

SEVERIJN HULSHOF

A D V O C A T E N

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Let's regulate everything!

91. BEPROEVING AANVULLEND

In aanvulling op artikel 00.02.08.21 dient voor oplevering ten minste 1 toiletpot door een bouwvakker met een minimaal gewicht van 120kg te worden beproefd door de pot te voorzien van tenminste 1,25kg aan fecaliën. Voor gebruik van de betreffende toiletspoeling dienen deze fecaliën door de directie te worden geïnspecteerd op samenstelling, kleur en geur. Deze inspectie dient te gebeuren zonder enige vorm van hulpmiddelen c.q. beschermingsmiddelen en op een maximale nasale afstand van 150mm. De aannemer dient hiervan een fotorapportage te maken en is verplicht bij de officiële opening van het gebouw hiervan een PowerPoint presentatie te geven.

91. Additional testing

In addition to article 00.02.08.21, a construction worker with a minimal weight of 120 kilo shall test at least 1 toilet bowl by applying to the bowl at least 1,25 kilo of faecal matter. Before the use of the toilet flush, the faecal matter shall be inspected by the Engineer regarding its composition, colour and odour. This inspection shall take place without any form of appliances or protective measures and shall take place at a maximum nasal distance of 150mm. The contractor shall make a photo report of this and shall be bound to present this report in the form of a Power Point presentation at the official opening of the building

Variations (a little background)

Dutch law provides for a basic mechanism for changes (7:755 Civil Code). The mechanism holds that:

- if the Employer requires additions to or changes in the works that was contracted, then
- the Contractor may only claim additional payment if and when he pointed out to the Employer that the required changes would cost more unless:
- the owner should have understood anyway that the required changes would cost more.

Variations (a little background)

→ This mechanism applies until it is opted out of.

So...

What's the point of seemingly endless and complicated contractual clauses aimed to more or less arrive at the same point?

Variations: an example

- Example clauses were taken from a contract for a project under Dutch law, in The Netherlands;
- Contract in English, Dutch law applies;
- Variations alone require 3.5 pages of clauses
- Contract was issued by the Employer

Example clause

Instructions of the Owner (article 13.1b)

- (b) An instruction under Clause 1 (a) above will be given by OWNER completing the authorisation on the relevant VARIATION FORM and issuing such form to the CONTRACTOR and such instruction will then constitute a VARIATION. On receipt of any such VARIATION the CONTRACTOR shall proceed immediately as instructed even though the amount of any adjustment to the CONTRACT PRICE and/or the SCHEDULE OF KEY DATES may not have been determined.

So basically: no variation form? No instruction.

No agreement on the price? Execution nonetheless..

Example clause

Variations generally (article 13.2 b and c)

- (b) The CONTRACT PRICE and/or the SCHEDULE OF KEY DATES shall be subject to adjustment only as a result of a VARIATION. The CONTRACTOR shall not be entitled to receive a VARIATION to cover any instruction, decision or act of OWNER, which may be made or given in order to ensure that the CONTRACTOR complies with any of its obligations under the CONTRACT.
- (c) A VARIATION shall in no way affect the rights or obligations of the parties except as expressly provided in that VARIATION FORM. Any VARIATION shall be governed by all the provisions of the CONTRACT.

So:

- for extra payment and time you need a variation
- No variations given for work of which the Owner reckons it is in the contract already
- And it should all be in the variation form

Example clause

13.3 CONTRACTOR'S Right to Request a VARIATION

- (a) If the CONTRACTOR considers that an occurrence has taken place for which it is entitled to receive a VARIATION the CONTRACTOR, before proceeding with any work affected by such occurrence, shall request immediately in writing that OWNER issue a VARIATION. Any such request shall include details of the occurrence including any dates and the Article or Articles of the CONTRACT under which the CONTRACTOR considers itself to be entitled to a VARIATION. Such occurrences shall include but not be limited to the following:
- (i) An instruction from OWNER, whether contained in drawings or specifications issued by OWNER or not, which in the opinion of the CONTRACTOR constitutes a revision to the WORK.

Hang on?! An instruction could only be given through the relevant variation form? (13.1b)

Example clause

Article 13.3 b

- (b) If the CONTRACTOR fails to submit requests for VARIATIONS in accordance with Clause 13.3 (a) when it considers or should reasonably have considered that an occurrence has taken place for which it is entitled to receive a VARIATION and/or fails to provide supporting estimates in accordance with Clause 3(a) above and Clause 4 below respectively the CONTRACTOR shall forfeit any right to receive such VARIATIONS and any rights concerning adjustment to the CONTRACT PRICE and/or the SCHEDULE OF KEY DATES.

Ah.. So no point getting exited about nothing; if the contractor fails to notice the implied instruction all is lost..

Example clause

Or is it now?

13.5 **Adjustments to CONTRACT PRICE and SCHEDULE OF KEY DATES**

Adjustments to the **CONTRACT PRICE** and **SCHEDULE OF KEY DATES** relating to any **VARIATION** shall be made as follows:

Wherever possible the effect (if any) of a **VARIATION** on **CONTRACT PRICE** and **SCHEDULE OF KEY DATES** shall be agreed before the instruction is issued or before work starts, using the estimates prepared by the **CONTRACTOR** in accordance with Clause 4.

And here I was thinking that a variation should follow the instruction instead of the other way around?

13.6 VARIATIONS in respect of delay and/or additional cost

OWNER will authorise a **VARIATION** if the **CONTRACTOR** can show that it has suffered delay and/or incurred cost as a direct result of any of the following:

- (a) failure of **OWNER** to comply with relevant contract provisions in respect of drawings and/or specifications and/or other information;
- (b) failure of **OWNER** to comply with relevant contract provisions in respect of Article 3.0 of Section 3.0 SPECIFIC CONDITIONS OF CONTRACT - "MATERIALS, EQUIPMENT, SERVICES AND FACILITIES PROVIDED BY OWNER";
- (c) **information supplied by OWNER for which OWNER is liable under the terms of the CONTRACT and which is incorrect**, other than information included in the CONTRACT to which the provisions of the Article headed THE RESPONSIBILITY OF THE CONTRACTOR TO INFORM OWNER shall apply.

Under any such VARIATION and notwithstanding the provisions of Clause 5(a) above the **CONTRACTOR** will be entitled to such adjustments to the **CONTRACT PRICE** and the **SCHEDULE OF KEY DATES** as are fair and reasonable taking into account all relevant factors including the following:

- (i) any acceleration ordered by **OWNER** to overcome all or part of any delay in accordance with Clause 1(a);
- (ii) that the **CONTRACTOR** has an obligation to mitigate the effects of any such failure;
- (iii) that the **CONTRACTOR** is entitled to recover necessary direct additional cost which includes any necessary additional overheads but not profit.

Example clause (Wrap up)

- So basically a variation order is imperative for the Owner in case of extra time and costs result from circumstances for which the Owner is liable?
- What does this do to the rather restricted clauses above? No instruction still not to worry?
- How much better is this extensive contractual arrangement than the basic system that the law already provides?
- Do drafters of such clauses actually consider how they will work out?
- And how much room does this leave to potential arbitrators?



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