

# AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL WEBINAR SERIES 2020

## Professional Development and Networking for the In-House Legal Community

So you need to build something? Construction contracts  
& key considerations

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# So you need to build something?

- Overview:
  - key construction risks;
  - different types of construction contracts;
  - which contract is right for your project;
  - understanding key terms;
  - key considerations in preparing a contract; and
  - concluding remarks / questions.

# Key construction risks

- Identifying Key Construction Risks at the outset:
  - counterparty risk (risk of insolvency of contractor);
  - authorities risk (the risk that the project will receive required approvals);
  - design risk (the risk that the design will deliver a project that produces the required outputs);
  - intellectual property risk (the risk that you will be entitled to use the project as designed and constructed);
  - construction risk (the risk that the project will be constructed in accordance with the design);
  - legislative compliance risk (the risk that the design and construction of the project and the physical works performed, comply with all laws);
  - cost risk (the risk that the project will cost more than budgeted);
  - time risk (the risk that the project will not complete 'on time'); and
  - risk of loss or damage to the project.
- Will the contract manage these risks?

# Different types of construction contracts

- Design & Construct
  - key features:
    - single contractor for both activities; and
    - less price certainty – VFM implications;
  - when to use:
    - design not fully settled; and
    - short timeframe;
- Construct only
  - key features:
    - requires separate design; and
    - higher price certainty;
  - when to use:
    - design can be fully detailed; and
    - time permits separate procurements.

# Different types of construction contracts

- Construction management and project management
  - key features:
    - can cover both design and construct, or just construct; and
    - agency relationship - 'all care and no responsibility';
  - when to use:
    - in-house capability is low to manage procurement and construction process; and
    - scope of requirement is unclear;
- Managing contractor
  - key features:
    - early contractor involvement;
    - two-stage contract: planning stage and delivery stage; and
    - managing subcontract packages;
  - when to use:
    - scope of work is uncertain - assistance required to sure up the scope (planning phase); and
    - other forms of contracts not cost-effective – too much 'contingency'.

# Different types of construction contracts

- Agreement to Design, Construct and Lease
  - key features:
    - essentially a D&C contract but completion triggers the grant of a lease, rather than a final payment; and
    - tenant does not want to own the building or asset;
  - when to use:
    - tenant has specific building / occupancy requirements; and
    - tenant has recurrent funding to meet lease costs;
- Relationship contracts
  - less adversarial – focus on relationship and mutually beneficial outcomes; and
  - price and risk uncertainty make it difficult from a procurement perspective.

# Different types of construction contracts

- Major Works v Minor Works
  - key features:
    - distinguishes between high/low risk and high/low value works; and
    - more detailed and prescriptive versus just longer or shorter versions;
  - when to use:
    - depends on the nature of the works.
- Bespoke V Standard Form
  - use depends on circumstance:
    - market considerations – common adoption of an industry standard; and
    - value of contract – big value supports bespoke contracts (time to review).

# Which contract is right for your project?

- Some factors which impact the choice of contract:
  - urgency?
    - how quickly is it required.
  - nature of works:
    - complexity;
    - certainty of scope; and
    - stakeholder engagement;
  - how important is controlling the design:
    - construct-only v D&C.
  - in-house capacity / experience to manage; and
  - time and cost certainty.

# Understanding key terms

- Superintendent
  - traditional role; and
  - common amendments.
- Practical Completion
  - practically complete – usual meaning – allows defects; and
  - final completion – understand the difference.
- Provisional Sums
  - when applicable.

# Understanding key terms (Cont'd)

- LDs
  - when payable;
  - calculation; and
  - relevance.
- EOTs
  - causes of delay; and
  - concurrent delays.
- Prevention Principle
  - application and avoidance.

# Understanding key terms (Cont'd)

- Float
  - allowance within the construction program; and
  - who owns the 'float'.
- Schedule of Rates
  - relevance to pricing – lump sum (based on volumes) or variations.
- Security of Payments
  - statutory right for payment; and
  - different regimes in each jurisdiction.

# Understanding key terms (Cont'd)

- Security
  - retention, bank guarantee or insurance bond; and
  - security for costs or performance?
- Directions
  - purpose and implications; and
  - who has a right to give: be clear in contract.
- Step-In Rights
  - protection afforded; and
  - are triggers, and associated rights (e.g. to use equipment) clear.
- Builders side deed (financier side deed)
  - financier enabled step in.

# Understanding key terms (Cont'd)

- Preliminaries and Overheads
  - site establishment – preliminaries; and
  - administration – overheads.
- Variations
  - effective management; and
  - clarity around pricing and change in scope.
- Claims
  - within time; and
  - managing claims.

# Key considerations in preparing a contract

- Commonwealth-specific considerations
  - compliance with policy; and
  - adequacy of remedies.
- Procurement and document preparation
  - having a clear SOR or scope; and
  - filling identified roles in the contract – ie superintendent, contract administrator.
- Consider contract administration load – both sides
- Allocation of risks
- Buildability
- ‘Waterproof’

# | Concluding remarks & questions

# Team contact



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