

## University of Vienna Variation and Design

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### 1 Payment under the Contract

- 1.1 The way in which a contractor is paid for the contract works is usually set out in the terms of the contract. The default position is complete performance before the entire contract sum is paid.
- 1.2 Payment terms might be implied in respect of stage payments under applicable legislation, for example in England, Wales and Scotland under the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009.
- 1.3 A fundamental distinction also needs to be made between:
  - 1.3.1 Lump sum contracts;
  - 1.3.2 An express contract (variations of the lump sum contract);
  - 1.3.3 A claim for a reasonable sum under the contract.

- 1.4 In addition, it is the scope of the works that determines when the works are complete. It is also important to consider whether the works are subject to *change*, frequently referred to as *variation*. This is of course linked to payment.

## 2 Lump Sum Contracts

- 2.1 A lump sum contract requires the completion of the works before entitlement to payment arises. Instalments might also be made, and so a distinction can be made in between:

- 2.1.1 **Entire contracts** - “an entire contract is an indivisible contract, one where the entire fulfilment of the promise by either party is a condition precedent to the right to call for the fulfilment of any part of the promise by the other” (*Cutter v Powell* [1795] 2 SmLC 1).

- 2.1.2 The determination is made by considering the terms of the contract.

- 2.1.3 An entire contract could provide for instalments. It could also provide for retention.

- 2.1.4 **Substantial performance** - The failure to entirely complete a lump sum contract does not mean that an employer can refuse to pay. The doctrine of substantial performance requires payment of the lump sum amount, subject to a deduction for any set-off or counterclaim (*Hoenig v Isaacs* [1952] 2 All ER 176 CA).

- 2.1.5 Compare this with *Bolton v Mahadeva* [1972] 1 WLR 1009 (CA). The contract price was £560 and the cost of remedying the defects was £174. At first instance the judge found that there had been substantial completion. The Court of Appeal did not accept this. This was because the contract was to provide a central heating system and the defects were such that the system did not work properly. Living in the house was uncomfortable. Work was therefore ineffective for its primary purpose of providing heating.

## 3 Completion not Achieved

- 3.1 The contractor could fail to carry out all the works. The employer could prevent completion.

- 3.2 If entire completion is a condition precedent to payment then the contractor will receive nothing. There may, however, be an exception:

- 3.2.1 An express agreement or imply a promise to pay;

- 3.2.2 Acceptance of the works in their current state;

- 3.2.3 Waiver the strict rules of the contract; or

- 3.2.4 Unpaid instalments.

3.3 Repudiation does not normally affect accrued rights for payment in respect of instalments under the contract price.

3.4 Frustration of the contract (English law). Similar to *force majeure* or impossibility.

#### 4 Exceptions to the Lump Sum

4.1 The parties are free to agree any manner of express terms based upon simple contractual principles. Many are used and developed in the construction industry:

4.1.1 Measurement-based contracts. Each unit is a lump sum contract, and then the amount of work carried out is measured and payment is made on that basis. It could be subject to a schedule or a cost plus a fixed fee or perhaps a formula. It might relate to a percentage of the cost or simply a reasonable price.

4.1.2 Cost plus percentage.

#### 5 Quantum Meruit

5.1 *Quantum meruit* means “that amount that he or she deserves”. It is also taken to mean “what the job is worth”. In effect this relates to payment of a reasonable sum for the work carried out.

5.2 It may occur in various situations:

5.2.1 There is a contract but without a fixed price.

5.2.2 There is a contract to pay a reasonable sum.

5.2.3 There is a restitutionary claim. In other words, no contract was formed but work has been carried out in expectation of payment.

5.2.4 Work has been done outside of the contract.

5.2.5 Work has been carried out under a void contract.

#### 6 Varied Work

6.1 It is common in the nature of construction work that the contractor is asked to carry out changes to the scope of the works. Most usually this is in the form of the employer (or one of the employer’s agents) changing the nature of the works by adding or omitting some element, or changing the nature and quality of the existing works.

6.2 Much more care is needed in respect of design and build contracts. They cannot be approached on the same basis as a traditional contract, where the contractor is simply building to the employer’s design. Under a design and build contract the contractor may need to change or vary some aspects of the works, but without in fact changing the contractual nature of the performance obligation.

- 6.3 The terminology can also be confusing. The expression “variation” is frequently used. However, strictly speaking a variation to a contract means that the contractual rights have been changed by agreement between the parties. In other words, the legal rights have changed. For example, the payment period has been changed from 30 days to 40 days. One party cannot do this on its own; both parties have to agree.
- 6.4 By contrast, a “change” to the works may well be within the agreed terms of the contract. The standard position is that neither party can change the nature of the works, unless the terms of the contract provide for variations.
- 6.5 To recover additional payment in respect of a change to the works a contractor will need to demonstrate:
- 6.5.1 The alleged extra work was not already included within the contractual works;
  - 6.5.2 There is an express or implied right to payment;
  - 6.5.3 That the employer requested it, or any agent ordering the work was properly authorised; and
  - 6.5.4 Any conditions precedent with regard to payment set out in the contract have been complied with.

## 7 What Comprises Additional Work?

- 7.1 The question as to whether work is additional depends upon the language used in identifying the scope of the works in the contract. Excavating a particular number of metres squared of a defined type of ground is quite different from constructing a four bedroom residential house.
- 7.2 The starting point is usually that of the lump sum contract. In other words, the whole works that are indispensably necessary to complete the contract.

## 8 Indispensably Necessary Works

- 8.1 If a contractor agrees to build a house or a railway from A to B for a lump sum of money then the courts usually infer that the contractor will provide everything indispensably necessary in order to complete the works. Examples include:
- 8.1.1 *Williams v Fitzmorris* (1858) 3 H&N 844. The contract was to build a house “to be completed and dry and fit for ... occupation”. The specification required the contractor to provide the whole of the materials mentioned or otherwise in the particulars of works. Floorboards had been omitted from the specification. The contractor refused to install them unless he was paid extra. The employer told the contractor to leave site and completed the house using floorboards left at the property by the contractor. The court refused to allow the contractor to recover any money in respect of the floorboards. The floorboards were clearly required from the language in the specification in order to complete the house.

8.1.2 In *Sharpe v San Paulo Railway (1873)* LR8 Ch. App. 597 the contractor was to build a railway line “from terminus to terminus complete”. The engineer’s original plans were inadequate. Further plans were provided and the contractor carried out 2 million cubic yards of excavation more than they had initially anticipated. The court held that the works were not in any sense additional to the contractually required performance.

8.2 **Method of carrying out the works** - See *Tharsis Sulphor & Copper Co v N’Elroy (1878)* 3 App Cas 1040. The contractor was to build a structure including cast iron trough girders. Attempts to cast the girders failed. They suggested casting the girders with increased thickness in order to overcome the problem. The employer agreed but refused to pay any increased price. The House of Lords rejected the contractor’s claim. The Lord Chancellor stated at PP1043-44:

*“On the other hand, the Respondents were in this position: they were obliged to execute the work; as I understand the contract they were obliged to execute it with the girders. If they could not cast the girders of the scantling, that is to say, of the exact thickness, mentioned in the contract, that was so much the worse for them. They ought to have known that when they undertook to execute the work in that form. Therefore they must have submitted to one of two things; either they must have refused to go on with the work, exposing themselves to the risk of being proceeded against for damages for not fulfilling their contract, or they must have increased the size, the scantling, of the girders to such an extent as would counteract the cracking to which the smaller scantlings subjected the girder.”*

8.3 In addition Lord Hatherley agreed, stating at P1050:

*“What the company permitted the Respondents to do was only for their own convenience, and that being so, there is nothing to support the claim made by the Respondents to be paid for it as extra works.”*

8.4 Compare this approach with *Turrif Ltd v Welsh National Water Development [1994]* Const LY 122, in which HHJ Stabb QC accepted that the contractor could not lay precast concrete culvert units within the tolerances set out in the specification. He held that the tolerance was impossible to achieve in a practical or commercial sense.

8.5 **Work at the engineer’s direction** – No additional payment will be accepted where the contract provides that work is to be carried out under the engineer’s directions and in the best manner to his satisfaction (*Neodox v Swinton & Pendlebury BC (1958)* 5 BLR 34).

## 9 Lump Sum Contracts Refined

9.1 A bill of quantities might be used to set out or schedule the works required under the contract. The terms of the contract, or the applicable method of measurement, will establish the status under the contract. The drawings and specifications might take

precedence; however, the price might be adjusted to reflect any errors or omissions in the measured quantities.

9.2 **Pricing errors** - A contractor will generally be liable for the calculations to arrive at the price regardless of any errors.

## 10 Omissions

10.1 The contract might provide for a party to omit work.

10.2 **PC sum** - A PC sum is a “prime cost” sum which is a precise amount of money allowed in the contract for a defined amount of work.

10.3 **Provisional sums** - This is an amount of money for work that might or might not be required. It may be *defined* if the extent and timing of it is known; it may be *undefined* in that very little is known about it. For example, a contingency for additional ground works as a result of unknown ground conditions.

## 11 Payment for Additional Work

11.1 Additional work does not necessarily or automatically lead to further payment. There must be an express or implied right to payment for that work. A variety of factors may need to be considered:

11.1.1 **Change procedures** - The contract might provide for additional work in certain specified circumstances. However, those procedures must be followed.

11.1.2 **Agreement** - There might be an express agreement for the additional work.

11.1.3 **Better materials** - If a contractor decides to use better materials then it does not automatically entitle the contractor to additional payments.

11.1.4 **Work in variance to the contract** - If the contractor carries out different work then he may not be entitled to payment for it or indeed any payment at all.

11.1.5 **Permission or request** - Permission by an employer or his agent to carry out different work is different from a request. A request to do something different may lead to payment, whereas permission is simply allowing the contractor to do something different at the contractor’s convenience. For example, an agreement to provide thicker girders may not lead to additional payment (see *Tharsis Sulphor* above).

11.1.6 **Emergency** - Perhaps in an emergency it is impossible to obtain instructions, and monies expended might then be recoverable.

11.1.7 **Increased expense known** - If an employer agrees to changing the works, then in the absence of any representation about additional costs there is no guarantee that the employer will become liable for an increased cost.

- 11.1.8 **Failure of consideration** - A contractor is not obliged to carry out additional work unless the employer agrees to pay for it.
- 11.1.9 **Contract limit** - Contracts occasionally limit the value of variations that can be ordered. Similar terms are sometimes included in letters of intent. These values should not be exceeded.
- 11.1.10 **Written instructions** - Frequently variations are to be ordered in writing and signed by the architect or engineer. A written instruction is therefore a condition precedent to payment. The particular circumstances in terms of the contract need to be taken into account.
- 11.1.11 **Breach** - A refusal or failure to give a written order when quite clearly one is needed is a breach by the employer, which will then entitle the contractor to additional money. An employer cannot rely upon its own role to avoid payment.
- 11.1.12 **An implied promise to pay** - This is an important concept. A promise to pay by the employer might be implied if there has been a waiver of a strict condition. An employer might waive the strict terms of the contract, or if the parties simply do not make any use of the provisions in the contract a court may not allow the parties to rely upon those strict provisions at some later date.
- 11.1.13 **An implied contract** - A new contract might be implied by the conduct of the parties.
- 11.1.14 **A collateral contract** - A contract “alongside” the main contract could be established by the facts, once again leading to payment for varied work.
- 11.1.15 **Work outside of the contract** - A restitutionary claim might arise under which the employer is to pay a reasonable price for the works carried out at his request.

## 12 Typical Variation Provisions

- 12.1 The variation clauses that appear in the standard form contracts most usually comprise the following elements:
  - 12.1.1 The ability for the architect or engineer to give instructions in respect of the carrying out of the works. These do not in themselves necessarily amount to variations.
  - 12.1.2 The power for an architect or engineer to issue variations to the works.
  - 12.1.3 The power for the engineer or architect to request quotations in respect of potential variations. The work can then be instructed at a fixed cost and known timescale as a result of the contractor’s quotation.

- 12.1.4 A contract should establish the valuation rules for the variation.
  - 12.1.5 An extension of time mechanism can then establish whether any additional time arises in respect of the variation.
  - 12.1.6 Notices and various condition precedents are often included, such as a requirement that the variation is in writing and signed, or that any additional time and money is notified by the contractor to the employer or his agent within a defined period of time.
- 12.2 JCT Standard Building Contract (Lump Sum)
- 12.2.1 Condition 3.10 - The Contractor is required to comply with any instruction issued by the Architect/Contract Administrator.
  - 12.2.2 Condition 3.11 - If the Contractor fails to comply with an instruction within 7 days, the Employer may employ and pay other persons to execute the instruction.
  - 12.2.3 Condition 3.12 - Instructions not given in writing have no immediate effect; however, the Contractor is required to confirm any verbal instruction within 7 days.
  - 12.2.4 Condition 3.14 - The Architect/Contract Administrator may issue instructions requiring a Variation.
  - 12.2.5 Condition 5.1 - Definition of a Variation
  - 12.2.6 Condition 5.2 - Variations are valued by agreement, by the Quantity Surveyor or by acceptance of a Variation Quotation.
  - 12.2.7 Condition 5.3 - Architect/Contract Administrator may instruct the Contractor to provide a Variation Quotation in accordance with Schedule 2.
  - 12.2.8 Condition 5.4 - Contractor is entitled to be present at the time of any measurements carried out for the purpose of a Valuation by the Quantity Surveyor.
  - 12.2.9 Condition 5.5 - The Contract sum is adjusted to take into account each Variation.
  - 12.2.10 Condition 5.6.1.1 - Variation works of similar character, conditions and quantity are valued at Contract rates and prices
  - 12.2.11 Condition 5.6.1.2 - Variation works of similar character but dissimilar conditions and/or dissimilar quantity are valued at Contract rates and prices plus a fair allowance for such dissimilar conditions and or quantity.



- 12.2.12 Condition 5.6.1.3 - Variation works not of similar character are valued at fair rates and prices.
- 12.2.13 Condition 5.6.1.4 - Variation works where the Approximate Quantity is a reasonably accurate forecast of the quantity of the work are valued at the Contract rates and prices.
- 12.2.14 Condition 5.6.1.5 - Variation works where the Approximate Quantity is not a reasonably accurate forecast of the quantity of the work are valued at the Contract rates and prices plus a fair allowance for such difference in quantity.
- 12.2.15 Condition 5.6.2 - Variation works which result in an omission to the Contract are valued at the Contract rates and prices.
- 12.2.16 Condition 5.7 - When variations cannot be valued in accordance with condition 5.6 or 5.8 then daywork rates are used. Variations are valued based upon recorded time, recorded material and plant usage.
- 12.2.17 Condition 5.8 - Variations in respect of CDP must make allowance for work involved in the preparation of the relevant design work.
- 12.2.18 Condition 5.9 - If there is a substantial change in the conditions under which any other work is executed then such other work shall be treated as variation.
- 12.2.19 Schedule 2.1.1 - Any instruction of the Architect/Contract Administrator requesting a Variation Quotation must provide sufficient information to allow the Contractor to provide that quotation. The Contractor has 7 days to notify the Employer that the information provided is not sufficient.
- 12.2.20 Schedule 2.1.2 - The Variation Quotation comprises: the adjustment of the Contract Sum, adjustment to the Completion Date, any direct loss/expense, cost in preparing the quotation (where applicable), the additional resources required to carry out the variation, the methods of carrying out the variation and (where applicable) the base date.
- 12.2.21 Schedule 2.3 - The Contractor has 21 days after receipt of instruction to submit its Variation Quotation and the quotation remains open for acceptance for a period of 7 days.
- 12.2.22 Schedule 2.4 - The Architect/Contract Administrator is required to confirm acceptance of the Variation Quotation within the period for acceptance (see Schedule 2.3 above).
- 12.2.23 Schedule 2.5 - If the Variation Quotation is not accepted the Architect/Contract Administrator may either value the variation in accordance with the valuation rules (Conditions 5.6 to 5.10) or instruct that the variation is not to be carried out. A fair and reasonable cost of preparing the Valuation Quotation is to be added to the Contract Sum.

### 13 Can Work be Deleted or Omitted?

- 13.1 Once the contract has been agreed then the contractor is not only obliged to carry out the work, but they also have an entitlement to perform all of the contract work. Standard form contracts occasionally provide for the possibility to omit work. However, this is usually taken to mean that work is omitted and not carried out at all. The purpose of these provisions is not to allow the employer to omit works and then give that work to another.
- 13.2 See for example clause 13.1(d) of the FIDIC Red Book (1999) which provides for the omission of any work unless it is going to be carried out by others.
- 13.3 In *Abbey Developments Ltd v PP Brickwork Ltd* (2003) CILL 2833 the court confirmed that a contractor had a duty and a right to carry out the work. Express variation provisions were not to be interpreted so as to allow the contractor to be deprived of its chance to complete the works.
- 13.4 In *Trustees of Stratfield Saye Estate v AHL Construction* (2004) EWHC 3286 TCC, shortly after the commencement of the works the employer cancelled the project. The contractor commenced an adjudication to claim compensation. The court considered the enforceability of the adjudicator's decisions, and whilst doing that approved *Abbey Developments*. The employer's power to omit works was limited, and the basic nature of the project could not be changed by an entire omission.
- 13.5 **Distinction between physical works and arrangement for the carrying out of the works.**
- 13.6 In *Strachan & Henshaw Limited v Stein Industrie (UK) Limited and GEC Alsthom Limited* [1997] (87 BLR 52), Strachan & Henshaw ("S & H") were engaged as subcontractors by Stein Industrie (UK) ("Stein"), for work relating to the installation and commissioning of heat recovery systems generators (HRSGs) in relation to the construction of a combined-cycle gas turbine power station on behalf of National Power plc. GEC Alsthom ("GECA") were engaged as the Main Contractor.
- 13.7 The subcontract incorporated the Model Form General Conditions of Contract (MF/1). Under the subcontract S & H were required to employ 150 workmen and arrangements had to be made for the provision of facilities for these workmen to clock in and clock out and for their meal breaks. Originally S & H's tea cabins were located in close proximity to where the operatives were to be working.
- 13.8 There were pre-contract discussions between the parties and it was clear that S & H raised the issue of the location of such cabins as a matter of importance to avoid productivity losses occasioned by "walking time". Shortly after commencement on site GECA gave instructions that the tea cabins were to be removed. In complying with this instruction S & H re-installed the cabins some half a mile from the HRSGs. S & H

calculated that this resulted in productivity losses in the region of some £1.6 million. S & H claimed that the relocation of the cabins and the clocking-in point some half a mile from the HRSGs was a variation, or in the alternative a breach of contract, following representations made to them pre-contract. The claim was referred to arbitration and subsequently on appeal to His Honour Judge Newman QC. The Official Referee held that Condition 27 defining variations did apply to S & H's claim and also held that Condition 44.4 of the subcontract would not bar any claim by S & H for breach of Contract. It was on these two main issues that Stein and GECA appealed.

- 13.9 The Court of Appeal held that the instruction to move the cabins was not a variation - that is, an alteration in the "work to be done" by S & H under the contract. S & H had argued that the instruction had given rise to a change in the way the work was to be done, and therefore constituted a variation. The Court of Appeal rejected this contention, drawing a distinction between the actual work to be done by S & H under the subcontract and the actual arrangements made by GECA to carry out that work.
- 13.10 Further, the Court of Appeal upheld the arbitrator's decision that the natural meaning of Condition 44.4 of MF/1 does constitute a bar on a party's right to bring claims outside of MF/1 by way of a claim for breach of contract or misrepresentation. Accordingly, under MF/1 the contract provisions are exhaustive of the parties' rights to claim additional monies.

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