

MDA PRESENTS



FIRST AID FOR CONTRACTS



Sixth Edition – June 2022

THE CONTRACTOR'S OBLIGATION TO GIVE AN ADEQUATE WRITTEN NOTICE TO THE EMPLOYER'S AGENT FOR ADDITIONAL DRAWINGS AND INSTRUCTIONS REQUIRED FOR CARRYING OUT WORKS

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Clause 5.9.3 of the 2015 General Conditions of Contract for Construction Works ("GCC") requires the Contractor to timeously notify the Employer's Agent of any requirements for instructions or drawings which are additional to those that are contained in the Scope of Work.

The GCC defines the Scope of Work as:

"the document that specifies and describes the Works which are to be provided, and any other requirements and constraints relating to the manner in which the work is to be carried out."

The information contained in the Scope of Work is meant to enable the Contractor to ascertain the Employer's objectives and ensure that the means it intends to employ to achieve these objectives

coincide with any requirements or restrictions that are placed on it by the Employer, or any obligations otherwise placed on the Employer that have an impact on the way in which the works are carried out. The idea is that the Contractor will be in possession of sufficient information regarding the Works.

Instructions and drawings

The contractor cannot commence works without an instruction from the Employer's Agent. Clause 5.3.1 provides that the Contractor commences carrying out the works on the instruction of the Employer's Agent, unless if the contract provides otherwise or there is an issue of physical impossibility or legality.

The Employer's Agent issues the instruction to commence works when the Contractor has submitted certain required documentation, including the programme, and the Employer's Agent has accepted such documentation.

Clause 5.3.1 operates in conjunction with Clause 5.9, which obliges the Employer's Agent to deliver instructions and drawings that will allow the Contractor to commence works. The clause provides that:

"On the Commencement Date, the Employer's Agent shall deliver to the Contractor copies of the drawings and any instructions required for the commencement of the works."

Clause 5.9.2 indicates that this obligation is continuous. It provides that:

"The Employer's Agent shall deliver to the Contractor from time to time, during the progress of the Works, drawings for construction purposes, or instructions as shall be necessary for the proper and adequate construction, completion and defects correction of the Works."

The court in *Alfred McAlpine & Son*¹ held as follows in respect of the Contractor's and the Employer's Agent's duties regarding instructions and drawings:

"The Contractor is under an obligation to execute the work which is the subject-matter of the contract... The work is required to be executed in accordance with the drawings annexed to the contract and with the

drawings and instructions supplied from time to time thereafter by the engineer... The cooperation of the engineer in the supply of such drawings and instructions was, therefore, necessary for the carrying out the contract and, in my view, it follows that there was implied in the contract an obligation on the part of the engineer to furnish these drawings and instructions."

The Employer's Agent is therefore required to diligently comply with his or her obligations in respect of issuing instructions or drawings to ensure the Contractor's compliance with the Employer's objectives regarding the works.

The Contractor's notice for additional drawings or instructions

The Contractor gives the Employer's Agent a notice in terms of Clause 5.9.3 when it requires an additional instruction or drawing that is not provided in the Scope of Work. An example would be where the contractor requires further instructions and drawings on the type and kind of structural equipment to be used to carry out the work if such information was not provided in the Scope of Work.

There are two requirements for a compliant clause 5.9.3 notice: it must be in written form and given to the Employer's Agent within an "adequate time".

¹ *Alfred McAlpine & Son (Pty) LTD V Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 534.

The GCC is not prescriptive on what constitutes “adequate time” in the circumstances. When the Employer’s Agent has been given a notice to provide the instruction or drawing, the obligation in terms of clause 5.9.4 arises; he or she is obliged to provide the instruction and/or drawing in “good time”.

In *Alfred McApline & Son*² the Appellate Division held as follows in respect of what would constitute a reasonable time:

“The determination of a reasonable time in particular instance would depend on a number of factors such as (the list is not intended to be in any way exhaustive) the contractor’s programme of work and where the work to which the drawing or instruction related fitted into that programme; the actual progress of the work; the need of the contractor for reasonable advance knowledge of the content of the drawing or the nature of the instruction in order to make the necessary preparations and do the necessary pre-planning, the knowledge of the engineer as to the contractor’s requirements; and whether the drawing or instruction related to the work as originally planned or to a variation thereof.”

It is essential to both the Contractor and the Employer that the Employer’s Agent deliver the instruction and/or drawing in good time having given regard to the Contractor’s programme which may, in some instances, set out the period of delivery. A failure to deliver the instruction and/or drawing as prescribed may result in a delay to the works and an Extension of Time and payment claim. Timeous delivery provides the Contractor with lead time to comply with the

instruction and/or drawing.

The GCC guidance note provides as follows in respect of the period within which the Contractor can provide the notice:

“The Contractor must give notice of such requirement in sufficient time for the Employer’s Agent to deliver the drawings and instructions in time for the Contractor to carry out the work so instructed. This is clearly a matter that should be indicated by the contractor on his programme which will serve as an adequate written notice to the Engineer.”

It is clear from the quote that the author considers that if the Contractor indicates in its programme that it requires or will require an instruction or drawing then it has provided adequate written notice in terms of the Contract.

Does indicating the requirement in the programme serve as an adequate written notice?

The Contract is not entirely prescriptive on the period within which the notice must be given but it is clear on the form and delivery of notices. Clause 1.2 of the Conditions sets out as follows:

“any written communication between the parties shall have been duly delivered if:

1.2.1.1 handed to the addressee or to his duly authorized agent, or

1.2.1.2 delivered at the address of the addressee as stated in the Contract Data.”

Clause 5.9.3 sets the delivery of a notice as a precondition to the Employer's Agent's obligation to deliver an instruction and/or drawing. Once the Contractor has delivered its notice in terms of the Contract, the Employer's Agent is under an obligation to provide the Contractor with the additional drawing and/or instruction. Such obligation does not exist prior to the issuing a written notice that is delivered within an adequate period. Therefore, the Contractor's notice places the Employer's Agent in mora to perform in good time in terms of Clause 5.9.4 and with due consideration to the factors outlined in *Alfred McAlpine*.

It is risky for the Contractor to conclude that it has given the Employer's Agent adequate written notice in terms of the Clause by reasons of an indication in its programme that it will require an instruction and/or drawing. The initial programme is provided to the Employer's Agent prior to the commencement of the works and may be outdated or adjusted which means the assumed obligation initially imposed on the Employer's Agent will have fallen away.

Importantly, the indication on the programme does not meet the requisites of a notice as envisaged by clause 5.9.3. This clause envisages a notice that is issued and delivered in compliance with clause 1.2 and which is aimed at creating an obligation on the Employer's Agent. Clause 5.9.3 also contemplates that the Contractor will notify the need for an additional instruction and/or drawing whilst carrying out the works. The requirements of this clause allow the Employer's Agent a reasonable time to produce and

provide such instruction and/or drawing or to inform the Contractor if the Employer's Agent has not been provided with sufficient time to provide the drawing or instruction.

It is therefore important for the Contractor to adhere to the requirements of Clause 5.9.3 in respect of the notice for additional instructions and/or drawings as read with Clause 1.2.1 which sets out the obligations of the parties in respect of the form and delivery of notices. This compliance places the Employer's Agent in mora as he or she is then required to perform in terms of Clause 5.9.4 of the Contract.

Risk free contracting should be the objective. Do not take the chance and rely on your programme being an effective Clause 5.9.3 notice. Always comply with the clause and give the requisite written notice.