

School Construction Contracts

We all commence construction projects hoping that everything will go smoothly with just the occasional hiccup. So how do you prepare for the unexpected difficulties that you may encounter?

Project Manager

Consider whether you should retain an experienced project manager at an early stage. Whilst we realise that a school generally turns to an architect for ideas when a project is first considered, we believe that a school should consider at the beginning of the project whether it is more appropriate to retain a project manager before any other consultant. Normally an architect has a conflict of interest in that the architect's fee is based on the cost of the project. Also, while there are architects who do perform the project management role well and cost effectively, it is better to have the independence of a project manager who can also oversee the contracts for all of the consultants. A school should beware of asking the business manager or bursar to act as project manager. Enough of their time is going to be taken up representing the school in project meetings, let alone carrying out their normal day to day responsibilities. It is false economy for a school to add the role of project manager to the tasks of a busy business manager or bursar.

Having said that, you need to ask around to check that any project manager – indeed any consultant – has performed well for other schools and comes well recommended.

Construction Contracts

A good place to start with building contracts are those published by Standards Australia, now sold through SAI Global, as they provide independently drafted terms. Most construction contracts which are prepared by industry associations for their members are biased in favour of the member/contractor. We generally find that contractors engaged by a school will be reluctant to make any changes to their industry construction contracts. They believe that, because the contract was prepared by their industry body, the clauses in the contract are necessary to protect the contractor. It is therefore preferable to start with a contract prepared by an independent organisation such as Standards Australia and then amend it appropriately for the particular project.

Industry construction contracts often contain indemnity provisions which are unacceptable as they attempt to reallocate risk from the contractor to the school. You should therefore have all contracts related to the project carefully looked at by your legal adviser so that they properly reflect the risk that is being carried by each of the parties.

Some of the matters that need to be included in construction contracts for both builders and contractors:

Fees

You will need to consider whether the fees are payable as a lump sum fee or are payable on a time, or cost plus, basis.

The timeframe for payment of the fees

This is important because under the Building and Construction Industry Security of Payment Act if payment is not made within the time frame set out in the contract, the contractor will have, in effect, a court judgment for payment of the money.

Professional indemnity insurance

You will need to consider what loss you may suffer if the consultant is negligent and ensure that the consultant has appropriate insurance to cover your potential loss.

Date for completion

Together with the project manager, you will determine the reasonable time for completion of the project. That date is the "date for practical completion". There will be clauses providing for extra time where there is unavoidable delay. It can be tricky negotiating clauses where the performance of one consultant, for example the builder, will be dependent upon the performance of the air-conditioning consultant.

Damages

You need to consider what loss the school may suffer if the project is delayed, whether for unavoidable causes such as weather, or for the poor performance of one of the consultants. That loss can be expressed as "liquidated damages", which is a genuine pre-estimate of the daily loss which the school may suffer if it is not able to use the buildings.

Retention sum

The contract should allow the owner to hold back some of the fees until a period of time has expired after practical completion when it should be reasonably clear that there are no serious ongoing problems. That period is generally referred to as the "defects rectification period".

Disputes

Construction contracts contain dispute resolution procedures. However, many contracts overlook the fact that under the Building and Construction Industry Security of Payment Act there are set procedures for adjudicating payment claims where there is a dispute as to the amount of any progress payment (or final payment) that is owing. The dispute mechanism in that Act is a helpful way of resolving payment disputes.

Limitation of liability

Some contractors wish to limit any ongoing liability to the amount of their professional indemnity insurance. In each case you should look carefully at the potential loss you may suffer if the contractor has not performed in accordance with the contract and negotiate appropriate clauses. You also need to ensure that sub-contractors have adequate cover for their potential liability.

Principal contractor

The NSW Work Health and Safety legislation requires, for most construction work, that there be a "principal contractor" who must ensure compliance with the legislation. The person who commissions a construction project has the obligations of a principal contractor unless they engage another person as principal contractor and authorise that person to have management or control of the workplace, and to discharge the duties of a principal contractor. Accordingly, to ensure that the

school will not have any Work Health and Safety liability, your contracts should ensure that a person is appointed as principal contractor.

For more information, please contact

Garry Pritchard

02 9267 9800

Garry.Pritchard@emilford.com.au

© Emil Ford Lawyers