

**[VARIATIONS] [CHANGES]**

*Comment: “Variation” could be interpreted so as not to include omissions, whereas “Change” could be interpreted more broadly to include omissions.*

**1. Variation Right**

1.1. The [Employer] and/or the [Engineer] and/or the [Employer’s Agent] shall have the [right] [power] to instruct Variations on the Works.

*Comment: the party responsible for administering the contract on the side of the owner, being the employer itself, or a project manager or the engineer, is typically entitled to instruct variations or changes to the works. Depending on the type of contract and jurisdiction, this entitlement may be shaped as a right (perhaps with a more regulated procedure) or as a power (with a shape that may show more discretionary features).*

1.2. Instructions on Variations shall be always in writing, and issued in the form of a Variation Order.

*Comment: an explicit form of instruction is advisable, particularly in jurisdictions where instructions/orders are often given verbally or through other informal or improper ways.*

1.3. Variations may be instructed at any time prior to the [issuance of the Preliminary Completion Certificate] [issuance of the Completion of Works Certificate] [expiration of the Defects Liability Term].

*Comment: the right or power to instruct variations should have a temporal limitation. This limitation may be as early as the issuance of the Preliminary Completion Certificate (the works are finished, only pending testing, correction of non-essential defects, completion of non-essential works, etc.), or as late as the end of the Defects Liability Term. How early or how late the variations right may be exercised may have a significant impact on Contractor’s exposure to liabilities.*

1.4. If upon receipt of a Variation Order the Contractor does not give reasoned notice of its inability to execute the Variation within YZ days of receiving the Variation Order, the Contractor shall be bound by such Variation Order.

*Comment: Contractors should be allowed a reasonable to time to analyze any Variation Order, as way to mitigate potential discretionary decisions by [Employer] [Engineer] [Employer’s Agent] particularly under the “obligation to comply with the owner’s/engineer’s instructions” present in many construction contracts. Reasons to object a Variation Order may include: variation is against the law; variation is materially different from the original scope of work; variation clearly exceeds the Contractor’s capabilities; variations are instructed to be performed within an unreasonable timeframe; variations may imply safety or suitability issues for the works. This clause*

*may trigger the need to provide for some time for the owner/engineer to evaluate Contractor's comments regarding the Variation Order, and cancelling, confirming, or modifying such Variation Order, which, in turn may require the repetition of the process or the initiation of a potential claim.*

1.4. The [Employer] and/or the [Engineer] and/or the [Employer's Agent] may request in writing that the [Contractor] research the financial and scheduling implications of any Variation tendered by the [Employer]. The [Employer] must provide the [Contractor] all relevant information about the proposed Variation to facilitate the analysis.

1.5. The [Contractor] shall provide to the [Employer] and/or the [Engineer] and/or the [Employer's Agent] a detailed cost estimate of the proposed Variation based on the [Cost Plan] within XXX working days of receipt of such written request. This cost estimate shall include all costs, rates, fees and items detailed in article 3.3. below, as well as any extension of time required for the completion of the Works.

1.6. The Contractor shall not make any Variation to the Works without an appropriate Variation Order issued by the [Employer] [Engineer] [Employer's Agent] in accordance with this clause, with the exception of Variations necessary in case of emergencies or situations where there is an immediate threat to any persons' health or safety, or to the Project's structural stability or integrity.

*Comment: the no-variation-without-an-order rule should admit some degree of flexibility to allow Contractor to act in extraordinary circumstances that may put the project in danger or threaten people's general safety and health, without bearing a potential contract breach risk.*

1.7. The Contractor may submit to the [Employer] [Engineer] [Employer's Agent] proposals on variations on Works, at any time prior to the [issuance of the Preliminary Completion Certificate] [issuance of the Completion of Works Certificate] [expiration of the Defects Liability Term]. Variations proposed by the Contractor shall be based on acceleration methods or strategies, reduction of costs, technological improvements, or on any other aspects that may benefit the Employer.

*Comment: this clause is intended to benefit from the Contractor's expertise and experience particularly in terms of value engineering and when the Contractor did not have responsibility on the design phase of the project.*

1.8. The Contractor's proposal shall include all matters relevant for execution of the Variation including any modifications to the programme, methodology and its proposed valuation for the Variation. If such proposals are accepted (whether as submitted or with modifications) the [Employer] [Engineer] [Employer's Agent] shall issue an appropriate Variation Order under this clause.

## **2. Definition of Variation**

2.1. A Variation means:

- (a) changes in the quantity of Works;
- (b) changes in the quality of Works;
- (c) changes on the location of Works;

(d) the demolition, omission or substitution of Works; and/or

(e) changes in the Contractor's obligations under the Contract or restrictions imposed by the Employer in relation to matters such as, access to or use of the site, limitations of working space and/or of working hours, the execution, timing or completion of the Works in any specific order or to any specific timescale.

**OR**

2.1. A Variation means an alteration of Works to be performed regarding its design, methodology, sequence, quantity, quality or working conditions whether by way of substitution, addition or omission.

**OR**

2.1. A Variation means any change to the original contract description of Works.

2.2 Subject to Clause 2.3, a Variation shall include any changes as aforesaid which may alter the ultimate use to which the Works will be put.

2.3 A Variation shall exclude any:

- (a) addition to Works that constitute a cardinal change or which otherwise bears no reasonable relationship to the original contract description of Works; and
- (b) omission of any part of the Works that is or will be awarded to a third party [unless the Contractor is already in culpable delay and/or breach of contract at the time of the variation instruction and it is issued in good faith to reasonably assist the Contractor to recover its delay or otherwise mitigate its breach of contract (as the case may be)].

*Comment: the definition of Variation is the core of the variations clause. It may differ substantially depending on the type of contract, the type of project, the jurisdiction, among other factors. Clear language is of the essence. A clear and comprehensive description of the works is just as important as a clear and comprehensive definition of variations. Technical advisors for the employer and the contractor should ensure that the employer's requirements clearly and comprehensively describe the works. This is most important in the context of design and build procurement as design is an iterative process so there can often be a blurring of lines between design development (developing/clarifying existing requirements) and variations (changing of existing requirements). A clear description can be complemented by thorough site investigations and condition surveys.*

**3. Valuation**

3.1. The value of a Variation shall be agreed by the [Employer] [Engineer] [Employer's Agent] and the Contractor.

*Comment: the first option should be allowing the parties to freely agree on the cost and time impact of any Variation. Thought should be given to the matters that the parties should have regard to in trying to reach agreement. For example, the parties should have regard to (i) whether the variation involves work of a similar type to work already priced in the cost plan; (ii) the market rate for such work if it is not priced in the cost plan; and (iii) any additional costs arising from the variation which need to be included in the*

*valuation (additional site overheads, for example). Although these matters are set out in clauses 3.2 and 3.3, they should be referenced in clause 3.1 so the parties have some guidance when trying to agree a valuation (but they will not necessarily be bound by this guidance unless they have failed to reach agreement, in which case clauses 3.2 and 3.3 become operable).*

3.2. If the parties cannot reach an agreement on the value of a Variation, the following valuation parameters shall apply:

(a) If the Variation requires changes to work similar to work in the Contract Documents, then the same rate under the Contract shall be used for valuing a Variation;

(b) If a Variation requires changes to work not similar to work contemplated in Contract Documents, then the Variation shall be measured and valued at fair market rates and prices;

(c) Fair market rates and prices shall also be applied to value the Variations set forth in article 2.1.(e) above.

*Comment: The approaches towards valuation of Variations where the parties cannot reach an agreement are diverse and depend upon the type of contract, whether there is an Engineering administering the contract on behalf of the Employer, among other factors. The contract could include a provision whereby, lacking agreement between the parties, the valuation made by the Employer or the Contractor shall prevail, leaving the other party with a right to a claim. Other provisions could differ the decision to the Engineer.*

3.3. Any valuation of a Variation shall include allowance for the addition or omission of the relevant design work, to the extent applicable and any necessary addition to or reduction in the provision of site administration, site facilities, temporary works, Contractor's direct costs, overheads, margins and profit.

*Comment: market rates and prices only address one part of the valuation issue; direct and indirect costs and Contractor's margins should also be considered as well as substantial additions/reductions in quantities, where applicable.*

3.4. The Price and the Completion Term shall be adjusted according to Variations.