**Victorian Public Sector – Annexure Part B Special Conditions of Contract for use in association with Australian Standard General conditions of contract for AS 2124-1992**

**Model clauses for optional use**

[***These model clauses may be inserted into the Special Conditions of Contract for use in association with AS2124-1992 (June 2023) only. Clause cross references are drafted for this agreement only.***

Model clauses have been developed for the Victorian Public Construction Contracts to address commercial situations that arise infrequently or respond to unusual project circumstances. The clauses have been approved by the Secretary to the Department of Treasury and Finance (DTF) for use with the applicable Victorian Public Construction Contract.

These model clauses either replace existing clauses, amend existing clauses or are additional clauses to the Victorian Public Sector – Annexure Part B Special Conditions of Contract depending on the specific issue being addressed. Use of these model clauses by delivery agencies is optional and does not require the approval of DTF.

Using model clauses from the Clause Bank provides a common Victorian public sector position on each matter, consistent with the use of standard form construction contracts.

Although use of these model clauses will take them into the public domain, they should only be adopted by Agencies in particular situations, rather than becoming the Agency’s standard position.

**Revision history for this Victorian Public Sector – Annexure Part B Special Conditions of Contract for use in association with Australian Standard General conditions of contract for AS 2124-1992 is listed on the cover page of the Special Conditions of Contract**

**Introduction**

The Special Conditions of contract replace Part B of the Annexure to the General conditions of contract (AS 2124 – 1992).

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The General conditions of contract AS 2124 – 1992 can be purchased from SAI Global or Standards Australia Limited. The SAI Global website address is http://www.saiglobal.com and that of Standards Australia Limited is http://www.standards.org.au/.

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| **Victorian Government Special Conditions of Contract for use in association with Australian Standard AS 2124 - 1992.** |
|  |  |
| **ANNEXURE to the Australian Standard General conditions of contract (AS2124-1992)** | **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 2124-1992.

|  |  |  |
| --- | --- | --- |
|  | Clauses which have been deleted from the General Conditions in AS AS2124-1992: |  |
|  |  | **5.1; 5.8; 14.2; 14.3; 27.5.** |
|  | The following clauses have been amended and differ from the corresponding clauses in AS AS2124-1992: |  |
|  |  | **1; 2; 3.1; 3.2; 3.3; 3.7; 4.2; 4.4; 5.2; 5.3; 5.4; 5.5; 5.6; 5.7; 5.9; 5.10; 6.1; 6.2; 7; 8.1; 8.3; 8.4; 8.6; 9.1; 9.2; 9.3; 10; 11; 12; 13; 14.1; 16.1; 16.3;17.1; 18; 19; 21.1; 21.3; 21.6; 23; 26; 27.1; 29.1; 30.3; 30.6; 31.1; 33.2; 34.1; 34.4; 35.3; 35.4; 35.5; 35.6; 35.7; 35.8; 36; 37; 40.1; 40.2; 40.4; 40.5; 41; 42.1; 42.2; 42.3; 42.5; 42.6; 42.7; 42.8; 42.9; 42.10; 42.11; 43; 44.1; 44.2; 44.3; 44.4; 44.7; 47.5; 44.8; 44.9; 44.10; 44.11; 46.1; 46.2; 47.1; 47.2; 47.3.** |
|  | The following clauses have been added to those of AS AS2124-1992: |  |
|  |  | **3.4; 3.5; 3.6; 6.3; 6.4; 7A; 7B; 12.2A; 12.2B; 12A; 13.2; 13.3; 13.4; 13.5; 14A; 14.5; 14.6; 20A; 21.7; 26A; 27A; 27B; 29.4; 29.5; 33.3; 33.4; 33.5; 33.6; 35.3A; 35.9; 35.10; 42.1A; 42.5A; 42.5B; 44.1A; 44A; 44B; 47.2A; 47.2B; 47.4; 49; 49A; 49B; 50; 51; 52; 53; 54; 55; 56; 57; 58; 59; 60; 61; 62; 63.** |
|  | 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.** |

**Table 1: Victorian Public Sector changes to AS 2124 – 1992**

**Optional clauses are shown in red font in the above table. These clause numbers do not need to be removed if the clause is not used as the place holder ‘Not used’ has been inserted in the main document.**

**Note: the following model clause are available delivery agencies for circumstances where the Principal under the Contract is not the owner of the land which constitutes the ‘Site’ under the Contract.**

**Third Party Clauses**

***Note: where the Site is leased, the following new definitions to be inserted to Clause 2:***

***'Lease'*** *means the agreement or other arrangement between the Lessee and the Lessor under which the Lessor grants to the Lessee a lease, licence or other occupancy rights over the Site*

***'Lessee'*** *means [agency to insert name and ACN of lessee]*

***'Lessor****’ means [agency to insert name and ACN of lessor]*

***Note: where the eventual occupier of the Site is also the owner of the site, and where there is no Lease The following new definition to be inserted to Clause 2:***

***'Owner'*** *means [agency to insert name and ACN of owner]*

#### **Clause 3 Nature of Contract**

***Note: where the site is leased, a new Clause 3.7 is inserted as follows:***

* 1. ***Site ownership***
		1. *The Contractor:*
			1. *acknowledges and agrees that the Site is owned by the Lessor; and*
			2. *must not, in the performance of the work under the Contract, do or omit to do (as the case may be) any act, the doing or omission of which causes or may cause the Lessee to be in breach of its obligations and covenants under the Lease.*
		2. *The Contractor indemnifies the Principal and the Lessee from and against any Claim or loss suffered or incurred by the State or the Lessee respectively, in connection with any breach by the Contractor of Clause 3.7(a).*
		3. *The Principal holds on trust for the Lessee the benefit of the indemnity referred to in Clause 3.7(b).*
		4. *The Contractor acknowledges the existence of the trust and consents to the Principal exercising rights in relation to, or otherwise enforcing such indemnity on behalf of the. Lessee.*

*The parties agree that the Principal does not require the consent of the Lessee to amend or waive any provision of the Contract.*

#### **Clause 17 Insurance of the Work Under the Contract**

***Note: where the eventual occupier of the Site is also the owner of the site, and where there is no Lease Clause 17.1 is deleted and replaced with the following:***

**17.1 Indemnity by Contractor**

*The Contractor shall indemnify both the Principal and the Owner (as applicable) against:*

*(a) loss of or damage to property of both the Principal and the Owner (as applicable), including existing property in or upon which the work under the Contract is being carried out; and*

* + 1. *(b) claims by any person against both the Principal and the Owner (as applicable) in respect of personal injury or death or loss of or damage to any property,*

*arising out of or as a consequence of the carrying out by the Contractor of the work under the Contract, but the Contractor's liability to indemnify both the Principal and the Owner (as applicable) shall be reduced proportionally to the extent that the act or omission of either or both of the Principal and the Owner or employees or agents of the Principal and the Owner may have contributed to the loss, damage, death or injury.*

*Clause 17.1 shall not apply to:*

1. *the extent that the liability of the Contractor is limited by another provision of the Contract;*
2. *exclude any other right of the Principal to be indemnified by the Contractor;*
3. *things for the care of which the Contractor is responsible under Clause 16.1;*
4. *damage which is the unavoidable result of the construction of the Works in accordance with the Contract; and*
5. *claims in respect of the right of the Principal to construct the work under the Contract on the Site.*

#### **Clause 18 Insurance of the Work Under the Contract**

***Note: where the Site is leased, the following marked-up works to be included in Alternative 1, Options A and B in clause 18.***

***Clause 18***

***Alternative 1 - Option A***

*The insurance policy shall be in the joint names of the Principal and the Contractor, and shall cover the Principal, the Contractor, the Lessee/Owner [delete whichever does not apply] and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights, interests and liabilities. The policy shall be maintained until the Contractor ceases to be responsible under Clause 16.1 for the care of anything.*

***Clause 18***

***Alternative 1 - Option B***

*The insurance policy shall cover the Principal, the Contractor, the Lessee/Owner [delete whichever does not apply] and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights, interests and liabilities and, unless otherwise specified elsewhere in the Contract, shall extend to cover the Principal as an insured party, and shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Contractor ceases to be responsible under Clause 16.1 for the care of anything.*

***Note: where there is no lease, the following marked-up words to be included to Alternative 1 - Option A and Option B of Clause 19 - marked-up words to be included below. This will extend the insurance coverage provided by the Contractor to the Lessee or Owner (as relevant).***

#### **Clause 19 Public Liability Insurance**

***Clause 19***

***Alternative 1 - Option A***

*Before the Contractor commences work, the Contractor shall take out a Public Liability Policy of insurance in the joint names of the Principal and the Contractor which covers the Principal, the Contractor, the Lessee/Owner [delete whichever does not apply], the Superintendent and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights and interests and covers their liabilities to third parties. The policy shall also cover the Contractor's liability to the Principal and Principal's liability to the Contractor for loss of or damage to property (other than property required to be insured by Clause 18) and the death of or injury to any person (other than liability which is required by law to be insured under a Workers Compensation Policy of insurance).*

*The Public Liability Policy of insurance shall be for the amount in respect of any one occurrence stated in Annexure Part A. The policy shall be maintained until the Final Payment Schedule is issued under Clause 42.8.*

***Clause 19***

***Alternative 1 - Option B***

*Before the Contractor commences work, the Contractor shall take out a public liability policy of insurance which covers the Principal, the Contractor, the Lessee/Owner [delete whichever does not apply], the Superintendent and all subcontractors employed from time to time in relation to the work under the Contract for their respective rights and interests and covers their liabilities to third parties and extends to cover the Principal as an insured party. The policy shall also cover the Contractor's liability to the Principal and Principal's liability to the Contractor for loss of or damage to property (other than property required to be insured by Clause 18) and the death of or injury to any person (other than liability which is required by law to be insured under a workers compensation policy of insurance).*

*The public liability policy of insurance shall be for an amount in respect of any one occurrence not less than the sum stated in Annexure Part A and, unless otherwise specified elsewhere in the Contract, shall be effected with an insurer and in terms both approved in writing by the Principal which approvals shall not be unreasonably withheld. The policy shall be maintained until the Final Payment Schedule is issued under Clause 42.8.*

Clause 5 Security, Retention Moneys and Performance Undertakings

Clause 5.2 is deleted and replaced with the following:

**5.2** **Provision of Security**

*The Contractor shall provide Security in the amount stated in Annexure Part A and in accordance with this Clause 5.*

*[The Contractor acknowledges and agrees that any Security provided in respect of a Separable Portion may be used by the Principal as Security for one or more other Separable Portions.] [Note: Optional paragraph.]*

**Note: if you use this clause, you must also update the applicable item of Annexure Part A. Remove the words ‘Not used’ and insert the text shown at the applicable item of the Annexure Part A.**

Clause 5.7 is deleted and replaced with the following:

**5.7** **Reduction and release of Security and retention moneys**

*[Subject to the paragraph below,] the Principal's entitlement to Security and retention moneys shall be reduced as stated in Annexure Part A.*

*[The Superintendent may, at any time after the time identified in Annexure Part A, make or allow a reduction of the amount of the Security or retention moneys by an amount which in the Superintendent’s opinion reasonably held is just and equitable provided however that the reduction shall not reduce the amount of the Security and retention moneys below fifty percent of the amount of the Security and retention moneys held by the Principal at the time the reduction is made or allowed by the Superintendent. Any such reduction shall not operate so as to waive, prejudice, release or discharge any of the conditions of the Contract or any of the obligations imposed on the Contractor by the Contract.] [****Note: Optional Clause]***

*Subject to the first paragraph of Clause 5.7, if in the opinion of the Superintendent it is reasonable to further reduce the Principal's entitlement to Security and retention moneys, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.*

*The Principal shall, within 14 days of the Superintendent making such a determination, release Security and retention moneys in excess of the entitlement.*

*The Principal's entitlement to Security for any item of unfixed plant and materials pursuant to Clause 42.4 shall cease 10 Business Days after incorporation into the Works of the unfixed plant or materials.*

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|  | Retention moneys shall be deducted progressively as follows:(Clause 5.7) ***[Optional]*** | [Not applicable / OR.........................per cent of the value of the work incorporated into the Works until …....…..per cent of the Contract Sum is reached.]  |

**Note: the amendments to clause 33.2 are needed if you intend to use Clause 33.5.**

Clause 33 Progress and Programming of the Works

Clause 33.2 is deleted and replaced with the following:

**33.2** **Construction program**

For the purposes of Clause 33, a 'construction program' is a statement in writing showing the dates by which, or the times within which, the various stages or parts of the work under the Contract are to be executed or completed.

A construction program shall not affect rights or obligations in Clause 33.1.

The Contractor shall not depart from:

(a) a construction program included in the Contract; or

(b) a construction program furnished to the Superintendent,

without reasonable cause or except where the departure is necessary to comply with another clause of the Contract.

The Contractor shall within 10 Business Days of the Date of Contract and, during the course of the Contract, within 10 Business Days of any request from time to time from the Superintendent, prepare and lodge with the Superintendent a construction program for the approval of the Superintendent, showing the Contractor’s bona fide planned work activities and sequences for bringing the work under the Contract to Practical Completion by the Date for Practical Completion.

If the Superintendent rejects a construction program or revised construction program submitted by the Contractor under this Clause, the Contractor shall promptly amend the construction program and resubmit it to the Superintendent for approval.

The construction program shall not form part of the Contract but it may be used by the Superintendent and the Principal to monitor and assess the progress of the work under the Contract.

No review, approval, acceptance or rejection by the Superintendent of, nor any comment or direction by the Superintendent upon or in connection with, a construction program, revised construction program, amended construction program or change to a construction program shall:

(c) relieve the Contractor from any of its liabilities or obligations, especially the obligation to achieve Practical Completion by the Date for Practical Completion;

(d) evidence or constitute a direction by the Principal or the Superintendent to accelerate, disrupt, prolong or vary any or all of the work under the Contract;

(e) evidence or constitute a ‘Sequencing Direction’ [or ‘Acceleration Direction’] by the Superintendent under Clause 33.1 or [Clause 33.5];

(f) evidence or constitute the granting of any extension of time for Practical Completion; or

(g) affect the time for performance of the Principal’s or the Superintendent’s obligations.

A construction program shall be in the form and comply with any requirements specified in Annexure Part A and comply with any other requirements as the Superintendent, acting reasonably, may direct from time to time. A program that does not comply with these requirements shall not be regarded as a construction program for the purposes of the Contract.

The furnishing of a construction program or of a further construction program shall not relieve the Contractor of any obligations under the Contract including the obligation to not, (without reasonable cause or where the departure is necessary to comply with another clause of the Contract) depart from an earlier construction program.

**Note: if you use this clause, you also need to use the amendments to clause 33.2.**

A new Clause 33.5 is inserted as follows:

**33.5** **Acceleration instead of extension of time** [Optional Clause.]

Where:

(a) the Contractor is entitled to an extension of time for Practical Completion under Clause 35.5; and

(b) it is feasible for the Contractor to overcome the delay which is the subject of the extension of time to which the Contractor would otherwise be entitled,

instead of granting a reasonable extension of time under that Clause, the Superintendent may direct the Contractor in writing to accelerate the performance of the work under the Contract so as to overcome the whole or part of the delay which gave rise to the entitlement to an extension of time.

The Contractor shall comply with a direction given by the Superintendent under this Clause 33.5.

If the Superintendent directs the Contractor under this Clause 33.5 to accelerate the performance of the work under the Contract so as to overcome the whole of the delay in question, the Contractor shall no longer be entitled to any extension of time for that delay.

If the Superintendent directs the Contractor under this Clause 33.5 to accelerate the performance of the work under the Contract so as to overcome part only of the delay in question, the Contractor shall no longer be entitled to any extension of time for that part of the delay, but the Superintendent shall grant a reasonable extension of time under Clause 35.5 for the balance of the delay.

No direction by the Superintendent shall constitute a direction under this Clause 33.5 unless the direction is in writing and expressly states that it is an ‘Acceleration Direction’ under Clause 33.5.

If compliance with a direction to accelerate given under this Clause 33.5 causes the Contractor to incur more or less cost than otherwise would have been incurred had the Contractor not been given the direction, the difference shall be valued under Clause 40.5.

Clause 33 Progress and Programming of the Works

A new Clause 33.6 is inserted as follows:

**33.6** **Acceleration for early completion** Optional Clause.]

The Superintendent may, at any time, direct the Contractor to provide a written proposal in connection with a proposed acceleration of the performance of the Works. If so directed, the Contractor shall provide to the Superintendent within the time stated in such direction, or if no time is stated, then promptly, an acceleration proposal including the following information:

(a) whether and to what extent the proposed acceleration is achievable;

(b) whether and to what extent the proposed acceleration is likely to cause delay or disruption to the execution of any other parts of the Works;

(c) details of any changes in labour, plant and activities required to comply with the proposed acceleration;

(d) details of any changes in the hours of work required to comply with the proposed acceleration; and

(e) an estimate of the costs that will be incurred to comply with the proposed acceleration.

The Superintendent may accept an acceleration proposal by notice in writing. If the Superintendent accepts an acceleration proposal, then the Contractor's entitlements (including as to extensions of time and adjustments to the Contract Sum) in connection with the acceleration will be governed by the proposal which was accepted by the Superintendent.

No communication from the Superintendent shall constitute acceptance of the acceleration proposal under this Clause 33.6 unless it is a direction in writing and expressly states that it is an acceptance of an acceleration proposal under Clause 33.6.

Clause 35 Times for Commencement and Practical Completion

Clause 35.3 is deleted and replaced with the following:

35.3 **Separable Portions**

The interpretations of:

(a) Date for Practical Completion;

(b) Date of Practical Completion; and

(c) Practical Completion,

and Clauses 5.7, 16, 35, 37, 38, 42.3 and 42.5 shall apply separately to each Separable Portion and references therein to the Works and to work under the Contract shall mean so much of the Works and the work under the Contract as is comprised in the relevant Separable Portion.

If the Contract does not make provision for, [or the Superintendent does not otherwise direct] [Note: Optional drafting], the amount of Security, retention moneys, liquidated damages or bonus applicable to a Separable Portion, the respective amounts applicable shall be:

(d) in relation to Security, the value of the whole of the work under the Contract; and

(e) in relation to retention moneys, liquidated damages and bonus, such proportion of the retention moneys, liquidated damages or bonus applicable to the whole of the work under the Contract as the value of the Separable Portion bears to the value of the whole of the work under the Contract.

**Note: if you use this clause, you must also update the applicable item of Annexure Part A. Remove the words ‘Not used’ and insert the text shown at the applicable item of the Annexure Part A.**

Clause 35.7 is deleted and replaced with the following:

**35.7** **Limit on liquidated damages [Optional Clause.]**

The Contractor's total liability under Clause 35.6 is limited to the amount stated in Annexure Part A.

If the Contractor's total liability for liquidated damages reaches the amount stated in Annexure Part A, the Principal may immediately terminate the Contract in accordance with Clause 44.4.

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| # | Limit of Liquidated Damages (Practical Completion):(Clause 35.7) |   |

**Note: if you use this clause, you must also update the applicable item of Annexure Part A. Remove the words ‘Not used’ and insert the text shown at the applicable item of the Annexure Part A.**

Clause 37 Defects Liability

* **inserting the following optional paragraph after the third paragraph (that is, the paragraph beginning with the words "At any time prior to the 4th day"):**

[The rectification work will be subject to a separate Defects Liability Period for the duration stated in Annexure Part A. The separate Defects Liability Period shall commence on the date the rectification work is completed. This Clause 37 shall apply in respect of the rectification work and the Defects Liability Period for that rectification work.] [Note: Optional Clause.]

|  |  |  |
| --- | --- | --- |
|  | The separate Defects Liability Period for rectification work(Clause 37) |  |

**Note: if you use this clause, you must also update the applicable item of Annexure Part A. Remove the words ‘Not used’ and insert the text shown at the applicable items of the Annexure Part A.**

**Refer to the Contracting Practice Note Limitation of Liability for guidance on the use of this clause. This Practice Note is available on request from** **Construction Policy Unit****.**

Clause 49 Severability

A new optional Clause 49A is inserted as follows:

**49A** **Limitation of Liability** [Optional Clause..]

(a) Subject to Clause 49A(b), the aggregate liability of the Contractor to the Principal arising out of or in connection with the Contract shall in no event exceed the amount set out in Annexure Part A (Limitation of Liability).

(b) The Limitation of Liability does not apply to any liability of the Contractor arising from or in connection with:

(i) Claims by any person against the Principal in respect of personal injury, death, loss or damage to any property or any other third party liability (including the liability of the Contractor under the indemnity set out in Clause 17.1);

(ii) a failure by the Contractor to effect and maintain the insurances required to be effected and maintained by the Contractor under the Contract;

(iii) events or circumstances in respect of which insurance proceeds are available or would have been available under insurance required by the Contract in relation to those events or circumstances but for:

(A) a failure of the Contractor to obtain or maintain the insurances (for which it is responsible) in accordance with Clauses 18, 19 and 20;

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

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

(D) the inclusion of Clause 49A(a);

(iv) a breach of the Contractor’s obligations under Clause 8.6;

(v) a breach of the Contractor’s obligations under, or the liability of the Contractor under the indemnities set out in, Clause 13;

(vi) the wilful misconduct, wilful default, wilful neglect, gross negligence, fraud or criminal acts or omissions of the Contractor or the employees or agents of the Contractor, or any act or omission of the Contractor or the employees or agents of the Contractor which gives rise to a statutory penalty or fine;

(vii) any amount which the Contractor recovers, or would have recovered but for an act or omission of the Contractor, from a third party in connection with a Claim;

(viii) any liability that cannot be excluded at law; or

(ix) the Contractor abandoning the work under the Contract.

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|  | Limitation of Liability(Clause 49A) |   |

**Note: if you use this clause, you must also update the applicable item of Annexure Part A. Remove the words ‘Not used’ and insert the text shown at the applicable items of the Annexure Part A.**

**Refer to the Contracting Practice Note Limitation of Liability for guidance on the use of this clause. This Practice Note is available on request from** **Construction Policy Unit****.**

Clause 49 Severability

A new optional Clause 49B is inserted as follows:

**49B** **Exclusion of liability** [Optional Clause.]

(a) Subject to Clause 49B(b), neither party shall be liable to the other party for any Excluded Loss suffered or incurred by the other party arising out of or in connection with the Contract.

(b) Clause 49B(a) does not apply to the extent that:

(i) liquidated damages (including any damages at common law pursuant to Clause 35.9), may be construed or are intended to cover such Excluded Loss;

(ii) such Excluded Loss is covered by insurance proceeds that are available under insurances required by the Contract in relation to that event or circumstance;

(iii) such Excluded Loss would have been covered by insurance proceeds that would have been available under insurances required by the Contract in relation to that event or circumstance but for:

(A) a failure of the Contractor to obtain or maintain the insurances (for which it is responsible) in accordance with Clauses 18, 19 and 20;

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

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

(D) the inclusion of Clause 49B(a);

(iv) such Excluded Loss is caused by the wilful misconduct, wilful default, wilful neglect, gross negligence, fraud or criminal acts or omissions of the Contractor or the employees or agents of the Contractor;

(v) the Contractor recovers, or would have recovered but for an act or omission of the Contractor, an amount from a third party arising from any Claim made in connection with the Contract;

(vi) such Excluded Loss cannot be excluded at law; or

(vii) losses identified in Annexure Part A.

For the purposes of this Clause 49B 'Excluded Loss' means any:

(a) loss of business or production;

(b) loss of actual or anticipated profit or revenue; and

(c) loss of business reputation.

|  |  |  |
| --- | --- | --- |
|  | Other losses excluded from Limitation of Liability (Clause 49B) |   |