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## Guide to administering HIA Trade contracts

### Project trade v period trade contract - what is the difference?

Project trade contract are for one-off subcontracts. The contract price, scope of works, commencement and completion dates is included in the one contract document.

On the other hand, Period Trade contracts are used when there is continuing relationship and sets out terms and conditions on which work will be done for a builder by a trade contractor for a set period. They avoid the necessity and expense of signing a new project trade contract for every job and are used in conjunction with a Work Order. Each individual Work Order within the period will set out the contract price and scope of works as well as the commencement, completion and defects liability dates.

### A Guide to the Schedules

#### Who are the “Parties?”

The **trade contractor** is the subcontractor undertaking the works.

The **principal contractor (PC)** is the builder/ head contractor.

#### The scope of the trade works

There may be insufficient space to precisely describe all of the works. Further details should be in the attached plans and specifications. If the plans refer to the head contract, the trade contractor should obtain a copy of the major working drawings and plans.

#### Contract price

The parties should read the contract to understand their rights and obligations before agreeing to a contract price. It is important that you know who bears the risk in certain situations such as defects etc when negotiating the duration of the project and terms.

#### Payment terms

Some states have specific requirements on payment terms, In Queensland, the contract can only provide for a maximum of 15 days between the date of the payment claim and the date of payment. If the contract provides for a longer period the clause is void and payment is due 10 days after the progress claim is made.

In Western Australia, the contract can only provide for a maximum of 50 days between the date of the payment claim and the date of payment. If the contract provides for a longer period the clause is void and payment is due 10 days after the progress claim is made.

#### Defects liability period

This is the period that the trade contractor is required to attend to rectify and defects in the works.



**Clause –by– Clause Guide to the General Conditions**

**Clause 1 – Trade Works**

Clause 1(a) sets out the *trade contractor's* obligations when carrying out and completing the *trade works*.

The works must be completed in accordance with plans and specifications and to the reasonable satisfaction of the principal contractor (*PC*). This clause also imposes the obligation upon the *trade contractor* to construct the works in accordance with any direction of the *PC*.

Clause 1(b) sets out the *trade contractor's* obligations to notify the *PC* should there be an error in any contract documents or the plans.

By clause 1(c) the *trade contractor* must supply all of the necessary tools of trade to complete the works - often during a project it will become apparent that additional or different materials, equipment or other machinery are required which the *trade contractor* may not have considered at the time it tendered for the project, or when the *contract* was being negotiated.

Clause 1(d) permits the *trade contractor* to subcontract out the works. The *trade contractor* will however remain responsible regardless of whether they are ultimately subcontracted to a third party. Similarly, the *trade contractor* will be liable for all acts, omissions and defaults of the subcontractors as if the *trade contractor* had committed the defects themselves.

**Clause 2 – Variations**

A variation is a change to the work required under the *contract*. In this clause a variation is a changes to the scope of the works and can mean any change including any addition, increase, decrease, omission or deletion to or from the Works or change to cost.

If the *PC* instructs a variation then the *trade contractor* is obliged to carry out the variations. By

clause 2(a) this instruction should be in writing. This is the golden rule.

Some variations may be:

- unavoidable such as a result of latent conditions
- because the client under the head contract requires a change; or
- for the convenience of the *trade contractor*.

There is no requirement that the *PC*, agree to a variation for the convenience of the *trade contractor*.

To avoid disputes all aspects of the variation (that is, both how long it will take and how much it will cost) should be agreed at the time of its instruction.

**How to cost the variation?**

If you cannot agree a cost then the *PC* is entitled to determine a reasonable amount.

In assessing the value of any variation, there are different factors that could go to make up a reasonable rate such as:

- a) the stage of the project at which the work is directed to be changed.
- b) whether the variation will make that work either more difficult and expensive, or alternatively simpler and less expensive; and
- c) the quantity of work to be done where an increase (or decrease) may add to the complexity (or simplicity) if there is a difference.
- d) *trade contractor's* non-time related overheads and preliminaries and off-site overheads and profit.

The contract price is adjusted as the next progress claim stage.



**Clause 3 – Acceptance of Base Works**

It is important that the *trade contractor* inspects the prior works (base works) as soon as is practicable after he or she has access to the Site.

If any defects or matters which in the *trade contractor's* opinion renders, or is likely to render, the base works unsatisfactory, then the *PC* should be notified in writing before commencing works.

There is a risk that if the *trade contractor* fails to notify the *PC* of any defects or matters which should have been detected at the time by a competent contractor and they are subsequently proves to be unsatisfactory then any work which is required to make the base works satisfactory will be at the *trade contractor* own expense.

If the *PC* agrees then the *PC* should issue a direction to the *trade contractor*. The value of any work carried out by the *PC* by reason of that direction is a variation.

**Clause 4 – Warranties**

The purpose of this clause is to ensure that the *trade works* are:

- a) carried out in a proper and skilful manner meaning – with a standard of workmanship which is consistent with the industry standards
- b) constructed with materials which are suitable, new and free of defects, and
- c) that the *trade contractor's* holds all licences required to carry out the works.

**Clause 5 – Defects**

**This clause requires the *trade contractor* to rectify defects in the time specified within the defects liability period stipulated on the front page of the contract.**

This may mean that *trade contractor* has to demolish or correct the defective workmanship, or replace faulty materials. It will need to be done at the *trade contractor's* expense.

If the *trade contractor* does not comply with an instruction to rectify, the *PC* may opt to simply

accept the defective work, with the amount incurred to correct the defect being a debt due from the *trade contractor*.

**Clause 6 – Indemnity**

Under this clause the *trade contractor* provides an indemnity in favour of the *PC* for breach of the *contract*. Legal advice should be sought before taking any action in respect of the indemnity.

All indemnities provided survive termination of the *contract* and may be relied upon and enforced by in the event that the *contract* has been terminated.

**Clause 7 – Insurance**

The purpose of this clause is to make sure the appropriate insurances are in place before the works start.

The *trade contractor* must take out different types of insurance:

- a) Public Liability Insurance for an amount not less than \$5,000,000 per claim;
- b) Workers Compensation Insurance:

*The trade contractor must ensure that each of its Subcontractors legally required to do so has similar insurance covering its statutory liability to employees.*

*This insurance must be held in accordance with the laws applicable in the relevant State or Territory in the minimum amount required by law.*

- c) Personal accident and disability insurance (unless the *trade contractor* is not personally undertaking the work and established that it is covered by the *PC's* workers compensation insurance).

These insurances should be in place from the contract date and before any works are commenced and satisfactory evidence should be provided to the *PC* of the existence of the policies.

**Clause 8 – Health and Safety**



**This clause specifies key responsibilities of the *trade contractor* in relation to safety on the Site.**

This clause makes it clear that the *trade contractor* is responsible for ensuring that it and all subcontractors comply with all Statutory Requirements and other requirements of the *contract* in relation to occupational health, safety and rehabilitation management.

In this regard, where appropriate the subcontractor should document, submit and implement “Work Method Statements” in accordance with OHS legislative requirements.

**Clause 9 – Damage and Site Cleaning**

Under this clause, the *trade contractor* is responsible for any damage caused by the *trade contractor* and is also responsible for keeping the Site clean and tidy – i.e the removal of all rubbish, materials and the *trade contractor’s* own tools, plant and equipment.

This is important for the safety and health of all who work on the site.

**Clause 10 - Payment**

The *PC* must pay the *trade contractor* the contract price in progressive payments as per the Payment Schedule.

To be paid the *trade contractor* must first issue a payment claim or invoice.

The *trade contractor* must include evidence to the *PC* via a statutory declaration that all amounts in respect of the *trade contractor’s* own subcontractors and employees’ payments and other obligations such as workers compensation and payroll tax premiums have been paid or otherwise discharged. The purpose of this clause is to ensure that the *trade contractor* pays its workers, subcontractors, suppliers and consultants.

The *PC* is entitled to withhold from any payment otherwise due to the *trade contractor* any amounts disclosed as unpaid under this clause.

Payment is on account only. This preserves the *PC’s* right to subsequently make claims in respect of work even if progress payments have been made.

**Clause 11 – Extension of Time**

This clause deals with Extensions of Time for delays.

For the *trade contractor* to be entitled to an extension of time under the *contract*, it must satisfy the following requirements:

Event is caused by the *PC* and is beyond the control of the *trade contractor*

The *trade contractor* will be disentitled to the extent that it has contributed to the delay or failed to take all necessary steps to preclude the cause of the delay and to avoid or minimise the consequences of the delay.

Qualifying events of delay

The qualifying events applicable in the circumstances depend upon whether the event is claimed to have delayed the *trade contractor* before or after the relevant Date for Completion.

An act, default or omission of the *PC* would include:

- a) a breach of the *contract* by the *PC*;
- b) any other act or omission (need not be wrongful); or
- c) a Variation which has been directed by the *PC*.

Timing of claim

The *trade contractor* has two (2) days to claim an EOT.

**Clauses 13, 14 and 15 – Default, Suspension and Termination**

**General**

These clauses set out the basis for suspending or terminating the *contract*.



A party is in default if:

- it commits a substantial breach of the *contract*, or
- becomes insolvent.

**Example of contractor’s default**

An example of contractor’s default is failing to carry out the *trade works* with professional skill and care and competence i.e defective works.

To support any allegations of default, the parties should keep proper documentation of the circumstances giving rise to such events, including exchanges of correspondence, site records, minutes etc.

**Notice to remedy the default**

Before a party can terminate the *contract* by reason of the other parties’ substantial breach of the *contract* they must give the defaulting party the opportunity to remedy the breach.

The defaulting party should be allowed 3 full days to make a positive response.

If the defaulting party does not respond satisfactorily to the notice to remedy the aggrieved party may then issue a termination notice. The contract is terminated when the notice reaches the other party.

Such a notice should not be issued without obtaining appropriate legal advice first.

**Clause 16 – Head contract ended**

If the *PC*’s contract with its client ends then the *PC* may end the subcontract.

In such a case, the *trade contractor* is entitled to be paid for work done to date such as:

- all the work the *trade contractor* has completed;
- the cost of commitments for *materials*; and
- costs of leaving the site.

However, the *trade contractor* is not entitled to claim for lost profits for the contract ending.

**Clause 17 – Administration**

The *trade contractor* is required to attend any site meetings to discuss matters related to the work being carried out.

**Clause 18 – Copyright**

The copyright for any plans provided to the *trade contractor* rest with the *PC*.

Additionally the *trade contractors* cannot use these plans for any project but this one.

**Clause 19 – Definitions**

This clause contains definitions of important terms used throughout the *contract*. All defined terms are identifiable as they are in italics.