NEC4 Y(Aus)1 Clause

Optional contract clause and guidance for the **Professional Service 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 including it in Contract Data as a Secondary Option as "Y(Aus)1 Security of Payment".

2 The relevant *security of payment legislation* is defined by where the service 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 (including the *Subcontractor's* assessment of the final amount due if one is issued) 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 The *Contractor's* certificate (including the certificate of the final amount due) 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 certificate 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   If the period within which payments are made is changed, it must not be greater than

   •   6 weeks from the date of the payment claim where the works are performed in Western Australia or

   •   30 business days where the works are performed in the Northern Territory (a business day is defined in the *security of payment legislation*).

   In Queensland, the period for payment has been changed in Subcontract Data to comply with the *security of payment legislation*. They should not be otherwise changed.

8   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.

9   The clause has been drafted for use as a subcontract to the Professional Service Contract. If it is used as a subcontract to another NEC4 contract, terms should be changed accordingly.

NEC4 Y(Aus) Clause

Y(AUS)1: SECURITY OF PAYMENT

Security of payment	Y(AUS)1	
Payment application and assessment (ACT, South Australia, Tasmania and Victoria)	Y1.1	Where the *service* in the main contract is carried out in Australian Capital Territory, South Australia, Tasmania or Victoria
		• an application for payment is submitted not more than one week before the assessment date,
		• an application for payment is a payment claim,
		• the date for making an application for payment is the reference date,
		• the following replaces the first sentence of clause 51.1
		The *Contractor* certifies a payment within two weeks of the date of the submission of an application for payment,
		• the *Contractor's* certificate is a payment schedule,
		• the date for the assessment of the final amount due is a reference date,
		• the *Subcontractor's* assessment of the final amount due is a payment claim and
		• if, at the date of issue of a termination certificate, the *Subcontractor* was entitled to submit an application for payment but had not yet done so, the *Subcontractor* may submit the application for payment, and the date the submission is made is an assessment date.
Payment application and assessment (New South Wales)	Y1.2	Where the the *service* in the main contract is carried out in New South Wales
		• clauses 50.1, 50.2, 50.3 and 50.4 are deleted and replaced by
		50.1 The *Contractor* assesses the amount due at each assessment date. There is an assessment date on the last day of each month until the earlier of
		• four weeks after the *defects date* or
		• the *Contractor* issues a termination certificate.
		50.2 The *Subcontractor* submits an application for payment to the *Contractor* setting out the amount the *Subcontractor* considers is due at the assessment date. The application for payment is a payment claim The *Subcontractor's* application for payment includes details of how the amount has been assessed and is in the form stated in the Subcontract Scope.
		In assessing the amount due, the *Contractor* considers an application for payment submitted by the *Subcontractor*.
		The *Contractor* certifies payment within two week of the date of the submission unless another period is stated in Subcontract Data. The *Contractor's* certificate is a payment schedule. The certified amount is paid within three weeks after the date of the submission.
		50.3 The amount due at the assessment date is
		• the Price for Service Provided to Date,
		• plus other amounts to be paid to the *Subcontractor*,
		• less amounts to be paid by or retained from the *Subcontractor*.

50.4 If payment is due from the *Subcontractor* to the *Contractor* at the assessment date, the *Contractor* certifies payment within one week of the assessment date unless another date is stated in the Subcontract Data. The certified amount is paid within three weeks of the assessment date.

- The first sentence of clauses 51.1 and 51.2 is deleted,

- the *Subcontractor's* assessment of the final amount due is a payment claim and

- if a termination certificate is issued, the *Subcontractor* may submit an application for payment on and from the issue of a termination certificate, and the date the submission is made is an assessment date.

Payment application and assessment (Queensland)	Y1.3	Where the the *service* in the main contract is carried out in Queensland

- an application for payment is submitted not more than one week before the assessment date,

- an application for payment is a payment claim,

- the date for making an application for payment is the reference date,

- the *Contractor's* certificate is a payment schedule,

- the final reference date is the date for the assessment of the final amount due,

- the *Subcontractor's* assessment of the final amount due is a payment claim and

- if a termination certificate is issued, the *Subcontractor* may submit an application for payment on and from the issue of a termination certificate, and the date the submission is made is an assessment date.

Payment application and assessment (Western Australia)	Y1.4	Where the *service* in the main contract is carried out in Western Australia, if a termination certificate is issued, the *Subcontractor* may submit an application for payment on and from the issue of a termination certificate, and the date the submission is made is an assessment date.
Adjudication of payment claims	Y1.5	If a Party makes an application for adjudication of a payment claim under the *security of payment legislation*, adjudication of the payment claim dispute under the contract ends, and adjudication of the payment claim dispute is governed by the *security of payment legislation*. In respect of this dispute, the *Adjudicator* is the person appointed under the *security of payment legislation*.
Suspension of performance	Y1.6	If the *Subcontractor* exercises its right under the *security of payment legislation* to suspend performance, it is a compensation event.

ADDITIONAL CONTRACT DATA ENTRIES

If option Y(Aus)1 is used	The *security of payment legislation* is	
If the *service* in the main contract is provided in New South Wales and the period for certifying payment is not two weeks	The period for certifying payment is	weeks

In section 5 of Contract Data part one insert the following

Against "The *assessment interval* is" state "monthly"

If the contract is a commercial building contract in Queensland, against "the period within which payments are made is" state "two weeks after the assessment date"