

**Senate Standing Committee on Environment and Communications
Legislation Committee**
Answers to questions on notice
Environment and Energy portfolio

Question No: 179

Hearing: Budget Estimates

Outcome: Outcome 3

Program: Australian Antarctic Division (AAD)

Topic: Icebreaker – Contract

Hansard Page:

Question Date: 05 June 2017

Question Type: Written

Senator Xenophon, Nick asked:

Please provide a copy of the contract termination clause.

Answer:

A copy of the contract termination clause is provided below:

33. Termination

33.1 Sole basis

- (a) Termination under this clause 33 or under clause 3.4 is the sole basis at Law or otherwise upon which the Department or the Contractor is entitled to terminate, rescind or accept a repudiation of this Contract.
- (b) The parties acknowledge and agree that each Termination Payment payable in accordance with this clause 33 is a genuine pre-estimate of the loss (if any) which will be suffered by the Contractor as a consequence of that termination.
- (c) Termination and the payment of the relevant Termination Payment will not in any way prejudice or limit either party's Liability to the other in respect of the events giving rise to the termination.

33.2 Termination for convenience

- (a) The Department may, at any time, in its sole and absolute discretion, terminate this Contract by giving the Contractor not less than 20 Business Days' notice. The Department need not give any reason or show any cause for termination in accordance with this clause 33.2.
- (b) Termination of this Contract for convenience will take effect upon the date specified in the notice given under clause 33.2(a).
- (c) If the Department issues a notice under clause 33.2(a), the Contractor must:
 - (i) stop work in accordance with the notice;
 - (ii) comply with any reasonable directions given to the Contractor by the Department; and
 - (iii) use Reasonable Endeavours to mitigate all Liabilities (including the costs of its compliance with any directions) and expenses in connection with the termination, including those arising from affected Subcontracts.
- (d) Subject to clause 33.11, if this Contract is terminated:
 - (i) during the D&B Phase in accordance with this clause 33.2, the Termination Payment shall be calculated as follows:
 - (A) the Direct Costs incurred by the Contractor;

- (I) for Work which has been performed in accordance with this Contract up to and including the date on which this Contract is terminated pursuant to clause 33.2(a);
 - (II) which would have been claimable by the Contractor under this Contract if this Contract was not terminated;
 - (III) in relation to the demobilisation of the Contractor after the termination date;
 - (IV) in relation to performing its obligations under clause 15.1 or 33.6, plus Mark-up (on those Direct Costs) provided however that such amount shall in no circumstances exceed the Contract Price; less
 - (B) the amount of all Milestone Payments paid by the Department to the Contractor; less
 - (C) subject to clause 14.16(i) and in addition to the rights of the Department under clause 30.17, the aggregate of any amount standing to the credit of the Call Amount Account and Insurance Proceeds Account as at the date on which this Contract is terminated pursuant to clause 33.2(a) and the amount of any insurance proceeds that would have been received but for any act, omission or breach by the Contractor or any Contractor Personnel of this Contract or as an insured under any Insurance Policy or would have been received by the Contractor or Contractor Personnel but for the relevant insurer or underwriter of that Insurance Policy failing to pay the Contractor or Contractor Personnel an amount which that insurer or underwriter is obliged to pay the Contractor or Contractor Personnel under that Insurance Policy and if received would have been required to be deposited into the Insurance Proceeds Account; less
 - (D) any other amount owing by the Contractor to the Department arising from or in connection with this Contract (including all amounts in respect of which the Department is entitled to deduct or set off under this Contract); plus
 - (E) any other amount owing by the Department to the Contractor arising from or in connection with this Contract; or
- (ii) during the O&M Phase in accordance with clause 33.2, the Termination Payment shall be calculated as follows:
- (A) the Direct Costs incurred by the Contractor for Services which have been performed in accordance with this Contract up to and including the date on which this Contract is terminated pursuant to the Contractor received the notice identified in clause 33.2(a) but which does not form part of any Monthly Service Payment which has been paid by the Department to the Contractor; plus
 - (B) an amount equal to:
 - (I) the Average Annual O&M Amount for the Operating Year in which the termination takes place divided by 2; multiplied by
 - (II) the number of years remaining in the Term (as at the termination date specified in clause 33.2(b)) divided by the total number of years in the Term (as at the termination date specified in clause 33.2(b)) divided by 2; less
 - (C) subject to clauses 14.16(i) and in addition to the rights of the Department under clause 30.17, the aggregate of any amount standing to the credit of the Maintenance Reserve Account, Call Amount Account and the Insurance Proceeds Account as at the date on which this Contract is terminated pursuant to clause 33.2(a) and the amount of any insurance proceeds that would have been received but for any act, omission or

- breach by the Contractor or any Contractor Personnel of this Contract or as an insured under any Insurance Policy or would have been received by the Contractor or Contractor Personnel but for the relevant insurer or underwriter of that Insurance Policy failing to pay the Contractor or Contractor Personnel an amount which the insurer or underwriter is obliged to pay the Contractor or Contractor Personnel under that Insurance Policy and if received would have been required to be deposited into the Insurance Proceeds Account; less
- (D) any other amount owing by the Contractor to the Department arising from or in connection with this Contract (including all amounts in respect of which the Department is entitled to deduct or set off under this Contract); plus
 - (E) any other amount owing by the Department to the Contractor arising from or in connection with this Contract; plus
 - (F) other than Crew which transfer to the Department or its nominee under clause 15.1(a)(vii), redundancy payments for Crew that have been or will be reasonably and properly incurred by the Contractor as a direct result of the termination of this Contract under clause 33.2 and which would not have been otherwise incurred if this Contract was not terminated under clause 33.2 less any other amount which the Department has paid the Contractor as part of the Monthly Service Payment which relates to redundancies (or any similar concept).

33.3 Termination for Force Majeure

- (a) If a Force Majeure Termination Event occurs:
 - (i) during the D&B Phase, the Department may terminate this Contract by giving notice to the Contractor as a result of that Force Majeure Termination Event;
 - (ii) during the D&B Phase, the Contractor may terminate this Contract by giving notice to the Department as a result of that Force Majeure Termination Event; and
 - (iii) during the O&M Phase, either party may terminate this Contract by giving notice to the other party as a result of that Force Majeure Termination Event,

provided however that the Contractor's right to terminate under either clause 33.3(a)(ii) or 33.3(a)(iii) will only apply where the Force Majeure Termination event has occurred and is subsisting and the Contractor is not able to recover under either any advance loss of profits or business interruption insurance (other than because of any act, omission or breach by the Contractor or any Contractor Personnel of this Contract or as an insured under any Insurance Policy or any relevant insurer or underwriter of that Insurance Policy failing to pay the Contractor or Contractor Personnel an amount which that insurer or underwriter is obliged to pay to the Contractor or Contractor Personnel under that Insurance Policy).
- (b) Termination of this Contract for a Force Majeure Termination Event will take effect upon the date specified in the notice given under clause 33.3(a).
- (c) Subject to clause 33.11, if this Contract is terminated in accordance with clause 33.3(a), the Termination Payment shall be calculated in accordance with clause 33.2(d) (except that the Contractor will not be entitled to Mark-up on Direct Costs identified in clause 33.2(d)(i)(A) and clause 33.2(d)(ii)(B) shall be excluded from the calculation).

33.4 Termination for Default Termination Event

- (a) If a Default Termination Event occurs, the Department may terminate this Contract by giving 18 Business Days' notice to the Contractor.
- (b) Termination of this Contract for a Default Termination Event will take effect upon the date specified in the notice given under clause 33.4(a) (but no less than that 18 Business Day period).
- (c) Subject to clause 33.11, if this Contract is terminated in accordance with clause 33.4(a):

- (i) each party will be entitled to any and all Liabilities (if any) determined in accordance with the Laws of the Australian Capital Territory; and
- (ii) in addition to the rights of the Department under clause 30.17, the Contractor must pay the Department, the aggregate of any amount standing to the credit of the Maintenance Reserve Account, Call Amount Account and Insurance Proceeds Account as at the date on which the Contractor received the notice identified in clause 33.4(a) and the amount of any insurance proceeds that would have been received but for any act, omission or breach by the Contractor or any Contractor Personnel of this Contract or as an insured under any Insurance Policy or would have been received by the Contractor or Contractor Personnel but for the relevant insurer or underwriter of that Insurance Policy failing to pay to the Contractor or the Contractor Personnel an amount which that insurer or underwriter is obliged to pay to the Contractor or Contractor Personnel under that Insurance Policy and if received would have been required to be deposited into the Insurance Proceeds Account.

33.5 Termination and payments under this Contract

Upon termination under this clause 33, the Department's future obligation to pay the Contract Price or Monthly Service Payments to the Contractor will cease.

33.6 Assistance

The Contractor must use Reasonable Endeavours to assist the Department in the exercise of the Department's rights in accordance with this clause 33.

33.7 Payment on Termination

- (a) Subject to clause 33.7(b) and other than a Termination Payment determined under clause 3.4, no later than the Termination Payment Date:
 - (i) where the Termination Payment calculated pursuant to clause 33.2 or 33.3 is a positive amount, the Department must pay to the Contractor;
 - (ii) where the Termination Payment calculated pursuant to clause 33.2 or 33.3 is a negative amount, the Contractor must pay to the Department;
 - (iii) where either:
 - (A) the Department owes the Contractor any amount; or
 - (B) the Contractor owes the Department any amount,
 in each case as determined pursuant to clause 33.4, the relevant party owing that amount must pay the other party;

as a debt due and payable, the absolute value of the relevant Termination Payment or amount (as applicable). The Department's obligation to pay a Termination Payment under 33 is subject to the Contractor having handed over, delivered up or transferred (to the extent it is obliged to do so) the Work, the Vessel and the other Deliverables and GFM to the Department pursuant to clause 15 and this clause 33, and otherwise having satisfied its other obligations under this Contract.

- (b) [Not used].
- (c) The Contractor must provide to the Department details the calculation of the relevant Termination Payment within 5 Business Days after this Contract is terminated including sufficient information and evidence to enable the Termination Payment to be determined.
- (d) In calculating any Termination Payment, there will be no double counting of amounts.

33.8 [Not used]

33.9 Additional rights and obligations on Termination

The additional rights and obligations of the parties on a termination of this Contract include those set out in clause 15.

33.10 Reduction in scope on Default Termination Event or Force Majeure Termination Event

- (a) Notwithstanding anything else to the contrary in this Contract and in addition to any other rights the Department has under this Contract or at Law, where a Default Termination Event or Force Majeure Termination Event occurs, the Department may elect to omit or remove the Work or other Activities to which that Default Termination Event or Force Majeure Termination Event relates from this Contract by issuing a notice to that effect to the Contractor as an alternative to terminating this Contract.
- (b) Where the Department issues a notice under clause 33.10(a):
 - (i) the Contractor shall mitigate all Liabilities (including the Liabilities relating to complying with any directions) arising from or in connection with the reduction in scope including those arising from affected Subcontracts; and
 - (ii) the Department will be deemed to have issued a Modification Request which requests the omission or removal of that part or all of the Work or other Activities provided however that in determining the Contractor's entitlements under clause 22:
 - (A) the Contractor and Contractor Personnel are not entitled to any Mark-up on any part of the Work or other Activities yet to be commenced and which have been omitted or removed pursuant to this Contract;
 - (B) the Department's liability to make payments under this Contract will, unless there is agreement in writing to the contrary, reduce proportionately in accordance with the reduction in scope of the Contract; and
 - (C) the Department will be deemed to have issued a Modification Order taking into account the adjustments identified in clauses 33.10(b)(ii)(A) and 33.10(b)(ii)(B).

33.11 Compensation for loss of prospective profits

Neither the Contractor nor any Subcontractors shall be entitled to any compensation for loss of prospective profits on any part of the Contract terminated or reduced in scope other than the payments expressly provided for in this clause 33.

33.12 Key Subcontracts

- (a) In each Key Subcontract, the Contractor must secure an equivalent right to terminate and to omit or remove the Work and other Activities which are functionally equivalent to that of the Department under this clause 33, mutatis mutandis. The provisions for compensation for that right to terminate or to omit or remove Work and other Activities must be equivalent to the Department's rights under this clause 33, mutatis mutandis.
- (b) Where the Contractor fails to include in a Key Subcontract a right to terminate, or to omit or remove any Work or other Activities, and provisions for payment of Termination Payments equivalent to that which the Department has under clause 33 (mutatis mutandis), the amount for which the Department is liable under clause 33 in relation to that Key Subcontract (if any) will be calculated on the basis that such right to terminate, or to omit or remove the Work or other Activities and those provisions for payment of Termination Payments(mutatis mutandis) are included in that Key Subcontract.

33.13 Department Default

- (a) If the Department is in breach of any obligation under this Contract to pay any amount to which the Contractor is entitled under this Contract when it is due and payable (other than any amount the subject of a bona fide Dispute), the Contractor may give the Department written notice requiring the Department to remedy that breach (**Default Notice (Department)**).
- (b) A Default Notice (Department) must:
 - (i) identify that it is a Default Notice (Department);

- (ii) identify and provide reasonable details of the alleged breach referred to in clause 33.13(a); and
- (iii) notify the Department that it has 20 Business Days from the date the Department receives that notice to rectify that alleged breach.

33.14 Suspension of Activities following Department default

- (a) If the Department fails to remedy the alleged breach referred to in clause 33.13(a) within that 20 Business Day period, the Contractor may suspend the performance of its obligations under this Contract with immediate effect by giving a further notice to the Department.
- (b) If the Contractor suspends the performance of such obligations in accordance with clause 33.14(a) and the Department subsequently remedies the breach leading to that suspension then:
 - (i) the Contractor must, as soon as practicable after that breach is remedied, recommence performance of its obligations having regard to the availability of the Contractor's facilities and personnel for the performance of the Activities; and
 - (ii) the Contractor will be entitled to an extension of time determined in accordance with clause 13 for the delay to the critical path caused by that suspension and recommencement of performance, taking into account all relevant considerations including all requirements of clause 12 and 13 and Schedule 10 (as applicable).

33.15 Contractor's rights on termination for Department Default

- (a) If the Department fails to remedy the alleged breach referred to in clause 33.13(a) and the Contractor has suspended the Activities for at least 20 Business Days under clause 33.14, the Contractor may terminate this Contract after:
 - (i) it has given the Department a further 20 Business Days notice to rectify that breach; and
 - (ii) issued a final notice to the Department giving it a further 7 days notice to rectify that breach.
- (b) This Contract will terminate at the end of that 7 day period unless the Department has paid the Contractor the relevant amount to which the Contractor is entitled and which was the subject of that breach.
- (c) For the purpose of determining the rights and obligations of the parties, that termination will be deemed to have been a termination of this Contract by the Department under clause 33.2.