
Fundamentals of Construction Contract & Contractual Risks:

Design Risks

The Belden logo consists of the word "belden" in a white, lowercase, sans-serif font, centered within a solid red square.

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Categories of Contracts

- Design and Build
- Build Only
- NSC (Specialist)

Design & Build

Design & Build

- Duty to ensure that design meets **the purpose, functionality and suitability as expressed in Employer's Requirement**- Fitness for purpose
- Duty can come in the form of express duty (included as term in Contract) & implied duty (by law)
- Absolute duty- need very clear language to exclude

Design & Build

- *Independent Broadcasting Authority v. EMI Electronics*

*“In the absence of any terms (express or to be implied) **negating the obligation**, one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose.”*

Design & Build

What is at stake?

- Works will **not** be deemed “completed” if not up to standard required
- Non-payment by Owner
- Call on Design Bonds
- Duty extends to Defects Liability Period
- Limitation of Liability – Contract & Tort
 - 6 years- Breach of Contract & Tort- S.6 (1) Limitation Act
 - Latent Defects? 6 years begins to run from the discovery of the defect

Design & Build

- So, where is the information (purpose or function) contained?
- Statement of Needs, Employer's Requirements, Performance Specification
 - Dictates the Design
 - Need to be aware if referred to other standards (e.g. British Standards and Code of Practice)

Ambiguity/Uncertainty of the Information

- Information provided maybe incomplete/unclear /inconsistent – most contentious/ open to interpretation
- Contractor's is required to understand the information **clearly**
- Interpretation standard applicable: Specialist Contractor's knowledge & Understanding (Not laymen)
- Duty to study and inspect information provided by Employer

Ambiguity/Uncertainty of the Information

- Seek clarity- ask for clarification if the information provided is incomplete/unclear/ambiguous or discrepant
- Failure to seek clarification on incomplete/unclear/conflicting information= **Waiver of right to variation**
- Conflicting Requirements= Employer choosing one option over the other= **X variation**

Duty to Clarify

- Conditions of Tender

“The Tenderer, before submitting his tender, shall clarify with the Consulting Engineers, the precise nature and requirements of the installation. The Tenderer shall clarify for himself the complete character of the work, access to the site, local conditions and facilities, safety requirements and generally as to all matters which can in any way influence his tender.”

Duty to Clarify

- Conditions of Tender

“Prior to submitting a proposal, the tenderer shall take cognisance of his responsibilities as outlined above and shall notify the party contracting for the work if any conditions exist which make it impossible for him to stand behind his unqualified proposal as a firm commitment... Unless the tenderer provides proper notification to the contrary, it shall be considered that he has found acceptable the conditions under which he has a dequate time to prepare his proposal and furnish qualifications he deems necessary.”

Duty to Clarify

- Conditions of Tender

“...It will also be assumed that he has adequate access to the site of the Project, adequate opportunity to inspect any existing conditions, and adequate opportunity to inspect the drawings, specifications and other documents...”


Duty to Clarify

- Duty to raise discrepancies for resolution timeously
- PAM Contract 2006, Clause 1.4

“... If during the said planning and subsequent execution of the Works, the Contractor finds any discrepancy in or divergence between any of the Contract Documents and any subsequent document issued by the Architect, he shall give to the Architect a written notice in sufficient time before the commencement of construction of the affected works...”

Don't just assume.

**It makes an ass
out of u
and me.**

 AndrewKelsall.com

Clarity of Information

- Clarification provided by Employer, is that enough? Does the risks end there?
- Are the clarifications binding? What if provided orally?
- Make sure that all clarifications are made part of the Contract (e.g. Appendix, Special Conditions).
- How?
 - Clarification provided orally, write letters- seek confirmation or write to confirm (even if unilateral)
 - Refer to in LOA

Design & Build

**Especially since most contracts these days provide that approval from Owner does not relieve the Contractor from design obligations

***Entire Agreement Clause- excludes all extrinsic representations, agreements etc.

"This Agreement ... constitute[s] the entire agreement and understanding between you and us in relation to the subject matter thereof. Without prejudice to any variation ... this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement ..."



Design & Build

- What if clarifications not included in Contract document?
- Law of Interpretation- 4 corners of the document.
 - But is that all?
- However, if the contract document gives rise to ambiguity, inconsistency or uncertainty, the *matrix of facts* approach becomes relevant.

Design & Build

- Even if the tender clarifications are not included as part of contract documents, Adjudicator/Tribunal/Court can still consider extrinsic facts to interpret the contract documents and determine the parties' intention
- Records e.g. minutes of meeting, handwritten notes

Design & Build

- How do you address clear ambiguity and/or discrepancies after Contract?
- Within contract itself, there maybe a provision ranking the priority of the contract documents
- However, typically, these provisions only deal with ambiguities/ discrepancies between different contract documents. Not discrepancy between drawings or details given.
- Contractor will need to issue RFI

Novation of Architect

- Increasingly common that Owners employ their own architect to start off process
- When contractor is appointed, novate the architect as part of the Contractor's team. Under the novation agreement, Contractor takes responsibility for the work carried out by architect both pre-and post contract.

Novation of Architect

- If contractor suffers loss because of architect's design error which occurred during architect's employment by the employer, can Contractor claim against architect?

Novation of Architect

- *Blyth and Blyth v. Carillion Construction Ltd* (2001)
 - Novation agreement allowed Contractor to pursue claims against the Architect which would have been available to employer.
 - However, design errors affect contractor's price. Employer did not have to pay additional loss. Employer suffered nothing.
 - Contractor recovered nothing.

Novation of Architect

- Propose that a warranty be created
- CIC/Nov Agr novation agreement published in 2004 by the Construction Industry Council deals with this issue. In Clause 4(a), consultants warrant to Contractor that all services provided by employer have been performed in accordance to terms of the original appointment.

Design Phases

Design & Build

- Conceptual Design, Preliminary Design, Detailed Design
- Design change instructed- Within / Outside scope of Owner's requirement
- If outside scope, variation
- What if changes relate to aesthetic changes?

Build Only

Build Only

- Can a Contractor be held responsible for a design error if there are no provisions in the contract to undertake any design Responsibility?

Build Only

- Implied term that a Contractor would undertake the work in a good and workmanlike manner. Duty to exercise reasonable skill and care.
- Civil Law, duty to warn= Good faith obligations
- A contractor can be held liable together with the designer, where the design is faulty, if a reasonably competent Contractor would identified the error.
 - *Edward Lindenberg v. Joe Canning, Jerome Contracting Ltd*

Build Only

- If Contractor offered alternatives, Contractor will have liability over the design proposed.

- What about selection of material?

The rating of equipment, materials & fittings offered and installed shall be suitably selected to suit the system as a whole...”

- Arguably this creates design responsibility in respect of the selection of equipment

Build Only

- If contract provides for supply of materials, implied warranty that materials will be good and proper quality.
- Beware of applicable standards, by-laws, regulations
- Instances where implied duty arguably do not apply: -
 - Contractor required under the Contract to use materials from a nominated supplier;
 - Contractor has no right to refuse to use the materials;
 - Unable to insist indemnity from supplier

Build Only

- PAM Contract 2006, Clause 1.3

“If the contractor proposes alternative design to that specified in the Works or if the Contract leaves any matter of design, specification or choice of materials, goods and workmanship to the Contractor, the Contractor shall ensure that such works are fit for its propose.”

Causes of Changes to Design

Changes caused by:-

- Unforeseeable Site Conditions
- Changes in Legislation/environmental policy
- Request for Value Engineering
- Employer's requirements changed
- Impossible to build

Unforeseeable Site Conditions

- When can the Contactor satisfy itself? Before tender?
- Was the relevant information given by owner to Contractor?
- Is there an exclusion on the veracity and dependency on Owner Information?
- Was there enough time pre-tender submission for Contractor to verify?

Changes in Legislation

- Neutral Risks- Not caused by Owner
- If Contract does not allocate, then often it is Contractor's risks

Value Engineering

- Is there a contractual provision?
- If none, cannot be requested or offered but subject to agreement on changes & impact
- If yes, does it amount to change?
 - No, if caused by design failure or build-ability problems
 - Yes, if due to improvements on functionality or savings on functionality

THANK YOU