

Singapore Institute of Building Limited

In conjunction with

WS INNOVATIONS PRIVATE LTD

UNDERSTANDING YOUR CONTRACT AND BEYOND

UNDERSTANDING YOUR CONTRACT AND BEYOND

PROGRAM

- INTRODUCTION TO CONTRACT LAW
- STANDARD CONDITION OF CONTRACT
- LIABILITIES OF PROFESSIONALS
- CONTRACT DOCUMENTATION
- DISPUTE RESOLUTIONS

WHAT IS A CONTRACT

- PROMISE OR A SET OF PROMISES
- SET OF OBLIGATIONS (LAW OF OBLIGATIONS) –

  VOLUNTARILY TAKEN AND OWED TO A SPECIFIC PERSON(S)

ISSUES ADDRESSED

COMMON LAW CONTRACT ADDRESSES

- WHEN AND HOW A CONTRACT IS FORMED
- WHEN MAY A PARTY ESCAPE OBLIGATION
- WHAT IS THE MEANING AND EFFECTS TO BE GIVEN TO THE TERMS OF A CONTRACT
- WHAT IS THE REMEDY TO BE GIVEN FOR A BREACH OF CONTRACT

CONTRACT FORMATION

- OFFER AND ACCEPTANCE
- CONSIDERATION

OTHER COMPONENTS

- FORM
- CAPACITY
- CONSENT
- LEGALITY

OTHERWISE –
VOID, VOIDABLE OR UNENFORCEABLE

VALIDITY OFCONTRACT

- MUTUAL AGREEMENT
- CONSIDERATION
- COMPETENT
- PROPER SUBJECT MATTER
- MUTUAL RIGHT OF REMEDY
- MUTUAL OBLIGATION TO PERFORM
- INTENTION TO CREATE LEGAL RELATIONSHIP

REMEDIES

- DAMAGES substantiable
- SPECIFIC PERFORMANCE

Penalties can be used in Contract.

PROCEDURE TO REMEDY

PERTINENT ISSUES RELATING TO CONTRACT

- OFFER AND ACCEPTANCE
- OFFER
- UNILATERAL CONTRACT
- INVITATION TO TREAT
- REVOCATION OF OFFER (Revoc — Deadline must be specified)

PERTINENT ISSUES RELAQTING TO CONTRACT (CONT'D)

- ACCEPTANCE
- TEST OF ACCEPTANCE
- RULES OF ACCEPTANCE
  - COMMUNICATED
  - ACCEPTED BY OFFEREE ONLY
  - METHOD OF ACCEPTANCE

MIRROR IMAGE RULE ✓ Must offer the base. * Alternative for Offeree only

CONTRACT INTERPRETATION

- PAROL EVIDENCE RULE
- PRESUMES THAT A WRITTEN CONTRACT EMBODIES THE COMPLETE AGREEMENT BETWEEN PARTIES
- GENERALLY FORBID INTRODUCTION OF EXTRINSIC EVIDENCE

EXCEPTION

- WORK OUT SUBJECT MATTER OF THE CONTRACT
- RESOLVE AMBIGUITY
- SHOW UNAMBIGUOUS TERM IS A MISTAKEN TRANSCRIPTION OF A PRIOR VALID AGREEMENT
- SHOW FRAUD, DURESS, MISTAKE, ILLEGAL PURPOSE
- CONSIDERATION NOT PAID
- IDENTIFY PARTIES
- INCORPORATE A TERM OF THE CONTRACT

STANDARD FORM OF CONTRACT

- ALSO CALLED ADHESION CONTRACT
- "TAKE IT OR LEAVE IT"

EXCUSES FOR NON PERFORMANCE

- MISTAKE
  -UNILATERAL MISTAKE
  -MISTAKE OF IDENTITY
  -MUTUAL MISTAKE
  -COMMON MISTAKE
- MISREPRESENTATION
  -FRAUDULENT
  -NEGLIGIENT
  -INNOCENT

EXCUSES FOR NON PERFORMANCE

- DOCTRINE OF IMPOSSIBILITY
- UNCLEAN HAND
- UNCONSCIONABILITY
- ACCORD AND SATISFACTION

REMEDIES

- RESCISSION
- DAMAGES
  -LIQUIDATED (CF PENAL)

  QUANTUM MERUIT

PRIVITY OF CONTRACT

- THIRD PARTY RIGHTS

EXCEPTIONS
- COMMON LAW EXCEPTIONS
- STATUTORY EXCEPTION — Authority

Common law allows these
- ASSIGNMENT
- DELEGATION
- NOVATION
- VESTING OF RIGHTS

PSSCOC PUBLIC SERVICE SECTOR CONDITIONS OF CONTRACT FOR CONSTRUCTON WORKS 2005 (4TH EDITION MARCH 2005)

PREAMBLE/ ADMINISTRATION

1. DEFINITION AND INTERPRETATION

(amended: payment claim – SOPA)

2. SUPERINTENDING OFFICER AND SO'S REP

- Authority
- Delegation
- Appointment
- Power
- Obligation

2.8 – The SO can or can need not make a decision

3. CONTRACT DOCUMENTS

-Documents forming contract

-Responsibility to request

-Delay caused by inadequate information

12. POSSESSION OF SITE AND COMMENCEMENT OF WORKS

-Commencement & Site Possession (Physical)

-Right of access → must be specified / to put insurance in line...

-Right of others to access → must state

24. CONSTRUCTION EQUIPMENT TEMPORARY WORKS MATERIAL & GOODS

-Exclusive use

-Vesting

-Liability

-Rental equipment

-Revesting

31. TERMINATION BY EMPLOYER

- 31.1 Default
  - Abandonment
  - Fail to commence
  - Fail to comply to program
  - Contractual breach
  - Fail comply to instruction
  - Bankrupt
  - Inducement
  - Deposit-security, bond etc
  - Termination certificate

31.2 Effects of termination for default

31.3 Liquidated damages

31.4 Termination without default

- Certification of works
- Loss & Expense

32. PROGRESS PAYMENTS AND FINAL ACCOUNTS

- Payment Claim
- Certificate
- Corrections
- Final Payment
- Interim Final, Final Account & Certificate
- Period of Honouring Certificate
- GST
- Damages for delay in Certification

33. FINAL COMPLETION CERTIFICATE

- Time for issue
- Certificate not conclusive (Doesn't mean completion guarantee)

35. RECOVERY BY THE EMPLOYER

- Right to deduct
- Recover as debt (A recognition in the Canadian law)

36. GOVERNING LAW AND NOTICES

- Law
- Notices (Faxes & emails – now traceable)

CONTRACTUAL OBLIGATIONS

4. GENERAL OBLIGATIONS OF CONTRACTOR

- Site operations & Method of construction
- Responsibility to subcontractor — NSC — Award to DSC
- Responsibility to identify discrepancy
- Security deposit
- Sufficiency of tender
- Patent, trademark, copyrights

8. SETTING OUT

- Accuracy
- Errors in setting out

9. PROGRAMME FOR THE WORKS

- Programme
- Revision
- Acceptance
- Failure to submit

10. QUALITY IN CONSTRUCTION
- Plant, Material, Goods & Workmanship
- Testing
- Cost of sample
- Cost of test
- Examination
- Uncovering & Making openings
- Defects during progress
- Default in compliance

11. ADMINISTRATION
- Working hours
- Contractor's representative
- Removal of personnel
- Access for SO

14. TIME FOR COMPLETION
14.1 Contractor to complete on time
14.2 Extension of Time (conditions)
- Force majeure
- Weather
- Industrial action
- Excepted risk
- Compliance to statutory requirement
- Acts of God
- Ordering of test

14.2 Extension of Time (conditions)
- Variation
- Provisional Sum items
- Failure to give site possession
- Suspension
- Non receipt of information
- Acts/omission by other contractors
- Search instructed by SO
- Adverse physical condition
- Any other grounds

- Notice
  - Time period to notify
  - Requirement to substantiate
  - Decision in writing
  - SO to assess without substantiation
  - Right to dispute

15. EXPEDITING PROGRESS OF WORKS
  - Notification to expedite
  - Request permission to expedite

16. LIQUIDATED DAMAGES

- Right to recover
- No dilution of contract
- Reduction of LD
- Common law rights for damages
- EOT during delay period

17. SUBSTANTIAL COMPLETION

- Certificate of substantial completion
- Access for Remedial Work
- Phase completion — DLP/Warranties

18. DEFECTS

- Completion of outstanding works & remedying defects
- Cost of remedying
  - defect, fault, neglect
  - variation works

- Dimunition in value of works
- Contractor to search
- Liability at common law

7. NOTICES AND FEES

- Responsibility to serve notice
- Variation arising from complaince
- Cost of compliance by law, regulations etc

25. GENERAL RESPONSIBILITIES

- Care of the works from commencement to period after completion
- excepted risk
    - external acts
    - occupation by employer
    - design by others

30. ASSIGNMENT & SUBCONTRACTING

- Assignment by Contractor
- Subcontractors

DEFINITION OF VARIATIONS

19. VARIATIONS TO THE WORKS

- 19.1 Variations
  - Definition – Change in the original Contract intention but exclude those necessitated to cure default or breach

- Power to order variation
- Submission of quotation
  - acceptance of quotation, not entitled to L&E
  - Instruction to quote not treated as acceptance of any quotation

20. VALUATION OF VARIATIONS

- 20.1 Valuation Methods
  - SOR
  - SOR + Adjustment
  - Market rate
  - Direct cost plus L&E
  - SOR used for omission

ENTITLEMENT FOR CLAIM

5. SUBSURFACE AND GROUND CONDITIONS

- 5.2 Adverse Physical Conditions

  If the Contractor shall encounter adverse physical conditions (other than weather conditions or effects due to weather conditions on the Site) in the course of carrying out sub-surface works, which adverse physical conditions could not have been **reasonably foreseen** by an **experienced contractor** and the Contractor is of the opinion that additional cost will be incurred which would not have been incurred if such adverse physical conditions had not been encountered, he shall if he intends to make any claim forthwith give notice in writing to the Superintending Officer pursuant to Clauses 14 and 23.

As soon as possible thereafter, the **Contractor shall give details** of the anticipated effects of such adverse physical conditions the measures he is taking or is proposing to take and the extent of the anticipated delay in or interference with the execution of the Works.

- If, in the opinion of the Superintending Officer, such adverse physical conditions could not have been reasonably foreseen by an experienced contractor, then subject to compliance by the Contractor with Clauses 14, 23 and 32 the Superintending Officer may grant an **extension of time** pursuant to Clause 14 and may certify pursuant to Clause 32 such sum as may be reasonable in respect of such **Loss and Expense** (but not including any loss, expenses, costs or damages which are the Contractor's responsibility under Clause 4.2) to which the Contractor shall have been put by reason:

  a) of **complying with any instruction** which the Superintending Officer may issue to the Contractor in connection therewith; and

  (b) of **any proper and reasonable measures** approved by the Superintending Officer which the Contractor may take in the absence of specific instructions from the Superintending Officer

- For the purpose of this Clause, adverse physical conditions shall be deemed to include unforeseen sub-surface and ground conditions and all underground services which are in use.

- The cost of diversion of underground services would be borne by the Employer unless otherwise specified.

7. NOTICES AND FEES

- 7.1 **Generally**

The Contractor **shall comply** with and give notices required by **any law, regulation or by-law, or by any public authority or public service company**, relating to the Works or, in the case of a public authority or public service company, with whose systems the same are or will be connected. The **Contractor shall pay and indemnify the Employer against any fees or charges** imposed by law, regulation or by-law, or by any public authority or public service company in respect of the Works

- 7.2 Variations arising from Compliance
- The Contractor shall, before making any variation from the Drawings and Specifications necessitated by the compliance with Clause 7.1, give to the Superintending Officer notice in writing specifying and giving the reasons for such variation and applying for instructions in reference thereto.

- Provided that if the Contractor does not receive instructions from the Superintending Officer within 7 days from the date of the receipt of his application by the Superintending Officer, he shall proceed with the Works conforming to the law, regulation, bylaw or requirements of the public authority or public service company in question.

- Any variation necessitated as aforesaid which could not have been reasonably foreseen by an experienced contractor at the time of submission of the Tender (and if it is not required by or in consequence of any deficiency or fault in the design of any part of the Works for which the Contractor is responsible under the Contract) shall be deemed a variation under Clause 19 and dealt with as such.

- 7.3 **Cost of Compliance**
- The Contractor shall be wholly responsible for compliance with the requirements of any law, regulation, by-law or public authority as stipulated in Clause 7.1 notwithstanding that such written law is enforced by the Employer or that such public authority is, or is part of, the Employer. The Employer shall be deemed not to be responsible or liable for:
- (a) any costs imposed by any requirements of any law, regulation, by-law or public authority; or
- (b) any default or delay by any public authority in the enforcement or implementation of any law, regulation or by-law.

10. QUALITY IN CONSTRUCTION

- 10.6 Uncovering and Making Openings

12. POSSESSION OF SITE AND COMMENCEMENT OF WORKS

- 12.3 Failure to give Possession

13. SUSPENSION

- 13.1 Suspension of Work

  1) The Contractor shall, on the instruction in writing of the Superintending Officer, suspend the progress of the Works or any phase or part of the Works for such time or times and in such manner as the Superintending Officer may consider necessary and shall, during such suspension, properly protect and secure the Works or such phase or part of the Works so far as is necessary in the opinion of the Superintending Officer.

2) Subject to Clauses 13.2, 23 and 32, the Superintending Officer may certify any Loss and Expense which the Contractor may have incurred in giving effect to the instruction beyond any loss, expense, costs or damages which would have been incurred or for which the Contractor had or ought to have allowed in the Tender and, subject to Clause 14, may grant the Contractor an extension of time unless such instruction, loss, expense, costs or damages or extension is:

- (a) otherwise provided for in the Contract; or
- (b) necessary by reason of some default on the part of the Contractor or is caused by an event which it was or would have been the Contractor's responsibility to have overcome; or
- (c) necessary for the proper execution of the Works or for the safety of the
- Works or any part of the Works.

- 13.2 **Suspension Lasting More than 90 Days**
- If the progress of the Works or any part of the Works is suspended on the instruction in writing of the Superintending Officer for more than 90 days, the Contractor may, unless such suspension is otherwise provided for in the Contract, or continues to be necessary by reason of some default on the part of the Contractor, or for the proper execution of the Works, or for the safety of the Works or any part of the Works, serve a notice in writing on the Superintending
- Officer requiring permission within 30 days from the receipt of such notice to proceed with the Works or that part of the Works which is suspended.

If such permission is not granted within such period of 30 days, the Contractor may by a further notice in writing so served elect to treat the suspension where it affects part only of the Works as an omission of such part under Clause 19.1 or, where it affects the whole of the Works, as if the Employer had at the expiry of such period of 30 days given a Notice of Termination pursuant to Clause 31.4, in which event the Contractor shall be entitled to be paid in accordance with the provisions of Clause 31.4(2).

14. TIME FOR COMPLETION

- 14.2 Extension of Time for Completion

The time within which the Works or any phase or part of the Works is to be completed may be extended by the Superintending Officer either prospectively or retrospectively and before or after the Time for Completion by such further period or periods of time as may reasonably reflect delay in completion of the Works which, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce such delay, will or might be or has been caused by any of the following events:

- (a) Force majeure.
- (b) Exceptionally adverse weather conditions the assessment of which shall be in
- accordance with the relevant provision in the Specifications.
- (c) Industrial action by workmen, strikes, lock-outs or embargoes affecting any of the trades employed upon the Works or in the preparation, manufacture or transportation of materials or goods required for the Works and provided the same are not due to any unreasonable act or default of the Contractor or of any subcontractor. Provided that this event shall only apply if the industrial action by workmen, strike, lock-out or embargo causing the delay is in Singapore.
- (d) One or more of the "excepted risks" referred to in Clause 25.2 .
- (e) Compliance with the requirements of any law, regulation, by-law or public authority or public service company as stipulated in Clause 7.1.
- (f) Fire, storm, lightning, high winds, earthquake or flooding.

- (g) Ordering of test by the Superintending Officer which is not provided by the Contract pursuant to Clause 10.4 and the uncovering or making openings for inspection of any work pursuant to Clause 10.6, unless the test or inspection showed that the Plant, materials, goods or workmanship had not been in accordance with the provisions of the Contract.
- (h) The issue of any instruction for a variation.
- (i) The issue of an instruction by the Superintending Officer in relation to a Provisional Sum Item but only if and to the extent that such instruction gives rise to a variation of the work described under the Provisional Sum Item.
- (j) Failure of the Employer to give possession of the Site or any part of the Site to the Contractor in as required by Clause 12.2.

- (k) Subject to Clause 13.1(2) an instruction by the Superintending Officer to suspend any work.
- (l) The Contractor not having received from the Superintending Officer within a
- reasonable time necessary Drawings, instructions or other information in regard to the Works for which notice has been given by the Contractor in accordance with Clause 3.4.
- (m) Acts or omissions of other contractors engaged by the Employer in executing work not forming part of the Contract.
- (n) Any act of prevention or breach of contract by the Employer not mentioned in this Clause.
- (o) Any search instructed by the Superintending Officer under Clause 18.4 and such search reveals any defect, shrinkage or other fault for which the Contractor is not liable.
- (p) Adverse physical conditions which fall within Clause 5.2.
- (q) Any other ground for extension of time expressly mentioned in the Contract and not mentioned in this Clause 14.2.

- Provided always that the Contractor shall not be entitled to any extension of time where the instructions, or acts of the Employer or the Superintending Officer are necessitated by or intended to cure any default of or breach of Contract by the Contractor and such disentitlement shall not set the Time for Completion at large

Without EOT — contract @ large

- 14.3 **Notice**
- (1) If the Contractor is of the opinion that the progress or completion of the Works is or will be or has been delayed by any of the events stated in Clause 14.2, he shall forthwith notify the Superintending Officer in writing of such event and shall in any case do so within 60 days of the occurrence of such event

- (5) Provided that the Contractor shall have complied with the requirements of Clause14.3(1), if the Contractor is dissatisfied with any extension of time made or not made by the Superintending Officer and shall dispute it, he shall not in any reference to the Superintending Officer or to any arbitrator pursuant to Clause 34 or otherwise (or to any other tribunal) claim a greater extension of time than that notified pursuant to Clause 14.3(1) or advance new or additional grounds not submitted to the Superintending Officer before he made his decision, nor shall the Superintending Officer or the arbitrator (or any other tribunal) in considering the dispute make a decision taking into account information which was not available to the Superintending Officer at the time when the Superintending Officer made his original decision to make or not to make an extension of time

- 16.2 **Reduction of Liquidated Damages**
- If, before the Time for Completion has expired, the Superintending Officer has issued a Certificate of Substantial Completion in respect of any part of the Works (or, where applicable, in respect of any part of any phase or part of the Works set out in the Appendix), the Contractor shall nevertheless remain liable for liquidated damages for any failure to complete the remainder of the Works by the Time for Completion but such liquidated damages in respect of the remainder of the Works (or, where applicable, in respect of the remainder of that particular
- phase or part of the Works) shall, for any period of delay after the date stated in such Certificate of Substantial Completion, and in the absence of alternative provisions in the Contract, be reduced in the proportion which the value of the part so certified bears to the value of the whole of the Works (or, where applicable, of that particular phase or part of the Works).

- 16.3 **Employer's Common Law Rights for Damages**
- In the event that the Employer for whatever reason shall not be entitled in law to recover liquidated damages, the Employer shall remain entitled to recover such loss, expense, costs or damages as he would have been entitled under common law as if the provisions in this Clause relating to the payment of liquidated damages had not formed part of the Contract. The Contractor's liability to pay the Employer such loss, expense, costs or damages shall not be limited in any way whatsoever by the amount of liquidated damages for which he might otherwise have been liable.

- 16.4 **Extension of Time During Delay Period**
- For the avoidance of doubt, if the Contractor shall have failed to complete the Works or any phase or part of the Works by the Time for Completion and the execution of the Works thereafter is delayed by any of the events set out in Clause 14.2(g) to (q) inclusive, the Employer's right to liquidated damages shall not be affected thereby but, subject to compliance by the Contractor with Clause 14, the Superintending Officer shall grant an extension of time pursuant to Clause 14. Such extension of time shall be added to the Time for Completion of the Works (or of the relevant phase or part).

22. CLAIM FOR LOSS AND EXPENSE

- 22.1 Reasons for Loss and Expense
- 22.1 **Reasons for Loss and Expense**
- The Contractor shall be entitled to recover as Loss and Expense sustained or incurred by him and for which he would not be reimbursed by any other provision of the Contract, all loss, expense, costs or damages of whatsoever nature and howsoever arising as a result of the regular progress and/or completion of the Works or any phase or part of the Works having been disrupted, prolonged or otherwise materially affected by:

- (a) the issue of an instruction for a variation;
- (b) the issue of an instruction in relation to Provisional Sum Items but only if and to the extent that such instruction on a true interpretation of the Contract as a whole,constitutes a variation in kind or extent, from the Works described under the Provisional Sum Items;
- (c) failure of the Employer to give possession of the Site to the Contractor in accordance with Clause 12.2;
- (d) the suspension by the Superintending Officer of any work for a cause which entitles the Contractor to recover Loss and Expense;
- (e) the Contractor not having received from the Superintending Officer within a
- reasonable time necessary Drawings, instructions or other information in regard to the Works for which notice in writing had been given by the Contractor in accordance with Clause 3.4;

- (f) the issue of an instruction by the Superintending Officer under any of Clauses 3.6, 4.4, 10.4, 10.6, 18.2, 18.4 and 25.1(3) but only if the Employer is liable to pay to the Contractor any Loss and Expense by reason of such an instruction;
- (g) unforeseeable adverse physical conditions of which notice in writing has been given pursuant to Clause 5.2;
- (h) acts or omissions of other contractors engaged by the Employer in executing work not forming part of this Contract; or
- (i) any act of prevention or breach of contract by the Employer not mentioned in this Clause

Provided always that the Contractor shall not be entitled to any such Loss and Expense where it arises from or is necessitated by or is intended to cure any default or breach of contract by the Contractor.

- 22.2 **Sufficiency of Loss and Expense**
- The Contractor shall not be entitled to recover any loss, expense, costs or damage whatsoever resulting from any disruption, prolongation or other material effect to the regular progress or completion of the Works or any phase or part of the Works except in accordance with the express provisions of the Contract.

EXCLUSION

6. PERMANENT WORKS DESIGNED BY CONTRACTOR
15. EXPEDITING PROGRESS OF WORKS

PROCEDURE

23. PROCEDURE FOR CLAIM

- 23.1 **Notice of Claims**
- **23.2 Contemporary Records**
- **23.3 Substantiation of Claims**
- **23.4 Access to Contractor's Books and Documents**
- **23.5 Payment of Claims**
- **23.6 Failure to Comply**

34. SETTLEMENT OF DISPUTES

34.1 Reference to the Superintending Officer

34.2 Reference to Arbitration

34.3 Arbitration in Event of Termination

34.4 Powers of the Arbitrator

34.5 Reference to Adjudication

34.6 Mediation

INSURANCE/ SPECIFIC LIABILITY

26. INDEMNITY PROVISION

- 26.1 **Injury to Persons**
- (1) The Contractor shall be liable for and shall indemnify the Employer against any loss, expense, costs, damages, liability or claim whatsoever in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or by reason of the carrying out of the Works, unless the same is shown to be due solely to any negligent or wilful act of the Employer or of any person for whom the Employer is responsible.

- (2) For the avoidance of doubt, the indemnity provided by the Contractor under Clause 26.1 shall include any damages or compensation payable at common law or under any statute in respect of or in consequence of any accident, illness or injury to any workman or other person in the employment of the Contractor or any subcontractor, save and except an accident, illness or injury resulting solely from any act or default of the Employer, or of any person for whom the Employer is responsible.

- 26.2 **Damage to Property**
- Without prejudice to his liabilities in regard to completing the Works under Clause 4.1, the Contractor shall be liable for and shall indemnify the Employer against any loss, expense, costs, damages, liability or claim due to injury or damage of any kind to any property real or personal (including any property of the Employer other than the Works) insofar as such injury or damage arises out of or in the course of or by reason of the carrying out of the Works, unless the Contractor proves to the satisfaction of the Superintending Officer that it was not due to any
- negligence, omission, breach of contract or default of the Contractor, or of any person for whom the Contractor is responsible including the Contractor's servants or agents or anysubcontractors and their servants or agents

- 26.3 **Contractor to Rectify Damage**
- **27.1 The Policies**
- **27.2 Damage to Property when Contractor Not Negligent**
- **27.3 Default in Insuring**
- **28.2 Application of Insurance Moneys**
- **29.1 Costs of Making Good Damages Loss or Injury**

27. INSURANCE FOR PERSONAL INJURY WORKMEN COMPENSATION AND PROPERTY DAMAGE

28. INSURANCE OF THE WORKS

- **28.1 Risks to be Insured**
- **28.1 Risks to be Insured**
- **(1) Without limiting his obligations or responsibilities under Clause 25, the Contractor shall, before commencement of any work under this Contract, in the joint names of the Employer and the Contractor, insure against all damage, loss or injury from whatever cause arising (other than the "excepted risks" as defined in Clause 25.2) for which he is responsible under the terms of the Contract, the Permanent Works, any Temporary Works and all unfixed Plant, materials and goods delivered on or adjacent to the Site for incorporation into the Works (but excluding tools and Construction Equipment owned or hired by the Contractor or any subcontractors) and any structures or other works erected on or adjacent to the Site to the value of not less than the Contract Sum shown in the Letter of Acceptance (plus the percentage stated in the Appendix for professional fees).**

- The Contractor shall keep such Permanent Works, Temporary Works, materials, goods, structures or works so insured until 14 days after the Date of Substantial Completion (or the latest Date of Substantial Completion if more than one) certified by the Superintending Officer pursuant to Clause 17 and during the Defects Liability Period for damage, loss or injury arising from a cause occurring prior to the commencement of the Defects Liability Period.

- (2) Such insurance shall be effected with an insurer in terms approved by the
- Superintending Officer and the Contractor shall deposit with the Superintending
- Officer before the commencement of any work on Site a copy of the policy or policies of insurance and no later than 14 days thereafter the receipts in respect of the premiums paid under such policy or policies. Each policy taken out pursuant to Clause 28 shall provide expressly for the payment in the first place to the Employer of any insurance moneys due under the policy.

Society of Construction Law

Delay and Disruption Protocol

Programme

- Programme - A programme (using industry standard critical path method project planning software) showing the manner and sequence in which the contractor plans to carry out the works and identifying where the critical paths lie.

Programme

- A provisional sum be allowed by the Employer in the contract price for the provision by the contractor of a proper programme, and further payments for properly updating the programme.

EOT- Purpose

- Purpose of extension of time - An extension of time (EOT) serves only to relieve the contractor of liability for liquidated damages for any period prior to the extended contract completion date.

Entitlement

- Entitlement to EOT - Applications for EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application. The contractor will be potentially entitled to an EOT only for Employer Delay arising from Employer Risk Events - being those causes of delay in respect of which the Employer has assumed risk and responsibility. The terms Contractor Risk Event and Contractor Delay.

Procedure

- Procedure for granting EOT - The Updated Programme (being the approved programme brought fully up to date to the point immediately before the occurrence of the relevant Employer Risk Event) should be the primary tool for determining the amount of the EOT. The EOT should be granted to the extent that the Employer Risk Event is predicted to prevent the works being completed by the then prevailing contract date for completion.

Float

- Float as it relates to time - An EOT should only be granted to the extent that the Employer Delay is predicted at the time of the Employer Risk Event to reduce below zero (or, if already in delay, to further reduce below zero) the total float on the activity paths affected by the Employer Delay viz. only to the extent that the activity paths are (or are anticipated to be) critical to completion on the then prevailing contract completion date, at the time the Employer Risk Event occurs.

Float

- Float as it relates to compensation - If, as a result of Employer Delay to Progress, the contractor is prevented from completing the works before the contract completion date, the contractor should in principle be entitled to be paid the costs directly caused by the Employer Delay to Progress, notwithstanding that there is no delay to the contract completion date (and therefore no entitlement to an EOT), provided also that such costs were in the contemplation of the parties when they entered into the contract.

Concurrent Delay

- Concurrent delay - its effect on entitlement to EOT - Where Contractor Delay to Completion occurs concurrently with Employer Delay to Completion, the contractor's concurrent delay should not reduce any EOT due.

Employer delay 10 day
Contractor delay 5 days
EOT - 10 days

Concurrent Delay

- Concurrent delay - its effect on entitlement to compensation for prolongation - If the contractor incurs additional costs that are caused by both Employer Delay and Contractor Delay, then the contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay.

Mitigation

- Mitigation - The contractor has a general duty to mitigate the effect on its works of Employer Risk Events. The duty to mitigate Employer Delays, however, does not extend to requiring the contractor to add extra resources or to work outside its planned working hours in order to reduce the effect of an Employer Risk Event, unless the employer agrees to compensate the contractor for the costs of such mitigation efforts.

Delay

- Delay analysis - The Protocol recommends that 'time impact analysis' should be used, as a delay analysis methodology, wherever possible, both for prospective and retrospective analysis. Time impact analysis utilises a critical path network of the works, that is updated periodically (usually each month) and when any Employer Risk Event occurs (eg any employer liability variation, delayed instruction, or a claim event such as lack of access) or contractor delays. Each of these updated networks is saved electronically. The analysis therefore records a moving simulation of the construction of the works. In respect of retrospective delay analysis, the Protocol recommends that the method of analysis should be agreed between the parties before either party begins the analysis.

EOT

- Link between EOT and compensation - Entitlement to an EOT does not automatically lead to entitlement to compensation.

Prolongation

- Basis of calculation of compensation for prolongation - Unless expressly provided for otherwise, compensation for prolongation should not be paid for anything else other than work actually done, time actually taken up or loss and/or expense actually suffered viz. the compensation for prolongation caused other than by variations is based on the actual additional cost incurred by the contractor.

Disruption

- Disruption - (as distinct from delay) is disturbance, hindrance or interruption to a contractor's normal working methods, resulting in lower efficiency. If caused by the employer, it may be open to compensation either under the contract or as a breach of contract.

Relevance of tender

The tender allowance has limited relevance for the evaluation of prolongation and disruption caused by breach of contract or any other cause that requires the evaluation of additional costs, though the tender allowance may be relevant as a base line for the evaluation of prolongation and disruption caused by variations.

Period of evaluation of compensation

Once it is established that compensation for prolongation is due, the evaluation of the sum due is made by reference to the period when the effect of the Employer Risk Event was felt, not by reference to the extended period at the end of the contract.

Global claims (Commercial settlement)

The practice of contractors making composite or global claims without substantiating cause and effect is strongly discouraged by the Protocol

COMMON SENSE FOR CONTRACTORS IN THE PREPARATION OF CLAIMS

Project Start Up

- Review of Documents.
  -A full set of the pre-tender and tender information
  -Understand the contract, as it defines your relationship with the client, the scope of work and how disputes are to be resolved

- Accurate Planning.

  - Ensure that the As-Planned Programme submitted contains all the necessary information and is as accurate as possible.

  - the basis of a successful and proper claim begins when the contract programme is produced, i.e. before the contract is awarded.

Project Duration

- Document Control.

  - Ensure a systematic form of document control is in place from day one, this will save valuable time and effort later on in the project.

  - Make it standard procedure to reply to all correspondence even if it is only to acknowledge the receipt of the letter. Confirm in writing all verbal Instructions from the client or clients representative, this will put on record events that later may be construed a "hearsay" or not what was intended to be understood from the conversation.

- Observe rigidly the requirements for the issuing of notices, these will be stipulated in the contract documents and to fail to follow the requirements to the letter, could be grounds for the client to reject a claim.
- Should it become evident that a claimable event has taken place, establish a new file to contain all documents that relate to the event. Include duplicate documents from the master file and any document, no mater how remote, should be included

- It may also be necessary to establish a new cost code in the project accounting system to accurately record all costs allocated to the event, this will also assist in the substantiation of costs.

- Records.

  - The single most important element of any claim is the records that it is based on. Any evaluation by the client or a third party will be based on evidence of the delay and disruption/ additional cost etc. and the burden of proving this falls only to the claimant.

- Preparation of Claim

  - In preparing the claim document a critical and unbiased apportionment of liability should be established.

- For all but the most basic of contracts this should be produced using Critical Path Method (CPM) schedule computer software. The advantage of this type of software is that by using various programmes (As-Planned, Baseline, As-Built) the impact of various delay issues can be shown in a CPM format.

- Status Reports

  - Monthly commercial status reports are a useful tool not only to check on the current financial health of the project but the position on outstanding / unresolved variations or claim issues

Key to successful claim

"It has been said that when the height of the construction project's paperwork reaches the height of the building itself, it is time for the contractor to apply for the final payment."

- READ THE CONTRACT AT THE TIME OF BID
  - be sure key personnel associated with the project get familiar with key provisions so that if a situation gives rise to a potential claim....

The Importance of Documentation

(1) document the facts to support the claim, and

(2) develop a method in which to prepare and present the claim.

Good Documentation

Good documentation means documents that are detailed and descriptive, prepared at the time of the event, and maintained on a continuing basis to show the contractor's progress on the project.

In the absence of good documentation, a contractor will be hard-pressed to present claims which will be persuasive to the owner or provable in litigation.

When to Start Documentation

The documentation necessary to support a construction claim starts at the beginning of the project and continues during the life of the project.

If you bid low and improperly manage the project, however, don't expect that you will necessarily be able to successfully support a claim simply by creating the paperwork trail.

On the other hand, a contractor who properly estimated and managed the project but failed to document the loss caused by others will have a difficult time establishing a basis for recovery.

What to Document

- Useful tools in preparing a claim if they are properly prepared:
  - Estimate should be clearly prepared and saved for the life of the project including the resolution of all claims;
  - Provide detail to cover each cost item in the project, showing man hours and dollars for each cost item;
  - Separately identify the costs related to project overhead, corporate overhead and profit.

- Schedule
  - the schedule is the starting point for any analysis to prove that the contractor was delayed in his work by the actions of others;
  - the owner will evaluate the contractor's performance based on this schedule;
  - prepare a thoughtful, well planned, and realistic schedule.

- The items which should be documented during a project:
  1. contractor/owner communications
  2. contractor/architect communications
  3. contractor/subcontractor communications
  4. job meeting minutes
  5. submittal logs
  - include the date of each submission and receipt of approval. Can be invaluable when a claim is based upon delayed submissions or delayed approvals of shop drawings

6. design change log

- include the date of receipt of revised drawings or written directives with a brief description describing the change

7. daily progress report

8. labor, material and equipment records for work which may be the subject of a claim for extra compensation

9. payment requisitions and records of payments

10. project close-out, punch-lists and warranties

The Daily Progress Report

A daily progress report is a must document for any contractor who

hopes to prevail on a construction claim. Whether it's a delay claim, a changed condition claim, or a claim for extra work, the daily progress report is a necessary evil. Use photographs of the job taken on a weekly basis of the job's progress.

A properly completed progress report serves four functions:
1. it's a standard method for recording events that take place on the job each day;
2. it keeps management personnel aware of job developments on a current basis, which allows them to take corrective action when a problem arises;
3. it creates a permanent record that can be used to resolve claims, particularly when a witness is unable to recall details from memory years later when the claim goes to trial;
4. since construction employees often change employers, it can minimize the impact of an unavailable witness.

What kind of information should go in a daily progress report?

1. date - both the date and the day of the week
2. weather - temperature and precipitation conditions
3. work in progress and work completed that day including the location and identification of the personnel performing the work
4. an indication of whether the work is on schedule, behind or ahead
5. instructions received including identification of the individual who gave the instructions
6. problems - delays, late deliveries, unclear specifications or instructions, and, actions taken to resolve the problem
7. manpower - manpower levels of various contractors on the project.

How to Document Certain Claims

(1) Changed Conditions

- Immediately upon discovery of changed conditions, notify the owner or architect or other agent as required by the contract.
- If a problem is non critical, you may be able to stop the work until you have resolved the problem with the owner.
- If it is critical, you should notify the owner that the work must continue and you will seek payment of the cost afterward. Those costs should be detailed records.

- Photograph the existing condition to provide a pictorial representation of the condition. Maintain detailed records as to the labor, materials and equipment needed for the work. Document your production rates.

(2) Delay claims

When a contractor seeks to recover costs associated with delay to the project, this usually involves increased overhead, wage escalation or inefficiency costs. In order to recover under such a claim, you will have to show that the delays were a direct result of the owner's action or the party at fault.

Here, it will be important to prepare an as-built schedule which graphically shows how the job was delayed. This is where your daily progress reports and photographs of the job's progress will pay off in preparing the as-built schedule.

3) Recording Costs

- Contractors may utilize a cost accounting system which records actual costs per unit of work as compared to the estimated unit cost. Consider establishing cost codes for non-productive time if the lack of production was caused by others. A cost code for changed conditions would also be helpful where time and costs associated with that work could be recorded. Request that the owner or architect verify the hours spent on the changed condition even if they dispute that it is in fact a changed condition.

- The contractor is obligated to mitigate his costs and keep the job moving. If you have a crew on site held up by a problem and you don't attempt to put them to work on other areas and later seek to recover stand-by time, you may not be able to do so unless you can show that there was no other work available or that a change in the work schedule could not be made to put those men to work.

(4) Use of Photographs

- To save time in completing paperwork, contractors sometimes use photographs to describe the progress of the work as well as changed conditions discovered on the job. Consider taking photographs of the project site at the beginning to provide a "before" condition of the job site. These photographs may be essential to establish a "changed condition" claim.
- Photograph all areas of the project on a weekly basis to document progress and attach them to the daily progress report as a "short-hand" way of describing the day's events.

- Effective use of photographs to support your claim should include the following:
  - identification of the photographer
  - date and time
  - project name/location
  - highlight problem areas
  - highlight areas of delay or changed conditions
- Consider a photo "log" containing descriptions

Maintaining the Documents for Preparing the Claim

- The receipt, review and filing of, as well as the response to, the documents are necessary procedures for any contractor who hopes to prevail in a construction claim.
- Review meeting minutes and respond if it varies with your recollection.
- Review correspondence and response.
- Review revised drawings and respond with any time or cost changes or requests for clarification.

Notice Requirements/Time Limitations

- A contractor may have the best facts and documentation to support his claim. But, miss the contract time period for giving notice of the claim and you may be out of luck.
- Review the contract in its entirety, including general and supplementary conditions. Locate and mark all applicable time limitations for the submission of a claim.

Putting the Claim Together

- When it comes time to prepare the claim for submission retaining a claims consultant and/or an attorney to assist with the process.
- The first step is to gather all project documentation for review so that the consultant or attorney can identify those documents which are necessary to support the claim. Be sure you collect each individual's "personal files" as well as the project files. Project personnel tend to keep their own files, which may contain copies of project documents, personal notes, diaries and calendars.

- Second, prepare a historical summary describing the facts that gave rise to the claim, why the contractor is entitled to extra compensation, and tie itto the contract, drawings and specifications. Consider using your daily progress reports, correspondence and photographs to substantiate the claim.
- Third, refer to correspondence and communications with the owner and architect which establish that notice of the claim was given and describe any action taken by those parties as to the claim

- Fourth, provide a detailed description of the work performed by the contractor.
- Fifth, provide a summary of the costs incurred by the contractor, including all subcontractor costs.
- Sixth, include back-up documentation as to the costs (labor, material and equipment) together with invoices and other documentation received from subcontractors.

Your Claim is Denied - The Next Step

- If the owner or architect denies your claim, you must be ready to take the next step. Review the contract to determine whether you must mediate, arbitrate or litigate.
- Once the forum is known, the attorney begins the process of setting the stage for the proceeding. Typically, there is no discovery in mediation and only limited discovery in arbitration. In court proceedings, however, full discovery is available.
- The attorney should not assume that his/her client's files are complete and should seek discovery from the other parties; namely, owner, architect, key subcontractors, other prime contractors, etc. Each party likely has their own project diaries or daily reports which may contain key information to support your claim.

- If the contractor has properly documented the facts, maintained good cost and schedule records, and assembled the supporting correspondence, photographs and reports, the contractor has maximized his chances of recovering on the claim

Engineer's Warranty To Contractor:
Adequacy of Design

- Two of the most common trouble spots in engineering contracts are
- indemnification provisions and
- warranty and guarantee clauses.

- indemnification provisions obligate an engineer to defend or indemnify losses beyond those caused by negligence.

- Words like insure, ensure, assure, complete, and every appear in an engineering contract. These words commonly indicate warranty or guarantee provisions, which fall beyond the bounds of professional liability insurance.

- Because design professionals base their services on judgment and expertise, the courts have ruled that they do not have a duty to guarantee their services. Their only legal standard is the standard of care.
- Owners frequently try to guarantee performance or warranty compliance with laws, regulations, and codes.

Design-Build Contract

- The extent of their responsibilities and liabilities as design-builders:

  - The hold-harmless provision could be held to be unenforceable. The shifting of liability for one's own negligence to another party may invalidate the provision.

- The design firm may not be in business when the claim is filed. Since professional liability insurance is written on a claims-made basis, it is likely that no coverage would exist at that time.
- Architects and engineers errors and omissions policies typically do not cover contractual liability, such as that assumed under a hold-harmless provision, unless such liability would have attached in the absence of a contract or agreement. Rather, coverage under such policies is limited to damages that are the result of "professional negligence."

Liability of Engineer

Areas of engineer's concern

- A. design
- B. inspection & contract administration
- C. safety/means & methods
- D. shop drawing approval
- E. actions A/E's can take to minimize exposure

- **Effect Of Incomplete, Ambiguous or Incorrect Design Documents**

  A. impact on project and to contractor
  B. consequences to A/E
  C. ways to reduce

Understanding Construction Contract Terms, Meaning & Ramifications

A. site investigation/subsurface conditions
B. no damage for delay
C. indemnification <—>
D. notice of claim/claim procedures
E. responsibility for design problems

Differing Site Conditions/Superior Knowledge Doctrine

A. definition

B. purpose and effect

C. recommendations on contract and specification drafting

D. notice and claim requirements

E. change order for equitable adjustment

F. geotechnical design reports

G. ways to minimize claims

Documentation And Why It's Critical

A. characteristics of good documentation

B. methods for documenting the job

C. how does keeping good documentation help?

Dispute Resolution Options

A. negotiation settlement
B. mediation
C. arbitration
D. dispute review board

Mediation

- Mediation involves an attempt by the parties to resolve their dispute with the aid of a neutral third party. The mediator's role is advisory. The mediator may offer suggestions but resolution of the dispute rests with the parties themselves. Mediation proceedings are confidential and private.

Fixed Term

ARBITRATION

- Arbitration is submission of a dispute to one or more impartial persons for a final and binding decision. The parties control the range of issues to be resolved by arbitration, the scope of the relief to be awarded, and many of the procedural aspects of the process. Arbitration is less formal than a court trial. The hearing is private.

Process will be new irrespective of what had been agreed in Mediation Process

PROCESS

- Commencement of Process
  - Referral
  - Fees
  - Appointment of mediator/Arbitrator

- Objection to Mediator/Arbitrator
- Submission of Papers
  - directions for the submission and exchange of documents by each party.
  - documents to be submitted
- The Mediation Hearing
- Settlement /Award
- Withdrawal of Mediator

In conclusion

- The bottom line is that all the parties involved in a design-build project must understand their roles and acknowledge the unique aspects of design-build that allow it to work effectively

- Contractors would be wise to avoid entering into design-build contracts with owners who want to retain control over the design yet obtain the lowest possible price.