

### THE ILLUSION OF A LATENT CONDITIONS CLAUSE

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Contractors receiving tender documents often have a simple risk evaluation checklist that is used to assess the risk profile of the proposed contract. The list is used to identify which conditions of contract have been included, modified or changed in the document. One of the items listed is usually, 'Is there a latent conditions clause?' Having ticked the box, is it reasonable for a contractor to assume that, if a latent condition were encountered, there was a mechanism in the contract for recovery of the extra costs incurred?

A client contractor has recently found, after encountering a latent condition on site, that the latent conditions clause provided very little protection from the consequent effects of delay to the progress of the works.

The standard AS4902-2000, general condition of contract for design and construct, had been adopted with some amendments and special conditions. However, clause 25, the latent conditions clause, was not amended or changed in any way.

The significant changes in the contract were to two definitions used in the interpretation and construction of the contract. The first of those changes was to the term, 'qualifying cause of delay'.

The standard form<sup>1</sup> allows for all neutral causes of delay to qualify and specifically, any act, default or omission of the superintendent, the principal, its consultants, agents or other contractors. It excludes a breach or omission by the contractor and industrial conditions or inclement weather occurring after the date for practical completion. Other express exclusions are to be stated in the contract information (item 28).<sup>2</sup>

The substituted definition reversed this listed exclusion position by including positively only the three causes of delay mentioned in the standard clause. It also limited qualifying causes to delays directly impacting on the path of the critical tasks shown on the contract program ['Critical Path'] for the works under the contract ['WUC']. The definition for 'qualifying cause of delay' read:

- Any act, default, omission or breach of contract of the superintendent, the principal or consultants retained by either the superintendent or the principal, their agents or other contractors (any of them not being directly or indirectly employed by the contractor) that directly impact the Critical Path for WUC;
- Statewide or nationwide strikes that directly impact the Critical Path for WUC;
- Inclement weather that directly impacts the Critical Path as determined by the superintendent solely by the use of relevant statistical records and data as kept and provided by the Commonwealth Bureau of Meteorology.

The definition then included the following exclusions:

The following shall not constitute a qualifying cause of delay:

- Any act, omission, default or breach of contract by the contractor;
- Industrial conditions or disputation or any inclement weather occurring AFTER the Date for Practical Completion for WUC or any extension of time certified by the superintendent; or
- Site specific strikes.

What the substituted clause does not state, of course, is how any other neutral causes of delay are to be treated. By omission of other possible causes, these

are excluded from the definition of 'qualifying cause of delay'. Hence, specifically, a latent condition is not a qualifying cause of delay unless caused by an act, omission or breach of contract by the superintendent or principal or those for whom they were responsible.

The other definition was 'compensable cause'. In the standard form, the meaning was stated as:

(a) any act, default or omission of the superintendent, the principal or its consultants, agents or other contractors (not being employed by the contractor); or

(b) those listed in item 31'.

There was nothing listed in item 31 of the contract information but a special condition was included. It read as follows:

By way of clarification, 'compensable cause' referred to in AS4902-2000 shall not include inclement weather, strike action or any other event reasonably beyond the control of the principal or superintendent.

Again, specifically, the latent condition is not a compensable cause of delay unless caused by an act, omission or breach of contract by the superintendent or principal or those for whom they were responsible.

The conditions encountered on the site in this case differed from the anticipated conditions described and outlined in a specialist consultant's report provided by the principal.

There was no negligence by the specialist consultant or any omission from the information provided for which the principal might be held responsible. The latent condition was caused by an event reasonably beyond the control of the principal.

Because the latent condition was not a qualifying cause of

delay, there was no entitlement to an extension of time ['EOT']. Furthermore, because the latent condition was not a compensable delay, there was no entitlement to delay damages pursuant to clause 34.9 of the contract.

However, there was no impediment to the recovery of the additional cost of the latent condition as a variation. Clause 25.3 provides that the latent condition shall be a deemed variation priced (subject to meeting the notice provisions) to include the contractor's costs of compliance with subclause 25.2. Clause 36.4 set out the order of precedence for pricing variations. The price for the variation was to be determined:

(a) by agreement;

(b) using applicable rates in the contract;

(c) using rates in a schedule of rates or schedule of prices to the extent that it was reasonable to use them; or

(d) reasonable rates or prices including a reasonable amount for overhead and profit.

There was no mention of any pricing element for delay or disruption costs. It is unlikely that these costs could be included in a 'reasonable amount for overhead'.

Thus, although there was an unamended latent condition clause in this contract, the contractor was not able to recover the costs of delay caused by the latent condition and, subject to the discretion of the superintendent to extend time,<sup>3</sup> may also be required to pay liquidated damages for late completion.

It may be noted that the earlier standard form general conditions, AS2124-1986, included specific provisions (at sub-clause 12.3) for extensions of time, if justified, and

valuation of delay and disruption costs incurred as a result of a latent condition.

Jones<sup>4</sup> has noted that the only risk generally allocated to the contractor under a latent conditions clause is related to foreseeability of the conditions encountered. Where there are 'neutral' conditions which go beyond the scope of information provided by the principal and could not reasonably have been foreseen by the contractor at the time of tendering, the contractor is generally able to recover all extra costs incurred.

The warning given by the authors in the preface to AS4902-2000 are a stark reminder of the effect of any changes to a standard form contract. They state, prophetically, that 'the risk allocation, drafting, interpretation and construction of this Standard are interrelated. Users who alter the Standard do so at their own risk and should obtain specialist advice as to whether it is suitable for a particular project'. Enough said.

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## REFERENCES

1. AS4902, clause 1
2. *ibid*, Annexure A
3. n1, clause 34.5, 2nd paragraph
4. Building and Construction Claims & Disputes, Jones, Doug, Construction Publications Pty Ltd 1996