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The risks of attaching too many documents to a construction contract

Large construction contracts are a common source of complaint from principals and contractors alike, and with good reason: unintended risk allocations may lurk in that pile of paper.

The kitchen sink approach: throwing everything in

When preparing contracts, we often see parties who believe it would be helpful to include a variety of pre-contractual discussion documents: tag negotiation lists, copies of emails, meeting minutes, and other documents relating to tenders and the negotiation process.

Some people think this approach is quicker and cheaper than updating the contract terms and specifications to reflect what the parties have agreed and that, if all the discussions are included, it will be clear what everyone meant. Advocates for this approach commonly assume that if there are conflicts between those discussion documents and the final contract, then a clause prioritising the documents will deal with any superseded and irrelevant items.

Include them all and let a judge sort them out? That may lead to unexpected outcomes

Obviously, including all of this material makes contracts unwieldly and hard to manage on the ground. Worse, parties may unknowingly be binding themselves to positions in the surplus documents that may not reflect the final intended position. *Clancy Docwra Limited v E.ON Energy Solutions Limited*, an English case which is likely to be influential in New Zealand, showed the uncertainty that can be introduced into a contractual relationship if care is not taken with what documentation is included.

CDL was subcontracted to carry out excavation work in London where there is a real risk of poor ground conditions, including obstructions and unexploded Second World War ordnance. In the contract documents:

- in the main contract terms, E.ON allocated the risk of adverse ground conditions to CDL;
- in CDL's tender, CDL excluded the removal/breakout of obstructions from its scope; and
- there was a priority clause, setting E.ON's contract terms above CDL's tender documents.

This apparent conflict came to light when CDL encountered brick walls and rubble that then increased the project costs. The presence of both positions in the contract introduced uncertainty and gave each party a reason to believe that its position was correct, making a dispute inevitable.

Eventually, the Court held that there was no conflict between the two positions: E.ON's ground risk allocation terms simply did not apply because the removal of obstacles was outside the scope, and therefore did not form part of the contract works. Importantly, the Court's decision was influenced by its view that the tender documents "*must have some role to play and they are included in the [Contract] for a reason*".

Key takeaways

- You should take care when compiling documents at the back of the contract, and only include items that you intend to be binding.
- If elements of a pre-contract document are relevant, you should extract the agreed positions and incorporate them directly into the contract and specifications. This provides clarity, makes the document more user-friendly, and can help to identify any areas where you are not yet aligned with the other side.

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(Continued)

Do include

- contract terms
- pricing
- site plans
- drawings
- specifications

Avoid including (where possible)

- emails
- tag lists and negotiation sheets
- tenders
- meeting notes

Want to know more?

If you have any questions about putting contracts together in a way that reduces the risk of disputes, please contact Anton Trixl or Steve O'Dea in our specialist Construction Team.

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