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Construction Law 101



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Contracts

Fixed price contracts

A fixed price contract is a contract with a fixed price for building work which may provide for variations.

Costs plus contracts

A costs plus contract is a contract for the actual cost of building work plus a commission or fee for the contractor.

A contract for domestic building cannot be a costs plus contract unless:

1. the work will cost \$500,000.00 or more or is public construction for the Crown or a statutory authority; and
2. the work involves the renovation or repair of a house and it is not possible to calculate the cost of a substantial part of the work without first carrying out some work.

Design and construct contracts

A design and construct contract is a contract under which the contractor is responsible for designing the building and carrying out the building work.

Major domestic building contracts

The parties must enter into a major domestic building contract for domestic building work which costs more than \$5,000.00.

Section 8 of the *Domestic Building Contracts Act 1995*

Section 8 of the *Domestic Building Contracts Act 1995* prescribes the following contractors warranties as part of every contract for domestic building work:

1. the work will be carried out in a proper and workmanlike manner;
2. materials supplied by the contractor will be suitable for their purpose;
3. the work will be carried out in accordance with the law;
4. the work will be completed by the date specified by the contract;
5. if the work consists of the construction, renovation or repair of a house, the house will be suitable for occupation; and
6. if the contract states a particular purpose for the work, the work will be fit for that purpose.

A provision in a contract for domestic building work which removes any of the contractors warranties in section 8 of the *Domestic Building Contracts Act 1995* is void to the extent that it applies to a breach other than a breach that was known or ought to have reasonably been known at the time the contract was entered into.

The contractors warranties in section 8 of the *Domestic Building Contracts Act 1995* run with the land.

Provisional sums and prime cost items

A provisional sum is an estimate of carrying out building work where the exact



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price of the work cannot be known at the time the contract was entered into.

A prime cost item is materials for the building work which have not been selected or whose price is not known at the time the contract was entered into.

If a contract for domestic building work makes provision for a provisional sum and/or prime cost item the provisional sum and/or prime cost item must not be less than the reasonable cost of carrying out the work or supplying the materials.

Extensions of time

Concurrent extensions of time

Where an extension of time has been granted for delay and the extension of time overlaps with delay the extension of time will be the period of the concurrent delay.

Superintendents power to grant extensions of time

Where a superintendent has a power to grant extensions of time and they are required to exercise this power fairly and honestly, e.g. AS2124-1992 and AS4300-1995, they must grant an extension of time for the benefit of either party where it is fair and reasonable even if the party has not complied with the notice requirements for extensions of time under the contract.

Liquidated damages as a penalty

Liquidated damages for delay which are disproportionate to the loss likely to be suffered may be considered a penalty in which case the provision for liquidated damages in the contract for the building work will have no legal effect.

Defects

“Defect”

There is no precise legal definition of “defect” but generally a breach of contract by a contractor which affects the quality of building work or a defect where a principal has a some other cause of action against the contractor will be a defect.

Design defects

If a defect is caused by the design of the building the architect or engineer who prepared the design will be liable for the defect if they did not exercise a level of care, skill and diligence that is usual among architects or engineers.

Defects liability period

The contractor must rectify defects which arise during the defects liability period under the contract for the building work.

Loss and damage for defects

If a contractor is found to be liable for a defect as a general rule an order can be made that the contractor must pay to the principal the difference between the contract price for the building work and the cost of bringing the work into compliance together with any consequential loss.

However, if the rectification method for the defect is not a reasonable course to adopt then an order may be made that the contractor must pay the principal the diminution in the value of the building caused by the defect.

Home warranty insurance

A contractor must obtain home warranty insurance for defects if they are carrying out domestic building work which costs more than \$12,000.00, unless the building is more than 3



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stories in height and contains 2 or more dwellings.

The insurance must operate for at least 2 years for non-structural defects and at least 6 years for structural defects and incomplete work.

A principal can only make a claim against the home warranty insurance if the contractor is dead, has disappeared or has become insolvent.

If the Victorian Civil and Administrative Tribunal makes an order against a contractor this order binds the provider of the home warranty insurance.

Dispute resolution

Limitation on building work claims

A building work claim can only be made within 10 years after the occupancy certificate or certificate of final inspection was issued.

Domestic building work disputes

Domestic building work disputes must be heard in the Victorian Civil and Administrative Tribunal.

Arbitration clauses

Contracts for building work other than domestic building work can provide for a dispute to be referred to arbitration.

Building and Construction Industry Security of Payment Act 2002

A contractor can elect to resolve a dispute in respect of a progress claim under the *Building and Construction Industry Security of Payment Act 2002* by serving a payment claim under the Act on the principal and then:

1. if the principal does not serve the contractor with a payment schedule within 10 business days after being served with the payment claim the amount of the payment claim is payable under the contract for the building work and if the principal does not pay the amount within the time for payment under the contract the contractor can enforce the amount as a debt in a court of competent jurisdiction or serve the principal with a notice of intention to stop work.
2. if the principal serves the contractor with a payment claim within 10 business days after being served with the payment claim and the amount of the payment schedule is less than the amount of the payment claim the contractor can refer the dispute to an adjudicator.

If an adjudicator orders that the principal pay the contractor amount, the principal can give security for the amount if they subsequently commence proceedings against the contractor for a dispute under the contract for the building work.

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