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STANDARD AUSTRALIA'S NEW DRAFT STANDARD: AS11000

UPDATE: STANDARDS AUSTRALIA HAS CONFIRMED THAT AS11000 WILL NOT BE RELEASED, STATING THAT THE CONTRACT 'WAS NOT SUPPORTED BY THE FULL SPECTRUM OF INTERESTS'.

INTRODUCTION

Standard Australia recently released a new draft General Conditions of Contract named AS11000 which is intended to replace the widely used AS2124:1992 and AS4000:1997.

AS110000 represents a significant shift from the previous contracts with new conditions as follows.

UNDERLYING PRINCIPLES

Standards Australia has advised that AS11000 is intended to provide a "broadly balanced approach" to ensuring that a Principal should not ask a Contractor to price an unquantifiable risk, which is within the control of the Principal.

Standards Australia have also indicated that they are exploring forms of product delivery, which will be suited for standard form contracts. This may mean that the new AS1100 will be in a form, which cannot be amended, such as an interactive PDF.

KEY CHANGES

GOOD FAITH OBLIGATION

Clause 2.1 of the contract provides for an overriding obligation for the Principal and Contractor to act in good faith towards each other in a spirit of mutual trust and cooperation. No definition has been provided for 'Good Faith' in the Contract, which may lead to disputes in the context of lump sum contracts with an agreed risk allocation.

EARLY WARNING PROCEDURE

Clauses 2.2 to 2.4 of AS11000 requires the Superintendent or Contractor to be notified when a party becomes aware of an event or circumstance which may impact upon time, cost, scope or quality under the Contract.

If the Principal invokes what is called the 'early warning procedure' and the Superintendent fails to respond to the claim in the set period, a Principal may prevent the Contractor from relying on clauses 37.10 or 40.8 to say that there was a deemed extension of time or a deemed progress certificate.

Clause 2.2 also requires the Superintendent to direct the parties to a conference if they become aware of a circumstance, which may impact on time, cost, scope or quality. The wording of this clause suggests that this power to direct is non-discretionary. Standards Australia have stated that this clause will encourage the prompt resolution of issues.

SUBCONTRACTING

Contractors bound by the AS11000 contract and entering into subcontracts are required to use the proposed AS11002:2015 contract (clause 12.3 of AS11000) if the subcontract sum equals or exceeds an amount to be set out by the parties in Annexure Part A of the main contract.

No amendments or additions are to be included in the subcontract "except those necessary to reflect the Contract between the Principal and the Contractor". If amendments or additions are included and are not "necessary to reflect the Contract between the Principal and the Contractor", there will be a substantial breach of the contract, leading to its termination.

Head contractors and subcontractors, who do not want to risk termination, ought to be wary of making amendments to the subcontract given the uncertainty of the phrase "except those necessary to reflect the contract between the Principal and Contractor".

PROSPECTIVE VARIATIONS

Clause 39.5 of the new draft standard introduces the idea of "prospective variations" which means that if a contractor considers a superintendent's direction to be a variation, the contractor shall, within 5 business days of receipt the direction, notify the superintendent that they consider the direction to be a variation.

ROLE OF THE SUPERINTENDENT

Clause 23 of the new draft standard clarifies when the Superintendent is required to act impartially and when the Superintendent acts as an agent of the Principal. Clause 23.1(c) requires the superintendent to act impartial while verifying, assessing, pricing, measuring, valuing work, quantities or time, or when acting reasonably. At all other times the Superintendent acts as an agent of the Principal.

Meanwhile, other clauses, which may concern Principals, provide that the Superintendent must act reasonably in situations where the Superintendent might have otherwise been expected to have an agent's role. For example, the Superintendent is required to act reasonably in relation to directing Separable Portions (clause 7) and directing suspension of the work under the Contract (clause 36).

PROGRAMMING

The AS11000 contains more requirements for the construction program (clause 35). Programs are defined as activity-based critical path program in a time-linked bar (or Gantt) chart form" (clause 35.5). Clause 35.5(c) also provides for the parties to select additional

requirements for the program in Annexure Part E.

DELAYS AND EXTENSIONS OF TIME

AS11000 has removed the definitions for qualifying causes of delay and compensable causes for delay and has transferred these decisions to the extension of time clauses.

The draft also introduces a new cause of delay called "act of prevention" which includes a default, act or omission of the superintendent and the principal, their consultants, agents or other contractors.

Contractors are now entitled to an extension of time if they give the Superintendent a written claim for an extension of time within 20 business days after the delay occurs.

The AS11000 provides for new causes of delay, which may entitle the Contractor to an EOT. For the period up to the date for practical completion, the events which may entitle the Contractor to an extension of time are those which are beyond the reasonable control of the Contractor (such as inclement weather or industrial conditions). For the period after the date for practical completion, the Contractor may be entitled to an extension of time for variations and acts of prevention (clause 37.4).

Clause 37.5 also includes a requirement for giving notice if a further delay results from the same cause of delay. It is not clear whether this clause is referring to a continuation of a delay notified in an earlier claim for an extension of time or to a separate delay arising from the same cause.

The AS11000 also sets out a procedure for the Superintendent's assessment of extension of time claims – presumably to encourage the

prompt resolution of claims. Clause 37.12 bars claims, which have been triggered because the Contractor has failed to comply with a direction to provide additional information.

The notice regime in AS11000 provides that, upon becoming aware of anything which will cause delay to the work under the contract, the party must promptly and within 5 business days, provide a notice of the cause and estimate delay to the superintendent and the other party (clause 37.2). Clause 37.2 provides that the notice must include details as to whether the contractor will be claiming an extension of time for the cause of delay. Given that the contract does not state that requirements in Clause 37 operate as a time bar, it is unlikely that a contractor will be disentitled to a claim based on non-compliance with notice requirements.

SECURITY OF PAYMENT LEGISLATION

The AS11000 has been brought in line with requirements under the Security of Payment legislation in different States and Territories in a number of ways.

References to business days and amendments to the payment regime in clause 40 represent the specification of time requirements and alignment of the AS11000 with legislative requirements. Furthermore, clause 40.1(a)(iii) provides that progress payments or the final certificate is a payment statement or a payment schedule for security of payment purposes. Clause 40.1(b) also provides that the superintendent can receive payment claims and issue progress certificates on behalf of the principal to comply with legislative requirements.

DISPUTE RESOLUTION

Clauses 45.7-45.9 allows the parties to resolve the disputes through a conference, followed by arbitration. Alternatively, clauses 45.10-45.13 allow the parties can resolve disputes by holding a conference followed by expert determination and litigation. Furthermore, parties can choose from 'Contract Facilitation' or the 'Dispute Resolution Board' as a means of dispute resolution.

The parties may choose resolve the disputes through other alternatives. If so, the dispute resolution process outlined in clause 45.15 of the AS11001 2015 standard will apply.

SERVICE

Clause 10 of the AS11000 provides for service by email.

LIQUIDATED DAMAGES

The AS11000 has reinserted a clause allowing parties to specify a cap on liquidated damages in Annexure Part A (clause 37.19).

OVERLAPPING DELAYS

Clause 37.6 provides that where there are overlapping delays the Contractor will be entitled to a full extension of time for the overlap but no delay damages.

DELAY DAMAGES

The Contractor will be entitled to delay costs and damages in respect of two events:

- Delay damages in respect of acts for prevention
- Delay costs in respect of variations

The drafting of this Clause makes it difficult for the Contractor to receive costs and damages in respect of other events.

DUE EXPEDITION

The AS11000 provides that a Contractor's failure to comply with their obligation to proceed with the work under the Contract with due expedition and without delay will be a substantial breach of the contract and a substantial departure from a program without reasonable cause.

INSURANCE EXCESS

Clauses 19.7 and 19.10 provides that, regardless of who is responsible for the insurance, the Contractor must bear the cost of any excess payable under the contract works insurance unless the loss or damage has been caused by a Principal's risk.

PRINCIPAL'S RISKS

The AS11000 provides for new "Principal's risks" (formerly "Excepted risks") such as terrorism and sudden or accidental chemical or biological pollution not caused by the Contractor or its subcontractors, employees or agents (clause 17.3).

UNFIXED PLANT AND MATERIALS

The AS11000 now provides that the Contractor will either be not entitled to payment for any unfixed plant or materials or, conditional upon the satisfaction of particular requirements, entitled to payment for all items of unfixed plant and materials (clauses 40.10 to 40.13).

For more information

For more information on the new AS1100,
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