Hidden Rise and Fall Provision

Subscribers were first (depending upon their position) alerted to, or warned of the provisions of section 128 of the *Sales Tax Assessment Act* 1992 (Cth) in *"Sales Tax: Recovery by Statutory Alteration of Contracts"* (1995) ACLN Issue #42, p52. This more descriptive article has been included in the Newsletter for the benefit of its additional warning and more detailed explanation.

One of the most deceptive ways in which the fixed price of a construction project can increase is by virtue of an obscure but powerful provision in the Commonwealth's *Sales Tax Assessment Act* 1992.

Section 128(1) of the *Act* provides that if, after a contract involving assessable goods has been made, an alteration to the sales tax law directly causes a change in the cost to a party to the agreement of complying with the agreement, then the contract is altered by allowing the parties to the contract to vary the contract by the amount attributable to that change. Therefore, an adjustment in the contract sum will automatically arise by virtue of the statutory provision.

This means that a building contractor whose costs increase as a result of an increase in the rate of sales tax is entitled to pass on that increase to the principal/customer. The section effectively operates as a statutory rise and fall clause.

From 1 July 1995, the rate of sales tax payable on most taxable goods increased by one percentage point. Principals who entered into fixed price lump sum contracts before that date can, therefore, expect any increased costs incurred by those carrying out the contract to be passed on.

However, the burden is substantially lighter than it would have been if former Treasurer Ralph Willis had successfully extended a 12% concessional wholesale sales tax for certain building materials. The Coalition parties combined with the Greens and the Democrats in the Senate to block the plan. This may have left a $215 million hole in the last Budget but it also removed a potentially huge liability from principals who had entered into fixed price contracts.

Under section 128(2), principals can negate the impact of section 128 by inserting into the contract "an express written provision to the contrary". There have been no court decisions as to what type of provision would be appropriate to exclude the operation of section 128.

The standard contracts deal with the costs of complying with statutory requirements which are introduced after the contract sum has been agreed upon. However, the broad terms in which the clauses are expressed would not appear to preclude the operation of section 128. For example, there is no relevant provision in either clause 14 of the AS2124-1992 General Conditions of Contract (Statutory Requirements) or in clause 6.05.02 of the JCC-C 1993 Building Works Contract (Requirements of Authorities) which would prevent the principal from having to bear the increased costs incurred by the builder when acquiring assessable goods to which an increase in sales tax applied.

Moreover, it seems that merely referring to the contract as a lump sum contract which is not subject to rise and fall, may not be sufficient. The safest course for principals is to specifically exclude the operation of section 128 by expressly saying so. Certainly anyone who proposes drafting a fixed price contract should bear in mind this provision in the *Sales Tax Assessment Act*.

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