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Good Contract Risk Management

Good Contract Risk Management can be achieved in many ways. In this article, Maren considers the importance of the contract to the execution of the project and the consequences of ignoring its procedures, as well as record keeping and clear communication and the key role contemporaneous records can play if a dispute arises but also the associated pitfalls.

The Contract is King
Lawyers are often involved at two stages of a project:

- firstly at the outset when the contract is negotiated and signed;
- and secondly, if things have gone wrong or a dispute has arisen and the project is potentially at risk.

However, the most important part is the execution of the project itself which is often left to the parties alone to manage.

Once the contract is signed, the parties are keen to start work and become engaged with the demands of the project. As a result, parties may put the contract in a drawer to gather dust and only retrieve it if something goes wrong. By doing this, there is a significant risk that the parties will move away from what has been contractually agreed. This is where problems usually begin.

Consequences of ignoring the contract
The problems that may arise include:

- **Loss of rights or "waiver"**. A party may lose a contractual right by not insisting on precise performance of that duty under the contract. For example, if the innocent party ignores or takes too long to respond to a breach of the contract, they may lose their right to take action in respect of that breach and also in respect of breaches of a similar nature in the future. Whilst contracts often contain a "no waiver" provision, there may be circumstances that are not covered by such a provision.
- **Variations**. A party may also be taken to have varied the contractual terms through what it says or implies by its conduct. For example, where on a number of occasions a party makes late payment and this is accepted by the other party, this might be treated as a variation of the payment terms set out in the contract. This is different from variation orders (also called change orders) which concern changes to the scope of the works itself. The fact that the contract requires variations to be formalised in writing will not necessarily protect against this.
- **Failure to comply with pre-conditions**. Prior to the exercise of a particular right, a party might need to satisfy certain conditions. For example, a contractor's entitlement to claim additional time for delay might be contingent on them serving a notice at the time of the event giving rise to the delay. Failure to comply with the relevant pre-conditions may mean that the relevant contractual right is lost altogether.

Good contract administration procedures
In light of the above, it is good practice for project managers to read the contract after signature and put in place the appropriate contract administration procedures for the project which are communicated to the project team. Some pointers to consider in this respect are as follows:

- **Flow charts and protocols.** Create flow charts or protocols for the contractual processes to ensure that individuals involved in the project have a clear overview of the correct forms to use, approvals to be obtained and timeframes in which to take the relevant steps. A project manager should also consider performing a periodical audit to check that these are followed throughout the project.
- **Variations**. If during the project, the parties agree to change any of the processes in the contract, these should be recorded in writing and the parties should also consider
- whether any of the administration procedures need to be up dated and whether the variation will have an impact on other parts of the contract.

- **Be aware of key risk areas.** This will depend on the nature of the project but these will typically include matters relating to payment, time for completion and adjustment of the contract price.

Essentially, the contract is not just for the lawyers, but a tool for achieving a successful project. As a result, every member of the project team should be familiar with the contract and, if its procedures are followed appropriately, it can be the key to avoiding disputes, not creating them.

Formal project documentation

Formal project documentation typically consists of drawings, contractual notices, work programmes, invoices and other documents that are required by the terms of the contract. It is common for the parties to agree the content and format of such documents during negotiations and the prescribed form will then be appended to the contract.

It is useful particularly on document heavy projects, to have a central system for storage of such records as well as a protocol for filing them, which is understood by the parties involved.

The main risks in relation to formal project documents are:

1. Failure to issue and/or complete the document in the manner prescribed in the contract;

2. Failure to use a prescribed form;

3. Where there is no prescribed form, failure to refer to relevant contractual provisions, i.e. if you are purporting to give notice pursuant to a specific contractual clause, the notice should refer to it;

4. Failure to file a document in the correct location or at all, which results in it effectively being lost.

These risks may seem trivial, however as explained above, completing the correct paperwork may be essential to preserve your contractual rights. Moreover, in the event that a dispute arises, having a clear document trail could mean the difference between resolving the issue quickly and in your favour.

To avoid such problems you might consider the following:

- Understand what the contract requires in relation to content of a document or notice, particularly if there is no prescribed form to be used;

- Where there is a prescribed form, ensure that it is completed properly and in line with the contractual requirements;

- Ensure that there is a central system where records are kept and easily retrievable and make sure that responsibility for filing and maintaining documents is clear;

- Depending on how document heavy the project is, consider having a dedicated person in charge of document management, who will maintain a full index of the documents with an appropriate filing/numbering system which is understood by all.

Email management

Email can be a helpful tool in managing a project and recording events and agreements between the parties. However, despite now being the commonplace method of communication between parties, email communication can be poorly managed and its significance is often overlooked.

There are some important considerations regarding email communications on a project that can be forgotten. These include:

- Email creates a permanent and easily recoverable document trail. Once an email has been sent, it is likely to sit in your mailbox, the mailbox of the recipient(s) as well as on a central server which is likely to be backed up.

- When it comes to the disclosure of documents during a dispute, in a number of jurisdictions, courts and arbitral tribunal have wide powers to order searches of not only copies of emails that are on the central file but also from individual email accounts, central servers, back-up tapes etc. This can mean that emails which may have been deleted and may be unhelpful in terms of the dispute may still have be disclosed to the other side.

Email does however have advantages for contract risk management. For example,

it can be a useful contemporaneous record of progress; a summary email at the end of the working day recording outstanding or incomplete tasks can be a very helpful tool to determine whether certain works were complete at a specific point in time. It can also be used to summarise and record your understanding of a conversation with other team members or the other party to the contract and if this is sent to them at the time and not disputed, can be powerful contemporaneous evidence.

However, given the instantaneous and informal nature of emails, they can often be less than helpful. Common pitfalls include:

- Not using clear language. Often, emails are typed up quickly and with little thought as to accuracy and clarity of content. This can give rise to differences at the time and could escalate a difference into a dispute.

- Thinking that email is private. Emails generated in the course of employment, even if they are private in nature, are still work emails that can become the subject of scrutiny in the event of arbitration or litigation. When writing emails, it is important to think about the possible future audience and the consequences if it were read by someone other than the original recipient.

- Not taking proper care with regards to the distribution of information. In particular, be careful when using "Reply All" to check who is copied on the email and when using "Forward" to check the email chain carefully to ensure that you do not pass on information which is confidential or unhelpful.

It can therefore be important to remind people of these pitfalls and their consequences when starting a new project. Ultimately, if a dispute arises, the key to resolving the dispute will often be contemporaneous documents, whether these are formal contract documents or electronic documents, such as emails, and if these are clear and unequivocal, disputes will often settle without need for lengthy litigation or arbitration.

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