

AS2124-1992 - A Step Sideways?

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An analysis of the new AS2124-1992 (available March 1993) discloses that it fails to adequately deal with many issues of vital interest to Owners (referred to in the contract as "Principal") and Contractors. Owners (and their Consultants) and Contractors who use AS2124 without amendment and without appreciation of these issues may be in for a nasty shock should the execution of the work throw up any problems in these areas of difficulty. Some of the deficiencies are carried over from AS2124-1986. Others are new.

In the preface to the new edition Standards Australia, the recommendations of "No Dispute" have been taken into account in its preparation. In a number of important respects the new edition fails to achieve advances in areas, the subject of consideration by No Dispute.

What follows is the brief identification of the more major issues. This article does not pretend to deal exhaustively with all matters of concern with the document.

Cost Management

A key issue in No Dispute and one of concern to all Owners is the capacity to manage the construction process to keep the project within the end budget by taking action during construction to avoid, minimise or overcome the consequences of unexpected overruns in the cost of the Works.

AS2124 does not provide an adequate framework within which this important objective can be achieved. Deficiencies include :

- **Bills of Quantities**

No Dispute failed to come to grips with this contentious topic. By way of compromise between competing interest groups on the Joint Working Party, Paper 4 suggested:-

- (a) use of Bills of Quantities should be minimised and alternatives considered, such as Tenderer/Contractor formulation of Bills and schedule of priced activities;
- (b) where Bills are used, the risk of pricing the Works should be clearly located in the Tenderer/Contractor and the Bills should not provide a vehicle for shifting that risk back to the Owner;

- (c) Conditions of Tender and Contract should be amended to prevent this transference of a risk which is properly a Contractor risk.

AS2124 continues the use of Owner prepared Bills of Quantities without providing any alternatives to use of Bills and without amendment to the General Conditions to place the risk of pricing the Works on the Contractor. A number of "alternatives" are provided but whichever is chosen the Owner bears the risk of all errors in the Bill exceeding \$400. In other words, under AS2124, the Owner not the Contractor, has the risk of pricing the Works.

- **Delay Costs**

Under AS2124 the costs of delay are unpredictable for Owner and Contractor. The 'extra cost' formula for compensation provided by Clause 36 is left to be calculated on proof provided by the Contractor which places an unnecessary burden on the Contractor and deprives the Owner of the capacity to predict and then manage the end cost of the project. The uncertainty is increased by preservation of the Contractor's entitlement to recover damages if delay is caused by a breach of contract. However where the Contractor elects to claim damages instead of extra costs (and it is uncertain whether this election is open to a Contractor) the Owner is at least given warning of that damages claim whereas no warning need be given of a claim for extra costs until 28 days after the expiration of the Defects Liability Period.

- **Variations**

There is no requirement for the valuation of variations prior to commencing work on the variation nor is there a requirement to have the pricing of the variations settled before the Final Payment Claim (the general notification requirements contained in Clause 46.1 spe-

cifically exclude claims for payment of variations).

- **Notification Provisions**

In an attempt to deal with the problem of claims being made late, AS2124 has introduced a barring provision in Clause 46 which requires notification of claims and bars claims which are not notified in accordance with the clause. Many claims which affect the out-turn cost of projects are not included within this notification provision. There is no requirement for the notification of extra contractual claims (such as claims in tort, under the Trade Practices Act or for restitution on a quantum meruit which are becoming increasingly common in the Industry). Further, the clause does not apply to claims for extra costs arising from delay, for additional payment for variations or indeed to any claim for costs which may be made under the Contract which is not the product of a Superintendent's direction or approval (see e.g. claims for latent conditions under Clause 12 which are available without any action by the Superintendent).

There is room for considerable disputation as to whether claims have in fact been notified in compliance with the clause because time for notification commences to run only from the first day upon which the Contractor 'could reasonably have been aware of the claim'.

The requirement for a Final Payment Claim under Clause 42.7 of AS2124 is intended to 'wrap up' claims by the Contractor at the expiration of the Defects Liability Period. However, Clause 42.7 does not include extra contractual claims which are left 'at large'.

- **Uncertain Risk Allocation**

A feature of AS2124 is the uncertainty of risk allocation in a number of important areas. This arises as a consequence of the compromise character of the drafting which required a large and diverse group of sectional interests to reach consensus on the provisions of the contract. Examples of uncertainty are the lack of risk allocation for default of Selected Subcontractors and the inadequate risk allocation for default of Nominated Subcontractors.

Uncertainty of risk allocation inevitably leads to unpredictability of end cost, increases disputation and benefits the legal profession at the expense of both Owners and Contractors.

- **Prior Work**

AS2124 makes no provision for a Contractor

to examine and accept (or reject) prior work upon which the contract work is dependent. Disputes can subsequently arise as to the suitability of prior work with consequent claims for additional payment by Contractors emerging unexpectedly at a late stage of construction.

Security and Retention

Under AS2124, an Owner does not have access to security or retention until after the determination of any dispute as to its entitlement to call upon the security or use the retention. This has the effect of depriving an Owner of access to cash flow to rectify work it considers to have been defectively carried out by the Contractor (but which the Contractor refuses to do on the basis that the work has been executed in accordance with the Contract) or complete the Works from which a Contractor has been removed for alleged default (where the Contractor contests the validity of its removal). There is no recognition in AS2124 of the use of retention (or replacement security) to cover the inherently approximate character of progress payments.

It is likely these provisions will be unacceptable to a large number of Owners. Whilst the intention might be to prevent abuse, these provisions destroy ready access to security and also, in the case of bank guarantees and the like, their commercial equivalence to cash.

Nominated and Selected Subcontractors

There is no recognition in AS2124 of the suggestions in No Dispute regarding ways of avoiding the contractual and project management difficulties presented by the Nominated Sub-Contract system. The system of nomination is continued carrying with it the responsibility of the Owner for Nominated Subcontractor default. Difficulties with the actual provisions are discussed below.

Collateral Contracts

At a time when the law is uncertain as to an Owner's rights to take action directly against sub-contractors (for instance for defective work where the Head Contractor becomes insolvent) there is no attempt in AS2124 to provide for collateral contracts creating a direct link between the Owner and the Subcontractor to enable an Owner to exercise rights against those responsible for project deficiencies.

Role of Superintendent

There are real difficulties with the way in which AS2124 deals with the role of the Superintendent. The first is the requirement for the Superintendent to act honestly and fairly in the exercise of all its functions under the Contract. Because there is no attempt to differentiate between agency functions and certifying functions, this produces the unworkable consequence that a Superintendent is required to act in the interests of a Contractor when exercising agency functions. This is a novel concept, likely to have far reaching legal consequences.

The second difficulty is that the Owner is required to

warrant that the Superintendent will arrive at a reasonable measure of work or extension of time, and the like. This has the effect of making the Owner liable for a decision of a Superintendent which, though made honestly and fairly, is not regarded as reasonable even though the Contractor has the capacity to have that decision opened up and reviewed by the dispute resolution provisions of the Contract. This produces a close legal identification between the Superintendent and the Owner notwithstanding the intention for the Superintendent to be independent and is likely to further erode the position of the independent Superintendent.

Key Personnel

There is no provision in AS2124 to require a Contractor to use key personnel whom it has represented to the Owner it intends to use in the execution of the Work and the identity of whom may have been crucial in the decision by an Owner to award the work to the particular Contractor.

Acceleration

AS2124 does not contain any power for the progress of the Works to be accelerated to overcome the effect of delays for which the Contractor is entitled to extensions of time. This means that an Owner who needs to have the Works accelerated is at the mercy of the Contractor when it seeks to negotiate an arrangement for acceleration.

Reduction in Security

Clause 5.7 of AS2124 gives a Contractor an automatic right to reduction of security to 50% upon Practical Completion. There is a discretion for the Superintendent to further reduce the Owner's security. There is no equivalent requirement or discretion in the Superintendent to reduce security given by the Owner to the Contractor even though the bulk of the contract sum will have been paid by Practical Completion.

Cash Retention and Security

Clause 5.9 of AS2124 provides for two alternative ways in which a Contractor's cash security or retention is to be held. There is no real distinction between the alternatives. Under each alternative, interest belongs to the party lodging the cash security or from whom cash is retained. Also under both the money is required to be kept separate from other moneys belonging to the Owner, ignoring one of the important reasons for retention, namely the fact that progress payments are 'on account' with retention designed to provide a 'buffer' against the approximate character of progress certificates which need to be adjusted for undiscovered defective work and other assumptions favourable to a Contractor which can result in substantial over-certification.

Incidental Work

It is a well established but not well known principle of construction contract law that a Contractor is obliged to provide things indispensably necessary to complete the

whole of the Works for the lump sum or Schedule of Rates prices tendered and accepted, even though those things are not shown in the Drawings or Specifications. There is no mention of this principle in AS2124 although it is enshrined in other standard form contracts. This omission can lead to uncertainty in risk allocation and a requirement to resort to lawyers in order to ascertain the true risk allocation position.

Owner induced Contractor errors

Clause 8.4 of AS2124 fails to deal with the situation where a Contractor's shop drawings approved by the Superintendent (for which the Contractor remains responsible notwithstanding that approval) is in error due to errors in documentation supplied by or on behalf of the Owner.

Selected and Nominated Subcontractors and Provisional Sums

These provisions in AS2124 are replete with uncertainties which include:

- A Contractor has no right of reasonable objection to a Selected Subcontractor nominated by the Owner (in the event the Owner provides a list of one Selected Subcontractor) nor is the Contractor given any remedies or indemnities to cover what may be good commercial grounds for objection.
- Selected Sub-Contract Work must be completely specified prior to calling of tenders and thus is not a system available to facilitate fast tracking.
- AS2124 does not deal with what happens when a Selected Subcontractor repudiates or abandons the work although it does deal with this question to some extent in relation to Nominated Subcontractors.
- There is no protection for payment of Selected Subcontractors although an option exists in this regard for Nominated Subcontractors.
- There is no obligation for Nominated Subcontractors to be contracted on terms and conditions compatible with the Head Contract.
- The extent of relief given to a Contractor where directed to enter into a Sub-Contract with a Nominated Subcontractor notwithstanding reasonable objection is fraught with legal uncertainty.
- There are real legal difficulties associated with the concept of Nominated Sub-Contracts by assignment which in effect defeat the traditional benefit for the Owner of a sub-contract arrangement.
- If the right of direct payment is chosen (by inclusion of the optional clause), it is arguable that the Contractor is not entitled to any compensation for profit or attendance in relation to Nominated Sub-Contract work.
- It would appear that a Contractor is entitled to

an extension of time where a Nominated Subcontractor drops out because of repudiation or abandonment (see Clause 35.5) but not where a Nominated Subcontractor drops out because of insolvency (except where the Superintendent unreasonably delays making renomination).

- There is a gap in relation to whether the Owner or the Contractor bears the risk for defective work executed by a Nominated or Selected Subcontractor who has dropped out.
- AS2124 does not provide for any time limit within which Nominated Subcontractors must be paid after the payment to the Contractor of provisional sums certified for Nominated Sub-Contract work. Further, if the option contained in sub-clause 10.5 for direct payment is not adopted, there is no power for the Owner to pay Nominated Subcontractors direct in relation to any delays in payment.
- Although there has been an attempt in AS2124 to exclude from the adjustment of provisional sums damages payable by a Contractor to a Subcontractor, there is no deduction to be made where the amount payable under the Nominated Sub-Contract is increased by extra costs payable for delays caused by the Contractor's own default.

Latent Conditions

Clause 12 of AS2124 gives a Contractor a right to additional payment where the particular Contractor could not reasonably have anticipated physical conditions encountered on the Site: a subjective test likely to favour inexperienced Contractors.

Variations Due to Defective Work

Under AS2124 where a variation is directed by the Superintendent to overcome the problems caused by a Contractor's defective work, the Contractor is entitled to an extension of time for the time taken to execute the varied work, unless the variation is requested by the Contractor under 40.4.

Costs for Delay to Early Completion

As a consequence of the wording of the extension of time clause in AS2124, Clause 35.5, and the subsequent entitlement to extra costs for delay conferred by Clause 36, a Contractor is entitled to be paid if it is delayed in reaching a date for completion earlier than the Date for Completion set out in the Contract. AS2124 imposes no constraint upon a Contractor's capacity to plan to finish early and thus claim the costs of being delayed from doing so.

Owner Notification of Delays

Clause 35.5 of AS2124 requires the Owner to notify the Contractor of any likely delaying event. Failure to do so will be a breach of contract. This requirement ignores the reality that the administration of the Contract is carried

out by the Superintendent (as agent of the Owner) and the Owner is unlikely to be aware of relevant delays. There is no obligation on the Superintendent to notify either party of events which it considers are likely to cause delay.

Neutral Delays

Clause 35.5 of AS2124 gives a Contractor an entitlement to extension of time for neutral events including those 'which are beyond the reasonable control of the Contractor'. This phrase invites dispute. Does it mean events which are beyond the physical, or contractual control of the Contractor? It may well entitle the Contractor to extension of time for Subcontractors' defaults over which the Contractor has no physical control.

Concurrent Delays

AS2124 adopts an arbitrary solution to the problem of the extension of time entitlement due to a Contractor in the event of concurrent causes of delay. Sub-clause 35.5 ignores which of the concurrent delays may have occurred first in time and thus have been the operative cause of the delay. It also ignores the impact of each cause on the progress of the Works.

Bonus

AS2124 contains an optional bonus clause. The criterion for entitlement to be paid the bonus is completion ahead of the Date for Practical Completion (which is extended by the extension of time clause). The bonus provision therefore does not provide any commercial motivation for a Contractor to spend some of the bonus achieving early completion which is the reason why many Owners provide for bonuses in the Contract. AS2124 has chosen not to adopt the alternative approach of having the bonus payable only in the event that a fixed date is met.

Progress Payments

A number of problems emerge in relation to the progress payment clause in AS2124 which include :

- The Superintendent appears to be required to certify damages claims which requires a level of legal sophistication beyond that normally expected of Superintendents.
- There is no clear alternative progress payment provision for payment upon completion of stages.
- The alternatives provided in Clause 42.4 for payment for unfixed plant and materials are confusing and inconsistent.

Interest on Late Payments

Clause 42.9 of AS2124 imposes a very high rate of interest, 18%, compounding six monthly, in default of the parties inserting a percentage for late payment in the Annexure to the Contract.

Dispute Resolution

The dispute resolution clause in AS2124 is not a binding arbitration agreement. It does not contain any

dispute resolution mechanism to permit binding interim decisions nor does its structure really encourage the parties to attempt alternative dispute resolution prior to resorting to either arbitration or litigation.

Conclusion

It is truly disappointing that AS2124-1992 fails to meet the needs of the Industry at this time of change and reform. This is no doubt as a consequence of the haste with which the consensus process of drafting has proceeded. The publication of the new edition is likely to lead to a plethora of 'one-off' contracts as public and private sector Owners (and Contractors) devise a variety of special conditions designed to meet the deficiencies and problems in the document : hardly the bold new step towards an Industry wide standard form promoted by Standards Australia. It is little wonder that the document is not supported by either BOMA or the AFCC. ☐