**Department of Treasury and Finance**

**Victoria**

**Special Conditions of Contract for use in association with Australian Standard General conditions of contract for design and construct**

**AS 4300- 1995**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision:** | **Date:** | **Clause reference:** | **Details:** | **Endorsed by:** |
| October 2011 |  |  | DRAFT Special Conditions for information and consideration by departments and public bodies at their own discretion. | N/A |
| December 2011 | 19 December 2011 | 36, 42.3A and 47 | Correct anomalies and harmonise with the AS2124, as suggested by Minter Ellison | DPCD |
| July 2012 | 12 July 2012 | New Clause 55 Victorian Code and Victorian Guidelines | New clause to comply with the requirements of the *Victorian Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry* | DPCD |
| July 2012 | 25 July 2012 | Throughout | * Replaced the words clause, subclause and sub-clause with the word ’Clause’. * Deleted the names of the AS 4300 General Conditions Clauses retaining only the Clause number | DPCD |
|  |  | Clauses 49 onwards | Adding the words “to the General Conditions” to the opening instruction relating to new Clauses | DPCD |
|  |  | New Clause 55 Victorian Code and Victorian Guidelines | New clause to comply with the requirements of the *Victorian Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry* | CCAP |
| February 2013 | August 2012 |  | Responsibility for administration of PDCM Act moved from DPCD to DTF | Minister |
| February 2015 | February 2015 | Replacement Clause 55 Victorian Code and Victorian Guidelines with Commonwealth Building Code clause | Removal of clause following abolition of the *Victorian Code of Practice for the Building and Construction Industry*  Replacement with clause for the Commonwealth Building Code 2013 and Supporting Guidelines |  |

**Introduction**

These Special Conditions of contract replace Part B of the Annexure to the General conditions of contract for design and construct (AS 4300 – 1995).

The copyright in these completed Special Conditions is owned by the Victorian Building Commission and is in the process of being negotiated for transfer to the Department of Planning and Community Development.

These Special Conditions must not be used in any way (including by being reproduced, transcribed or printed) without the permission of the Victorian Building Commission or the Building Policy Branch of the Department of Planning and Community Development.

To make use of these Special Conditions users must lawfully obtain a copy of AS 4300 – 1995, the copyright in which is owned by Standards Australia Limited and subject to terms of use prescribed by Standards Australia Limited (or its authorised distributor(s)).

The General conditions of contract for design and construct AS 4300 – 1995 can be purchased from SAI Global or Standards Australia Limited. The SAI Global website address is <http://www.saiglobal.com/shop/Script/search.asp> and that of Standards Australia Limited is <http://www.standards>.org.au/default/asp.

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| --- | --- |
| **Victorian Government Special Conditions of Contract for use in association with Australian Standard AS 4300 - 1995.** | |
|  |  | |
| **ANNEXURE to the Australian Standard General conditions of contract for design and construct (AS4300-1995)** | **PART B** | |

Table 1 below identifies Clauses which have been deleted, have been amended and differ from, or have been added to, the Australian Standard AS 4300-1995.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Clauses which have been deleted from the General Conditions in AS 4300-1995: | |  |
|  |  | **No clauses deleted entirely** | |
|  | The following clauses have been amended and differ from the corresponding clauses in AS 4300-1995: | |  |
|  |  | **2; 3; 5.4; 5.6; 8.1; 9.2; 10; 14; 15; 16.3; 23; 29; 35.5; 36; 42.1; 42.3; 42.4; 42.5; 42.6; 43; 44.2, 44.10; 44.11; 46.1; 47.** | |
|  | The following clauses have been added to those of AS 4300-1995: | |  |
|  |  | **3.4; 14.3; 29.4; 49; 50; 51; 52; 53; 54; 55.** | |
|  | The amendments to the following clauses apply unless struck out by the Principal (Principals should not strike out the amendments unless the issues addressed by the amendments have been covered in the specification): | |  |
|  |  | **8.1; 14; 15.** | |

**Table 1: Victorian Public Sector changes to AS 4300 – 1995**

The provisions of the document described as “General conditions of contract for design and construct (AS 4300-1995)” which form part of the Contract between the parties are amended, added to, and varied in the following respects:

Clause 2 is amended as follows:

The existing definition of ‘*Contract*’ is deleted and replaced with the following new definition:

'Contract' means this contract and includes the Schedules and any annexures or documents incorporated by reference and where a Formal Instrument of Agreement is signed means the Formal Instrument of Agreement and the documents listed in it.

The following new definitions are added to Clause 2:

‘Direction’ includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;

‘Variation’ means any of those actions which the Superintendent is able to direct the Contractor to do at Clause 40.1 (a) - (e);

Clause 5.4 is deleted and replaced with the following Clause 5.4:

Security shall be lodged prior to the earlier of:

(a) the expiration of 28 days after the Date of Acceptance of Tender; or

(b) the commencement of the Works on Site by the Contractor.

If the Contractor does not lodge Security in accordance with this clause, the Principal may, notwithstanding Clause 42.1, withhold payment of moneys otherwise due to the Contractor until the Contractor lodges the Security.

Clause 5.6(a) is deleted and replaced with the following new clause 5.6(a)

(a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security or there is a debt due under the Contract to the party from the other party.

Clause 5.6 is amended by adding the following paragraph to the end of the Clause:

A party is not entitled to commence any proceeding, seeking relief by way of injunction or any other relief, which has as its objective the obtaining of an order preventing the other party from having recourse to retention moneys and/or security even though the party contemplating the commencement of proceedings may assert that there is no right to have recourse to retention moneys and/or security.

Clause 8.1 is amended by inserting the following sentence after the first sentence in paragraph 1:

Where there is a conflict between the several documents forming the Contract, the documents shall, subject to Clause 8.2, be interpreted in accordance with the Annexure.

Part A Annexure is amended by inserting the following item 19A (in relation to Clause 8.1):

|  |  |  |
| --- | --- | --- |
| *(19A)* | *Order of precedence to be applied in interpreting the Contract:*  *(Clause 8.1 – as amended)* | *(a) Formal Instrument of Agreement dated ……..*  *(b) Letter of Acceptance of Tender dated ………..*  *(c) Annexure Part B to AS 4300-1995 General Conditions of Contract;*  *(d) AS 4300-1995 General Conditions of Contract and Annexure Part A;*  *(e) Draft Construction Program;*  *(f) Specifications,*  *(g) Drawings numbered* |

(\* Principal should strike out if this Clause does not apply.)

Clause 9.2 is deleted and replaced with the following new Clause 9.2:

For the purposes of this Clause 9.2:

"Subcontract" means a contract between the Contractor and a third party whereby the third party (in this clause called the "Subcontractor") agrees to perform work comprising part of the work under the Contract; and

"Secondary Subcontract" means a subcontract between the Subcontractor and a subcontractor to the Subcontractor.

The Contractor shall not without the written approval of the Superintendent, which approval shall not be unreasonably withheld, subcontract or allow a Subcontractor to assign or enter into a Secondary Subcontract for any of the work under the Contract where the amount payable under that contract exceeds the lesser of:

(a) the sum of $10,000; or;

(b) 10% of the Contract Sum;

With a request for approval, the Contractor shall provide to the Superintendent:

(c) particulars in writing of the work to be subcontracted and the name and the address of the proposed Subcontractor;

(d) written confirmation, where the proposed subcontract sum for the particular work is greater than $20,000.00, that the proposed subcontract conditions incorporate AS 4303-1995 Subcontract Conditions and contain no amendments to those subcontract conditions other than those necessary to reflect the Main Contract General Conditions of Contract;

(e) a written warranty, the breach of which shall be deemed to be a substantial breach of contract for the purposes of Clause 44.2 of these General Conditions of Contract, that the Subcontract will be entered into in accordance with the requirements of this Clause 9.2; and

(f) any other information which the Superintendent reasonably requests, including the proposed Subcontract documents without prices.

Within 14 days after a request by the Contractor for approval, the Superintendent shall advise the Contractor of approval or the reasons why approval is not given.

Approval may be conditional upon the Subcontract including:

(i) provision that the Subcontractor shall not assign or enter into a Secondary Subcontract for any of the work under the Contract without the consent in writing of the Contractor; and

(ii) provisions which may be reasonably necessary to enable the Contractor to fulfil the Contractor's obligations to the Principal.

Clause 14 is amended by adding the following new Clause 14.3:

**14.3 Goods and Services Tax**

“Adjustment Event” has the same meaning as in the GST Act;

"GST" means any tax imposed under any GST Law and includes GST within the meaning of the GST Act.

“GST Act” means the A New Tax System (Goods and Services Tax) Act 1999 (Commonwealth) as amended;

“GST Related Tax Reform” includes any changes, reductions or abolition of any State, Territory or Commonwealth taxes, excise, fees or imposts including, but not limited to, financial transactions tax, wholesale sales tax, stamp duty, debits tax, attributable to the introduction of the GST Act;

“Supply” has the same meaning as in the GST Act

(a) The Contract Sum is, subject to this Clause 14.3, inclusive of all expenses of the Contractor, insurance, duties, imposts and taxes. All such expenses, insurance, duties, imposts and taxes shall be paid by the Contractor.

(b) If during the carrying out of the Works a GST applies, a valuation will be made under Clause 40.5. The valuation will be based upon the net financial impact of the GST and any associated taxation reform on the cost to the Contractor of carrying out the Works or otherwise complying with its obligations under the Contract. Such net financial impact shall be calculated on the basis of and be limited to -

(i) the GST payable by the Contractor imposed on the Contract Sum (after allowing for any entitlement to input credits);

(ii) any and all reduction in cost (or other financial benefit) to the Contractor arising from the application of the GST and any associated taxation reform (whether directly related to the carrying out the Works or otherwise complying with its obligations under the Contract or not) including such reduction or benefit arising from any changes in financial transactions tax, wholesale sales tax, excise, stamp duty, debits tax, and any other changes to taxes, imposts, or costs associated with the application of the GST and any associated taxation reform.

(c) Either party may, from time to time, propose a valuation under Clause 40.3 to reasonably reflect the effect of any net financial impact (as defined in paragraph (b) of Clause 14.3), resulting from the application of a GST and any associated taxation reform, which should impact upon the cost of carrying out the Works or otherwise complying with its obligations under the Contract. The proposal for a valuation shall be in writing and include the basis for its calculation. If the other party does not dispute the proposed valuation within the period set out in the notice (which shall be not less than 28 days) the valuation proposed in the notice shall be the valuation under Clause 40.5 and shall apply from the date of the notice which must be a date after the date on which the GST is first payable. Any dispute under this clause shall be resolved by dispute resolution under Clause 47.

(d) Notwithstanding a proposal, agreed valuation or a determination, under paragraph (c) of Clause 14.3 or Clause 47, the Principal may make a further proposal under paragraph (c) of Clause 14.3 where further reduction in cost (or other increased financial benefit) to the Contractor, as defined in paragraph (b) of Clause 14.5, arises from the application of the GST or any associated taxation reform.

(e) The Contractor must do all things reasonably necessary in order to derive the benefit of all input credits to which it would be, subject to it complying with all relevant requirements, be entitled to obtain. If the Contractor does not comply with this obligation the effect of any input credit to which the Contractor does not derive an entitlement will not be taken into account in determining any net financial impact or carrying out any valuation.

(f) ~~The Contractor must comply with Part VB of the Trade Practices Act 1974 (Commonwealth) and the Pricing Guidelines prescribed under that Part~~.

(g) The Contractor warrants that it is and will, until the issue of the Final Certificate under Clause 42.6 remain registered for the purposes of Part 2-5 of A New Tax System (Goods and Services Tax) Act, 1999.

(h) The Contractor warrants that it has, and will, correctly disclose its Australian Business Number to the Principal and will immediately advise the Principal of any change to its Australian Business Number.

(i) If the Principal becomes entitled to any payment by reason of reimbursement, indemnification or compensation by the Contractor then the Contractor must also pay to the Principal an additional amount equal to the amount of the GST payable by the Principal.

Clause 15 is amended by adding the following new paragraphs to the end of the clause:

In connection with the execution of the work under the Contract, the Contractor shall, as far as practicable, ensure the health and safety of all persons including without limitation, members of the public, the Contractor’s employees, subcontractors and agents.

The Contractor shall comply with and, at the request of the Superintendent demonstrate that it has in place and complies with, safe systems for and in relation to the execution of the work under the Contract, in accordance with the Occupational Health and Safety Act 2004.

The Contractor acknowledges that acts or omissions of the Contractor may affect the ability of the Principal to comply with duties and obligations arising under the Occupational Health and Safety Act 2004. The Contractor shall ensure so far as is practicable that it does not by its acts or omissions cause or contribute to any breach by the Principal of any provision of the Occupational Health and Safety Act 2004 and shall take all steps as are practicable to assist the Principal in complying with the provisions of that Act . Although the Contractor shall not be required to indemnify the Principal with respect to any prosecution of the Principal for a breach of the Occupational Health and Safety Act 2004, the Contractor shall otherwise indemnify the Principal to the extent permitted by law in respect of any liability, costs, losses or expenses whatsoever arising in connection with any breach of that Act by the Principal to which the Contractor has contributed by a breach of this clause. The indemnity given under this paragraph does not restrict or alter and is not restricted or altered by any indemnity given elsewhere under this Contract.

The Contractor shall comply with and, at the request of the Superintendent demonstrate that it has in place and complies with an environmental management system. The Contractor shall so far as is practicable ensure that in connection with the execution of the work under the Contract the Principal does not become liable in connection with any environmental pollution or like matter and the Contractor shall, to the extent permitted by law, indemnify the Principal in respect of any such liability or any allegation thereof and associated costs, losses or expenses.

(\* Principal should strike out if this clause does not apply)

Clause 16.3 is amended by deleting subparagraph (e).

Clause 23 is amended by:

Deleting, in subparagraph (a), the words “*and fairly*”;

Adding the following new paragraph after existing paragraph 1:

The Principal shall also ensure that in the exercise of the functions of the Superintendent under Clauses 5.7, 5.8, 6.2, 8.1, 22.5 and clauses 35, 40 and 42 of the Contract, the Superintendent acts fairly.

**Deleting, in the original paragraph 2 (that is the paragraph beginning with the *words “If, pursuant to a provision…”*), the words “*enabling the Superintendent to give directions*”;**

Clause 29.1 is amended by adding the following new sentence at the end of the existing Clause:

Except to the extent that the Contract otherwise provides, incidental items not expressly mentioned in the Contract but which are necessary for the satisfactory completion and performance of the work under the Contract shall be supplied and executed by the Contractor without adjustment to the Contract Sum.

Clause 29 is amended by adding the following new Clause:

**29.4 Warranties**

Where the Contract requires, the Contractor must procure from the relevant subcontractors and suppliers warranties, in the name of the Principal, to the effect stated in the Contract. Such warranties shall be in a form approved by the Superintendent and shall be submitted to the Superintendent (and be in a form exercisable for the benefit of the Principal) prior to the issue of the final payment certificate.

To the extent that the Contractor, in breach of this clause, does not procure warranties, in the name of the Principal, to the effect stated in the Contract, or in respect of work carried out by subcontractors or materials supplied by suppliers where the Contractor is not obliged to procure such warranties, the Contractor hereby assigns to the Principal all its right, title and interest in the Contractor’s rights against all subcontractors and suppliers in relation to the work under the Contract.

To the extent that the assignment sought to be effected by the preceding paragraph is not effective the Contractor holds the rights sought to be assigned on trust for the Principal and will exercise those rights as directed by the Principal.

Clause 36 is amended by adding the following paragraphs to the end of the clause:

For the purposes of clause 36, an event referred to in Clause 35.5(b)(i) shall be an event which relates solely to the Contract.

Other than a payment which may become due by reason of this clause 36 or other provisions of the Contract, , the Contractor shall not be entitled to any additional payment from the Principal, including a payment by way of damages for breach of contract or other obligation where that payment relates to any delay or disruption which the Contractor may have encountered, irrespective of the cause of the delay or disruption, and including delay or disruption caused by the events referred to in Clauses 35.5(b)(i) or 35.5(b)(x).

Clause 42.1 is amended by:

* replacing at line 33 the words “14 days” with “10 business days”;
* replacing the words “payment certificate” with “payment schedule” and “final certificate” with “final payment schedule”.
* adding the words:

*A claim for payment must:*

1. *include a tax invoice (within the meaning of the GST Act);*
2. *set out:*

*(i) the Contractor’s Australian Business Number;*

*(ii) the amount claimed by the Contractor and the basis for calculation of that amount;*

*(iii) the amount of any GST paid or payable by the Contractor with respect to the amount claimed;*

*(iv) the Contractor’s address for payment;*

*(v) the Principal’s Reference number;*

*(vi) the details of any claim arising under clause 12 or otherwise in respect of a Latent Condition;*

*(vii) the details of any claim arising under Clause 14.1 or otherwise in respect of the consequences of a change in a statutory requirement as described in clause 14;*

*(viii) the details of any claim arising under clause 36 or otherwise in respect of extra costs incurred by reason of delay; and*

*(ix) the details of any claim capable of being valued under Clause 40.5(ii) or otherwise in respect of delay or disruption or loss of productivity;*

1. *in respect of each aspect of the claim that is made other than in relation to the work under the Contract :*

*(i) separately set out details of each such claim;*

1. *refer to each such claim with a unique numerical identifier with the identifiers being consecutive and commencing with the number 1;*
2. *describe the factual circumstances giving rise to the claim; and*
3. *identify the clause of clauses of the contract relied upon, or, in the absence of reliance upon the contract, the other legal basis relied upon in support of the claim.[[1]](#footnote-1)*

If a claim for payment does not include a tax invoice and the details described above then the claim is not, for the purpose of this clause a claim for payment. The date of receipt of a claim for payment is taken to be the later of the date of the receipt of the claim or the date of receipt of the tax invoice or the date of receipt of the last of the details described above.

If there is an Adjustment Event in relation to a Supply which results in the amount of GST on the Supply being less than the amount in respect of which GST was charged or recovered by the Contractor then the Contractor must refund to the Principal the amount by which the GST charged or recovered exceeds the adjusted GST on the Supply. The amount of the refund is a debt due and payable by the Contractor to the Principal.

Clause 42.3A is inserted after Clause 42.3:

**“42.3A. Matters to be attended to prior to and after practical completion**

By the date of the issue of a Certificate of Practical Completion, the Contractor shall:

(a) deliver to the Principal the following:

(i) the originals of all operating and maintenance manuals for all plant and equipment forming part of the Works; and

(ii) all notices, permits, approvals and certificates required to be obtained from relevant authorities;

By 30 days after the date of the issue of a Certificate of Practical Completion, the Contractor shall:

(b) deliver to the Principal the following:

(i) all shop drawings and as built drawings as required by the Contract or requested by the Superintendent; and

(ii) all original warranties; and

(c) provide evidence of compliance with all relevant aspects of the quality assurance system including, but not limited to, having undertaken all final inspections and testing of the Works required by that system.”

Clause 42.4 is amended by replacing the words in the heading *“Effect of Certificates”* with *“Effect of Payment Schedules”.*

Clause 42.5 is amended by adding, in subparagraph 2, after the words "*under or arising out of*" the words” *or in connection with*".

Clause 42.6 is amended by:

adding, in subparagraph 1, after the words "*under or arising out of*" the words " *or in connection with”*

replacing the words “Final Certificate” with “Final Payment Schedule” and replacing at line 16 the words “14 days” with “10 business days”.

Clause 43 is amended by replacing the words *“Payment Certificate”* with *“Payment Schedule”*

Su-clause 44.2 is amended by deleting, in subparagraph 1, the words "and the Principal considers that damages may not be an adequate remedy".

Clause 44.10 is amended by adding the following new subparagraph to the end of the clause:

If the Contract is wrongfully terminated pursuant to Clause 44.9 the Contractor shall only be entitled to recover damages in respect of the wrongful termination of the Contract and shall not be entitled to claim on a quantum meruit or by reason of unjust enrichment.

Clause 44.11 is replaced with the following new clause:

If:

(a) a party informs the other party in writing or creditors generally that the party is insolvent or is financially unable to proceed with the Contract;

(b) execution is levied against a party by a creditor;

(c) a party is an individual person or a partnership including an individual person, and if that person:

(i) commits an act of bankruptcy;

(ii) has a bankruptcy petition presented against him or her or presents his or her own petition;

(iii) is made bankrupt;

(iv) makes a proposal for a scheme of arrangement or a composition; or

(v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration Order made, under Part X of the Bankruptcy Act 1966 (Cth); or

(d) in relation to a party being a corporation:

(i) notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;

(ii) the party enters a deed of company arrangement with creditors;

(iii) a controller or administrator is appointed;

(iv) an application is made to a court for the winding up of the party and not stayed within 14 days;

(v) a winding up order is made in respect of the party;

(vi) it resolves by special resolution that it be wound up voluntarily (other than for a members' voluntary winding-up); or

(vii) a mortgagee of any property of the party takes possession of that property,

then, where the other party is:

(A) the Principal, the Principal may, without giving a notice to show cause, exercise the right under Clause 44.4(a) or Clause 44.4(b); or

(B) the Contractor, the Contractor may, without giving a notice to show cause, exercise the right under Clause 44.9.

The rights given by this Clause 44.11 are in addition to any other rights and may be exercised notwithstanding that there has been no breach of contract.

Clause 46.1 is amended by deleting subparagraph 1 replacing it with the following new subparagraph:

The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract or arising out of or related to the Works (including claims in tort, for a quantum meruit or pursuant to statute) unless within 28 days after the first day upon which a competent and experienced contractor could reasonably have been aware of the circumstances which might give rise to any such claim, the Contractor has given to the Principal and to the Superintendent the prescribed notice.

Clause 47 is amended by adding the following paragraph before the heading 'Alternative 1':

In each of Alternative 1 and Alternative 2 of this clause the calculation of any period of time which is dependent on the date of the service of a notice of dispute shall be calculated from the conclusion of the earlier of the mediation contemplated by clause 47.1A or the prescribed period provided for in clause 47.1A.

Clause 47 is amended by adding the following new Clause 47.1A:

**47.1A Resolution of Disputes - Mediation**

Subject to Clause 47.2, a party must not start arbitration or court proceedings in respect of a dispute arising out of this Contract unless it has complied with this clause.

During the 20 day period after a notice of dispute is given under Clause 47.1 (or longer period agreed in writing by the parties to the dispute) each party to the dispute must use its best efforts to resolve the dispute. If the parties are unable to resolve the dispute within the prescribed period, each party agrees that the dispute must be referred for mediation, at the request of either party, to:

(a) a mediator agreed on by the parties; or

(b) if the parties are unable to agree on a mediator within 7 days after the end of the prescribed period, a mediator nominated by the then current Chairman of the Institute of Arbitrators Australia, Victorian Chapter or the Chairman’s nominee.

The role of any mediator is to assist in negotiating a resolution of the dispute. Any information or documents disclosed by a party under this clause must, unless and until that information or those documents come into the possession of that party through legitimate means other than the mediation:

(c) be kept confidential; and

(d) not be used except to attempt to resolve the dispute.

Each party must bear its own costs of complying with this clause and the parties must bear equally the costs of any mediator engaged.

After the expiration of the prescribed period, a party that has complied with this clause may terminate the mediation process by giving notice to the other party. If in relation to a dispute a party breaches any provision of this clause, the other party need not comply with this clause in relation to that dispute.

The following new Clause 49 is added to the General Conditions:

**49 Severability**

The parties agree that a construction of this Contract that results in all provisions being enforceable is to be preferred to a construction that does not so result.

If, despite the application of this Clause, a provision of this Contract is illegal or unenforceable:

(a) if the provision would not be illegal or unenforceable if a word or words were omitted, that word or words are severed; and

(b) in any other case, the whole provision is severed,

and the remainder of this Contract continues in force.

The following new Clause 50 is added to the General Conditions:

**50 Disclosure of Tender Information**

The Contractor, under the conditions forming part of the Tender has consented to the party requesting the tender, publishing (on the Internet or otherwise) the name of the Contractor and the contract value together with conditions of this Agreement generally. Subject to this right of publication the party requesting the Tender will treat as confidential all information provided to it in the Tender.

The following new Clause 51 is added to the General Conditions:

**51 Audit of and Other Access to Contractor’s Records**

The Contractor shall permit an accountant or auditor on behalf of the Department from time to time during ordinary business hours and upon reasonable notice, to inspect and verify all records maintained by the Contractor for the purposes of this Agreement and the Contractor, its servants, agents and subcontractors shall give all reasonable assistance to any person authorised to undertake such audit or inspection. Any information provided or to which an accountant or auditor has access under this clause shall be treated as confidential information and shall not be used other than for the purposes of this Agreement or disclosed other than as required to comply with the written request of the Auditor General for Victoria.

The confidentiality obligations of the parties shall not extend to:

(a) Information already in the public domain other than due to a breach of this Agreement;

(b) any disclosure required by law.

The following new Clause 52 is added to the General Conditions:

**52 Victorian Industry Participation Policy**

(Applicable to all Government projects over $3 million in Metropolitan Melbourne and $1 million in country Victoria)

**Definitions**:

**‘Certified VIPP Plan’** means a VIPP Plan certified by the Industry Capability Network Victoria Limited.

**'Victorian Industry Participation Policy'** means the policy of the Victorian Government, revised with effect from 1 July 2009, which seeks to maximise opportunities for Australian, New Zealand and Victorian suppliers to compete for government business on the basis of best value for money over the life of the goods or services and applies to Government procurement activities, construction activities, Major Projects, Major Events, Public Private Partnerships and investment support, business development and community infrastructure grants above the threshold values of $3 million or more in Metropolitan Melbourne and $1 million or more in Regional Victoria. Further information on the policy and templates are available on the Department of Innovation, Industry and Regional Development (DIIRD) website [www.diird.vic.gov.au/vipp](http://www.diird.vic.gov.au/vipp).

**'VIPP'** means the Victorian Industry Participation Policy.

**52.1** The Contractor shall comply with the Certified VIPP Plan submitted to the Principal as part of the tender process and shall provide to the Principal:

(a) a written report regarding its compliance with the Certified VIPP Plan from time to time as requested by the Principal, such request not to be made unreasonably; and

(b) a final report on the VIPP outcomes achieved by the Contractor certified by Industry Capability Network Victoria Limited prior to or on completion of this Agreement.

**52.2** The Principal will monitor the Contractor’s performance measured against the Certified VIPP Plan and the auditing provisions in Clause 51 shall apply to allow an auditor or other nominated representative of the Principal to have access to and to obtain information from the Contractor’s records and staff. The Contractor shall provide authorisation for the Principal to obtain information from the persons, firms or corporations nominated in the Certified VIPP Plan or otherwise relevant to verifying compliance with the Certified VIPP Plan. The Principal’s Representative shall exercise his or her reasonable discretion in assessing the Contractor’s performance under this clause and shall take into account any issue raised by the Contractor which fairly represents a cause of failure to comply beyond the Contractor’s reasonable control.

**52.3** The Contractor acknowledges that the Certified VIPP Plan, or information from the Certified VIPP Plan, and the measures of the Contractor’s compliance with the Plan shall be provided by the Principal to the Department of Innovation, Industry and Regional Development to be included in a register of VIPP performance.

(\*Principal should strike out if this clause does not apply)

The following new Clause 53 is added to the General Conditions:

**53 Information Privacy**

Definitions:

“Code of Practice” means a code of practice as defined in, and approved under, the Information Privacy Act 2000;

“Information Privacy Principles” means the principles so identified and set out in the Information Privacy Act 2000 (Vic.);

“Personal Information” means information or an opinion (including information or an opinion forming part of a database) that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

53.1 The Contractor agrees in respect of Personal Information held in connection with this Agreement:

(a) that it shall be bound by the Information Privacy Principles and any applicable Code of Practice with respect to any act done or practice engaged in by the Contractor for the purposes of this Agreement, in the same way and to the same extent as the Principal would have been bound by the Information Privacy Principles and any applicable Code of Practice in respect of that act or practice had it been directly done or engaged in by the Department; and

(b) to immediately notify the Principal where it becomes aware of a breach of Clause 53.1 by it or any of its agents or employees;

53.2 This clause 53 shall continue to have effect after the termination or expiration of this Agreement.

The following new Clause 54 is added to the General Conditions:

**54 Security of Payment Act**

**54.1** **Application of the Security of Payment Act**

(a) 'Security of Payment Act' means the Building and Construction Industry Security of Payment Act 2002 (Vic) upon commencement and as amended from time to time.

(b) This clause shall apply if the Security of Payment Act applies.

**54.2** **Service of Notices under the Security of Payment Act**

The Contractor shall:

(a) ensure that a copy of any written communication it delivers or arranges to deliver to the Principal of whatever nature in relation to the Security of Payment Act (including, without limitation, a payment claim under the Security of Payment Act), is provided to the Superintendent at the same time;

(b) when the Contractor becomes aware that a subcontractor is entitled to suspend work pursuant to the Security of Payment Act, promptly and without delay give the Superintendent a copy of any written communication of whatever nature in relation to the Security of Payment Act which the Contractor receives from a subcontractor.

**54.3 The Role of the Superintendent under the Security of Payment Act**

In receiving payment claims or issuing payment schedules pursuant to the Security of Payment Act, the Superintendent acts as the agent of the Principal.

**54.4 Payment Claim**

(a) A payment claim for the purposes of the Security of Payment Act is a valid claim for payment pursuant to Clause 42.1

(b) The date prescribed in Clause 42.1 as the time for payment claims is, for the purpose of the Security of Payment Act, the 'reference date'.

**54.5 Payment Schedule**

(a) The amount (if any) set out in a payment schedule as the amount of payment which the Principal proposes to make to the Contractor is, for the purposes of section 9, 10, 11 and 12 of the Security of Payment Act, the amount of the 'progress payment' (as defined in the Security of Payment Act) calculated in accordance with the Contract which the Contractor is entitled to be paid under the Contract.

(b) Failure by the Superintendent to set out in a payment schedule an amount which the Principal is entitled to retain, deduct, withhold or set-off (whether under this Contract or otherwise) from the amount which would otherwise be payable to the Contractor by the Principal will not prejudice the Principal's right to subsequently exercise that right to retain, deduct, withhold or set-off any amount.

**54.6 [Insert if appropriate] Method of Resolving Disputes Regarding Second Class of Variation.**

The Principal and Contractor agree that clause 47 is a method for resolving disputes for the purposes of section 10A)3)(d) of the Security of Payment Act.

**54.7 [Insert of appropriate] Authorised Nominating Authority**

In the event of an adjudication application under the Security of Payment Act, the Contract or must make an adjudication application to one of the authorised nominating authorities referred to in the Annexure Part A.

**54.8 Conduct of Adjudication**

In dealing with any adjudication application made by the Contractor under the Security of Payment Act, the Adjudicator shall:

(a) have no power to open up, review or revise any certificate issued under the Contract by the Superintendent;

(b) at all times act impartially between the parties, in accordance with the laws; and

(c) include in the determination the reasons for the determination and the basis on which any amount or date has been decided.

**54.9** **Suspension of Works under the Security of Payment Act**

*If the Contractor suspends the whole or part of the work under the Contract pursuant to the Security of Payment Act:*

* + 1. *the suspension shall not of itself affect the Date for Practical Completion but may be a ground for an extension of time under Clause 35.5;*
    2. *the Principal shall not be liable for any costs, expenses, damages, losses or other liability including delay or disruption costs whatsoever suffered or incurred by the Contractor as a result of the suspension other than loss or expenses as a result of the removal by the Principal, from the Contract, of part of the work or supply;*
    3. *the Contractor must continue to comply with its obligations in relation to all statutory requirements as referred to in clause 14;*
    4. *the Contractor must hold itself available to return to work as soon as practicable after the right, under the Security of Payment Act, to suspend the carrying out of the work under the Contract, no longer exists;*
    5. *the Contractor must do all things reasonably practicable to return to work as soon as practicable after the right, under the Security of Payment Act, to suspend the carrying out of the work under the Contract, no longer exists; and*
    6. *the Contractor shall return to work within 3 business days of payment by the Principal of the amount outstanding or such lesser period as may be stated in Annexure Part A (being not less than 1 business day).*

*If the Contractor has complied with the obligations set out in this clause, any inability in the Contractor to return to work within the required time will not be an event giving rise to a right, in the Principal, to damages or to terminate the Contract.*

*If the Contractor does not resume the work in accordance with this clause or does not comply with its obligations under this clause:*

* + 1. *the Superintendent may direct the Contractor to omit the whole or part of the suspended work (and thereafter the Principal may engage others to carry out the suspended work); or*
    2. *the Principal may give a notice under Clause 44.4(b) as if the Contractor had committed a substantial breach of contract.*

*In the event that the Superintendent gives a direction to omit work under this clause and if the direction causes the Contractor to incur more or less cost than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 40.5.*

**54.10** **Subcontractor suspension**

If the Principal becomes aware that a subcontractor is entitled to suspend work pursuant to the Security of Payment Act, the Principal may (in its absolute discretion) pay the subcontractor such money that is or may be owing to the subcontractor in respect of that work, and any amount paid by the Principal shall be a debt due from the Contractor to the Principal.

**54.11 Indemnity**

The Contractor shall indemnify the Principal against all damage, expense (including legal costs), loss (including consequential and economic loss) or liability of any nature suffered or incurred by the Principal arising out of:

(a) a suspension pursuant to the Security of Payment Act by a subcontractor of work which forms part of the Work; or

(b) a failure by Contractor to comply with Clause 54.2.

***Clause 55:*** *The following new Clause 55 is added to the General Conditions:*

***Clause 55*** *is only applicable where the Building Code 2013 applies to the project.*

***55 Building Code 2013***

*The Contractor must comply with the Building Code 2013 (Building Code). Copies of the Building Code are available at* [***www.employment.gov.au/BuildingCode***](http://www.employment.gov.au/BuildingCode) ***.***

***55.1*** *Compliance with the Building Code shall not relieve the Contractor from responsibility to perform the Contract, or from liability for any defect in the works arising from compliance with the Code and Guidelines.*

***55.2*** *Where a change in the Contract is proposed and that change would affect compliance with the Building Code, the Contractor must submit a report to the Commonwealth specifying the extent to which the Contractor’s compliance with the Building Code will be affected.*

***55.3*** *The Contractor must maintain adequate records of the compliance with the Building Code by:*

* 1. *the Contractor;*
  2. *its Subcontractors;*
  3. *consultants; and*
  4. *its Related Entities (see Section 8 of the Building Code).*

***55.4*** *If the Contractor does not comply with the requirements of the Building Code in the performance of this Contract such that a sanction is applied by the Minister for Employment, the Code Monitoring Group or the Commonwealth, without prejudice to any rights that would otherwise accrue, those parties shall be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by the Contractor or a related entity in respect of work funded by the Commonwealth or its agencies.*

***55.5*** *While acknowledging that value for money is the core principle underpinning decisions on Government procurement, when assessing tenders, the Contractor may give preference to subcontractors and consultants that have a demonstrated commitment to:*

* 1. *adding and/or retaining trainees and apprentices;*
  2. *increasing the participation of women in all aspects of the industry; or*
  3. *promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.*

***55.6*** *The Contractor must not appoint a subcontractor or consultant in relation to the Project where:*

* 1. *the appointment would breach a sanction imposed by the Minister for Employment; or*
  2. *the subcontractor or consultant has had an adverse Court or Tribunal decision (not including decisions under appeal) for a breach of workplace relations law, work health and safety law, or workers’ compensation law and the tenderer has not fully complied, or is not fully complying, with the order.*

***55.7*** *The Contractor agrees to require that it and its subcontractors or consultants and its related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Fair Work Building Industry Inspectorate, with access to:*

* 1. *inspect any work, material, machinery, appliance, article or facility;*
  2. *inspect and copy any record relevant to the Project the subject of this Contract; and*
  3. *interview any person*

*as is necessary to demonstrate its compliance with the Building Code.*

***55.8*** *Additionally, the Contractor agrees that the Contractor and its related entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Fair Work Building Industry Inspectorate, to produce a specified document within a specified period, in person, by fax or by post.*

***55.9*** *The Contractor must ensure that all subcontracts impose obligations on sub contractors equivalent to the obligations under these Contract Clauses.*

1. [↑](#footnote-ref-1)