

THE CONTRACTING ESSENTIALS FOR LAWN MOWER MECHANICS

Throttle and Fuel- Part 2

Introduction

A contract is like a lawn mower. Each has about 50 operable parts, some are dangerous, others fuel the engine and others clean up and catch the grass.

Welcome to your second lesson on the contracting essentials for lawn mower mechanics.

This second article will discuss the 'throttle and fuel' of the contract. These clauses keep the machine running. They outline how money is to flow between *Principal* and *Contractor* as well as any other requirements which facilitate the operation of the *Contract*.

The throttle and fuel includes:

- clause 2 Nature of Contract;
- clause 3 Provisional sums;
- clause 5 *Security*;
- clause 9 Assignment and Subcontracting;
- clause 16 Insurance of Works and Professional Indemnity Insurance;
- clause 17 Public Liability Insurance;
- clause 36 Programming;
- clause 37 Payment; and
- clause 38 Payment of workers ,consultants and sub-contractors.

2. Nature of Contract

2.1 Performance and Payment

The *Contractor* shall carry out and complete *WUC* in accordance with the *Contract* and directions authorised by the *Contract*.

The *Principal* shall pay the *Contractor*:

- a) for work which the *Principal* accepted a lump sum, the lump sum; and
- b) for work which the *Principal* accepted rates, the sum of the products ascertained by multiplying the measured quantity of each section or item of *work* actually carried out under the *Contract* by the rate accepted by the *Principal* for the section or item,

Adjusted by any additions or deductions made pursuant to the *Contract*.

Essence of Clause

Clause 2 of AS 4902-2000 sets out the primary obligations of both the *Contractor* and *Principal* under the *Contract*. The *Contractor's* primary obligation is to carry out and complete *WUC* in accordance with the *Contract*. While the *Principal's* primary obligation is to pay the *Contractor* for the *work*.

Sub clause 2.1 is the fuel which drives the *Contract*. It establishes a quid pro quo relationship between the parties and in essence holds that a *Contractor* will perform *WUC* for the *Principal* in exchange for a fee.

Implied Clause

Essentially a construction contract is an exchange of promises to produce a project for a price within a period of time. The common law has implied a term to nearly every construction contract, being that, the *Principal* and *Contractor* have each promised the other they will do all that is necessary (to be done on their part) for the carrying out and achievement of the contractual aim.¹ In addition to this positive duty of cooperation, there is likewise a duty on both the *Principal* and the *Contractor* to not act in a manner which would prevent or hinder the other party performing the contract.² This implied duty on both parties reflects the obligation of the *Principal* and *Contractor* to cooperate in order to achieve the aims of the *Contract*.

2.2 Contractor's warranties

Without limiting the generality of subclause 2.1, the *Contractor* warrants to the *Principal* that:

- (a) the *Contractor*:
 - (i) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the carrying out and completion of *WUC*;
 - (ii) has examined any *preliminary design* included in the *Principal's project requirements* and that such *preliminary design* is suitable, appropriate and adequate for the purpose stated in the *Principal's project requirements*;

¹*Mackay v Dick* (1881) 6 App Cas 251

²*Perini Corp v Commonwealth* [1969] 2 NSW 530

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- (iii) shall carry out and complete the *Contractor's design obligations* to accord with the *Principal's project requirements* and, if subclause 9.4 applies, accept the novation and retain the *Principal's* consultants for any work the subject of a prior contract with the *Principal*; and
- (iv) shall carry out and complete WUC in accordance with the *design documents* so that the Works, when completed, shall:
 - (A) be fit for their stated purpose; and
 - (B) comply with all the requirements of the *Contract*; and
- (b) subject to clause 9, the consultants identified in the *Contractor's* tender are suitably qualified and experienced.

Essence of Clause

Sub-clause 2.2 outlines the warranties provided by a *Contractor* to the *Principal* when entering into a *Contract*, undertaking WUC and carrying out any other steps necessary to complete the project and satisfy the *Contract*. Warranties differ from conditions in the *Contract* as a breach of a warranty will not provide the innocent party with a right to determine the entire project immediately. Breaching a warranty will only provide the innocent party with a remedy for damages.³

It is important to note, that the abovementioned warranties are not exhaustive and the parties are free to add to the warranties as they see fit.

Due care, skill and diligence

The first warranty of the *Contractor* under sub clause 2.2 is that they are qualified and exercise due skill, care and diligence when carrying out and completing WUC. Such a duty requires that the project in question is constructed with the requisite due skill, care and diligence of an **ordinary** *Contractor* and in accordance with good building practice.⁴

Where building contracts have not expressly included such a warranty; the common law has implied that the *Contractor* is nonetheless under such an obligation.⁵ Accordingly, it is important for *Contractor's* to keep this duty in mind when performing their obligations under the *Contract*.

Design Warranties

Under subclause 2.2(a) ii and iii the responsibility for detailed design rests with the *Contractor*. Put simply, the *Contractor* has a duty to perform all tasks necessary to design and specify the Works, including preparation of the *design documents* and developing the *preliminary design* if required under Part A Item 10.

³*Son and Wells v Pratt and Haynes* [1910] 2 KB 1003

⁴*Brian Geaney Pty Ltd v Close Constructions Pty Ltd* [2003] Aust Torts Reports 81-719

⁵*Harmer v Cornelius* (1858) 5 CB (NS) 236; *Foster v AT Brine & Sons Pty Ltd* [1972] WAR 157; *Cassidy v Engwirda Construction Co (No 2)* [1968] Qd R 159

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The *Principal* therefore has a contractual remedy against the *Contractor* if the *preliminary design* is inadequate. Moreover, the *Contractor* has a key obligation to carry out *WUC* in a manner which is reflective of the design documents as the design documents ultimately reflect the *Principal's project requirements*.

2.3 Warranties unaffected

The warranties remain unaffected notwithstanding:

- a) that design work (including *preliminary design*) has been carried out by or on behalf of the *Principal* and included in the *Principal's project requirements*;
- b) that the *Contractor* has entered into a novation of any prior contract between the *Principal* and a *Principal's* consultant under subclause 9.4 and thereafter has retained that consultant in connection with *WUC*;
- c) any receipt or review of, or comment or *direction* on, the *design documents* by the *Superintendent*, or
- d) any *variation*.

Operation of Clause

This clause goes hand in hand with subclause 2.2. Under sub-clause 2.3, the *Contractor* must warrant that they have examined any design work that has been carried out by either the *Principal* or one of their agents and that such design work is appropriate and adequate.

Moreover, the *Contractor* remains under the abovementioned warranty, regardless of whether or not a novation agreement for *preliminary design* has been entered into with one of the *Principal's* consultants (under sub clause 9.4). This clause is critically important to ensure that design risk arising out of the *Principal's* novated design consultants is fully passed to the *Contractor*. Moreover this clause ensures that any design warranties provided by the *Contractor* relating to design are not limited due to the *Principal's* initial engagement of *consultants*. Put simply, sub clause 2.3 reiterates that the *Contractor* is completely responsible for all design risks warranted under sub-clause 2.2.

However, this responsibility does not extend to defects in the such part of the design of *WUC*, including preliminary design provided by the *Principal*, as they are not warranted under sub-clause 2.2.

2.4 Quantities

Quantities in a *schedule of rates* are estimated quantities only.

The *Superintendent* is not required to give a *direction* by reason of the actual quantity of an item required to perform the *Contract* being greater or less than the quantity shown in the *schedule of rates*.

Operation of Clause

A bill of quantities is a list or schedule of the estimated quantities of *work* and materials required for construction. It is used primarily by the *Contractor* for the pricing of their work.

Under the standard form of AS 4902-2000, the quantities are an 'estimate only' and do not form part of the *Contract* documents. Accordingly, under a lump sum design and construct

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Contract, the *Contractor* will not be entitled to any extra payment if the quantities required are underestimated in the *schedule of rates*. Similarly, where the quantities are overestimated the *Principal* will not need to reduce or set off against the *contract sum*.

On the other hand, if the parties agree that the quantities should constitute a contractual document, the priced bill of quantities will represent a contractual promise by the *Contractor* to perform a particular amount of work for a particular price. Should the quantity of work exceed the amount stated in the bill of quantities, the *Contractor* will be entitled to extra payment.

2.5 Adjustment for actual quantities

Where, otherwise than by reason of a *direction* to vary *WUC*, the actual quantity of an item required to perform the *Contract* is greater or less than the quantity shown in the *schedule of rates*:

- a) the *Principal* accepted a lump sum for the item, the difference shall be a deemed *variation*;
- b) the *Principal* accepted a rate for the item, the rate shall apply to the greater or lesser quantities provided that where limits of accuracy for a quantity in a *schedule of rates* are stated in *Item 12*, the rate shall apply to the greater or lesser quantities within the limits, and quantities outside the limits shall be a deemed *variation*.

If such a *schedule of rates* omits an item which should have been included, the item shall be deemed *variation*.

Subclause 2.5 allows for the adjustment of quantities, if the actual quantities used do not match the amount of quantities specified in the *schedule of rates*. However such adjustments are subject to certain limits of accuracy outlined in Part A *Item 12* of the *Contract*. If the quantities actually used under the *Contract* fall outside those limits of accuracy, those rates may ultimately be inapplicable under the *Contract*.

3. Provisional Sums

A *provisional sum* included in the *Contract* shall not itself be payable by the *Principal* but where pursuant to a *direction* the *work* or item to which the *provisional sum* relates is carried out or supplied by the *Contractor*, the *work* or item shall be priced by the *Superintendent*, and the difference shall be added to or deducted from the *contract sum*.

Where any part of such *work* or item is carried out or supplied by a *subcontractor*, the *Superintendent* shall allow the amount payable by the *Contractor* to the *subcontractor* for the *work* or item, disregarding:

- a) any damages payable by the *Contractor* to the *subcontractor* or vice versa; and
- b) any deduction of case discount for prompt payment,

plus an amount for profit and attendance calculated by using the percentage thereon stated in *Item 13* or elsewhere in the *Contract*, or, if not so stated, as assessed by the *Superintendent*.

Essence of Clause

Provisional sums for certain items of work or equipment are estimates only and do not represent a maximum threshold for that item, equipment or *work*. This is because it is not possible for the parties to accurately price such items or *work* when entering into the contract. Accordingly, *provisional sums* will be subject to adjustments once a *direction* is given for payment.

The UK case of *Midland Expressway Ltd v. Carillion Construction Ltd*⁶ provides a useful definition and interpretation of *provisional sum*. The contract in question contained three *provisional sums* which were to be expended under *direction*. Directions were given for the expenditure of the three sums however the *Contractor* argued that he was entitled to those three sums without adjustment and any other appropriate amounts relating to the *work* actually performed regarding those sums. Not surprisingly the Court of Appeal rejected the *Contractor's* submission.

“*Provisional sum* by the very use of the word “provisional” indicates that the parties do not expect that sum to be paid without adjustment. The appellant's construction in my view offends this expectation. A *provisional sum* is there essentially for the employer (*Principal*) to spend or not as the relevant contingency arises.”

The *provisional sum* is not payable until a *direction* is given to the *Contractor* to carry out the *work* or provide the item to which the sum relates. The *Superintendent* has the responsibility of determining the final price, with any difference between the final price and *provisional sum* being added to or deducted from the *contract sum*.

Subcontractor risk to Principals

A potential risk arises where the *work* relating to the *provisional sum* has been carried out by a *subcontractor*. Under the standard clause 3 provisions of AS 4902-2000, the *Principal* is

⁶[2006] EWCA Civ 936

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unable (by operation of the clause) to independently value the work. Accordingly, the *Principal* must simply pay the *Contractor* any money due by the *Contractor* to the *subcontractor* plus profit and attendance stated in *Item 13*.

It may hence be beneficial for *Principals* to amend clause 3 so that the work done by *subcontractors* may be valued by the *Superintendent*. Alternatively, the clause may also be amended to incorporate a review process of all quotes provided by *subcontractors*.

A further risk to *Principal's* is the prospect of a *direction* being given regarding payment of a provisional sum and a further *direction* being given (in relation to the same sum) due to the *Contractor* neglecting a detail which the *Superintendent* would need to accurately price the *work* or item. Accordingly, ***Principal's* should amend clause 3 to bar work or items being valued more than once by the Superintendent.**

5. Security

5.1 Provision

Security shall be provided in accordance with *Item 14* or *15*. All Delivered *security*, other than cash or retention moneys, shall be transferred in escrow.

Essence of clause

Clause 5 of the *Contract* provides that the parties will be required to provide *security* for the performance of their obligations under the *Contract*. If one party fails in its obligations, the other party will have recourse to the *security* enabling them to cover the costs associated with the breach.

Unlike previous design and construct contracts, AS 4902-2000 caters for *security* being provided by either the *Contractor* or *Principal*. Accordingly, if the *Contractor* is to provide *security*, *Item 14* is to be completed whilst if the *Principal* is to provide *security*, *Item 14* is to be completed.

Security is defined under clause 1 (see page 30 of document.) All forms of *security* required to be delivered by one party to the other must be transferred and held in escrow. (Escrow may be described as ‘a bond, deed or other document kept in the custody of a third party, taking effect only when a specified condition has been fulfilled.’⁷ In other words, a *security*, will only be payable from one party to another once a certain event or condition has taken place. Once such an event has taken place, the payee is said to have recourse.)

In addition, AS 4902-2000 incorporates retention moneys as a *security*, whereas previous design and construct contracts have dealt with retentions money separately.

An example of a *security* would be a *Contractor* holding a sum of money in favour of the *Principal*, with the money being payable subject to unfixed plants and materials being left on *site*.

5.2 Recourse

Security shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse.

When does a party have recourse?

The right of recourse may be had when a party fails to pay moneys due and owing to the party once the time for payment of those moneys has passed. The party seeking to have recourse to the other party’s *security*, must give at least 5 days written notice to the other party of intention to have recourse to the *security*.

The “time for payment” is to be determined with reference to sub-clause 37.2 which deals with certificates and provides that payments shall be made within seven days of receiving written notice of the *Superintendent’s* assessments of the moneys payable to either party.

⁷*Macedo v. Stroud* (1992) 2 AC 330

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There are a number of clauses in AS 4902-2000 which provide for certification by the *Superintendent* of costs incurred as moneys payable to either party. These clauses include:

- Clause 27 (cleaning up)
- Clause 29.3 (defective work)
- Clause 34.7 (liquidated damages)
- Clause 35 (defects liability)
- Clause 39.6 (adjustment on completion of work taken out of the *Contractors'* hands)

Accordingly, where a party is owed money under these clauses (and any other clauses which give rise to a recourse) the party will have recourse to the *security* after providing the other party at least 5 days written notice regarding the recourse.

In *FMT Aircraft Gate Support Systems AB v Sydney Ports Corporation*⁸ the NSW Supreme Court considered the conditions necessary for a party to have recourse to a *security*. FMT (the Contractor) was contracted by Sydney Ports (the Principal) for the gangway construction at the Overseas Passenger Terminal in Circular Quay. Under contractual provisions, Sydney Ports had recourse to the *security* where it had 'any claim or entitlement to payment of damages, costs or an amount of debt due by FMT to Sydney Ports under the contract.'

The Court held that in order for a claim or entitlement to be genuine it must be a non-fraudulent **arguable** claim. In other words, a mere bona fide, good faith claim will not in itself provide recourse to a *security*. In addition to being 'bona fide,' the claim must likewise be **objectively arguable** and not a mere assertion. The Court further defined claims as arguable where they are 'not specious, fanciful or untenable.'

The Court's approach to the meaning of 'claim' and 'entitlement' reflects the perceived commercial purpose of the *security* clause of the *Contract*.

5.3 Change of Security

At any time a party providing retention moneys or cash *security* may substitute another form of *security*. To the extent that another form of *security* is provided, the other party shall not deduct, and shall promptly release and return retention moneys and cash *security*.

If a party provides *security* in the form of retention moneys or by way of cash they may substitute this *security* for a non-cash *security* subject to the approval of the other party. Such approval may be withheld by the other party, without any requirement that the approval must not be unreasonably withheld. Where the *security* is unconditional (e.g. an unconditional bank undertaking) the *security* must be accepted by the other party (yet the body providing such a guarantee will still be subject to approval by the other party.) This is because an unconditional bank undertaking is as good an equivalent to cash.

5.4 Reduction and Release

⁸1 [2010] NSWSC 1108.

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Upon the issue of the *certificate of practical completion* a party's entitlement to *security* (other than in *Item 14(e)*) shall be reduced by the percentage or amount in *Item 14(f)* or *15(d)* as applicable, and the reduction shall be released and returned 14 days to the other party.

The *Principal's* entitlement to *security* in *Item 14(e)* shall cease 14 days after the incorporation into *the Works* of the plant and materials for which the *security* was provided.

A party's entitlement otherwise to *security* shall cease 14 days after *final certificate*.

Upon a party's entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.

Operation of Clause:

By the time of *practical completion* the major performance obligations of the contract have been met and hence only residual obligations remain. Accordingly, sub clause 5.4 provides for the reduction of *security* as the party's no longer need to hold such *security* to guarantee performance obligations. Where the reduction rate is not specified by the parties under *Item 14(f)* or *Item 15(d)* the default rate will be 50%.

Release will take the form of either cash payment, or return of the *security* documents themselves. Where a party holds a *security* after the date of which it should have been released, the party will not be permitted to have recourse to such a *security*.

Sub clause 5.4 provides an exception to these provisions for the additional *security* over unfixed plant and materials as stated in *Item 14(e)*. This reflects the provisions of sub clause 37.3 which states that the *Principal* shall not be liable to pay for unfixed plant materials unless they are listed in *Item 34* and the *Contractor* provides extra *security*. Once this additional *security* is released the subject plant and materials become the property of the *Principal*. The *security* may hence be held until such a time that the plant and materials are of sufficient quality and condition to hand over to the *Principal*.

5.5 Trusts and Interests

Except where held by a government department or agency or municipal, public or statutory authority, any portion of *security* (and interest earned thereon) which is cash or retention moneys, shall be held in trust for the party providing them until the *Principal* or the *Contractor* is entitled to receive them.

Interest earned on *security* not required to be held in trust shall belong to the party holding the *security*.

Sub clause 5.5 provides two alternatives for holding retentions moneys and cash *securities*. The first limb of the clause provides that where a *security* must be held on trust, the party holding such *securities* shall own any interest earned, yet must provide such interest to the other party once the other party becomes entitled to the *securities*. (Such provisions do not apply to any government bodies)

The second limb of the sub clause provides that where a *security* is not held on trust, interest earned on that *security* is owned by the party lodging the *security* until such a time as the other party becomes entitled to it.

5.6 Deed of guarantee, undertaking and substitution

Where:

- a) party is a related or subsidiary corporation (as defined in the applicable corporations law of the jurisdiction); and
- b) a form of *deed of guarantee, undertaking and substitution* was included in the tender documents, that party shall, within 14 days after receiving a written request from the other party, provide such *deed of guarantee, undertaking and substitution* duly executed and enforceable.

Under s50 of the *Corporations Act*⁹ a related corporation referred to in sub clause 5.6(a) is defined as:

Where a body corporate is:

- (a) a holding company of another body corporate; or
- (b) a subsidiary of another body corporate; or
- (c) a subsidiary of a holding company of another body corporate;

the first-mentioned body and the other body are related to each other.

Under s46 of the *Corporations Act* a subsidiary corporation referred to in subclause 5.6(a) is defined as:

A body corporate (in this section called the **first body**) is a subsidiary of another body corporate if, and only if:

- (a) the other body:

- (i) controls the composition of the first body's board; or
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or
 - (iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

- (b) the first body is a subsidiary of a subsidiary of the other body.

A party will only be required to provide a *deed of guarantee, undertaking and substitution* where the form of the deed is included in the tender documents either by the *Principal* or the *Contractor*.

⁹*Corporations Act 2001* (Cth)

9. Assignment and subcontracting

9.1 Assignment

9.1 Assignment

Neither party shall, without the other's prior written approval (including terms) assignment *Contract* or any payment or any other right, benefit or interest thereunder.

General Requirements

- Neither party can assign the *Contract* or any other interest or benefit under the *Contract* without the other party's written approval.
- There is no requirement that the refusal of approval should be held reasonably.

Relevant Case Law

In *Linden Gardens Trust Ltd. V Lenesta Sludge Disposals Ltd and others and another appeal* (1993) 3 All ER 417, two separate cases related to assignment of contracts were decided together by the House of Lords. The court held that the Principal was unable to validly assign a building contract, or any interests under the contract, without the consent from the Contractor. The court also held that the Principal was entitled to sue for the damage for the amount of loss suffered by the assignee who was not entitled to sue because the assignment was void due to lack of contractors' consent.

Assignment and Subcontracting

The general principle is that while a party may usually assign its contractual rights or benefits, it may not assign its contractual obligations. The assignment must be absolute which means that the right under the contract can be assigned in full or in partial but the assignment cannot be conditional or contingent on some event. Additionally, an assignment is not absolute if the assignor retains some continuing interest in the subject matter of the contract.

Subcontracting, on the other hand, is a process of the contractor to sub-contract with another party for the performance of part or the whole of the contractual obligation. The contractor, however, does not cease the obligation owed to the principal even if the contract is subcontracted to a third party.

Subcontracting and relevant case law

In *Rail Corporation New South Wales v Fluor Australia Pty Ltd* [2009] NSWCA 344, the appellant was a train track owner who entered into a contract with the respondent for the track maintenance work. The subcontractor of the respondent's performed defective work which resulted in train derailment. The appellant claimed from the respondent for the damage paid to third party train owner.

It was held by Justice McFarlane that the general rule is that when the contractor performs the contract through a third party subcontractor, the contractor remains liable under the contract and therefore may be sued for breach of contract if the subcontractor failed to perform the work in accordance with the contract terms.

9.4 Novation

This subclause applies only where the *Principal's project requirements* include a *preliminary design* or the *Contract* includes *selected subcontract work*.

When directed by the *Principal*, the *Contractor*, without being entitled to compensation, shall promptly execute a deed of novation in the form of Annexure Part D, such deed being between the *Principal*, the *Contractor* and the *subcontractor* or the *selected subcontractor* stated in *Item 20* for the particular part of the *preliminary design* or *selected subcontract work*

9.4 Novation

Assignment and Novation

Assignments are governed by the *nemodat* rule which means that the assignor can only assign the rights vested in the assignor and the assignee is left with the inherited rights from the assignor. Novation, on the other hand, occurs where the parties to a contract, for valuable consideration, agree to discharge the contract and to enter into a replacement contract. It usually requires the consent of all relevant parties to the original contract. A novation does not involve transfer of rights. The parties obtain original rights under the replacement contract.

Novation is used in construction law for the *Principal* to enter into a contract with a specialist on the basis that when the *Principal* enters into the main contract, the specialist will become a *subcontractor* to the main contractor. This procedure can save time and costs in practice.

Requirement for Novation under the Standard

- Novation is a creation of a new contract where new party stands in the shoes of old party.
- The *Principal* must, in *Item 20*, state the subcontractor or *selected subcontractor* with whom the *Contractor* must enter a deed of novation and that part of *WUC* concerned.
- Under subclause 9.5, the *Contractor* shall remain responsible to the *Principal* for all subcontractors, whether or not they are novated to the *Contractor*. The *Contractor's* responsibility shall cover all subcontract *work* as well.

Relevant Case Law

In *O'Ision v Dyson* (1969) 120 CLR 365, Windeyer J stated that since novation is the extinguishment of the original contract and replacing it by another, it is necessary that consideration should be provided for the new contract.

In [*Fightvision Pty Ltd v Onisforou*](#) (1999) 47 NSWLR 473, the court stated that novation can be either expressed or implied. It can even be inferred from evidence of informal conversation and the subsequent consistent pattern of the parties' conduct. Intention is crucial to show a novation. A novation may be express or implied from the circumstances. In searching for an intention that there is a novation, there is no narrow or pedantic approach is warranted, particularly in the case of commercial contracts.

16A Insurance of the Works

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The Alternative in *Item 23(a)* applies

Alternative 1: Contractor to insure

Before commencing *WUC*, the *Contractor* shall insure all the things referred to in subclause 14.1 against loss or damage resulting from any cause until the *Contractor* ceases to be responsible for their care.

Without limiting the generality of the obligation to insure, such insurance shall cover the *Contractor's* liability under subclause 14.2 and things in storage off *site* and in transit to the *site* but may exclude:

- a) the cost of making good fair wear and tear or gradual deterioration, but shall not exclude the loss or damage resulting therefrom;
- b) the cost of making good faulty design, workmanship and materials, but shall not exclude the loss or damage resulting therefrom;
- c) consequential loss of any kind, but shall not exclude loss of or damage to *the Works*;
- d) damages for delay in completing or for the failure to complete *the Works*;
- e) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause;
- f) loss or damage resulting from the *excepted risks* referred to in paragraphs (b) and (c) of subclause 14.3

the insurance cover shall be for an amount not less than the aggregate of the

- (a) contract sum;
- (b) provision in *Item 23(b)* to provide for costs of demolition and removal of debris;
- (c) provision in *Item 23(c)* for *Consultants' fees* and *Principal's consultants' fees*
- (d) value in *Item 23(d)* of any materials or things to be supplied by the *Principal* for the purposes of *WUC*, and
- (e) additional amount or percentage in *Item 23(e)* of the total of the items referred to in subparagraphs (a) to (d) of this paragraph.

Insurance shall be in the joint names of the parties, shall cover the parties, *consultants* and *subcontractors* whenever engaged in *WUC* for their respective rights, interests and liabilities and, except where the *Contract* otherwise provides, shall be with an insurer and in terms both approved in writing by the *Principal* (which approvals shall not be unreasonably withheld).

The insurance shall maintained until the *Contractor* ceases to be responsible under subclause 14.1 for the care of anything.

Alternative 2: Principal to insure

Before the *date of acceptance of tender*, the *Principal* shall insure *WUC* in the terms of the policy included in the tender documents and nominating or stating the insurer. The *Principal* shall maintain such insurance while ever the *Contractor* has an interest in *WUC*.

16A Insurance of the Works

Scope of Coverage

Insurance of the Works is an 'occurrence based' type of policy which provides protection against physical damage or loss to the project property and the contract works from the commencement of the work to practical completion. It excludes the protection on damages caused by faulty materials or defective workmanship.

Alternative I: Contractor to Insure

Unless *Alternative 2* is stated in *Item 23(a)* to be applicable, *Alternative 1* shall be the default position, either by stating *Alternative 2* applies or to leave *Item 23(a)* blank. The insurance shall be taken in the joint names of the *Contractor* and *Principal* and to cover the *Contractor*, the *Principal* and all subcontractors for their respective rights, interests and liabilities.

The *Contractor* shall take out the insurance before commencing *any* work under the *Contract*, including the *offsite* works commencing before the *onsite* works and to maintain the policy until the end of the last *defects liability period*. The contract work policy shall cover the *contract sum* plus the additional allowance in regards to the amounts stated in *Item 23(b)-(e)* respectively.

Relevant Case Law

In, *Petrofina (UK) Ltd & Ors v Magnaload Ltd and Anor* [1983] QB 127, the court has expressed that it is a commercially convenient way to deal with insurance in building and engineering contracts for a head contractor to insure the works, and take out the insurance on behalf of itself, any subcontractors and consultants.

In some circumstances, it is necessary for the contractor to insure not only the works it is responsible for but also damage it may cause to the whole of the works. The court critically stated that if all contractors and subcontractors assume this obligation, this will result in duplication in the insurance as each contractor and subcontractor will individually insure the whole of the works.

Alternative II: Principal to Insure

Contractors should inspect the policy to ensure that it covers the *Contractor* for the liability the *Contractor* has. The *Principal* should maintain the policy as long as the *Contractor* maintains an interest in *WUC*.

Relevant Case Law

In *Co-operative Buld Handling Ltd v Jennings Industries Ltd* (1996) 17 WAR 257, it was held that if the *Principal* is to take out the insurance for the works and contractors, this insurance will cover each named contractor for not only the part of the works it is responsible for, but also any damage it causes to the whole of the works.

16B Professional indemnity insurance

Before commencing *WUC*, the *Contractor* shall effect and maintain professional indemnity insurance with levels of cover not less than stated in *Item 24(a)*.

The insurance shall be maintained until the *final certificate* is issued and thereafter for the period as stated in *Item 24(b)*.

The *Contractor* shall ensure that every *consultant*, if within a category stated in *Item 24(c)*, shall effect and maintain professional indemnity insurance with levels of cover not less than stated in *Item 24(c)* applicable to that category.

Each such *consultant's* professional indemnity insurance shall be maintained until the *final certificate* is issued and thereafter for the period as stated in *Item 24(d)*.

16B Professional indemnity insurance

Scope of Coverage

Professional Indemnity (PI) insurance is a liability based policy which provides essential financial protection for professionals for claims made against them in carrying out their professional services. As a liability based policy, the insured's entitlement to indemnity does not arise until the insured's liability to a third party is determined.

Insurance is required to be provided from the commencement of the work or services and to be maintained to a specified period after the *final certificate* is issued or otherwise for six years after the *final certificate* is issued. This requirement reflects the 'long tailed' nature of professional indemnity insurance

Consultants are also under a contractual obligation to take out insurance which meets the criterions stated in the contract. The value of insurance cover provided will need to reflect the value of the project works as opposed to the value of the consultancy services provided. If not specifically stated in the contract, term 24(a) will assume an amount of \$5,000,000 for the insurance cover.

Often a failure to comply with the insurance requirements of the contract will also amount to a 'substantial' breach which will entitle the owner to terminate the contract.

Meaning of 'Professional'

Traditionally, only architects and engineers have been viewed as professionals in construction context. (*Voli v Inglewood Shire Council* (1963) 110 CLR 74). Contractors are not traditionally recognized as 'professionals'. Due to the modern complex building contracts which involve architects and highly skilled builders, contractors are now capable of obtaining professional indemnity policy in respect of their 'professional activities', including design, project management or even construction management but negligence arising from actual construction still remains an uninsurable risk.

Additionally, in *Bryan v Maloney* (1995) 182 CLR 609, the High Court indicated its readiness to equate the position of a builder to that of the 'professional' architect in *Voli*. By this

analogous treatment, it can be argued that it is possible now to include builders as 'professionals' whom can be covered under the professional indemnity insurance.

17. Public liability insurance

17. Public liability insurance

The Alternative in *Item 25(a)* applies.

Alternative 1: Contractor to insure

Before commencing *WUC*, the *Contractor* shall effect and maintain for the duration of the *Contract*, a *public liability policy*.

The policy shall:

- a) be in the joint names of the parties;
- b) cover the
 - i) respective rights and interests; and
 - ii) liabilities to third parties,of the parties, the *Superintendent*, *consultants* and *subcontractors* from time to time, whenever engaged in *WUC*,
- c) cover the parties' respective liability to each other for loss or damage to property (other than property required to be insured by the clause 16A) and the death of or injury to any person (other than liability which the law requires to be covered under a workers compensation insurance policy);
- d) be endorsed to cover the use of any *construction plant* not covered under a comprehensive or third party motor vehicle insurance policy;
- e) provide insurance cover for an amount in respect of any one occurrence of not less than the sum in *Item 25(b)*; and
- f) be with an insurer and otherwise in terms both approved in writing by the *Principal* (which approvals shall not be unreasonably withheld).

Alternative 2: Principal to insure

Before the *date of acceptance of tender*, the *Principal* shall effect in relation to *WUC*, a *public liability policy* in terms of the policy included in the tender documents and nominating or stating the insurer. The *Principal* shall maintain such insurance while ever the *Contractor* has an interest in *WUC*.

17. Public Liability Insurance

Scope of Coverage

Public liability insurance is a liability based policy which provides insurance to the insured in respect of claims brought by third parties for damage to property or injuries to persons. It does not cover in respect of damage to contract works (which is otherwise covered by contract works insurance) or damages caused by breach of professional duty (which is covered by professional indemnity insurance).

The policy must be maintained until at least the time of issuing the *final certificate*.

Alternative 1: Contractor to Insure

Unless it is specified in *Item 25(a)* that *Alternative II* applies, if the *Contract* requires the *Contractor* to insure for public liability or if *Item 21(a)* is not completed and the default position to that *Item* applies (*Contractor* to insure), then the minimum amount per occurrence shall be stated in *Item 25(b)*.

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If in any event *Item 21(b)* is not completed, the *Contractor* is obliged to effect a public liability policy for a sum not less than \$10,000,000. Parties should never allow this default position to take place as it will be for a totally inadequate cover on most projects.

Alternative II: Principal to Insure

- *Contractor* should inspect the policy to ensure it covers the liability for the *Contractor* for the duration of the *Contract* which is usually until at least the *final certificate* is issued.
- Any shortfall in the *Principal's* public liability policy should be covered by the *Contractor* taking out any additional insurance.

Relevant Case Law

In *GIO General Limited v Newcastle City Council* (unreported) NSWSC, Court of Appeal, it was found that in order to determine whether the claim fell within the scope of public liability policy, it is necessary to consider the circumstances surrounding the claim and whether they fell within the description of an occurrence for the purpose of the public liability policy.

The case concerned with two appeals from NSWSC for actions between GIO and Newcastle City Council arising out of the Newcastle earthquake. The Council sought on indemnity from GIO in regards to the claims brought against it for the damage to the Newcastle Workers' Co-Operative Club Ltd ('the Club') and 12 deaths caused by that damage. The claim fell within the public liability section if it was for personal injury or property damages '*caused by an occurrence in connection with the business of the insured*'.

The majority (Kirby P and Powell JA) held that the relevant event was the earthquake and therefore, any claim brought against any person arising out of the earthquake would not be covered by the public liability insurance. The reason is that it is difficult to imagine any situation which an earthquake could be said to be '*in connection with*' an insured person's business.

Public Liability Insurance and Professional Indemnity Insurance

Public liability insurance covers the damages to another person or their property as a result of the work carried out by the employees or contractors during the construction work. Professional indemnity insurance, on the other hand, protects the insured party from any claims against him/her due to his/her own professional negligence. The principal or the contractor affects the public liability insurance and it can cover multiple parties to the contract. PI insurance policy covers individual professionals who are covered by such insurance policy.

32 Programming

32 Programming

The *Superintendent* shall give to the *Contractor* the information, materials, documents and instructions by the times or within the periods both stated in *Item 27*.

The *Contractor* shall give the *Superintendent* reasonable advance notice of when the *Contractor* needs other information, materials, documents or instructions from the *Superintendent* or the *Principal*.

The *Principal* and the *Superintendent* shall not be obliged to give any information, materials, documents or instructions earlier than the *Principal* or the *Superintendent*, as the case may be, should reasonably have anticipated at the *date of acceptance of tender*.

The *Superintendent* may direct in what order and at what time the various stages or portions of *WUC* shall be carried out. If the *Contractor* can reasonably comply with the direction, the *Contractor* shall do so. If the *Contractor* cannot reasonably comply, the *Contractor* shall give the *Superintendent* written notice of the reasons.

A *program* is a written statement showing the dates by which, or the times within which, the various stages or portions of *WUC* are to be carried out or completed. It shall be deemed a *Contract* document.

The *Superintendent* may direct the *Contractor* to give the *Superintendent* a *program* within the time and in the form directed.

The *Contractor* shall not, without reasonable cause, depart from a program.

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

What is a *program*?

A *program* is a written statement. It is 'merely deciding in advance when and where work will be performed and how it will be sequenced in relation to other activities.'¹⁰ A *program* is deemed a *Contract* document. It enables planning so as to maximise profits and minimise risk. It is the focus of proof for the quantum of delay claims.

The *program* is developed by using Critical Path Methods (CPM). The initial use of the CPM was as a planning technique but it has become recognised as the most common means of substantiating construction delay claims before courts and tribunals.

The importance of the program is demonstrated by the fact that it is a substantial breach of the *Contract* if the *Contractor* substantially departs from the programme without reasonable cause or the *Superintendent's* approval (subclause 39.2(c)).

¹⁰Keith Pickavance, *Delay and Disruption in Construction Contracts*, (1997), p113.

Why have a *program*?

The *program* is the prime method by which the *Contractor's* progress of WUC is measured. This is particularly relevant if the *Contract* includes a provision for bonus to be paid to the *Contractor* for early *practical completion*. The *Contractor* cannot otherwise require the *Principal* or the *Superintendent* to expedite the giving of information under this clause to achieve practical completion so as to earn any bonus¹¹.

A *program* can be used to identify the problems relating to the integration of successive trades. It can be used as a principal tool in demonstrating delay and disruption and a tool for replanning in the event of change.

Use of a *program* for the *Principal* and the *Contractor*

- **Financing -**
 - it enables the *Principal* to know the likely progress in any particular claim period and therefore the likely progress claim.
 - it enabled the *Contractor* to know the likely progress in any particular periods and the likely outgoings.
 - this is particularly important to the cash flow of the *Principal* and the financing costs of the project.
- **Planning and Management** – a *program* assists the *Contractor* to plan and manage the sequence of work to be done and also to complete jobs on time and within budget.
- **Co-ordination** –
 - it enables the *Principal* to plan other interrelated activities and projects. It enables the *Principal* to know the likely times when areas will be completed or when other projects that link in must be completed so as not to delay the *Contract*.
 - It enables the *Contractor* to know the likely times when interrelated activities will occur so as not to delay the *Contract* or to expose it to claims by their subcontractors for delays.
- **Supply of materials** – the *Principal* or the *Contractor* may be responsible for the supply under the *Contract* of certain materials. The materials may have a long lead time for delivery and the construction *program* provides an indication of when they will be required. The *program* can prevent a potential delay claim if the *Principal* can plan for their timely delivery. This can also have implications for cash flow and financing costs.
- **Supply of information** – it is often a requirement of contracts that the *Principal* or the *Contractor* supply certain information. A construction *program* provides information on when this is required.
- **Supply on approval or *direction*** – if the *Contractor* submits shop drawings which require approval from the *Principal* the *program* provides information on when the *Principal* must deliver approvals.

¹¹ *Glenlion Construction Ltd v Guinness Trust* (1987) 39 BLR

- **Assess Variations**– it enables a *Principal* to determine what the delay will be if *variations* are made beyond the completion of certain activities and completion dates. See clause 36.2(b) (value of time).
- **Assessing delays**– a *program* affects a *Contractor's* ability to obtain adjustments in the time and cost of performing work. Without a good provable *program* it is virtually impossible to make a valid assessment of delay and establish the right to an *EOT*.
- **Assess the scope and methods prior to acceptance** – where the proposed construction *program* is provided in the tender, it allows a *Principal* to assess whether the tendered who has become the *Contractor* fully understands the scope and the nature of work. It also allows assessment of possible alternative methods which may have commercial advantage for the *Principal*.
- **Monitor progress** – a *program* can often illuminate failure of due diligence on the part of the *Contractor*. This may demonstrate the inability or unwillingness of the *Contractor* to complete their obligations. Normally express expedition or due diligence provisions are linked to express provisions enabling the *Principal* to terminate the *Contract*.

Rights and Obligations that construction programs impose on the parties

The *Principal* is able to require the *Contractor* to perform the *WUC* in a specific manner or sequence.

The *Contractor's* primary obligation under this clause is not to depart from the *program* except with reasonable cause or the *Superintendent* gives approval to do so. So for example if a *qualifying cause of delay* occurs, the *Contractor* would have reasonable cause to depart from the *program*.

The *Contractor* is entitled to have any more or less cost incurred by the *Contractor* in complying with the *Superintendent's direction* given under this clause assessed by the *Superintendent* and added to or deducted from the contract sum provided the *direction* was not due to the *Contractor's* default.

The *Contractor* is responsible for the method and sequencing of the works to achieve completion of the project. The burden for programming within the *Contract* period lies squarely on the shoulders of the *Contractor*.

The ownership of the float belongs to the *Contractor*. The float is the amount of time that the completion of an activity can extend past its early finish date before it impacts upon the critical path. The float is important if the *Contract* includes a provision for bonus to be paid to the *Contractor* for early *practical completion*.

37 Payment

37 Payment

37.1 Progress claims

The Contractor shall claim payment progressively in accordance with Item 33.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract.

37.2 Certificates

The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:

- (a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and
- (b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.

If the Contractor does not make a progress claim in accordance with Item 33, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).

If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

37.3 Unfixed plant and materials

The Principal shall not be liable to pay for unfixed plant and materials unless they are listed in Item 34 and the Contractor:

- (a) provides the additional security in Item 14(e); and
- (b) satisfies the Superintendent that the subject plant and materials have been paid for, properly stored and protected, and labelled the property of the Principal.

Upon payment to the Contractor and the release of any additional security in paragraph (a), the subject plant and materials shall be the unencumbered property of the Principal.

37.4 Final payment claim and certificate

Within 28 days after the expiry of the last defects liability period, the Contractor shall give the Superintendent a written final payment claim endorsed 'Final Payment Claim' being a progress claim together with all other claims whatsoever in connection with the subject matter of the Contract.

Within 42 days after the expiry of the last defects liability period, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the moneys finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject

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matter of the Contract.

Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as the case may be, within 7 days after the debtor receives the final certificate.

The final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the Contract except for:

- (a) fraud or dishonesty relating to WUC or any part thereof or to any matter dealt with in the final certificate;
- (b) any defect or omission in the Works or any part thereof which was not apparent at the end of the last defects liability period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the final certificate;
- (c) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation; and
- (d) unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate.

37.5 Interest

Interest in Item 35 shall be due and payable after the date of default in payment.

37.6 Other moneys due

The Principal may elect that moneys due and owing otherwise than in connection with the subject matter of the Contract also be due to the Principal pursuant to the Contract.

The *Contractor* is required to periodically deliver to the *Superintendent* progress claims for payment under the *Contract*. The *Superintendent* is required to assess those progress claims by reference to the degree of completeness and the quality of the materials and workmanship. These dates are reference dates. (see section 8 of the *Building and Construction Industry Security of Payments Act 1999* ("the Act").

Contractors have a similar statutory entitlement under section 8 of *Building and Construction Industry Security of Payments Act 1999* to progress payments

Under the *Contract*, the *Superintendent* is required to form an opinion. This is regardless of whether or not he is able to assess precisely what is due to the *Contractor*. This is because the *Superintendent* must issue a progress certificate but he must do so **reasonably and in good faith**. (Clause 20 but this is often amended see *Peninsula Balmain Pty. Limited v. Abigroup Contractors Pty. Limited*¹²)

The *Superintendent* must calculate the amounts having due regard to:

- a. the work carried out by the *Contractor*, and
- b. claims for breach of *Contract*.

and not the cost to complete which is an error.

The following are examples of claims that can be included in a payment claim under 37.1:

¹²[2002] NSWCA 211

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- a. Subclause 8.1: claim for complying with a *Superintendent's direction* resolving an inconsistency, ambiguity or discrepancy in a document;
- b. Subclause 25.3: claim for latent *condition*;
- c. Subclause 34.8: claim for bonus (if *Contractor* can claim the bonus immediately);
- d. Subclause 36.4: claim for *variation*;
- e. Subclause 37.1: payment claim;
- f. Subclause 37.3: claim for unfixed plant and materials;
- g. Subclause 37.5: claim for interest; and
- h. Subclause 37.4: *final payment claim*.

The *Superintendent* must issue two certificates under subclause 37.2 (a) and 37.2 (b) each time the *Contractor* claims payment.

The *Principal* can set off moneys which are set out in the certificate issued under 37.2 (b).

If the *Superintendent* fails to issue the 2 certificates within the 21 day period, the *Principal* is **obliged** to pay the claim and cannot make a contractual set off.

Money due and payable means moneys are to be paid immediately and a party can immediately claim from the other party:

- a. when the moneys are certified as due and payable by a *Superintendent's* certificate; or
- b. when the money is determined by the Court to be a debt due under section 15(2) (a)(i) of the Act.

Failure by a *Contractor* to make a progress claim in accordance with the *Contract* creates 2 courses of action for the *Superintendent* :

- a. **may** issue a *progress certificate* with details of the calculations (optional); and
- b. **shall** issue the certificate in subclause 37.2 (b) (mandatory).

A *Principal* does not have to make a corresponding claim in order to trigger the issue of a certificate by the *Superintendent* pursuant to subclause 37.2(b) in favour of the *Principal*.

The *Superintendent* may also include moneys that may be due to the *Principal*. An example would be moneys due to the *Principal* otherwise than under the *Contract* in terms of subclause 37.6

It is important to note that the overall time for payment under subclause 37.2 is 21 days.

'Payment on account only' means that payments (except a final payment) can be adjusted at a later date. This means that any errors or misstatements in earlier payment certificates may be corrected in later certificates.

It is important to note that the *Superintendent* has the right to extend the *defects liability period* (under clause 35). This is relevant for the *Contractor* in terms of subclause 37.4 which

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gives the *Contractor* the right to give the *Superintendent* a written *final payment claim*. The *final payment claim* must be given 28 days after the expiry of the last *defects liability period*.

The *final payment claim* must include all other claims the *Contractor* wishes to make. It must also include value of the *WUC* done and details of other moneys dues as well as other claims the *Contractor* wishes to make under the *Contract*.

Once the *final certificate* is issued, the moneys certified as due and payable are to be paid by the *Principal* or *Contractor* within 7 days after the party required to pay the money has received the *final certificate*.

Subject to the exceptions in 37.4 (a)-(d) and clause 42 (dispute resolution), the final certificate has the effect that it is the end of the parties contractual obligations to each other.

38 Payment of workers, consultants and subcontractors

38 Payment of workers, consultants and subcontractors

38.1 Workers, consultants and subcontractors

The Contractor shall give in respect of a progress claim, documentary evidence of the payment of moneys due and payable to:

- (a) workers of the Contractor and of the subcontractors;
 - (b) consultants; and
 - (c) subcontractors,
- in respect of WUC the subject of that claim.

If the Contractor is unable to give such documentary evidence, the Contractor shall give other documentary evidence of the moneys so due and payable to workers, consultants and subcontractors.

Documentary evidence, except where the Contract otherwise provides, shall be to the Superintendent's satisfaction.

38.2 Withholding payment

Subject to the next paragraph, the Principal may withhold moneys certified due and payable in respect of the progress claim until the Contractor complies with subclause 38.1.

The Principal shall not withhold payment of such moneys in excess of the moneys evidenced pursuant to subclause 38.1 as due and payable to workers, consultants and subcontractors.

38.3 Direct payment

Before final payment, the Principal, if not aware of a relevant relation-back day (as defined in the Corporations Law) may pay unpaid moneys the subject of subclause 38.1 directly to a worker, consultant or subcontractor where:

- (a) permitted by law;
- (b) given a court order in favour of the worker, consultant or subcontractor; or
- (c) requested in writing by the Contractor.

Such payment and a payment made to a worker, consultant or subcontractor in compliance with a legislative requirement shall be deemed to be part-satisfaction of the Principal's obligation to pay pursuant to subclause 37.2 or 37.4, as the case may be.

The purpose of the subclause 38.1 is twofold.

- a. it serves to protect the *Principal* from the *Contractor's* liability under s175B of the *Workers Compensation Act 1987*, Schedule 2 Part 5 of the *Payroll Tax Act 2007* and s 127 of the *Industrial Relations Act 1996*; and
- b. it can operate as a barrier to the *Contractor* receiving payment.

In terms of 175B (2) of the *Workers Compensation Act 1987*, the *Contractor* is liable for the payment of any workers compensation insurance premiums payable by the *Subcontractor* in respect of work done in connection with the *Contract* during any period of the *Contract* unless the *Contractor* has a written statement given by the *subcontractor* under s 175B (2) for the period of the *Contract*.

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A written statement under this Act is a statement by the *subcontractor* that all workers compensation premiums payable by the subcontractor in respect of the work done in connection with the *Contract* during any period of the contract have been paid. A written statement is also accompanied by a copy of the relevant certificate in respect of that insurance.

In terms of Schedule 2 Part 5 of the *Payroll Tax Act 2007*, if at the end of 60 days of a financial year, any payroll tax payable by the *subcontractor* in respect of wages paid or payable to the relevant employees during the financial year for work done in connection with the *Contract* has not been paid, the *Contractor* is jointly and severally liable with the *subcontractor* for the payment of payroll tax.

A *Contractor* will not be liable for payment of any payroll tax in respect of wages to the relevant employees during the period if the *Contractor* has been given a written statement by the *subcontractor* for that period.

Section 127 of the *Industrial Relations Act 1996* makes the *Contractor* liable for the payment of any remuneration of the relevant employees that have not been paid for work done in connection with the *Contract* during any period of the *Contract* unless the *Contractor* has a written statement given by the *subcontractor* under this section for that period of the *Contract*.

Subclause 38.2 allows a *Contractor* to withhold payment of moneys certified as due and payable in respect of the progress claim until subclause 38.1 has been complied with. All three statutes above contain similar provisions that allow a *Contractor* to withhold any payment due to a *subcontractor* until the *Contractor* receives the relevant written statement in the correct form and accompanied by the necessary documents (if applicable).

Under all three statutes, a written statement is not effective to relieve the *Contractor* of liability if the *Contractor* had reason to believe when given the statement that it was false.

The statutes have no application in relation to a *Contract* if the *subcontractor* is in receivership or in the course of being wound up.

The *Contractor* is entitled to recover from the *subcontractor* as a debt in a Court any payment made by the *Contractor* under these statutes.

The *Contractor* is required to keep a copy of a written statement for:

- 5 years under the *Payroll Tax Act 2007*,
- 6 years under the *Industrial Relations Act 1996*, and
- 7 years under the *Workers Compensation Act 1987*.

Case law

In *FPM Constructions Pty Ltd v Council of the City of Blue Mountains*,¹³ FPM Constructions was only entitled to payment of a progress claim if the *Principal* (Council of the City of Blue Mountains) was provided with a statutory declaration. The statutory declaration had to state that no outstanding debts were due and payable to *subcontractors* and the *Superintendent* had certified the amounts properly payable. FPM Constructions defaulted and the *Principal* terminated the *Contract*. The court held that the obligation to supply supporting information with a progress claim was a non-promissory condition the non fulfilment of which would entitle the withholding of payment but not termination of the *Contract*.

If the *Principal* requires the *Contractor* to provide copies of the *subcontractor's* statement as a supporting document to the progress claim, the *Principal* can use this to protect itself from pressure from the unions to pay the *Contractor's* liabilities under s175B of the *Workers Compensation Act 1987*, Schedule 2 Part 5 of the *Payroll Tax Act 2007* and s 127 of the *Industrial Relations Act 1996* in the event that the *Contractor* is in receivership or in the course of being wound up.

If the *Principal* requires the *Contractor* to provide copies of the *subcontractor's* statement as a supporting document to the progress claim, then as the case of FPM Constructions above illustrates, non fulfilment of this requirement would entitle the *Principal* to withhold payment.

Disclaimer

This is intended as a guide only and should not be used in place of professional legal advice.

For further information please contact:

Mr Brett Vincent, Principal of Vincent Young

P: (02) 9261 5900

E: brett.vincent@vylaw.com.au

¹³[2005] NSWCA 340

Interpretation and Construction of Contract

	Comment
In the <i>Contract</i> , except where the context otherwise requires:	
<i>Item</i> means an <i>Item</i> in Annexure Part A;	
<i>Construction plant</i> means appliances and things used in carrying out <i>WUC</i> but not forming part of <i>the Works</i> .	See Public Liability Insurance page 18
<i>Consultant</i> means any person engaged by the <i>Contractor</i> to perform consultancy services in connection with <i>WUC</i> and includes any <i>Principal's</i> consultant whose prior contract is novated to the <i>Contractor</i> .	See Nature of Contract page 3-4 See Insurance of Works page 14-15 See Professional Indemnity Insurance page 16,18 See Payment of workers, consultants and subcontractors page 27
<i>Contract Sum</i> means: a) where the <i>Principal</i> accepted a lump sum, the lump sum; (b) where the <i>Principal</i> accepted rates, the sum of the products ascertained by multiplying the rates by the corresponding quantities in the schedule of rates; or (c) where the <i>Principal</i> accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (a) and (b), including provisional sums but excluding any additions or deductions which may be required to be made under the <i>Contract</i> ;	See Nature of Contract page 5 See Provisional Sums page 7 See Insurance of works page 15 See Professional indemnity insurance page 16 See Programming page 21 See Payment page 23
<i>Contract</i> has the meaning in clause 6;	
<i>Contractor</i> means the person bound to carry out and complete <i>WUC</i> ;	
<i>Contractor's design obligations</i> means all tasks necessary to design and specify <i>the Works</i> required by the <i>Contract</i> , including preparation of the design documents and, if the documents stated in <i>Item</i> 10 as describing the <i>Principal's</i> project requirements include a preliminary design, developing the preliminary design;	See Nature of Contract page 3-5
<i>date for practical completion</i> means: (a) where <i>Item</i> 7(a) provides a <i>date for practical completion</i> , the date; (b) where <i>Item</i> 7 (b) provides a period of time for practical completion, the last day of the period, but if any <i>EOT</i> for practical completion is directed by the Superintendent or allowed in any arbitration or litigation, it means the date	

resulting therefrom;	
<p><i>date of practical completion</i> means:</p> <p>(a) the date evidenced in a certificate of practical completion as the date upon which practical completion was reached; or</p> <p>(b) where another date is determined in any arbitration or litigation as the date upon which practical completion was reached, that other date;</p>	
<i>Deed of guarantee, undertaking and substitution</i> has the meaning in subclause 5.6	See Security page 12
<i>design documents</i> means the drawings, specifications and other information, samples, models, patterns and the like required by the <i>Contract</i> and created (and including, where the context so requires, those to be created by the <i>Contractor</i>) for the construction of the Works;	See Nature of Contract page 3-4
<i>direction</i> includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;	
<p><i>Legislative requirement</i> includes:</p> <p>(a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where WUC or the particular part thereof is being carried out;</p> <p>(b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of WUC; and</p> <p>(c) fees and charges payable in connection with the foregoing;</p>	See Payment of workers, consultants and subcontractors page 28
<p><i>practical completion</i> is that stage in the carrying out and completion of WUC when:</p> <p>(a) <i>the Works</i> are complete except for minor defects:</p> <p>(i) which do not prevent <i>the Works</i> from being reasonably capable of being used for their stated purpose;</p> <p>(ii) which the Superintendent determines the <i>Contractor</i> has reasonable grounds for not promptly rectifying; and</p> <p>(iii) the rectification of which will not prejudice the convenient use of <i>the Works</i>;</p> <p>(b) those tests which are required by the <i>Contract</i> to be carried out and passed before <i>the Works</i> reach practical completion have been carried out and passed; and</p>	<p>See Security page 8</p> <p>See Professional indemnity insurance page 16</p> <p>See Programming page 22</p> <p>See Payment page 23</p>

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(c) documents and other information required under the <i>Contract</i> which, in the Superintendent's opinion, are essential for the use, operation and maintenance of the Works have been supplied; preliminary design means the documents stated in <i>Item 11</i> ;	
<i>Preliminary design</i> means the documents stated in <i>Item 11</i> .	See Nature of Contract page 2-4 See Insurance of works page 14
<i>Principal</i> means the <i>Principal</i> stated in <i>Item 1</i> ;	
<i>Principal's project requirements</i> means the <i>Principal's</i> written requirements for <i>the Works</i> described in the documents stated in <i>Item 10</i> which: (a) shall include the stated purpose for which <i>the Works</i> are intended; (b) may include the <i>Principal's</i> design, timing and cost objectives for <i>the Works</i> ; and (c) where stated in <i>Item 10</i> , shall include a preliminary design;	See Nature of Contract page 2-4 See Insurance of works page 14
<i>Program</i> has the meaning in clause 32	See Programming page 20-22
<i>Progress certificate</i> has the meaning in clause 17;	
<i>Public liability policy</i> has the meaning in clause 17	See Public liability insurance page 19-20
<i>schedule of rates</i> means any schedule included in the <i>Contract</i> which, in respect of any section or <i>Item</i> of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices;	
<i>Security</i> means: (a) cash; (b) retention moneys; (c) bonds or inscribed stock or their equivalent issued by a national, state or territory government; (d) interest bearing deposit in a bank carrying on business at the place stated in <i>Item 9(c)</i> ; (e) an approved unconditional undertaking (the form in Annexure Part B is approved) or an approved performance undertaking given by an approved financial institution or insurance company; or (f) other form approved by the party having the benefit of the security;	See Security page 8-11 See Programming page 23
<i>Selected subcontractor</i> has the meaning in subclause 9.3	See Assignment and subcontracting page 13

<p><i>Subcontractor</i> in clause 3 and 9 include a <i>consultant</i>;</p>	<p>See Provisional sums page 6-7 See Assignment and subcontracting page 12-13 See Insurance of works page 14-15 See Public liability insurance page 18 See Programming page 21 See Payment of workers, consultants and Subcontractors page 27-29</p>
<p><i>Superintendent</i> means the person stated in <i>Item 5</i> as the Superintendent or other person from time to time appointed in writing by the <i>Principal</i> to be the Superintendent and notified as such in writing to the <i>Contractor</i> by the <i>Principal</i> and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative; Superintendent's Representative means an individual appointed in writing by the Superintendent under clause 21;</p>	
<p><i>Temporary works</i> means works used in carrying out and completing WUC, but not forming part of the Works.</p>	
<p><i>the Works</i> means the whole of the work to be carried out and completed in accordance with the <i>Contract</i>, including variations provided for by the <i>Contract</i>, which by the <i>Contract</i> is to be handed over to the <i>Principal</i>;</p>	
<p><i>variation</i> has the meaning in clause 36;</p>	
<p><i>work</i> includes the provision of materials;</p>	
<p><i>WUC</i> (from 'work under the <i>Contract</i>') means the work which the <i>Contractor</i> is or may be required to carry out and complete under the <i>Contract</i> and includes variations, remedial work, construction plant and Temporary works, and like words have a corresponding meaning.</p>	
<p>In the <i>Contract</i>: (a) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or unincorporate; (b) time for doing any act or thing under the <i>Contract</i> shall, if it ends on a Saturday, Sunday or Statutory or Public Holiday, be deemed to end on the day next following which is not a Saturday, Sunday or Statutory or Public Holiday; (c) clause headings and subclause headings shall not form part of, nor be used in the interpretation of, the</p>	

<p><i>Contract</i>;</p> <p>(d) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender;</p> <p>(e) communications between the <i>Principal</i>, the Superintendent and the <i>Contractor</i> shall be in the English language;</p> <p>(f) measurements of physical quantities shall be in legal units of measurement of the jurisdiction in <i>Item 8</i>;</p> <p>(g) unless otherwise provided, prices are in the currency in <i>Item 9(a)</i> and payments shall be made in that currency at the place in <i>Item 9(b)</i>;</p> <p>(h) the law governing the <i>Contract</i>, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in <i>Item 8</i>; and</p> <p>(i) if pursuant to Annexure Part E to these General Conditions, clauses or their parts in these General Conditions are deleted, the <i>Contract</i> shall be read and construed as though the clause or its part has been deleted, whether or not that particular clause or its part has been struck from these General Conditions.</p>	
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