under Clause 74.4.

The Contractor is not permitted to remove from the Site *Materials* for which the Principal has paid. This also applies to *Materials* which have been included in a *Payment Schedule* under Clause 59. This is because, once a *Payment Schedule* is issued, the Principal is required to make the payment within the specified time period.

Unless they are specifically identified in the Principal’s notice under Clause 74.1, all other *Materials* and unfixed items and equipment are to be removed.

#### 74.4 Amounts payable

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

* the value of all the work the Contractor had completed at the date of termination, minus amounts already paid, deductions, retentions and set-offs to which the Principal is entitled;
* the value of the Contractor’s commitments to pay for *Materials* that cannot be returned or for which the order cannot be cancelled, provided that they will become the property of the Principal without any *Encumbrance*, ie ‘free and clear’, upon payment;
* the reasonable costs of disestablishment from the Site as required by Clause 74.3; and
* other reasonable costs incurred by the Contractor ‘in the expectation of completing the Works’.

Note that the Principal must pay for *Materials* that the Principal instructed were to be left on the Site and are not included in the amounts paid under Clause 74.4.1. Note also that the Contractor is required to mitigate the costs claimed under Clauses 74.4.3 and 74.4.5, and this needs to be taken into account in determining the Contractor’s entitlement to payment of ‘reasonable’ costs.

In addition, and as a form of compensation for the Contractor’s loss of opportunity to profit from the remaining work, the Principal pays 2% of the value of the outstanding portion of the Works.

#### 74.5 Return of Undertakings

The Principal must return the *Undertakings*, but has the right to deduct the value of any debt owed by the Contractor to the Principal from the amount returned. If the amount of an *Undertaking* is reduced, the Principal needs to be able to produce evidence of the debt, including evidence of the Principal’s entitlement to payment from the Contractor and the amount of the debt.

#### 74.6 No other entitlement

The Contractor has no right to claim damages, other than the amounts set out in Clause 74.4, arising from the Principal exercising its rights under Clause 74, even under the common law. However, the Contractor could dispute the Principal’s calculation of the amount paid under Clause 74.4.

To avoid a dispute, the value of completed work, the costs of disestablishment and ‘other reasonable costs incurred’ should either be agreed with the Contractor or determined by the Valuer or another independent person, usually a Quantity Surveyor, agreed by the parties.

### Clause 75 – Termination for principal’s default

This Clause sets out:

* the circumstances under which the Contractor has a right to terminate the Contract for the Principal’s default; and
* the procedures and conditions for termination.

#### 75.1 Contractor’s right and notice requirements

GC21 specifies three categories of default by the Principal that would give the Contractor the right to terminate the Contract, namely:

* failure to pay the Contractor an amount which is not in dispute;
* failure to give the Contractor access to the Site to allow the Contractor to start work within 3 months (or other longer specified or agreed period) after the Date of Contract; and
* a ‘fundamental’ breach of the Contract.

If any one of these things occurs, the Contractor may give the Principal a ‘show cause’ notice requiring the Principal to remedy the default within 28 days after the Principal receives the notice. The requirements of Clause 76 apply to these notices. If the Principal receives a communication that states it is a notice under Clause 75.1, then the Principal should carefully check whether the notice is valid (ie complies with Contract requirements) and ensure that the Contractor is given a response adequately dealing with the alleged default within the 28 days. If the Principal fails to meet this deadline, it could be claimed that the Principal repudiated the Contract. The damages flowing from that repudiation could be significant.

Failure to pay

In the case of failure to pay an undisputed amount, the 28 day period gives the Principal sufficient time to issue a *Payment Schedule* that includes the relevant amount and then to make the payment.

Failure to provide access to the Site

Contract Information item 13 provides for the Contract to specify a longer period than three months before the delay in giving access to the Site becomes a default. This may be appropriate if it is known that the Site will not be available until a particular time and the Contractor has significant design work to undertake before construction begins, or if long lead times apply to the procurement of specialist equipment which must be obtained before work begins. The parties may also negotiate a longer period of delay, even after the *Letter of Award*.

The Principal has not committed a default under this Clause if it has not given access to all the Site within the required period. However, if the Contractor has complied with all the relevant requirements of the Contract and the Principal has not provided access to enough of the Site for the Contractor to start work within the period noted above, immediate steps must be taken to resolve the issue with Contractor to avoid the Contractor taking steps to terminate the Contract.

Refer to the commentary for Clause 34 for discussion about delays in giving Site access in the more usual situation where the *Contract Documents* specify a shorter period than 3 months for access to the Site.

Fundamental breach of contract

There could be disagreement over whether an act or omission of the Principal constitutes a ‘fundamental’ breach of the Contract.

A ‘fundamental’ breach means that, on account of the Principal’s act or omission, the Contractor would be substantially deprived of the benefits it had a right to expect as a result of entering into the Contract. For example, the Contractor has a right to expect progressive payment for work completed. The Contractor also has a right to carry out the work for which it expects to be paid.

The two default events that are defined in this Clause (failure to pay and failure to give access) would be fundamental breaches. It could also be a fundamental breach if the Principal were unable to obtain a particular approval which it had undertaken to provide, and this delayed the whole of the work for an unreasonable time.

#### 75.2 Termination and remedy for the breach

If the Contractor notifies a default by the Principal, the Principal should immediately take steps to respond to the Contractor and, if possible, to remedy the notified default.

Sample letter 75 provides options for the Principal to respond to a show cause notice from the Contractor 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 proposed steps in order to remedy it.

The Contractor has no right to terminate the Contract if, within 28 days after receiving the show cause notice, the Principal:

* remedies the default, for example by paying the amounts owing, or
* proposes reasonable steps to remedy the default.

There may be disagreement about what steps are ‘reasonable’ but the Contractor would be unwise to terminate the Contract if the Principal disputed that the Contractor had the right to do so. In that event, the Principal could claim that the Contractor repudiated the Contract and terminate it under Clause 73 for *Contractor’s Default* or under the common law.

If it is not possible to pay an undisputed amount within 28 days after receiving a show cause notice, the Principal should seek the Contractor’s agreement to an alternative arrangement.

If it is not possible to give access to the Site within 28 days after receiving a show cause notice, the Principal could try to reach agreement on another acceptable time period. If it will not be possible to provide access within a reasonable period, the Principal could attempt to negotiate termination by agreement.

If the Principal fails to respond to the Contractor’s show cause notice within 28 days after receiving it (as referred to in Clause 75.1), the Contractor could issue a termination notice. The Contractor could argue that the Principal had repudiated the Contract. The Principal would have no defence even if it later argued that the Contractor had no right to issue the show cause notice. The Principal’s failure to comply with the Contract and adequately respond to the show cause notice could be considered a repudiation in itself.

Even if agreement cannot be reached and the Contractor terminates the Contract, the payment to the Contractor, on account of its lost bargain, would be capped by the entitlements set out in Clause 74.4. These are the same as if the Principal had terminated the Contract for the Principal’s convenience. The Contractor has no other entitlements, for example for loss of expected profits or opportunities. The Contract prohibits the Contractor from pursuing a higher level of damages, even under the common law or legislation such as the *Competition and Consumer Act 2010* (Cth).

### Clause 76 – Termination notices

### Clause 77 – Survival

# Meanings

### Clause 78 – Interpretation

### Clause 79 – Definitions