

BUILDING CONTRACTS

NIA – INQS

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Workshop summary



- General reflections on building contracts
- Contract documents
- Time line (WF): practical completion - defects - completion
- Time line (GCC): Completion
- sub-contractors (WF): nominated and selected
- Indemnities, liabilities, works risk and reinstatement (WF)
- Insurances (WF)
- Penalties for non-completion (WF)
- Liquidated damages and Bonus (GCC)
- Delay and extension of time (WF)
- Certificates and payments (WF)

General reflections on building contracts

- Contract : reason, purpose
- Document itself: copyright (white form, JBCC, FIDIC) - no copyright (GCC)
- Articles of Agreement : who, what, parties, domicilia
 - contracting parties : Employer, Contractor
 - Consultants : Principal Agent ,Project Manager, Architect, Quantity Surveyor
 - other contractual : site representative (clause 7), witness
- Contract documents : priority
- Timeline of building contract
- Definitions – refer to contract

Contract documents (WF)



- To be found in the schedule
 - Agreement and Schedule of Conditions of Building Contract
 - Bill of Quantities
 - Drawings
 - Specifications
 - Other

Contract documents (GCC)



- to found in cl 2.3
 - Agreement
 - Letter of Acceptance
 - Contractor's Bid
 - Particular Conditions of Contract
 - General Conditions of Contract
 - Specifications
 - Drawings
 - Bill of Quantities
 - Any other document listed in SCC

Timeline (WF): practical completion

- The stage of completion which, in opinion of PA, enables the Employer to use the Works for the intended purpose without undue inconvenience (27.17)
- No practical completion without certificate of practical completion
- This is the date from which the contractor is liable and required to make good PATENT defects = start of patent defects liability period
- The risk of caring for the building and the liability for insuring the site stops on the date of practical completion – this risk and liability shifts from the Contractor back to the owner of the building (Employer)
- The liability to pay the penalties ceases if project is in time. If late, the total amount of days is defined by practical completion date
- The performance guarantee no longer required (max 60 days in general) if scope of Works is completed.
- A preliminary completion list is the list of work required to be completed in order for the Contractor to be entitled to receive a certificate of practical completion (13.1.4)

Time line (WF): practical completion cont

Upon practical completion the following MUST happen:

- A certificate of practical completion must be issued by PA
- A completion list must be issued by PA
- The retention is reduced in the next payment certificate

Upon practical completion the following should happen asap:

- The final account to be prepared
- Works on completion list to be executed (time span)
- The performance guarantee to be released (if scope of Works complete)

Time line (WF): practical completion – q 1

(2015) A new warehouse is practically complete on 15 April 2015, but the PA has to leave for another site visit immediately after the inspection for practical completion and therefore does not issue the certificate itself. The Employer is very happy that the warehouse is completed and moves 50 computers into the warehouse that same afternoon. Unfortunately there is a fire in the building due to an electrical short on the evening of 15 April 2015 and the warehouse burns down to the ground.

Question: Who is responsible for damage to computers and building?
essence of question?

Time line (WF): practical completion – q 2

(2016) You are the Principal Agent on a clinic and the Contractor informed you that the Works are ready for achieving practical completion.

Scenario 1 : On inspection of the project, you notice that the grout of the wall tiles in the bathrooms, around the basins in consulting rooms and above work areas (laboratory and kitchen) is not acceptable and needs to be re-done.

Scenario 2 : The leveling of the site (storm water) is not done correctly as per documentation (drawings and instructions) of the civil/structural engineer as water is damming up in some areas. The c/s engineer instructs the Contractor verbally to rectify surrounding levels without touching any of paved areas.

Scenario 3 : The borehole drilled on site is duly executed and yields sufficient water for the project. The borehole water is tested and is drinkable, but falls within the category C - Health risk

Question : Can practical completion be taken or not? Why?

Time line (WF): patent defects

- PATENT defects are those defects that are obvious and can easily be seen
- The patent defects liability period COMMENCES from the date of practical completion – not the date of the issue of the certificate of practical completion and ends at the date of completion.
- The patent defects liability period must be stated in the Schedule.

government projects (new)	12 months
government project (maintenance)	3 months
private projects	3 months
- Any defects in workmanship and materials and damage caused to the Works that appear within the patent defects liability period due to materials or workmanship not being in accordance with the contract must be made good by the Contractor at his own cost. Therefore, defects or damage due to materials not being fit for purpose or any damage resulting from that due to poor design is not covered under this clause
- Within 14 days after the end of the patent defects liability period, a list of all defects must be issued = defects list. Contractor to make good

Time line (WF): completion - latent defects

- Once the Contractor has rectified all the defects as specified in the defects list, the Principal Agent (after inspection) must issue a certificate of completion to both the Employer and Contractor.
- The latent defects liability period commences from the date stated in the certificate of completion.
- Latent defects are those defects that are NOT obvious and only become apparent after the end of the patent defects liability period AND are as a result of the contractor not having built according to the design and specifications.
- The latent defects liability period is limited to 5 years.
- Contractor must also fix / make good any damage caused to the Works resulting from latent defects that occur during the 5 years period.
- Often difficult to determine if defect is latent or due to some other cause.

Time line (GCC): Completion



- (GCC 53) The Contractor shall request the Project Manager to issue a Certificate of Completion of the Works, and the Project Manager shall do so upon deciding that the whole of the Works is completed.
- No Completion without certificate of Completion

Subcontractors (WF): nominated & selected

- Nominated & selected sub-contractors are normally included in bill of quantities or tender documents by means of provisional sums, whereby an amount of money is allowed to cover the cost of specialist installation.
- The sub-contracts are signed between the (main) Contractor and the sub-contractor – there is no direct contract with the Employer.
- The Contractor can refuse to engage a sub-contractor only if he/she has reasonable grounds or objections or if the sub-contractor refuses to enter into a sub-contract that provides for certain conditions
- Contractor takes full responsibility for performance of sub-contractor

Subcontractors (WF): nominated & selected - cont.

- Nominated sub-contractors is where the Employer SPECIFIES who he/she wishes to do the sub-contract works. The (main) Contractor has no input as to who should be appointed for the sub-contract Works.
- Selected sub-contractors is where both the Employer and the Contractor AGREE beforehand as to who (by form of list) should be invited to tender for the sub-contract Works.
- When a nominated sub-contractor delays the progress of the Works or is in default, the Contractor is entitled to an extension of time, but the Contractor must take all practical steps to avoid or reduce the delay (and prove it).
- If the Contractor does not pay the nominated sub-contractor, then the nominated sub-contractor can apply for a direct payment from the Employer.
- The above is not applicable to a selected sub-contractor

Subcontractors (GCC)

- No nominated or selected subcontractors
- Specialist to submit separate bid
- Found in cl 8 : Other Contractors
- Liability, coordination etc

Indemnities, liabilities (WF)

Indemnities and liabilities (Public Liability)

- Contractor is required to INDEMNIFY the Employer against liability, losses or proceedings arising in common law or by statute for:

- A) personal injuries or death

- B) Loss of/or damage to moveable or immovable property

Arising out of the execution of the Works, except where the loss or damage is caused by the Employer or the omission of the Employer or by persons for whom the Employer is responsible

- HOWEVER, where the risk is insurable and the contract is for alterations and/or additions to existing structures OR parts of the building or structures have been handed over for the use before completion of the contract as a whole, the Employer is required to INDEMNIFY the contractor.
- This indemnity by the Employer includes the contents of the structures.

Lateral support (WF)



- Lateral support is required where there is risk of removal or interference with any supporting structures or land that can effect the stability and structural integrity of adjacent properties or even any structures to be altered.
- Employer must appoint an engineer to design any temporary support structures.

Work risk (WF)

- The Contractor carries the risk of the Works including the materials and goods stored on site except where:
 - A) the contract is for alterations and/or additions to existing structures, or
 - B) parts of the Works have been handed over for occupation before completion of the Works as a whole
- In which case the Employer carries those risk that are insurable
- In addition any existing structures are at the risk of the Employer
- The Contractor's maximum liability for the works risk is limited to the contract sum plus 20%
- The Contractor is not liable for:
 - A) any costs that exceed the above amount
 - B) excepted perils as defined
 - C) any losses occurring for those portions of structures handed over to the Employer for occupation.

Reinstatement (WF)



- Contractor is only liable for the cost of re-instatement of any loss or damage for which he/she is at risk.
- Where these risks are insured, insurance monies placed in trust for the Contractor and payments from the trust account certified by Principal Agent's certificates.
- Where the Employer is at risk, the cost or reinstatement is for his account
- Contract may be cancelled in the event of substantial destruction.

Insurances (WF)

- Insurance are taken out to cover the various liabilities and risks:
 - A) Public liability insurance
 - B) Lateral support insurance (only if required)
 - C) Works risk insurance
- Important that the insurances remain in full force and effect until practical completion is achieved
- Many insurance policies are only for limited period (e.g. 12 months). Therefore make sure that the insurance are still effective especially if an extension of time is granted or the contractor is late in completion.
- Insurances are required to be taken out by either the Contractor or Employer depending on who is the responsible party.
- Proof must be submitted to the Principal Agent of the insurances
- If the insurances are not taken out, the other party can take out insurance on behalf of the responsible party, who will then be liable for the cost of the insurance.

Insurances (WF): question

(2015) A new warehouse is practically complete by 15 April 2015. There is no practical completion certificate. The Employer moves in his computers that same afternoon. Unfortunately there is a fire in the building due to an electrical short on the evening of 15 April 2015 and the warehouse burns down.

Question: Who is responsible for damage to computers and building?

The original date of practical completion (in contract) was 20 March 2015, but an extension of time was granted and the new date was set at 15 April 2017. The Contractor did not extend the insurance to the new date

Question: Is the Contractor covered? Who is responsible? Role of PA?

Penalties for non-completion (WF)

- Penalties can only be imposed if the Contractor fails to bring the Works to practical completion by the date stated in the schedule or any extended period (extension of time) AND the Principal Agent certifies in writing that the Works ought reasonable to have been completed by such date.
- Penalties can only be deducted by the EMPLOYER, not the Principal Agent
- The Employer is not obliged to deduct penalties, but may do so.
- Government has issued instruction on penalties for all new capital projects (directive MWT 01/2015-2016)
 - Penalties per calendar day
 - less N\$ 20 million N\$ 500.00
 - Up to N\$ 100 million 1/75 % of contract sum
 - Maximun penalties
 - Up to N\$ 60 million 2.5% of contract sum

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Liquidated damages and Bonus (GCC)



- Liquidated damaged for each day that Completion Date is later than the Intended Completion Date.
- The total amount of liquidated damages shall not exceed amount defined in SCC.
- Bonus to be paid per day that Completion is earlier than the Intended Completion Date

Delay and extension of time (WF)

- The onus is on the Contractor to prove that he was delayed in bringing the Works to practical completion.
- In certain circumstances, the Contractor is entitled to additional payment and in some cases not. The additional payment is normally for time-related preliminary costs (P & G's). Escallation will also be affected.
- Contractor must apply within 28 days when he became aware or ought to have become aware of the delay, failing which he forfeits his right to an extension of time.
- In assessing a claim for extension of time, it is useful to examine the Contractor's programme to asses whether the cause of the delay has effected the critical path. If yes, then an extension of time should probably be granted.
- Principal Agent must notify his decision within 28 days of the substantiated and quantified submission by the Contractor, failing which the PA is deemed to have refused to grant an extension of time.

Delay and extension of time (WF) – cont.

- Extension of time but no additional payment
 - A) Acts of God
 - B) Inclement weather – not only rain, but includes dusty, windy conditions.
 - C) Opening up of work for inspection provided that on inspection, the work is in compliance with the contract.
 - D) Civil commotion, strikes, lockouts, etc. effecting the trades employed on the Works, unless it is confined to the works.
 - E) Delay/default by nominated sub-contractor or the supply of PC items provided Contractor has taken reasonable steps to avoid and/or reduce the delay.

Delay and extension of time (WF) – cont..

- Extension of time with additional payment
 - A) Instructions given by the Principal Agent in pursuance
 - variations involving alteration or modification of the design, quality or quantity of the Works
 - any discrepancies in the drawings or between BoQ and/or drawings and/or specifications (also see clause 3)
 - B) Directions given by the Principal Agent consequential on disputes with neighbouring owners.
 - C) Late instruction from the Principal Agent provided the Contractor has applied in writing for such instructions in good time.
 - D) Works of persons employed by the Employer on work not included in the contract.
 - D) Delays beyond the control of the Contractor that he/she could not have foreseen at the signing of the contract and which the Principal Agent may consider sufficient.

Delay and extension of time (WF) – cont...

- Where delays are of an ongoing nature the time limit for the decision of the Principal Agent is extended for 28 days after the Contractor notifies that the Works are no longer delayed and quantifies and submits substantiation for the extension of time required.
- Principal Agent must take into account all other factors and make allowances where necessary for any and all building industry holidays whether statutory or customary.

WARNING

- You are within your rights as Principal Agent not to respond to a claim for an extension of time if you are of the opinion after careful consideration that the Contractor is not entitled to an extension of time.

However

- If you as PA do not respond and it can be proven that your failure to do so is due to negligence, you could well have claim against you by the contractor in court of law.

Certificates and payments (WF)

- Contractor entitled to receive interim monthly payment certificates, a penultimate certificate and a final certificate.
- Certificates must state the amount due.
- Payment certificates must be reasonable estimate of the total value of work executed and assessed up to a date not more than 7 days prior to the date of the certificate LESS the amount to be retained (retention monies) and LESS any amounts previously certified.
- Payment certificate may include the value of material and goods stored on the site provided that they are reasonably, properly and not prematurely brought upon the site and only if they are adequately stored and/or protected against weather and other casualties.

Certificates and payments (WF) - cont.

- With each payment certificate the PA must issue to the Contractor a detailed statement as to all amounts included for nominated and/or selected sub-contractors.
- In addition each nominated and/or selected sub-contractor must be advised by the PA of the amount included (standard forms).
- Contractor is entitled to receive payment from Employer within the period stated in the Schedule.
- If Contractor does not receive payment within stated period, the Employer is liable for the payment of interest at 2% per annum greater than the lending rate of the Contractor's bank calculated from the due date for payment.

Certificates and payments (WF) - cont..

- The value of materials and goods stored OFF site (aka on extended site) may at the discretion of the PA also be include provided:
 - A) Contractor is the bona fide owner
 - B) The materials are safely and properly stored and insured
 - C) The materials are intended for inclusion in the Works
 - D) Nothing remains to be done to the materials to complete them up to the point of inclusion in the Works
 - E) Must be in accordance with the contract
 - F) Must be stored and clearly marked and identified as being for the Works at the premises where stored
 - G) Proof of actual or constructive delivery to Contractor
 - H) Proof of credit for materials or proof of payment

Certificates and payments (GCC)

- The Contractor shall submit to the Project Manager monthly statements of the estimated value of the work executed less the cumulative amount certified previously.
- The Project Manager shall check the Contractor's monthly statement and certify the amount to be paid to the Contractor.
- The value of work executed shall be determined by the Project Manager.
- It shall include the valuation of Variations and Compensation Events.
- Payment term is 30 days.