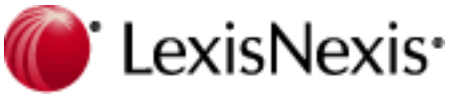
NOTE: Butterworths



Print Request: All Documents: 1-4
Time Of Request: Friday, June 05, 2009 21:38:15
Send To:

ISAUNI OF MELBOURNE, AU
ISAUNI OF MELBOURNE
ATTN: CAROLE HINCHCLIFF
L3 LAW SCHOOL BUILDING

Source: Commentary by keyword(s)
Combined Source: Commentary by keyword(s)

1 of 4 DOCUMENTS: Building Contracts Australia/Introduction/DETAILS ON THE STANDARD CONTRACTS

Introduction

Introduction

Introduction

[5000] DISPUTATION IN THE INDUSTRY

One of the major causes of disputes in the building and engineering industry is inadequate contracts. There is no shortage of standard forms, but the great majority of them have been drafted by committees made up of disparate groups whose overriding interest is to protect one party at the expense of any other party to the contract. Furthermore, these standard forms are invariably inflexible, complicated and liberally sprinkled with ambiguity.

This collection of contracts and clauses aims to redress these problems. The authors aim to provide a platform of simplicity of language, standardisation and consistency that will promote more efficient contracting in the industry.

[5100] PROCURING WORK AND SERVICES

The initial issue of ***Building Contracts Australia*** covers the following methods of procuring work and services:

1. Traditional Contract
2. Design and Construct
3. Subcontracts
   (a) Companion
   (b) Risk Sharing

4. Minor Works
   (a) Minor Works
   (b) Short Form Minor Works

5. Supply
   (a) Supply of Major Equipment
   (b) Supply of Goods

6. Project Management
7. Project Alliances
   (a) Project Alliances in the Construction Industry
   (b) Project Alliance Works Agreement
   (c) Project Alliance Main Agreement

8. Consultancy
9. Miscellaneous contracts
   (a) C21 Construction Contract
   (b) Domestic Building

DETAILS ON THE STANDARD CONTRACTS

[5200] Traditional Contract

The Traditional Contract form has been developed bearing in mind the conventional manner of procuring major capital works. It is suitable for the construction of large buildings and engineering infrastructure, on the basis that all preconstruction phases such as investigation, design and design documentation have been separately arranged by the owner.

This precedent form has been called the Traditional Contract because it adopts and follows the format which has for many decades in Australia, England and parts of South-East Asia been used for the construction of major architectural and engineering works. Owners, developers, contractors, subcontractors and consultants (architects, engineers, financiers and lawyers) will be familiar with the format.

While most of the provisions have been tried and tested before, there are a number of terms and conditions which are quite novel. At the same time, there has been an attempt to use an efficient and fair approach to the allocation of risk.

The Traditional Contract readily lends itself to similar types of contracting, namely:

- design and construction
- minor works
- subcontracting
- supply of major equipment

Once an owner's employees, consultants and contractors become familiar with one of the above standard forms, they should be readily able to adopt any of the other standard forms with confidence. The same broad philosophy and approach of the Traditional Contract has been embraced in the Design and Construct, Minor Works, Companion and Major Equipment Contracts.

A number of special conditions of contract have been included for the benefit of users of the Traditional Contract. These special conditions deal with guaranteed maximum price, programming of the work, novation, selected subcontractors, partnering, quality assurance and dispute resolution.

This new form of Traditional Contract has a useful introduction outlining the main characteristics of the standard form, and there are also explanatory notes for many of the clauses. The notes should prove to be very helpful to tenderers and contract administrators.

The novel position of an adjudicator has been included in the contract to allow parties to appoint an independent person to make decisions on disputes. The adjudicator can either be a truly independent umpire appointed by both parties or the traditional superintendent engaged by the owner. The title "superintendent" has in fact been dropped from this suite of contracts in favour of the expression "principal's representative". The aim is to use a term that more accurately describes the title and role of the person who has traditionally exercised the functions of the prime contract administrator in building and engineering contracts. The legal position of the owner is in no way whatsoever affected by the replacement of the term "superintendent" with the expression "principal's representative".

The terms and conditions are quite precise and the language is clear, thus providing users with a greater certainty of interpretation than can be found in most other contracts. The explanatory notes should increase the confidence of those needing to interpret specific clauses. Not only is the drafting intended to be clear, comprehensive and conclusive, but the standard form aims to assist the parties to the contract with any consequences that flow from the

various promises and obligations, such as breaches of contract, other acts or omissions, delays and insurance issues.

In particular, the Traditional Contract (as well as the other standard forms in the suite of contracts) deals comprehensively with the essential matters of:

- insurance
- time
- variations
- programming of the work
- defective work
- suspension of the work
- payment
- termination
- disputes

The Traditional Contract contains an extensive index which has been incorporated with the other indexes for ease of movement between the standard forms.

[5300] Design and Construct Contract

The Design and Construct form is particularly suited for major building and engineering works where the contractor, in addition to being responsible for construction of the building or the engineering facility, is to provide design or design documentation.

Although this standard form is based on the Traditional Contract and mirrors most of the terms and conditions in that base document, the Design and Construct Contract has been especially created with design functions and obligations in mind.

Furthermore, the contract provides for "document and construct" as well as "design and construct" because design and documentation are really parts of the one process. It is important, however, to spell out clearly in the technical specification what design will be carried out by the owner and what design will be done by the contractor. Likewise, the specification should clearly state the obligations of the respective parties regarding documentation. In other words, these issues are more appropriately matters for the specification writer, not the drafter of the general or special conditions of contract.

The Traditional Contract has been modified in a number of respects to create a suitable form for design and construct applications, including the following areas:

- the definition of work
- the performance and payment obligations
- bill of quantities
- the supply of documents
- latent conditions
- intellectual property
- excepted risks
- insurance
- extension of time
- variations
- valuations
- termination by frustration

Like the Traditional Contract, there is a user friendly preface and explanatory notes that should give extra confidence to owners, designers, contractors and subcontractors.

[5400] Companion Subcontract

This standard form is intended to be used in conjunction with either the Traditional or the Design and Construct Contract in circumstances where major building or engineering works are being subcontracted out by the main contractor. The Companion Subcontract, however, can stand alone or be used with other general conditions of contract such as the Supply of Major Equipment Contract.

The Companion Subcontract follows closely the Traditional Contract. For example, the role of the main contractor's representative under the subcontract conditions is similar to the role of the principal's representative under the main contract, with the exception that the main contractor's representative does not issue progress payment certificates, only the final payment certificate.

Furthermore, there is no provision for the main contractor's representative to delegate powers like the principal's representative can entrust to a delegate of the principal's representative under the main contract.

If the work under the subcontract is mainly offsite manufacture with a small component of onsite installation, the Supply of Major Equipment Contract or the Supply of Goods Contract may be more appropriate as subcontract conditions.

On the other hand, if the work or service under the subcontract is only design work, then the Consultancy Contract would be more suitable.

Particular features of the Companion Subcontract include:

- the terms and conditions in the Traditional Contract are mirrored in the subcontract
- "substantial completion" replaces the expression "practical completion"
- various time periods in the Traditional Contract have been altered for the subcontract situation
- there is a provision dealing with services and facilities

[5500] Risk Sharing Subcontract

The Risk Sharing Subcontract form is suitable for the subcontracting out of large architectural and engineering capital works, whether it involves construction only activities or both design and construction activities. With appropriate amendment, this standard contract can also be adopted for many other types of subcontract work.

This form differs quite markedly from the companion subcontract and other subcontract forms in general use in the construction industry. The Australian standard subcontract conditions of contract AS 2545-1987, for example, are virtually the same as the head contract conditions AS 2124-1986 just as the companion subcontract in this Service very closely follows the traditional contract. The main contractor would, therefore, assume the same sort of risks that the owner assumes when the conventional contracts are being used together on a project. This ignores the difference between a head contract and a subcontract.

Novel features deal with:

- key dates
- indemnity
- pay if paid

- disruption
- collateral warranties
- assignment of rights
- joinder in arbitration

Under most subcontracts, the relationship of the main contractor to the subcontractor is more like a master/servant relationship than a partnership, and the subcontractor does not assume the risk of defaults by the owner. The subcontractor can sue the main contractor irrespective of whether the main contractor is recompensed by the owner. Under the risk sharing contract, the subcontractor assumes the obligations of the main contractor to the owner and accepts the risk of the owner's default.

[5600] Minor Works

There are two minor works contracts. The first one is merely an abbreviated version of the Traditional Contract and is suitable for small and uncomplicated building and engineering works where either construction or design and construction are the responsibility of the contractor.

This standard is modelled on the Traditional Contract, but by deleting many of the conventional terms, the owner and the contractor can base their bargain on a simple set of contract conditions.

Contractors, owners and consultants can efficiently and effectively move between the Minor Works form and the Traditional Contract because of the similarity between the more fundamental terms common to each contract.

The second minor works contract (ie the Short Form version) is also suitable for small building and engineering works. The parties merely use a simplified agreement to evidence their contract. The annexure from the Traditional Contract has been abridged for utilisation in this minor works standard form.

[5700] Supply

There are two supply contracts. The Supply of Major Equipment Contract is suitable for the supply of major goods, including equipment and materials. It is particularly appropriate for the building and engineering industry because this standard form follows the format which has been used for the Traditional, Design & Construct and Companion Contracts.

Although this supply contract is intended to deal with the supply (and installation) of large engineering equipment, this major equipment form of contract could equally be used for the supply of computers, vehicles or materials.

The Supply of Goods Contract has been created for use as a main contract or as a subcontract where the goods are of a miscellaneous nature rather than being, for example, a typical piece of large engineering equipment. This supply contract also caters for installation, where necessary.

There are an enormous variety of supply arrangements in the construction industry and these two supply contracts attempt to provide a choice for suppliers and purchasers based on flexibility and conciseness.

[5750] Project Management

The Project Management form of contract is suitable for building and engineering works where the principal wants to appoint a manager as agent for the principal for the purpose of letting trade contracts, including design, construction and supply work.

The manager under this contract is required, on behalf of the principal, to manage a project or to represent the principal (as a superintendent, for example).

The expression "Project Managment Contract", as used in this standard form, has the same meaning as the expression "Construction Managment Contract". The contract has not been created for the situation where a manager directly and personally contracts with the principal to construct or to design and construct work.

[5800] Consultancy

This standard form is a set of conditions of contract for the engagement of a consultant to give advice or provide a service to a principal. The Consultancy Contract can also be used for a consultancy subcontract.

This contract can be novated ie discharged and replaced by a new contract so that, for example, a design and construct contractor takes on the liabilities of the consultant.

The Consultancy Contract could also be let by a principal to a consultant and later be assigned (ie transferred) to a design and construct contractor which would then create a new contract between the principal and the design and construct contractor.

[5850] Domestic Building Contract

The Domestic Building Contract has been created for use in the cottage industry. This standard form deals concisely with the six essential elements of any contract - the parties, price, payment, program, promise and proof ("the six Ps").

The Domestic building form of contract also deals with the six desirable elements of a house construction contract - drawings, deposit, delay costs, damages, determination and disputes ("the six Ds").

Although this contract is designed to satisfy the law in each State or Territory, individual legal advice should be sought to obtain specific and up to date information.

Comment is included on the Home Building Act 1989 (NSW) which commenced on 1 May 1997.

[5900] WHICH CONTRACT DO I USE?

Each procurement situation should be carefully considered, taking into account the type of work or service, the parties, the price, previous experiences and relationships, the program, the location and, naturally, all the circumstances.

The following table is merely a guideline to which contract should be used for a particular work or service.

Contract	**Application**
Traditional Contract	This standard form can be used for the construction of major building and engineering works where all (or at least the great majority) of the preconstruction activities, such as investigation and design, have been separately arranged by the principal).
Design and Construct Contract	This contract is intended for the design and construction of major building and engineering works where the contractor is responsible for design as well as construction.
Companion Subcontract	This form follows closely the Traditional Contract and is intended to be used in conjunction with either the Traditional Contract or the Design and Construct Con-

	tract where major building or engineering works are subcontracted out by the main contractor.
Risk Sharing Subcontract	The Risk Sharing Subcontract differs quite markedly from the usual subcontract. Under the Risk Sharing Subcontract, the subcontractor assumes the obligations of the main contractor to the principal and accepts the risks of the principal's default. The Risk Sharing Subcontract is suitable for the contracting out of major building and engineering work whether it involves construction only activities or both design and construction activities.
Minor Works Contract	This standard form is an abbreviated version of the Traditional Contract and is suitable for small and uncomplicated construction works where either construction or design and construction are the responsibility of the Contractor.
Short Form Minor Works Contract	This contract is suitable for small building and engineering works where either construction or design and construction are the responsibility of the contractor. It is particularly suited to repeat minor works situations. The parties merely use a simplified agreement to evidence their bargain. The Short Form Minor Works Contract gives the parties the comfort of all the provisions of the Traditional Contract without the need for the principal and the contractor to actually express those provisions in the Short Form Contract. The annexure of the Traditional Contract has been abridged for utilisation in this minor works contract.
Supply of Major Equipment Contract	This form of supply contract has been created for the supply and installation of major goods, including equipment and materials. It is particularly appropriate for the construction industry because the format of this contract mirrors the Traditional, Design & Construct and Companion Contracts. This Supply of Major Equipment Contract can be used for the procurement of a wide range of things that may be utilised by the construction industry, eg computers, vehicles and materials.
Supply of Goods Contract	The Supply of Goods Contract can be used as a main contract or a subcontract and also covers installation requirements. Goods of any description can be procured with this standard form for construction projects.
Project Management Contract	This contract can be used for building and engineering works where the principal wants to appoint a manager as agent for the principal for the purpose of letting trade contracts, including design, construction or supply work. The manager under this standard form can either manage a project on behalf of the principal or represent the principal (eg as a superintendent).
Consultancy Contract	This standard agreement is suitable for the engagement of a consultant to provide advice or a service to a principal, either as a main consultancy contract or a consultancy subcontract. The Consultancy Contract provides for novation and assignment of the professional service.
Domestic Building Contract	The Domestic Building Contract has been created for use in the cottage industry. Although this contract is designed to satisfy the law in each State or Territory, individual legal advice should always be sought to obtain specific and up to date information.

[6000] THE WAY FORWARD

In developing a suite of contracts for the building and engineering industry in Australia, the authors have been encouraged by the pleadings of owners, contractors, consultants and subcontractors for contracts that not only use simple language, but offer the industry an improved degree of standardisation and consistency of contractual terms and conditions.

Although the building and construction industry has used standard form contracts for many years, the encyclopaedia has attempted to modernise the contracts and particular clauses that apply to the type of complex projects that are being developed and constructed today by government and the private sector.

Moreover, standard forms have been created that are applicable to design & construct, subcontracting and project management situations where to date there has been a real scarcity of appropriate contracts to meet the needs of owners, contractors, consultants and subcontractors.

Contracts dealing with traditional construction, design and construction, minor works and the supply of major equipment complement each other and will allow users of these documents to confidently and easily move from one standard form to another. The terms and conditions in the Traditional Contract have been mirrored in these other standard forms.

There has been a general adoption of the terminology and sequence of clauses used in typical building and engineering contracts in Australia and overseas for this new suite of contracts. As a result, users of the contracts will be familiar with the format of these new standard forms.

At this stage, explanatory notes accompany the traditional, design and construct and major supply contracts. These notes deal with many of the clauses in those contracts and should be of assistance to tenderers and contract administrators alike. In time, the explanatory notes will be developed for the balance of the contracts in the suite.

In future issues of this service, additional standard forms and separate clauses will be drafted for such matters as:

- Joint Ventures
- Maintenance
- Build Own Operate and Transfer Projects
- Swimming Pool Contracts
- Demolition
- Removal of Dangerous Substances
- Guarantees
- Alternative Dispute Resolution
- Releases
- Warranties
- Trusts
- Notices and Certificates
- Expert Determination

There is also an intention to include in the encyclopaedia, precedents drafted by others. An editorial panel will be established to invite and to assess submissions by others.

This publication will not only include draft contracts and clauses, but will include articles on which form of contract is best used for certain purposes or which contract conditions are more appropriate for particular problems.

There is a real and pressing need for precise and clear language in the drafting of contracts and particular terms and conditions. The authors are confident that their contracts will give greater certainty of understanding and interpretation to contracting in the building and engineering industry.

2 of 4 DOCUMENTS: Building Contracts Australia/Miscellaneous Contracts/GC21 General Conditions of Contract/The Contract

The Contract

[75,210] 7 The Contract

[75,215] 7.1 The Contract is comprised of the Contract documents

The preamble to cl 7.1 says that a Contract is formed by the signing of the Deed of Contract Agreement by the parties, or by the Principal sending a letter awarding the Contract to the Contractor. The word "sending" is not a defined term under GC21, so in this context sending could include posting, delivering, dispatching, giving or otherwise conveying the letter of award to the Contractor. The parties could consider clarifying the meaning of the word sending under GC21. For example, the word sending in cl 7.1 could be substituted by the following expression: "posting or delivering by hand".

The word "Contract" is defined under cl 83 as "The agreement between the Contractor and the Principal constituted by the Contract Documents". The expression Contract documents is then defined under cl 83 as "(a)ll the documents listed or referred to in cl 7.1"; and that list refers to the following documents:

(a) the GC21 General Conditions of Contract;
(b) Contract Information (defined under cl 83);
(c) Schedules annexed to GC21;
(d) Principal's Documents (defined under cl 83) (at the Date of Contract); and
(e) any documents listed in item 17 of Contract Information as reference Contract documents.

The expression "Principal's Documents (at the date of Contract)" is misconceived because the term "Principal's Documents" is defined under GC21 such that the design and other documents comprising the Principal's Documents includes any modified or further such documents subsequently provided by the Principal to the Contractor for the Contract.

The letter of award to the Contractor (or the Contract agreement, if used instead to form the Contract) is a reference Contract document.

The Contract between the Principal and the Contractor is intended to be constituted solely by the Contract documents. The general rule of law is that a court will not hear evidence of a party's actual intention in entering into a Contract. Clause 7.1 states that Contract documents:

> ... supersede all understandings, representations and communications (ie. all dealings -- written or oral) between the parties related to the subject matter of the Contract made before the Date of Contract.

Where a document embodies the terms of a Contract, there is a presumption in law that the document expresses all the terms of the Contract, with the consequence that a court will only consider the written document "in determining what the Contract really was and what it really meant": Inglis v John Buttery & Co(1878) 3 App Cas 552. This is known as the parol evidence rule.

Despite this rule, a court is able to receive evidence of the circumstances surrounding the Contract, as well as the commercial purpose of the Contract on the basis that it forms part of the commercial matrix against which the parties

Contracted. In Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)[1976] 3 All ER 570; [1976] 1 WLR 989; [1976] 2 Lloyd's Rep 621, Lord Wilberforce said that, when constructing or construing a Contract, the court must "place itself in thought in the same factual matrix as that in which the parties were". The High Court adopted the factual matrix concept in Codelfa Construction Pty Ltd v State Rail Authority (NSW)(1982) 149 CLR 337; 41 ALR 367; BC8200083 and held that evidence of discussions between the parties to a construction Contract, prior to the Contract being executed, was admissible for the purpose of establishing the common understanding of the parties in relation to the fact that work would be carried out on the basis of three 8 hour shifts. In *Reardon Smith*, Lord Wilberforce said that no Contracts are "made in a vacuum"; there is always a setting (that is, the surrounding circumstances) in which they have to be placed". Isaacs J held in Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd(1919) 26 CLR 410; [1919] HCA 18 that it is legitimate to adduce evidence of surrounding circumstances to prove that "words susceptible of more than one meaning are applicable to one only of those meanings."

Nevertheless, the express terms in a Contract are unlikely, except in the most meticulously and comprehensively written Contracts, to be the final measure of the obligations of the parties (as discussed in the commentary for cl 3 regarding implied terms). At common law, the High Court has stated in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266; 16 ALR 363 that for a term to be implied into a Contract, it must:

(a) be reasonable and equitable;
(b) be necessary to give business efficacy to the Contract;
(c) be obvious, ie "it goes without saying";
(d) be capable of being expressed in clear words; and
(e) not contradict an express term.

The courts have said that a court does not make or improve Contracts. Their function:

> ... is to interpret and apply the Contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between the different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their Contract; it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them; it must have been a term that went without saying, a term necessary to give business efficacy to the Contract, a term which, though tacit, formed part of the Contract which the parties made for themselves: *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260; [1973] 1 WLR 601.

The implications may be necessary because "language is imperfect and there may be, as it were, obvious interstices in what is expressed which have to be filled up": Luxor (Eastbourne) Ltd v Cooper[1941] AC 108; [1941] 1 All ER 33.

However, there are a number of terms which the Sale of Goods statutes in the Australian states and the Trade Practices Act 1974 (Cth) will imply into Contracts (for example, merchantable quality and fitness for a particular purpose) and these implied terms cannot be excluded in certain situations.

Although the Principal's documents form part of the Contract and include "further documents (such as instructions) later provided by the Principal to the Contractor for the Date of Contract", oral instructions may not necessarily form part of the Contract. There may be occasions (for example, protection of people, property or the environment) when the Principal issues an oral instruction, but the terms of the present cl indicate that it does not become part of the Contract even though it would obviously be in the Principal's interest for an oral instruction to be part of the Contract. Despite the statement in cl 7.1 that the Contract is "made up solely of the Contract Documents", cl 30 gives some protection to the Principal in respect of oral instructions because it envisages that in certain circumstances oral instructions will be given by the Principal. On such occasions, cl 30 requires oral instructions to be "confirmed in writing as soon as practicable". It is, therefore, most important that any oral instructions given by the Principal be confirmed promptly in writing.

If, for some sound reason (for example, funds are not yet available for the whole Contract or the site is not available) the Principal is not in a position to award the Contract, then the Principal may decide to issue a "letter of intent" to the preferred tenderer: see Attachment B. Even though there is an impediment to the Contract being let at that stage, the Principal may find it necessary to issue a letter of intent to the preferred tenderer so that, for example, a pump or certain materials can be ordered in advance of a Contract being let. It is essential that the letter of intent be treated by the parties as a separate order, with a specified upper limit of liability, to avoid the letter of intent:

(a) being construed as the Principal's acceptance of the tender for the whole work;
(b) providing the Contractor with a "legitimate expectation" of being awarded a Contract for the whole work: see FAI Insurances Ltd v Winneke (1982) 151 CLR 342; 41 ALR 1 ; or
(c) giving rise to a trade practices or fair trading claim for "misleading or deceptive conduct".

The Contract is formed either:

(a) by the signing of the GC21 Contract Agreement by the Principal and the Contractor : see Attachment C; or
(b) by the Principal sending a letter of award to the Contractor: see Attachment D.

Once the Principal and the Contractor have both signed the Contract agreement or the Principal has issued a letter of award to the successful tenderer, the unsuccessful tenderers are to be advised that their respective tenders were unsuccessful: see Attachment E.

Although not expressly incorporated in the Contract, it is possible for "trade customs", or as they are generally known in law "trade usages", to form part of the Contract. A trade custom consists of a particular course of dealing or a line of conduct generally adopted by persons engaged in a particular trade. The dealing or conduct which has become so well known that where persons Contract in that trade, they are assumed in law to have intended to be bound by such dealing or conduct, except in so far as they have, by the terms of a Contract, expressly or impliedly excluded it to be a valid trade custom capable of forming part of the bargain between the parties. A custom must satisfy four conditions, namely:

(1) It must be notorious, that is, so well known in the trade that persons who make Contracts of a kind to be effected by such custom must be taken to have intended that such custom should form part of their Contracts.
(2) The custom must be certain. It must have the same degree of certainty as any other Contractual term.
(3) The custom must be reasonable. What is reasonable is a question of law. A custom cannot be reasonable unless it is fair and proper and such as honest and right-minded persons would adopt. A custom which is of general convenience to all parties engaged in the trade will not usually be regarded as unreasonable.
(4) A custom must not be contrary to law. A custom which sanctions conduct which is illegal would be void.

If a custom satisfies these four conditions, then the custom is just as much a part of the bargain between the parties as the express agreement: see Tucker v Linger (1883) 8 App Cas 508; (1882) 21 Ch D 18.

It is, however, always possible for the parties by the terms of their Contract to exclude the operation of a trade custom, either expressly or impliedly. In London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd[1958] 2 All ER 411; [1958] 1 WLR 661 Jenkins LJ said:

> An alleged custom can only be incorporated into a Contract if there is nothing in the express or necessarily implied terms of the Contract to prevent such inclusion and, further, a custom will only be imported into a Contract where it can be so imported consistently with the tenor of the document as a whole.

Trade customs should be distinguished from those provisions which are common to the standard forms of Contract

which are now commonly used in the building and engineering industry. There is no custom in the industry that any standard form of Contract should be used, nor do the specific provisions of any such standard form (for example, whether as to retention funds, interim payments, rise and fall, or variations) afford any evidence of trade custom. Trade custom is a variable thing in the sense that a trade custom, once recognised by law, does not necessarily remain a trade custom forever. Since it must be established that it is notorious, if a trade practice falls into disuse it loses its notoriety and ceases to be a valid custom. Just as trade customs may lapse, however, new practices may become valid customs.

[75,220] 7.2 Contract documents to be considered in total

Unless the context or relevant circumstances require otherwise, the meaning of the various terms and conditions of the Contract is to be explained by reading the Contract documents as a whole and not individually or in part only; and anything contained in any one of the Contract documents is to be read and applied as though it is included in all the other Contract documents. For example, if a particular item of work to be carried out by the Contractor is shown on a drawing in the Contract, but it is not shown in a specification in the Contract, it follows that the work must be carried out by the Contractor at the Contractor's cost.

The situation is different if, say, one of the Principal's documents required ladders to be built of stainless steel, while another document specified timber ladders. Despite cll 7.2 and 71.2 (Interpretation), the Contractor would (on the face of it) have a case for arguing that the Contract price was based on timber ladders.

[75,225] 7.3 Provisions of the Contract not to be altered

Unless both the Principal and the Contractor agree in writing, the terms and conditions of the Contract cannot be amended or waived. The legal term "waive" involves a person giving up or not relying on a legal right.

[75,230] 7.4 Principal's documents to be given to the Contractor

The Principal is required by cl 7.4 to give the Contractor the number of copies of the Principal's documents specified in item 18 of Contract Information. Where the Contract does not prescribe a time for doing something (for example, supplying documents), the law implies that the act must be performed within a reasonable time. It may not necessarily be a simple exercise to determine what a reasonable time is, but the task will be easier if a warning is given. For example, the Principal should write to the Contractor in the following terms:

> Unless by 5 pm on Friday 12 October 2001 the Principal gives the Contractor five copies of the Principal's Documents as required by cl 7.4 of C21, the Principal will be in breach of the Contract.

The Principal's warning will not necessarily make the stated time a reasonable time, but such a warning can be of assistance in any subsequent dispute as to what was a reasonable time. If a deadline is notified by one party to the other, the person giving the notice should endeavour to make the period between the giving of the notice and the deadline a reasonable period, otherwise a court or an arbitrator could decide that the warning period was inadequate and disallow an argument that "a reasonable time" had been established. This essentially states what would be the obligation of the Principal at common law: see Panamena Europa Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd (J Russell & Company)[1947] AC 428 and Charnock v Liverpool Corporation [1968] 3 All ER 473 .

The failure of the Principal to supply the Principal's documents, as distinct from the prescribed number of copies, may give rise to a claim by the Contractor for damages for delay or may (in certain circumstances) justify the Contractor in giving the Principal a notice under cl 79.1 an account of the Contractor's "fundamental breach of the Contract". The

ultimate sanction would be termination of the Contract under cl 79. Failure to provide the prescribed number of copies is only likely to give rise to damages being the cost of making copies. Sir Anthony May in *Keating on Buildings Contracts*, 6th ed, Sweet & Maxwell, London, 1995, p 236, says:

> There is no room for implying such a term (ie Completion of the Contract within a reasonable time) where damages for non-Completion are expressly tied to Contractual machinery: see Temloc v Errill Properties(1987) 39 BLR 30 at 38 (CA).

[75,235] 7.5 Letter of Award

This provision provides that:

> Where a Letter of Award is used to form the Contract, if requested in writing by the Principal, the Contractor must also execute two copies of the Deed of Contract Agreement and return them to the Principal within 14 days of these being forwarded by the Principal. The Principal will return an executed copy to the Contractor.

[75,250] 8 Assignment

Without the prior written approval of the Principal, cl 8 prohibits the Contractor from assigning (transferring) a right or benefit under the Contract to a third party. A similar provision was considered by the House of Lords in England in Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd[1994] 1 AC 85; [1993] 3 All ER 417; [1993] 3 WLR 408. The court held that the words used in the Contract in that case did prohibit assignment by the Principal of the benefit of the Contract or any part of it. The decision would equally apply to a Contractor that found itself in the same circumstances of that encountered in the House of Lords' case.

It seems that the prohibition on the assignment of any payment, for example, would be effective to render void a purported assignment by the Contractor to a third party of the right to receive payments due under the Contract. In Helstan Securities Ltd v Hertfordshire County Council [1978] 3 All ER 262, the court held that a purported assignment by a Contractor to a third party of the right to recover the amount due under the construction Contract was prevented by a clause which stated that the Contractor could not "assign the Contract or any part thereof or any benefit or interest therein or there under without the written consent of the employer".

On occasions, a Contractor may enter into an agreement with a third party (for example, a subcontractor to whom the Contractor owes money) purporting to assign to the third party a progress payment due or to become due from the Principal. Clause 8 would allow the Principal to ignore the purported assignment and to still pay the Contractor: see *Helstan Securities*, above.

Examples of rights or benefits of the Contractor under the Contract include, the right to:

(a) be paid the Contract price (cl 1.2.1 and 59.4);
(b) receive cooperation from the Principal (cl 3);
(c) perform the Contract without hindrance from the Principal (cl 4);
(d) an early warning from the Principal regarding any likely adverse effect on the Works (cl 4.1);
(e) meet regularly with the Principal to evaluate and monitor performance of the Contract (cl 6.1);
(f) jointly decide on participation by third parties in meetings to assess performance (cl 6.2);

(g) have oral instructions from the Principal confirmed in writing (cl 30.2);
(h) possession of the site (cl 38);
(i) jointly engage the valuer (cl 39.2);
(j) have ambiguities resolved (cl 42.1);
(k) have innovative proposals considered by the Principal (cl 46.4);
(l) extensions of time (cl 54.1);
(m) delay costs, if a rate is specified (cl 55.1);
(n) accelerate progress, if the Principal instructs acceleration (cl 56.1);
(o) suspend work (cl 58.1);
(p) claim prepayment (cl 61.1);
(q) progress payments (cl 63.5);
(r) the completion amount (cl 64);
(s) a final payment schedule (cl 65.2);
(t) the final payment (cl 65.3);
(u) interest on late payments (cl 66);
(v) an actual completion date notice (cl 69.2);
(w) a close out workshop (cl 70.1).

In this context, assignment is the process by which either party to the Contract, with the agreement of the other party, arranges for a third party to take on some or all of the Contractual obligations of either party to the Contract. Contractor"LMN" (see Attachment F) steps into the shoes of Contractor "BCB" when an assignment occurs. "BCB" (assignor) ceases to be liable for the performance of the Contract and "LMN" (assignee) becomes liable to perform the Contract, including the remedying of any breaches of Contract existing at the time of the assignment.

The Contractor cannot assign a right or benefit under the Contract without the Principal's permission. The Contractor would usually write to the Principal requesting permission to assign. The first thing the Contractor would invariably be required to demonstrate is that the assignee would be a satisfactory Contractor. The Principal would require evidence of the technical experience and financial capacity of the assignee. If the Principal is satisfied, then the Principal would inform the Contractor that, subject to the Contractor submitting for the approval of the Principal a satisfactory deed of assignment (deed), the Principal (as presently advised) would be inclined to consider favourably the request for permission to assign.

If a Contract is to be assigned then a formal agreement (usually a deed of assignment) should be drawn up to evidence the assignment. It should be signed by the assignor, the assignee and the Principal. It must record the date that the assignment becomes effective. Retention moneys then ultimately become payable to the assignee, but security by way of a bank guarantee or other promise by a third party needs special attention. The bank guarantee is in respect of the assignor and a new bank guarantee should be obtained in respect of the assignee. Unless precautions are taken, a promise by a third party in the nature of a guarantee may be discharged by the assignment.

The essential matters that the Principal would want to incorporate in the deed should include the following:

(a) there is a date for assignment (it cannot be retrospective) which will not be earlier than the date that the minister (as used in our example in Attachment F) gives consent;
(b) the deed covers the date of cut-off for payments to the assignor so that there is no ambiguity as to whom the minister pays and when the minister pays;
(c) a new insurance cover is arranged to coincide with this cut-off date;
(d) new undertakings (bank guarantees) are provided prior to assignment;
(e) the assignee agrees with the minister that in consideration of the minister consenting to the assignment, the assignee will fulfil all the obligations of the assignor under the Contract as if the Contract had originally been made with the assignee; and
(f) the assignee agrees to pay the minister's legal costs in relation to the assignment.

The conditions included in a deed of assignment must include an agreement for Contractor "BCB" to guarantee the performance of Contractor "LMN" or for the Principal to receive increased security. The deed of assignment must include all aspects necessary to provide to the Principal the requisite protection for the set of circumstances which are to apply. The general rule is that only rights can be assigned, not liabilities. So, strictly speaking, Attachment F is a novation and not an assignment, but nothing turns on this fact.

The distinction between assignment and novation is discussed in P J Davenport's article "Pitfalls in Novation", *Australian Construction Law Newsletter*, no 29, 1993, p 38. When persons A, B and C collectively agree that a Contract between A and B is to be replaced by a Contract between B and C, the arrangement is said to be a "novation". The parties will often evidence their collective agreement in a deed of novation. After novation, A ceases to be liable to B. If A and B have a Contract and A assigns to C the rights which A has against B, the arrangement is said to be an "assignment". Person A would continue to be liable to B. Person A can only assign benefits, not obligations. However, acquiring benefits does not always mean that obligations do not come with the benefits, as is demonstrated in Calaby Pty Ltd v Ampol Pty Ltd(1990) 71 NTR 1; (1990) 102 FLR 186.

Another example of the possibility of liabilities being acquired with the assignment of the benefit of a Contract is Holland-Stolte Pty Ltd v Bill Acceptance Corporation Ltd(AD(Vic), Tadgell J, No 2272 of 1991, 30 March 1992, unreported). In that case, the Principal assigned to a financier the benefit of the building Contract. The financier tried to argue that the financier had not acquired the Principal's obligations to the Contractor and could not be sued by the Contractor. While not finally deciding the liability, if any, of the financier to the builder, the court recognised that obligations could be acquired with the benefit of the Contract, although most Australian and English courts have decided that only benefits (not liabilities) can be transferred in an assignment.

Conditions for consent to an assignment could, for example, include the agreement of A to guarantee the performance by B or that security under the Contract be increased. Under both the standard form design and construct Contract in ***Building Contracts Australia*** and Australian Standard AS 2124-1986, there is no obligation upon either party to act reasonably in granting or withholding consent or in imposing conditions. McGarvie J in Australian Mutual Provident Society v 400 St Kilda Road[1990] VR 646; (1989) V ConvR 54-352 considered an instance where the lessor refused consent solely for the purpose of forcing the lessee to agree to a varied lease on more favourable terms to the lessor. The court decided that, since there was no requirement that approval would not be unreasonably withheld, the lessor was not constrained.

In Australian Standards AS 2124-1992 and AS 4300-1996, cl 9.1 has been amended by the inclusion of "reasonable" before "terms". This introduces ambiguity. Either each party has a discretion to refuse consent or they cannot unreasonably refuse consent. Australian Standards AS 2124-1992 and AS 4300-1996 fail to state which alternative applies.

[75,260] 9 Governing Law of the Contract

Clause 9 provides that the laws of New South Wales will govern the Contract. The courts, however, are not necessarily bound by the choice made by the parties if, for example, there is any dispute in relation to the Contract or the courts are called upon to interpret the meaning of a term of the Contract. Generally speaking, the law chosen by the parties must have some connection with the parties themselves or the place where the work is carried out.

In Naviera Amazonica Peruana SA v Compania International de Seguros del Peru[1988] 1 Lloyd's Rep 116, the Court of Appeal in England had to consider the choice of the following legal issues:

(a) the law governing the substantive Contract;
(b) the law governing the agreement to arbitrate and the performance of the agreement; and
(c) the law governing the conduct of the arbitration.

The Principal and the Contractor have also agreed to "submit to the non-exclusive jurisdiction of the courts of New South Wales". This means that although the parties acknowledge that the courts of New South Wales will have jurisdiction in appropriate matters regarding the Contract, the Principal and the Contractor may also come within the jurisdiction of other courts, such as the Federal Court of Australia.

GC21 can be readily amended so that, for example, the laws of Western Australia, Tasmania, New Zealand or any other jurisdiction govern the Contract and that the parties will submit to the non-exclusive jurisdiction of the courts of their choosing.

Although there is a uniform Commercial Arbitration Act in each state or territory of Australia, the courts of the various states and territories do not always give the same interpretation to the same provisions of the uniform legislation. Furthermore, the statute law and the common law are not the same in all states and territories. An example of the differences between jurisdictions is the law relating to frustration of Contracts.

If the parties do not specify the particular law to be applied, the arbitrator or court, using common law principles, will decide which law is applicable. In JMJ Contractors v Marples Ridgway(1985) 31 BLR 100 where a subcontract did not specify the law applicable, the applicable law was held to be the law of Iraq, because the main Contract was governed by the law of Iraq. In other words, the court decided that the law applying to the subcontract should coincide with the law governing the main Contract.

Two important High Court decisions dealing with legal action in one state in respect of an event which occurred in another State are Breavington v Godleman(1988) 169 CLR 41; 80 ALR 362; (1988) 7 MVR 289; BC8802620 and McKain v R W Miller(1991) 174 CLR 1; 104 ALR 257. The first case held that a claimant could not recover more by suing in a different state to that in which the event occurred, but the second case held that a claimant could avoid a limitation period effective in one state by suing in another state which had a different limitation period on claims.

[75,270] 10 Scope of the Works, Temporary Work and Work Methods

[75,330] 10.1 Description of the scope of the Works

A description of the Works is to be found:

(a) briefly, in item 3 of the Contract Information; and
(b) more specifically, in the Principal's documents and in other Contract documents.

Clause 10.1 states that the scope of the Works to be designed (as applicable) and constructed by the Contractor includes:

(a) all the work specifically referred to in the Contract and any work "contemplated by the Contract";
(b) all items not specifically referred to or described in the Contract which, nevertheless, are necessary:
    (i) for the Works to be completed; and
    (ii) for the effective and efficient use and operation of the Works to be achieved;

(c) all items of work reasonably inferred from the Contract documents as necessary to properly carry out and complete the Works; and
(d) all items of work reasonably inferred from the Contract documents as necessary to properly carry out and complete the Works.

In other words, the scope of the Works to be carried out and completed by the Contractor is more than just work or items of work expressly mentioned in the Contract.

The scope of the Works also includes work or items of work:

(a) envisaged by the Contract, even though the work or item of work was not actually described in the Contract documents;
(b) needed by the Works themselves prior to hand-over to the Principal and so that the Works are totally finished and so that they can be effectively and efficiently used and operated, despite the fact that the work or item of work is not expressly mentioned in the Contract documents;
(c) that can be reasonably concluded from the Contract documents as being necessary to properly execute and complete the Works; and
(d) requiring changes to the Works ordered by the Principal under the Contract (see cl 10.3).

The amount and character of the work which a Contractor must do to fulfil the obligation to execute and complete the work under the Contract and to be paid depends upon the construction of the particular Contract. Most Contracts deal very explicitly with the Contractual effect of drawings, specifications or bills of quantities and of their effect upon each other. It does not necessarily follow, however, merely because the parties to the particular Contract use drawings, specifications or bills as part of the Contract documents to describe the work, that these technical documents will automatically prevail over other terms or provisions in the Contract: see Bryant & Son Ltd v Birmingham Hospital Saturday Fund[1938] 1 All ER 503. I N Duncan Wallace in *Hudson's Building and Engineering Contracts*, 11th ed, Sweet & Maxwell, London, 1995, p 498, says:

> ... it is a cardinal principle of construction ... that, in the absence of an expressed contrary intention, an obligation to do described work imports an obligation to do all the necessary ancillary work or processes, whether described or not which are needed to produce the described work. Thus, to take a simple example, an obligation to construct fair-faced concrete imports an obligation to carry out all the necessary formwork to achieve that result. Again, a simple jobbing Contract to supply and fit a new door may or may not include an obligation to supply hinges or other door furniture, and a carpentry or joinery Contract will usually imply the provision of nails and screws.

Wallace refers to the fair-faced concrete example as being indispensably necessary work expressly or impliedly included in the Contractor's obligation to complete the work under the Contract.

Where the Contractor must complete a specific or an entire work, such as a pump station or a pipeline from A to B or a concrete retaining wall (see Walker v Council of the Municipality of Randwick(1929) 30 SR (NSW) 84; 47 WN (NSW) 20) for a lump sum, the courts readily infer a promise on the Contractor's part to provide everything indispensably necessary to complete the whole work: see Williams v Fitzmaurice(1858) 3 H & N 844; 157 ER 709. Such necessary Works are not extras for they are impliedly included in the lump sum: see Sharpe v San Paulo Railway Co(1873) LR 8 Ch App 597. Instances of "indispensably necessary work" are as follows:

(1) Work not expressly specified. In *Williams v Fitzmaurice* above, there was a Contract to build a house to be completed and dry and fit for the Principal's occupation by a certain date. The Contractor agreed to provide all the necessary materials "to perform all the Works of every kind mentioned and contained in the forthgoing specification". Flooring was omitted from the specification and the Contractor refused to put it in unless the Contractor was paid for the work as an extra. The court held that it was clearly to be inferred from the language of the specification that the Contractor was to do the flooring for no additional cost.
(2) Work not taken out on quantities supplied to the Contractor for tender or wrongly stated on the drawings. In *Sharpe* above, the Contractor had agreed to construct a railway line "from terminus to terminus complete". In carrying out the work, it was found that the engineer's original plan was quite inadequate and had to be replaced by another. As a result the Contractor, upon the engineer's orders, carried out nearly double the excavation originally contemplated. The court held that these Works were not "in any sense of the words extra Works": see also Thorn v City of London(1876) 1 App Cas 120; 45 LJQB 487.

A Contractor who has been put to unexpected expense because of inaccurate quantities or drawings or impracticable plans cannot usually recover the expense on the basis of a breach of an implied warranty

that the plans, drawings or bills of quantities are accurate or practicable. No such warranties are implied merely from the fact that these documents are submitted to the Contractor for tender (see *Thorn*, above, and *Re Ford v Pemrose* (1902) in *Hudson's Building and Engineering Contracts*, above), nor even from their attachment to the Contract as a schedule, but the express words of the invitation of the tender may show an intention to warrant the accuracy of statements which it contains: see Bacal Construction (Midlands) Ltd v Northhampton Development Corp(1975) 8 Build LR 88. However, a Contractor may be entitled to additional remuneration on the basis of a negligent misstatement claim (see Hedley Byrne & Co Ltd v Heller & Partners Ltd(1964) AC 465; [1963] 2 All ER 575 and L Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)(1981) 150 CLR 225; 36 ALR 385) or a "misleading or deceptive conduct" claim under either the Trade Practices Act 1974 (Cth) or a state's fair trading legislation.

(3) Unexpected labour caused by difficulties of the terrain (see *Jackson v Eastbourne Local Board* (1885) mentioned by Wallace in *Hudson's Building and Engineering Contracts*, above) or by the proposed method of carrying out the Works: see *Thorn*, above.

(4) Work caused by the lawful and not unreasonable exercise by the Principal of statutory powers existing at the time of entering into the Contract: see Rigby v Bristol Court(1860) 29 LJ Ex 359.

As a second example of work included in the Contractor's obligation to complete, Wallace in *Hudson's Building and Engineering Contracts*, above, refers to work contingently necessary to achieve completion, he says, at p 501 that:

> It frequently occurs in practice, particularly in engineering Contracts, that unexpected difficulties may be encountered which may not only necessitate a change from the expected method of working, but in extreme cases may mean that Completion of the work in accordance with the original design is impossible. In addition, damage to the Works while under construction may occur as a result of some unforeseen event or act of a third party which needs to be made good if the Works are to be brought up to Completion. Most Contracts contain express provisions making such risks or contingencies the responsibility of the Contractor, in the form of, for example, express disclaimers as to the state of the site and physical conditions or dangers generally, and also of provisions for the protection of the Works during construction ... In most Contracts, even in the absence of an express disclaimer, an employer who uses a professional adviser does not warrant that Completion according to his adviser's plans or designs is practicable, and even in the absence of express provisions for the protection of the Works, the risk in regard to the safety of the Works remains with the Contractor until they have been re-occupied by the employer, and according a Contractor who ... expressly or impliedly undertakes to complete the work or project accordingly to the Contract drawings and designs thereby impliedly warrants that he can do so and if he cannot he will be liable in damages. In consequence, any additional work necessary to achieve Completion must be carried out by him at his own expense if he is to discharge his liability under the Contract.

Whether work described in Contract documents such as the specifications or bills of quantities include ancillary work is a question of construction of the Contract. For example, a lump sum price quoted by a cottage builder for the supply and fixing of new doors for a house in a minor Works Contract might be held to include hinges and door handles (see Williams v Fitzmaurice (1858) 3 H & N 844), but if a carefully drawn bill of quantities prepared by the Principal omitted to make any mention of these items a different view might be taken (apart from complications that might arise from the incorporation of standard methods of measurement in a Contract using bills of quantities). Wallace suggests in *Hudson's Building and Engineering Contracts*, above, that wherever it can reasonably be inferred from the Contract description that other undescribed work will be necessary to achieve completion for a satisfactory and effective result within the terms of the Contract's express or implied obligations as to design, workmanship and materials, then in the absence of some indication to the contrary the undescribed work will be included in the Contract sum. Every case, Wallace says, must however depend on its special facts and under the *contra proferentem* rule much may turn upon which party to the Contract puts forward the description in question. (However, see the contrary position under cl 71.2 of the C21). It is normal, according to Wallace, that both parties to a building or engineering Contract may be presumed to intend the Contract sum to be comprehensive and not subject to adjustment in the absence of variations, cost adjustment or fluctuations in difference between the quantities of the work described in the bills and the same items of work as actually carried out.

Whether the Contract incorporates a bill of quantities or a schedule of rates, the basic presumption is that the prices for described items of work include for all ancillary or contingent work which may be necessary for the completion of the

described work.

Some Contracts stipulate that "minor items" not expressly mentioned in a Contract, but which are necessary for the satisfactory completion and performance of the work under the Contract must be supplied and executed by the Contractor without adjustment to the Contract sum: see, for example, cl 8.1 of NPWC3. Whether a minor item is to be paid for or not will, in effect, depend upon the method of measurement chosen for the bill of quantities, if indeed a bill is incorporated in the Contract. In other cases, it will be a matter of interpretation of the technical specification which should expressly or by necessary implication say that the work under the Contract includes all work and materials necessary for the satisfactory completion and performance of the Contract, not merely say minor items. By singling out minor items, there may be an inference drawn that all other items not expressly mentioned do not have to be supplied and executed unless there is an adjustment to the Contract sum.

[75,340] 10.2 Contractor's acknowledgment of competence and price

The Contractor is required by cl 10.2 to acknowledge that:

(a) the Contractor is both experienced and expert in the particular work (of type and scale) to be carried out under the Contract; and
(b) the Contractor has ensured that the agreed price fully allows for all work (excluding variations).

The acknowledgment in cl 10.2.1 is really only the sort of statement of what a Contractor would make to the Principal in the course of tendering for the Contract, otherwise the Principal would surely be misled or mistaken in engaging a Contractor that was inexperienced and lacking the necessary expertise for "the type and scale of the Works".

Clause 10.2.2, however, is very much a wrap-up provision requiring the Contractor to agree that all things "big and small" have been considered, costed and allowed for in the Contractor's tender, including:

(a) "items not specifically referred to or described in the Contract": see cl 10.1.2; and
(b) "all items of work referred to in one or more of the Contract documents or otherwise necessary for the Works to be fit for the purposes required by the Contract": see cl 10.1.3; and
(c) "items of work reasonably inferred from the Contract Documents": see cl 10.1.4.

This provision should put tenderers on notice that they must be extremely careful and thorough regarding the pricing of their tender. The Contractor will be held responsible for making "full allowance in the Contract Price" for a broadly expressed scope of work under the Contract as demanded by cl 10.2.

[75,345] 10.3 Variations

Under cl 10.3, the Contractor acknowledges that "variations" instructed by the Principal will cause the scope of the Works to change. The term "variation" is defined under cl 83 as:

> Any change to the Works including additions, increases, omissions and reductions to and from the Works, but not including such changes or otherwise in respect of the development by the Contractor of Design (including without limitation development of shop drawings and other Contractor's Documents) in accordance with the requirements of the Contract, but not including omissions of the type referred to in clause 10.1.3.

[75,350] 10.4 Temporary Work

Clause 10.4 obligates the Contractor to carry out and be responsible for all temporary work, as well as "perform,

provide and do everything necessary including all ancillary or other work for or in connection with the design and construction of the Works", subject to:

(a) The Principal being permitted to instruct the Contractor at any time to use a particular method or type of Temporary Work (and the Contractor must comply with the Principal's instruction), but subject to para (b) below if the instruction directly causes the Contractor to incur necessarily and unavoidably any extra costs, then the Contractor may be entitled to those extra costs and, if applicable, an extension of time under cl 54; and

(b) If the need for the instruction arises from the Contractor's own act or omission, then the Contractor is not entitled to those extra costs or extensions of time.

GC21 does not provide any guidance as to how it is be determined that the Contractor "may be entitled to those extra costs" referred to in para (a) above. The term "Temporary Work" is defined under cl 83 as:

> Temporary structures, amenities, physical services and other work, including Materials, plant and equipment used in or in relation to the carrying out of the Works, but not forming part of the Works.

[75,355] 10.5 Work methods

Under GC21, work methods are a matter for the Contractor. However, this "freedom" is subject to the following provisions:

- Clause 10.5.1: the Contractor has the sole responsibility for all work methods, whether or not those work methods are specified in the Contract;
- Clause 10.5.2: the Contractor warrants that it has undertaken all necessary investigations and enquiries to be satisfied that the specified or proposed work methods are appropriate;
- Clause 10.5.3: the Contractor must use any work method specified in the Contact;
- Clause 10.5.4: if a particular work method is specified in the Contract, but it is not possible to use that work method, the Contractor must use another work method without entitlement to an extension of time or extra costs;
- Clause 10.5.5: If a work method for which the Contractor is responsible turns out to be impractical and the Contractor (with or without an instruction from the Principal) uses another work method "by necessity" to complete the Works, the Contractor is not entitled to an extension of time or extra costs;
- Clause 10.5.6: at any time, the Principal may instruct the Contractor to use a particular work method; and
- Clause 10.5.7: subject to clauses 10.5.4 and 10.5.5, if the Principal's instruction directly causes the Contractor to incur necessarily and unavoidably any extra costs, the Contractor is entitled to those extra costs provided the Contractor demonstrates to the Principal's satisfaction that it incurred such extra costs. In addition, the Contractor may be entitled to an extension of time under cl 54, if applicable.

Tenant's Fitout Works

Introduction

[87,000] Introduction

These guidenotes for tenant's fitout Works are intended to assist developers, owners, Contractors, subcontractors, suppliers and consultants in the provision of fitout Works for commercial tenants.

The design and construction of fitout Works is a very specialised area of building work and should only be carried out by skilled practitioners, whether they are head Contractors, subcontractors, suppliers or consultants.

Depending on the complexity, nature and size of the particular fitout project, the general conditions of Contract can be based on several of the contracts from the suite of standard form contracts in LexisNexis Butterworths' "**Building Contracts Australia**", such as:

- Traditional Contract;
- Design and Construct Contract;
- Companion Subcontract;
- Risk Sharing Subcontract;
- C21 Construction Contract; or
- Minor Works Contract.

Irrespective of the Contract used to implement the fitout activities, the main obligation of the specialist fitout provider will invariably be to complete the work under the Contract in all respects suitable for use by the tenant for the specified purpose and ready for occupation and use (see, for example, cl 3.1 of the Design and Construct Contract). Reference should also be made to LexisNexis Butterworths' "Construction Lease" that deals with a typical regime of conditions of use and obligations pertaining to a landlord/tenant situation.

At the same time, Contractors and suppliers involved in Tenant's Fitout Works will also be obliged to "prevent nuisance and unreasonable noise and disturbance to persons, the environment and property" (see, for example, cl 15 of the Design and Construct Contract).

In addition, specific measures must be taken to prevent damage, obstruction or other interference with existing services such as air-conditioning, electricity, gas, lifts, sewerage, telephone and water.

These guidenotes deal with:

(a) the building Contract between the tenant and the builder for the provision of fitout Works (involving the design and construction of offices and other facilities in the owner's building and modifications to the building's car park) for the tenant's business;

(b) the commercial lease between the tenant and the owner of the building that governs the tenant's use of the premises; and

(c) the licence between the tenant and the owner of the building that permits the tenant to park a certain number of cars in the building's car park.

Demolition of Structures

Introduction

[87,600] Introduction

These demolition guidenotes are intended to assist developers, owners, Contractors, subcontractors and consultants in the planning and execution of the demolition of buildings and other structures.

Demolition work is potentially so fraught with risks to the safety of persons, property and the environment that it should only be carried out by specialists, whether they are head Contractors or subcontractors.

Depending on the complexity, nature, sensitivity and size of the particular demolition project, the work can be based on several of the contracts from the suite of standard form contracts in LexisNexis Butterworths "**Building Contracts Australia**", such as:

- Traditional Contract;
- Companion Subcontract;
- Risk Sharing Subcontract;
- C21 Construction Contract; or
- Minor Works Contract.

Irrespective of the Contract used to carry out the demolition activities, the non-negotiable obligation of the specialist demolition expert will invariably be "to provide all things and take all measures necessary to protect persons, the environment and property" (see, for example, cl 15 of the Traditional Contract").

At the same time, demolition Contractors will also be obliged to "prevent nuisance and unreasonable noise and disturbance to persons, the environment and property" (see, for example, cl 15 of the Traditional Contract").

In addition, specific measures must be taken to prevent damage, obstruction or other interference with services such as electricity, gas, sewerage, telephone and water.

---- End of Request ----
Print Request: All Documents: 1-4
Time Of Request: Friday, June 05, 2009 21:38:15