

UPDATE

Property & Infrastructure Issues: The Do's and Don'ts

Wallmans Property and Infrastructure Team provides dedicated legal services to Councils involved in construction and engineering projects. Our objective is to give appropriate and practical advice directed at the early and effective resolution of issues. In the past number of months there have been a growing number of such disputes with Contractors arising from the 'GFC' and the detrimental impact that has had on the construction industry.

Effective allocation and pricing of risk at the commencement of a project is essential to successful completion. It is important that standard-term contracts be finalised to reflect the basis on which a project is procured. Do not be afraid to seek comprehensive advice in relation to the construction or engineering elements being undertaken by the Contractor throughout the lifetime of the project - waiting can cost thousands of rate payer dollars. Procurement of a project, which does not address the commercial considerations of the parties and where risk lies, can result in very expensive problems. Recent cases have illustrated the need to control 'expenditure' early. However, such situations can and should be avoided. Watch for 'Variations' and the associated costs. Much of this risk is determined on the basis of the knowledge of the Contract being used. Even experienced Superintendents can be caught out.

Project Procurement:

This may involve traditional contracting, design and build contracting, Public Private Partnership (PPP), and variations of these contracts. Common issues include the implications of nomination of sub-contractors and the use of PC sums, responsibility for co-ordination, integration and other aspects of design, and the potential fitness for purpose implications of design and build contracting. It has been our experience that where older versions of Contracts are being used, especially in the 'design and construct' projects, there is a greater degree of risk and exposure for Councils. Our advice is that existing agreements need updating by a seasoned Contracts Manager and reformed to limit liability issues. Do not choose to rely on a document that has not been tested simply because it was used last month. Each Contract requires different clauses to be effective and others to be deleted. Unless you are certain as to the exact meaning of the clauses do not take the chance; it could prove a costly mistake. Consult your Contracts Manager.

Contract Advice, Drafting and Negotiation:

The use and adaptation of Australian Standards and similar forms of contract, together with collateral warranties and bonding agreements (more recently introduced) are typical features of many construction and engineering projects. Understanding how the standard form contracts meet your needs, or can be adapted to do so, is highly important. To take one example, the frequency with which building contracts are not adequately amended for sectional completion can deprive Council of an important facility through no fault of the Contractor. Ultimately the requirements of a project may only be met by a bespoke contract - the problem is that quite often the Standard Contract is used and does not meet the legal requirements to afford the maximum protection to Council. Recently we have advised a number of Councils where the cost implications ran into hundreds of thousands of dollars because of a 'loose' contract.

Contract Management and Dispute Avoidance:

By their nature, construction and engineering contracts are designed to accommodate change and take account of the unforeseen. In contrast, the principal objective of many other commercial contracts is to ensure there is no change or alteration to the subject matter. Difficulties can arise when procedures for change in a construction contract are not observed by the parties, leading to an accrual of cost or extension of time (EOT's) issues towards the end of the project, and likely disputes. Timely advice during the course of a project can assist with early resolution of problems and if that is not possible then management of issues can significantly reduce the scope for dispute.

Dispute Resolution:

Assessing when and how to seek resolution of disputes is very important, but divorcing this assessment from critical examination of the substance of claims can make it a pointless exercise. Thorough investigation of a claim early can lead to a strong and convincing presentation of that claim, or a realisation of its difficulties - either can be valuable for differing reasons and save countless dollars in the process. Often protections are hidden in the wording of the Contract that was previously not known to have practical application to your particular scenario.

Conclusion:

Successful completion of a project is in the common interest of all concerned. Taking effective advice in the early stages is a cost-effective way of pursuing this objective and managing the many complex issues, which can and do arise. We believe that our Property and Infrastructure Team can add value to your project. Should you wish to discuss any aspect of construction law please do not hesitate to contact us.

Please contact Trevor Gormley, Senior Associate in the Local Government Team, on 8235 3010 or trevor.gormley@wallmans.com.au or Mark Sallis, Consultant in the Local Government Team for further information on 8235 3006 or mark.sallis@wallmans.com.au

Wallmans Lawyers
173 Wakefield Street
Adelaide SA 5000
P: 8235 3000
www.wallmans.com.au