

# **SOL PLAATJE LOCAL MUNICIPALITY**

**DIRECTORATE: FINANCIAL SERVICES**

**SUB-DIRECTORATE: SUPPLY CHAIN MANAGEMENT**



## **PROCEDURES FOR VARIATION ORDERS**

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## 1. INTRODUCTION

*The term “construction law” is universally understood to cover the whole field of law which directly affects the construction industry and the legal instruments through which it operates. However, construction law extends well beyond the law as such. Efficient and workable construction contracts require that the needs of the construction process should be considered by applying the principles of management. Construction contracts must also take account of disputes and their resolution. Construction law is thus an interactive subject in which both lawyers and construction professionals, including managers, have an essential part to play.*

Variation orders are common to all types of projects, and most if not all projects have the presence of variation clauses, thus admitting that no project can be completed without changes. Even if carefully planned, it is likely that there will be changes to the scope of these. The contract, as the work progresses indicated that variations occur given the uniqueness of each project and the limited resources, time and money available for planning.

Construction contracts must make provisions for possible variations given the nature of building construction because construction projects involve complex operations which cannot be accurately determined in advance. A degree of change should be expected as it is difficult for clients to visualize the end product we are procuring. Unforeseen conditions<sup>4</sup> may arise which require measures that have not been provided for in the contract. Arguably, variation orders cannot be avoided completely and that it is hardly possible to complete a construction project without changes to the plans or the construction process itself due to the complexity of construction activities. Variation orders occur due to a number of reasons ranging from finance, design, aesthetic, geological, weather conditions to feasibility of construction, statutory changes, product improvement, discrepancies between contract Further, the human behaviour of parties to the contract cannot be predicted.

Variation orders may arise from changes in the minds of parties involved in the contract. Variation orders may be initiated either by clients or by contractors.

## 1.1 What is a contract?

A contract is an agreement entered into between two or more people with the intention of creating legally enforceable obligations. Once properly concluded, a contract is binding on each party. This means that each party has a legal obligation to do the things which the contract requires him or her to do. If a party does not do so, he or she may be in breach of the contract and the other party will have certain remedies, such as claiming for additional costs caused by the breach (called damages). They are also able to get a court order to force the party in breach to do what is required of them under the contract.

The law of contract is frequently the first 'case law' subject to which students are introduced when they commence their legal studies. The main reason for this is that contracts affect the general public more than most other areas of law and arise daily in business and commercial life. The contract is the most important stage in the process when land or buildings are transferred and when building projects are undertaken.

A contract is made up of a set of mutual promises stating the rights and obligations of the parties to that contract. These rights and obligations become enforceable by law and, therefore, parties rely on contracting and contracts in structuring their business relations.

Although parties have significant flexibility in setting the terms of their contracts the enforceability of these terms are subject to limits imposed by relevant legislation and common law. Contracts are, therefore, *private law created by the agreement between contracting parties within the parameters of well-established basic legal mechanisms.*

In order for a valid contract to come into existence, certain requirements must be satisfied. These requirements are:

- i) The parties should be competent to contract
- ii) There should be an agreement and consensus between parties
- iii) The contents or consequences of the contract should be possible at the time that the contract is entered into;
- iv) The subject matter of the contract should be legal;

- v) The contract should not be contrary to public policy;
- vi) The contract should be voluntarily, seriously and deliberately entered into for some reasonable cause;
- vii) The formalities required by law should be observed

**The contract should describe the following:**

1. What will be done;
2. How long it will take to complete;
3. How much it will cost and the payment terms;
4. What will be done if either party defaults; and
5. The extent to which the common law, which would usually apply, is adhered to.

1.2 What is an Agreement

The basis of a contract is agreement between the parties. The common law has developed a series of tests to determine whether or not agreement has been reached. These tests have been crystallised into the test of offer and acceptance. It is an accepted principle that:

*‘According to our law if two or more persons, of sound mind and capable of contracting, entered into a lawful agreement, a valid contract arises between them which is enforceable by action’*

**1.3 Offer and Acceptance**

An offer is defined as “... a declaration of intent made by a prospective party to a contract (the *offeror*) that contains proposals regarding the propose contract, and that is of such a nature that mere acceptance thereof by the *offeree* (to whom the offer was made) creates a contract”.

When an offer has been made, no contract is formed until the *offeree* accepts the offer. Many offers (or counter-offers) may be made during contractual negotiations, yet there can always

be only one acceptance. The point at which the offer is accepted has been described as the moment when consensus has been reached, a '*meeting of the minds*', or when the parties are '*ad idem*'. Contractual liability is based on this consensus or '*meeting of the minds*.' Steyn *et al.* defines an acceptance as "... an unqualified declaration of intent made by the *offeree*, approving the offer without reservation".

However, consent is not always as clear-cut as the express acceptance of an offer. It is sometimes necessary to make enquiries into surrounding circumstances to determine whether or not an offer has been accepted.

Accordingly, acceptance of an offer can be implied or tacit – i.e. it can be inferred from the circumstances that the offer has been accepted. However, acceptance (like an offer) must be clear and unequivocal so as to leave no doubt in the *offeror's* mind that the offer has been accepted.

A party to whom an offer has been made should not assume that the offer will remain open indefinitely. The party making the offer is free to revoke the offer at any time before acceptance by the other party (provided there is no express validity period). Once the offer is terminated, the party to whom the offer has been made can no longer accept that offer and form a valid contract. An offer is deemed to be open for a reasonable time when no time limit is stipulated.

Generally construction contracts take some degree of clarification and negotiation to finalise. During such negotiations, various statements may be made by the parties, which may be interpreted by one party (and not the other) as a firm offer. Our courts have distinguished certain statements from true offers, some examples are:

- Invitations to negotiate – these are statements made to induce another party to enter into a contract.
- Requests for a quotation (RFQ, RFP or enquiry) – a request to submit an offer/an invitation to do business.
- Statements of information – these usually relate to information made by one party in respect of the terms on which he is prepared to conduct business.

- Statements of intention/letters of intent – there is an extremely fine line between stating that you intend to contract and actually offering to do so. The fine line usually turns on whether the party making the offer indicated an intention to be bound by contract without further thought on his part.

## **2.1 Conditions – General**

A condition qualifies a contractual obligation in such a manner as to make implementation of that contractual obligation dependant on the occurrence (or non-occurrence) of an uncertain future event. The most distinguishing characteristic of a condition is that it relates to an *uncertain future event*.

In a contract, a condition operates to suspend, rescind, or modify the principal obligation under given circumstances. A further example of a condition is the condition common in most agreements of sale of an immovable property which stipulates that the agreement of sale is subject to the purchaser obtaining a bank loan of a certain amount. If the purchaser fails to obtain a loan as provided for in the agreement of sale, the obligations set out in the agreement fall away. This is known as a *condition precedent*, which is discussed further below.

Conditions can be used in contracts, offers and, in some instances, acceptance. Conditions are classified into different categories that describe the different types of conditions:

## **2.2 Suspensive conditions**

A suspensive condition *suspends* the operation of an obligation, in whole or in part, pending the occurrence or non-occurrence of a particular specified future event i.e. until certainty is reached in respect of that future event.

An example of a suspensive condition is a standard clause relating to special risks (FIDIC). In the event of a special risk occurring, such as an outbreak of war, and damage taking place to the site and/or contractor's equipment, the contractor shall be entitled to suspend the works and claim payment of the cost of rectifying the site and replacing his equipment.

Another example can be found in the new FIDIC red book, clause 4.24 which relates to "fossils" etc.:

*'All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological interest found on the site shall be placed under the care and authority of the employer. The contractor shall take reasonable precautions to prevent contractor's personnel or other persons from removing or damaging any of these findings. The contractor shall, upon discovery of any such finding, promptly give notice to the engineer, who shall issue instructions for dealing with it.'*

### **2.3 Resolutive conditions**

A resolutive condition, on the other hand, does not postpone the operation of a contractual obligation – the obligation becomes effective immediately and operates in full, but the obligation may come to an end if certainty is reached in that the condition is fulfilled or in that it fails.

### **2.4 Condition precedent**

A condition precedent is a condition that the parties agree must be fulfilled before any contractual obligations at all come into existence between them. Usually the securing of financing for a project is a condition precedent to either party incurring contractual obligations.

Another example of a condition precedent is the obtaining of council approval before the project or contract commences.

### **2.5 Options**

An option is a right acquired under a contract and agreed to between the parties in terms whereof one party acquires a right to something that may be exercised and realised in specified circumstances. An option is actually a contract within a contract.

### 3. VARIATION ORDERS

A variation (sometimes referred to a variation, instruction, variation order or change order, is an alteration to the scope of works in a construction contract in the form of an addition, substitution or omission from the original scope of works.

Variation order means all changes to the job, which are ordered or approved as a change. The existence of variation order problems in the field that impact on the achievement of project targets and the company's profit target in the project comes from aspects of construction, administrative aspects, aspects of resources. From some cases projects have occurred with regard to variation orders causing increased cost of contract value (cost overruns).

Almost all construction projects vary from the original design, scope and definition. Whether small or large, construction projects will inevitably depart from the original tender design, specifications and drawings prepared by the design team. This can be because of technological advancement, statutory changes or enforcement, change in conditions, geological anomalies, non-availability of specified materials, or simply because of the continued development of the design after the contract has been awarded. In large civil engineering projects variations can be very significant, whereas on small building contracts they may be relatively minor.

#### ***Variations may include:***

- a) Extension of time
- b) Alterations to the design
- c) Alterations to quantities
- d) Alterations to quality
- e) Alterations to working conditions
- f) Alterations to sequence of work

Variations may also be deemed to occur if the contract documents do not properly describe the works actually required.

Variations may not (without the contractors consent):

- a) Change the fundamental nature of the works
- b) Omit work so that it can be carried out by another contractor
- c) Be instructed after practical completion

- d) Require the contractor to carry out work that was subject of a prime cost sum

In legal terms, a variation is an agreement supported by consideration to alter some terms of the contract. No power to order variation is implied, and so there must be express terms in contracts which give the power instruct variations. In the absence of such express terms the contractor may reject instructions for variations without any legal consequences.

Standard forms of contract generally make express provisions for the contract administrator (generally the architect or engineer) to instruct variations (for example, FIDIC Clause 51.1). Such provisions enable the continued, smooth administration of the works without the need for another contract.

Variation instructions must be clear as to what is and is not included, and may propose the method of valuation.

- a. Extension of time

Many construction contracts allow the construction period to be extended where there are delays that are not the contractor's fault. This is described as an extension of time (EOT).

Variations may (but do not necessarily) constitute relevant events that can merit an extension of time and so adjustment of the completion date.

#### **4. Construction Contingency**

A **construction contingency** is an amount of money set aside to cover any unexpected costs that can arise throughout a construction project. This money is on reserve and is not allocated to any specific area of work. Essentially, the contingency acts as insurance against other, unforeseen costs.

Determining the amount of contingency is a balancing act. On the one hand, you want to have enough contingency funds to cover any uncertainties. On the other hand, you need enough cash on hand to keep construction going. Most projects will use a rate of around 5-10% of the total budget for contingencies.

##### **4.1 Types of Construction Contingencies**

There are two main types of construction contingency funds: contractor contingency and owner contingency.

#### ***4.1.1 Contractor Contingency***

A contractor contingency is an amount built into the contractor's anticipated price for the project to account for various risk factors that cannot otherwise be accounted for in a **schedule of values**. This money is set aside to account for any errors that occur on behalf of the contractor. Accordingly, contractors consider these funds *spent money*. Building this extra funding into your estimate is the contractor accepting the fact that unpredictable costs are all part of the construction biz.

#### ***4.1.2 Owner Contingency***

An owner's reserve is an amount set aside for additions or modifications of the scope of the work. These types of contingencies are used mainly in **guaranteed maximum price (GMP) contracts**. Changes and mistakes are not always the contractor's fault. Any changes that are not included in the initial bid will have to be paid by the owner funded contingency. Incomplete plans or owner directed changes are the leading causes of dipping into an owner contingency fund.

### **4.2 Creating a Construction Contingency Budget**

When encountering a construction contingency clause in your contract, it is essential to keep an eye out for a few things. First, it should detail both the owner's contingency and the contractor's contingency. They should list any and all predetermined costs that the contingency should be used for.

The list could include anything from incomplete designs, **construction project delays**, substitute subcontractors, price increases, and any other number of unexpected costs. This is generally referred to as the contingency budget.

#### 4.2.1 Schedule Delay: How to Assess & Reduce Impact in Construction

Anyone in the construction trade knows that schedule delays are part of the gig. In fact, 80 percent of construction businesses expect delays on at least some, if not all, of their projects. It is proven that one out of every three contractors finishes their projects on time.

Below are the different types of schedule delays are, as well as these can be handled.

#### 4.2.2 *Critical delays*

When determining the type of delay you're dealing with, the first thing you need to consider is if it's a critical delay.

If a delay affects the project's completion date, it's a **critical delay**. A delay that affects important milestones on the project (which always have the potential to affect the project completion date) can also be a critical delay.

By their nature, you can't make up for critical delays. Skilled management can minimize the long-term effects, but you can't completely absorb the delay elsewhere in the project.

The main factor determining whether a delay is critical is if it affects any of the waypoints set by the **Critical Path Method (CPM)**. If a delay prevents or delays reaching any of the CPM milestones, you've got a critical delay on your hands.

If you compare your schedule delay against the CPM and there are no changes, you're dealing with a **non-critical delay**.

#### 4.2.3 *Excusable delays*

Once you determine the effect that the delay will have on the project's timeline, it's time to assign some blame (well, not really). Rather than jumping straight to laying blame, you need to determine whether the delay is excusable or not.

If your new timeline results from something outside of the contractor's scope or control, it's **excusable**. You can't hold someone responsible for an aspect of the project that they simply cannot control.

Excusable delays can include things like dangerous or impending weather conditions, **customer or owner change orders**, hidden issues with the property, or errors in the project specs.

On the other hand, **inexcusable delays** are a whole other animal: These delays are definitely someone's fault. Whether it's a sub's fault for not ordering materials on time, poor planning on the part of the GC, or faulty craftsmanship somewhere in the project, someone specific is to blame.

#### ***4.2.4 Compensable delays***

While you're sorting through the delay, you have to determine if someone should receive compensation. Compensation can come in the form of more time, more money, or both.

If the delay affects a party, and that party has nothing to do with causing the delay, it's likely **compensable for that specific party**. If the drywallers have to wait because the subcontractor responsible for order insulation made a mistake, the drywallers should receive compensation in the form of a longer deadline (at the least).

In this case, the drywallers' delay is compensable, but the delay of the sub responsible for the insulation is not — the delay of the sub responsible is also inexcusable.

#### ***4.2.5 Concurrent delays***

Concurrent delays and their effects are where things get particularly cloudy. Concurrent delays occur when two or more delays occur on a project. These two delays don't need to occur at exactly the same time but instead happen within a particular window, overlapping each other. Concurrent delays can compound the issue, and they're very difficult to sort through. Determining if either, or both, are compensable or excusable can be extremely challenging.

#### 4.2.6 Schedule delays

Schedule delays are a lot like snowflakes: No two are exactly alike. There are many ways that a project's schedule can go sideways. The following are schedule delays:

##### 4.2.7 Weather delays

Avoiding bad jokes about weathermen always being wrong, the reality is that you simply cannot plan for the weather. Sure, you can tailor your project to start in the spring and end in the fall, but a lot of **bad weather that can result in long construction delays** can happen in that window.

##### 4.2.8 Budget delays

Budget delays can bring a project to a complete standstill. Whether it's because the contractor misquoted the estimate, or the owner can't secure financing, there can be major delays.

##### 4.2.9 Labor scheduling

Construction coordination isn't always straightforward. A subcontractor managing several projects at once can lead to light crews and delayed timelines.

##### 4.2.10 Lack of communication

**Communication is crucial to any construction project.** Communication between subs, site management, and the owner is absolutely key for a successful project. Without the proper channels to follow, issues that come up can go unreported or unnoticed. They'll compound into much larger problems that cause delays.

##### 4.2.11 Site coordination

These delays arise from contractors and between subcontractors blaming each other. The reality is that at some point, most subs' time on a project consists of sitting around, waiting for another contractor to finish their job — or, worse, waiting on the GC for an approval — before they can proceed.

This downtime adds up into an inefficiency-snowball, tacking days and weeks onto the project. Better coordination and communication can lead to less downtime and faster approvals.

#### 4.2.12 Pandemics

Some delays are entirely out of everyone's hands, and pandemics are one of them. COVID-19's effect on the construction industry continues to mount.

At one point, the majority of projects were on hold in some parts of the country. Once sites reopened, labor and materials shortages continue to plague projects, extending their schedules

## 5 Planning a project:

### 5.1 Set realistic expectations

Setting an unrealistic deadline or budget doesn't do anyone any good. While no one will fault you for being a go-getter, setting a deadline you know will be difficult to meet is setting your project up for failure (or at least a missed deadline).

When you're running full speed, the slightest slip can cost you your footing. Instead of pushing yourself and your crews at redline, **set up realistic goals and timelines that you can both reach**, allowing some room to absorb small delays along the way.

### 5.2 Update the construction contract

Your contract can help or hurt you in the event of a schedule delay. Be sure to set it up to help by including the common excusable delays in your contract. Be sure they include a force majeure clause, as so many have realized the benefits of one recently.

If there's one thing to avoid in your contract, it's a No Damage for Delay clause, which can mean you won't see any compensation for any delay, **excusable or otherwise**.

Also, you should outline any changes along the way in by using change orders. A change order essentially acts as the new contract after a change like a delay.

### 5.3 Watch your lien & notice deadlines

Schedule delays don't just affect the flow of work; they can very easily impact payments to contractors, subs, and suppliers on the job, too. If a project delay is causing a payment delay, keep a close eye on your state's mechanics lien rules.

Each state has deadlines for sending notice and/or filing a lien. Miss the deadline and you could lose one of the most powerful tools in your payment toolbox.

### 5.4 Encourage collaboration and transparency

Creating a jobsite atmosphere where subcontractors are comfortable reporting issues to site management can go a long way toward avoiding significant project delays. By creating channels for communication, you'll create a collaborative and transparent environment where everyone works together to address problems.

The opposite of this environment is a scenario where subs feel like they need to hide issues or handle issues by themselves. This can lead to bigger problems that fall outside of their limited scope, becoming widespread delays.

### 5.5 Negotiate

We've already established that delays will probably happen on a project. Once you accept that, you can think objectively and come to a creative resolution. Sometimes that creative resolution requires a scheduling adjustment. Other times, creativity might mean adjusting payment terms or amounts.

When you're willing to negotiate over the terms of a delay, you're able to minimize its effects on the project and solve it quickly.

## 6 Versus Contingencies:

Allowances and contingencies are often confused with one another, but understanding their differences is crucial to successfully executing project contracts.

One simple, yet effective, way to remember these differences is that allowances are the “known” unknowns, such as underground utility conflicts, while contingencies are for the “unknown” unknowns, such as changes in a project’s scope. Allowances are typically used to cover the scope of items where the extent of the work is not known at the time the guaranteed maximum price (GMP) is submitted. On water treatment plant facilities, this unknown work may include the type and quantity of structural concrete repair, underground utility conflicts, or performance coating repairs to name a few. These variances in quantities and types, and therefore price, are typically reconciled with the allowance. Through the change order process, the change order is either added or deducted from the contract price depending on whether the amount of established allowance is exceeded or under-run.

The “unknown” unknown, or contingency, is the dollar amount added to an estimated price that allows for items or conditions that are uncertain and require additional costs. There are two primary types of contingencies: owner- and contractor-specific. Owner contingencies include those amounts reserved for additions to the project’s scope or owner’s risk items, while contractor contingencies are the amounts built into the contractor’s anticipated price for the project to account for contractor risk. Owner contingencies often arise on projects with a GMP, in which the owner funds the contingency, so that costs arising from risks are drawn from this contingency fund until it is exhausted. Any unused funds are typically reverted to the owner or are shared with the contractor.

A contractor contingency is used when there is a degree of statistical certainty that unpredictable individual costs will arise. Often thought of as “spent money,” this type of contingency is set at a level that balances the desire to have liquidity with the contractor’s need to control risk on a project, such as risks associated with incomplete designs, scope errors, or escalation. The contractor’s contingency exists to mitigate project-related risks for which the contractor is responsible, and it’s critical for parties to not lose sight of the basic purpose of the contractor’s contingency; it should not be viewed as a possible source for project cost savings. Again, any unused funds are typically reverted to the owner or are shared with the contractor.

Early in the preconstruction process, the contracting team should have a detailed risk management discussion to outline the risks associated with the project. During this discussion, the teams should discuss:

- Differences between allowances, contractor contingencies, and owner contingencies;
- Possible risks on the project and how these can be covered through use of the above;
- The agreeable amounts of the allowance or contingency, whichever is chosen;
- What will happen with unused contingency or allowance, or if the contingency or allowance are overrun at the end of a project.
- Once the team determines to move forward with a contingency, whether contract- or owner-specific, the clause should:
  - Clarify both the owner's contingency and the contractor's contingency;
  - Describe the types of costs or risks for which the contingency is to be used;
  - Determine a process by which contingency is accessed during the project, and the paperwork and approvals needed to use contingency;
  - Outline whether there is supplemental funding of contingency, if there is an overrun, and whether or not there is sharing of unspent contingency at project closeout.

## 7 WASTE ASSOCIATED WITH VARIATION ORDERS

The nature of variation orders can be determined by referring to both the reasons for their occurrence and subsequent effects. So far, there are two distinguishable types of variation orders, namely beneficial and detrimental variation orders. A beneficial variation order is one issued to improve the quality standard, reduce cost, schedule, or degree of difficulty in a project). A beneficial variation order eliminates unnecessary costs from a project; and as a result, it optimizes the client's benefits against the resource input by eliminating unnecessary costs. However, it should be noted that regardless of how beneficial a variation order might

be non-value-adding costs are likely to accrue as a result. A detrimental variation order is one that negatively impacts the client's value or project performance. Arguably, a detrimental variation order compromises the economical value of the project.

While most construction industry stakeholders are arguably interested in the reduction of overall production costs, they are not always aware of the extent of non-value adding activities on construction projects. Consequently, there is a lack of knowledge about non-value-adding costs associated with variation orders. The realistic quantification of such costs is problematic due to lack of appropriate techniques for their measurement. In common practice, non-value-adding costs arising from variation orders that are typically transferred to the client are underestimated. For example, one may be able to calculate the costs of aborted works, but non-value-adding costs arising from non-productive time, redesign and overheads are not attributed to such an activity. Very often these costs are unknowingly transferred under the account of contingencies.

## 8 Valuation of Variations

Variations may give rise to additions or deductions from the contract sum. The valuation of variations may include not just the work which the variation instruction describes, but other expenses that may result from the variation, such as the impact on other aspects of the works. Variations may also (but not necessarily) require adjustment of the completion date.

Variations may be valued by:

- a) Agreement between the contractor and the client
- b) The cost consultant
- c) A variation quotation prepared by the contractor and accepted by the client
- d) By some or other method agreed by the contractor and the client

Valuations of variations are often based on the rates and prices provided by the contractor in their tender, provided the work is of a similar nature and carried out in similar conditions. This is true, even if it becomes apparent that the rates provided by the contractor were higher or lower than otherwise available commercial rates.

The contractor's rates do not become reasonable or unreasonable by the execution of variations. If similar types of works to those instructed by a variation cannot be found in the drawings, specification or bills of quantities, then fair valuation of the contractor's direct costs, overheads and profit is necessary.

However, NEC contracts do not value variations based on rates in the tender. Guidance on assessing compensation events states:

*'Assessment of compensation events as they affect Prices is based on their effect on Defined Cost plus the Fee. This is different from some standard forms of contract where variations are valued using the rates and prices in the contract as a basis. The reason for this policy is that no compensation event for which a quotation is required is due to the fault of the Contractor or relates to a matter which is at his risk under the contract. It is therefore appropriate to reimburse the Contractor his forecast additional costs (or actual costs if the work has already been done) arising from the compensation event.'*

In other words, the contractor can ignore their tender pricing and claim cost plus on variations. However, there may be disagreements about items such as factory overheads and management which are very hard to evaluate. In addition, given the complexity and length of the supply chain in major building works, getting forecast pricing from all the parties affected takes time, often beyond the date by which the contract administrator has to make the decision as to whether or not to instruct the variation.

They may then have to decide whether or not to proceed with a variation based on estimates from the cost consultant which in due course get replaced by the actual cost. It has been argued that this practicality defeats the some of the rationale of the NEC contracts in relation to cost control and decision making.

## 9 Financing the Variation Order

1. If the Chief Financial Officer or his/her delegate confirms that the variation order estimate is not funded, then the variation order can be approved pending funding availability which may only be dealt with through the adjustment budget or by a mere virement with the limits of the Municipal Manager or the Chief Financial Officer.

Confirmation must be made with the Project Owner if no standby funding was made available at the inception of the project such as contingency or similar funds.

2. If the Municipal Manager or the CFO have taken all reasonable steps to obtain funding but were unable, the Project Manager will have no obligation to further substantiate on the required funding nor commit to the contractor, the VO will be deemed expired, unless the contractor waives the requirement for additional funding for the scope as listed in the VO.
3. If the MM or CFO confirms funding availability to cover the VO, details of such funding shall be provided and confirmed by the BTO, and as such the Municipal Manager shall have the discretion whether the work under the VO should continue or not.

#### 10 Payment of the Variation Order

If the variation order has been confirmed to be funded or funding requirement has been waived by the contractor, the price adjustment for the variation must be completed on the prescribed template and duly signed by the relevant authorities initiating and agreeing to the variation. The following must be considered when the price adjustment is taking place:

#### 11 Source of conflict

Conflict can arise when work is not mentioned in the bills of quantities, drawings or specifications. In common law this silence does not mean the contractor has an automatic right to claim for extra payment. The client is not bound to pay for things that a reasonable contractor must have understood were to be done but which happen to be omitted from the bills of quantities.

Where there are items that, whilst they are not expressly mentioned, are nonetheless required in order to complete the works, then the contractor should have included them in their price. The bills of quantities and specification do not necessarily have to include 'every nail to be punched in'. For example, in fixing GRC façades it is necessary to have steel supports, and a reasonably experienced contractor must make provision for this in the contract price. Unless expressly excluded, such supports are not paid for as a variation.

Conflict can also arise when a sub-contractor qualifies that, for example, 'Supply & Fixing of Door is included' but 'Supply & Fixing of Ironmongery is excluded'. A reasonable sub-contractor should foresee that a door cannot be fixed without hinges – which

is a part of the ironmongery. So even if ironmongery is excluded, the sub-contractor cannot expect a variation for any of the items required to fix the doors.

Also, under the pretext of variation, the contract administrator cannot change the nature of works. For example, if the contract provides for secant pile shoring, they cannot ask for diaphragm wall shoring as it will entirely change the nature of the work.

Further, if the contract administrator omits work from contractor's scope, such an omission must be genuine: that is, the work omitted must be omitted from the contract entirely, it cannot be used to take work away from the contractor to give it to another (for example, see FIDIC). Similarly, the contract administrator is not empowered to order variations to help the contractor if the contract works are proving too difficult or expensive for them.

#### 12. Procedures for the approval and financing of variation order

A variation order may result in an unforeseen and unavoidable expenditure which is explained thoroughly in MFMA Section 29. In this case, once such a Variation Order is approved, the Executive Mayor must present any expenditure incurred that was unforeseen to council within 60 days from date of approval. The following process must be followed:

1. In a case where the variation is initiated by the contractor, the following process must be followed:
  - a) At the site meeting or Project Steering Committee, the Variation must be discussed and recorded in the minutes
  - b) In a case of a project with consultants appointed, the consultant must verify the grounds as motivated by the contractor and obtain consensus from the Senior Manager responsible for the project outcome
  - c) The Variation Order must be proposed to confirm compliance with SCM or any other procurement guidelines and whether the variation can be split as separate scope of work, or scope amendment or just unforeseen and unavoidable expenditure.
  - d) CFO to confirm funds availability
  - e) In a case where funds are not immediately available, the CFO has about 60 days to look for funding, otherwise, the matter

must be referred back to the PSC to discuss the implications of the lack of funding on the project deliverables

- f) Once funded, the Variation Order is recommended by the CFO to the Municipal Manager for approval
- g) The Head of SCM must correspond with the Contractor and BTO for budget adjustment, and the final budget be communicated to Payments Office for noting

2. In a case where the variation is initiated by the Project Manager or internally within the municipality, the following procedure will apply

- a) Before raising the variation with the contractor and professional service provider on the project, a consensus memorandum from the Executive Director must be obtained, with the details of the variation, the impact on the project and the costs estimate
- b) The signed memorandum must be presented to the BTO to discuss funding sources and funding availability
- c) If funds are available, the variation must be presented to the Project Steering Committee and assessed by the Professional Service Provider
- d) Once concurred upon, the minutes of the Project Steering Committee will serve as additional information to adjust the funds allocated to the project
- e) If the Variation necessitates an adjustment budget, the CFO is responsible for the tabling of such top Council.

### VARIATION ORDER

Contract No:	Variation Order No:															
Contract description <b>(as per Procurement Plan)</b>	Construction of Carters Ridge Sewer Outfall Mains.															
VO description/Motivation:																
How will this variation affect the contract period?																
<b>REASON AND MOTIVATION FOR VARIATION:</b>																
1. Reason for Variation:	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 30%;">Additional Work / <b>Overtime</b></td> <td style="width: 10%; text-align: center;">×</td> <td style="width: 50%;">Design/ Plans Change</td> <td style="width: 10%;"></td> </tr> <tr> <td>Specification Change</td> <td></td> <td>Provisional Item</td> <td style="text-align: center;">×</td> </tr> <tr> <td>Prime Cost Item</td> <td></td> <td><b>Unforeseen Events (photos must be attached)</b></td> <td></td> </tr> </table>	Additional Work / <b>Overtime</b>	×	Design/ Plans Change		Specification Change		Provisional Item	×	Prime Cost Item		<b>Unforeseen Events (photos must be attached)</b>				
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Prime Cost Item		<b>Unforeseen Events (photos must be attached)</b>														
<u>Variation % Calculation:</u>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 70%;">Original contract amount <b>(Vat Incl):</b></td> <td style="width: 10%; text-align: center;">R</td> <td style="width: 20%;"></td> </tr> <tr> <td>Previous variation orders <b>(Vat Incl):</b></td> <td style="text-align: center;">R</td> <td></td> </tr> <tr> <td><b>Revised contract amount (Vat Incl):</b></td> <td style="text-align: center;">R</td> <td></td> </tr> <tr> <td>- Proposed variation order <b>(Vat Incl)</b></td> <td style="text-align: center;">R</td> <td></td> </tr> <tr> <td><b>New Revised contract amount (Vat Incl):</b></td> <td style="text-align: center;">R</td> <td></td> </tr> </table>	Original contract amount <b>(Vat Incl):</b>	R		Previous variation orders <b>(Vat Incl):</b>	R		<b>Revised contract amount (Vat Incl):</b>	R		- Proposed variation order <b>(Vat Incl)</b>	R		<b>New Revised contract amount (Vat Incl):</b>	R	
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- Proposed variation order <b>(Vat Incl)</b>	R															
<b>New Revised contract amount (Vat Incl):</b>	R															
<b>Calculation of Variation % = ((B+D)/Ax100)</b>																
2. <b>Motivation:</b>																

**3.Discussion**

**3.1 Assessment of reason for variation**

**Financial implications**

**Conclusion**

Appointed Contract Amount	
VO 1 & 2 Pipe jacking & non-destruction blasting	
VO 3 Relocation of Prison Fence	
VO 4 Pipe Jacking Shafts	
VO 5 Extension of Time Claim	
<b>New Contract Value (Vat inclusive)</b>	

ITEM	DESCRIPTION	UNIT	QUANTITY	RATE (Vat Incl)	AMOUNT T (Vat Incl)
	OMIT:				

ADD:

(The above rates include VAT)

**NEW RATES:**

The value (Vat incl) of the variations is being calculated accordance the principles in clause as per bid document

**ADDITIONAL EXPENDITURE:**

Estimated additional expenditure (Vat Incl) : R .....

CPA (Contract price Adjustment) (Vat Incl) : R (not applicable) .....

*The above rates are valid at base date for the purposes of contract price adjustment.*

This expenditure will be funded from: Savings on scheduled work  Contingencies allowed

**BTO Available Budget** ..... Additional funds requested  x

**Scoa Vote Number:** .....

Summary of VO's and Claims is attached.

Issued by:		Accepted by:	
<u>PROJECT MANAGER/ ENGINEER</u>	DATE	<u>CONTRACTOR</u>	DATE
Recommend by:		Approved by:	
<u>CHIEF FINANCIAL OFFICER</u>	DATE	<u>MUNICIPAL MANAGER</u>	DATE

## PICTURES ATTACHED

