

30 June 2019

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ATTENTION: Dr Matthew Butlin, Presiding Commissioner

**re: Submission - Government Procurement Inquiry Stage 2.**

**Executive Summary**

The Specialist Contractors SA Incorporated (SCSA) is pleased to make a submission to this Inquiry (the South Australian Productivity Commission – Issues Paper – *Inquiry into Government {Procurement Stage 2. 05 June 2019.}*)

SCSA members are primarily sub-contractors or suppliers operating in the building and construction industry.

The terms of reference of this second stage of the Inquiry seek to target:

- *capital projects (construction procurement) valued over \$165,000 (GST inclusive), as defined in Appendix 1 of PC028 - Premier and Cabinet circular 028 (construction procurement policy project implementation process); and*
- *prescribed public authorities, as prescribed by the State Procurement Regulations 2005.*

This submission includes responses to the eleven issues identified in the Issues Paper.

In making this submission we note that the South Australian Productivity Commission (SAPC) is of the view that:

*While South Australia's government procurement system serves the state reasonably well, the capacity to drive the whole-of-government system with authority, accountability and human resources is very limited. Overall, the Commission considers the system is prescriptive, unnecessarily risk averse, and lacks transparency and guidance in key areas. The Commission will be interested in further evidence in these matters.*

SCSA agrees with this view and our responses herein will seek to provide examples of procurement that is not working as it should and offer commercial suggestions on how to improve the procurement process.

The basis of this submission is on our members' experience as sub-contractors for builders, who are contracted to the Department of Planning, Transport and Infrastructure (DPTI), as part of a contractual chain, which is not dissimilar in both the private and public sectors.

It has been the SCSA members experience that there are few processes in place for sub-contractors, tendering or undertaking government work in building and construction that ensures that:

- the scope of work is fully and consistently applied throughout tendering levels;
- all documents, including the contracts (head and sub-contracts) provide for a proportional allocation of risk throughout the contractual chain;
- the party best able to control risk should bear that risk;
- the tenderer will retain their right and title to intellectual property;
- when submitting a tender that information will not be passed on to any third party in the tender process;
- monitoring and ensuring consistent terms and conditions are applied throughout the contractual chain;
- the risk is equitably managed and fair terms are enforced during the building project;
- the application of the government's commitment to pay the builder and all sub-contractors and suppliers, within 30 days.

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## Industry Background

Specialist Contractors SA is an incorporated association under the Association Incorporation Act 1985 with membership comprising individuals, firms and companies whose business consists of operations in connection with the erection, repair or extension of or alteration to buildings or work as Sub-Contractors in the building and construction industry. The current membership of the Association is the National Electrical Contractors Association SA/NT Chapter (NECASA/NT), Air Conditioning & Mechanical Contractors Association of SA Inc. (AMCA), Master Plumbers Association of SA Inc. (MPA), National Fire Industry Association (NFIA) and the Australian Subcontractors Association (ASA).

SCSA members acknowledge the benefits of industry participation that is focussed on creating opportunities for local business, including building and construction and the Department of Planning, Transport and Infrastructure is a good example of SME business engagement.

The SCSA also acknowledge that improvements to government procurement across the building and construction industry have occurred because of the oversight of the Office of the Industry Advocate however concerns remain that not all procurement in all departments conform to the procurement or payment standards the State Government requires.

The Office of the Small Business Commissioner (SBC) through their oversight of business contracts and payments, are endeavouring to ensure more efficiency and equity and is currently working on the national review of payments in the building and construction industry, and in particular its response to and application of the J Murray report.<sup>1</sup>

Notwithstanding both South Australian and Federal Government undertakings and statements in the first Inquiry paper, which *“expects sub-contractors to receive contract terms consistent with the head contract terms and conditions, and agencies are to undertake financial checks before the letting of the contract and during its operation.”*<sup>2</sup> SCSA members have not been made aware that such processes are in place by DPTI to monitor consistent terms and conditions throughout the contractual chain, either at the time of the issuing of head contracts and sub-contracts, or their operation; or proportional allocation of risk, or application of the government’s commitment to payment within 30 days.

The SCSA notes that in recent times DPTI has begun to transform these processes in their capital projects work, and in particular commenced a complete revision of contractual terms and conditions for builders, consultants and sub-contractors engaged in those projects.

Unfortunately, DPTI has recently determined to delay that review and implementation of new contracts and sub-contracts with an announcement that reads:

*“DPTI update 24/5/19: Implementation date of July 2019 for a new suite of contracts will not be occurring.*

*Direction has been provided from the Chief Executive that the revised target date for a new suite of contracts will be end of 2019 or early 2020.*

*If any key issues with the existing suite of contracts are identified they will be considered in isolation of a new suite.”*

To date we are not aware of any direct industry engagement on the draft sub-contracts being considered although we understand that both head and professional contracts have been widely reviewed with those industry sectors.

SCSA is of the view there is inconsistency and great resistance to discussing payment terms in building and construction and goods and services contracts with little or no consideration by the client (government in this case) that whilst it pays the contractor (the builder) within 30 days it fails to recognise, or put in place, any arrangements to ensure sub-contractors, who supply the materials (which must be paid within 7-30 days), pays employee wages (normally 7 days), builds structure, installs all equipment, fixtures, finishes and fit-outs (that must be paid for in 30 days) are similarly paid.

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<sup>1</sup> Australian Government. *Review of Security of Payment Laws – Building Trust and Harmony*. John Murray AM. December 2017.

<sup>2</sup> South Australian Government. *Issues Paper: Government Procurement Inquiry*. November 16, 2018. Pg. 12.

In our view it is totally inappropriate that in spite of the fact that the combined cost of building and installing projects generally comprises more than 75% the total building project cost, which is being supplied and paid for by sub-contractors, those sub-contractors are not paid in 30 days regardless of what their contractual terms are under the sub-contract, or government policy.

Reports prepared by Coggins, Teng and Rameezdeen<sup>3</sup>, Collins (2012), The Senate (SERC, 2015) and Murray J. (2018) indicated that:

*Payment terms between principal contractors and their sub-contractors fell between 45 and 80 days, and in worst cases extended to between 90 and 120 days<sup>4</sup>. Globally<sup>5</sup>, Australia has the worst payment numbers / average days to pay at 26.4 days after the due date! In the building and construction industry that means that is more than sixty (60) days after the work is completed!*

*The construction industry accounted for 8-10% of national gross domestic product, but accounted for 23% of all external administrations<sup>6</sup>! These statistics finalised in 2014 have changed little since that time.*

When consistently late payments to sub-contractors, is combined with:

- the continual shifting of all forms of risk down through the building and construction contractual chain, away from those most capable of managing risk down to those least capable of managing that risk,
- implementing by head contractor of sub-contract conditions that bear little resemblance to the contract provided from the client to the head contractor; and
- where the sub-contractor has little or no bargaining power to negotiate fairer contractual terms;

it is quite obvious there is direct correlation of these issues with level of insolvency in the SA building and construction industry.

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<sup>3</sup> *Construction insolvency in Australia: Reigning in the Beast*. Coggins J, Teng B., Rameezdeen R. School of Natural and Built Environment, University of South Australia. Construction Economics and Building. 2016

<sup>4</sup> Subsequent to this finding, the NSW Parliament introduced amendments to the *Building and Construction Industry Security of Payment Act 1999* (NSW) requiring that progress payments under a construction contract become due and payable on the date occurring no later than 15 business days after a payment claim is made by a head contractor, and no later than 30 business days after a payment claim is made by a subcontractor.

<sup>5</sup> Source:MarketInvoice, The State of Late Payment 2016 [www.marketinvoice.com](http://www.marketinvoice.com). drawn from page 14, Review of Security of Payment Laws: Building Trust and Harmony, John Murray. 2018.

<sup>6</sup> The next largest single identifiable industry is retail trade, accounting for 10% of all external administrations.

## Submission

The following comments provide our industry's views of government procurement for construction projects.

### 1. Cost and Time to tender for government work;

The use of tendering is a traditional method of determining who will win a project. The cost of undertaking tenders is the cost of participation in the bidding process for public or private work.

The time to undertake proper preparation, of all documents, the scope of the work and specifications, must be sufficient which unfortunately is not the case with most tender time frames provided to sub-contractors with often an unacceptable difference between the time a builder receives the tender and when the sub-contractor is provided with their tender documents.

The adoption of the Pre-Qualification system for builders, various specialist sub-contractors, professional consultants and asbestos removal contractors, is designed to ensure that an entity registering to undertake government work at various value ranges, can be checked on issues such as financial capacity, work health and safety standards, environmental management and human resources are adequate to undertake the work and have the technical expertise required to deliver the project. We are constantly informed that all of these factors not simply price alone form part of the consideration by DPTI for each tender determination.

Pre-qualification establishes the foundation from which an audit of project delivery can be undertaken during the course of construction and on completion and particularly in regard to the quality of work and payment processes are consistent with the contract conditions and their pre-qualification declarations.

An unfortunate practice that epitomises the problems facing sub-contractors in the procurement process is when prequalified sub-contractors who were part of the original tender process and subsequent awarding of head contracts are subject to further renegotiation of their sub-contracts often then losing the contract and being replaced by other non-prequalified sub-contractors who agree to a lower price.

This practice undermines industry confidence in the validity of the prequalification process and in our view ultimately degrades the quality outcome of the project which one would have thought is what the process is meant to achieve.

### 2. Contract management (specifically from the point of view of poor performance and sub-contractors' exposure to head contractors' unfair contract terms or failure);

#### Contract Relationships

Currently DPTI and government more generally, appear to work on the premise that when undertaking a building project for Government, the only recognised contractual relationship is between the Client (DPTI) and the Builder.

Until very recently and certainly for the five years prior to that, DPTI appears to have taken little account of timely payment matters to sub-contractors, consistency of the scope of work through the contractual chain being applied, the shifting of risk down the contractual chain, or the unconscionable contract terms placed on sub-contractors, which are often at odds with the conditions contained in the head contract. DPTI does not site, at any time, the final sub-contracts from the builder to the sub-contractor.

#### Payment through the contractual chain

In the case of payment to sub-contractors, the highest level of enquiry from DPTI is to get builders to sign Statutory Declarations, declaring that the sub-contractors have been paid.

In various State and Federal enquiries and reporting on building company insolvencies, it is clear that these declarations 'are more honoured in the breach than in the observance'.

The failure of a building company is inevitably followed by large losses for sub-contractors and suppliers. In some cases that loss can lead to a domino effect through the sub-contractors, as not only is

money not paid, but plant and equipment of the sub-contractors, as an unsecured creditor, is subsequently taken into possession by the liquidator.

Whilst the sub-contractor has the capacity to register the plant and equipment under the Personal Property Security Act process this may require the consent of the Builder which is often withheld or severely limited within the terms of the sub-contract, noting however that the same document, requires the sub-contractor to conform with any similar request from the builder as the example shows below:

*If the Main Contractor determines that a Transaction Document (or a transaction in connection with a Transaction Document) is or contains a security interest, the Main Contractor will give notice to the Subcontractor and the Subcontractor agrees to do anything that the Main Contractor reasonably requires (such as obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) for the purposes of:*

- (a) ensuring that the security interest is enforceable, perfected (including, where possible, by control in addition to registration) and otherwise effective;*
- (b) enabling the Main Contractor to apply for any registration, or give any notification, in connection with the security interest so that the security interest has the priority required by the Main Contractor. This includes registration under the PPSA for whatever collateral class the Main Contractor thinks fit. The Subcontractor consents to any such registration or notification and agrees not to make an amendment demand; or*
- (c) enabling the Main Contractor to exercise rights in connection with the security interest.*
- (d) The Subcontractor must comply with the requirements of a notice given by the Main Contractor under this clause 28A.2 within the time stipulated in the notice.*

*The Main Contractor and the Subcontractor acknowledge and agree that in relation to a security interest that may arise in favour of the Contractor under or in connection with a Transaction Document:*

- (e) the Subcontractor will be responsible for registering the financing statement in respect of the security interest but will consult with the Main Contractor in relation to the financing statement as required by paragraphs (b) and (c);*

### Contract Management

The contract management that sub-contractors experience is between themselves and the builder and in many sub-contracts the arbiter of management conflicts is the Superintendent.

However, in many such sub-contracts an impartial, independent Superintendent is not engaged and the main contractor appoints its own employee as a “contract administrator”.

It is important to note that even where a Superintendent is engaged, the common law obligation placed on a Superintendent (when engaged by a main contractor) to act “fairly and justly and with skill with respect to all parties” (see *Perini Corporation v Commonwealth* (1969) 2 NSW 530 and *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322) can be contracted out by a main contractor in a subcontract, such that this common law obligation to act fairly and justly does not apply to a Superintendent.

Clauses of this type are common in larger commercial building sub-contracts an example of which is as follows:

### ***Contract administration/Superintendent***

#### ***Warranties Unaffected***

- (b) The occurrence of any of the events listed in this Clause 2A.2 will not:*
  - (i) impair, limit, reduce or exclude in any respect any liability (including liability for negligence) of the Subcontractor to the Main Contractor;*
  - (ii) prejudice any of the Main Contractor’s rights against the Subcontractor;*
  - (iii) impose on the Main Contractor or Subcontract Superintendent any duty of care or liability whatsoever (including liability for negligence) to the Subcontractor; or*

- (iv) result in the Main Contractor or the Subcontract Superintendent assuming any responsibility or liability for the adequacy, quality, compliance or fitness of the works or of any document provided by the Subcontractor for any errors in or omissions from any such document or the Subcontract Works;
- (v) constitute an admission that the Main Contractor, the Subcontract Superintendent or any of their agents or employees have checked any document or work for errors, omissions or compliance with the requirements of the Subcontract; or
- (vi) give rise to or be relied upon by the Subcontractor as a defence or set off to any claim by the Main Contractor against the Subcontractor arising from any defect in any design or other work carried out or caused to be carried out by the Subcontractor.

### ***Subcontract Superintendent***

(c) *The Main Contractor shall reasonably ensure that at all times there is a Subcontract Superintendent, and that the Subcontract Superintendent fulfils all aspects of the role and functions reasonably and in accordance with the timeframes and requirements of this Subcontract. The Subcontract Superintendent shall carry out the duties and functions under the Subcontract and exercise discretions not as an independent certifier, valuer or assessor but as agent for the Main Contractor.*

(d) *The Subcontractor acknowledges and agrees that:*

*it will be permissible for, and the Subcontractor will not assert that there is a breach of Clause 20 if, the Subcontract Superintendent has sole regard to the instruction or direction given by the Superintendent and exercises the powers and discretions conferred on the Subcontract Superintendent under this Subcontract to give effect to, or implement, the instruction or direction of the Superintendent;*

### Examples of Other Unconscionable Contract Terms

SCSA members have provided detailed examples of other unconscionable terms taken from sub-contracts covering a number of topics as listed below, the details of which are included in **Appendix 2** - Contract clauses reflecting those contained in Sub-Contractor contracts from Builders.

- Consequential loss
- Personal Property Securities Act
- Proportionate liability
- Latent conditions
- Recourse to security
- Warranties as to security
- Variations

### Examples of Alternate Contract Terms

Specialist Contractors SA which represents sub-contractors in Plumbing, Mechanical Services, Electrical, Fire Protection and general sub-contractor building work has engaged solicitors to develop contract clauses that they believe resolve the unconscionable clauses provided in this report.

These more equitable and acceptable clauses can be found in **Appendix 3** - Alternates clauses that would represent more equitable terms offered by builders in sub-contracts.

## **3. Risk management framework including inefficient allocation of risks (public liability and other contract clauses that create potentially avoidable costs);**

The progressive change in the allocation of risk through the contractual chain is a matter of great concern to SCSA in regard to both government and private sector building contracts and sub-contracts.

The Client (in the case of government contracts DPTI) has until recent times sought to shed the historic position of acting in a way that reflects best practice, toward acting as an aggressive commercial client,



without consideration of the effect of this change on builders, subcontractors or suppliers. The shifting of risk from the client down through the builder and subsequently down the contractual chain is a matter that is being experienced by the whole building industry and runs counter to the principal<sup>7</sup> “conditions of contract should observe the principle that the party best able to control risk should bear that risk”.

In more recent times DPTI appeared to be seeking to change their current contract and sub-contract documents towards contracts that are more equitable, reflecting the terms and conditions in existing Australian Standard contracts, more transparent and accessible processes during the time of tender and the time sub-contracts are being issued and signed.

Unfortunately, we understand that this review and implementation process has been delayed under instruction of the DPTI’s Chief Executive until late 2019 or early 2020.

#### **4. Capabilities of public authorities resulting in issues such as poor quality of tenders, lack of capacity to evaluate tenders and inadequate engagement with the market.**

With greatest respect to the current staff of DPTI, SCSA is concerned that several organisational reviews and re-structures undertaken over the last five years has resulted in a significant loss of skilled staff with substantial corporate history.

The quality, specifications, scope of work, contractual obligations and their adherence, consistency down through the contractual chain, the enforcement of reasonable timing to assess tender and contract documents, is not monitored and in most cases not adequate to properly consider documentation as part of project scope, project delivery and management of risk assessments.

The level of design and the quantity of detail provided at the time of tender to sub-contractors has substantially reduced over time. These changes have coincided with the shifting of design responsibilities down through the construction chain, using contractual terms and moving from traditional procurement methods such as Construct Only and Cost Plus, toward Design and Construct.

Furthermore, the principles contained in standard contracts are not applied consistently down through the contractual chain.

Standardised procurement methods are inconsistently applied and based on risk shedding.

The most recent work to address this area can be read in the New South Wales paper “CONSTRUCTION LEADERSHIP GROUP Construction Procurement Methods: Best Practice Guidelines” December 2018<sup>8</sup>.

*Choosing the most appropriate procurement method for a project is critical to achieving the project’s objectives on terms which represent value for money. Procuring the right scope of work, with the correct counterparty, with the right risk allocations supported by the right contract are essential.*

*Engagement with industry and stakeholders more generally can highlight market conditions or other contextual factors which may mean that decisions of procurement method differ over time for ostensibly similar projects – the technical nature of the project is just one element to be considered in method selection. Proposed criteria for selecting options include the extent to which the proposed method will optimise for:*

- *whole-of-project costs, including costs of risks retained by the Government;*
- *whole-of-life benefits;*
- *alignment with the project/program objectives;*
- *budget certainty;*

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<sup>7</sup> AS4120-1994 Australian Standard – Code of Tendering

<sup>8</sup> Construction Leadership Group – Construction Procurement Methods, Industry Discussion Paper, December 2018. NSW Government

- *timeframes, including procurement timeframes, and the ability to meet the Government's requirements such as completion dates;*
- *market capacity, capability and interest;*
- *flexibility to allow changes over time (this would include change to scope, as well as future phases/additional stages);*
- *the allocation of risk to the party best placed to manage it. Key risks include: design, construction, maintenance, operating, financing, technology, delivery, user demand, cost/budget certainty and interface risk;*
- *innovation;*
- *project risks; and*
- *certainty of scope.*

In regard to the lack of capacity to evaluate tenders and inadequate engagement with the market SCSA members have no engagement in the evaluation of tenders at the sub-contract level therefore cannot provide legitimate comment.

## **5. Opportunities to streamline the procurement process;**

SCSA would recommend the following:

- Government should ensure that all projects follow an agreed state/national methodology that identifies industry drivers for the most appropriate procurement process and agreement on definitions of the scopes of work to be applied throughout the contractual chain.
- When the procurement of a project begins within DPTI, the team that sets the procurement method and the scope of work should include representation from the builders, the consulting sectors and specialist sub-contractor groups. These representatives would cease as soon as head contracts and sub-contracts have been signed and reviewed by the project team.
- Consistent application through the tender levels, of the Australian Standard Code of tendering AS4120, in all practices and documentation.

## **6. SME access to and participation in government work (aggregated contracts and other barriers);**

SCSA SA understands that work undertaken by DPTI and the Office of the Industry Advocate over several years has sought to unbundle large building and construction projects, to allow more local SME's to participate in those projects.

## **7. Lack of support for innovation in the current procurement system.**

SCSA could not comment as to whether there is support or lack thereof from DPTI in regard to innovation in the current system but would comment that historically affecting change on procurement processes within the department is difficult and lengthy.

A good example of the lethargy and resistance to the introduction of new and innovative processes associated with the building and construction industry is the attempt by members of the Construction Industry Forum to get DPTI to introduce and implement Building Industry Modelling (BIM) into state government projects which was a most frustrating and discouraging process to all involved.

Questions have been raised by SCSA members in regard to meaning and true application of "innovation in the procurement process". Does it mean that a high level of design has been provided and full documentation has been provided, as part of the tender or that the various specialist tenderers, can clearly assess what is required and the application of special design, products, performance, efficiency, operational costs and whole of life considerations are provided in the tender response from various bidders

Alternatively does it mean that the scope is neither clear nor comprehensive, the documentation is poor and inadequate, such that when an innovative design is provided (which is intellectual property), that same system design is then provided to other tenderers to price, to get an innovative outcome. Unfortunately it would seem that the later example is commonplace.

It would seem to SCSA members that innovation is the result of the architect, professional consultants, project teams and specialist contractors being engaged properly and early, to ensure that the most appropriate design is provided and comprehensive documents accompany it at the time of tender. If a particular tenderer has an “alternative design” that is innovative, they can submit that innovation as a second accompanying tender, as they submit their conforming tender.

Members have often expressed the view that “innovation” is code for cutting cost that are consolidated by the builder.

### **The Commission will also consider in relation to infrastructure spending:**

#### **8. The achievement of value for money (including incorporating broader policy objectives into the value for money assessment of procurement, including environmental and social outcomes);**

SCSA supports any inclusions into determinates of what determines a successful tender and the weightings applied to those determinates, other than the lowest cost.

Sub-contractor’s tenders are traditionally based on lowest price, unless of course one includes a lower cost “innovative design” in which case it is likely the design will be re-issued for others to submit new pricing.

#### **9. The level of performance, reporting and accountability of public authorities;**

SCSA is not in a position to comment on these matters, as we are not aware of how performance is to be measured and compared with, or what reporting to whom, as far as DPTI is concerned.

#### **10. The level of compliance of public authorities with the government procurement framework;**

SCSA is not in a position to comment on this matter.

#### **11. The performance and impact of the Industry Participation Policy.**

The previous Industry Participation Scheme has been replaced by the Skilling South Australia innovation. An explanation can be found at <https://dsdstore.blob.core.windows.net/publications-reports/Publications/Skills/Skilling-South-Australia-Procurement-Guideline.pdf?t=1561438735861>

Skilling South Australia is making it easier to take on apprentices and trainees and create skilled careers:

- Increased access and choice of subsidized training.
- A new state-wide advisory service to help employ apprentices or trainees with tailored support from first contact to your apprentice or trainee’s first day.
- Less red tape for businesses seeking to employ apprentices or trainees by streamlining registration and working to remove other barriers.
- Support for employers and apprentices by reimbursing the cost of goods and services essential to starting an apprenticeship or traineeship.
- An increase of nearly double the previous Travel and Accommodation Allowance for regional apprentices and trainees to help with the cost of attending training.

- Additional funding for Group Training Organisations to support businesses to take on apprentices and trainees, particularly in non-traditional trade industries. The GTO has responsibility for recruitment, selection and pastoral care, saving time.
- Industry Skills Councils have been established to strengthen industry's voice in skills and workforce development, and to ensure that funding for skills and training is directly aligned to industry priorities. More than 80 industry representatives will provide advice about skills and workforce development.
- Funding is available for innovative Skilling South Australia Projects that drive apprenticeship and traineeship growth, designed by business and industry in collaboration with Skilling South Australia advisers.
- Learner Support Services to help an apprentice or trainee complete their training.

A matter of greater concern to the SCSA is the lack of protection afforded South Australian based sub-contractors in the SA Government procurement where little or no preference is provided to SA sub-contractors.

The common practice of abusing the expertise of long term SA based contractors who provide employment to thousands of tradespersons and apprentices in the tendering phase of major SA Government Projects and then award such projects to interstate companies who may pass the DPTI Industry Participation Policy through their employment of SA based workers does nothing for the long term success or indeed survival of SA based sub-contracts.

**For any further information on this submission please contact:**

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## **Appendix: 1 – Prescribed public authorities**

Adelaide Venue Management Corporation

Architectural Practice Board of South Australia

Construction Industry Training Board

Health Services Charitable Gifts Board

Legal Profession Conduct Commissioner

Local Government Finance Authority of South Australia

Motor Accident Commission

Return to Work Corporation of South Australia

South Australian Forestry Corporation

South Australian Housing Trust

South Australian Water Corporation

Superannuation Funds Management Corporation of South Australia

Urban Renewal Authority

## Appendix 2 – Contract clauses reflecting those contained in Sub-Contractor contracts from Builders.

Specialist Contractors Association of South Australia Inc

Example clauses from subcontracts

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### 1. Personal Property Securities Act

If the Main Contractor determines that a Transaction Document (or a transaction in connection with a Transaction Document) is or contains a security interest, the Main Contractor will give notice to the Subcontractor and the Subcontractor agrees to do anything that the Main Contractor reasonably requires (such as obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) for the purposes of:

- (a) ensuring that the security interest is enforceable, perfected (including, where possible, by control in addition to registration) and otherwise effective;
- (b) enabling the Main Contractor to apply for any registration, or give any notification, in connection with the security interest so that the security interest has the priority required by the Main Contractor. This includes registration under the PPSA for whatever collateral class the Main Contractor thinks fit. The Subcontractor consents to any such registration or notification and agrees not to make an amendment demand; or
- (c) enabling the Main Contractor to exercise rights in connection with the security interest.
- (d) The Subcontractor must comply with the requirements of a notice given by the Main Contractor under this clause 28A.2 within the time stipulated in the notice.

The Main Contractor and the Subcontractor acknowledge and agree that in relation to a security interest that may arise in favour of the Contractor under or in connection with a Transaction Document:

- (a) the Subcontractor will be responsible for registering the financing statement in respect of the security interest but will consult with the Main Contractor in relation to the financing statement as required by paragraphs (b) and (c);
- (b) the Subcontractor will provide the Main Contractor with a draft financing statement in relation to the security interest 15 Business Days prior to registration;
- (c) the Subcontractor will allow a consultation period of up to 10 Business Days to agree the financing statement with the Main Contractor prior to registration;
- (d) notwithstanding this clause 28A.2, the Main Contractor will not be liable to the Subcontractor for any failure by the Subcontractor to register the financing statement or for any error or omission in the financing statement;
- (e) the financing statement description of the collateral must only refer to specific goods provided under this Subcontract. The description must not use the collateral classes “*all present and after-acquired property*” or “*all present and after-acquired property, except*”. If the description uses the collateral class “*other goods*” or any other collateral class for which a free text box is available in the register, then that free text box must specifically identify the relevant goods and must make no reference to any assets or use any general description that may cover any assets other than the specific goods; and
- (f) when Project Practical Completion has been achieved, the Subcontractor must lodge a financing change statement discharging the security interest.

The parties agree that, despite any other provision in this Subcontract and to the extent permitted by law, in relation to any security interests that arise in the Main Contractor’s favour:

- (a) Sections 142 and 143 of the PPSA are excluded and the Main Contractor need not comply with Sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4) and any other section(s) of the PPSA notified to the Subcontractor by the Main Contractor after the date of this Subcontract; and
- (b) neither the Main Contractor nor any receiver need give any notice required under any provision of the PPSA (except Section 135).

The Subcontractor:

- (a) warrants to the Main Contractor that when payment is made to the Subcontractor or title otherwise passes to the Main Contractor in respect of goods to be incorporated in the Subcontract Works those goods will be free and clear of any encumbrance; and
- (b) must, if requested by the Main Contractor, provide the Main Contractor with a statutory demand or evidence to the Main Contractor's satisfaction that such goods are free and clear of any encumbrance.

## 2. Consequential loss

### General Indemnity

The Subcontractor shall indemnify the Main Contractor from and against all and any actions, proceedings, claims, demands, losses, damage, penalties, costs and expenses (including without limitation any claim for consequential loss) which the Main Contractor may incur or become liable for in respect of or arising out of:

- (a) any claim or demand made against the Main Contractor under the Main Contract arising from or contributed to by a breach of this Subcontract or the negligence or other default of the Subcontractor or any of its employees, contractors or agents; and
- (b) any claim or demand made against the Main Contractor by an employee, contractor or agent of the Subcontractor in respect in respect of the carrying out of the WUS; and
- (c) any breach, act or omission by the Sub-Contractor in connection with the performance of the Subcontract Works

## 3. Proportional Liability

### Subcontractor's responsibility

- (a) The Subcontractor shall be liable to the Main Contractor for the acts, defaults and omissions of secondary subcontractors (including selected secondary subcontractors) and employees and agents of secondary subcontractors as if they were those of the Subcontractor.

### Operation of Proportionate Liability Legislation

- (a) If the parties' rights, obligations or liabilities arise out of or otherwise relating to this Subcontract are subject to legislation that apportions liability for apportionable claims between concurrent wrongdoers including Part 3 of the Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005 (SA), then to the extent permitted by law, that legislation is excluded and does not apply. The Subcontractor acknowledges this Clause 47 constitutes a special limitation for the purposes of Part 3 of the Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005 (SA).
- (b) If the Subcontractor breaches any of its obligations under this Subcontract, and the operation of any legislation results in the Main Contractor being unable to recover some part of the consequential loss or damage from the Subcontractor ("the Apportioned Loss"), as a separate obligation under the Subcontract, the Subcontractor indemnifies the Main Contractor in respect of the Apportioned Loss and must pay the Main Contractor the amount of the Apportioned Loss immediately on demand by the Main Contractor.
- (c) The Subcontractor must ensure that its subcontracts, including contracts with material suppliers, include provisions that are functionally equivalent to this clause 52.

## 4. Contract administration/Superintendent

### 2A.2 Warranties Unaffected

- (a) The occurrence of any of the events listed in this Clause 2A.2 will not:
- (i) impair, limit, reduce or exclude in any respect any liability (including liability for negligence) of the Subcontractor to the Main Contractor;
  - (ii) prejudice any of the Main Contractor's rights against the Subcontractor;
  - (iii) impose on the Main Contractor or Subcontract Superintendent any duty of care or liability whatsoever (including liability for negligence) to the Subcontractor; or
  - (iv) result in the Main Contractor or the Subcontract Superintendent assuming any responsibility or liability for the adequacy, quality, compliance or fitness of the works or of any document provided by the Subcontractor for any errors in or omissions from any such document or the Subcontract Works;
  - (v) constitute an admission that the Main Contractor, the Subcontract Superintendent or any of their agents or employees have checked any document or work for errors, omissions or compliance with the requirements of the Subcontract; or
  - (vi) give rise to or be relied upon by the Subcontractor as a defence or set off to any claim by the Main Contractor against the Subcontractor arising from any defect in any design or other work carried out or caused to be carried out by the Subcontractor.

### 20 Subcontract Superintendent

- (a) The Main Contractor shall reasonably ensure that at all times there is a Subcontract Superintendent, and that the Subcontract Superintendent fulfils all aspects of the role and functions reasonably and in accordance with the timeframes and requirements of this Subcontract. The Subcontract Superintendent shall carry out the duties and functions under the Subcontract and exercise discretions not as an independent certifier, valuer or assessor but as agent for the Main Contractor.
- (b) The Subcontractor acknowledges and agrees that:
- (i) it will be permissible for, and the Subcontractor will not assert that there is a breach of Clause 20 if, the Subcontract Superintendent has sole regard to the instruction or direction given by the Superintendent and exercises the powers and discretions conferred on the Subcontract Superintendent under this Subcontract to give effect to, or implement, the instruction or direction of the Superintendent;

## 5. Latent conditions

### 25 Site conditions

#### 25.1 Acknowledgement

- (a) The Subcontractor warrants that before executing the Subcontract it has:
- (i) for the purposes of ascertaining and making an allowance in the Subcontract Sum for Site Conditions, carried out enquiries and investigations, including:
    - (A) a review of the Drawings and Specifications; and
    - (B) attending at the Site to perform a visual inspection of the Site, the existing facilities at the Site and the nature of the physical conditions near or surrounding the Site;



- (ii) satisfied itself as to the nature and conditions of access to the Site and the obligations owed to Adjoining Property Owners that may be affected by the performance of the WUS;
  - (iii) not assumed or relied on the completeness, accuracy or adequacy of any Drawings and Specifications provided by the Main Contractor; and
  - (iv) obtained all appropriate professional and technical advice on all matters and circumstances relevant to the Site Conditions.
- (b) The Subcontractor shall not make any Claim relating to or arising from any of the physical conditions and characteristics of the Site including for Differing Site Conditions.
- (c) Without limitation the Subcontractor also acknowledges and agrees that it accepts all risks associated with Site Conditions including for Differing Site Conditions and has made its own determination as to the scope and extent of any inspections and investigations undertaken by it for such purpose and the Main Contractor has given the Subcontractor all reasonable time and opportunity to complete such inspections and investigations.
- (d) Without limitation, the Subcontractor also acknowledges and agrees that it is responsible for, and assumes the risk of, all increased costs and any losses and expenses in respect of Site Conditions including Differing Site Conditions and all physical conditions and characteristics of the Site and their surroundings (including water, atmospheric and subsurface conditions or characteristics) encountered in the execution of the WUS.
- (e) Pursuant to the assumption and acceptance of risk set out in this clause 25.1, the Subcontractor must (and is deemed to have) carefully inspected any work that has been previously carried out and completed by preceding trades where such previously completed work has the potential to impact on the ability of the Subcontractor to carry out the WUS in accordance with the requirements of this Subcontract (“Existing Trade Work”). If prior to commencing the WUS at any part of the Site, the Subcontractor identifies any defect or non-conformance in Existing Trade Work, the Subcontractor shall give written notice to the Subcontract Superintendent of the defect or non-conformance so identified. If the Subcontract Superintendent determines that the defect or non-conformance so notified by the Subcontractor exists, the Subcontract Superintendent may within 3 Business Days of receiving such notice direct a suspension of the WUS under clause 33 to allow for the rectification of the Existing Trade Work. Unless the Subcontract Superintendent gives such a suspension direction, the Subcontractor shall have no Claim against the Main Contractor arising out of or in connection with the adverse affect of any defects or non-conformances in Existing Trade Work on the WUS.

## 25.2 Notification

- (a) The Subcontractor, upon becoming aware of a Differing Site Condition while carrying out WUS, shall promptly, and where possible before the Differing Site Condition is disturbed, give the Subcontract Superintendent written notice of the general nature thereof.
- (b) If required by the Subcontract Superintendent promptly after receiving that notice, the Subcontractor shall, as soon as practicable, give the Subcontract Superintendent a written statement of:
- (i) the Differing Site Condition encountered and the respects in which it differs materially;
  - (ii) the additional work, resources, time and cost which the Subcontractor estimates to be necessary to deal with the Differing Site Condition; and
  - (iii) other details reasonably required by the Subcontract Superintendent.

## 25.3 Time and Cost Relief For Differing Site Conditions

Pursuant to Clause 25.1, the Subcontractor shall not be entitled to make any Claim against the Main Contractor in respect of either encountering any Differing Site Conditions or addressing and overcoming any Differing Site Conditions once encountered.

### 6. Recourse to security

#### 5. Security

##### 5.1 Provision

- (c) The Subcontractor acknowledges that:
  - (ii) the Main Contractor can claim under the unconditional undertaking if the Main Contractor asserts that the Subcontractor is liable to compensate the Main Contractor pursuant to the terms of the Subcontract; and

##### 5.2 Recourse

- (a) The Main Contractor may convert into money and have recourse to security provided by the Subcontractor under this Subcontract where:
  - (iii) the Main Contractor asserts that a debt is due by the Subcontract and the Subcontractor is liable to reimburse any loss, damage or expense suffered by the Main Contractor as a result of a breach of this Subcontract by the Subcontractor without prejudice to any other rights of the Main Contractor; or
- (b) In order to remove any doubt, the Subcontractor acknowledges that the Main Contractor may have recourse to all or part of any security and the Main Contractor may do so:
  - (iv) without the Subcontractor having any right of objection or prior notice.
- (c) The Subcontractor agrees that it will not take any steps to injunct or otherwise restrain:
  - (i) any issuer of the security from paying the Main Contractor pursuant to the security;
  - (ii) the Main Contractor from taking any steps for the purpose of making a demand against the retention moneys or under any other security or unconditionally receiving payment under the security; or
  - (iii) the Main Contractor using the retention moneys or the moneys received under the security unconditionally.

### 7. Warranties as to accuracy

#### 2A Warranties

##### 2A.1 Subcontractor's Warranties

- (a) The Subcontractor warrants to the Main Contractor that the Subcontractor:
  - (i) as a prudent, suitably qualified and experienced person, has examined and carefully, checked the Drawings and Specifications and satisfied itself, consistent with the requirements of clause 8.2 (d);

(A) as to the extent of any errors or omissions in the Drawings and Specifications that would impact on the performance of the Subcontract Works and made allowance for such errors or omissions in the Subcontract Sum;

(B) that the Drawings and Specifications are suitable, appropriate and adequate for the Subcontractor to discharge the Subcontractor's obligations under this Subcontract;

(C) that the Drawings and Specifications are suitable, appropriate and adequate for the Subcontractor to construct the Subcontract Works so that the Subcontract Works, when complete, will be Fit for Purpose;

(ii) shall execute and complete the WUS in accordance with the Drawings and Specifications so that the Subcontract Works, when completed, shall comply with all the requirements of the Subcontract and all Legislative Requirements;

(b) The Subcontractor provides the following additional warranties to the Main Contractor, namely that the Subcontractor:

(iii) has examined and carefully checked the Drawings and Specifications and the Drawings and Specifications are accurate and do not contain any Obvious Discrepancy or Inconsistency;

## 8 Subcontract documents

### 8.1 Discrepancies

Figured shall prevail over scaled dimensions in a discrepancy. Otherwise, if the Subcontractor discovers any inconsistency, ambiguity or discrepancy in any document comprising part of the Drawings and Specifications or otherwise prepared for the purpose of carrying out WUS, the Subcontractor shall give the Subcontract Superintendent written notice of it. The Subcontract Superintendent, thereupon, and upon otherwise becoming aware, shall direct the Subcontractor as to the interpretation and construction to be followed and the Subcontractor will complete the relevant work without Claim unless the Subcontract Superintendent issues a notice of variation in connection with the instruction given.

The Subcontractor acknowledges that, subject to, and pursuant to, clause 8.3, notwithstanding any insufficiencies, inadequacies or discrepancies in the Subcontract Documents, the Subcontractor shall at its own cost carry out all work and provide all material, goods and services necessary to execute and complete the Subcontract Works in accordance with this Subcontract in order to give full effect to the scope and intent of the Subcontract Documents and it shall attend to and rectify at its own cost all errors and/or omissions contained in the Subcontract Documents in order to execute the Subcontract Works.

### 5.2 Main Contractor-supplied documents

(a) The Subcontractor must, prior to commencing any WUS, give written notice to the Main Contractor of any errors, flaws or defects in the design contained in the Drawings and Specifications which would be capable of identification by a reasonably competent construction subcontractor ("Design Flaws"). If the Subcontractor commences WUS without giving any notice under this clause 8.2, the Subcontractor will be deemed to have accepted and warranted to the Main Contractor that the Drawings and Specifications are free from any Design Flaws and also warranted the matters set out at clause 2.1A (a) (iv).

- (b) The Main Contractor does not warrant, guarantee or make any representation about the accuracy or adequacy of, and owes no duty of care with respect to, any information, data and documents which may be included in the Drawings and Specifications but which has been provided by the Principal and concerns investigations carried out by the Principal, or on its behalf by independent consultants as to the conditions on, in, under or in the vicinity of the Site.
- (c) To the extent permitted at law, the Main Contractor has no liability nor will it be liable for an Claim by the Subcontractor arising out of or in any way in connection with:
  - (i) the provision of, or the purported reliance upon, or use of, information or data such as described in this clause by the Subcontractor or any other person to whom such information or data is made available;
  - (ii) a failure to provide any other like information or data to the Subcontractor.

## 8. Variations

### Directing variations

- (a) The Subcontractor shall not vary WUS except as directed in writing.
- (b) The Subcontract Superintendent, before the date of practical completion, may upon receiving a request from the Main Contractor (and the Main Contractor may make a request if the Superintendent has given a direction for a variation under the Main Contract), direct the Subcontractor to vary WUS by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Subcontract (“Variation”):
  - (i) increase, decrease or omit any part;
  - (ii) change the character or quality;
  - (iii) change the levels, lines, positions or dimensions;
  - (iv) carry out additional work;
  - (v) demolish or remove material or work no longer required by the Main Contractor.

The Subcontract Superintendent may omit works relating to provisional sums and engage an alternative contractor to carry out such works and that omission of works shall not in any circumstances give rise to a Claim.

- (c) If the Subcontractor considers that any Direction by the Subcontract Superintendent constitutes or involves a variation, the Subcontractor must, if it wishes to make a Claim against the Main Contractor arising out of or in connection with the Direction, give written notice to the Subcontract Superintendent within 5 days of receiving the Direction and before commencing work on the subject matter of the Direction:
  - (i) stating that it considers the Direction constitutes or involves a variation; and
  - (ii) containing a quote for carrying out the Subcontract Works the subject of the Direction, including a detailed breakdown of how the quote is calculated and any further information requested by the Main Contractor. To avoid doubt, the provision of the quote and additional information will be at the cost of the Subcontractor.

- (d) If the Subcontract Superintendent considers that the direction is a variation to the WUS it will within 21 days of receiving the Subcontractor's notice under Clause 36.1(c) confirm this in writing, in which event it will be valued under Clause 36.4. If no notice of confirmation is given within 21 days, the Subcontract Superintendent is deemed to have decided that the direction was not a variation. (e) If the Subcontractor is directed to perform urgent work, and it is unreasonable to expect the Subcontractor to give the notice referred to above prior to commencement, the fact that the Subcontractor commences the work will not prevent the Subcontractor from making a claim for a variation in relation to that work, provided:
- (i) the Subcontractor gives the Subcontract Superintendent the notice referred to above within 24 hours of commencing the work; and
  - (ii) the Subcontractor's failure to give the notice prior to commencing the work does not prejudice the Main Contractor's ability to make a claim in respect of that work against the Principal under the Main Contract.
- (f) Any failure by the Subcontractor to comply with this clause 36.1 will bar and invalidate any Claim the Subcontractor may otherwise have had arising out of or in connection with the direction said to constitute a variation.
- (g) The Subcontractor shall have no entitlement to a make a claim in respect of a proposed variation arising from the following:
- (i) any discrepancy, error or omission in or between any of the documents comprising the Drawings and Specification which an experienced and competent subcontractor should have identified or been alert to prior to commencement of the WUS save for Design Flaws identified accordance with clause 8.2;
  - (ii) any obvious or necessary work not detailed in the Drawings and Specifications; and
  - (iii) work that is not assessed, authorised or approved by the Superintendent as a variation under the Main Contract.

## Appendix 3 – Alternates clauses that would represent more equitable terms offered by builders in sub-contracts.

Specialist Contractors Association of South Australia Inc.

### Subcontract Schedule – additional Special Provisions

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#### 8. Special Provisions

- (a) The Special Provisions in this schedule vary the terms and conditions of the Subcontract.
- (b) Despite any other provision of the Subcontract, if there is any inconsistency, ambiguity or conflict between the Special Provisions and any other provision of the Subcontract, the parties agree that the Special Provisions will prevail to the extent of that inconsistency, ambiguity or conflict.

#### Interpretation

##### 9.1 Interpretation

In these Special Provisions:

**Head Contract** means the contract between the Principal and the Head Contractor for the project of which the subcontract works form part.

**Head Contractor** means [Insert].

**Principal** means [Insert].

**Special Provisions** means the special provisions in this schedule.

**Subcontract** means the subcontract between the Head Contractor and the Subcontractor which comprises the documents described in the Subcontract and includes these Special Provisions.

**Subcontractor** means [Insert].

#### 10 Liability under the Subcontract

##### 10.1 Liability limited

Despite any other provision of the Subcontract to the contrary except Special Provision 3.2, the:

- (a) Subcontractor shall not be liable to the Head Contractor or any of its agents, officers, employees, consultants or contractors under or in connection with the Subcontract for any Consequential Loss; and
- (b) maximum liability of the Subcontractor arising out of or in connection with the Subcontract is limited to an amount equal to [*insert – recommend between 20 and 100 per cent*]% of the total amount payable to the Subcontractor under the Subcontract for performing the subcontract works

##### 10.2 Exclusion from liability limitation

Special Provision 3.1 does not apply:

- (a) to the extent that the liability:
  - (i) cannot be limited or excluded (as applicable) at law; or
  - (ii) arises as a direct result of the Subcontractor's Wilful Misconduct, fraud or criminal conduct; and

- (b) to the extent that the Subcontractor is insured for that liability under a policy of insurance, or would have been insured or entitled to insurance proceeds for that liability but for the Subcontractor's failure to effect or maintain the policies of insurance required by the Subcontract; or
- (c) with respect to liability for property damage, personal injury or death.

### **10.3 Indemnities limited**

Any indemnity given under the Subcontract by the Subcontractor in favour of the Head Contractor or any of its employees, officers, representatives, agents, or contractors for any loss, cost, liability, expense or damage:

- (a) does not apply to the extent the loss, liability, expense, cost, or damage is caused or contributed to by an act or omission the Head Contractor or its employees, officers, representatives, agents, or contractors or any breach of the Subcontract by the Head Contractor; and
- (b) is limited to the direct loss, liability, cost, expense, or damage incurred or suffered by the Head Contractor or any of its employees, officers, representatives, agents, or contractors.

### **10.4 Proportionate liability and common law rights**

Despite any other provision of this Subcontract to the contrary:

- (a) *Law Reform (Contributory Negligence and Apportionment of Liability) Act (SA) 2001* applies to this Subcontract; and
- (b) each party's common law rights are not affected, limited or waived in any way by this Subcontract.

### **10.5 Definitions**

In this provision:

***Consequential Loss*** means:

- (a) *loss of revenue, loss of profit or anticipated profit (other than under the Subcontract), loss of business or business opportunity, loss of bargain, loss of anticipated savings, loss of use, loss of production, loss of reputation, pure economic loss, and special, penal or exemplary damages; and*
- (b) *payment of liquidated sums, penalties or damages under any agreement or arrangement (other than the Subcontract); and*

***Wilful Misconduct*** means *an act or omission known by the Subcontractor to be wrong yet the Subcontractor intentionally persisted in, or persisted in with reckless disregard as to the likely consequences of such act or omission.*

## **11 Head Contract**

- (a) The Subcontractor is responsible for performing the works under the Subcontract in accordance with the terms and conditions of the Subcontract. The Subcontractor's role and responsibility does not extend to ensuring the Head Contractor is able to meet its obligations under the Head Contract.
- (b) The Subcontractor's rights and entitlements under the Subcontract, including its rights to an extension of time or payment, are no in way limited by the Head Contractor's corresponding rights and entitlements under the Head Contract.

## 12 Responsibility for subcontract works and co-ordination

- (a) The Subcontractor will use reasonable endeavours to coordinate and integrate its works with the other works under the Head Contract, but the Head Contractor is ultimately responsible for all co-ordination and integration of the various elements of work under the Head Contract.
- (b) Despite any other provision under this Subcontract, the Subcontractor gives no warranty and has no responsibility or liability for in respect of the works performed by other contractors.

## 13 Standard of performance

Despite any provisions of the Subcontract to the contrary, the standard of skill, care and diligence:

- (a) required of the Subcontractor in the performance of its obligations under the Subcontract; or
- (b) warranted by the Subcontractor in relation the performance of its obligations under the Subcontract,

will in no circumstance exceed the standards of 'Good Industry Practice'.

*Good Industry Practice means exercising the degree of skill, diligence and prudence that would reasonably be expected of a competent contractor in performing work similar to the work under the Subcontract and under conditions comparable to those applicable to the work under the Subcontract.*

## 14 Administration of Subcontract

The Head Contractor must, in the administration of the Subcontract, ensure that it or its representative or the superintendent (as applicable):

- (a) acts honestly and fairly; and
- (b) arrives at a reasonable measure or value of work, quantities or time.

## 15 Subcontract works - Excepted Risks

The **Excepted Risks** causing loss or damage to the works under the Subcontract for which the Head Contractor is liable to the Subcontractor are:

- (a) a breach of the Subcontract by the Head Contractor or any default or negligent act or omission of the Head Contractor, or those for whom the Head Contractor is responsible including employees, contractors, suppliers, consultants or agents of the Head Contractor or the Principal;
- (b) contamination of or presence of pollutants at the site not caused by the Subcontractor or the Subcontractor's contractors or consultants or the employees or agents of any of these;
- (c) war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, acts of terrorism, martial law or confiscation by order of any government or public authority;
- (d) use or occupation by the Head Contractor or those for whom the Head Contractor is responsible, including the employees, contractors, suppliers, consultants or agents of the Head Contractor or Principal, of any part of the Subcontract Work; and
- (e) defects in such part of the design of the work under the Subcontract including any design contained in the Subcontract which has not been performed by the Subcontractor.



## **16 Delay**

### **16.1 Delay events**

If the Subcontractor is or will be delayed in reaching practical completion of the subcontract works by a cause described in the next paragraph and within 10 days after cessation of the delay, the Subcontractor gives the Head Contractor a written claim for an extension of time for practical completion setting out the facts on which the claim is based, the Subcontractor shall be entitled to an extension of time for practical completion of the subcontract works.

Any of the following causes whether occurring before, on or after the date for practical completion:

- (a) delay or disruption caused by:
  - (i) the Head Contractor;
  - (ii) the Principal;
  - (iii) an employee, consultant, supplier, other contractor or agent of the Head Contractor or Principal,  
including but not limited to a suspension directed by the Head Contractor which is caused by an act or omission of the Head Contractor or Principal;
- (b) variation to the subcontract works;
- (c) breach of the Subcontract by the Head Contractor;
- (d) change in laws;
- (e) delay caused by any State or nation-wide industrial disputes or strike beyond the control of the Subcontractor;
- (f) acts of God, fire, flood, earthquake, embargo and any other Excepted Risks;
- (g) injunction or litigation affecting the site or the execution of the subcontract works, unless the injunction or litigation was caused by the Subcontractor;
- (h) delay arising out of or in connection with a Latent Condition;
- (i) delay caused by adjoining owners;
- (j) delay caused by any authority, unless the delay is caused or contributed to by the Subcontractor; and
- (k) any event for which the Head Contractor is entitled to an extension of time under the Head Contract.

### **16.2 Assessment of extension of time claim**

In determining whether the Subcontractor is or will be delayed in reaching practical completion of the subcontract works, regard shall not be had to:

- (a) whether the Subcontractor can reach practical completion by the date for practical completion without an extension of time; or
- (b) whether the Subcontractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

### **16.3 Delay costs**

Where the Subcontractor has been granted an extension of time under the Subcontract, the Head Contractor shall pay to the Subcontractor such extra costs as are necessarily incurred by the Subcontractor by reason of the delay. This does not:

- (a) limit the Head Contractor's liability for damages for breach of contract; or

- (b) oblige the Head Contractor to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Subcontract.

## **17 Latent Condition costs**

**If a Latent Condition** causes the Subcontractor to:

- (a) carry out more work;
- (b) use more constructional plant, materials or other resources; or
- (c) incur more cost,

than the Subcontractor could reasonably have anticipated at the date of the Subcontract, the Subcontractor shall be entitled to any costs incurred by the Subcontractor including any overheads in respect of those costs to the extent such costs exceed the amount already due to the Subcontractor under Special Provision 9.3 above.

*Latent Conditions are physical conditions on the site or its surroundings, including artificial things but excluding weather conditions, which differ from the physical conditions which should reasonably have been anticipated by the Subcontractor at the date of the Subcontract if the Subcontractor had:*

- (d) *examined all information made available in writing by the Head Contractor to the Subcontractor;*
- (e) *examined all information relevant to the risks, contingencies and other circumstances obtainable by the making of reasonable enquiries; and*
- (f) *conducted a visual inspection of the site and its surroundings.*

## **18 Liquidated Damages Cap**

The Subcontractor's liability for liquidated damages for delayed completion of the subcontract works is capped to the amount of [*Insert – suggest between 5 and 20*] % of the total consideration payable to the Subcontractor under the Subcontract.

The Head Contractor's right to delay liquidated damages is the Head Contractor's sole remedy for the Subcontractor's delayed completion of the subcontract works.

## **19 Security**

### **19.1 Recourse to security**

The Head Contractor may only make a claim on security provided by the Subcontractor, or have recourse to retention moneys under the Subcontract if:

- (a) the Subcontractor has breached the terms of the Subcontract;
- (b) the Head Contractor notifies the Subcontractor in writing that the breach has occurred; and
- (c) the Subcontractor has failed to rectify the breach within 10 days of receipt of the Head Contractor's notice.

### **19.2 Reduction and release of security**

- (a) Within 14 days of practical completion of the subcontract works the Head Contractor's entitlement to security provided by the Subcontractor under the Subcontract shall be reduced to 50 per cent thereof; and
- (b) Within 14 days of the expiry of the defect liability period under Special Provision 12, the Head Contractor shall release the remaining security held under the Subcontract.

### 19.3 Holding of and interest on cash security and retention moneys

The Head Contractor shall deposit any cash security or retention moneys provided by the Subcontractor in an interest-bearing account and any interest earned belongs to the Subcontractor.

### 20 Defective works

If the Head Contractor discovers material or work provided by the Subcontractor which is not in accordance with the Subcontract, the Head Contractor shall as soon as practicable notify the Subcontractor and must not:

- (a) have those works performed by other persons; or
  - (b) accept the defective work or materials and direct a variation in relation to the same,
- before the Subcontractor has been given a reasonable opportunity to rectify the defective works.

### 21 Payment terms

#### 21.1 Payment terms

Within:

- (a) 30 days of the receipt by the Head Contractor of a claim for payment; or
- (b) 21 days of the issue by the Head Contractor of a payment certificate or the final certificate (as applicable),

whichever is the earlier, the Head Contractor shall pay to the Subcontractor or the Subcontractor shall pay to the Head Contractor, as the case may be, an amount not less than the amount shown in such certificate as due to the Subcontractor or to the Head Contractor as the case may be, or if no payment certificate has been issued, the Head Contractor shall pay the amount of the Subcontractor's claim.

#### 21.2 Default interest

If any moneys due to either party remain unpaid after the date upon which they should have been paid, then interest shall be payable on the amount from but excluding the date upon which the amount should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the cash rate published by the Reserve Bank of Australia at the date of the Subcontract plus 10%.

### 22 Defect liability period

- (a) The defect liability period for the subcontract works is a period of [52 weeks] commencing at 4:00pm on the date of practical completion of the subcontract works.
- (b) Where it is beyond the control of the Subcontractor to reasonably rectify the defects or omissions in the time period set out in the Subcontract, the Subcontractor shall rectify those defects or omissions in a reasonable time given all the circumstances.

### 23 Default

#### 23.1 Subcontractor default

- (a) The Head Contractor may only give the Subcontractor a written notice to show cause or similar notice, if the Subcontractor has committed a **substantial breach** of the Subcontract and the Head Contractor considers that damages may not be an adequate remedy.
- (b) A 'Substantial Breach' for the purpose of this provision means:
  - (i) failing to provide security required under the Subcontract;
  - (ii) failing to provide evidence of insurance required under the Subcontract;
  - (iii) failing to use the materials or standards of workmanship required by the Subcontract;

- (iv) suspension of work (except where the suspension is caused or directed by the Principal or Head Contractor);
  - (v) failing to proceed with due expedition of the subcontract works; or
  - (vi) a failure by the Subcontractor to meet its obligation to pay liquidated damages for which it is liable.
- (c) Any notice to show cause or similar notice issued by the Head Contractor to the Subcontractor which specifies the time and date by which the Subcontractor must show cause or cure the breach (as applicable) must not specify a time less than **[14 clear days]** after the notice is given to the Subcontractor.

### **23.2 Head Contractor default**

- (a) The Subcontractor may only give the Head Contractor a written notice to show cause or similar notice, if the Head Contractor has committed a substantial breach of the Subcontract and the Subcontractor considers that damages may not be an adequate remedy.
- (b) Substantial breaches of the Head Contractor include but are not limited to:
- (i) failing to give the Subcontractor access to and possession of the site sufficient to enable the Subcontractor to commence and carry out the subcontract works, if the failure continues for a period of 30 days;
  - (ii) failing to make a payment when due under the Subcontract; and
  - (iii) failure by the Head Contractor to issue a certificate of practical completion for the subcontract works or give the Subcontractor the reasons in writing for not issuing that certificate within 14 days of receipt of a request by the Subcontractor to issue the certificate.
- (c) Any notice to show cause or similar notice issued by the Subcontractor to the Head Contractor which specifies the time and date by which the Head Contractor must show cause or cure the breach (as applicable) must not specify a time less than **[14 clear days]** after the notice is given to the Head Contractor.

### **24 Dispute resolution**

Any dispute arising between the Head Contractor and the Subcontractor under the Subcontract must be resolved by reference to the dispute resolution provisions under the Subcontract and not have regard to the dispute resolution provisions under the Head Contract.

### **25 Documents provided by Head Contractor**

- (a) The Subcontractor has examined and carefully checked the documents provided by the Head Contractor including any preliminary design but gives no warranty in relation to the accuracy, completeness of correctness of those documents.
- (b) If either party discovers any ambiguity or discrepancy in any document or between documents provided to the Subcontractor for the purpose of executing the work under the Subcontract, that party must notify the other in writing of the ambiguity or discrepancy. In the event of an ambiguity or discrepancy being discovered and brought to the attention of the Head Contractor, or discovered by the Head Contractor, the Head Contractor shall direct the Subcontractor as to the interpretation to be followed by the Subcontractor in carrying out the work.
- (c) If the direction causes the Subcontractor to incur more or less cost than the Subcontractor, having complied with 21(a), could reasonably have anticipated at the date of the

Subcontract then the difference shall be valued by the Head Contractor's representative or superintendent (as applicable) and the subcontract sum shall be adjusted accordingly.

## **26 Variation approvals**

- (a) Upon receipt of a variation claim from the Subcontractor in response to a direction or instruction under this Subcontract from the Superintendent, the Head Contractor or the Head Contractor's representative (as applicable), the Superintendent, or the Head Contractor, or the Head Contractor's representative is to confirm by the issue of a notice in writing to the Subcontractor within 5 days of the variation claim being submitted whether or not the variation claim is approved for payment "in principle".
- (b) If no notice of confirmation is given to the Subcontractor within 5 days of the variation claim being received, the Superintendent, or the Head Contractor or the Head Contractor's representative (as applicable) is deemed to have decided "in principle" that the direction constitutes a variation to the scope of works for which the Subcontractor is entitled to payment in addition to the Contract Sum.
- (c) If the Superintendent, the Head Contractor or the Head Contractor's representative (as applicable), issues a notice of confirmation approving a variation claim in principle, or there is a deemed issue of a notice of confirmation approving a variation claim in principle, the Subcontractor will be entitled to include up to 80% of the amount of the variation claim in its next progress claim.
- (d) The issue, or deemed issue, of a variation confirmation notice does not prevent the Superintendent, or the Head Contractor or the Head Contractor's representative (as applicable) from disputing the amount claimed by the Subcontractor for the cost of the variation, or from requesting further information regarding the cost claimed for the variation, but the Superintendent, or the Head Contractor or the Head Contractor's representative (as applicable) cannot dispute that the variation constitutes a variation to the scope of works for which the Subcontractor is entitled to payment in addition to the Contract Sum.

## **27 Security of Payment Act**

The Head Contractor acknowledges and agrees that any payment made by it to the Subcontractor pursuant to a determination under the *Building and Construction Industry Security of Payment Act* (2009) SA will not be deducted by the Head Contractor from any progress claim and/or payment claim received from the Subcontractor following such payment.

## **28 Personal Property Securities Act 2009**

- (a) Expressions used in this clause and the Subcontract that are defined in the Personal Property Securities Act (2009) (Cth) ("PPSA") have the same meaning as in the PPSA.
- (b) The Head Contractor consents to the Subcontractor doing whatever the Subcontractor considers necessary at any time to register (including registering a financing statement and/or a financing change statement), perfect (with the priority required by the Subcontractor) or enforce any security interest (including as a purchase money security interest or a PPS Lease) that arises under the Subcontract or any other agreement with the Head Contractor and/or in respect of any personal property of the Subcontractor. The Head Contractor must execute any documents, provide any information and otherwise assist the Subcontractor as required by the Subcontractor at any time to enable the Subcontractor to do anything contemplated by this clause.
- (c) In accordance with s157(3) of the PPSA, the Head Contractor waives its right to receive notice of a verification statement in respect of a registration event.

- (d) In accordance with s115 of the PPSA, the Subcontractor and the Head Contractor contract out of the provisions, to the extent such provisions grant rights in favour of the Head Contractor to create obligations upon the Subcontractor, of sections 95, 96, 117, 118, 120, 125, 130, 135, 142 and 143, subsections 121(4), 132(3)(d) and 132(4), and Division 6 of Part 4.3 of the PPSA.

**29 Special Provisions to form part of subcontract**

- (a) The Subcontractor's tender price has been calculated on the basis that these Special Provisions will form part of the Subcontract terms and conditions, and no inconsistent or additional terms shall apply without being agreed to by both parties in writing.
- (b) An acceptance by the Head Contractor of the Subcontractor's tender offer shall include these Special Provisions.
- (c) Any counteroffer made by the Head Contractor to the Subcontractor's tender offer shall be deemed to include these Special Provisions.
- (d) These Special Provisions apply to all quotations, purchase orders, sales acknowledgments, invoices and other documents issued by the Subcontractor in connection with the work under the Subcontract.