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GCC:

The GCC 2015 (3rd Edition) – Welcomed with Open Arms

Commentary on the Changes Introduced by the GCC 2015 (3rd Edition)

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During November 2015 the GCC drafting committee of SAICE published the GCC 2015, 3rd Edition.

It wasn't clear what prompted the issuing of the 3rd Edition even though the Industry knew that changes were necessary. However, Mr Willie Claassen, a member of the drafting committee clarified the purpose and motivation for the publication of this edition namely:

- The employer's ongoing failure to make timeous payment to contractors after the issuing of payment certificates;



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- The need to clarify the Escalation Calculation and which Indices should be used.
- The CIDB not willing to register sub-contractors. Clause 4.4.2 is an additional requirement for approval of sub contractors.

There are pertinent issues in the GCC 2010 (2nd Edition) that needed to be addressed and which required clarification. Prior to reviewing the 3rd Edition, we were quietly holding thumbs and hoping that the changes introduced by the drafting committee in the 3rd Edition would address these issues and other shortcomings of the 2nd Edition.

We will now, in this article look at some of the changes introduced in the latest edition of the GCC, and provide a summary of commentary on such changes.

General changes throughout the contract document

The drafting committee made certain amendments to general terms throughout the contract. These changes are:

- The definition of and reference to “*Engineer*” has been deleted and replaced with “*Employer’s Agent*”. This change was implemented and it was necessary to change the description of the person administering the contract as the GCC 2015 is now also suitable for other than construction and building projects.
- The word “*Legally*” has been added to precede “*deemed*” and where the word “deemed” was considered redundant the word “deemed” has been deleted and replaced with other appropriate words. Only where the meaning / purpose of the word “deemed” is the legal meaning, namely, the event must be considered as conclusive in the absence of evidence or facts, it remained.

Amendments to defined terms

The following definitions have been amended:

Clause 1.1.21 “*General Items*” means items stipulated in the Pricing Data relating to general obligations, site services, facilities, and/or items that cover elements of the cost of the work which are not considered as proportional to the ~~quantities~~ **cost** of the Permanent Works.

Commentary: The difficulty with the wording as per the GCC 2010 is that it is illogical to think it could be proportional to the quantities of the Permanent Works. General Items, as defined in this clause, are usually paid on a time related basis. This amendment clarifies any possible confusion.

Clause 1.1.22 “*Permanent Works*” means the permanent works to be **designed (if required)**, constructed, **and/or provided** in accordance with the Contract.

Commentary: Previously the GCC 2010 could only be used for ‘construct only’ projects. This change is introduced to the GCC to now allow for different contracting strategies namely design and construct and therefore it is more suited to Mechanical and Electrical projects.

Amendments to the core clauses of the contract

Clause 1.3.6 is a new clause and is titled “*Employer’s copyright*” and provides for:

Clause 1.3.6: *“Except where otherwise stated in the Contract, the Employer shall retain the copyright and other intellectual property rights in documents supplied to the Contractor under the Contract.*

The Employer shall legally be deemed to have given the Contractor a non-terminable, transferable, non-exclusive, royalty-free licence to copy, use and communicate the Employer’s documents for the purposes of the Contract.”

Commentary: This change seems to be introduced in ‘support’ of the amended definition of “Permanent Works” (see clause 1.1.22) and the idea that the GCC, what was originally a civil construction contract where the employer provided the design, can also now be used for projects other than engineering projects and where the contractor would do the design which would be required to conform to the Employer’s requirements. It addresses the copyright issue in regard to information provided by the Employer and the use of such information and documentation for the specific project only.

Clause 2.1.2 *“The Contractor shall be deemed to have inspected **and examined** the Site and its surroundings and to have studied all available information pertaining thereto before submitting his tender (**as far as is reasonable**). The Contractor shall thus be ~~deemed~~ **considered** knowledgeable in respect of: ...”*

Commentary: The site conditions and the circumstances under which the work is to be carried out places an onus on the Contractor and presents challenges and potential risks to the Contractor. It is important that the Contractor understands its’ obligations and responsibilities in this regard.

It could be argued that the wording of the GCC 2010 gave rise to a degree of unreasonableness and that the obligations on the Contractor was extremely onerous.

The modifications to this clause are intended to clarify the Contractor’s obligations and responsibilities and to introduce a measure of reasonableness. The inclusion of the wording “(as far as is reasonable)” means the information gathered will be limited to the facts made available during the inspection of the Site with the tenderers, in the tender documents and other documents referred to. This places a responsibility on the Employer and the Employer’s Agent to make pertinent information available to the tenderers at tender stage. If not, it may result in a claim if such “unknown” conditions are encountered later. Please refer clause 2.1.1 and 2.3.1.

Clause 2.1.3: The Contractor shall, in general, be deemed to have obtained all ~~attainable~~ **available** information on risks, contingencies and all other circumstances which may influence or affect the Works (**as far as is reasonable**).

Commentary: Similar to my commentary under clause 2.1.2, the GCC 2010 wording could be argued to be onerous and to place an unreasonable onus on the Contractor to research the circumstances under which the work is to be carried out. The lengths to which the Contractor is supposed to go to obtain information have been moderated in this clause which is perceived to be less susceptible and more reasonable.

Clause 3.1.1 provides for the “Qualification of the Employer’s Agent” and states that:

Clause 3.1.1: *“The natural person acting, or purporting to act, as the Employer’s Agent shall be a registered professional in a built environment profession that is appropriate to the Scope of Work.”*

Commentary: As the GCC 2015 is now also suitable for projects other than engineering projects, it was necessary to change the name of the person administering the contract.

In addition to this, it is a common (and serious) problem in the construction industry that the person appointed to act as engineer / principal agent often does not possess adequate experience or understanding that is required for successful management of a contract / project.

This clause sets out the minimum requirements that need to be complied with in order to act as the Employer’s Agent (i.e. the Engineer). However, we believe that the inclusion of this clause will only go part way to addressing the issue and that a minimum amount of experience together with the stipulated qualification would be a better approach.

Clause 4.4.2: *“Except where otherwise provided in the Contract, the Contractor shall not subcontract any part of the Contract without the prior written consent of the Employer’s Agent, which consent shall not be unreasonably withheld.”*

Commentary: The GCC 2004 (1st Edition) made provision for approval by the engineer of subcontractors, however such provision was excluded in the GCC 2010 as it was taken that the CIDB would require subcontractors to register.

However, this did not happen and as a result thereof this provision had to be re-introduced.

Clause 5.11.1 is a new clause which is titled “Suspension of the Works by the Contractor” and states the following:

Clause 5.11.1: *“The Contractor may, after giving fourteen (14) days written notice to the Employer, with a copy to the Employer’s Agent, (with specific reference to this Clause) suspend the progress of the Works where the Employer’s Agent or the Employer has failed in terms of Clause 6.10.4 to:*

5.11.1.1 Deliver a payment certificate, or

5.11.1.2 Make full payment of the amount certified in the payment certificate without prejudice to the Contractor’s other rights under this Contract or by law.”

Commentary: This new clause entitles the Contractor to suspend its works if payment is not forthcoming and will hopefully force the Employer to make payment timeously. This clause is included as a result of the supply chain management taking over from the technical professionals. Hopefully the new Standard for Infrastructure Procurement and Delivery Management issued by the National Treasury and the CIDB prompt payment regulations (which are currently still in draft format) will solve the issue of non-payment, which are currently one of the biggest issues Contractors and Sub-contractors are experiencing in the construction industry.

Clause 5.14.1 has been amended and now reads as follows:

Clause 5.14.1: *“~~Save as otherwise provided in the Contract,~~ **The** Contractor shall be entitled to receive a Certificate of Practical Completion when the Works have reached **been completed to the requirements for achieving Practical Completion as set out in the Contract Data**. When the Works are about to reach the said stage, the Contractor shall, in writing, request a Certificate of Practical Completion and the ~~Engineer~~ **Employer’s Agent** shall, within 14 days after receiving such request, issue to the Contractor a written list setting out the work to be completed to justify Practical Completion. Should the ~~Engineer~~ **Employer’s Agent** not issue such a list within 14 days, Practical Completion shall be ~~deemed to have been~~ **taken as** achieved on the Due Completion Date; **or, if a penalty is imposed in terms of Clause 5.13, on expiry of the 14 days.***

If the Contractor does not request a Certificate of Practical Completion if the Works reach Practical Completion before the Due Completion Date, Practical Completion shall be considered achieved on the Due Completion Date.”

Commentary: As we all know Practical Completion is a contentious issue and under most contracts a dispute usually arises as to when Practical Completion was actually achieved. The Practical Completion Date is also usually linked to the date from when delay damages / penalties are applied.

The drafting committee of the GCC, by making the changes highlighted above, tried to overcome any confusion surrounding the process of Practical Completion by introducing requirements for achieving Practical Completion and similar to the latest revision of the JBCC, trying to eliminate the never ending “snag lists” by setting out the requirements for Practical Completion in the Contract Data. It further places an obligation on the Contractor to ensure that the Contractor requests the issuing of a Practical Completion certificate if it believes Practical Completion was achieved.

Clause 8.3.1 titled “Excepted risks” has been changed as per the following:

Clause 8.3.1: “The “excepted risks” are risks of damage or physical loss or any other loss caused by or arising directly or indirectly as a result or consequence of:

8.3.1.1 *War, invasion, act of foreign enemies, hostilities or warlike operations (whether war be declared or not) ~~or civil war~~, or imposition of economic sanctions between governments*

8.3.1.2 *Insurrection, rebellion or revolution, **acts of terrorism or civil war***

8.3.1.3 *Mutiny, military uprising, military or usurped power, martial law or state of siege, or any other event or cause which determines the proclamation or maintenance of martial law or state of siege,*

8.3.1.4 *Any event which, at the closing date of the tenders, is defined as a risk in terms of insurance offered by the ~~South African Special Risks Insurance Association~~, **Strike, riot, commotion, disorder, violent demonstrations, sabotage or any form of civil disturbance (whether lawful or not) which is not attributable to any action or inaction of the employees of the Contractor or his Subcontractors,***

8.3.1.5 *Any occurrence for which a fund has been established in terms of the ~~War Damage Insurance and Compensation Act, as amended~~, **The confiscation, commandeering, nationalization, requisition or destruction of or damage to property by an order of government, or any public or local authority,***

8.3.1.6 *~~The impact of meteorites~~, **Disconnection of electricity supply not covered by the agreement with the supply authority,***

8.3.1.7 *~~Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,~~ **Epidemic famine or plague***

8.3.1.8 ~~Ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuels, **The impact of meteorites,**~~

8.3.1.9 ~~The use of or occupation by the Employer or his employees or agents or other contractors (not employed by the Contractor) of any part of the Works, **Pressure waves caused by aircraft, or other aerial devices, travelling at sonic or supersonic speeds,**~~

8.3.1.11 ~~The confiscation, commandeering, nationalisation, requisition or destruction of or damage to property by an order of government, or any public or local authority, **The use of or occupation by the Employer or his employees or agents or other contractors (not employed by the Contractor) of any part of the Works,**~~

8.3.1.12 ~~The fact that the value of materials, as supplied by the Employer for incorporation in the Works, exceeds the value thereof as specified by or on behalf of the Employer at the time of delivery thereof by the Employer. **The design, specification or instruction of the Employer's Agent, Employer or any of their employees or agents, or defects in the materials supplied by the Employer for incorporation in the Works, and/or**~~

8.3.1.13 ~~The fact that the value of materials, as supplied by the Employer for incorporation in the Works, exceeds the value thereof as specified by, or on behalf of the Employer, at the time of delivery thereof by the Employer.~~

Commentary: The current climate of the construction industry, i.e. the increase in strikes and power outages, necessitated the changes set out above. Clause 9.1 that deals with termination by the Contractor was also amended and brought in line with the excepted risks which could lead to termination.

Clause 8.3.2 titled "Claim for expected risks" is a new clause and provides for:

Clause 8.3.2: *"If, in carrying out the Works, any of the excepted risks, other than pertaining to the damage or physical loss referred to in Clause 8.2.2.2, causes the Contractor to suffer delay to Practical Completion and/or brings about proven additional costs, the Contractor shall be entitled to make a claim in accordance with Clause 10.1."*

Commentary: Previously, under the GCC 2010, claims as a result of excepted risks were unusual. This was due to Clause 8.3 not providing for the Contractor's entitlement to submit a claim as a result of the occurrence of an excepted risk nor did Clause 8.3 refer to Clause 10.1. However, then came along all the strikes and the Employers and Contractors were unsure how to treat a claim for costs and delay due to excepted

risks. In the GCC 2010 it had to go through as a dissatisfaction claim which was not the way the GCC intended to handle such entitlement claims. Now, by introducing Clause 8.3.2 a claim due to an excepted risk became an entitlement claim (see Clause 10.1) for the Contractor.

One of the most common problems in the South African construction industry is community unrest / interference, which are typically associated with the aims and obligations of the employer. The occurrence of these events usually result in loss of money and disruption and / or delay to the works without proper compensation. Under and in terms of the GCC 2010 no specific provision was made for the Contractor's entitlement to an extension of time for the practical completion date and / or additional payment or compensation.

As a result of this it was often argued that the occurrence of such event was beyond the Contractor's control (see clause 5.12.2.4). If argued successfully, the Contractor was only entitled to an extension of time and payment of time related P&G costs. This clause placed an onus on the Contractor to prove that such event was beyond its' control and in any event did not provide for or entitle the Contractor to payment of its' direct costs / proven additional costs.

By amending clause 8.3.1.4 the Contractor is relieved of the onus to prove that the strike, community unrest / interference was beyond its' control and of creative thinking of proving that it is entitled to payment of additional costs (excluding P&G). The loss of money and / or time due to strikes and community unrest / interference is no longer the Contractor's risk as this amendment and the inclusion of Clause 8.3.2 provides for a claim, due to an excepted risk, to be an entitlement claim under Clause 10.1.

This will now entitle the Contractor to not only claim an extension to the practical completion date but will also allow the Contractor to claim additional payment / compensation (including direct costs).

Clause 10.5.4 titled "Implementation of decision" is a new clause and states that:

Cause 10.5.4: *The parties shall implement the Adjudication Board's decision without delay whether or not the dispute is to be referred to arbitration or court proceedings. Payment shall be made in accordance with Clause 6.10*

in the payment certificate which becomes due after the date of issue of the decision, unless otherwise directed by the Adjudication Board.

Commentary: By introducing this new Clause the drafting committee enforced standard practice and again imposed the principle of an adjudication decision being binding notwithstanding a notice of dissatisfaction. This is inescapable as this principle has been enforced in our courts.

By reviewing and considering the changes introduced by the GCC 2015, I experienced a warm fuzzy feeling that this revision might just be the answer. This GCC revised edition provides clarity, and simplifies and clarifies a whole lot of issues.

This edition is welcomed with open arms!