



Contract Negotiations – 5 Key Clauses

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Introduction

5 Key Clauses in contract negotiations:

1. Security and recourse to security
2. Risk of errors, ambiguities and inconsistencies in contract documents
3. Entitlement to Extension of Time
4. Liquidated Damages
5. Suspension

No. 1 - Security

Security & Recourse

- Traditionally provided as performance security in the form of bank guarantee or retention money;
- Performance security generally would only be called upon if subcontractor fails to perform the works under the contract or fails to rectify defects;
- Today move away from traditional performance security to a mechanism to allocate risk of who should be out of pocket in the case of disputes or breaches of contract.

No. 1 - Security

Security & Recourse

- Notice before recourse to bank guarantee;
- Limit entitlement to have recourse to security for debts due under contract only;
- Avoid clauses that suspend return of bank guarantee in the event of disputes or provide entitlement to draw on bank guarantee for any breach of contract;
- Always negotiate an express entitlement to return of bank guarantee upon termination for convenience.

No. 2 - Risk of Errors in Contract Documentation

Risk of Errors, Ambiguities and inconsistencies in Contract Documentation

- Consider where has risk been allocated for any discrepancies, errors, inconsistencies or ambiguities in contract documents?
- Construct only – Principal or Head Contractor;
- Design and Construct – Subcontractor.

No. 2 - Risk of Errors in Contract Documentation

AS 4000 – 1997

8.1 Discrepancies

Figured shall prevail over scaled dimensions in a discrepancy. Otherwise, if either party discovers any inconsistency, ambiguity or discrepancy in any document prepared for the purpose of carrying out *WUC*, that party shall give the *Superintendent* written notice of it. The *Superintendent*, thereupon, and upon otherwise becoming aware, shall direct the *Contractor* as to the interpretation and construction to be followed.

If compliance with any such *direction* under this subclause causes the *Contractor* to incur more or less cost than otherwise would have been incurred had the *direction* not been given, the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

No. 3 - Extension of Time

Extension of Time

- Reasonable notice provisions – at least **5 business days**;
- Entitlement to EOT for delays caused by other contractors;
- Extension of time for weather is rare;
- Beware of EOT clauses which only provides for entitlement upon breach of contract of Principal or Head Contractor;
- Beware of EOT clauses that require the contract to incur costs to overcome delays (ie increase resources);
- Consider exposure to Liquidated Damages and other delay costs if no EOTs are awarded.

No. 3 - Extension of Time

Extension of Time (example clause)

Preconditions to Extension of Time

- (a) The Subcontractor must take all steps necessary to avoid, or if it cannot be avoided, minimise the effect of any delay in the performance and completion of the Subcontract Works, including reallocation of resources, reprogramming and the commitment of additional resources.*
- (b) The delay must be caused by the Head Contractor's breach, act, or omission (excluding other contractors, whether employed by the Head Contractor or not) and not any act or omission by the Head Contractor expressly permitted under the Subcontract.*
- (c) The Subcontractor must not cause or contribute to the delay.*

No. 4 - Liquidated Damages

Liquidated Damages

- Rate per day should be reasonable;
- Generally LDs should be capped at 5% of contract sum;
- LDs should be express as the Principal / Head Contractor's sole remedy for delays caused by the subcontractor;
- Do not agree to unlimited LDs;
- Do not agree to LDs and general delay damages.

No. 4 - Liquidated Damages

Liquidated Damages (Example Clause)

The Subcontractor must pay the Contractor Liquidated Damages for every day after the Date for Practical Completion until and including the Date of Practical Completion or the date that this Subcontract is terminated, whichever first occurs and further indemnifies the Contractor against:

- (i) liquidated damages payable by the Contractor to the Principal under the Head Contract;*
- (ii) any other damages payable by Contractor to the Principal; and*
- (iii) any other loss, expense or damage suffered or incurred by the Contractor, as a result of the Subcontractor's failure to reach Practical Completion by the Date for Practical Completion.*

No. 5 - Suspension clauses

Suspension

- Right to suspend for any reason;
- Right to terminate if works are suspended for longer than 6 months, subject to notice;
- Payment of costs of suspension;
- AS Contracts provide for suspension in limited circumstances and payment of payment of additional cost if subcontractor did not cause the suspension.

No. 5 - Suspension clauses

Suspension (Example Clause)

- (a) The Contractor may in its sole discretion suspend the whole or any part of the Works by giving the Subcontractor a notice of suspension.*
- (b) Upon receipt of the notice of suspension, the Subcontractor shall cease the whole or that part of the Works which is the subject of the suspension notice on the date of receipt of the notice or such later date as may be specified and take all necessary action to properly protect and secure the Works.*
- (c) The Contractor shall only be liable to pay the cost of the suspended work, actually performed up to and including the date on which the work was suspended in the suspension notice. The Contractor shall not be liable for any loss of profits, or any costs incurred after receipt by the Subcontractor of the suspension notice.*
- (d) The Contractor may at any time by written notice, direct the Subcontractor to recommence the Works and the Subcontractor will promptly do so in accordance with the Contractor's written instruction.*

No. 5 - Suspension clauses

AS 4000 – 1997 (Unamended)

33.1 Superintendent's suspension

The Superintendent may direct the Contractor to suspend the carrying out of the whole or part of WUC for such time as the Superintendent thinks fit, if the Superintendent is of the opinion that it is necessary:

- a) because of an act, default or omission of:
 - i) the Superintendent, the Principal or its employees, consultants, agents or other contractors (not being employed by the Contractor);
or
 - ii) the Contractor, a subcontractor or either's employees or agents;
- b) for the protection or safety of any person or property; or
- c) to comply with a court order.

No. 5 - Suspension clauses

AS 4000 – 1997 (Unamended)

33.4 Cost

The *Contractor* shall bear the cost of suspension pursuant to paragraph (a)(ii) of subclause 33.1 and subclause 33.2. If the *Contractor* made the protection, safety or court order necessary, the *Contractor* shall bear the cost of suspension pursuant to paragraph (b) or (c) of subclause 33.1. If the *Contractor* otherwise incurs more or less cost than otherwise would have been incurred, the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

Questions



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