Medium Works Contract (with option for Design) - Model Clauses

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| **Guidance Note:**  The model clauses in this document are available for incorporation in the Victorian Public Sector Medium Works Contract (published by the State of Victoria (Department of Treasury and Finance) (**DTF**)) (**MWC**), if required by an agency for a specific project.  The MWC sets out the State's preferred risk allocation and, with the exception of two model clauses, should be issued in an RFT without use of any model clauses. The exceptions are model clauses 5 and 6 which, respectively, provide for the imposition of an aggregate cap on delay damages payable to the Contractor, and State ownership of intellectual property rather than a licence. Those model clauses, however, should only be used in exceptional circumstances. Please refer to the guidance notes in model clauses 5 and 6 for that purpose.  Otherwise, after tenders are received, there may be circumstances when it is necessary to depart from the standard position as a result of tenderer departures or negotiations. It is in those circumstances that the model clauses may be used.  Where inclusion of a model clause necessitates amendment to other clauses in the MWC, instructions as to how to effect those changes are set out in this document.  Importantly, please note as follows:   * Legal review of a MWC which has been amended to include any of the model clauses should always be obtained before it is released for tender or prior to execution (as the case may be). * Incorporating a model clause in the MWC will not be regarded as a material amendment or departure if the agency incorporates the model clause in its unamended form. Any modifications to the model clauses will necessitate an evaluation by DTF to determine their materiality. * Because clauses in this document do not represent the State's preferred position, they must NOT be made publicly available. They are only intended as an **internal resource** for agencies.   In this document, items highlighted:   * ***GREEN*** are to be completed by the agency before going to tender; * ***YELLOW*** are to be completed by the agency using information provided by the tenderer in response to the tender (RFT); and * ***BLUE*** are internal guidance notes designed to assist agencies. |

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| **Revision:** | **Date:** | **Clause reference:** | **Details:** | **Endorsed by:** |
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**Medium Works Contract – Model Clauses**

# Limitation of liability and exclusion of Consequential Loss

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| 1. **Guidance Note:** 2. Contractors will often seek to limit their total liability to a Principal under a contract, or to limit the types of losses that the Principal can recover. Typically, this will be sought by way of a tender departure requesting the inclusion of either or both of a limitation of liability and exclusion of "Consequential Loss" clause:  * **Limitation of liability:** a clause which imposes a monetary cap on the Contractor's liability to the Principal for claims arising out of or in connection with the Contract. * **Exclusion of Consequential Loss:** a clause that limits the types of losses for which either party can be held responsible by excluding liability for consequential or indirect losses arising out of or in connection with the Contract. The term "Consequential Loss" is defined in the model clause to mean "any loss of revenue, profit, business opportunity, anticipated savings or goodwill".  1. The standard form MWC does not include either of these clauses. 2. Agencies should avoid their inclusion if possible and seek legal advice before doing so. While they allow contractors to safeguard themselves from significant financial risks and unforeseen events (and so reduce the risk of insolvency), they limit the amount of compensation a Principal can recover for losses flowing from the Contractor's performance under the Contract.   Model limitation of liability and exclusion of Consequential Loss clauses   1. Three optional model clauses are available for use with the MWC if necessary. They are described in the table set out below:  |  |  |  | | --- | --- | --- | | **Option** | **Type of Clause** | **Features** | | 1 | Limitation of liability **AND** exclusion of Consequential Loss | 1. Provides for:  * the Contractor’s total liability to the Principal to be capped at a specified amount, subject to certain exclusions; and * an exclusion of a party's liability to the other for Consequential Loss.   **Important:** Note that if model clause 2 (Liquidated damages) is also used in your Contract, you will need to decide whether the limitation of liability provided for in this clause is inclusive or exclusive of the cap on liquidated damages provided for in model clause 2 and tailor the limitation of liability model clause accordingly - refer to the blue highlighted notes in new clause 11.4(b)(ix). | | 2 | Limitation of liability only | Provides for the Contractor’s total liability to the Principal to be capped on the same basis as set out in Option 1 but does not include a Consequential Loss exclusion. Again, please refer to the blue highlighted notes in new clause 11.4(b)(ix) if model clause 2 (Liquidated damages) is also used. | | 3 | Exclusion of Consequential Loss only | 1. Provides for a mutual exclusion of Consequential Loss liability. |   Should they be included?   1. Whether or not a liability cap and/or a Consequential Loss exclusion should be agreed is ultimately a commercial decision for the agency, after having obtained legal advice. The agency's decision should be informed by consideration of several factors, including:  * the nature and scale of the works; * the proposed tenderers (and their risk appetite); * any relevant State/agency requirements or policies; and * the risks associated with limiting the Contractor's liability for the relevant project (for instance, does the project entail a high risk of third-party claims? This will be particularly relevant if works are being performed in an urbanised or sensitive environment where there may be a material risk of damage to surrounding infrastructure).   Quantum of liability cap   1. Options 1 and 2 of this model clause provide for the inclusion, in the MWC Schedule 1 (Contract Particulars), of a new Item 49, where the Contractor's maximum aggregate liability is to be specified. The default position is 100% of the Contract Sum. Agencies **should not** specify a lesser percentage or amount without legal advice. 2. Agencies must ensure that the amount of any liability cap is reasonable and proportionate to the nature and size of the project and sufficient to protect the agency against losses it may suffer. The quantum of the liability cap should be based on a fair assessment of the potential risks and liabilities involved.   Carve outs from Consequential Loss   1. Options 1 and 3 of this model clause provide for the inclusion, in the MWC Schedule 1 (Contract Particulars), of a new Item 50 (Option 1) or 49 (Option 3), where the parties can specify carve outs to the definition of "Consequential Loss". 2. Because clause 11.4(a) already provides that the Consequential Loss exclusion does not apply to various categories of liability of the Contractor (listed in clause 11.4(b)), the need to specify additional carve-outs to the definition of "Consequential Loss" is restricted to liabilities not already referred to in clause 11.4(b). One example of losses that a Principal may want to ensure are not included in the Consequential Loss exclusion are damages claimed by the Principal as a result of third party claims against the Principal (for example by neighbouring landowners) for loss of amenity or loss of business as a result of the Contractor's Activities. Legal advice should be sought in respect of any items proposed to be included as additional Consequential Loss exclusions. |

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| **Option 1** |

### 1.1 Add the following definitions in clause 1.1 of the MWC (in alphabetical order):

1. **Consequential Loss** means any loss of revenue, profit, business opportunity, anticipated savings or goodwill, but does not include any loss of the type referred to in Item 50.

**Limitation of Liability** has the meaning given in clause 11.4(a)(i).

### 1.2 Add a new clause 11.4 as follows:

### **11.4 Limitation of liability and exclusion of Consequential Loss**

### Subject to clause 11.4(b):

#### to the extent permitted by Law, the maximum aggregate liability of the Contractor to the Principal arising out of or in connection with the Contract (whether arising in contract, in equity, tort (including negligence), by way of indemnity, under statute or otherwise at Law) is limited to the amount specified in Item 49 (**Limitation of Liability**); and

#### neither the Principal nor the Contractor will be liable to the other for any Consequential Loss howsoever arising.

### Clause 11.4(a) does not apply to a liability of the Contractor:

#### under the indemnities in clause 11.2(a) (other than clause 11.2(a)(i));

#### under any indemnity given in accordance with the Mandatory Government Policy Requirements;

#### arising from or in connection with any failure to include provisions in a Subcontract giving effect to the Mandatory Government Policy Requirements;

#### arising from or in connection with events or circumstances to the extent the Contractor would be entitled and able to recover insurance proceeds under insurance required by the Contract in relation to those events or circumstances, or would have been so entitled and able but for:

##### a failure of the Contractor to obtain or maintain the insurances for which it is responsible in accordance with the Contract;

##### a failure by the Contractor to claim under the relevant insurances (or comply with the claim procedures under the relevant insurances);

##### the Contractor not complying with any provision, obligation or duty owed under the relevant insurance policy (including the Contractor’s duty to disclose); or

##### the inclusion of clause 11.4(a)(i);

#### to the extent that the Contractor recovers, or would have recovered but for an act or omission of the Contractor, an amount in respect of that liability from a third party arising from any Claim made in connection with the Contract;

#### for fines or penalties incurred by the Principal arising from the Contractor’s Activities or the Works;

#### which cannot be excluded or limited at Law;

#### arising from or in connection with an abandonment of the Contractor's Activities or the Works; or

#### ***[Guidance Note: Use this version of clause 11.4(b)(ix) if the Contractor's liability to pay liquidated damages / damages under clause 7.4 is NOT INCLUDED in the Limitation of Liability.]***to pay liquidated damages or damages for delay in accordance with clause 7.4.

#### ***OR***

#### ***[Guidance Note: Use this version of clause 11.4(b)(ix) if the Contractor's liability to pay liquidated damages / damages under clause 7.4 IS INCLUDED in the Limitation of Liability.]***in respect of clause 11.4(a)(ii) only, to pay liquidated damages or damages for delay in accordance with clause 7.4.

### 1.3 Add the following new Items in the Contract Particulars (Schedule 1):

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| 49 | Maximum aggregate liability of the Contractor to the Principal: (Clause 11.4(a)(i)) | 100% of the Contract Sum [***Guidance Note: this is the default position. A lesser percentage or amount should not be agreed without legal advice.]*** |
| 50 | Consequential Loss (Clauses 1.1 and 11.4(a)(ii)) | [Insert]………………………………………………………. *(If nothing is stated, there are no additional exclusions)* [***Guidance Note: Include any carve-outs to Consequential Loss.]*** |

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| **Option 2** |

### 1.1 Add the following definition in clause 1.1 of the MWC (in alphabetical order):

**Limitation of Liability** has the meaning given in clause 11.4(a).

### 1.2 Add a new clause 11.4 as follows:

### **11.4 Limitation of liability**

### Subject to clause 11.4(b) and to the extent permitted by Law, the maximum aggregate liability of the Contractor to the Principal arising out of or in connection with the Contract (whether arising in contract, in equity, tort (including negligence), by way of indemnity, under statute or otherwise at Law) is limited to the amount specified in Item 49 (**Limitation of Liability**).

### Clause 11.4(a) does not apply to a liability of the Contractor:

#### under the indemnities in clause 11.2(a) (other than clause 11.2(a)(i));

#### under any indemnity given in accordance with the Mandatory Government Policy Requirements;

#### arising from or in connection with any failure to include provisions in a Subcontract giving effect to the Mandatory Government Policy Requirements;

#### arising from or in connection with events or circumstances to the extent the Contractor would be entitled and able to recover insurance proceeds under insurance required by the Contract in relation to those events or circumstances, or would have been so entitled and able but for:

##### a failure of the Contractor to obtain or maintain the insurances for which it is responsible in accordance with the Contract;

##### a failure by the Contractor to claim under the relevant insurances (or comply with the claim procedures under the relevant insurances);

##### the Contractor not complying with any provision, obligation or duty owed under the relevant insurance policy (including the Contractor’s duty to disclose); or

##### the inclusion of clause 11.4(a);

#### to the extent that the Contractor recovers, or would have recovered but for an act or omission of the Contractor, an amount in respect of that liability from a third party arising from any Claim made in connection with the Contract;

#### for fines or penalties incurred by the Principal arising from the Contractor’s Activities or the Works;

#### which cannot be excluded by Law;

#### arising from or in connection with an abandonment of the Contractor's Activities or the Works; or

#### ***[Guidance Note: If the Contractor's liability to pay liquidated damages / damages under clause 7.4 IS INCLUDED in the Limitation of Liability, delete this clause 11.4(b)(ix).]***to pay liquidated damages or damages for delay in accordance with clause 7.4.

### 1.3 Add the following new Item in the Contract Particulars (Schedule 1):

|  |  |  |
| --- | --- | --- |
| 49 | Maximum aggregate liability of the Contractor to the Principal: (Clause 11.4(a)) | 100% of the Contract Sum [***Guidance Note: this is the default position. A lesser percentage or amount should not be agreed without legal advice.]*** |

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| **Option 3** |

### 1.1 Add the following definition in clause 1.1 of the MWC (in alphabetical order):

1. **Consequential Loss** means any loss of revenue, profit, business opportunity, anticipated savings or goodwill, but does not include any loss of the type referred to in Item 49.

### 1.2 Add a new clause 11.4 as follows:

### **11.4 Consequential Loss exclusion**

### Subject to clause 11.4(b), neither the Principal nor the Contractor will be liable to the other for any Consequential Loss howsoever arising.

### Clause 11.4(a) does not apply to a liability of the Contractor:

#### under the indemnities in clause 11.2(a);

#### under any indemnity given in accordance with the Mandatory Government Policy Requirements;

#### arising from or in connection with any failure to include provisions in a Subcontract giving effect to the Mandatory Government Policy Requirements;

#### arising from or in connection with events or circumstances to the extent the Contractor would be entitled and able to recover insurance proceeds under insurance required by the Contract in relation to those events or circumstances, or would have been so entitled and able but for:

##### a failure of the Contractor to obtain or maintain the insurances for which it is responsible in accordance with the Contract;

##### a failure by the Contractor to claim under the relevant insurances (or comply with the claim procedures under the relevant insurances);

##### the Contractor not complying with any provision, obligation or duty owed under the relevant insurance policy (including the Contractor’s duty to disclose); or

##### the inclusion of clause 11.4(a);

#### to the extent that the Contractor recovers, or would have recovered but for an act or omission of the Contractor, an amount in respect of that liability from a third party arising from any Claim made in connection with the Contract;

#### for fines or penalties incurred by the Principal arising from the Contractor’s Activities or the Works;

#### which cannot be excluded or limited at Law;

#### arising from or in connection with an abandonment of the Contractor's Activities or the Works; or

#### to pay liquidated damages or damages for delay in accordance with clause 7.4.

### 1.3 Add the following new Item in the Contract Particulars (Schedule 1):

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| --- | --- | --- |
| 49 | Consequential Loss (Clauses 1.1 and 11.4(a)) | [Insert]………………………………………………………. *(If nothing is stated, there are no additional exclusions)* [***Guidance Note: Include any carve-outs to Consequential Loss.]*** |

# Liquidated damages

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| 1. **Guidance Note****:** Liquidated damages are a predetermined amount of money (specific to each project or each Separable Portion, as the case may be) which the parties agree will be paid by the Contractor to the Principal for each calendar day that the Contractor is late in achieving Practical Completion beyond the Date for Practical Completion. 2. There are a number of advantages to specifying liquidated damages, including that it removes the need for a Principal to prove or quantify the amount of actual loss that it suffers in the event of late completion. However, the amount specified by way of liquidated damages will not be enforced by a court if it is a 'penalty'. To avoid liquidated damages being void on this basis, the amount specified must be a pre-estimate - genuinely made at the time of contract award - of the loss the Principal will suffer if Practical Completion is not achieved by the Date for Practical Completion. 3. The sorts of losses that should be considered for this purpose include the additional costs of project staff (retained over the extended construction period), external project managers/advisers/consultants, amounts payable to third parties with which the agency has agreed the project will be complete and ready for use by a certain date, any loss of revenue, any increases in the cost of maintaining existing infrastructure, and any diversion of resources. Liquidated damages cannot be excessive, punitive or used as a penalty for breach of contract. 4. Depending on the project, if requested by a tenderer in negotiation or by way of tender departure, it *may* be acceptable to agree to cap the aggregate amount of liquidated damages payable by the Contractor, although this concession should be avoided if possible. (In particular, it should be avoided if the complexity of the project heightens the risk of project delays). This clause provides for such a cap. |

### 2.1 Amend clause 7.4(a) of the MWC to replace “If the Contractor does not” with “Subject to clause 7.4(d), if the Contractor does not”.

### 2.2 Insert a new clause 7.4(d) in the MWC as follows:

### “(d) The amount of liquidated damages payable by the Contractor to the Principal under clause 7.4(a) for the whole of the Works will be capped at the amount specified in Item 27”.

### 2.3 Amend Item 27 of Schedule 1 (Contract Particulars) to read as follows:

|  |  |  |
| --- | --- | --- |
| 27 | Liquidated damages rate and cap: (Clauses 7.4(a) and (d)) | **Rate:**  $ [## insert] per day  **OR**, if Separable Portions apply, see the Separable Portions Particulars.  **Aggregate cap:**  The aggregate liquidated damages payable by the Contractor for the whole of the Works is capped at:  [## insert] % of the Contract Sum  [***Guidance Note: Note that this is an AGGREGATE cap for the liquidated damages payable for a project, that is, should cover all Separable Portions (where Separable Portions apply).]*** |

# Pandemics

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| 1. **Guidance Note:** This model clause 3 affords the Contractor time relief for pandemic related statutory changes. It covers COVID and any other infectious disease declared by the World Health Organisation to be a pandemic. 2. The entitlement to claim an extension of time is limited to the introduction of, or changes in, pandemic specific statutory requirements. The available relief is to time only (not direct or delay costs). And, it does not extend relief for other pandemic impacts such as supply chain issues or labour shortages. |

### 3.1 Add the following definitions in clause 1.1 of the MWC (in alphabetical order):

**Pandemic** means:

### the disease known as Coronavirus (COVID-19) which was characterised to be a pandemic by the World Health Organisation on 11 March 2020; and

### any other infectious disease that is declared as a pandemic by the World Health Organisation after the Contract Date.

1. **Pandemic Adjustment Event** means, after the Contract Date, a change in an existing, or the introduction of a new, Pandemic Statutory Requirement which impacts the performance or progress of the Contractor's Activities or the Works.
2. **Pandemic Statutory Requirement** means:

### any Law applicable to the Contractor's Activities or the Works; and

### directions affecting the Contractor's Activities or the Works given by an Authority,

1. which the Principal considers is enacted or occurs as a direct result of the Pandemic.

### 3.2 Amend the definition of “Force Majeure Event” in clause 1.1 to capitalise the word "pandemics" where it appears after the words “but excludes”.

### 3.3 Add a new clause 6.7 as follows:

### **6.7 Pandemic acknowledgement and obligations**

### The Contractor acknowledges and agrees that it has taken into account the risks arising out of or in connection with Pandemics, including:

#### local or foreign government actions taken in response to Pandemics (including changes in border requirements or quarantine requirements);

#### delays, restrictions or shortages in the supply or transport of materials or parts or the availability of local labour;

#### the closure (or reopening) of a Subcontractor’s facility or other locations where subcontracted activities are being carried out in respect of goods or materials required for the Works; and

#### delays in transport, quarantine or customs clearances of any item intended to be used in performing the Contractor’s Activities or incorporated into the Works.

### The Contractor must:

#### proactively monitor the potential impacts of any Pandemic on the Contractor’s Activities and the Works;

#### without limiting its other obligations under the Contract, promptly advise the Principal if it becomes aware of any impact that a Pandemic has had or may have on the Contractor’s Activities or the Works and thereafter consult with the Principal in relation to that impact;

#### implement all necessary measures to avoid, or if avoidance is not possible, minimise and mitigate any potential or actual impacts of a Pandemic on the Contractor’s Activities or the Works; and

#### sequence the Contractor’s Activities and the Works and employ construction methodologies and practices that minimise the impacts of any Pandemic on the Contractor’s Activities and the Works.

### 3.4 Add a new clause 9.7 as follows:

### **9.7 Pandemic Adjustment Event**

### If the Contractor considers that a Pandemic Adjustment Event has occurred it must give written notice to the Principal's Representative no later than 5 Business Days after becoming aware of its occurrence, together with particulars of the Pandemic Adjustment Event.

### Within 10 Business Days after receipt of a notice under clause 9.7(a), the Principal's Representative:

#### will notify the Contractor if it agrees that a Pandemic Adjustment Event has occurred; and

#### may, if it agrees that a Pandemic Adjustment Event has occurred, direct the Contractor as to how it is to proceed insofar as the Contractor’s Activities or the Works are affected by the Pandemic Adjustment Event.

### If the Principal's Representative gives notice under clause 9.7(b)(i) agreeing that a Pandemic Adjustment Event has occurred, the Contractor may submit an Adjustment Notice in respect of that Pandemic Adjustment Event (and any direction given under clause 9.7(b)(ii)) no later than the date for submission specified in the Adjustment Event Table.

### 3.5 Insert a new row in the Adjustment Event Table in clause 10.1(f) as follows (placed immediately after existing row 10 (Force Majeure Event), with the remaining rows renumbered accordingly):

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 11. | (**Pandemic Adjustment Event**) Principal's Representative has given notice under 9.7(b)(i) agreeing that a Pandemic Adjustment Event has occurred | Within 10 Business Days after the date on which the Principal’s Representative gives notice under clause 9.7(b)(i) agreeing that a Pandemic Adjustment Event has occurred | 🗶 | ✓ | 🗶 |

# Approvals delays

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| 1. **Guidance Note:** This clause gives the Contractor time relief for delay caused by Authorities in issuing Approvals. Tenderers commonly request this by way of departure. This clause does not, however, provide time relief more generally for the impacts of complying with directions or requirements of Authorities. 2. Whether it is reasonable to allow time relief for Authority delays in issuing Approvals is a matter that will need to be assessed by agencies on a case-by-case basis. Agencies should consider the nature of the project, the Approvals that will need to be obtained, and any potential difficulties (and therefore possible delays) in procuring those Approvals (and, whether the agency is assuming responsibility for obtaining any key Approvals). 3. Note there is **optional drafting** in paragraphs (c) and (d) of the definition of "Approvals Delay " that needs to be addressed if this model clause 4 is used. If both this model clause 4 **AND** model clause 3 (Pandemic relief) are incorporated in an agency's MWC, then:  * include paragraph (d); and * amend paragraph (c) as indicated below.  1. This is to ensure that there is no potential duplication or inconsistency in terms of the heads of relief available to the Contractor. |

### 4.1 Add the following definition in clause 1.1 of the MWC (in alphabetical order):

1. **Approvals Delay** means a delay to the performance of the Contractor's Activities or the Works as a direct result of the time taken by the relevant Authority to issue an Approval, except where:

### the Contractor or a Contractor Associate caused or contributed to the Authority delay; or

### the Authority has:

#### complied with any timeframes relating to the issue of the Approval prescribed by Legislation or published by the Authority before the Contract Date; or

#### acted within a reasonable time, including any timeframe of which a Competent Contractor could reasonably have been aware before the Contract Date,

1. and does not include:

### requirements or directions of an Authority with which the Contractor must comply in accordance with the Contract ##<insert a full stop if (d) is not used **OR** insert “; and” if (d) is used>

### ##<include **ONLY** **IF** the Covid-19 pandemic model clause 3 is used>any Pandemic Statutory Requirement.

### 4.2 Insert a new row in the Adjustment Event Table in clause 10.1(f) as follows (placed immediately before existing row 13 (Delay Events), with the remaining rows renumbered accordingly):

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 13. | (**Approvals Delay**) AnApprovals Delay occurs | Within 10 Business Days after the date on which the Contractor first became aware of the Approvals Delay (or the date on which a Competent Contractor could reasonably have first become aware of the Approvals Delay, whichever is earlier) | 🗶 | ✓ | 🗶 |

# Delay costs (aggregate cap)

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| 1. **Guidance Note:** Under the MWC, the Contractor is entitled to be paid a pre-agreed amount per Working Day where it is granted an extension of time for certain events of delay (that is, Compensable Delay Events). In addition to capping the amount per Working Day, agencies may wish to cap the aggregate amount payable by way of delay damages (although this is not usual). Before including this model clause, agencies should consider the complexity of the project and the potential for extended periods of delay. Note that if such a cap is imposed, Contractors are likely to seek a reciprocal aggregate cap on the amount of liquidated damages payable to the agency. |

### 5.1 Amend clause 10.4(a)(iii) to read as follows:

#### “(iii) exceed:

#### the Delay Cost Cap per Working Day; or

#### the maximum aggregate liability of the Principal to the Contractor for costs under this clause 10.4, being the amount specified in Item 38.

### 5.2 Amend Item 38 in the Contract Particulars (Schedule 1) to read as follows:

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| --- | --- | --- |
| 38 | Delay Cost Cap and maximum aggregate liability: (Clauses 1.1 and 10.4) | 1. Delay Cost Cap:   $ [*insert*] per Working Day 2. **OR**, if Separable Portions apply, see the Separable Portions Particulars.   [***Guidance Note: this should be a bid back item.***]  Maximum aggregate liability:   1. 10% of the Contract Sum 2. [***Guidance Note: 10% is the default position. Alter only if required as a result of tender negotiation.***] |

# Intellectual Property – Ownership

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| 1. **Guidance Note:** Under clause 15.2 of the MWC, the Contractor grants to the Principal a licence to exercise certain Intellectual Property Rights in the Project Material and its Background IP. Ownership of the Project Material does not transfer to the Principal. Project Material refers to any designs, materials and documents provided by the Contractor. 2. That position is consistent with the Whole of Victorian Government Intellectual Property Policy (IP Policy). It relevantly provides that where a State procurement may result in intellectual property being generated, the contract for that procurement should, in relation to rights in the intellectual property generated (and in any pre-existing intellectual property), secure a licence to the intellectual property, and only to the extent necessary to achieve the purposes of the procurement. 3. The IP Policy also states, at Principle 9(c), that ownership of intellectual property can be acquired but only if a licence is not adequate in the circumstances. 4. As to when those circumstances might arise, section 6.4 of DTF's Intellectual Property Guidelines states: 5. *Acquiring ownership of IP under a procurement agreement is discouraged under the IP Policy. It is normally inconsistent with the Policy Intent of the IP Policy to maximise the value of IP to the community. It can also make negotiations with contractors more complex and result in a higher purchase price.* 6. *The State may only acquire ownership of IP under a procurement agreement where the agency has a specific purpose for use of the IP that cannot be achieved under a licence. This is unlikely to be the case in most circumstances. However, ownership of IP may be required in some cases, including:*  * *where development of the IP is the purpose of the contract (for example, where a contractor is engaged to develop enhancements to the agency’s IP);* * *where the IP is an essential part of delivering a core State service;* * *where an existing agreement requires the State to retain ownership;* * *for reasons of privacy, public safety, security and law enforcement, public health, commercialisation and compliance with the law; and* * *where it is the best way to maximise the impact, value, accessibility and benefit of the IP consistent with the public interest (for example, where the State retains ownership of copyright material produced during procurement to ensure public accessibility, but only where this could not be achieved through licence).*  1. Model clause 6 provides for the above exception, that is, it effects a transfer of ownership in the Project Material to the Principal. The Principal then grants the Contractor a licence to use the Project Material solely for the purpose of performing the Contractor's obligations under the Contract. The Principal is still granted a licence in respect of any pre-existing intellectual property of the Contractor that is used in the Project Material. 2. Legal advice should be sought before an agency uses this model clause, to ensure acquisition of ownership is appropriate in the circumstances and therefore consistent with the IP Policy. |

### 6.1 Amend the existing clause 15.1(b) by deleting the words "or, to the extent that it does not, is entitled to grant the licence under clause 15.2."

### 6.2 Delete the existing clause 15.2 and substitute the following:

### **15.2 Ownership and licencing**

### Ownership of the Project Material vests in the Principal immediately upon creation, and the Principal grants to the Contractor a revocable, non-exclusive, royalty-free licence to use the Project Material solely for the purpose of the Contractor performing its obligations under the Contract.

### The Contractor must do everything possible to perfect the vesting of ownership in Project Material in accordance with clause 15.2(a), including assigning to the Principal from the date of creation all Intellectual Property Rights in the Project Material.

### The Contractor grants to the Principal (or must procure the grant to the Principal of) an irrevocable, non-exclusive, perpetual, transferrable, royalty-free worldwide licence to use the Contractor's Background IP to obtain the benefit of the Project Material and the Works, including to use, re-use, reproduce, communicate to the public, modify, adapt and update the Project Material and the Works.

### The licence under clause 15.2(c):

#### arises on the Contract Date;

#### includes an unlimited right to sublicense;

#### without limitation, extends to:

##### any subsequent occupation, use, operation and maintenance of or additions, alterations or repairs to the Works; and

##### the use, re-use, reproduction, communication, modification, adaptation or update of the Project Material; and

#### will survive the termination or expiration of the Contract.

### The Principal grants the Contractor a non-exclusive, royalty-free licence to use the Principal's Background IP only to the extent necessary for the Contractor to perform the Contractor's Activities.

# Performance Security

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| --- |
| 1. **Guidance Note:** The MWC does not impose any conditions upon the Principal's right to have recourse to the Approved Security. This is the preferred position from the Principal's point of view. 2. Tenderers may seek to depart from that position by requiring some form of fetter or limitation on the Principal's ability to call on the security. Care needs to be exercised in this regard; if the conditions in which a Principal can call on security are inappropriately drafted, they may enable the Contractor to injunct recourse. Model clause 7 provides an acceptable formulation of such a limitation on the Principal's rights to have recourse. |

### 7.1 Delete the existing clause 4.1 and substitute the following:

### **4.1 Form and recourse**

### The Contractor must, within 10 Business Days after the Contract Date, provide security to the Principal in the form of Approved Security and in the amount specified in Item 15.

### Without limiting any of the Principal's rights, the Principal may at any time have recourse to Approved Security (and convert into money any Approved Security that does not consist of money) to satisfy:

#### any debt or other moneys due from the Contractor to the Principal (including liquidated damages or damages for delay payable under clause 7.4); and

#### any Claim to money which the Principal asserts in good faith against the Contractor whether under the Contract, or otherwise at Law or arising out of or in connection with the Contractor’s Activities or the Works.