

CONTRACT ADMINISTRATION DO'S AND DON'TS

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ALWAYS USE A STANDARD INDUSTRY BUILDING CONTRACT

You must ensure that you use contracts that are published by the MBAV. This is particularly the case with regards to residential building work. All residential building contracts are governed by the Domestic Building Contracts Act. These contracts have to be executed if the value of the works exceeds \$5000.00. Failure to enter into such contracts can culminate in dire circumstances. Amongst other things the builder can be prosecuted by the Building Practitioners Board for mis-conduct.

CONTRACTS MUST BE EXECUTED

The DBCA requires contracts to be executed. Both parties must sign and execute the building contract. One copy also has to be given to the owner. In MDBC's there are a number of statutory warnings in building contracts, they also have to be initialled by the parties. In addition initial every single page of the contract.

VARIATIONS

Any change to the contract or the scope of works or any "extra" is regarded as a variation under the DBCA. Variations have to be in writing. They have to clearly describe the nature of the change, the cost and time impacts of the change and they have to be co signed by both parties to the contract.

Never contemplate carrying out any varied works unless the variation form is executed.

If a variation form is not executed it is a breach of the Act and the VCAT might take the view that the builder is not entitled to be paid for the varied works on account of the lack of a compliant variation form.

Furthermore when things aren't in writing confusion often follows. It is not unusual for an owner to deny that he or she authorised the varied works and this can become a fertile ground for litigation.

TIME EXTENSIONS

Whenever circumstances prevail that dictate that the completion date will change the builder needs to consider whether there exists an entitlement to lodge a time extension. Typical grounds upon which a builder can lodge a time extension claim are as follows:

- Owner induced delays
- Variations that are caused by the owner
- Inclement weather
- Unforeseen circumstances that do not emanate from builder neglect or default

If the builder has a right to make a time extension claim it should occur promptly, it should be in writing and should articulate the number of days sought. The claim should also comply with the letter of the clause that governs time extensions under the contract. Failure to claim time extensions will often culminate in the builder being charged liquidated damages by the owner.

LIQUIDATED DAMAGES.

These are damages/costs that are negotiated before the contract is executed. LD's represent the amount of money that the owner can claim (ordinarily on a weekly basis) if the contract completion is late. Liquidated damages at law are supposed to represent a genuine estimate of the economic loss that will be sustained if the builder causes a delay to completion of the project. Typically rent will be claimed because if the owner is not able to move in on time then he or she will be paying rent.

PAYMENT

A builder can only make request for payment when the designated contractual stages have been finished. The builder must familiarise itself with the "contractual stages" to ensure that the builder knows when contractually it is permissible to lodge a claim. For instance "base stage" or "lock up", the builder must ensure that every component of the contractual definition has been complied with. If a component of "lock up" has not been completed and a claim for payment is generated the claim at law will be considered to be premature.

The claim for final payment cannot be lodged until an occupancy certificate has been issued by the relevant building surveyor and the work has been completed in accordance with the plans and the specifications. Mere issue of an occupancy certificate alone does not entitle the builder to request payment.

Also note that under the Building Act if an owner occupies a building without an occupancy permit the owner is breaking the law and can be prosecuted.

PERMIT ISSUES

Never, ever, carry out any building work of any nature unless a building permit has been issued. If a builder is fool hardy enough to work without a permit then the builder must realise that it can be prosecuted by the Building Commission and fined up to \$50,000.00 in the case of a company and \$10,000.00 in the case of a natural person.

MANAGING THE RELATIONSHIP WITH THE OWNER

10 Golden Rules

1. Do your homework on the owner, make sure the owner has the ability to pay. Ascertain whether the owner has a history of litigating.
2. Ensure that in the case of clients who are spouses that one of them is designated as the person responsible for dealing with the builder. You can't brook a situation where the husband says one thing and the wife another. That is a recipe for disaster.
3. Do not under any circumstances under quote, if you can't make a profit out of a job "go fishing".
4. Be prompt, stick to the time frames. Do your damndest to get things completed on time.
5. Don't take short cuts, don't compromise on quality. If you do it will cost you more in the long run.
6. Know the building contract like "the back of your hand". Stick to the terms of the contract religiously, to be pedantic with respect to contract administration is a virtue and compliment not a criticism.
7. Be meticulous with your paperwork, your time extensions, your variations and your documentation. Keep a site diary and record any matters of moment, key discussions or matters that may revisit you down the track.
8. Ensure that you are paid on time and the amount under the building contract.
9. Never lodge a claim prematurely.
10. Don't take on too much work, don't spread yourself too thin.

SUSPENSION

If the owner is late in paying act quickly, contracts often have a suspension clause, which permits the builder to suspend works pending payment. If this should occur ensure that you follow the contract to the letter and ensure that “your slate” is perfectly clean when you invoke the suspension clause. Better still, get a construction lawyer to draft the notice for you.

TERMINATION OF A CONTRACT

If the magnitude of the clients default is such that the contract needs to be concluded the builder can terminate the contract. The contract however must be terminated in accordance with the provisions of the contract. Typically a notice of default must be issued. It must prescribe the default with specific reference to the default clause under the contract. It must state the period of time for the rectification by the owner of the default.

The time period again will be set out under the contract. Once the period of time for rectifying the default has concluded and if the owner has failed to rectify that default then in those circumstances the builder can terminate the contract. But again the builder must have regard to termination provisions under the contract.

Termination of contracts can be a deadly affair because of the legal ramifications that can flow from contractual determination. If the builder fails to terminate the contract correctly the consequences can be onerous at worst. Invariably it costs a great deal more to complete a partially completed project and the owner will invariably seek to visit those increased costs upon the builder. Mindful of the delicacy and vagaries attaching to contractual termination a builder is well advised to engage the services of a construction lawyer for the purposes of contractual termination.

DEBT RECOVERY

With regards to residential building contracts all disputes have to be resolved at VCAT. Debt recovery and litigation is by definition expensive and the builder has to undertake a cost benefit analysis to determine whether it is worth pursuing a debt. If the amount of money is less than \$5,000.00 the builder has to bear in mind that he may throw more money at chasing that money than writing it off.

If an election has been made to pursue the debt then the sooner that the matter is listed in the VCAT the better. Once a claim has been filed with the VCAT ordinarily the matter will be referred to mediation within the first 6 to 7 weeks.

Every endeavour should be made to settle the matter at mediation to ensure that the legal costs are kept at bay. If a matter does not resolve at mediation it can end up going to a full-blown trial if this occurs the legal costs will take on a “telephone directory” momentum. It is critical that you use a construction lawyer for resolution of building disputes as the area is highly specialised and afflicted with its own legislative vagaries.