PRE-TENDER INFORMATION: WHAT IF IT'S WRONG?

PricewaterhouseCoopers

Owners who enter into complex building contracts are often required to make representations about a building project, when the accuracy of the representation cannot always be verified.

PROVIDING NECESSARY INFORMATION

The entire pre-tender procedure may be a significant and necessary 'representation' by the owner to the tenderer.

Items such as the geotech report and the bill of quantities are examples of 'information' made available by the owner to the tenderer. This information is often provided by a third party to the owner or is otherwise not capable of accurate verification at the tender stage. Sometimes 'information provided' may require investigation by a tenderer who has a particular skill in assessing the information, such as the estimation of quantities by a demolition expert.

REPRESENTATION, MISREPRESENTATION AND LIABILITY

If representations are wrong they could be misrepresentations which are actionable under the *Trade Practices Act*, even if the maker of that representation was completely honest in making it. The *Trade Practices Act* in Australia sets a low threshold for liability. A Corporation which acts honestly can be liable if its representation is wrong. Seeking to contract out of a duty imposed by legislation is not easily accepted by the courts in Australia.[1]

There are boilerplate clauses included in contracts today which may assist in minimising the risk of incurring liability because a representation may turn out to be incorrect. These clauses are however not the subject matter of this article.

This article examines what steps could be taken to avoid liability by reducing a party's ability to rely on information which may not be correct.

WHAT CAN THE OWNER DO?

Identify the unverified information to the tenderers at an early stage

This can be done so that the recipient of the information is not prejudiced by having already acted on it. The best time to do this is at the latest when the information is provided. Sometimes the fact that information has not been verified can be pointed out before the information is even provided. An example might be 'site plans will be made available for inspection but the owner does so for the sake of convenience only and the information contained on the site plans has not been verified'.

The effect of this conduct may lesson the likelihood that the party could reasonably rely on information which turns out to be incorrect.[2]

Describe the source of information and state why you are disclaiming it

This is appropriate if you are not an expert, will not be able to verify the information and cannot vouch for its accuracy. In the case of re-development, for instance, site plans may be many years old and may have been provided by an institution which no longer exists. Reasons for not being able to verify the information are provided so that the tenderer can understand why he/she should not place reliance on the information. If a tenderer is careless in relation to a warning received about the unreliability of information that may be a factor which would prevent him from recovering loss.[3]

Make the disclaimer as specific as possible

State exactly what you disclaim. The danger in this conduct is that the disclaimer will be narrowly construed. It is of greater advantage to have a narrow disclaimer that is effective than a wide disclaimer which is ineffective. Courts have on occasions found that disclaimers in contracts are so general that the practical effect is that contracting parties ignore them.[4]

INCLUDING POST-TENDER CORRESPONDENCE IN THE CONTRACT

Including post-tender correspondence in a contract can often seem an easy and 'safe' way of ensuring that everything that was agreed has been recorded. Unfortunately, it very often has the opposite effect, and can sometimes lead to results which neither party intended.

THE 'ALL OR NOTHING' APPROACH

Construction contracts sometimes involve lengthy negotiations, recorded in a series of faxes, letters and emails. The parties are so relieved at finally reaching their hard-won agreement that they decide to include all the post-tender correspondence as some kind of 'safety blanket' to ensure that the contract records every point of agreement so that none will be missed.

Correspondence may not always be clear and each party could seize upon nuances and suggestions which suit its position if a dispute arises.

Including all the post-tender correspondence is nothing more than an admission by the parties that they had finally reached agreement on the issues but were too exhausted to work out exactly what the concise terms of agreement were.

PROPOSED SOLUTION

When tempted to use the 'all or nothing' approach, summarise the points of agreement in all the correspondence. If you include those summary points as contract terms you will no longer need the 'safety blanket' correspondence. The chances are better that you will now have a clear and concise contract.

THE 'GOLDEN NUGGET' APPROACH

This occurs when an item of particular contention is finally settled. One party (let's say in this case the owner) is particularly anxious that a hard-won concession from the contractor is clearly recorded and so includes in the contract a long letter in which the important concession (the 'golden nugget') is buried as item 25 on page 10.

Unfortunately the 30 other items in the letter all represent issues still under discussion, and the position taken by the contractor in the letter on each of those other items is different from what was later agreed between the parties. On the face of the letter, the contractor may appear to have won concessions from the owner on a number of items, whereas in reality, it later resiled from those positions and the ultimate agreement on those issues is reflected in the General Conditions.

If a dispute arises on one of those other 30 issues, the contractor could point out that the 'agreed' position is clearly set out in the letter. There will be arguments available to the owner to refute the allegation that the letter reflects the true position (inconsistent terms, General Conditions take precedence etc) but the contractor on the other hand will no doubt more specific, or that the subject matter of the clause in the General Conditions is

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really different from the subject matter of the sentence in the letter, etc. By adding this letter to the contract a whole raft of potential disputes is unnecessarily added.

Proposed solution

If you are anxious about the 'golden nugget', treat it with the respect it deserves: summarise the agreement, insert it in the appropriate place in the contract and exclude the letter from the contract.

THE 'SQUARE PEG' LETTER

In this case, a seemingly clear letter containing a succinct summary of the parties' agreement on one point only is inserted in the contract. It appears to sit quite happily with the proposed solutions referred to above.

However the letter is completely inconsistent with a clause in the General Conditions and also directly contradicts a number of sub-items in the Specification. The item was negotiated by the parties independently of the main contract negotiations, and no-one thought to check with those drafting the contract to see whether consequential changes needed to be made to the other contract documents to avoid inconsistency.

If a dispute arises, a party can easily make mischief of the inconsistency, and the parties would be in dispute over something supposedly 'agreed'.

Proposed solution

Provide your lawyer or contract draftsman with sufficient time to review all contract documents and to cull or amend the content for inconsistencies. Lawyers are often accused of 'holding up execution' but sometimes this is due to no more than the need to make sure all the negotiated issues are reflected in a consistent, accurate and workable contract.

Post-tender correspondence? When in doubt, leave it out.

REFERENCES

1. *Burg Design Pty Ltd v Wolki* (1999) FCA 388 (9 April 1999).

2. *TACO of Australia Inc v Tacobell* (1982) 42 ALR 177.

3. *Parikdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

4. *Keen Mar Corp Pty Ltd and others v Labrador Park Shopping Centre Pty Ltd and another* (1989) 67 GRA 238.

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