CLIENT COMMUNIQUÉ

For over 10 years, EPM has held a preference for an amended form of Australian Standard 4000:1997 as the general conditions of contract by which clients should procure construction services. During this time, EPM and Kennedys have regularly collaborated in an effort to improve project-specific amendments of the standard on the principle that risk should be allocated to the party who is best able to manage the risk.

On 23 January 2015, Standards Australia invited public submissions in relation to draft General Conditions of Contract AS 11000 and confirmed its intention to eventually supersede AS 2124:1992 and AS 4000:1997 with AS 11000.

The committee within Standards Australia that is responsible for AS 11000 is chaired by Professor Ian Bailey, who represents the Society of Construction Law and the Australasian Procurement and Construction Council. Professor Bailey said, "The proposed new general conditions of contract in AS 11000 provide a broadly balanced approach to risk allocation in language which is focused on brevity and certainty. They include a new early warning procedure based upon an express good faith obligation, which is intended to assist in the management and resolution of issues under contracts."

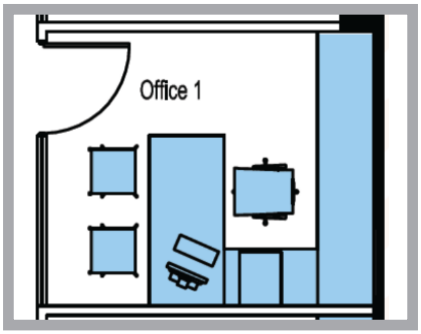
Dr Bronwyn Evans, Chief Executive Officer of Standards Australia said "The Standard on General Conditions of Contract is used widely and underpins many major business and public contracts. It is timely to update the Standard to bring it in line with new legislation and changing business needs. As part of our open and transparent standards development process, we welcome public feedback on the revisions".

On 25 March 2015, EPM and Kennedys made a submission to Standards Australia proposing eight amendments to draft AS 11000 (attached). The most significant amendment proposed by EPM and Kennedys addresses an issue that I know many clients are keenly interested in – the responsibility of a contractor in circumstances where there are ambiguities or inconsistencies in in design documents. The submission to Standards Australia on this matter is as follows:

"In my experience over the 15 years that EPM Projects has been administering AS2124 and AS4000 in the capacity of the Superintendent, the overwhelming majority of claims for extension of time to the date for practical completion and an increase in the contract sum stem from an assertion by a Contractor that the interpretation of the contract documents by the Superintendent relating to inconsistency, ambiguity or discrepancy in the contract documents has caused the Contractor to incur more cost than otherwise would have been incurred had the direction not been given.

The difficulty for the Principal with this approach is that the Principal becomes liable to the Contractor for the cost incurred by the Contractor over and above the cost that the Contractor would have incurred to construct the Works in accordance with the Contractor's (possibly unreasonable) interpretation of the Contract documents. This is because with the exception of latent conditions, neither sub clause 11.3 nor any other provision in DR AS 11000:2015 makes the Contractor responsible for costs incurred by the Contractor in carrying out the work under the Contract in a manner that should have been anticipated by a competent Contractor at the time of the Contractors tender.

For example:
The Contract documents include a drawing showing a door into an office, being the only access into and out of the office. The Contract documents specify the type of door, door jamb assembly and door closer but don't show or specify the type or number of hinges to connect the door to the door jamb assembly or the type of screws to fasten the hinges to the door and door jamb assembly. The Contract documents also fail to show or specify a door handle on either side of the door. A plan of the office and the door are shown in the diagram below:



It is somewhat inconceivable that a competent Contractor would assert that it could not have anticipated the need for hinges, screws and at the very least a handle on the inside of the office door. Yet in the circumstances where the Superintendent were to direct the Contractor pursuant to sub clause 11.2 of DR AS 11000:2015 to supply and install hinges, screws and a door handle on the inside of the office door, then in

accordance with sub clause 11.3 the Contractor would have an entitlement to the cost that it incurs for this.

The touchstone should not be cost incurred by the Contractor. This erodes the concept of inclusive rates and, alternatively, the lump sum. It has the effect of turning anything not anticipated by the Contractor into a "cost -plus" exercise. The touchstone should be whether the Contractor has had to undertake more or less work than a competent contractor ought to have contemplated having regard to the contract documents. In other words a material variation arises.

We propose an amendment to clauses 11.3 and 31.1 to:

1. create some objective standard as to what should have been anticipated by the Contractor; and
2. make the relevant touchstone the scope of work as opposed to cost.

In the example above under the proposed amendment, hinges of an appropriate size, quantity and location and corresponding screws and at the very least a handle on the inside of the office door would be deemed to be included in the contract sum. In this case, the handle on the outside of the office door would not be "necessary for… completing the work under the Contract" as the door could be opened simply by pushing it, and closed by letting go of the door (because of the door closer). Consequently If the Superintendent directed the Contractor to supply and install a type of hinge, screws or door handle (on the inside of the office door) that exceeds the type that is necessary for enabling the operation of the door, or directed the Contractor to supply and install a door handle on the outside of the office door, then this would be a direction for a variation pursuant to sub clause 39.2(d)."

On the basis of the foregoing, EPM and Kennedys have proposed the following amendment to clause 11.3 of draft AS 11000:

"Delete the words "to incur more or less cost than otherwise would have been incurred had the direction not been given" and replace with:

"to undertake works materially different from those that a competent contractor in the position of the Contractor, ought to have anticipated based upon the contract documents."

EPM and Kennedys have also proposed the inclusion of the following "warning" in the preface of AS 1100:

"These General Conditions of Contract do not preclude the Contractor being required to undertake design work necessary for the proper performance of the Works."; and "Where a lump sum is accepted by the Principal under this Contract these terms have the effect that contract sum includes all things reasonably necessary for and incidental to the proper construction of the Works."

I will update you on the outcome of our joint submission in due course.

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Kennedys
Legal advice in black and white

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