

## Changes to AS 2124 Disappointing

**Changes to AS 2124-1986 are essentially cosmetic but require careful consideration by contract users.**

In April 1992 Standards Australia released for public comment a draft revision of its widely used contract, AS 2124-1986. The period for comment on the draft (DR 92053) expired on 31 May and Standards Australia hopes that a final contract will be released by the end of 1992.

Disappointingly, the proposed amendments are more cosmetic than substantive, particularly in view of the increasing (if still tentative) support of the National Public Works Conference for the replacement of its own general conditions of contract (NPWC3) with a revised form of AS 2124-1986. The following article gives an assessment of the more significant proposals.

### Certificates and payments

- The payment procedures under clause 42 appear designed to make the Superintendent's certificate conclusive and require the Principal (or Contractor) to pay on the certificate even though it may be disputed. If no payment certificate has been duly issued, the Principal must pay the amount of the Contractor's claims. [42.1].
- Payment for unfixed plant and materials is the subject of three "alternatives": payment in exchange for additional security equal to payment claimed for the plant and materials; if the Principal elects to make payment (regardless of whether or not security is provided), the Contractor must establish to the Superintendent's satisfaction reasonable delivery, proper storage, labelling and protection and the passing of ownership upon payment; or no payment. [42.4]
- In the absence of a notice of dispute under clause 48 being issued before or within 15 days after the final payment certificate, that certificate shall be conclusive evidence that the work has been completed in accordance with the terms of the contract. The certificate is also evidence that necessary effect has been given to all the terms of the contract which require an adjustment to be made to the contract sum — except in cases of fraud, dishonesty or fraudulent concealment, defects not apparent at the end of the defects liability period or arithmetical error or omission. [42.8]

### Security

- Failure to lodge security within the specified time will constitute a default of the Contractor. [44.2(c)] Access to security comprising retention moneys or other

forms of security which do not consist of money, shall be on five clear days notice to the other party of an intention to call up that security. [5.5]

- Security, in the form of unconditional undertakings, shall no longer be enforceable 14 days after the date upon which the Principal's entitlement to that undertaking ceases (that is, upon the issue of certificates of practical completion and final payment). [5.3] If the contract is terminated under clause 44, the party terminating the contract may have recourse to any security or retention moneys provided by the defaulting party — but only to the extent that would have been necessary to ensure the due and proper performance of the contract had the contract not been terminated. However, a defaulting party holding security or retention moneys provided by the other party is precluded from recourse to the security or retention moneys unless or until a determination is made (under clause 48 or otherwise) or the other party agrees in writing that the defaulting party is entitled to the security. [44.10]
- The provision of alternatives to interest on security moneys has been maintained. However, the order of the alternatives has been reversed, presumably to encourage the establishment of joint interest bearing trust accounts. [5.9]

### Termination

- In the event of default by the Principal under clause 44, the Contractor has been given the right to terminate the contract immediately if the Principal fails to show reasonable cause (rather than having to suspend for 28 days before terminating the contract). [44.9]

### Variations

- The Superintendent's power to order variations under clause 40 has been expanded to allow the Superintendent orally to direct a variation where he considers that the matter is one of urgency and that the Contractor should proceed without awaiting a written direction. An oral direction must be confirmed in writing within 24 hours. [40.1]
- Other amendments to clause 40.1 require the Contractor to 'price' a variation if directed to do so by the Superintendent. The provision by the Contractor of the price of the variation supported by measurements and other evidence of cost (when so directed by the

Superintendent) entitles the Contractor to his costs of preparing the measurements and other evidence of costs. [40.2]

- Where a bill of quantities is in error by more than \$2,000 (or 5% of the value of the item) or erroneously includes or omits an item (unless the error is less than \$400), the contract sum is adjusted as if it were a variation under clause 40.2. [4.3]

#### Delays

- The Principal must notify the Contractor of likely delay when it becomes evident that anything which the Principal is obliged to do or provide under the contract is likely to be delayed. Additionally, where there are concurrent delays and one of those delays is a delay for which the Contractor is not entitled to an extension of time, the Superintendent shall determine whether and to what extent the Contractor is entitled to an extension of time. [35.5]
- Extra costs necessarily incurred by the Contractor resulting from the exercise by the Superintendent of the power to determine an extension of time under clause 35.5 shall be paid by the Principal only if the extension of time was due to an act or omission by the Principal or any of its consultants, servants or agents. The Principal's liability for damages for breach of contract is preserved. [36]

#### Disputes

- The Superintendent is required to determine within a reasonable time after the provision of specified detailed particulars, the Contractor's entitlements for additional payment claims. [47.1] However, the Principal shall not be liable for any such claim unless it has been lodged in writing with the Superintendent not later than 56 days after the Contractor first became aware (or should reasonably have become aware) of the events or circumstances on which the claim is based. [47.3]
- The mechanism for resolving disputes has been significantly altered. The initial step of referring the dispute for determination by the Superintendent has been retained. The Superintendent's decision will be final and binding unless further steps set out in clause 48 are followed and, in any event, litigation or arbitration proceedings are issued within 90 days of his decision [48.2]. If the dispute remains unresolved the parties are required to confer. [48.3]
- If the dispute cannot be resolved through these procedures or "if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute", then either party may, by notice to the other, refer the dispute to arbitration or litigation. [48.4]

- Reprinted with permission from Construction Headlines, a publication of the Australian Legal Group.

#### Note:

A detailed article on the draft amendments to AS2124 by John Pilley, a member of Standards Australia's AS2124 review committee, appeared in Issue #23 of the Newsletter at p4. This article presents another viewpoint.