



Précis Paper

Practical Tips in Drafting and Reviewing Construction Contracts

This is an interesting and practical discussion by two experienced practitioners about drafting and reviewing construction contracts and the pitfalls about which practitioners should be aware.

Discussion Includes

- The potential for inconsistency in construction contracts
- The lawyer's role in reviewing construction contracts
- Looking for loophole engineering
- Time pressures for lawyers - The need to build in time for review into the timetable
- Best practice tips

Précis Paper

Practical Tips in Drafting and Reviewing Construction Contracts

1. In this edition of BenchTV, Geoff Wood (Partner – Baker & McKenzie Lawyers, Sydney) and Tony Bosman (Managing Director – Bosman Consulting Services, Sydney) share their advice about and experience of drafting and reviewing construction contracts.

Overview of Construction Contracts

2. The presenters considered the elements for ensuring that a construction contract is both structurally sound and also a good project management tool. Mr Wood reminded viewers that construction contracts can span 30 years, and cover not just the construction period but also the maintenance and operation of the facility. Construction contracts can also govern the interrelationship of sometimes hundreds of people who are working on a major project. A contract is therefore necessary that not only articulates the risk allocation and what has to be done in a technical sense, but also will be able to be used as a project management tool by the people who have to administer the contract.

The Potential for Inconsistency

3. Construction contracts are almost always drafted by multiple people, and can be made up of multiple separate documents. As a result, there is a risk of inconsistency between the different documents that make up the contract, which can cause difficulties down the line if the parties end up in court and a judge is required to interpret the terms of the contract.
4. Typically, a construction contract will be comprised of some commercial conditions (either standard or bespoke); special conditions that are added because of the specific circumstances of the particular project; and also the technical documents (the specifications put together by engineers and architects who understand the technical elements of the job) and drawings. Many different people will work on the technical specifications and drawings, giving rise to the potential for inconsistency, overlap and gaps unless the final document is carefully reviewed.
5. Mr Wood emphasised that the key to avoiding these issues is to ensure that careful planning and preparation is built into the project timeline to allow for a thorough review of the contract. The lawyer will not be reviewing the technical documents for accuracies but will review the documents for consistency. This removes the possibility of misinterpretation but also gives the project administrator a clear document that can be used in project management. He also advised that the danger of cutting and pasting from precedent

contracts is leaving in terms that are not appropriate to the new job, and the role of the construction lawyer is to identify and remedy such issues.

Loophole Engineering

6. Mr Wood explained that most work in the construction industry is tendered, meaning that the owner prepares a set of documents, sends them out to the industry to bid, and then selects the winning tender. The tender process is competitive, and as tenderers are often cut profit margins in order to be chosen as the winning bid, they will look at the contract closely and try to find the loopholes that allow them to claim more time and money than intended in the contract.
7. Therefore, if one part of the document says that the contractor must do one thing, but another part of the contract or the specifications contradicts this, the contractor may seek to make variation claims based on the inconsistencies in the contract. One of the key roles of construction lawyers is try to eliminate those loopholes.

Building Preparation Time into the Timetable

8. Once the tender process is complete, the owner will often want to turn over the contract documents as quickly as possible, putting pressure on the lawyer to review the documents quickly. One of the key issues that arises in construction contracts is why owners do not build into their schedule sufficient time for lawyers to get the tender documents in the best possible shape. In addition, it is important to leave sufficient time to assess where things are at by the end of the negotiation process and amend the contract documents accordingly. Mr Wood therefore again emphasised how important it is to do as much work as possible upfront to ensure consistency between the various documents making up the contract.

Best Practice Tips

9. Mr Wood explained that it is important to differentiate between the tender process documents and the contract itself. The tender documents define the process for the tender – explaining how bids should be made; how the owner will select the winning tender; and how contract negotiations will ensue.
10. The contract documents are part of this tender process documentation, but define the final relationship between the tender winner and the owner. The contract documents should *not* contain tender terminology, and lawyers should make sure that the terms of the final contract are clear.

11. Mr Wood also advised that tender documents will at time talk generally about the job, whereas the contract will contain specific terms about the general issues described. Sometimes, when people get to the end of the tender process, all of the documents (including the tender process documents) are put into the document. This creates confusion and inconsistency, because as well as the very specific terms of the contract there may be general terms discussing the same issues in the tender process documentation. If the matter ends up in court, all of the documents included in the contract will have to be interpreted by the court, and this creates a loophole engineering opportunity for the contractor.
12. Second, Mr Wood explained that it is important to reflect any updates that have been negotiated in the contract document, including qualifications that the successful tenderer made in the tender, or clauses that have been subsequently negotiated. The "worst practice" noted by Mr Wood is just to include notes of communications or letters that have passed between the parties in the contract itself. Not only is this rife with confusion, it does not assist the project manager who ultimately has to administer the contract.
13. Third, Mr Wood again emphasised the importance of building time into the project timetable to review the documents once the tender is complete. It is also in the interests of tenderers and contractors to leave time to review the contract as it will never be clear cut that interpretation issues will result in a decision in their favour. Having a skilled construction lawyer review contracts is similar to taking out insurance in that it helps to minimise risks.
14. Finally, in terms of specific issues that lawyers should look out for when reviewing a specification, Mr Wood gave the following advice to practitioners:
 - Check technical specifications that may contain commercial clauses that are covered in the contract itself.
 - Check that the specifications make sense in relation to the head contractor. For example, for electrical components, a spec writer writing the electrical specifications may include a term such as "the contractor does not have to do X", when the term is really referring to the electrical sub-contractor, not the contractor under the head contract.
 - Look out for inconsistent terminology.

BIOGRAPHY

Geoff Wood

Partner, Baker & McKenzie Lawyers, Sydney

Geoff Woods is a partner in the Sydney office of Baker & McKenzie, where he specialises in construction, infrastructure and major projects. With more than 30 years' experience, Geoff is recognised as one of Australia's leading construction lawyers and is experienced in all aspects of the negotiation, documentation and administration of major construction, civil engineering, resources, defence and privately funded infrastructure projects, together with alliancing and the outsourcing of maintenance and other functions.

Tony Bosman

Managing Director, Bosman Consulting Services, Sydney

Tony Bosman was admitted as a solicitor in 1986. He has held many positions since this time including Contracts and Probity Manager for Sydney Airports and Head of Legal and Insurance for ISS Facility Services Australia. He is currently the Managing Director of Bosman Consulting Services.