



Buildings and Contracts

MINOR WORKS CONDITIONS OF TENDERING AND CONDITIONS OF CONTRACT

CONDITIONS OF TENDERING (AS AMENDED QUARTER 1 2024)

- T.1** These Conditions of Tendering must be read in conjunction with any Conditions of Tender that may be included in any Preliminaries attached hereto. The Conditions of Tendering that may be included in Preliminaries attached hereto take precedence over these Conditions of Tendering.
- T.2** The tender must be submitted on the Form of Tender - BC 03 as a lump sum, subject to these Conditions of Tendering, the Conditions of Contract hereunder and the Drawings and Specification (if any) attached hereto. Any tender that does not comply with these Conditions of Tendering may not be considered.
- T.3** The tender must be submitted electronically in one file, named 'Criteria Response and Price' and additionally named with the Tenderer's name and project title. Any tender submitted after the time fixed on the date named for the receipt of tender or without the stated supporting documents may not be considered.
- T.4** The Tenderer must inform itself fully of all circumstances and conditions relating to the Contract including but not limited to inspecting the site, availability of materials, labour and plant and all risks and contingencies likely to affect its tender price. If the Tenderer has any doubts as to the meaning of any part of the documents, it shall obtain clarification in writing from the nominated contact officer.
- T.5** Tenderers must make allowance for payroll tax on all wages and for all fees, royalties, or other costs and charges payable to any person or authority as a result of carrying out the works.
- T.6** The Principal is not bound to accept the lowest, or any tender. A tender will be deemed accepted when a notice in writing of such acceptance is handed to the Tenderer or is posted to the address contained within its tender. The tender and the documents accompanying it, together with the Principal's written acceptance thereof will constitute a binding contract between the Principal and the Tenderer (hereinafter called "**The Contractor**").

CONDITIONS OF CONTRACT (AS AMENDED 1 MAY 2021)

G.1 INTERPRETATION

For the purposes of this Contract:

"**Business Day**" means a day other than:

- (a) a Saturday, Sunday or public holiday; or
- (b) any other day that falls between 22 December in any year and 10 January in the following year (inclusive).

"**Date for Practical Completion**" means the date provided for in the Contract by which the Contractor must achieve Practical Completion;

"**Day or Days**" means calendar days;

"**Practical Completion**" means the works under Contract are at the stage where any existing minor defects and/or omissions: do not prevent the reasonable use of the works; do not significantly inconvenience the Principal; and can reasonably be remedied within 14 days of a Superintendent's direction to remedy;

"**Principal**" means the body corporate identified as the Principal on the Department of Finance Form of Tender BC 03;

"**Statutory Requirements**" mean all relevant Acts, regulations, by-laws, orders, directions and proclamations made or issued under any such Act and all lawful requirements of public and other authorities;

"**SOPA Legislation**" means the *Building and Construction Industry (Security of Payment) Act 2021* (WA) and its accompanying regulations; and

"**Superintendent**" means the person appointed by the Principal to be the Superintendent (and in the absence of any appointment shall be the Office of the Superintendent – Buildings and Contracts – Department of Finance) and shall include any person notified to the Contractor as the representative of the Superintendent for the purposes of the Contract.

G.2 SECURITY OF PAYMENT

The Contractor acknowledges the provisions of the SOPA Legislation. The Contractor hereby confirms that nothing in this Contract permits or otherwise allows the Contractor to implement an arrangement with its subcontractors that would result in provisions of its subcontracts having no effect by virtue of the application of section 14 of the Act or any other provision of the SOPA Legislation.

The Contractor must:

- (a) ensure that a copy of any written communication in relation to the SOP Legislation (including a "payment claim" under the SOP Legislation) which it delivers or is deemed to deliver to the Principal is provided to the Superintendent's Representative at the same time; and

- (b) provide written notice to the Principal and the Superintendent when:
 - (i) the Contractor becomes aware that a subcontractor is entitled to suspend work pursuant to the SOP Legislation; or
 - (ii) the Contractor receives any communication from any subcontractor in relation to any adjudication pursuant to the SOP Legislation.
- (c) If the Contractor suspends the Works pursuant to the SOP Legislation, the Contractor will have no claim other than as expressly provided for by the SOP Legislation.
- (d) If any of the Contractor's subcontractors suspend any work, services or supply pursuant to the SOP Legislation, the Contractor will have no claim for a variation, extension of time or delay costs.

G.3 SERVICE OF DOCUMENTS

Any notice to be given by either party to the Contract by the other must be in writing and must be served by post, or by leaving the notice at the address given in the Tender.

Notice will be deemed received:

- (a) if hand delivered, at the time of delivery; or
- (b) if sent by prepaid post, on the fourth Day after the date it was posted to the address.

G.4 MATERIALS, LABOUR AND CONSTRUCTIONAL PLANT

The Contractor must provide all materials, labour, plant, equipment, tools and everything else necessary for the work. The Contractor:

- (a) is responsible for the execution, completion and maintenance of the work in accordance with the Contract, the Drawings and Specification (if any) and such directions as the Superintendent may issue; and
- (b) is solely liable for any loss or damage to the work from any cause whatsoever until the Superintendent has certified that the whole of the works have been satisfactorily completed by the Contractor.

Notwithstanding clause G.4(b), the Contractor is not liable for any loss or damage caused by any negligent act or omission of the Principal, the Superintendent or the employees, professional consultants or agents of the Principal.

G.5 ASSIGNMENT AND SUBCONTRACTING

The Contractor must not assign, mortgage, charge or otherwise encumber:

- (a) the Contract or any part thereof; or
- (b) any benefit or moneys or interest under the Contract,

without the prior written approval of the Principal.

The Contractor must not subcontract any part of the work under the Contract unless it has made prior application in writing to the Principal giving full particulars of:

- (a) the part of the work under the Contract the Contractor wishes to subcontract; and
- (b) the proposed subcontractor.

No further steps may be taken by the Contractor under this clause until it has obtained the written approval of the Principal.

G.6 STATUTORY REQUIREMENTS

The Contractor must:

- (a) comply with the provisions of all Statutory Requirements in any way affecting or applicable to the works or the execution of the work under the Contract;
- (b) give all notices necessary to comply with any statutory requirements; and
- (c) pay and bear all fees and charges payable in connection with any statutory requirements unless the statutory requirement did not exist at the time of close of tender.

G.7 INSURANCE

Without limiting its obligations and responsibilities under the Contract, the Contractor must take out:

- (a) a Contractors Contract Works Policy which covers the whole of the work for a sum not less than the Value of Work; and
- (b) a Public Liability Policy in respect of death or bodily injury to any person and damage to property for an amount not less than the sum specified or for the sum of **\$5,000,000**, whichever is the greater sum.

The insurance above must:

- (a) be in the joint names of the Contractor and the Principal;
- (b) extend coverage to each party for their respective rights, interests and liabilities; and
- (c) be subject to a cross liabilities clause and waiver of rights of subrogation.

The Contractor must insure against statutory and common law liabilities for death of or injury to an employee of the Contractor or of a subcontractor. The insurance must extend coverage to the Principal in respect of its liabilities for payment of compensation to any employee of the Contractor or of a subcontractor of the Contractor.

The Contractor must:

- (a) hold certificates of currency and full policy documents for all insurances available for inspection by the Principal or the Superintendent on request; and
- (b) provide certificates of currency and full policy documents for all insurances upon written request by the Principal or Superintendent.

All insurances required by this clause must be put in place by the Contractor prior to the commencement of work and maintained until the end of the defects liability period.

G.8 TIME FOR COMMENCEMENT, EXTENSIONS OF TIME, AND COMPLETION

The Contractor must commence work on the site within fourteen Days after the Principal has given to the Contractor possession of sufficient of the site to commence work or within such further time as may be approved by the Superintendent.

Before commencing work the Contractor must give the Superintendent three Days clear notice in writing and must thereafter execute the work under the Contract:

- (a) in accordance with the Contract and any directions of the Superintendent; and
- (b) at a rate of progress satisfactory to the Superintendent.

When it becomes evident to either party that anything may delay the work under the Contract, that party must promptly notify the Superintendent in writing with details of the possible delay and the cause.

If the Contractor will be delayed in reaching Practical Completion by a cause beyond the reasonable control of the Contractor, the Contractor must give the Superintendent a written claim for an extension of time within 21 Days of the occurrence of the delay event. The written claim must:

- (a) state the dates upon which the Contractor was delayed;
- (b) set out the facts the claim is based on; and
- (c) identify the critical activity that is delayed by the delay event.

If the Contractor is subject to a concurrent delay which was caused by an act or omission of the Contractor, the Contractor will not be entitled to an extension of time.

The Contractor must complete the work within the time specified from the date of award of the Contract or within any extended time allowed by the Superintendent under this clause.

G.9 MATERIALS

Materials used in the work under the Contract and standards of workmanship must be in conformity with the provisions of the Contract. Any materials not otherwise specified must be new and where applicable, materials and workmanship must be in accordance with the relevant standard of the Standards Association of Australia and the National Construction Code.

At any time before the issuance of the Final Certificate the Superintendent may reject any material or work which is not in accordance with the

Contract and may direct its replacement, correction or removal. All such replacements, corrections and removals will be at the Contractors cost.

G.10 AUSTRALIAN AND NEW ZEALAND MANUFACTURED GOODS

Unless otherwise specified, materials or goods to be incorporated in or used in the execution of the work shall be manufactured in Australia or New Zealand wherever:

- (a) they are available and conform to the requirements of the specification; and
- (b) the cost to the Contractor or any of his subcontractors of such materials or goods does not exceed by 20 per centum the cost of the equivalent materials or goods manufactured outside Australia or New Zealand.

If the Contractor or any of its subcontractors propose to use materials or goods not manufactured in Australia or New Zealand in the works, the Contractor shall obtain the prior written approval of the Superintendent.

Approval will not be granted unless the Contractor submits to the Superintendent documentary evidence showing that:

- (a) the materials or goods manufactured in Australia or New Zealand are unavailable;
- (b) the materials or goods manufactured in Australia or New Zealand do not conform to the requirements of the specification; or
- (c) the cost exceeds by 20 per centum the cost of materials or goods manufactured outside Australia or New Zealand.

G.10 CONTRACTOR'S REPRESENTATIVE

Execution of the work must be personally supervised by the Contractor or by an approved competent person employed by the Contractor whose name must be notified to the Superintendent in writing.

The Contractor or its authorised representative must be on the site whenever work under the Contract is proceeding to provide adequate supervision of the execution of the work.

Any direction given by the Superintendent to the Contractor's authorised representative is deemed to be a direction given to the Contractor.

G.11 CLEANING UP

On the completion of the work the Contractor must:

- (a) clear away and remove from the site all constructional plant, surplus material, rubbish and temporary works of every kind;
- (b) where necessary, fill and compact and level off all excavations (other than those forming part of the work) made by the Contractor on the site; and
- (c) leave the whole of the site and work in a clean and tidy condition to the approval of the

Superintendent.

G.12 VARIATIONS

If the Superintendent determines that the form, quality or quantity of the work under the Contract should be varied, the Superintendent may order the Contractor to:

- (a) increase, decrease or omit any part of the Work under the Contract; or
- (b) change the character or quality of any material or work.

The rate or price payable for the variation shall be determined by agreement between the Contractor and the Superintendent and shall be taken into account in determining the final contract sum.

G.13 PAYMENT CERTIFICATES, PROGRESS PAYMENTS, SET OFF & INTEREST

On the last day of each calendar month, commencing from the month in which the Contractor commenced work under the Contract, the Contractor must submit its payment claim. Claims for payment shall:

- (a) include the value of work carried out by the Contractor in the performance of the Contract to that time;
- (b) set out all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof;
- (c) describe the items and quantities of the Works to which the progress payment relates;
- (d) expressly state that: "This is a Payment Claim made under the *Building and Construction Industry (Security of Payment) Act 2021 (WA)*"; and
- (e) include any such further information as may be required by the Superintendent or the Principal from time to time.

A claim for payment under Clause G13 delivered by the Contractor to the Superintendent shall be deemed to be given by the Contractor to the Principal for the purposes of the SOP Legislation.

Within 10 days after a claim for payment is given, the Superintendent shall issue to the Principal and the Contractor a payment certificate stating the amount of the payment which is to be made by the Principal to the Contractor or by the Contractor to the Principal.

The Superintendent shall set out in the certificate the calculations employed to arrive at the amount, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference and if payment is to be withheld, the reasons why payment is being withheld.

A payment certificate issued under this clause by the Superintendent to the Contractor shall be deemed to be a payment schedule issued by the Principal to the Contractor for the purposes of the SOP Legislation.

Subject to the provisions of the Contract, within 20 days after the Contractor makes a claim for payment or within 10 days of issue by the Superintendent of a payment certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal.

If no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim.

Unless the Contract provides otherwise:

- (a) the Contractor shall receive monthly progress payments within 20 days after receipt of its progress claim equivalent to 95 per centum value of the work done as determined by the Superintendent; and
- (b) the Principal shall retain 5 per centum by way of retention security.

Upon giving 5 Business Days notice, the Principal may have recourse to retention moneys to deduct or set-off any debt or money due, or any amount that the Principal considers (acting reasonably) will become due, from the Contractor to the Principal otherwise than under the Contract.

During the defects liability period, the monies retained by the Principal shall be reduced to two and one half per centum of the final contract sum. Interest shall not be payable on retained monies.

The monies retained by the Principal shall be held until the Superintendent certifies:

- (a) that the works have been fully completed; and
- (b) the Contract obligations as to the Defects Liability period have been fulfilled.

The Principal may set off any amount claimed by the Principal under this or any other Contract from:

- (a) any amount due to the Contractor from the Principal; and
- (b) any security or retained monies held by the Principal under this Contract.

No certificate of the Superintendent shall be deemed to signify approval or acceptance of any complete works.

Where any amount of money certified as due and payable:

- (a) to the Contractor by the Principal; or
- (b) to the Principal by the Contractor,

remains unpaid by the date for payment, interest will be payable on the unpaid amount at the rate prescribed under section 8(1)(a) of the *Civil Judgments Enforcement Act 2004*.

G.14 DEFECTIVE WORK

The Contractor shall use the materials and standards of workmanship required by the Contract.

If the Superintendent discovers material or work provided by the Contractor which is not in accordance with the Contract, the Superintendent may direct the Contractor to —

- (a) remove the material or work from the Site;
- (b) demolish the work;
- (c) reconstruct, replace or correct the material or work; or
- (d) not deliver the material or work to the Site.

The Superintendent may direct the times within which the Contractor must commence and complete the removal, demolition, replacement or correction.

If:

- (a) the Contractor fails to comply with a direction of the Superintendent pursuant to this clause within the time specified in the direction; and
- (b) provided the Superintendent has given the Contractor notice in writing that after the expiry of 7 days from the date on which the Contractor receives the notice the Principal intends to have the work carried out by other persons,

the Principal may have the work of removal, demolition, replacement or correction carried out by other persons. The costs incurred by the Principal in having the work so carried out shall be a debt due from the Contractor to the Principal.

G.15 PRACTICAL COMPLETION & DEFECTS LIABILITY

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

The Superintendent will issue a Certificate of Practical Completion when the Superintendent:

- (a) is satisfied that the work has been substantially completed in accordance with the Contract;
- (b) the Contractor has given possession of the Site and the works to the Principal; and
- (c) has received a written undertaking by the Contractor to finish any outstanding work during the defects liability period.

The defects liability period shall be calculated from the date certified as the date for Practical Completion.

As soon as practicable after the expiration of the defects liability period, the work shall be delivered up to the Principal:

- (a) fully completed in accordance with the Contract; and
- (b) in good condition (excluding any reasonable fair wear and tear) to the approval of the Superintendent.

Within 14 days after the expiration of the defects liability period, the Contractor must execute all work of removal, repair, amendment, reconstruction, rectification and making good of defects as may be required by the Superintendent. All work required under this clause shall be at the Contractor's expense.

The Superintendent may direct that in respect of the work of rectification there will be a separate defects liability period of a duration not exceeding the length of the original defects liability period.

G.16 LIQUIDATED DAMAGES

If the Contractor fails to complete the works by the date for Practical Completion, the Contractor must pay the Principal the daily rate sum specified as liquidated damages for every day by which completion of the works is delayed.

The Contractor warrants that the amount specified as liquidated damages is the best genuine pre-estimate of the detriment that the Principal will incur if Practical Completion is not achieved by the Date for Practical Completion. The Contractor further agrees to waive any right relating to the enforceability of this clause or the characterisation of it or any part thereof as a penalty.

G.17 CONDITIONS OF EMPLOYMENT

Any person who for the purpose of his, her or its trade or business employs a person or employee upon or in connection with any part of the works, shall be required to observe all the conditions of the relevant award or modern award applicable to that trade or business or of a registered enterprise or workplace agreement. For the purpose of this clause:

Award – has the meaning ascribed to it under the *Industrial Relations Act 1979* (WA).

Employee - has the meaning ascribed to it under the *Industrial Relations Act 1979* (WA) or the *Fair Work Act 2009* (Cth) as the case may be.

Modern Award – has the meaning ascribed to it under the *Fair Work Act 2009* (Cth).

G.18 PAYMENT OF WORKERS WAGES AND ALLOWANCE

The Principal may require the Contractor to deliver to the Principal a statutory declaration that all workers and subcontractors who at any time have been engaged on the work under the Contract have been paid in full all amounts which have become due and payable to them.

If the Contractor fails to provide a statutory declaration in accordance with this clause, the Principal is entitled to withhold any and all payments due and payable to the Contractor.

At the written request of the Contractor and out of moneys otherwise payable to the Contractor, the Principal may make payments directly to any worker or subcontractor on behalf of the Contractor. Such payments will discharge any

payment obligations owed by the Principal to the Contractor in the quantum of the payments made on the Contractor's behalf.

G.19 DEFAULT OR BANKRUPTCY OR INSOLVENCY OF CONTRACTOR

If:

(a) the Superintendent certifies to the Principal that the Contractor has:

- (i) failed to commence the works within the period specified;
- (ii) failed to carry out the works at a rate of progress satisfactory to the Superintendent;
- (iii) failed, neglected or omitted to carry out any directions of the Superintendent in respect of the works;
- (iv) failed to complete the whole of the works within the time specified for completion or such extended time as the Superintendent may approve,

and the Contractor has received at least 7 days notice from the Superintendent or the Principal of the existence of these failures; or

(b) the Contractor has intimated to the Superintendent or the Principal that it is unwilling or unable to complete the works; or

(c) the Contractor becomes a debarred supplier as defined in section 32 of the *Procurement Act 2020*;

(d) the Contractor:

- (i) has committed an act of bankruptcy or insolvency;
- (ii) becomes bankrupt or insolvent;
- (iii) presents with a bankruptcy petition;
- (iv) proposes a scheme of arrangement or composition;
- (v) is subject to a meeting of creditors;
- (vi) proposes or enters into a deed of company arrangement;
- (vii) has a controller or administrator appointed;
- (viii) resolves to apply for a winding up order or a winding up order is made or applied for;
- (ix) has a liquidator, receiver or manager is appointed; or
- (x) a mortgagee takes possession of any property,

then the Principal may, by giving notice in writing, terminate the Contract and all moneys held by the Principal may be utilised by the Principal for the purpose of completing the works.

The Principal may utilise all moneys held under the Contract to deduct or set-off any debt or money due, or any amount that the Principal considers will

become due, from the Contractor to the Principal otherwise than under the Contract.

Before having recourse to the security, the Principal must give five (5) days notice to the Contractor of its intention to do so.

G.20 SETTLEMENT OF DISPUTES

All disputes or differences between the Principal and the Contractor arising out of the Contract whether raised during the execution of the Work under the Contract or after the completion of the works may be resolved by either arbitration or litigation.

If both parties agree, the dispute may be referred to an arbitrator who shall be either:

- (a) mutually agreed upon by the parties in writing;
- (b) in the absence of the parties agreeing in writing, one of at least three persons nominated in writing by the Principal for the selection of the Contractor; or
- (c) in the absence of that selection, by an arbitrator appointed in accordance with the laws of Western Australia.

The arbitrator appointed under this clause shall not be an employee of the Principal or the Contractor or have had any association with the work under the Contract

It is a condition precedent to every arbitration that the party requesting arbitration shall give notice in writing to the other party within twenty-eight days of the dispute or difference arising.

If either or both parties do not agree to arbitration, within 14 days after service of a notice of dispute, the parties shall confer at least once to attempt to resolve the dispute. Either party may elect to have the conferral attended by the Superintendent if the Superintendent so agrees. In the event that the dispute cannot be resolved or either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may by notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to litigation.