

AS4902 — 2000: THE NEW DESIGN & CONSTRUCT STANDARD

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Standards Australia is currently undertaking a major overhaul of its suite of construction contracts. The new suite will contain revised versions of many existing standards, together with some new standards to 'fill the gaps' in the current standards.

The centrepiece of the new suite AS4000, was released in 1997. It replaced the well known and well used AS2124-1992, a construct-only contract. In January this year, Standards Australia released AS4902-2000 which is the replacement contract for AS4300-1995. As part of the AS4000 suite AS4902 closely follows the risk allocation, drafting style and format of AS4000. There are, of course, different clauses to address the allocation of design obligations and risk, however, the changes to these clauses are minor. Indeed, the major changes to AS4300 are those which have already been included in the changeover from AS2124 to AS4000.

AS4902 uses both the format (with clause headings being made more prominent) and the language (intended by the drafting committee to be plain English) which was adopted in AS4000. So far as more substantive issues are concerned, [the articles included from] this edition of *On Site* will identify and briefly examine some key features of the new contract.

DESIGN

Very little has changed from AS4300.

The treatment of the principal's project requirements, the novation of any preliminary design and the design warranties imposed on the contractor are essentially the same.

Unfortunately, the drafting committee did not take the opportunity to address the shortcomings in the design approval process, so uncertainty

remains as to what documents are required to be submitted, how long the superintendent has for review, and how a design impasse between contractor and superintendent is to be resolved.

AS4902, like AS4300, does not include any provisions that deal with commissioning. This will continue to restrict the use of the document where commissioning is integral to completion.

The scope of the power to vary remains extremely broad. This wide power to vary leaves open the difficulties encountered under AS4300 with respect to the extent to which it is appropriate for superintendents to direct variations which affect the design which has been prepared by the contractor. Although it is appropriate that a superintendent be entitled to direct variations to the principal's project requirements, it is potentially onerous for contractors if a superintendent is also entitled to direct variations to the work designed by the contractor and impacts on the warranties given by the contractor.

The pricing clauses have been altered. Unlike AS4300, if there is a deduction in price, the amount of the deduction only includes a reasonable amount for profit but not for overheads. This acknowledges that, save for extreme cases, the contractor's overheads will remain static regardless of any work taken away. However, contractors will no doubt argue that the profit element of deleted work should also be preserved.

Similarly, there is no daywork clause, emphasising the broad nature of the power given to the superintendent when pricing variations. Of course, the superintendent could use a de facto dayworks valuation when determining a reasonable rate or price.

PROGRESS CLAIMS & CERTIFICATES

Claims are now limited to work done (whereas the old contract required submission of all claims in relation to work under the contract, leading to the argument about whether claims such as those for breach of contract/tort should also be lodged in progress claims), although the contractor is given the option of including claims for amounts otherwise due to the contractor.

Claims otherwise than for work done may be brought under Clause 41 of AS4902 (the general claims clause), so that there does not need to be a claim under the progress claims. Either way, the superintendent is still obliged to assess those claims.

Superintendents are likely to be concerned that they are still required to deal with claims other than strict claims for payment for work done, including claims for damages, misrepresentation, and *quantum meruit*.

Other points to note are:

- The superintendent now issues two certificates — a Progress Certificate together with a Principal's Certificate setting out amounts due from the contractor to the principal under the contract. The new clause favours the principal as it gives the principal an option to enforce the certificate by way of setoff when making payment to the contractor.
- The requirement for payment is reduced to 7 days compared with 14 days in AS4300. Although this is, on its face, a change in favour of the contractor, to the extent that a certificate produces a net balance in favour of the principal, the contractor has seven days to pay the net balance before the principal can have recourse to the security, and this is a change in the principal's favour.

- If the superintendent does not issue the Progress Certificate within 14 days of the progress claim, the progress claim is deemed to be the Progress Certificate. This change has a negative impact on the principal as the principal must ensure the superintendent issues the certificate strictly within the 14 day time limit.

- The final payment claim is defined as a progress claim together with all claims whatsoever in connection with the subject matter of the contract. This is relevant to the new procedure for claims in Clause 41.

- The principal may elect that moneys due from the contractor on a completely unrelated project are to be treated as due pursuant to the contract, thus obliging the superintendent to take them into account in the certification process.

- Surprisingly, there is no GST clause.

CLAIMS PROCEDURES

AS4902 maintains the obligation upon the contractor to notify both the other party and the superintendent of potential claims using either a Prescribed Notice (which sets out the basis of liability and quantum) or a Notice of Dispute.

However, the notice must only be given as soon as practicable 'after a party becomes aware of any claim'. This should be compared with AS4300 Clause 46.1 which states the notice must be given 'as soon as practicable after a party **could reasonably have been aware of any claim**'. The test is subjective not objective.

Unlike Clause 46.1 in AS4300, Clause 41.1 in AS4902 applies to claims which would have been included in the final payment claim. Therefore, claims which

arise during the defects liability period must be communicated as soon as practicable after a party becomes aware of the claim. Under AS4300 there is an argument that claims during the defects liability period need only be made by way of the final payment claim.

Like Clause 46.2 of AS4300, Clause 41.2 of AS4902 provides that the time requirements in Clause 41.1 (and elsewhere in the contract) are not time bars. Rather, failure to communicate will only entitle the other party to damages to the extent that the other party can prove loss. There is a real possibility that the wording of the clause will apply to all notifications under the contract, so that there will not be any time bars.

DISPUTE RESOLUTION

The broad terminology in Clause 42.1 (which mirrors the terminology in AS4300) will continue to ensure that a broad range of disputes are referred to arbitration under that clause.

The most significant change in this clause is that the clause no longer contains a second alternative, under which the superintendent provides a preliminary assessment of the dispute. This reflects industry concern that decisions by the superintendent were in fact of little effect in resolving the dispute once a Notice of Dispute had been given and tended to delay the resolution of disputes.

It should also be noted that, as with AS4000, the default nominating body is the President of the Australasian Dispute Centre, not the President of the Institute of Arbitrators as was previously the case in AS4300.

SECURITY

Throughout the new contract, the superintendent is obliged to certify amounts which were previously stated as being 'due and payable'. This will ultimately lead to easier access to security as it will make clear the dates on which the amounts became due and payable because those dates will be included in the relevant Progress Certificate or Principal's Certificate.

SEPARABLE PORTIONS

It is now clear superintendents may create separable portions at any time and that security, liquidated damages and delay damages must then be allocated pro rata (see clause 4).

LATENT CONDITIONS

The latent conditions test for a latent condition in AS4902 (Clause 25) is whether the condition should reasonably have been anticipated by a competent contractor, not (as in Clause 12 of AS4300) the contractor. In other words, the test is now strictly objective. The procedure for claiming latent conditions is now more streamlined, although the contractor's right to additional payment is still limited to a period from 28 days prior to notice being given.

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