

28 May 2024

Standards Australia
Level 10, The Exchange Centre
20 Bridge Street
SYDNEY NSW 2000

Via online portal

Dear Standards Australia

Standards Australia proposed update to the AS 4000 General Conditions of Contract

1. This submission concerning Standards Australia's public consultation about its proposed update to the AS 4000 General Conditions of Contract is made by the Construction and Infrastructure Committee of the Business Law Section of the Law Council of Australia (the **Committee**).
2. The Committee thanks Standards Australia and its MB-010 committee members for progressing the update of AS 4000 to this point. An update to AS 4000 and the other documents in Standards Australia's suite of construction contracts, most of which were last updated before the new millennium, is long overdue. The Committee is pleased to have been part of this initiative, via its representative on the MB-010 committee.
3. The Committee understands that the MB-010 committee was given a narrow mandate for the update, which prevented the committee from proposing any changes that would impact the contract's risk allocation. The Committee considers that the 'no change to risk allocation' mandate has prevented the MB-010 committee from proposing changes to AS 4000 that would respond to the changing needs of many users of the standard form.
4. The Committee suggests that Standards Australia should broaden the scope of the review (or commence a fresh review with a broader scope) to permit the MB-010 committee to consider the range of issues commonly arising, so as to meet the changing demands of industry users. The below suggestions are not comprehensive, and the Committee would welcome the opportunity to provide a comprehensive list, if invited to do so.

5. The Committee suggests that the mandate for MB-010 be extended to consider:
 - 1) Alternative payment regimes to lump sums and unit rates, such as:
 - a) Cost reimbursement plus a fee for profit and contribution to corporate overheads;
 - b) Cost reimbursement plus fee, with a target cost and sharing of cost savings or cost overruns; and
 - c) Cost reimbursement plus fee, with a gainshare/painshare regime that incorporates a target cost and other non-cost KPIs.
 - 2) Optional clauses that the parties can select, which may involve changes to the risk allocation, such as:
 - a) Limitation of liability clause;
 - b) Clause excluding liability for loss of profit, loss of opportunity, loss of anticipated savings etc (commonly referred to as consequential loss);
 - c) Termination by the Principal for convenience (with compensation for loss of profit);
 - d) Advance payment to the contractor, including deposit payments Principal's right to direct acceleration, if possible and at the principal's cost, to overcome an extension of time to which the contractor is otherwise entitled;
 - e) Building information modelling clause;
 - f) Early contractor involvement clause (similar to that found in NEC4);
 - g) Express obligation to act in good faith;
 - h) Early warning mechanism.
 - 3) The correction of 'known problem clauses' within the contract, such as:
 - a) the Superintendent's obligation, when both non-qualifying and qualifying causes of delay overlap, to apportion the resulting delay according to the respective causes' contribution;
 - b) the absence of an obligation on the Contractor to provide a programme and to update it—the Contractor is only obliged to do so if directed by the Superintendent, in which event the cost impact of the direction is added to the contract price;
 - c) the Contractor is prohibited from departing from the programme without reasonable cause—most industry participants now accept that the contractor should be free to adjust its programme as it sees fit, so long as it informs the Principal and remains obligated to achieve Practical Completion by the Date for Practical Completion; and the absence of a definition of Force Majeure which should be an expressed inclusion as a Qualifying Cause of Delay;
 - d) the treatment of latent conditions, perhaps via another optional clause that uses a Geotechnical Baseline Report (similar to that found in the FIDIC Emerald Book);

- e) the contract's failure to expressly recognise the dual role of the Superintendent, who exercises:
 - i) some functions, such as the power to direct a variation, as the agent of the Principal, and
 - ii) other functions, such as the certification of payment claims and the valuation of variations (when not agreed between the parties), as an independent certifier.
6. The Committee also considers the following issues were within the mandate but have not been addressed:
- (a) anti-bribery and corruption;
 - (b) appointment as Principal Contractor for work health and safety purposes;
 - (c) chain of responsibility legislation; and
 - (d) whilst appreciating that the legislation differs across the country and the statutory right to payment does exist independently of the contract, nevertheless incorporation of consistency between the standard form and respective Security of Payment timeframes where the parties elect for consistency which can occur by way of items within Annexure Part A for the payment certificate to be issued and the claims to be paid.

Conclusion and further contact

- 7. The Committee would be pleased to discuss any aspect of this submission.
- 8. Please contact the Deputy Chair of the Committee, Owen Hayford, at owen.hayford@infralegal.com.au, if you would like to do so.

Yours faithfully



Dr Pamela Hanrahan
Chair
Business Law Section