

Conditions of Contract – C7832.TIC.DC

**Transport Infrastructure Contract
Annexure B (Commercial Framework)
to the General Conditions of Contracts
for Design and Construct Contract**

November 2023



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1 Overview and defined terms

- 1.1 Item 8A of Annexure A specifies one of the following as the basis for calculating the Contract Sum:
- a) Alternative 2 – lump sum, or
 - b) Alternative 3 – part Schedule of Rates and part lump sum
 - c) Alternative 4 – cost reimbursable with a Guaranteed Maximum Price (GMP) or Gain / Pain Share model.
- 1.2 In this Contract, the following definitions apply:
- a) **Contract Sum** has the meaning given in Clauses 3.2 and 4.2 (as applicable) of this Commercial Framework and which, for the avoidance of doubt, includes any GST payable in respect of the relevant supply to which the payment relates.
 - b) **Schedule of Rates** means any schedule (other than a Schedule of Prices) included in the Contract which, in respect of any section or Item of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, Provisional Sums, other sums, quantities and prices. The rates of payment should not include an amount of GST in respect of the work.
 - c) **Schedule of Prices** means a schedule (other than a Schedule of Rates) which provides an itemised breakdown of the work under the Contract and which is priced by the Contractor in its Tender, with the sum of the prices and the amount of GST totalling the Contract Sum and a Schedule of Prices may also include an itemised table of work related tasks for which the Contractor is required to provide a unit rate in its Tender.

2 General

- 2.1 The Contract Sum is not subject to adjustment, except as expressly provided for under the Contract.

3 Schedule of Rates (Alternative 3)

- 3.1 This Clause 3 of the Commercial Framework applies. If Alternative 3 applies in Item 8A of Annexure A, but only in respect of that part of the work under the Contract which is not the work under the Contract to be paid on a lump sum basis, as specified in Item 44A of Annexure A.
- 3.2 The Contract Sum is the sum ascertained by:
- a) multiplying the measured quantity of each Item of work completed (measured in accordance with the Specifications) by the rate included in the Schedule of Rates
 - b) adjusting that sum by any additions or deductions made pursuant to the Contract
 - c) adding any GST in respect of the relevant supply, and
 - d) if Alternative 3 applies in Item 8A of Annexure A, adding the lump sum (including GST) applicable to the part of the work specified in Item 44A of Annexure A that is to be paid on a lump sum basis.

- 3.3 For the purposes of Clauses 18(g), 14.8 and 29.3 (if applicable) of the General Conditions of Contract and Item 11A of Annexure A, the Contract Sum is the amount specified in Item 44B of Annexure A.
- 3.4 Quantities in a Schedule of Rates are estimated quantities only and the Principal does not warrant, guarantee or make any representation with respect to the completeness, accuracy or adequacy of the Items and quantities in a Schedule of Rates.
- 3.5 A direction shall not be required to be given by the Administrator by reason of the actual quantity of an Item required to perform the Contract being greater or less than the quantity shown in the Schedule of Rates.
- 3.6 Where otherwise than by reason of a direction of the Administrator to vary the work under the Contract, the actual quantity of an Item required to perform the Contract is greater or less than the quantity shown in the Schedule of Rates, the tendered rate shall apply to the greater or lesser quantities within the limits of accuracy of Item 44C of Annexure A, and quantities outside the limits shall be valued under Clause 40.5 of the General Conditions of Contract as if they were varied work directed by the Administrator as a variation. However total payment for a reduced quantity of work will not exceed the amount calculated by multiplying the quantity of work, at the lower limit of accuracy, by the tendered rate.
- 3.7 If, in the opinion of the Administrator, a Schedule of Rates omits an Item which should have been included and the value of that Item exceeds \$10,000, the provisions of Clause 8.2 of the General Conditions of Contract shall apply.
- 3.8 If no rate or price is shown in a Schedule of Rates for an Item, the rate or price for that Item shall be deemed to have been included elsewhere in the Schedule of Rates.
- 3.9 The quantity of work under the Contract completed shall be measured in accordance with the standard method of measurement specified in Clause 2 of Specification (Measurement) MRS01 *Introduction to Specifications*, as amended or updated from time to time by the Principal.
- 3.10 Where the unit of measurement for an Item in the Schedule of Rates is stated as 'lump sum', the Contractor may include part of the relevant amount in a Claim for payment under Clause 42.1 of the General Conditions of Contract. Valuations of such Items will be made based on the Administrator's assessment of the percentage of completed and conforming work under the Contract or, where an appropriate formula is included in the Specifications associated with the particular work under the Contract, in accordance with that formula.

4 Lump sum (Alternative 2 and Alternative 3)

- 4.1 This Clause 4 of the Commercial Framework applies:
- a) if Alternative 2 applies in Item 8A of Annexure A, and
 - b) if Alternative 3 applies in Item 8A of Annexure A, but only in respect of that part of the work under the Contract to be paid on a lump sum basis, as specified in Item 44A of Annexure A.
- 4.2 The Contract Sum is the lump sum (including GST) specified in Tender Schedule M2 (Schedule of Prices), adjusted by any additions or deductions made pursuant to the Contract.

- 4.3 A Schedule of Prices may be used for the purposes of valuation of variations pursuant to Clause 40.5 of the General Conditions of Contract and for the valuation of Claims for payment under Clause 42.1 of the General Conditions of Contract.
- 4.4 The Principal does not warrant, guarantee or make any representation with respect to the completeness, accuracy or adequacy of the sections and Items in a Schedule of Prices and the Principal shall have no liability for any Claim to the Contractor arising out of or in connection with any errors in or omissions from the Schedule of Prices.
- 4.5 The Contractor may include part of Items contained in the Schedule of Prices in a Claim for payment under Clause 42.1 of the General Conditions of Contract. Valuations of such Items will be made based on the Administrator's assessment of the value of conforming work under the Contract completed or, where an appropriate formula is included in the Specification associated with the particular work under the Contract, in accordance with that formula.

5 Rise and fall

5.1 Overview

- a) This Clause 5 of the Commercial Framework applies if specified in Item 44D of Annexure A.
- b) For payments made to the Contractor for work under the Contract completed prior to the Date for Practical Completion, rise and fall adjustments will be applied in accordance with Clauses 5.2 and 5.3 of this Commercial Framework.
- c) No cost adjustment shall be made under this Clause 5 of the Commercial Framework for work under the Contract carried out after the Date for Practical Completion.

5.2 Bitumen

- a) The Contract Sum shall be subject to adjustment for variations in the cost of bitumen supplied by the Contractor in accordance with the following formula:

$$D = (C-B) \times A$$

where:

A = the quantity of bitumen supplied by the Contractor derived from:

- the calculation of residual bitumen at 15 degrees Celsius where the product is sprayed bituminous surfacing or a tack coat
- the approved design binder content where the product is asphalt (excluding Reclaimed Asphalt Pavement)
- the approved residual binder content where the product is a bituminous slurry surfacing
- where the binder is modified bitumen, the quantity shall be the quantity of manufactured polymer modified binder, and
- the approved residual binder content where the product is foamed bitumen pavement

B = the price of Class 170 bitumen on the 15th day of the month prior to the Time for Lodgement of Tenders

- C = the price of Class 170 bitumen on the 15th day of the month during which the work is performed
- D = the applicable cost adjustment for the relevant Claim for payment submitted under Clause 42 of the General Conditions of Contract.

- b) The price of Class 170 bitumen shall be the average general market price of Class 170 bitumen of all Queensland manufacturers.

To avoid any doubt, the Item 'B' from the Bitumen Rise and Fall formula as stated in Clause 5.2, is using the price of Class 170 bitumen on the 15th day of the month prior to the Time for Lodgement of Tenders. For example, a tender that is closing between the dates of 1st to 31st March and Transport and Main Roads has managed to publish the updated Bitumen price index on the 15th March, Tenderers shall make appropriate allowances in their tender submission on the basis that 'B' will be using the February price index.

5.3 Other adjustments

- a) Where the original Date for Practical Completion specified in the Tender Documents is greater than 90 days after the Date of Acceptance of Tender, in addition to adjustments under Clause 5.2, payments to the Contractor shall be subject to a cost adjustment to reflect variations in the cost of labour and materials in accordance with the following formula:

$$H = \frac{0.85 \times (G - F) \times E}{F}$$

where:

- E = the value of the monthly payment certificate subject to rise and fall less:
- any variations or payments made under a Provisional Sum Item, that were based on actual cost or current prices and for which rise and fall payments do not apply
 - any Daywork assessed using plant and labour for which the Daywork Rates were established during the Contract, and
 - the assessed value of bitumen used in sprayed seals and asphalt for which a cost adjustment is payable under Clause 5.2.
- F = the value of the Index for the quarter prior to the month in which the Contractor's Tender was lodged.
- G = the value of the Index for the quarter prior to the month during which the work under the Contract is performed.
- H = the applicable cost adjustment.

If a tender is not awarded to a Contractor within the tender validity period; and the Contractor provides a revised tender price, the F value Index shall be the quarter prior to the month in which the Contractor lodged the revised tender price.

- b) For the purposes of this Clause 5.3 of the Commercial Framework, the 'Index' is the index of road and bridge construction (Australia) in Table 17 of catalogue 6427.0 (Producer Price Indexes, Australia) published quarterly by the Australian Bureau of Statistics.
- c) If at any time the Index is discontinued or modified, the Administrator shall request the Australian Bureau of Statistics to nominate the index or Authority which in its opinion is the most practical for the purposes of measuring any variation in costs during the performance of the Contract. The index or Authority nominated by the Australian Bureau of Statistics shall be adopted for the purposes of making the calculation under this Clause. If the Australian Bureau of Statistics fails to nominate an index or Authority which is practical for the purpose of measuring any variation in costs, then the amount of the cost adjustment shall be the amount determined by the Administrator acting reasonably.

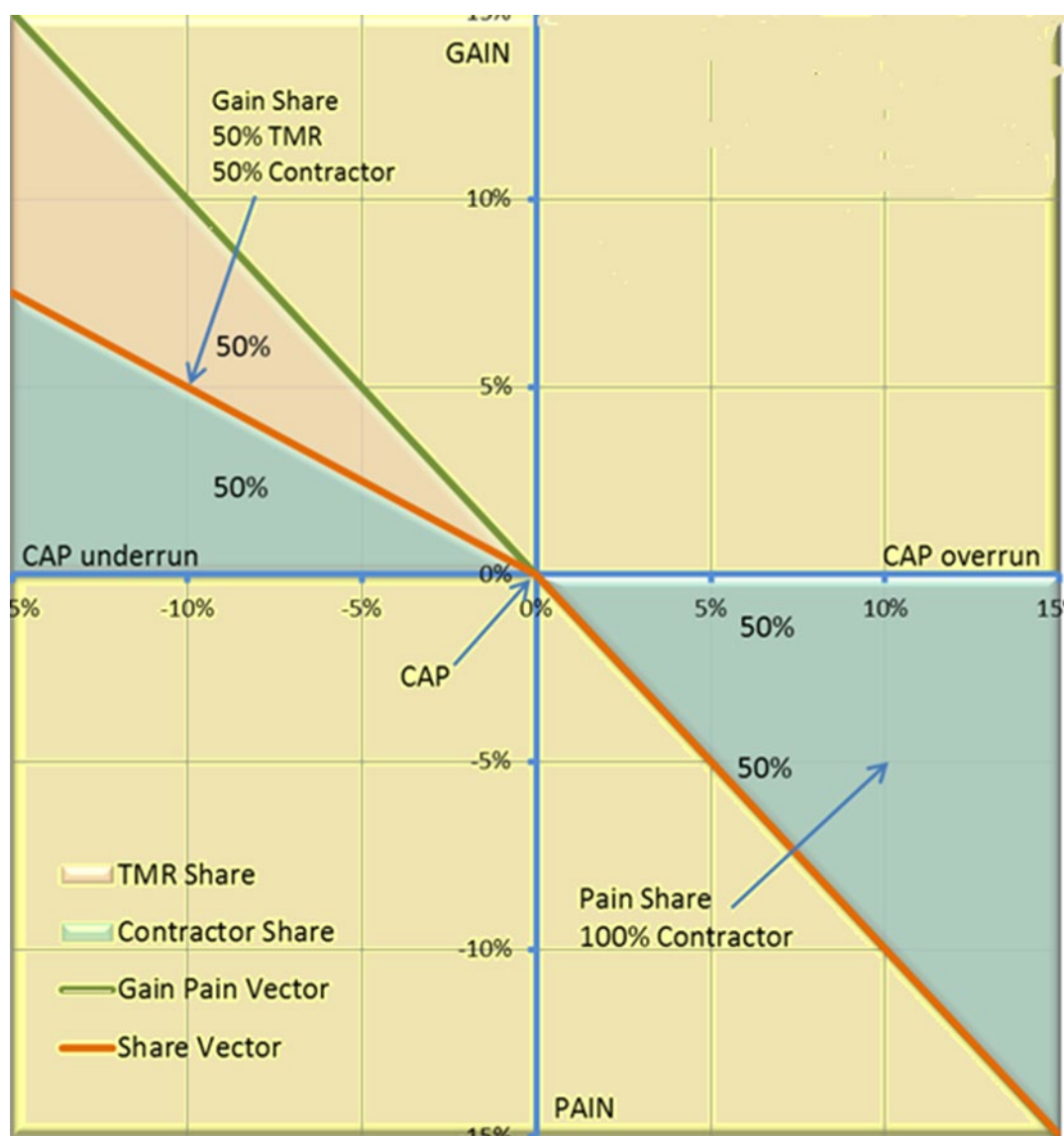
6 Gain / Pain Share Regime (example only)

This section is an extract from a departmental project and shall be referred as an example only for Gain / Pain Share Regime.

S-1.1 Gain / Pain Share Regime

Introduction

S-1.1.1 Figure 1 is intended to simply illustrate in diagrammatic form the principles of the Gain / Pain Share Regime as further detailed in this Clause S-1.1

Figure 1 – Gain / Pain Share Regime**Gain Pain Share Explanation**

S-1.1.2 Table 1 describes the principles of the Gain Share / Pain Share Regime as further detailed in this Clause S-1.1.

Table 1 - Gain Pain Share Scenarios

Gain Share Pain Share	Scenario	Parties Entitlement	Clause Reference
Gain Share	Underrun on CAP	The Contractor is entitled to 50% and the Principal is entitled to 50%	Schedule 1 Clause S-1.2.88
Pain Share	Overrun on CAP	The Contractor is liable for 100% of all pain	Schedule 1 Clause S-1.2.10

Table 2 - Sample calculations of entitlement

Scenario	Description	Underrun or Overrun	Contractor entitlement	Department entitlement
1	Underrun on CAP	(\$1 000 000)	\$500 000	\$500 000
2	Overrun on CAP	\$1 000 000	(\$1 000 000)	\$0

Capital Adjustment Price (CAP) Gain Share and Pain Share

S-1.1.3 *Gain Share and Pain Share shall be calculated in accordance with Clause S-1.2.*

S-1.1.4 *Immediately after the issue by the CLT of the Certificate of Final Completion the CLT will make a determination of the Gain or Pain Share after having determined the sum of the amount by which the Reimbursable Costs and Fee are less or greater than the CAP achieved in performing the Work under the Contract to bring the Project Works to Final Completion.*

S-1.1.5 *The CLT may determine, after Practical Completion that an interim payment of the Gain or Pain Share should be made to or by the Contractor.*

S-1.2 Performance Incentive

Principles:

S-1.2.1 *In creating the Commercial Framework for the Project the Parties have agreed that the Performance Incentive Regime must satisfy the following principles:*

- a) *equitable rewards commensurate with performance*
- b) *the Contractor is genuinely incentivised to exceed Minimum Conditions of Satisfaction (MCOS) through the Regime*
- c) *the Principal is committed to the Contractor being able to earn 100% of the Performance Incentive entitlements*
- d) *the Commercial Framework is clear, concise, robust and defensible*
- e) *the separate elements of the Performance Incentive Regime are interdependent to provide no incentive to sacrifice performance in one element to secure reward in another*
- f) *complete transparency in all arrangements for auditable direct job costs*
- g) *the Commercial Framework will allow the Parties to invest extra resources to drive Outstanding Performance*
- h) *there will be no reward for inefficiency, and*
- i) *the only way to earn exceptional returns is through outstanding performance.*

Establishment of Non-Cost Fund

S-1.2.2 *Not used.*

Performance Incentive

S-1.2.3 *Not used.*

Incentive

S-1.2.4 Where the sum of Reimbursable Costs plus Fee is less than CAP the Contractor's Gain Share shall be calculated as:

$$\text{Amount} = 50\% \times (\text{CAP} - (\text{ARC} + \text{LSRC} + \text{Fee}))$$

where:

CAP = Final Contract Adjusted Price calculated in accordance with the Contract

ARC = Actual Reimbursable Costs (actual cost component of Reimbursable Costs)

LSRC = Lump Sum Reimbursable Costs calculated in accordance with the Contract (lump sum component of Reimbursable Costs)

Fee = Final Fee calculated in accordance with the Contract

S-1.2.5 Where the sum of Reimbursable Costs plus Fee is greater than CAP, the Contractor's Pain Share shall be calculated as:

$$\text{Amount} = 100\% \times ((\text{ARC} + \text{LSRC} + \text{Fee}) - \text{CAP})$$

S-1.3 Trend Analysis

S-1.3.1 The CLT will ensure that appropriate procedures are put in place to allow a monthly trending analysis of the performance against each element of the CAP to be completed and reported to the CLT.

S-1.3.2 In the event of the termination of the Contract under Clause 44, the CLT, notwithstanding S-1.1.4 and S-1.1.5, will determine a distribution of Share of Savings after having determined the performance under the Contract and the Key Result Areas Overall Performance Score (KRA OPS) to the date of the Notice of Termination. Any determination of Share of Savings will be paid by the Principal to the Contractor in accordance with Clause 42.

S-1.4 CAP Adjustments

S-1.4.1 For each CAP Adjustment pursuant to Clause 40 of the General Conditions of the Contract will be the aggregate of:

- a) the adjustment to the estimated actual cost component of the Reimbursable Costs included in the CAP as the result of the adjustment event calculated in accordance with Clause 40 of the General Conditions of the Contract the adjustment to the estimated lump sum component of the Reimbursable Costs included in the CAP as the result of the adjustment event calculated in accordance with Clause 40.5 of the General Conditions of the Contract, and
- b) an amount for Fee calculated in accordance with Clause 42 of the General Conditions of the Contract

and the adjustment to any non-cost performance targets as determined by the PLT.

S-1.5 Final Payment

S-1.5.1 The final payment to the Contractor shall be calculated as follows:

$$\text{Final Payment} = (\text{ARC} + \text{LSRC} + \text{Fee} + \text{Contractor's Gain Share or Pain Share}) - \text{Previously Paid}$$

where:

ARC = *Actual Reimbursable Costs (actual cost component of Reimbursable Costs)*

LSRC = *Lump Sum Reimbursable Costs calculated in accordance with the Contract (lump sum component of Reimbursable Costs)*

Fee = *Final Fee calculated in accordance with the Contract*

Contractor's Gain or Pain Share = *calculated in accordance with Clause S-1.2*

All as adjusted under the Contract.

