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AN INTRODUCTION THE TO THE GENERAL CONDITIONS OF SUBCONTRACT FOR CONSTRUCTIONS WORKS – FIRST EDITION (2018)

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In 2018, SAICE published its first edition of the “General Conditions of Subcontract for Construction Works” (“SC”), suitable for use in conjunction with the third edition of the General Conditions of Contract for Construction Works GCC2015 (“GCC”).

The first observation noted, is that for ease of use, the clause numbering and the titles of the respective clauses in the SC and GCC, are similar and aligned with each other.

The parties to the GCC and SC, possess similar rights, duties, responsibilities and obligations under each of these contracts.

The time periods for actions and performance have been amended, to avoid the risk of possible time bar under the GCC. Time periods are set under the SC to afford the contractor enough time to consider the

subcontractors information, submissions and incorporate same to makes its submissions under the GCC.

A comparison between the GCC and the SC follows:

The GCC, has 34 definitions compared to the SC’s 37. These additional definitions are not considered material to this article.

Under the interpretations clause 1.2, the SC adds an additional clause 1.2.1.3, that provides that a written communication shall have been duly delivered if “An electronic recognition such as a read receipt is returned by the recipient to the sender and who prints it,..”. The GCC has no such provision. This is an important differential between these two documents.

Additional SC Clause 2.1.1, stipulates the expected back-to-back reciprocal arrangement between the two contracts, stating:

“The Contractor shall assume toward the Subcontractor all obligations and liabilities that the Employer, under the GCC2015, assumes towards the Contractor. The Subcontractor shall assume towards the Contractor all obligations and liabilities which the Contractor, under the GCC2015, assumes towards the Employer and Employer’s Agent. The Contractor shall have all benefits of all rights against the Subcontractor that the Employer, under the GCC2015, has against the Contractor. The Subcontractor shall have the benefits of all rights against the Contractor that the Contractor, under GCC2015, has against the Employer.”

Clause 3.2, dealing with the Functions of the Employer’s Agent, the SC omits GCC clauses 3.2.3 (Specific approval of the Employer required) and 3.2.4 (Employer’s agent for health and safety).

GCC2015 Clause 3.3, dealing with the Employer’s Agent’s Representative, is titled *“Nomination”* of Employer’s Agent’s Representative, whereas the SC clause, is titled *“Appointment”* of Employer’s Agent’s Representative. The SC further adds to the first sentence to include wording following the words *“The Employer’s Agent shall be”*, by adding *“legally deemed to be”*, before the word *“entitled...”*. This SC clause is further shorter, as it excludes clauses 3.3.2.2.3 up to 3.3.6, of the GCC. These clauses that are excluded, deal with the *“Limitations of authority of Employer’s Agent’s Representative”*, *Employer’s Agent’s authority to delegate*, *“Limitations on delegations”* and *“Contractor’s right to refer to Employer’s Agent”*.

SC Clause 4.2, dealing with instructions, is an important clause and expressly provides that the subcontractor only takes instructions from the contractor or a person authorised by the contractor, not from the Employer’s Agent under the GCC.

The time limits provided under clause 5.4.3, which provides for an entitlement to claim in terms of clause 10.1, in event of delays suffered and/or additional costs incurred, the contractor under the GCC has 28 days to exercise its entitlement for a claim whereas the subcontractor has 21 days. This position is the same under clauses 5.10.1 (Delays attributable to the Employer) and clause 10 (Claims).

Clause 5.14.1, dealing with a request for the certificate of practical completion, the time periods to issue a written list setting out the work to be completed to justify practical completion under the GCC, is 14 days from when the Employer’s Agent has received the contractor’s request for a certificate for practical completion, whereas the SC period extends by another week, providing the contractor 21 days to issue such list to the subcontractor. .

SC clause 6.3.1, dealing with a variation issued by the Employer’s Agent to the contractor, provides that *“The Employer’s Agent may issue a Variation Order to the Contractor. Upon receipt of such a Variation Order, the Contractor shall promptly notify the Subcontractor of the Variation Order, if such Variation Order requires any variation in the form, quantity or quality of the Subcontract Works...”*.

Clause 6.10.1 of the SC, dealing with the provision of monthly statements for payment, places an obligation on the subcontractor to submit a monthly statement *“not later than 7 days before the Contractor must deliver his monthly statement..., the Contractor shall include the Subcontractor’s monthly statement in his monthly statement...”*. These periods are important, in that should the subcontractor fail compliance with this period, it will risk not being paid, which can result in cashflow challenges, amongst other risks.

SC Clause 6.10.4, provides that *“The Contractor shall pay the amount due to the Subcontractor not later than 7 days after the Contractor receives payment from the Employer, failing which the provisions of Clause 6.10.6.2 shall apply.”* The latter clause provides an entitlement for interest on late payment. The clause goes further and places an obligation of the subcontractor, which states that *“Payment shall be subject to the Subcontractor submitting a tax invoice, if required by law, for the amount due”*.

The above time period and obligation repeats in clauses 6.10.8 and 6.10.9, of the SC dealing with payment upon completion by the subcontractor.

If during the duration of the subcontract, one of the excepted risks occur, which materially affects performance of the works or impacts the costs on the contracts (whether main contract or subcontract or both), Clause 9.1 of the SC, deals with the entitlement to terminate the main contract by the Employer, who may exercise such entitlement to terminate at any time after such excepted risk event occurred. SC Clause 9.1.4 deals with increased in costs and states

that *“...the Subcontractor shall be entitled to payment of any increased cost of or incidental to the execution of the Subcontract Works...”*. As soon as such increase in cost *“comes to his knowledge, at least within 7 days after becoming aware of such increase in Cost, notify the Contractor thereof, in writing.”*. Similar under the GCC, the contractor must notify within 14 days after becoming aware of such increase in his cost.

Under Clause 9.3, dealing with termination, Clause 9.3.1.3 in the SC, adds a notice requirement, which is excluded in the GCC, and provides that the subcontractor can terminate, where the contractor has interfered with or obstructed the issue of any certificate, *“for 14 days after receipt of written notice from the Subcontractor (with specific reference to this Clause), to remedy the default,”*. Further, under clause 9.3.1.5, in the event the contractor has assigned the subcontract (the employer has done similar under the GCC) without the written consent of the subcontractor, the period of notice required under the SC before the subcontractor can terminate, is 21 days written notice to the contractor to remedy the default, whereas the GCC requires a shorter period of 14 days.

SC Clause 9.3.2.2, excludes the last sentence following the wording *“Temporary Works”*, which in the GCC states *“without prejudice to the exercise of any lien the Contractor may have acquired over the Employer’s property.”*. The subcontractor logically (because he wouldn’t be in control of the site), does not to have a right of lien under the SC.

SC Clause 9.4 provides an entitlement to the Employer to terminate the subcontract. Clause 9.4.1 states that *“The Employer is empowered to terminate the Main Contract, which can include the Subcontract, in terms of Clause 9.2 of the Main Contract General Conditions...”*.

SC Clause 10.1, provides for the appointment of a mutually agreed independent third party to deal with any claim or notice of dissatisfaction between the contractor and subcontractor, which does not form part of a claim or notice by the contractor to the Employer’s Agent. This, it must be concluded, is intended to assist in expediting resolution on internal matters or issues arising under the subcontract between the contractor and subcontractor.

It is further required that the contractor, subcontractor and the third party shall act in accordance with the procedures in Clause 10.1, 10.2, 10.3 and their sub-clauses to resolve such internal matters. Clause 10.1. of the SC, *inter alia* provides:

“At commencement of the Subcontract the Contractor and Subcontractor shall appoint a mutually agreed independent party or person, to be referred to by either of them, to consider, and, after consultation with the Contractor and Subcontractor, give a reasoned ruling on any claim or notice of dissatisfaction....”.

It further provides that *“If, however, the matter or notice will be included in whole or part in a claim or notice to be submitted by the Contractor to the Employer’s Agent in terms of the Main Contract, the*

Third Party shall not be required to consider that part of the matter. The Subcontractor shall be joined with the Contractor, and shall deliver to the Contractor such particulars as the Contractor may require to be included in his claim, in accordance with the procedures and time periods laid down in the Main Contract.”

Under Clause 10, the notice periods that are required to be complied with, is 21 days under the SC as opposed to 28 days under the GCC.

Furthermore, the time periods in clause 10.1.1.1 of the SC, requires the subcontractor to deliver to the Third Party a written claim (with reference to this clause), within 21 days after the circumstance, event, act or omission giving rise to such a claim has arisen or occurred. The GCC, requires the contractor to deliver his claim to the Employer’s Agent within 28 days.

Clause 10.1.1.1.5 of the SC, is an additional clause, which is not provided in the GCC. The subcontractor is required to set out in its claim *“Particulars of any portion of the claim which is not an internal matter between the Contractor and Subcontractor, to be incorporated by the Contractor in a claim to the Employer’s Agent under the Main Contract.”*.

SC Clause 10.5.1, deals with adjudication, and states that *“If the Main Contract provides for dispute resolution by a standing Adjudication Board, and such Board has been established, it shall also adjudicate the Subcontract disputes.”*

Further, SC clause 10.5.3, limits the Adjudication Board members to one member, whereas this clause under the GCC, states that *“The Adjudication Board shall consist of the number of members stated in the Contract Data...”*.

This subcontract agreement is a welcome addition to the risk management tools available to contractors. It’s similarity to the GCC contract will make it a user-friendly document.