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Legal Bulletin

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Working with ABIC

ABIC CONTRACTS

The ABIC forms of contract are construction contracts involving administration and certification of the Works by an Architect appointed by the Owner.

In these contracts there is a dual role for the Architect. For example, the Architect is charged with acting impartially when valuing progress claims while also acting as an agent for the Owner when issuing instructions or directions to the Builder.

THE MAJOR WORKS CONTRACT (MW-1)

The MW-1 is used for larger commercial works however it can also be used for larger domestic works (e.g. construction of 3 double storey town houses) through the addition of standard special conditions provided by the Royal Australian Institute of Architects. With respect to the MW-1's residential application, depending on the particular state there will be major amendments required to ensure that there is compatibility with the relevant Act; be it the Home Building Act NSW or the Domestic Building Contracts Act, Victoria.

The following is an assessment of the MW-1 Contract's key clauses from the builder's (Contractor's) perspective for commercial works. Under a paraphrasing of each clause is a consideration of the risks involved in agreeing to the clause as drafted.

RISK MATRIX

F4: Contractor to examine site information

The Contractor must have examined the site information and have inspected the site and its surroundings and is entitled to rely on the site information to the extent that it is reasonable to do so, having regard to the nature of the site and its surroundings.

Issue

The Contractor must indemnify the owner against any claim or loss, expense or damage incurred by a subcontractor as a result of the contractor failing to inspect the site or examine the site information.

In addition, the effect of clauses F5.1, F5.2, F6 and F7.1 means a Contractor can only make a claim to adjust the contract (e.g. price including adjustment of time costs and/or practical completion date) for a latent condition if the contractor would not have anticipated the latent condition had it reviewed the site information.

It is therefore important for this examination of the site information to be as thorough as possible before the contract is signed and an amendment made to F4 if for example access to the site is limited or the site has not been cleared.

G4: Subcontracting

The Contractor may subcontract any part of the works but not the works as a whole. This is a standard industry term.

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H1: Time for making claim to adjust the contract

The Contractor is entitled to make a claim to adjust the contract. But the Contractor must:

(i) promptly notify the Architect in writing of its intention to make a claim after receiving an instruction (e.g. to proceed with a variation), or after becoming aware of an event that will result in a claim; and

(ii) submit the detailed claim to adjust the contract to the Architect within the time agreed in writing between the Contractor and the Architect *or* within 20 working days after receiving an instruction, or within 20 working days after becoming aware of the event that has resulted in the claim.

H5: Sum recoverable by Contractor for claim for adjustment of time costs

If a sum per day is shown in item 15 of Schedule 1, the claim for adjustment of time costs is limited to that sum. If no sum per day is shown the Contractor is entitled to a cost adjustment equal to the loss or expense it incurs due to the decision by the Architect to adjust the date for Practical Completion.

Issue

Any amount per day at item 15 of Schedule 1 would act as a limit upon a claim for adjustment of time costs. The sum given could make financial sense when the contract was entered into but less so by the time the loss or expense is incurred. If a sum is written in item 15 it should allow for the vagaries of material prices and other costs over the life of the project.

In a high inflation environment where the cost of steel and concrete is going up both rapidly and alarmingly, time is increasingly going to be of the essence, because delays will occasion higher construction costs.

J1: Architect may instruct variation to the Works

The Architect may give to the Contractor a written instruction for a variation at any time before the date of Practical Completion. The instruction may include a direction to provide for one or more of the following:

(i) an estimate of the cost of the variation;

(ii) an estimate of the effect of the variation on the date for Practical Completion;

(iii) a quotation for the whole or any part of the cost of the variation.

Issue

The Contractor should only undertake variations after receiving a written instruction from the Architect. Failure to do this could cause disputation at a later juncture.

J2: Contractor to review instruction

The Contractor must review any instruction to carry out a variation, and if the variation will not result in an adjustment to the contract price, or require an adjustment to the date for Practical Completion, the Contractor must carry out the variation promptly.

If the instruction will result in an adjustment to the contract price or require an adjustment to the date for Practical Completion, the Contractor must notify the Architect in writing within 20 working days.

Issue

The Contractor should be aware the effect of Clauses J1, J2.3 and J3 is such that even though the Contractor is instructed to work on a variation by the Architect unless the cost is explicitly agreed in writing at the time the Architect confirms the instruction the cost of the variation may later be disputed.

If in the Contractor's opinion a variation will result in an adjustment to the contract price or date for practical completion, and the Architect has not given a direction to the Contractor to give an estimate, the Contractor should notify the Architect of the need for a variation in writing within 20 working days. Twenty working days is a long time and consideration should be given to amending this provision to allow for a shorter period.

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Note, the Contractor should only commence work on such a variation if and when the Architect has given written instruction to the Contractor to proceed.

J3: Architect to instruct whether variation is to proceed

Within 5 working days after receiving the Contractor's notification under J2, the Architect must either instruct the Contractor whether or not to proceed with the Variation, or request further information.

Within 15 working days after receiving all requested or further information required under J1, the Architect must instruct the Contractor whether or not to proceed with the variation.

An instruction to proceed under sub-clause J3.2 may confirm acceptance of any quotation but, unless it does so, any quotation supplied in relation to the instruction for the variation is rejected.

Issue

As currently drafted only a written instruction by the Architect confirming the acceptance of a quotation for a variation will allow the contract price to be adjusted to include the quoted amount.

The Contractor could be left in the unenviable position of being required to complete a variation without knowing if the contract price will be suitably adjusted to allow for the cost.

Clause J3 and J4 should be redrafted so any quote given by the Contractor upon notification of the Architect is confirmed as accepted when the Architect instructs the Contractor to proceed with the variation.

The deadline of 5 working days for the Architect to instruct the Contractor to proceed, or request further information, and the 15 working days for the Architect to instruct the Contractor to proceed after receiving all requested further information are unworkable if the variation relates to a default that needs immediate rectification. Clause J3 should be amended to limit any possible delay in the Architect's decision making.

L1: Causes of delay which entitle making claim for adjustment of time with costs

The Contractor may make a claim for an adjustment to the date for practical completion and adjustment of time costs, in respect of a delay affecting working days, caused by:

(i) loss or damage to works or materials not caused by the Contractor;
(ii) any act or omission of a separate contractor which causes interference to the Contractor beyond which a competent Contractor might have anticipated;
(iii) a breach of the contract by the Owner including a failure to give possession of the site, make progress payments or other act of prevention;
(iv) an Architect's instruction;
(v) an authority's (including a private building surveyor) failure to promptly give approval for the works;
(vi) the owners consultants failing to promptly provide necessary information which is properly due to the Contractor;
(vii) a dispute with an adjoining owner (except one caused by an act or omission of the Contractor); and
(viii) widespread industrial unrest.

Issue

As drafted Clauses L1 and L2 do not allow for the Contractor to make a claim for adjustment of time with costs caused by disruptive weather conditions or any other circumstances exceeding the allowance shown in the Schedule. Both clauses and Item 17 of Schedule 1 should be amended to allow for other such events.

The Contractor should note if delay has been caused by any of the reasons listed in L1 or due to disruptive weather the Contractor must still submit a claim to adjust the contract under Clause H2.

M13: Contractor to correct defects and finalise works

The Contractor must rectify any defects or finalise any incomplete work, whether before or after the date of practical completion, within the agreed time stated in the instruction, or within 10 working days after receiving a written instruction from the Architect to do so.

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Issue

Clause M13 should be amended to ensure the time stated in the instruction is a reasonable one given the nature of the defect and the amount of work that may be incomplete. This is particularly important because of the effect of Clause M14.

Under Clause M14 where the Contractor fails to correct a defect or finalise any incomplete work within the time nominated under M13 or fails to show reasonable cause for the failure together with a timetable for correcting the problem, the Owner may use another builder to correct/complete the item(s) at the Contractor's cost.

N1: Contract price

The contract price is a lump sum and the Contractor represents that the contract price allows for:

(i) everything reasonably required to complete the works;
(ii) all provisional sums and prime cost sums;
(iii) installation of any items shown to be supplied by the Owner an installed by the Contractor;
(iv) rise and fall;
(v) all statutory taxes and charges applying 5 working days before the closing of tenders;
(vi) all import duties and tariffs on imported materials or equipment to be incorporated in or used in the completion of the work;
(vii) exchange rates applying 5 working days before the closing of tenders;
(viii) relevant industrial awards and work place agreements, site allowances, building industry superannuation levies and long service leave levies; and
(ix) GST.

The contract price does not include any items to be supplied and installed by the Owner as identified in the contract.

Issue

The lump sum amount stated in the contract price includes "everything reasonably required to complete the work". An item may not be mentioned in plans however this does not mean it is not included in the contract price, if a Contractor would reasonably expect the item to be needed to complete the work.

P3: Alternative Dispute Resolution

If the dispute is not resolved within 10 working days after the dispute notice is delivered, the parties may agree to resolve the dispute by one of the alternative dispute resolution methods set out in clauses P4, P5 or P6 that is wither by Mediation, Expert Determination or Arbitration.

The parties must agree in writing to a method within 20 working days. If not, either party may begin legal proceedings.

Issue

Clause P3 should be amended to require speedy Mediation rather than stating the parties must agree in 20 days to a method of Alternative Dispute Resolution.

Provision should also be made in the event Mediation fails that the matter is to proceed straight to a court of competent jurisdiction.

This is more conducive to a quick settlement without wasting time and money, as Arbitration is expensive.

Furthermore we generally advise against the inclusion of arbitration clauses because if a matter goes to arbitration, the parties are precluded from joining co-defendants or third parties to the proceedings, reason being the disputants at arbitration are limited to those whom are parties to the contract.

When engaged to amend such contracts we always allow for a quick time frame for the matter to be brought to Mediation, often we have a provision for the parties to nominate the mediator before the contact is executed with a stipulation that both parties pay for the cost of the mediator on a 50/50% basis.

If the Mediation fails then we stipulate that the matter is referred to a Court of competent jurisdiction. That is save for situations where the contract pertains to residential building works, in which case the matter has to go to the jurisdiction specified in the relevant Act of

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Also note that with arbitration the parties pay for the arbitrator and arbitrators can charge anywhere between $1500 and $7,000 a day. Compare this with the Courts where you don't pay for the judges, it is something that requires "factoring into the equation."

Q1: Owner may require Contractor to remedy default

If the Contractor fails to meet a "substantial obligation" under this contract, the Owner may give the Contractor a written notice requiring the default to be rectified within 10 working days.

If the default is not rectified within that time without reasonable cause being given, the Owner may terminate the Contractor by giving further written notice (i.e. notice of termination).

Issue

This is the notice of default provision. The clause should be redrafted to give greater clarity to what are substantial obligations under the MW-1 Contract or/and giving more time for rectification by listing the obligations.

It begs the question what is a substantial obligation, how does one differentiate a substantial obligation from an ancillary or non-substantive obligation. It is more conventional for a default clause to prescribe a menu of defaults, i.e. to list the types of defaults that permit a party to invoke the default procedure this is clear and non-contentious. Also bear in mind that if a party terminates on the basis of the default being substantial and a Court finds that the default was not substantial then the party terminating will be construed as the repudiator of the contract.

S2: Special Conditions

A range of special conditions can be included, for example, to make the contract compliant with any domestic building legislation in the State or Territory applicable. For example the addition to clause A3 of Warranties by Contractor (i.e. domestic builder warranties required in a given State or Territory).

Issue

Where there is an inconsistency between a Special Condition and a general condition of the MW-1 Contract, the Special Condition will take precedence.

Special Conditions, as shown by the above example, can result in the Contractor agreeing to additional obligations and they can also act to diminish or extinguish a Contractor's rights.

*So be aware of the Special Conditions and how they vary the contract **BEFORE** you sign. If in doubt seek legal advice.*

For more information, please contact Nina McLaughlin or Kim Lovegrove
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