



Australian Government Solicitor

DRAFT

INSTRUMENT OF AGREEMENT

**SECURITY CONTROL ROOM AND LIFT FOYER UPGRADE, HIGH COURT BUILDING
PARKES, CANBERRA**

Commonwealth of Australia (as represented by the High Court of Australia)

ABN 69 445 188 986

^Insert name of Contractor^

INSTRUMENT OF AGREEMENT for the Security Control Room and Secure Lift Foyer Upgrade, High Court Building, Canberra.

Date

This Instrument of Agreement is dated [insert].

Parties

This Instrument of Agreement is made between and binds the following parties:

Commonwealth of Australia (as represented by the High Court of Australia)
(ABN 69 445 188 986) (**Principal**)

and

^Insert name of Contractor^(**Contractor**)

1. Context

This Agreement is made in the following context:

- a. The Security Control Room and Security Lift Foyer of the High Court Building at Parkes in Canberra must be upgraded.
- b. The Contractor has tendered to upgrade the control room and foyer.
- c. The Principal has agreed to accept the Contractor's tender (Tender) on the following terms and conditions.

2. Operative provisions

In consideration of the mutual promises contained in this document, the parties to this Instrument of Agreement agree as follows:

3. Documents Comprising the Agreement

The following documents annexed to this Agreement shall be deemed to form and be read and construed as part of this Agreement:

- a. AS 4000 - 1997 General conditions of contract (as amended by this Instrument of Agreement)
- b. Annexure Part A to AS 4000 (Items Schedule) marked Annexure Part "A"
- c. Annexure Part B to AS 4000 (Deletions Amendments and Additions) marked Annexure Part "B"
- d. Annexure Part C to AS 4000 (Form of Bank Undertaking) marked Annexure Part "C"

- e. Annexure Part "D" (Principal Supplied documents)
- f. Annexure Part "E" (Practical Completion, Liquidated Damages and Delay Damages)
- g. Annexure Part F (Provisional Sums)
- h. Annexure Part G (Schedule of Rates)

which documents with this Instrument of Agreement constitute and are hereinafter referred to as the "Contract".

4. Obligations of the Parties

- 4.1. In consideration of the agreements set forth in the Contract, the Contractor will execute the Works in conformity with the Contract and will perform fulfil comply with submit to and observe all and singular the provisions conditions stipulations and requirements and all matters and things expressed or shown in or reasonably to be inferred from the Contract and which are to be performed fulfilled complied with submitted to or observed by or on the part of the Contractor.
- 4.2. In consideration of the agreements on the part of the Contractor in the Contract, the Principal will pay to the Contractor the fixed lump sum of [^insert details of the contract sum^] including provisional sums but excluding any additions or deductions which may be required to be made under the Contract Payments will be made to the Contractor in accordance with the provisions of the Contract and will perform fulfil comply with submit to and observe all and singular the provisions conditions stipulations and requirements and all matters and things expressed or shown in or reasonably to be inferred from the contract documents and which are to be performed fulfilled complied with submitted to or observed by or on the part of the Principal.

SIGNED for and on behalf of the)
Commonwealth of Australia as)
represented by the High Court of)
Australia (ABN 69 445 188 986) by its
authorised delegate:

Name of signatory

Signature

In the presence of:

Name of witness

Signature of witness

Date:

SIGNED for and on behalf of)
(^Contractor^) pursuant to Section 127 of)
the *Corporations Act 2001* (Cth):)
)

Print Name of Director

Signature of Director

In the presence of:

Print Name of Director/Secretary

Signature of Director/Secretary

Date:

ANNEXURE PART A**ANNEXURE PART A**

This Annexure shall be completed and issued as part of the Tender documents and, subject to any amendments to be incorporated into the Contract, is to be attached to the General conditions of contract and shall be read as part of the Contract.

Item

- | | | |
|----|---|--|
| 1. | <i>Principal</i>
(clause 1) | Commonwealth of Australia as represented by the High Court of Australia (ABN 69 445 188 986) |
| 2. | <i>Principal's Address</i> | Parkes Place East
Parks ACT 2600
Australia |
| 3. | <i>Contractor</i>
(clause 1) | To be completed by Tenderer |
| 4. | <i>Contractor's Address</i> | To be completed by Tenderer |
| 5. | <i>Superintendent</i>
(clause 1) | Integrated Spaces Pty Ltd (ACN 098 835 299) |
| 6. | <i>Superintendent's Address</i> | 16 National Circuit, Barton ACT 2600 |
| 7. | (a) <i>Date of Practical Completion</i>
(clause 1)

OR

(b) <i>Period of time for practical completion</i>
(clause 1) | To be advised by the <i>Principal</i> |
| 8. | Governing law
(page 5, clause 1(h)) | Law of Australia as applied in Australian Capital Territory |
| 9. | (a) <i>Currency</i>
(page 5, clause 1(g)) | Australian Dollars |

	(b) Place for payments (page 5, clause 1(g))	Payment will be effected by electronic funds transfer (EFT) to the nominated bank account of the Contractor:
	(c) Place of business of bank (page 3, clause 1(d))	Not applicable
10.	<i>Bills of quantities</i> (subclause 2.2)	Not applicable
	(a) Alternative applying (subclause 2.2)	Alternative 2 – A bill of quantities does not form part of the Contract
	(b) If Alternative 2 applies, is the <i>bill of quantities</i> to be priced? (subclause 2.2)	Not applicable
	(c) Lodgement time (subclause 2.3(b))	Not applicable
11.	Quantities in <i>schedule of rates</i> , limits of accuracy (subclause 2.5(b))	Not applicable
12.	<i>Provisional sum</i> , percentage for profit and attendance (clause 3)	Not applicable - No additional markup for profit and attendance or any other cost applies for any Provisional Sum
13.	<i>Contractor's security</i>	
	(a) Form (clause 5)	Unconditional bank guarantee or insurance bond in the form detailed at Annexure Part C

	(b) Amount or maximum percentage of <i>contract sum</i> (clause 5)	5%
	(c) If retention moneys, percentage of each <i>progress certificate</i> (clause 5 and subclause 37.2)	Not applicable
	(d) Time for provision (except for retention moneys) (clause 5)	On or before the date of execution of the Instrument of Agreement.
	(e) Additional <i>security</i> for unfixed plant and materials (subclauses 5.4 and 37.3)	Not Applicable
	(f) <i>Contractor's security</i> upon <i>certificate of practical completion</i> is reduced by (subclause 5.4)	50% of amount held
14.	<i>Principal's security</i>	Not Applicable
15.	<i>Principal-supplied documents</i> (subclause 8.2)	As listed in Annexure D
16.	Time for <i>Superintendent's direction</i> about documents (subclause 8.3)	14 days
17.	Subcontract <i>work</i> requiring approval (subclause 9.2)	All subcontracting work requires approval unless it is work detailed below performed by the contractors detailed below:- To be completed by the Tenderer

- | | | |
|--|---|---|
| 18. | Novation
(subclause 9.4) | Not applicable |
| 19. <i>Legislative requirements</i> | | |
| | (a) Those excepted
(subclause 11.1) | The Principal shall obtain all approvals required under the <i>High Court of Australia Act 1979</i> and <i>Australian Capital Territory (Planning and Land Management) Act 1988</i> . |
| | (b) Identified <i>WUC</i>
(subclause 11.2(a)(ii)) | Any substantial aspect of the <i>WUC</i> as determined by the Superintendent |
| 20. Insurance of <i>the Works</i>
(clause 16) | | |
| | (a) Alternative applying | Alternative 1 |
| If Alternative 1 applies | | |
| | (b) Provision for demolition
and removal of debris | 10% of the contract sum |
| | (c) Provision for
consultants' fees | 10% of the contract sum |
| | (d) Value of materials or
things to be supplied by the
<i>Principal</i> | Not applicable |
| | (e) Additional amount or
percentage | 5% of the total of paragraphs (a) to (d) in clause 16 |

21. Public liability insurance (clause 17) \$20 million – Public Liability Policy must be in the nature of a Broadform policy covering both public liability and product liability.

(a) Alternative applying Alternative 1

If Alternative 1 applies

(b) Amount per occurrence shall be not less than \$ 20 Million

22. Time for giving access (subclause 24.1) The *Principal* will provide non-exclusive access of the *site* after the *Contractor* has satisfactorily provided the *Principal* with the following:
- (a) provision of all *Approvals* required to be obtained by the *Contractor* in accordance with item 19 of Annexure Part A of this Contract;
 - (b) provision of security required by clause 5;
 - (c) endorsement of the Work Health and Safety plan as required by clause 12 (as amended)
 - (d) evidence of insurance as required by clause 19.1;
 - (e) provision of review of the Principal Supplied Documents as required under clause 52.1;
 - (f) endorsement of the Construction Programme as required by paragraph 1.1.21 of the Preliminaries & Architectural Technical Specification 2573-SP1/A;
 - (g) provision of the Work Method Statements & material Safety Data Sheets as required by paragraph 1.1.28 of the Preliminaries & Architectural Technical Specification 2573-SP1/A;
 - (h) provision of the Dilapidation Report required by paragraph 1.1.29 of the the Preliminaries & Architectural Technical Specification 2573-SP1/A; and
 - (i) endorsement of the Inspection and Testing Plan required by paragraph 1.8.5 of the Preliminaries & Architectural Technical Specification 2573-SP1/A

23.	Qualifying causes of Delay Causes of delay for which EOT's will not be granted.	EOT's may only be claimed for events falling within the amended definition of 'qualifying cause of delay' contained in Annexure Part B. EOT claims may not be made for delays lasting more than one day
24	Liquidated damages, rate (subclause 34.7)	In accordance with Annexure Part E
25	Bonus for early completion	Not applicable
25A.	Maximum daily rate for delay costs (clause 34.9)	Refer Annexure E - Practical Completion, Liquidated Damages and Delay Damages
26.	Delay damages, other <i>compensable causes</i> (page 1, clause 1 and subclause 34.9)	There are no additional compensable causes.
27.	<i>Defects liability period</i> (clause 35)	12 months
27A	Allowance for overhead and profit for additional variations (clause 36.4)	10% (inclusive of all charges for preliminaries)
27B	Allowance for overhead and profit for negative variations	10% (inclusive of all charges for preliminaries)
28.	Progress Claims (subclause 37.1)	
	(a) Times for progress claims	Monthly progress claims on the 25 th day of each month

- | | | |
|-----|--|--|
| 29. | Unfixed plant and materials for which payment claims may be made
(subclause 37.3) | Deposit amounts paid by the Contractor for specified or nominated equipment items supported by Contractor correctly rendered invoices. |
| | | |
| 30. | Interest rate on overdue payments
(subclause 37.5) | 7% per annum |
| | | |
| 31. | Time for <i>Principal</i> to rectify inadequate possession
(subclause 39.7) | 30 days |
| | | |
| 32 | Key Personnel
(subclause 49) | To be completed by Tenderer |

Part A

Not Applicable

Separable Portions

ANNEXURE PART B

SPECIAL CONDITIONS OF CONTRACT

for

AS 4000 - 1997

The General Condition of Contract AS 4000 - 1997 shall be read subject to these Special Conditions and the Annexure Part B is deemed to be completed accordingly. References to clause numbers in these Special Conditions shall, except where the context otherwise requires, mean the clause numbers referred to in the General Conditions of Contract.

1. Clause Deletions

The following clauses have been deleted from the General Conditions as in AS 4000-1997:

- a. The Contract is a lump sum contract as contained in the Instrument of Agreement, the following provisions are deleted clause 2.1(b); clause 2.3, clause 2.4; clause 2.5.
- b. There is no obligation on the Principal to provide any indemnity - clause 15.2 is deleted.
- c. There is no bonus for early completion. Clause 34.8 (Bonus for early completion) is deleted.
- d. There is no obligation to go to arbitration - clauses 42.3 and 42.4 are deleted.

2. Clause Amendments

The following clauses have been amended from the General Conditions of Contract in AS 4000-1997:

2.1. Practical Completion

The definition "Practical Completion" in clause 1 of AS 4000 is amended to include:

- a. *the Contractor has provided the Superintendent with approved final as-built draft drawings in respect of the Works;*
- b. *the Contractor has provided the Superintendent with approved final operation and maintenance manuals in respect of the Works;*
- c. *the Contractor has assigned and provided copies of all the warranties to the Principal of all the applicable warranties, guarantees and service agreements. This includes all warranties to be provided by subcontractors or consultants;*
- d. *there exists no physical or legal impediment to use the Works;*

- e. *the Contractor has ensured the Works are clean and free from refuse and rubbish, and the Principal has clear safe and unrestricted access to the site and the premises;*
- f. *the Contractor has provided all warranties, guarantees and service agreements;*
- g. *the Contractor has ensured that the Works have been certified and has obtained all necessary approvals for use and occupation of the premises, site and building services from relevant Authorities and has provided evidence to this effect and to the satisfaction of the Superintendent;*
- h. *all building services have been commissioned to the satisfaction of the Superintendent and all tests required by the Contract, Superintendent and authorities have been satisfactorily completed and the building services are operating according to the manufacturer's recommendations, accepted trade practices, Australian Standards and other applicable standards and to the satisfaction of the Superintendent;*
- i. *the Contractor has removed all temporary work and protective measures;*
- j. *the Contractor has provided all required training to the Principal's personnel in respect of the operation of all building services and other items (if applicable);*
- k. *the Contractor has obtained all necessary certificates of compliance from authorities in respect of fire, safety and other essential services in relation to the WUC; and*
- l. *any additional requirements stated in Annexure Part A are satisfied.*

2.2. **Qualifying Cause of Delay**

The definition of 'qualifying cause of delay' in clause 1 of AS 4000 is amended to read:

qualifying cause of delay means:-

- a. *acts, omissions or defaults of the Principal or Superintendent;*
- b. *industrial action which affects the building industry generally and is not limited to the Contractor or its subcontractors or to the Works;*

delay caused by other contractors of the Principal and not due to any act, omission or default by the Contractor;

2.3. **Confidential Information**

Clause 8.5 of AS 4000 is amended by adding at the end of the first sentence the following:

- ...and that a party, acting reasonably, would assume to be confidential. Confidential Information shall not be disclosed to a third party without the approval of the Principal. Unless the parties agree otherwise all confidential information shall remain confidential for a period of 10 years.

2.4. Assignment and subcontracting

Clause 9.2 of AS 4000 (Subcontracting Generally), fourth (final) paragraph is amended to read as follows:

The Superintendent may give approval under this clause on such terms and conditions as the Superintendent considers appropriate or necessary, including, without limiting the generality of the above, a condition that any subcontract include one or more of the following -

- a. *provision that the subcontractor shall not assign nor subcontract without the Contractor's written consent, and*
- b. *provision which may be reasonably necessary to enable the Contractor to fulfil the Contractor's obligations to the Principal.*

2.5. Intellectual Property Rights

Clause 10 of AS 4000 is amended by adding the following to the conclusion of this clause:

All intellectual property rights in Contractor supplied documents (other than Pre-existing IP) shall vest in the Principal. The Contractor shall execute such documentation reasonably required by the Principal to vest such rights in the Principal.

Pre-existing IP means intellectual property rights embedded in the Contractor supplied documents that is owned by a third party.

2.6. Changes to Legislative Requirements

2.6.1. Clause 11.2(b) of AS 4000 is amended to provide as follows:-

"Comes into effect after the Contract date but could not reasonably then have been anticipated by a competent Contractor;"

2.6.2. The following clauses are added as 11.3 and 11.4:-

11.3 Notification

The Contractor must immediately notify the Superintendent and the Principal in writing if:

- a. *it breaches any legislative requirement, or fails to comply with clause 11; or*
- b. *it receives any certificates or other documents in connection with the Contractor's compliance or otherwise with any legislative requirement or any environmental or occupational health and safety matter in relation to*

the Works including any licence, consent, approval, notice, policy, procedure or practice.

11.4 Australian Standards

Unless otherwise provided in the Contract, the Contractor must ensure that (in the absence of any express contractual provision or legislative requirement to the contrary) the Works comply with all relevant Australian Standards published by the Standards Associated of Australia.

The obligations imposed on the Contractor under this clause 11.4, do not extend to ensuring that the design of the WUC complies with any relevant Australian or other Standard. However, the Contractor agrees that it will notify the Superintendent of any non-conformances in respect of the design of the WUC of which it becomes aware prior to the date of practical completion.

2.7. Protection of People and Property

Insert the following at the end of Clause 12 of AS 4000:

Without limiting in any way any other obligation of the Contractor under the Contract, the Contractor shall ensure that work practices at the Site in relation to the execution and completion of the works meet all applicable safety standards and conform to all Legislative Requirements.

The Contractor will prepare a Workplace Health and Safety Plan within 14 days of the date of the Contract and submit such plan to the Superintendent for endorsement. The plan should at a minimum detail the Contractor's approach to workplace health and safety (including the identification and management of possible risks, site control, training and competency, risk and hazard identification and management) and the other matters detailed in Part 6 to the Work Health and Safety Regulations Act 2011(ACT) and the related regulations. The Contractor must comply with all requirements of and maintain accreditation under the Commonwealth's Work Health and Safety Accreditation Scheme.

2.8. Clause 19.1 Proof of Insurance

Clause 19.1 - the following is added to the end of the clause:-

At the Superintendent's request, the Contractor must promptly provide a copy of the policy wording for any insurance the Contractor is required to effect and maintain under this Contract.

The Contractor will maintain insurance with the Insurer acceptable to the Principal.

2.9. Notices form or to insurer

2.9.1. Clause 19.3 is amended to read as follows:-

The party insuring under clause 16 or 17 shall ensure that each insurance policy contains provisions acceptable to the other party which:

- a) requires the insurer to inform both parties, whenever the insurer gives a party or a subcontractor a notice in connection with the policy;*
- b) provides that a notice of claim given to the insurer by either party, the Superintendent or a subcontractor shall be accepted by the insurer as a notice of claim given by both parties, the Superintendent and the subcontractor; and*
- c) requires the insurer, whenever the party fails to maintain the policy, promptly to give written notice thereof to both parties and prior to cancellation of the policy.*

The requirements in paragraphs (a) and (c) will be deemed satisfied if a notice in those terms is given to the Superintendent by the Contractor.

2.10. **Latent Conditions**

2.10.1. Clause 25.1 (Scope) is replaced with the following:

Latent conditions are physical conditions on the site and its near surrounds, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by an experienced and competent Contractor after making enquiries, if the Contractor had inspected:

- a. all written information made available by the Principal to the Contractor for the purpose of submitting its tender;*
- b. all information influencing the risk allocation in the Contractor's tender and reasonably obtainable by the making of reasonable enquiries;*
- c. the site and its near surrounds; and*
- d. all information provided by the Principal; and*
- e. all other reasonable and obtainable information relevant to the risks, contingencies and other circumstances affecting the site and its surrounds.*

For the avoidance of doubt, the occurrence of a latent condition is not a qualifying cause of delay or a compensable cause under the Contract and will be treated as a variation in accordance with the above paragraph.

2.10.2. Clause 25.3 is replaced with the following:

If, in the Superintendent's opinion, the latent condition causes the Contractor to:

a. carry out more work; or

b. incur more cost,

than the Contractor could reasonably have anticipated at the date of the Contract, a valuation for all reasonable costs directly and necessarily incurred by reason of the latent condition shall be valued under clause 36.4.

2.11. **Acceptance of Defective Work**

Clause 29.4 is amended by adding the following to the end of the existing clause:

If, in the Superintendent's opinion, the subject work is worth less or has cost substantially less for the Contractor to carry out than the work which is in accordance with the Contract, then the variation shall be valued in accordance with clause 36.4 and;

a. *the variation causes a decrease in the value to the Principal of the Works or has cost less for the Contractor to carry out, regard shall be had to the decrease and the contract sum adjusted accordingly; and*

b. *the variation results in the Contractor incurring less cost than would reasonably have been incurred had the Contractor been given a direction pursuant to clause 29.3, regard shall also be had to the difference and the contract sum adjusted accordingly.*

If, in the Superintendent's opinion, the work is worth more or has cost substantially more for the Contractor to carry out than the work which is in accordance with the Contract, the Contractor is not entitled to any addition to the contract sum.

The Contractor is not entitled to any EOT in respect of a variation directed by the Superintendent under this clause 29.4.

2.12. **Programming**

Replace the last paragraph of clause 32 with the following:

The Contractor shall update the Construction Program from time to time when requested by the Superintendent to reflect only approved extensions of time, approved variations and any departure from the Contractor's Program approved by the Superintendent. The Contractor shall immediately provide a copy of any updated Construction Program to the Superintendent.

If the Contractor fails to furnish a Construction Program or updated Construction Program following a request by the Superintendent, the Principal may withhold payment of any amounts otherwise due to the Contractor until the Contractor remedies such failure. The rights given in this clause 32 are in addition to any other rights of the Principal.

2.13. **Time**

- 2.13.1. Clause 34.3 (Claim) in subclause 34.3(a), after the words "practical completion by", insert:

"delays affecting critical path activities on the Contractor's Program and caused by ..."

- 2.13.2. In clause 34.3(b), delete "28" and substitute "14" and add to the end of the clause:

The Contractor shall promptly provide such details of the delay to practical completion or the Contractor's claim as the Superintendent requests in writing. The Contractor acknowledges that the giving of notice within time is a precondition to making a claim.

An entitlement to an EOT will only arise where there has been a delay for at least one whole working day. Claims for part days shall not be allowed. Notwithstanding any other provision of the Contract, if the Contractor does not give the Superintendent written notice of delay in accordance with clause 34.2 and a written claim in accordance with this clause 34.3, the Contractor shall not be entitled to an EOT, and the Contractor hereby releases any claim for an EOT which is not made in accordance with this clause.

The Contractor acknowledges and agrees that it is not entitled to claim any additional cost or expense, any adjustment to the contract sum, or to claim an EOT or any claim otherwise at law, if it has failed to comply with clauses 34.2 and 34.3.

The Contractor waives any right to make a claim for delayed access to the Site for Works the subject of any Separable Portion (and will adjust the programme accordingly) if the Principal gives forty two (42) days' notice of the delay.

- 2.13.3. Clause 34.4 (Assessment) - the introduction to the second paragraph should be amended to read:

In assessing each EOT the Superintendent shall take into account whether:

- 2.13.4. Clause 34.5 (Extensions of Time) - add to the end of the clause the following:

For the avoidance of doubt, the exercise of the power in the previous paragraph of this clause shall be at the absolute discretion of the Superintendent and nothing in this clause shall entitle the Contractor to an EOT where that entitlement has not been claimed in accordance with clause 34.3.

Any failure by the Superintendent to grant a reasonable extension of time or to comply with any of the requirements of this clause shall not cause the Date for Practical Completion to be set at large. The Contractor may refer any decision of the Superintendent for dispute resolution under clause 42 and, subject to the Contract, the decision shall be reviewable. Under no

circumstances will a failure to grant a reasonable extension of time or a delay in granting an extension of time entitle the Contractor to damages or compensation, whether under the Contract, in tort, in equity, under statute or otherwise.

2.14. **Delay Damages**

Add to the end of this clause 34.9:

Delay damages shall be limited to the Contractor's actual verified costs reasonably and necessarily incurred as a result of the relevant delay, up to the maximum amount per working day as specified in Item 38. The amount specified in Item 25A is a cap on the Contractor's entitlement for loss, damage or compensation arising out of delay or disruption.

2.15. **Clause 36: Variations**

2.15.1. Clause 36.1 (Directing Variations) - Add the following to the end of clause:

Notwithstanding any other provision of the Contract, the approval of the Principal or the Superintendent to anything or the failure to disapprove of anything shall not be taken to be a variation. A variation shall only occur if the Superintendent has directed in writing the Contractor to do one or more of the things listed in this clause 36.1 and either:

- a. the direction is stated to be a variation instruction; or*
- b. prior to the Contractor commencing to comply with the direction, the Superintendent has confirmed in writing to the Contractor that the direction will be regarded as a variation; or*
- c. the Superintendent has determined under paragraph (b) that the direction is not to be regarded as a variation, but the Contractor, prior to commencing to comply with the direction, has given a notice of dispute under clause 42.1 in relation to that determination and such dispute is resolved or determined in favour of the Contractor.*

Otherwise, any work carried out by the Contractor shall be deemed not to be a variation and the Contractor will have no claim of any nature whatsoever against the Principal (or the Superintendent).

2.15.2. Clause 36.2 (Proposed Variations) - replace the last paragraph of clause with:

Notwithstanding any other provision of the Contract, the Contractor shall not be entitled to any extension of time for Practical Completion on the grounds of any variation if a notice has been given by the Superintendent under this clause 36.2 and the Contractor has not given notice of an anticipated effect of the proposed variation on the time for Practical Completion as required by this clause.

2.15.3. Clause 36.3 (Variations for convenience of Contractor) - Insert after the sentence ending "... extra time or extra money.":

Where the directed variation results in a reduction of the Contractor's costs or where it diminishes the value to the Principal of the Works, the Superintendent will be entitled to make a reasonable deduction to the contract sum, having regard to these matters.

- 2.15.4. Clause 36.4 (Pricing) - Insert the following at the end of this clause:

The allowance for profit and overhead to be applied for the purpose of this clause is the allowance set out in Item 27A and Item 27B

- 2.15.5. Clause 36.5 (Reduction of time for variations) - Insert new subclause as follows:

Where a variation will reduce the time required to complete the WUC, the Superintendent may direct a reasonable adjustment to the date for practical completion.

2.16. **Pricing**

- 2.16.1. Clause 36.4 (d) is amended by deleting the words "include a reasonable amount for profit and overheads" and inserting "comprise the actual net aggregate cost to the Contractor to effect the Variation, plus the Profit and Overheads at the rates identified in Item 27A and 27B" in its place.

- 2.16.2. The penultimate line is amended by deleting the words "a reasonable amount" and inserting "the rate identified in Item 27A and 27B " in its place.

2.17. **Liability for Failure to Communicate**

- 2.17.1. Delete clause 41.2 and substitute:

The Principal shall not be liable upon and the Contractor hereby releases any claim by the Contractor arising under, out of, or in connection with the Contract, whether in contract, in tort, in equity, under statute or otherwise unless within 28 days after the first day upon which the Contractor could reasonably have been aware of the events or circumstances which gave rise to the claim, the Contractor has given to the Superintendent the prescribed notice, provided that where a different period than provided in this clause is allowed under any other provision of the Contract, then for the purpose of claims to which such provision applies only, such different period shall apply to this clause.

2.18. **Dispute Resolution**

- 2.18.1. Clause 42 of AS 4000 is amended to read as follows:

42.1 Notice of Dispute

If a dispute or difference arises between the Contractor and the Principal or between the Contractor and the Superintendent in respect of any fact, matter or thing arising out of, or in any way in connection with the Works or the Contract, or either party's conduct before the Contract, the dispute or difference must be determined in accordance with the procedure in this clause 42.

Where such a dispute or difference arises, the Principal or the Contractor may give a notice in writing to the Superintendent and the other party specifying:

- (a) the dispute or difference;
- (b) particulars of the party's reasons for being dissatisfied; and
- (c) the position which the party believes is correct.

42.2 Executive Negotiations

If the dispute or difference arises between the Contractor and the Principal then either party may give the other a notification of dispute by a written Executive Negotiation Notice setting out details of the dispute. The persons stated in the Contract Particulars as the Representatives for Executive Negotiations are to:

- (a) meet promptly and undertake genuine and good faith negotiations to resolve the dispute or difference; and
- (b) if they cannot resolve the dispute or difference, use their best endeavours to agree to a procedure to promptly resolve the dispute or difference.

42.3 Mediation

42.3.1 If the Representatives for Executive Negotiations cannot resolve or agree upon a procedure to resolve the dispute or difference within 21 days of the issue of the Executive Negotiation Notice under clause 42.2, then the parties agree to endeavour in good faith to settle the dispute by mediation administered by the Australian Commercial Disputes Centre ('ACDC'), to be conducted in accordance with the ACDC Mediation Guidelines.

42.3.2 Each party agrees to:

- (c) bear its own costs in respect of the mediation; and
- (d) pay one half of ACDC's costs.

42.4 Expert Determination

42.4.1 If:

- (e) despite the ACDC mediation the dispute or difference remains unresolved within 21 days following the issue of the Executive Negotiation Notice under clause 42.2; and
- (f) the dispute or difference is in relation to a direction of the Superintendent under one of the clauses referred to in the Contract particulars,

then it is to be referred by either or both parties for resolution by expert determination.

- (g) The expert determination is to be conducted by a person appointed by the President of the Australian Institute of Arbitrators and Mediators or his or her nominee with relevant expertise in the field of the dispute.

- (h) *The expert may reach a decision from his or her knowledge or expertise.*

42.5 Not Arbitration

Any mediation and expert determination is not an arbitration.

42.6 Agreement with Expert

The parties agree to enter into an agreement with the appointed expert on the terms of the Expert Determination Agreement.

42.7 Conclusion of Expert Determination

Unless otherwise agreed between the parties, the expert determination conducted pursuant to clause 42.4 is to be concluded within the period required by the Expert Determination Agreement which the parties execute pursuant to clause 42.6.

42.8 Costs

Each party agrees to:

- (i) *bear its own costs in respect of any expert determination; and*
- (j) *pay one-half of the costs of the expert.*

42.9 Determination of Expert

The determination of the expert:

- (k) *is to be in writing and contain reasons;*
- (l) *is to be:*
 - i. *substituted for the relevant direction of the Superintendent; and*
 - ii. *final and binding,*

unless a party gives a notice of appeal to the other party within 21 business days of the determination; and

- (m) *is to be given effect to by the parties unless and until it is reversed, overturned or otherwise changed under the procedure in the following clauses.*

42.10 Jurisdiction of Courts

Nothing in this clause 42:

- (n) *prevents a party from seeking urgent interlocutory relief in a court of competent jurisdiction;*
- (o) *permits any issues involving the constitutional power of the Commonwealth or the rights, powers and immunities of the Principal as a Commonwealth entity to be referred for resolution to either an expert or an arbitrator and courts of competent jurisdiction are the forum for resolution of any disputes of this nature not mutually resolved by agreement or mediation.*

42.11 Survive Termination

This clause 42 survives the termination of the Contract.

42.12 Proportional Liability

Notwithstanding anything else, to the extent permissible by law, the expert or the arbitrator (as the case may be) will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any dispute referred to arbitration or expert determination pursuant to this clause.

42.13 Continuation of Contractor's Activities

Despite the existence of a dispute or difference between the parties the Contractor must:

- (p) *continue to carry out the Works; and*
- (q) *otherwise comply with its obligations under the Contract.*

3. Additional Clauses

43 Concurrent Works

The Contractor acknowledges that the Principal will be conducting concurrent works during the execution of the WUC (see further paragraph 1.1.5 of the Preliminaries & Architectural Technical Specification 2573-SP1/A. The Contractor will liaise with the Principal and the Principal's subcontractor to facilitate the execution of the concurrent work in a manner that minimises the execution of the WUC.

44 Site Meetings

The Contractor must attend site meetings throughout the duration of the Contract on a weekly basis or at a frequency determined by mutual agreement between the Contractor and the Superintendent. The meetings are to be attended by the Superintendent, Contractor and relevant subcontractors. The Contractor shall keep minutes of the meeting and provide copies to all relevant parties within 2 working days after each meeting.

45 Privacy

- 45.1 In this clause, Australian Privacy Principle has the same meaning as it has in the Privacy Act 1988 (Cth).
- 45.2 The Contractor agrees, in carrying out WUC, not to do any act or engage in any practice which, if done or engaged in by the Principal, would be a breach of an Australian Privacy Principle.
- 45.3 The Contractor agrees to notify the Principal immediately if it becomes aware of a breach or possible breach of any of its obligations under this clause.

46

GST

- a. The Principal must pay to the Contractor any amount which is payable by the Contractor on account of goods and services tax introduced by the A New Tax System (Goods and Services Tax) Act 1999, value added tax or any other like tax ("GST") as a consequence of any supply made to the Principal under the Contract ("GST Amount");
- b. If at any time an adjustment is made between the Contractor and the relevant taxing authority of an amount paid on account of GST on any supply made to the Principal under the Contract, a corresponding adjustment must be made as between the Contractor and the Principal and any payments required to give effect to the adjustment must be made. If the Contractor is entitled to an adjustment by way of refund, the Contractor must apply for the refund if requested to do so by the Principal;
- c. At least 5 days before the date for payment of any GST Amount the Contractor must provide to the Principal a tax invoice complying with any legislation under which GST is imposed. The Principals' obligation to pay a GST Amount will be conditional on compliance by the Contractor with this clause. The Contractor must do all other things reasonably requested by the Principal to enable the Principal to obtain any input tax credit to which it is entitled;
- d. Nothing in this clause requires the Principal to pay any amount on account of a fine, penalty, interest or other amount for which the Contractor is liable, to the extent that the liability arises as a consequence of a default of the Contractor;
- e. If the Principal makes any supply to the Contractor as a consequence of any matter arising under or in connection with the Contract, the Contractor must pay to the Principal an amount equal to any GST payable in relation to that supply.
- f. A party's obligation to reimburse the other party for an amount paid or payable to a third party includes GST on the amount paid or payable except to the extent that the party being reimbursed is entitled to claim an input tax credit for that GST.

47

Building and Construction Industry (Security of Payment) Act 2009 (ACT)

The Contractor must promptly give the Superintendent a copy of any notice given to the Contractor, or to any subcontractor (which in this clause includes any supplier or secondary subcontractor), under the *Building and Construction Industry (Security of Payment) Act 2009 (ACT)* (in this clause referred to as "the Act"). The Contractor must give the copy of the notice to the Superintendent on the day on which it is received by the person to whom it is addressed;

The Contractor must indemnify the Principal against all damage, loss (including financial loss), cost, expense (including lawyer's fees on a

solicitor/client basis) or liability of any nature suffered by the Principal arising out of any suspension by a subcontractor under the Act or a failure by the Contractor to comply with its obligations under paragraph (a) of this clause.

48 Contractor's Warranties

The Contractor warrants that:

- g. the WUC will be carried out in a proper and workmanlike manner using good quality materials and in accordance with all of the requirements of the Contract;
- h. the execution of the WUC will comply with good industry practice;
- i. it has adequate financial, technical and managerial resources to carry out and complete the Works;
- j. It has, to the extent that a competent builder would be reasonable required to do so:
 - i. examined carefully and has acquired actual knowledge of the contents of all documents and information made available to the Contractor for the purpose of the Works or otherwise available to the Contractor on the making of enquiries; and
 - ii. satisfied itself as to the correctness and sufficiency of the allowances in the Contract Sum for the WUC.

49 Key Personnel

The Contractor shall ensure that the Key Personnel are dedicated to WUC and:

- k. are available at all times to perform the work for which they are nominated and at any other time requested by the Superintendent or the Principal;
- l. are appropriately qualified, trained, instructed and skilled to carry out their respective roles and responsibilities;
- m. attend all meetings requested by the Superintendent or the Principal; and
- n. Properly perform their respective roles and responsibilities.

If any of the Contractor's Key Personnel are unable to perform work as required by this clause or are removed following a direction of the Superintendent under clause 23, the Contractor must at the earliest opportunity provide appropriate replacement Personnel. The Principal must consent in writing in advance to any replacement of the Contractor's Key Personnel.

50 Appointment as Principal Contractor

For the purposes of the *Work Health and Safety Act 2011* (WHS Act) and the Work Health and Safety Regulations, the Principal:

- o. appoints the Contractor as the principal contractor for the Works (Principal Contractor) and the Contractor accepts that appointment; and
- p. authorizes the Contractor to exercise such authority of the Principal as is necessary to enable the Contractor to discharge the responsibilities imposed on the Contractor by the OH & S Regulation in its function as Principal Contractor.

Without limiting its duty to perform the Works, the Contractor must comply strictly with the Work Health and Safety Act 2011(WHS Act) and the Work Health and Safety Regulations 2011(WHS Regulations), including without limitation, by complying with its obligations as the 'Principal Contractor'.

The Contractor shall comply with its obligations under this clause at its own costs.

51 Progress Reporting

Monthly progress reports are to be provided by the Contractor. The format of the report is to be agreed by the Superintendent and Contractor prior to the issue of the first report. The report as a minimum must cover:

- q. Construction Management Program
- r. Monthly Program Update
- s. Risk Report
- t. Cost Report
- u. Design Report
- v. WH&S & EMS Reports
- w. Quality Assurance
- x. Design Consultant Report

52 Principal-supplied documents

52.1 Responsibility

The intention of this clause is that the Contractor takes responsibility for the internal consistency and coordination of the Principal-supplied documents.

The *Contractor* shall accept responsibility for the assessment of the Principal-supplied documents, the identification of omissions, inconsistencies and failure of coordination and the recommendation of suitable alternate solutions to the *Superintendent* for approval. The Contractor must provide its review of the Principal-supplied documents to the Superintendent before gaining access to the site. The cost of such assessment, coordination, preparation of alternate proposals (including any necessary design) and all costs associated with implementing those alternative proposals are to be borne by the *Contractor* and are deemed to be included in the *contract sum*.

The *Contractor's* costs of compliance with this clause will not entitle the *Contractor* to any additional costs for the time or work involved in preparing detailed quotations or other advice to the *Superintendent*.

52.2 Notification

The *Contractor* shall notify the *Superintendent* immediately upon identification of an omission, inconsistency or failure of coordination in the Principal-supplied documentation. The *Contractor* shall submit a suitable alternate proposal to the *Superintendent* not later than 25 business days before the date at which the instruction to proceed with an alternate proposal is required such that there is no adverse effect on the *construction program*. The *Contractor* shall not proceed with the implementation of the alternate proposal until approval in writing is received from the *Superintendent*. The *Contractor's* alternate proposal must be of equal or higher quality / intent as that documented in the Principal-supplied documentation and must be fit for the application.

52.3 Approval

The *Superintendent* shall not reasonably withhold approval of a suitable alternate proposal, and in any case must assess the submitted alternate proposal as soon as practicable and notify the *Contractor* within 10 business days after the *Superintendent* receives the notice under clause 52.2:

- y. of approval to proceed with the implementation of the proposed alternate solution; or
- z. that the *Contractor's* alternate proposal is not approved, including an explanation of the reasons the alternate proposal is not approved, in which case clause 58.4 will apply.

52.4 Obligation

Within 5 business days of receiving a notice under clause 52.3 (b), the *Contractor* must:

- aa. prepare a further alternate proposal of equal or higher quality as that documented in the Principal-supplied documentation, that is fit for the application and that addresses the reasons for the proposal submitted under clause 58.2 having been not approved; and
- bb. Submit its estimate of any change in the cost of the construction of this component in comparison to the proposal submitted under clause 58.2.

52.5 Dispute Resolution

If the *Superintendent* notifies the *Contractor* within 10 business days after the receipt of a notice under clause 52.4 that it accepts the matters set out in that notice or if a notice is given under clause 52.3 a), the *Contractor* must undertake the necessary design amendments and implement the alternate proposal so as to have no adverse effect on the *construction program*.

If the *Superintendent* does not accept the matters set out in the *Contractor's* notice under clause 52.4, this non-acceptance will be deemed to be a notice of dispute under clause 42 (Dispute resolution) and the matters specified under clause 58.4 will be determined in accordance with clause 42 (Dispute Resolution).

53 Representations made as part of tender

Unless inconsistent with these terms and conditions, the Contractor must comply with all representations made as part of its tender and the subsequent meetings and correspondence for the WUC.

54 Work Health and Safety

54.1 Compliance with Work Health and Safety Act 2011

The Contractor agrees to comply with all its obligations under the Commonwealth and ACT Work Health and Safety Act 2011. The Contractor shall submit with each progress claim, a statutory declaration, in a form to be approved by the Superintendent, identifying any Work Health and Safety incidents that have occurred during the claim period and confirming that it has:

- a. eliminated risks to health and safety, so far as is reasonably practicable; and
- b. if it is not reasonably practicable to eliminate risks to health and safety, it has minimised those risks so far as is reasonably practicable.

54.2 Withholding payment – WHS obligations

Subject to Clause 38.3, the Principal may withhold moneys certified due and payable in respect of the progress claim until the Contractor complies with subclause 54.1

55 Workplace Gender Equality Act 2012

The Contractor must:

- a. comply with its obligations, if any, under the *Workplace Gender Equality Act 2012*; and
- b. not enter into a subcontract under the Contract with a subcontractor named by the Director of Workplace Gender Equality Agency as an employer not currently complying with the Act.

56 Provisional Sum Work

Tendering Provisional Sum

- 56.1 Unless the Superintendent directs otherwise, the Contractor must obtain for each Provisional Sum Trade Package Contract the Principal's prior endorsement of a list of at least 3 prospective tenderers from whom competitive tenders will be invited.

56.2 Unless the Superintendent directs otherwise the Contractor must call tenders from each of the endorsed prospective tenderer and any other tenderer identified by the Superintendent.

56.3 In conducting a tender for a Provisional Sum Trade Package Contract the Contractor must:-

- a. Undertake the tender in a proper and professional manner; without any conflict of interest and to the highest standards of probity;
- b. Undertake the tender with the objective of achieving 'value for money', 'encouraging competition', 'efficient, effective, economic and ethical procurement' as described in the Commonwealth Procurement Rules;
- c. Unless the Superintendent approves otherwise, ensure that the contract is a fixed lump sum contract and that the tender contains a schedule of rates and prices and quantities, with rates and prices when applied to the quantities and after taking into account any relevant costs and expenses equals the fixed lump sum offered price;
- d. Ensure that each tenderer complies with Commonwealth Policies and any additional matters required by the Superintendent.

Evaluation of Provisional Sum Trade Package Contracts

56.4 If requested by the Superintendent the Contractor must:-

- a. Provide a copy of all tender documents and offers received;
- b. Promptly after the opening of tenders give details of the tenderers respective prices in a form as directed by the Superintendent.

56.5 The Contractor shall promptly carry out the assessment of tenders for each Trade Package contract to determine the best 'value for money' tenderer. In making such assessment the Contractor shall be satisfied that the tenderer can comply with the technical and other specified requirements of the relevant Trade Package contract and also has the physical, financial and technical capacity to perform the specified work.

56.6 Unless the Superintendent directs otherwise, the Contractor shall provide a written report on the tender evaluation process commenting on the physical, financial and technical capacity of all tenderers with a recommendation of a 'preferred tenderer' and why the 'preferred tenderer' represents best 'value for money'.

56.7 Subject to the requirements of this clause, the Contractor shall determine the terms and conditions of the Provisional Sum Trade Package contracts.

Requirements of Provisional Sum Trade Package Contracts

56.8 The Contractor shall use its reasonable endeavours to ensure that all Provisional Sum Trade Package Contracts -

- a. are fixed price lump sum contracts and (unless the Superintendent determines otherwise) contain a schedule of rates for pricing variations comparable to the schedule of rates and process provided as part of the tender; and
- b. comply with Commonwealth policies.

56.9 If directed by the Superintendent:-

- a. the Contractor will provide a copy of all Provisional Sum Trade Package documentation (including the contract) to the Superintendent promptly on request;
- b. the Contractor shall obtain the Superintendent's approval to the terms of any Provisional Sum Trade Package contract before entering into the contract.

Conflicts of Interest

56.10 Unless otherwise approved by the Superintendent the Lessor shall not itself tender for Provisional Sum Trade Package contracts and shall not invite any partner or any company of which it is a subsidiary or which is a subsidiary of it, or any associated or any related company, within the meaning of the Corporations Act, to tender for any Provisional Sum Trade Package contract.

56.11 Where any actual or potential conflict of interest situation arises in the course of tendering for or executing the Provisional Sum Work, the Contractor shall advise the Superintendent and comply with any direction given by the Superintendent if any.

56.12 No Trade Package contract shall require the Fitout subcontractor or specified Fitout subcontractor to provide services, labour or materials which are to be provided by the Lessor as part of its Fitout Service.

57. Books and records

Contractor to keep books and records

57.1 The Contractor shall:

- (a) keep and shall require its subcontractors to keep adequate books and records, in accordance with Australian accounting standards, in sufficient detail to enable the amounts payable by the Principal under the Contract to be determined; and
- (a) retain and require its subcontractors to retain for a period of 7 years after termination or expiration of the Contract all books and records relating to the Works.

Costs

57.2 The Contractor shall bear its own costs of complying with this clause.

Survival

- 57.3 This clause applies for the term of the Contract and for a period of 7 years from the termination or expiry of this Contract.

58 Site Meetings

The Contractor must attend site meetings throughout the duration of the Contract on a weekly basis or at a frequency determined by mutual agreement between the Contractor and the Superintendent. The meetings are to be attended by the Superintendent, Contractor and relevant subcontractors. The Contractor shall keep minutes of the meeting and provide copies to all relevant parties within 2 working days after each meeting.

59 Privacy

- 59.1 In this clause, Australian Privacy Principle has the same meaning as it has in the Privacy Act 1988 (Cth).
- 59.2 The Contractor agrees, in carrying out WUC, not to do any act or engage in any practice which, if done or engaged in by the Principal, would be a breach of an Australian Privacy Principle.
- 59.3 The Contractor agrees to notify the Principal immediately if it becomes aware of a breach or possible breach of any of its obligations under this clause.

ANNEXURE PART D

ANNEXURE PART D – PRINCIPAL SUPPLIED DOCUMENTS

Drawings– as detailed in Schedule of Drawings and Documents forming part 1.1.2 of Preliminaries & Architectural Technical Specification 2573-SP1/A

Specifications - as detailed in Preliminaries & Architectural Technical Specification 2573-SP1/A (Reference

Preliminaries - as detailed in Preliminaries & Architectural Technical Specification 2573-SP1/A

Contractor Handbook (Site Terms and Conditions)

Court sittings calendar available at <http://www.hcourt.gov.au/registry/court-calendar-2019>

ANNEXURE PART E

**ANNEXURE PART E –PRACTICAL COMPLETION, LIQUIDATED DAMAGES AND
DELAY DAMAGES**

Damages

practical completion Date	
Liquidated damages	No liquidated damages are payable for delay. Any entitlement to damages for delay will be calculated in accordance with common law principles
Delay damages	

ANNEXURE PART F – PROVISIONAL SUM

Provisional Sum

Provisional Sum	Amount

In the event of a Provisional Sum not being expended or being greater or less than the amount stated, then the amount of the difference shall be certified by the and shall be taken into account in determining the final Contract sum. Where any adjustment is made that adjustment shall not include any amount on account of profit or attendance on the part of the Contractor.

ANNEXURE PART G – SCHEDULE OF RATES

Ideally a schedule of rates should be included to value variations. The rates should be for work only ie without any allowance for oncosts, overheads or profit (these should be covered by the Delay Rate)

(To be inserted)