
Contracts

The Construction Industry Contract – Changes and Differences Explained

The Royal Australian Institute of Architects launched its Construction Industry Contract (CIC-1) in October 1997. In addressing comments received about this contract, the Institute's National Contracts Committee and Phillips Fox, solicitors, prepared a revised version which was launched in October 1998. The Institute's Practice Services General Manager, Graham Scott-Bohanna, explains key changes and clarifications.

Introduction

One of the underpinning principles of CIC-1 is that all claims and other matters that arise during the course of construction are dealt with as they arise. The contract seeks to avoid the disputes that so often occur when claims are delayed or belatedly presented by encouraging the speedy resolution of all matters when the work in question can be inspected and the issues are clear to all parties.

To meet this objective the contractor is required to meet defined time limits in relation to claims for variations [sic!] to the time for completion or the contract sum. In short, the contractor is expected to apply the same level of project management efficiency and discipline that architects and owners have been required to apply under other standard form contracts. The contract recognises that matters are best dealt with at the time that they occur and that the owner has a right to be kept informed of progress and the financial status of the project, in a timely manner.

The RAIA is confident that based on the use of the contract, contractors will have little difficulty in managing the project in accordance with the requirements of the contract, without added administrative burden. It is also confident that all parties will quickly recognise the benefits that flow from the efficiencies and lack of disputes under this contract due to the timely resolution of claims.

A complementary subcontract and comprehensive administration proforma for the architect and the contractor support the contract. Both the architect and the contractor will find that the proforma greatly assist them in meeting the terms of the contract.

General Issues

CIC-1 is written in plain English a fact that has raised some questions regarding the structure of the contract and its terminology. Some of these include:

Structure

In keeping with the clear communication philosophy of the contract, it is set out logically and nearly as possible, in the order that matters arise in the normal process of building. CIC aims to reduce disputes through clear language, simple understandable procedures and by encouraging prompt communications between the parties.

Promptly

In a number of clauses the architect is required to act promptly. Promptly is variously defined as, *without delay, quickly, expeditiously or as soon as possible*. Promptly requires the architect to quickly resolve issues rather than delay decisions until the end of some contractually stated time limit.

Administrative burden

There have been suggestions that the time limits in CIC-1 will increase the administrative workload for contractors, however, there is no reason for it to be greater, for any of the parties, than that required under JCC, SBW or AS4000. It is simply required to be completed at the appropriate time.

The contract also recognises, that on occasions, claims will be overlooked or it will not be possible to finalise a claim within these time limits. Under the contract the architect has the power to deal with such claims where there is a genuine cause for the delay.

Definitions

In accordance with the plain English philosophy most terms are defined in the body of the contract where they first occur. A number of terms, however, are not defined, including separable part, variation and practical completion, to name a few. These are common building terms, widely used and well defined by case law. If any party to the contract is unfamiliar with these terms or

uncertain as to their meaning, they should not be signing any building contract until they have a clear understanding of such terms.

Clause numbering

The numbering system used in the contract follows the plain English format and intentionally forces a reader to consider a dot point or sub clause in the context of the entire clause. Each clause is concise and focuses on a single issue. This is designed to assist with a complete understanding of each issue and provides a level of clarity rarely found in building contracts.

Specific issues

The role of the architect

An architect must administer the contract. The architect must act independently when assessing, valuing or certifying. The owner may change the architect at any time but the new architect is bound by any decisions given by all previous architects. These provisions protect the contractor by clearly defining the impartiality of the architect and ensuring that they can rely on all instructions issued by the architect.

Contract documents

The contractor is required to examine the documents and accept the risk that all items that would normally be included in the contract documents are provided for in the contract sum. Examples of the information that would not normally be specifically described in the documents but is expected to be covered by this provision would be the nails that hold the timber frame together or the screws that connect various elements of the joinery. Such items can be reasonably inferred and are obviously required to complete the works. If an item could not reasonably be inferred from the documents then it is an omission and is dealt with under other provisions in this Section or elsewhere in the contract. This requirement clearly does not cover inaccurate, inadequate or incomplete documentation.

Security

Under all standard form contracts the owner is able to withhold the release of the security if it chooses to do so and with contracts other than CIC-1 it may do so without having to provide a reason. With both this contract and other standard form contracts, recovery of the security by the contractor then follows dispute resolution or legal process. By requiring the owner to provide a statutory declaration as to the reasons for withholding the security, the contractor is protected from an owner retaining the security for no good reason. In addition, it places the contractor in a better position to recover the security by giving it early advice of the grounds for the owner's action.

Site information

The owner is required to provide all information concerning the site that it has in its possession but is not required to warrant the accuracy of the information. This provision is designed to protect the contractor from an owner who knowingly withholds information that could materially affect the cost of the works or the time required to complete them.

By way of example, in a demolition contract if the owner has original drawings of the building to be demolished even though the building may have been altered significantly since they were prepared, these must be given to the contractor. Such information clearly cannot be guaranteed for accuracy but information contained in such documents may have a significant impact on the way that the contractor prices the project or undertakes the work.

This requirement does not cover documents prepared specifically for the project such as geotechnical tests, site surveys and the like. These documents should be included in the contract documents.

Provision for separate contractors

The contract allows for separate contractors to be engaged by the owner for specialist works such as art works. The contractor is required to provide access for the separate contractors and to cooperate with them. The contractor does not take responsibility for them and is entitled to claim for any loss or damages suffered through the actions of a separate contractor.

Separable parts

The contract allows for separable parts to be identified either from the outset or at some other time during the course of construction. This is a flexible provision that enables the owner to amend the date or dates on which it takes possession of all or part of the works as circumstances change. The contract is protected by the provisions which enable it to recover any additional costs, any losses or damages that might be suffered as a result of changes to the separable parts during the construction period.

Termination by the owner

The owner may terminate the contract at any time. This provision is intended to protect the contractor in a situation where an owner's circumstances alter during construction and its continuing ability to meet its obligations is uncertain. This provision would only be utilised in exceptional circumstances and the contractor is entitled to recover costs and losses suffered if an owner exercises its rights under this provision.

Conclusion

CIC-1 is unique. It is a contract that encourages efficient and cooperative administration through the resolution of all claims and other matters at the time that they arise. It provides a clear administrative framework

within which the owner, the contractor and the architect work. And, it facilitates a clear understanding, by all parties, of the status of the contract at any given time by eliminating belated claims. CIC-1 recognises that building projects are most successful when the parties know what is expected of them and when they all meet their obligations.

Contractors will appreciate the certainty that CIC-1 1998 brings to the processes for managing a project and architects will appreciate the timely presentation and resolution of claims. The Owner will appreciate the certainty of accurate, up to date information regarding cost and progress of their project.

Finally, promptly resolving claims and the other matters that inevitably arise under a building contract, at the time that they arise, is perhaps, the single most effective way of avoiding disputes on construction projects.

THE CHANGES

The differences between the two versions of the contract are described and explained below.

Section A – Overview

This section sets out the general obligations of each of the parties to the contract.

The owner is now required to warrant that it engaged the architect on terms that give the architect the necessary authority to act as required by the contract. Furthermore, clause A3.4 requires that the owner warrant that an architect will be appointed at all times. It also stipulates that in the event of termination of the architect, the newly appointed architect will abide by the decisions made by any previous architect and not just the preceding architect.

These changes are such that, if an architect is not appointed, the owner would be in breach of its obligations, which would enable the contractor to terminate the contract.

Section B – Documents

This section deals with the contract and construction documentation.

Clause B2 has been amended and now sets out the order of precedence of documents, unless the parties agree otherwise and set out a different order of precedence in schedule three.

An additional clause has been added to this section and, consequently, clause B4 now requires the architect, in the event of a discrepancy, to generally follow the order of precedence; otherwise clause B3 applies allowing the contractor the right to claim for any loss, expense or damage that arises from an instruction to resolve a discrepancy which does not follow the order of precedence.

Clause B5 requires the contractor to carefully examine the contract documents during the tender period. However, rather than the contractor taking the risk that the construction documents adequately describe the works, which some saw as an opening for the architect to absolve themselves of any omissions in the construction

documents, the contractor is now required to include in its contract sum all items that are not specifically referred to but which can be reasonably inferred as being required to complete the works.

Section C – Security

This section deals with security requirements and procedures.

CIC-1 1998 now clearly allows for the works to be completed in separable parts from the outset, with consequential changes throughout the contract, including the issue of security. Where the works are to be completed in separable parts, clause C3.1 applies to separable parts such that security in the form of bank guarantees must be provided in pairs for the separable parts, with each of the guarantees within the pair being of an equal amount.

Section D – Liability

This section deals with the legal obligations placed on the parties at the various stages of the construction process.

The issues of liability and insurance have been dealt with in different sections to demonstrate that there is a difference between the two – a factor that is often confused by those involved in the construction process.

A number of changes have been made to this section that are intended to make its operation clearer. There are now fourteen clauses in this section, which are summarised as follows:

- **D1** places the risk of personal injury or death on the site with the contractor up to practical completion. Clauses D1.1 and D1.2 are now contained in two separate clauses.
- **D2** requires the contractor to indemnify the owner with respect to personal injury or death which occurs on the site up to practical completion, given that the contractor has this risk by virtue of clause D1. Clause D2 also stipulates that the contractor's obligation to indemnify the owner is reduced by the extent to which the owner was responsible for the personal injury or death. In CIC-1 1997 there was no provision for indemnity to be reduced for contributory negligence.
- **D3** places the risk of loss or damage to the works and associated defined items with the contractor until practical completion. Clauses D2.1 and D2.2 in CIC-1 1997 are now contained in separate clauses.
- **D4** requires the contractor to indemnify the owner with respect to loss or damage which occurs on the site up to practical completion, given that the contractor has this risk by virtue of clause D3. Clause D4 also stipulates that the contractor's obligation to indemnify the owner is reduced by the extent to which the owner was responsible for the loss or damage.
- **D5** places the risk of personal injury or death after practical completion with the owner. This was previously clause D1.1 in CIC-1 1997.

- **D6** requires the owner to indemnify the contractor with respect to personal injury or death which occurs on the site after practical completion. Clause D6 also stipulates that the owner's obligation to indemnify the contractor is reduced by the extent to which the owner was responsible for the personal injury or death.
- **D7** places the risk of loss or damage to the works and associated items after practical completion with the owner.
- **D8** requires the owner to indemnify the contractor with respect to personal loss or damage which occurs on the site after practical completion. Clause D8 also stipulates that the owner's obligation to indemnify the contractor is reduced by the extent to which the contractor was responsible for loss or damage.
- **D9** stipulates that if loss or damage occurs to the works and associated items when the contractor is on risk, the contractor must reinstate the loss or damage as soon as possible at its own expense. Provision is now made in clause D9.1 for the contractor to claim indemnity from the owner to the extent that the owner was responsible.
- **D10** allows the owner to reinstate at its own expense if loss or damage occurs to the works or associated items when it is on risk. Furthermore, clause D10 in CIC-1 1998 now requires the owner to make an election with respect to reinstatement as soon as possible. The owner may seek indemnity from the contractor with respect to reinstatement if the contractor was in any way responsible. Under clause D10.2, if the owner elects not to reinstate, the contractor must still indemnify the owner with respect to loss or damage to the extent that the contractor was responsible. Clauses D10.1 and D10.2 allow a distinction to be made between the cost of reinstatement and diminution.
- **D11** is a new clause that expressly entitles either party to make a claim for indemnity.
- **D12** is a new clause that sets out the conditions that must be met in order for a party to claim indemnity under this section.
- **D13** is a new clause requiring the architect to make a written decision in relation to a claim for indemnity.

Section E – Insurance

Contract works insurance and public liability insurance are dealt with in separate clauses, unlike many other standard form contracts. The contractor has the responsibility in the first instance of taking out and maintaining contract works and public liability insurance, unless otherwise agreed and specified in schedule one (clauses E1 and E2). Clauses E1 and E2 now expressly allow for the owner to take out these insurances by nomination in the schedule.

Clause E4 gives the owner the right to take out and maintain either of the required insurances and at the contractor's cost, if the contractor fails to do so. CIC-1 1998 allows for the contractor to take out and maintain these insurances at the owner's cost in circumstances where the parties had agreed that the owner would effect the insurances (clause E5).

Subclause E5.2 is a new provision that places the overall responsibility on the contractor for ensuring that the relevant insurances are in place.

CIC-1 1998 contains significant changes to the clauses dealing with insurance claims and payment for loss or damage. These changes are summarised as follows:

- **E10** allows the contractor to submit a special progress claim for work completed since the previous progress claim, up to the time that the loss or damage occurred. This also enables the architect to establish the extent of the loss or damage to the works.
- **E11** is a new clause that merely sets out the mechanism for claiming and the conditions precedent.
- **E12** has been added to clarify the procedures for claims where there has been loss or damage to the works.
- **E13** permits the contractor to make a claim on the owner's insurance where the owner has taken out contract works insurance. Subclause E13.1 merely confirms that if the contractor has taken out contract works insurance, the contractor has the right to make a claim on their own insurance policy.

Regardless of whether the contractor deals with the owner's insurer through the architect, where the owner has effected contract works insurance, or deals with its own insurer where it has taken out the insurance, clause D9 requires the contractor to reinstate the works if the loss or damage occurred when it was on risk.

Section F – The site

This section deals with matters affecting the site, including issues such as access, site information, site inspection and latent conditions.

The contractor is now given possession of the site, rather than access. Consequently, there are amended provisions requiring the contractor to give access to the owner, the architect, separate contractors and consultants (clause F2). The contractor is required to have "reviewed" the site information provided (clause F4). The indemnity provided by the contractor to the owner, with respect to a claim by a subcontractor, has been changed accordingly (clause F4.1). The contractor is required to have "thoroughly inspected the site" before executing the contract (clause F5).

There is a further significant change contained in CIC-1 1998, which first appears in this section of the contract. Wherever in the contract the architect is able or required to give an instruction, it is now expressly stated

that the instruction must be in writing, with the exception of an urgent oral instruction, given under clause H9. This, by way of example, is seen in this section in clauses F7 and F13.

In CIC-1 1997, if a latent condition was identified, the architect was entitled to give an instruction. This has been altered in CIC-1 1998 such that, where a latent condition is identified, the architect must give an instruction, regardless of the fact that the instruction may be to take no action at all. This concept is also seen in clause F13.

There is one further change seen in this section, which is reflected throughout the contract. This relates to the architect's power to make a decision. Where a claim has been made by the contractor in relation to an instruction given by the architect, even if the decision of the architect is that the contractor is not entitled to an adjustment to the contract sum, the architect must issue a written decision.

Section G – Building the works

This section deals with matters relating to construction of the works including subcontracting, the program, suspension and opening up and testing of the works.

A requirement that the program be updated monthly has been included in a new clause, G5. This gives effect to the intention that the contractor provides and progressively maintains a program for the works.

Under CIC-1 1997 the contractor's right to claim for an instruction to recommence the works was implied. Given concerns about this being an implied right and in view of the lack of a sunset provision with respect to suspension of the works, this has now been expressly included in clauses G14 to G17 inclusive. Clause G14 entitles the contractor to claim for suspension and clauses G15 to G17 deal with the procedural matters relating to suspension of the works.

Clause G23 deals with the contractor's obligations in relation to separate contractors and G24 deals with contractor's duties with respect to separate contractors.

Section H – Variation to the works

This section deals with variations to the works, including variations consequent on urgent, and urgent oral, instructions.

A distinction has now been made between urgent and urgent oral instructions. The architect is able to give an urgent instruction to vary the works and if that instruction is oral, it must be confirmed in writing within one working day (clause H9.1).

The contractor is required to keep detailed records of the costs relating to a variation, which will enable the architect to issue a decision on the cost of a variation in circumstances where the contractor and the architect have not been able to agree on the price prior to the architect issuing an instruction to the contractor to proceed.

Section J – Completion of the works

This section deals with matters relating to completion of the works, including practical completion, separable parts, adjustment of time, adjustment of time costs, liquidated damages, and defects.

The contract contains a clear statement of the requirements for the works to have reached practical completion. Although CIC-1 1997 contemplated that the works could be in separable parts, a new clause, J1.1, has been included in CIC-1 1998 so that there is no confusion about separable parts. If the works are to be in separable parts at the outset, they are now defined in item seventeen of schedule one.

The works may still be broken into separable parts after work has begun, either by agreement or by a decision by the architect. This does not mean that every request by the owner for the works to be broken into separable parts will be decided in the owner's favour by the architect.

There is a provision for deemed practical completion where the owner takes possession of the whole or part of the works before practical completion, without agreement from the contractor. Clause J9 has been amended to include a new subclause, J9.1, which requires the program to be updated in the event that the owner takes possession of the whole or part of the works before practical completion.

Clause J10 lists eighteen specific causes giving rise to an entitlement to the contractor to make a claim for an adjustment of time.

Cause eleven in clause J10 has been amended and limits the rights of the contractor to make a claim in relation to the owner's consultants failing to provide information to the contractor, which is "*properly due*" to the contractor.

Section K – Payment for the works

The contract may be a lump sum or a schedule of rated sums or both. The contract provides for provisional sums, which may be expended in one of the following ways:

- by instructing the contractor to undertake the work;
- by instructing the contractor to employ a subcontractor;
- by having the work performed by a separate contractor;
- in the payment of a fee or charge.

Clause K4 has been amended such that an instruction given to the contractor in relation to a provisional sum is not valued as a variation but, rather, in accordance with the procedure set out in clause K6.

Clause K6 has been amended and now provides the basis for valuation of provisional sum work where that work is undertaken by the contractor. Clause K9 has been amended and now provides the basis for valuing provisional sum work done by a separate contractor.

Significantly, clause K10 and other payment clauses that previously dictated that payments were to be made within ten working days of delivery of a certificate, have now been altered so that the time provision in these clauses may now be agreed between the parties. Consequential changes have been made throughout the document to reflect this change.

Section L – Termination of engagement

This section deals with all matters relating to contract termination.

The circumstances where the owner may terminate the engagement of the contractor or the contractor may terminate the contract are prescribed.

If the owner wishes to terminate the contractor's engagement at their sole discretion under clause L12, a new subclause L12.1 requires them to do so on "*reasonable grounds*".

Clause L13 has been amended to allow the contractor to claim loss of profit in the event that their engagement is terminated under clause L12.

Where the contractor makes a claim for wrongful repudiation by the owner or a claim is made where the contract is terminated for non payment or insolvency, it is now expressly stated in clause L24 that the architect must issue a written decision.

A new clause, L25, requires the party certified as owing the money to pay within ten working days or the time stipulated in the schedule.

Section M – Miscellaneous

This section deals with all matters that were not appropriate to locate in other sections. It also contains the "*boilerplate*" clauses.

A new clause, M2, has been inserted whereby the owner warrants that it has the financial resources to perform its obligations under the contract.

A new clause requiring each party to continue to perform its obligations under the contract has been inserted and is now clause M9.

Confidentiality with respect to information exchanged is now mutual (clause M13).

These notes are issued by the RAIA for general guidance only. No responsibility for their accuracy or currency is accepted by the RAIA, its office bearers, members, staff or by the author.

CIC-1 1998 is available from the RAIA Practice Services. Telephone (03) 9650 3364.