



NEC4 YS(Aus)1 Clause

Optional contract clause and guidance for the **Engineering and Construction Short Subcontract** for use in Australia on contracts which are subject to security of payments legislation

Clauses and guidance are also provided for other NEC4 contracts. These are available for download from neccontract.com.

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Guidance

- 1 This optional clause should be incorporated into the contract by listing it in Contract Data as an additional condition of contract as “YS(Aus)1 Security of Payment”.
- 2 The relevant *security of payment legislation* is defined by where the work in the main contract is carried out. The relevant legislation should be entered in the Subcontract Data; for each state it is the following.
 - Building and Construction Industry Security of Payment Act 1999 (NSW),
 - Building and Construction Industry Security of Payment Act 2002 (Vic),
 - Building and Construction Industry Security of Payment Act 2009 (SA),
 - Building and Construction Industry Security of Payment Act 2009 (Tas),
 - Building and Construction Industry (Security of Payment) Act 2009 (ACT),
 - Building Industry Fairness (Security of Payment) Act 2017 (Qld),
 - Construction Contracts Act 2004 (WA) and
 - Construction Contracts (Security of Payments) Act 2004 (NT).
- 3 To comply with the relevant *security of payment legislation*, an application for payment must
 - be in writing,
 - be addressed to the *Contractor*,
 - state the name of the *Subcontractor*,
 - identify the work to which the claimed payment relates, in sufficient detail to enable the *Contractor* to assess the claim,
 - indicate the amount of the progress payment that the *Subcontractor* claims to be due (the “claimed amount”),
 - request payment of the claimed amount,
 - state that it is made under the relevant *security of payment legislation* and
 - where made in New South Wales, be accompanied by a ‘supporting statement’ prescribed by the New South Wales *security of payment legislation*.
- 4 If the *Contractor* corrects the *Subcontractor’s* assessment, the correction must
 - identify the claim to which it relates,
 - identify the amounts of the payment (if any) which the *Contractor* proposes to make (the “scheduled amounts”),
 - if the work is performed in Victoria, identify amounts which the *Contractor* alleges are an “excluded amount” and
 - if the scheduled amount is less than the claimed amount, indicate why the scheduled amount is less and (if it is less because the *Contractor* is withholding payment for any reason) the *Contractor’s* reasons for withholding payment. (Should a dispute as to the scheduled amounts proceed to adjudication, the *Contractor* will generally be held to the reasons which it provided in the payment schedule (and, generally, not be able to provide new reasons)).

- 5 In all states, the *Subcontractor* may be entitled to submit a payment claim after termination. If the *Subcontractor* submits a payment claim following termination, it should be dealt with as any other application for payment. If termination is due to the *Subcontractor's* default, and the cost to the *Contractor* resulting from termination is greater than the amount claimed, the *Contractor* must identify in broad terms what those costs are to justify a payment certificate of nil. The final assessment will assess the amount the *Subcontractor* is due to pay to the *Contractor*.
- 6 If the *Contractor* does not issue a correction of the *Subcontractor's* assessment within the relevant timeframe, it will become liable to pay the claimed amount on the due date for that progress payment. If the *Contractor* fails to make payment of this claimed amount by that due date, the *Subcontractor* could obtain a judgement debt against the *Contractor*. If the work is in Queensland, the *Contractor* will also have committed an offence. The *Contractor* should therefore ensure that it has adequate contract management procedures in place to deal with payment claims within the required time frames.
- 7 In all states except Western Australia and the Northern Territory, interest is payable at the greater of the rate prescribed in the *security of payment legislation* and the subcontract. In Western Australia and the Northern Territory, interest will be payable at the rate set out in the subcontract, and if no rate is set out, at the rate prescribed by the *security of payment legislation* in those states.
- 8 The clause has been drafted for use when the Engineering and Construction Short Subcontract is used as a subcontract to the Engineering and Construction Contract or the Engineering and Construction Short Contract. If it is used as a subcontract to another NEC4 contract, terms should be changed accordingly.

NEC4 YS(Aus) Clause

ADDITIONAL CONDITIONS OF CONTRACT YS(AUS)1: SECURITY OF PAYMENT

Security of payment	YS(AUS)1
Payment application and assessment (ACT, South Australia, Tasmania and Victoria)	<p>YS1.1 Where the main contract works are carried out in Australian Capital Territory, South Australia, Tasmania or Victoria</p> <ul style="list-style-type: none"> • an application for payment is submitted not more than one week before the <i>assessment day</i>, • an application for payment is a payment claim, • the date for making an application for payment is the reference date • the date for the assessment of the final amount due following termination is a reference date, • the <i>Contractor's</i> communication to the <i>Subcontractor</i> informing it of an error in the assessment of the amount due is a payment schedule and • if, at the date of issue of a notice to terminate the <i>Subcontractor's</i> obligation to Provide the Works, the <i>Subcontractor</i> was entitled to submit an application for payment but had not yet done so, the <i>Subcontractor</i> may submit the application for payment, and the date the submission is made is an <i>assessment day</i>.
Payment application and assessment (New South Wales)	<p>YS1.2 Where the main contract works are carried out in New South Wales</p> <ul style="list-style-type: none"> • Clauses 50.1, 50.2, 50.3 and 50.4 are deleted and replaced by <p>50.1 The <i>Subcontractor</i> assesses the amount due at each <i>assessment day</i>. There is an <i>assessment day</i> on the last day of each month until the earlier of</p> <ul style="list-style-type: none"> • the month after the <i>Contractor</i> issues the Defects Certificate and • either Party gives notice to the other to terminate the <i>Subcontractor's</i> obligation to Provide the Works. <p>50.2 The <i>Subcontractor</i> submits an application for payment to the <i>Contractor</i> setting out the amount the <i>Subcontractor</i> considers is due at the <i>assessment day</i>. The application for payment is a payment claim. The <i>Subcontractor's</i> application for payment includes details of how the amount has been assessed. Payment is made within three weeks of the date of the application for payment.</p> <p>50.3 The amount due at the <i>assessment day</i> is</p> <ul style="list-style-type: none"> • the Price for Work Done to Date, • plus other amounts to be paid to the <i>Subcontractor</i>, • less amounts to be paid by or retained from the <i>Subcontractor</i>. <p>50.4 If payment is due from the <i>Subcontractor</i> to the <i>Contractor</i> at the <i>assessment day</i>, the <i>Contractor</i> assesses the amount due and gives details of how the amount has been calculated. Payment is made within three weeks of the <i>assessment day</i>.</p> <ul style="list-style-type: none"> • the first sentence of clause 51.1 is deleted, • the <i>Contractor's</i> communication to the <i>Subcontractor</i> informing it of an error in the assessment of the amount due is a payment schedule and

- if a notice to terminate the *Subcontractor's* obligation to Provide the Works is issued, the *Subcontractor* may submit an application for payment on and from the issue of the notice, and the date the submission is made is an *assessment day*.

Payment application and assessment (Queensland)	YS1.3	<p>Where the main contract works are carried out in Queensland</p> <ul style="list-style-type: none"> • an application for payment is submitted not more than one week before the <i>assessment day</i>, • an application for payment is a payment claim, • the date for making an application for payment is the reference date, • the <i>Contractor's</i> communication to the <i>Subcontractor</i> informing it of an error in the assessment of the amount due is a payment schedule, • the final reference date is the earlier of <ul style="list-style-type: none"> – four weeks after the <i>Contractor</i> issues the Defects Certificate and – thirteen weeks after termination, • if the contract is a commercial building contract, the first sentence of clause 51.1 is deleted and replaced by <ul style="list-style-type: none"> – a payment is made within two weeks after the <i>assessment day</i> • if a notice to terminate the <i>Subcontractor's</i> obligation to Provide the Works is issued, the <i>Subcontractor</i> may submit an application for payment on and from the issue of the notice, and the date the submission is made is an <i>assessment day</i>.
Payment application and assessment (Western Australia)	YS1.4	<p>Where the main contract works are carried out in Western Australia, if a notice to terminate the <i>Subcontractor's</i> obligation to Provide the Works is issued, the <i>Subcontractor</i> may submit an application for payment on and from the issue of the notice, and the date the submission is made is an <i>assessment day</i>.</p>
Adjudication of payment claims	YS1.5	<p>If a Party makes an application for adjudication of a payment claim under the <i>security of payment legislation</i>, adjudication of the payment claim dispute under the contract ends, and adjudication of the payment claim dispute is governed by the <i>security of payment legislation</i>. In respect of this dispute, the <i>Adjudicator</i> is the person appointed under the <i>security of payment legislation</i>.</p>
Suspension of performance	YS1.6	<p>If the <i>Subcontractor</i> exercises its right under the <i>security of payment legislation</i> to suspend performance, it is a compensation event.</p>

ADDITIONAL CONTRACT DATA ENTRIES

Insert the following in the *Client's* Contract Data

The *security of payment legislation* is