
**Layperson's Guide to
the Main Construction Contract for the Otago Stadium
with Hawkins Construction Limited**

THIS GUIDE

This guide is in two parts:

Part A : An explanation of the key concepts in the Contract.

Part B : A longer summary of the main provisions of the Contract.

Public Version

PART A : An Explanation of the Key Concepts in the Contract

PARTIES TO CONTRACT

There are three parties to the Contract: The Carisbrook Stadium Charitable Trust ("CST") as the Council's agent, the Contractor (Hawkins Construction Limited) and the Council itself so as to evidence Council approval of the Contract and because Council has all financial liability under the contract. The Contract becomes binding when the Council executes it.

STRUCTURE OF CONTRACT

The Contract as a whole comprises:

- a. the main body of the contract (clauses 1 to 25) – 65 pages;
- b. 13 Schedules containing the detailed operational information, Project Requirements, commercially sensitive information, a Master Programme, forms of subsidiary guarantee and performance bond agreements and some explanatory material – about 100 pages;
- c. the "Contract Documents" listed or referred to in Schedule 1 – these fill about four Eastlight ringbinders.

NATURE OF CONTRACT

The contract is a guaranteed maximum price ("**GMP**") contract. The Contractor is required to construct and complete the new Stadium for no more than the GMP by 1 August 2011 ("**Date for Practical Completion**").

The four major elements giving rise to legal risk under any construction contract are price, design risk, delay and general operational risk.

PRICE

Key Concepts: The key concepts are that:

- a. The GMP is the guaranteed final maximum price for the construction Works.¹
- b. the amount Council actually has to pay Hawkins is the "Contract Sum", which cannot be higher than the GMP.
- c. the GMP (as at the date the Contract is signed) can change because of 'Scope Amendments'². A change to the GMP can be upwards or downwards.

¹ The 'Works' are everything Hawkins is obliged to do or have done under the Contract, including all the work to be subcontracted by Hawkins. The 'Works' do not include the services of the Design Consultants engaged by CST.

² This is the term used for variations to the agreed scope of the construction 'Works' after the Contract is entered into.

- d. Hawkins bears the risk of its actual total construction cost being higher than the GMP (as adjusted for Scope Amendments).
- e. If the Contract Sum is lower than the GMP (as adjusted for Scope Amendments), savings are shared between the Council and Hawkins in the manner specified in Schedule 2.

The GMP: The GMP as at the date the Contract is signed (i.e. before any Scope Amendments) is made up of:

- a. the 'Guaranteed Maximum Construction Sum' – This is the amount it is predicted at tender time that the construction 'Works' will cost, excluding items b. to d. below.
- b. the 'Provisional Sum' – This is the total of the provisional sum items stated in Schedule 8³;
- c. the 'Fixed Preliminaries and General Sum' (usually shortened to "Fixed P&G") – This is the dollar figure stated in Schedule 2, Item 3.2 b.;
- d. the 'Fixed Percentage Margin Sum' – This is the Contractor's profit margin. It is an agreed percentage of items a. to c. above. It remains fixed by reference to the GMP, not to the actual construction cost.

For the purposes of calculating the maximum total cost to the Council only, the GMP also includes the Contractor's fixed fee for assisting CST with the project scoping, design development and indicative costing processes already undertaken by Hawkins since November 2008 under a separate "Preferred Contractor Contract".

DESIGN RISK/SCOPE AMENDMENTS

The detailed design of the stadium is well advanced and is due to be completed by 30 June 2009. CST has engaged the design consultants and therefore substantially all design risk, whether of errors in design or of material changes to design, is borne by CST. The key concepts are then that:

- a. the agreed scope is determined by reference to the 'Project Requirements' in Schedule 5;
- b. the Project Requirements contain statements of intent and general principle and references to the existing Contract Documents that define the design to its current state of development (the developed design);
- c. the detailed design process due to be completed by 30 June 2009 results in 'Final Plans and Specifications' approved by CST, which are within the original scope so long as they are within the statements of intent and general principle set out in Schedule 5 and flow from the existing developed design shown in the Contract Documents;

³ This total is subject to verification by the Project Manager. Any adjustment as a result of verification adjusts the GMP.

- d. a design error or material change in design results in a 'Scope Amendment', which is directed or agreed by the Project Manager (on behalf of CST) and subject to dispute resolution;
- e. any 'Scope Amendment' results in a change to the GMP and can result in a change to the Date for Practical Completion;
- f. a Scope Amendment can mean the GMP goes up (a 'positive' adjustment) or down (a 'negative' adjustment).

The parties have sought to lessen the risk of dispute about Scope Amendments by agreeing that changes in detailed design for the following summarised reasons are outside the agreed scope: material errors or omissions inherent in the original design, changes to the original intent or scope, addition of detail requiring extraordinary techniques, materials or working practices, and design changes due to legislative changes.

Delays incurred by the Contractor arising from Scope Amendment directed by the Project Manager (e.g. because a new plan or specification has to be prepared to remedy an error in design) can itself be a Scope Amendment, as the resulting delay is a cost to the Contractor that is outside its control. The Contractor is entitled to be paid for the processing of Scope Amendments.

DELAY

The scheduled Date for Practical Completion and handover of the stadium is 1 August 2011. The Contractor is entitled to extension of time and delay costs for suspension by CST of any part of the Work (other than through the fault of the Contractor), delay or breach of contract by CST, or events which are beyond the Contractor's control and which are not agreed to be the Contractor's risk.

If the Contractor fails to achieve Practical Completion by 1 August 2011 (as adjusted for any legitimate extension of time) for any other reason, the Contractor is liable to pay 'liquidated damages' – an agreed dollar figure representing the estimated cost to the Council for each day the Contractor is overdue.

Extraordinary weather delay is the main uncontrollable timing risk taken by the Contractor. The Construction Programme includes a delay allowance for bad weather, so as to achieve Practical Completion by 1 August 2011, and a liquidated damages allowance. So the risk of weather delays beyond those allowances is on the Contractor.

The diagram in Schedule 13 helps explain what happens if excusable and inexcusable delays occur at the same time.

GENERAL OPERATIONAL RISK

Project Control Group ("PCG"): Oversight is provided by the PCG, comprising the Contractor's Representative, a representative of CST, the Project Manager's ("PM") representative, the Architect's representatives, the Quantity Surveyor's representative and any other person the PM considers should be involved in any meeting of the PCG. Meetings of the PCG will take place monthly, with the main focus of these meetings being improvements in project delivery.

The Master Programme and Construction Programme: An agreed high level Master Programme is included in the Contract as Schedule 4. Within 10 Business Days of contract execution, the Contractor must produce a more detailed Construction Programme for approval by the PM on behalf of CST. The Construction Programme is to include a Documentation Programme detailing the design development and documentation, tendering, subcontracting and delivery processes yet to be completed or undertaken. The Contractor must provide monthly status reports against the Construction Programme.

Suspension and Acceleration: The PM may at any time instruct the Contractor to suspend the Works or to accelerate any part of the Works, even where the Contractor is complying with the Master Programme.

Subcontractors: The Contractor has overall responsibility for managing and calling for all subcontractors' tenders. The Contractor is required to work closely with the PM throughout this process on an 'open book' basis. This is the mechanism by which CST can monitor the Contractor's selection of subcontractors and the extent of local subcontractor involvement in the project. The Contractor remains responsible for all subcontracted work. CST has the right to require removal and replacement of an unsatisfactory subcontractor.

Site Risk: Site risk lies with the Contractor, including the operational risk of dealing with unforeseen Site conditions and hazardous substances. We understand the allocation of cost risk for these issues remains to be determined by the Council. The Contractor will develop 'Site Rules' for the PM to approve, which anyone going onto the Site must comply with.

GENERAL

Contractor Design: Although CST has overall design responsibility and risk, CST relies on the Contractor to carry out a number of design-related obligations, including reviewing and satisfying itself as to the buildability of all designs, verifying that the design complies with the Project Requirements and executing the Works in accordance with the Project Requirements.

Statutory Compliance: CST is responsible for obtaining all resource and building consents required under the contract at its own cost. The Contractor will provide to CST all information necessary for the issue of any code compliance certificate and to assist CST with obtaining any permits and consents required for operation of the Works. The Contractor will pay all fees and charges in connection with work permits and service connections.

Defects Liability Period: This is a 12-month period commencing on Practical Completion of the Works (or any Section of the Works) during which the Contractor is required to rectify any defects in the Works that arise during this period. No "Sections of the Works" have been identified at present. The PM may identify Sections of the Works during construction.

Progress Payment Claims: The Contractor will submit monthly progress payment claims. The PM and QS will jointly issue a progress payment schedule certifying the amount payable in respect of each payment claim. The PM will require the Contractor to certify that approved subcontractors' payments have been made. This is the mechanism by which CST can monitor the Contractor's financial management of its subcontractor relationships.

Retentions: CST is entitled to withhold a percentage from each progress payment due to the Contractor, up to the cumulative maximum figure specified in clause 17.5. The total amount of retentions reduces under that clause on issue of the certificate of Practical Completion.

Final Payment: Following issue of the last certificate of Practical Completion, the Contractor must submit a final payment claim to the QS. This will be treated as a full and conclusive statement by the Contractor of the maximum amount the Contractor believes it is entitled to receive. The QS and the PM will jointly issue a final payment schedule to CST and the Contractor certifying the final amount payable, which will be payable by the relevant party within 20 business days.

Dispute Resolution: Any dispute under the contract must first be referred to the Chief Executive Officer of CST and the Chief Executive of the Contractor for resolution. If the participants are unable to resolve the dispute within 72 hours, the dispute can be escalated and referred to mediation and ultimately to arbitration.

Termination: CST is entitled to terminate if the Contractor commits any of the specified default events set out in the contract, commits an act of insolvency or commits any other breach of a term of the contract. CST also has the right to terminate at its convenience. CST must then pay the Contractor a specified percentage (see Schedule 2) of the amount still required to be paid under the Contract at that time.

Performance Bond: The Contractor is required to provide CST with a performance bond from an approved insurance company⁴ for the figure specified in Schedule 2 within 5 business days of commencing work. CST also has the right to require the Contractor to use best endeavours to obtain a replacement performance bond if the original bond ceases to be valid and enforceable or CST reasonably considers the bond provider is at risk. The bond will be released following Practical Completion of the whole of the Works. A performance bond is generally considered of real value only in a worst case scenario. In most circumstances, the cash retentions amount referred to above is the more important discipline for Contractor performance.

Indemnity: The Contractor is required to indemnify CST against any loss suffered by CST (including costs) arising out of or in consequence of the Contractor's breach of contract or matters for which the Contractor is responsible under the contract.

CST's Role and Trustee Liability: CST's role under the Contract is entirely as the Council's agent. The liability of CST (so long as it is acting as agent within the powers granted by the Council) and of CST's trustees is excluded.

Insurance: CST is responsible for arranging contract works insurance and insurance to cover loss or damage to any existing structures on or adjoining the site that are owned by the Council and that might be affected by the Works and are not to be demolished as part of the Works.

The Contractor is responsible for arranging:

- insurance on the Contractor's plant and equipment while on site;
- public liability insurance ([\$] for any one claim or series of claims arising out of the same occurrence, with no overall cap on the total amount payable in respect of all occurrences);
- motor vehicle insurance ([\$]); and
- insurance against any liability arising from death or injury to any person employed by the Contractor in connection with the Works.

All insurances must name the other parties for their respective rights and interests.

⁴ The Contractor has nominated QBE Insurance

PART B : Summary of the Main Provisions of the Contract

PARTIES

- 1 **The Carisbrook Stadium Charitable Trust ("CST")** as agent for Dunedin City Council ("**the Council**")
- 2 **Hawkins Construction Limited ("the Contractor")**
- 3 **Dunedin City Council ("the Council")**

CONTRACT

The contract is a guaranteed maximum price ("**GMP**") contract.

The Contractor is required to construct and complete the new Otago Stadium for no more than the GMP by 1 August 2011 ("**Date for Practical Completion**"). The contract provides for permitted adjustments to the Date for Practical Completion, eg any Scope Amendments directed by the Project Manager (see the section entitled "Scope Amendments" below for further details).

KEY PEOPLE

Project Manager ("PM")

The PM has a dual role under the contract. Where the PM is assessing and certifying progress and other claims under the contract, the PM is required to act impartially. In relation to all other matters, the PM represents CST and will act in the interests of CST. In both cases, the PM must act reasonably and honestly. The Contractor must comply with all instruction issued by the PM.

Contractor's Representative

The Contractor's Representative is essentially the Contractor's project manager under the contract. The Contractor's Representative has authority to direct and co-ordinate the Contractor's work, to give and receive communications under the contract and to exercise any other function of the Contractor.

Architect

The Architect is a joint venture of HOK Sport & Event & Venue Pty Limited and Jasmax Limited.

Quantity Surveyor ("QS")

The QS is Rawlinsons.

Project Control Group ("PCG")

The PCG will meet on a monthly basis and comprises the Contractor's Representative, a representative of CST, the PM, the Architect, the QS and any other person the PM considers should be involved in any meeting of the PCG. The main function of the PCG is to consider any status report prepared by the Contractor and agree the ways in which delivery of the project can be improved in terms of quality, timeliness and cost effectiveness.

PRICE

The price for the construction of the new Otago Stadium will be the lesser of the GMP and the Contract Sum.

Guaranteed Maximum Price

The GMP for the project is [\$]. The GMP is made up of four separate components:

1. **The Guaranteed Maximum Construction Sum:** [\$]. This is the component of the GMP that the Contractor has allowed for and is the maximum amount CST will be liable to pay to the Contractor for the Works.
2. **The Provisional Sum:** This is the total of the provisional sums specified in Schedule 8.
3. **The Fixed Preliminaries and General Sum:** This is a fixed amount of [\$], representing the component of the GMP that the Contractor has allowed for to meet all of its resource establishment requirements both on and off site.
4. **The Fixed Percentage Margin Sum:** [\$]. This is the component of the GMP that the Contractor has allowed for Contractor's profit. It is calculated at []% of the Guaranteed Maximum Construction Sum, the Provisional Sum and the Fixed Preliminaries and General Sum.

For the purposes of calculating the maximum total cost to the Council only, the GMP also includes the Contractor's fixed fee for assisting CST with the project scoping, design development and indicative costing processes already undertaken by Hawkins since November 2008 under a separate "Preferred Contractor Contract".

The GMP will only be adjusted by reason of:

- i. Scope Amendments;
- ii. establishment of the verified cost of any Provisional Sum; and
- iii. any consequential adjustments to the Fixed Preliminaries and General Sum and Fixed Percentage Margin Sum by reason of (i) and (ii) above.

Contract Sum

The Contract Sum is made up of three separate components:

1. **The Actual Construction Sum:** This is the actual verified cost of constructing the new Otago Stadium. This amount includes all work comprised in any Scope

Amendment and any construction contingency, escalation provision and provisional sum actually incurred.

2. **The Fixed Preliminaries and General Sum:** This is a fixed amount of [\$] representing the component of the Contract Sum that the Contractor has allowed for to meet all of its resource establishment requirements both on and off site.
3. **The Fixed Percentage Margin Sum:** [\$]. This is the component of the Contract Sum that the Contractor has allowed for Contractor's profit. It is calculated at []% of the Actual Construction Sum and the Fixed Preliminaries and General Sum.

SAVINGS

In no circumstances will the Contract Sum exceed the GMP. In other words, the GMP is the maximum amount the CST will be liable to pay to the Contractor for the Works.

If the Contract Sum is less than the GMP, the savings achieved will be shared by CST and the Contractor in the manner specified in Schedule 2.

SITE

The Contractor is to be given possession of the site in accordance with the Master Programme.

The Contractor is required to confirm that it has inspected the site and is satisfied as to the location of services, the previous use of the site and adjoining land, the nature of any existing structures or improvements, site access and requirements to maintain CST's (or any other person's) existing lawful operations adjacent to the site. As such, site risk generally lies with the Contractor. However, with regard to subsurface conditions and hazardous substances, cost risk is not expressly allocated in the Contract on the basis that the Council has yet to make a commercial decision as to responsibility for these risks.

DESIGN

CST is responsible for engaging, briefing and instructing the Design Consultants on the development and documentation of the design for the project. While as between the contracting parties CST has overall design responsibility, the Contractor has a number of design-related obligations. A summary of these obligations is as follows:

- to advise and assist CST throughout the phases of developed design and documentation;
- to assist with the co-ordination and management of the Design Consultants;
- to advise in respect of buildability, quality and general compliance by the Design Consultants with the Project Requirements;

- to advise and assist CST in respect of issues of suitability, durability and maintenance considerations for materials or systems selected or recommended by the Design Consultants; and
- to provide all reasonable assistance and support to the PM and the Architect to ensure that design documentation is produced in an orderly and timely fashion.

In addition, the Contractor is responsible for reviewing and satisfying itself as to the buildability of all designs produced by the Design Consultants and is required to use its reasonable endeavours to verify that the design and design documentation complies with the Project Requirements.

The Contractor is responsible for executing the Works in accordance with the Final Plans and Specifications, and otherwise complying with the Project Requirements and the Contract. Any approval by the PM and CST under the design development and documentation processes of any element of design constitutes confirmation by CST that the design for the element concerned, so far as development of that design has occurred, is approved by CST.

Where the Contractor believes that an element of the design or the design documentation does not comply with the Project Requirements or contains errors, the Contractor must notify the PM, the Architect, the relevant Design Consultant and any other Design Consultant whose work may be affected by the non-compliance/errors.

Where the Contractor has design responsibility in respect of any package of work (ie where design for a package of work or any part thereof is not being performed by CST's Design Consultants), the Contractor is responsible for ensuring that the design complies with the Project Requirements and Contract Documents.

SUBCONTRACTORS

The Contractor has overall responsibility for managing and calling for all subtrade tenders. However, the Contractor is required to work closely with the PM throughout this process, as detailed below:

- The Contractor may only call for tenders from recommended subcontractors approved by the PM.
- The tender documents need to be approved by the PM.
- All tenders will close at the office of the PM.
- All tenders are to be opened in the presence of the PM.
- The Contractor is required to assess tenders in consultation with the PM.
- The Contractor must not consult or negotiate with any tenderer without the prior approval of the PM.
- The Contractor will consult and liaise with the PM over the selection of any subcontractor or supplier.

- The PM's approval is required prior to the Contractor engaging any subcontractor or supplier, including as to the form of subcontract or conditions of supply.

The Contractor is responsible for co-ordinating the work of all subcontractors engaged by the Contractor. The Contractor is not relieved from any of its liabilities or obligations under the contract by subcontracting any part of the Works and remains responsible for all subcontracted work.

The Contractor is required to obtain guarantees from the subcontractors and suppliers in favour of CST and must also provide to CST a guarantee in respect of the completed Works. In addition, the Contractor must ensure that where the contract requires warranties in respect of any services or materials supplied by the Contractor, the Contractor will procure a warranty from the relevant supplier or manufacturer of the services or materials in favour of CST and any subsequent owners, lessees, occupiers or operators of the Works.

COMPLIANCE

CST is responsible for obtaining all resource and building consents required under the contract at its own cost. CST is also responsible for providing to the relevant territorial authority the bonds referred to in the resource consents. If a claim is made under any bond and the Contractor's action or inaction in breach of the Contract contributed to the claim, the Contractor will indemnify CST for any resulting liability to the extent of its contribution.

The Contractor will give CST all information necessary for the relevant territorial authority to issue any code compliance certificate to enable occupation of the Works. The Contractor will also provide any information required by CST to assist CST with obtaining any permits and consents necessary for operation of the Works.

The Contractor must comply with all relevant legislative requirements, consents and approvals in carrying out the Works. The Contractor will pay all fees and charges in connection with work permits and service connections.

SCOPE AMENDMENTS

A Scope Amendment is any direction of the PM that has the effect of:

- i. increasing, decreasing, adding to, or omitting any part of the Project Requirements;
- ii. changing the character or quality of any material or work or changing the level, line, position or dimensions of any part of the Project Requirements; or
- iii. changing the sequence or duration of any part of the Works, provided the Contractor can prove that the change has materially impacted the time and/or cost of completing the Works.

The Contractor or CST may claim an adjustment to the GMP and/or an adjustment to the Date(s) for Practical Completion if the following apply:

- the change to the Project Requirements increases or decreases the amount of work to be performed by the Contractor or causes the Contractor to incur more or less cost; and

- the Contractor uses its reasonable endeavours to reduce any additional work, time and/or cost resulting from the Scope Amendment.

Where the Contractor is entitled to an extension of time due to any Scope Amendment, the Contractor will be entitled to reasonable compensation for time related costs together with an allowance for profit.

The GMP will be adjusted by the value of each Scope Amendment. The value of each Scope Amendment will be determined by agreement of the Contractor and PM, or failing agreement, in accordance with the following:

- The PM will assess a reasonable sum for the additional or saved work, taking into account any applicable rates in the schedule of rates.
- The PM will also assess the amount of actual and reasonable preliminaries for the Contractor's overheads, taking into account the rates appearing in the Contractor's priced preliminary and general schedule.
- The contract includes a cap of [\$] on the daily rate for extensions of the overall contract period. If the PM is required to assess delay costs, the value of the Scope Amendment will include the verified costs flowing directly from the cause of delay which entitles the Contractor to delay costs, up to the daily maximum for the Works.
- The Fixed Percentage Margin Sum will be calculated on the adjusted Guaranteed Maximum Construction Sum and the adjusted Fixed Preliminaries and General Sum

PRACTICAL COMPLETION

Practical Completion will be achieved when the Works:

- a. are complete, except for minor omissions and minor defects:
 - i. which do not prevent the Works from being used for its intended purposes;
 - ii. which the PM determines the Contractor has reasonable grounds for not promptly rectifying; and
 - iii. rectification of which will not prejudice the convenient intended uses of the Works;
- b. may be lawfully occupied by CST (but only to the extent that the Contractor has responsibility for achieving any requirement or prerequisite for lawful occupation); and
- c. all other contractual requirements for Practical Completion have been complied with (for example provision of all relevant documents, certificates, plans and operating manuals, provision of all guarantees and warranties, satisfactory completion of all relevant testing).

If CST occupies part of the Works prior to the Date of Practical Completion to the exclusion of the Contractor, CST will be fully responsible for that part of the Works for the duration of CST's occupation.

DEFECTS LIABILITY

The Defects Liability Period is a 12-month period commencing on Practical Completion of the Works. The Contractor is required to rectify any defect in the Works that arises during that period.

Upon expiry of the Defects Liability Period, if the Contractor has rectified all defects notified to it during that period, the PM will issue a final certificate for all of the Works.

TIME & PROGRESS

Programme

The Contractor is required to perform the Works in accordance with the Master Programme and complete the Works by the Date for Practical Completion.

Liquidated Damages

If the Contractor fails to achieve Practical Completion in respect of the Works by the Date for Practical Completion, the Contractor will be liable to pay liquidated damages to CST for every day that Practical Completion is delayed. It is intended that the daily liquidated damages rate represents a genuine pre-estimate of the loss that CST is likely to incur for each day that Practical Completion in respect of the Works is delayed.

Liquidated damages are CST's only remedy in damages in the event of delay.

Suspension

The PM may at any time instruct the Contractor to suspend any part, or all, of the Works. If the suspension is not the result of a breach of contract by the Contractor, the Contractor is entitled to claim an extension of time and delay costs. If however the PM's instruction to suspend the work arises out of a material breach of contract by the Contractor, the Contractor will not be entitled to make any claim in respect of that suspension.

Acceleration

The PM may instruct the Contractor to accelerate any part of the Works, even in circumstances where the Contractor is complying with the Master Programme. If the PM instructs the Contractor to accelerate any part of the Works, the Contractor will be entitled to claim an adjustment to the GMP only if at the date of such instruction the Contractor is complying with all aspects with the Master Programme affecting that part of the Works, or the Contractor is not complying at the date of such instruction with all aspects of the Master Programme affecting that part of the Works, and such non-compliance is caused by or contributed to by CST, its representatives, any separate contractor (not being a Subcontractor) or anyone for whose actions, as between CST and the Contractor, CST is responsible.

Extensions of Time

If the Contractor is delayed by any of the following events, the Contractor may be entitled to claim an adjustment to the date for Practical Completion in respect of the Works:

- a. a suspension of any part of the Works which is not due to the conduct of the Contractor;

- b. delay in obtaining any consent which is the responsibility of CST to obtain, or delay caused by breach of contract by CST; or
- c. a force majeure event (which is essentially any event beyond the control of the Contractor but not an obligation of the Contractor or a risk assumed by the Contractor under the contract).

The Contractor may only claim an adjustment to the date for Practical Completion in respect of the Works if all of the following apply:

- a. the Contractor is actually delayed (through changes or extensions to the critical path) in bringing the Works to Practical Completion by the scheduled date by any event giving rise to a right for the Contractor to claim an extension of time under the contract;
- b. the Contractor has taken, in the reasonable opinion of the PM, reasonable steps to minimise the effects of the delaying event;
- c. the Contractor has notified the PM of the delaying event as soon as practicable after the first occurrence of that event came to (or should have come to) the attention of the Contractor; and
- d. the Contractor has given the condition precedent notice.

The condition precedent notice referred to above is a notice to be given every time the Contractor wishes to claim an extension of time. The notice must be given within one month from when the Contractor became aware (or should have become aware) of its entitlement to make the claim. The notice needs to include details of the event and the consequence of the event, and any advice obtained from any consultant in respect of accommodating or rectifying the consequence of the event. The notice also needs to include the Contractor's estimate of the effect of the event on the master programme, and additional costs (if any) necessary to accommodate or rectify the consequence of the event. Finally, the notice needs to set out the steps the Contractor is able to take or has taken to reduce the amount of additional work, additional cost and/or additional time caused by the need to accommodate, or rectify the consequence of, the event.

PAYMENT

Progress Payment Claims & Progress Payment Schedules

The Contractor will submit a progress payment claim at the end of each month for work performed in that month. The PM and QS will consider the claim and jointly issue a progress payment schedule to CST and the Contractor certifying the amount payable in respect of the claim. The progress payment schedule will be issued within 10 business days of receipt of the progress payment claim. The QS and the PM will certify each progress payment by reference to the lesser of the value of work performed and the cost to complete the project at the time the progress payment claim is made, where applicable, by reference to the rates appearing in the schedule of rates.

Invoicing & Payment

Upon receipt of the progress payment schedule, the Contractor must immediately issue to CST a tax invoice under the GST Act 1985 for the scheduled amount. If the Contractor fails to do this, the PM is entitled to issue a tax invoice on behalf of the Contractor. At no time is

the Contractor entitled to certification of any amount for payment which will leave a balance of the unpaid adjusted GMP which is less than the cost to complete all work under the contract, as assessed by the QS. CST is required to pay the Contractor the amount in any progress payment schedule within 10 business days of receipt of the relevant tax invoice.

Final Payment Claim & Final Payment Schedule

Within 60 business day after the issue of the certificate of Practical Completion for the Works, the Contractor must submit to the QS a final payment claim for payment of what the Contractor considers to be any unpaid entitlement under the contract. The final certificate shall include any share of savings to which the Contractor believes it is entitled under the contract. If the Contractor fails to submit a final payment claim, the Contractor will be deemed to have foregone all rights to make any further payment claim under or in relation to the contract. If the Contractor does submit a final payment claim it will be treated as a full and conclusive statement by the Contractor of the maximum amount to which the Contractor believes it is entitled.

Within 30 business days after the QS and the PM receive the final payment claim from the Contractor, the QS and the PM will jointly issue a final payment schedule to CST and the Contractor certifying the final amount payable. The amount certified in the final payment schedule will be payable by the relevant party within 20 business days of receiving the final payment schedule, however this does not affect CST's ability to withhold the defects liability retentions until expiry of the Defects Liability Period.

DISPUTE RESOLUTION

Where a dispute arises under the contract either party may refer the dispute to the early resolution process. This involves the Chief Executive Officer of CST and the Chief Executive of the Contractor attempting to resolve the dispute. If the participants are unable to resolve the dispute within 72 hours of referral of the dispute to them, either the PM or the Contractor may give notice of the dispute to the other specifying the nature of the dispute, the factual basis for the dispute and the relief sought. The Contractor and CST will then explore in good faith whether or not the dispute can be resolved by reference to mediation. If any dispute is not resolved within 10 business days of the notice of dispute being given, either the Contractor or CST may notify the other party of its intention to refer the dispute to mediation. If no agreement has been reached in mediation and a dispute still exists, either the Contractor or CST may require the matter in dispute to be referred to arbitration. Any award given in arbitration is final and binding.

Neither the Contractor nor CST is entitled to suspend performance of any of its obligations under the contract because a dispute has been referred, is being determined or has been determined pursuant to the dispute resolution mechanism set out in the contract.

DEFAULT & TERMINATION

Contractor Default

CST is entitled to immediately determine the Contractor's engagement under the contract if the Contractor commits any of the specified default events set out in the contract (including unauthorised suspension of the Works, failure to perform the Works in accordance with contractual requirements, failure to complete the Works by the Date of Practical Completion and failure to rectify defects and omissions), commits an act of insolvency or commits any other breach of a term of the contract.

CST Default

The Contractor is entitled to determine its engagement under the contract if CST fails to make any payment or commits any other material breach of the contract and fails to remedy such failure or breach within 15 business days of written request by the Contractor.

Consequences of Termination

The obligations of the parties will cease as at the date of termination, however neither party will be relieved of liability in respect of any breach or failure to perform any contractual obligation arising prior to the date of termination or, in the case of the Contractor, the date the Contractor vacates the site (whichever is later).

There are a number of provisions setting out the Contractor's obligations and CST's rights in the event of termination for the Contractor's default, including the following:

- The Contractor is required to immediately vacate the site and hand over possession of the site and the Works to CST.
- CST may suspend any further payments to the Contractor.
- The Contractor is required to leave on site all temporary buildings, plant and equipment, machinery, fittings and unfixed materials intended to be incorporated into the Works. The Contractor's interest in the above and in the Works shall vest in CST as at the date of termination and CST is entitled to use the same if it elects to complete execution of the Works.
- CST can also require the Contractor to assign the benefit of any supply contracts or subcontracts relating to the Works to CST.

If CST terminates the contract for Contractor default and elects to complete execution of the Works:

- a. The PM will assess the cost to CST of completing execution of the Works.
- b. The PM will also certify the balance of the Contract Sum that would have been payable to the Contractor under the contract had it not been terminated.
- c. If the amount calculated under paragraph b. above is less than the amount calculated in paragraph a. above, the amount of the deficiency shall be payable by the Contractor to CST immediately upon written demand.
- d. If the amount calculated under paragraph b. above is more than the amount calculated in paragraph a. above, the amount of the excess shall be payable by CST to the Contractor following completion of execution of the Works by CST.
- e. If paragraph d. above applies, the amount payable by CST will be reduced by any reasonable costs or losses incurred by CST as a result of the Contractor's default in excess of those provided for in paragraph b. above or any further moneys payable by the Contractor to CST under the contract that were not provided for in the sum calculated in accordance with paragraph a. above.
- f. At expiry of the Defects Liability Period, CST is entitled to deduct from the retentions (see section entitled "Performance Security" below for further details) all further costs or liabilities CST has incurred as a consequence of all defects or omissions in the

execution of the Works arising through the Contractor's default or otherwise owing by the Contractor to CST under the contract.

- g. CST will release the uncalled portion (if any) of the performance bond after expiry of the Defects Liability Period and after payment by the Contractor of all moneys payable to CST under the contract.

If CST terminates the contract for Contractor default and elects not to complete execution of the Works:

- a. CST will pay the Contractor the value of work done by the Contractor up to the date of termination as certified by the PM, less all reasonable costs or losses CST has incurred as a consequence of the Contractor's default or otherwise owing by the Contractor to CST under the contract.
- b. CST will release the uncalled portion (if any) of the performance bond.

Termination for Convenience

CST also has the ability to determine the engagement of the Contractor at its convenience. In such circumstances, the Contractor will be entitled to payment of the following:

- the value of all work carried out under the contract to the date of determination (less amounts previously paid to the Contractor);
- all reasonable costs incurred by the Contractor as a direct result of the determination; and
- an amount equal to []% of the unpaid portion of the Contract Sum at the date of determination.

PERFORMANCE SECURITY

Under the contract there are two forms of performance security – cash retentions and the performance bond.

Retentions

CST is entitled to withhold from each progress payment due to the Contractor a sum calculated as follows:

from the first [\$] of the Contract Sum, []%; plus
 from the next [\$] of the Contract Sum, []%; plus
 []% of the Contract Sum in excess of [\$],
 but with a maximum of [\$] (plus GST).

CST is also entitled to deduct from any progress payment the amount of any liquidated damages, insurance deductibles, or other amounts which the Contractor may owe to CST under the Contract or in respect of the Project.

The defects liability retention for the Works shall be 50% of the sum determined by the PM by taking the assessed value of the Works and applying the calculations above to that assessed value. The defects liability retention shall be retained for the Works until expiry of the Defects Liability Period and shall be payable within 10 business days following expiry of the Defects Liability Period.

Performance Bond

The Contractor is required to provide CST with a performance bond to the value of [\$] within 5 business days of commencing work.

There are provisions in the contract relating to the adequacy of the performance bond, whereby CST can require the Contractor to provide replacement security if the performance bond is not delivered to CST within the required time or at any time ceases to be valid and enforceable. In such circumstances, CST is entitled to:

- instruct the PM to suspend the Works until the performance bond is delivered to CST and any such suspension will not be treated as a Scope Amendment (ie the Contractor will not be entitled to any extensions of time or any compensation as a result of such suspension);
- withhold any payment due to the Contractor until the performance bond is delivered to CST and the Contractor shall not be entitled to make any claims against CST by reason of any such withholding; and/or
- treat such failure as a default by the Contractor giving CST the ability to determine the Contractor's engagement under the contract.

If the third party providing the performance bond becomes, in the reasonable opinion of CST, at material risk of not being able to meet its obligations under the performance bond, CST can require the Contractor to obtain a new performance bond. The Contractor must use its best endeavours to obtain a replacement bond.

The performance bond will be released following Practical Completion of the Works.

LIABILITY

Indemnity

The Contractor is required to indemnify CST against any loss suffered or liability incurred by CST (including liability in respect of injuries to persons or damage to property), together with any costs incurred by CST in respect of such liability, arising out of or in consequence of the Contractor's breach of contract or matters for which the Contractor is responsible under the contract.

However, the Contractor's liability under this indemnity will be reduced by the extent that such liability arises as a direct result of a breach of contract by CST.

Limitation of Trustee Liability

The contract acknowledges that the Trustees of CST enter into the contract in their capacity as trustees of CST and not in their personal capacity or otherwise.

INSURANCE

Contract Works

CST is responsible for arranging contract works insurance. The amount of cover shall be for no less than the GMP, plus the following amounts (stated as percentages of the GMP):

- a. for the cost of demolition, disposal and preparation for replacement work, [];
- b. for professional fees including the cost of clerks of works and inspectors, and the Architect, []%; and
- c. for increased construction costs arising from fluctuations, []%.

Existing Structures

CST is responsible for arranging insurance to cover loss or damage to any existing structures on or adjoining the site that are owned by the Council and that might be affected by the Works and are not to be demolished as part of the Works. The insurance will be for the reinstatement or indemnity value of the existing structures provided that where CST insures for the indemnity value of the existing structures, it will have no claim against the Contractor in respect of the shortfall in the cover that would have been met had the insurance been for the reinstatement value.

Contractor's Plant

The Contractor will insure the Contractor's plant and equipment while on site. The amount of cover will be at least the current market value of the Contractor's plant and equipment. The contract acknowledges that this cover may not extend to cover small tools and plant with a value of less than [\$].

Public Liability

The Contractor will be responsible for arranging public liability insurance. The minimum amount of cover is [\$] for any one claim or series of claims arising out of the same occurrence. There is no limit on the total amount payable in respect of all occurrences.

The Contractor is also required to arrange insurance against liability arising from the use of any motor vehicle either belonging to, or under the care, custody or control of, the Contractor in connection with the execution of the Works. The minimum amount of cover is [\$].

Personal Injury

The Contractor and each subcontractor is required to arrange insurance against any liability arising from death or injury to any person employed by them respectively in connection with the Works, or as is otherwise required by any relevant workers compensation or insurance legislation.

General

All insurances must name the other parties for their respective rights and interests.