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## **COMMON CONTRACTUAL RISKS**

*that affect your margin in  
construction and engineering  
projects*

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CONTRACT & COMMERCIAL LAW



## NO WRITTEN CONTRACT

**SCENARIO:** A valued client calls and asks you to help with a strategic project. You make some suggestions about scope and price, and they agree. The program is under pressure - can you get started ASAP? They'll send you a PO or something in writing soon.

**RISK:** The client never gets around to sending that PO. The project goes pear-shaped, they renege on the agreed price and your relationship is souring fast. There may be a legal contract, but no one knows what its terms are.

**CONTROL:** Have a set of brief, reasonable T&Cs that you can attach to a follow up email after the initial phone call, outlining the scope and price and stating that you'll commence the work when they confirm acceptance of your T&Cs by return email.



# 2

## IGNORING PROCEDURES & MISSING DEADLINES

**SCENARIO:** You've won a big project. The commercial team reviewed the contract pre-award and you're confident the risks are manageable. The contract is really long so you didn't read it yourself. Time goes on. The project is dogged by constant variations and delays. You don't worry too much, you'll sort it all out at the end of the job.

**RISK:** You miss contractual deadlines for notifying and claiming variations, extensions of time and delay costs and end up time barred. You'd been relying on those claims to prop up your margin. The project finishes at a loss.

**CONTROL:** Have your contract reviewer prepare flowcharts and guidelines for the contract administration team, visually setting out contract requirements and deadlines.



# 3

## POORLY DEFINED SCOPE

**SCENARIO:** You've won a big subcontract on an iconic project. The contract isn't too bad, but the section that explains your scope is vague - it says something like "see head contract scope". The head contract scope isn't attached to your contract, and in any event doesn't distinguish between subcontractor scopes or disciplines.

**RISK:** You're working on the basis that your scope was in your tender. But your tender isn't in the contract, and the client assumes that you'll do a whole lot of other stuff that is loosely connected to your part of the project - all for the same price.

**CONTROL:** Clearly define your scope, in as much detail as possible. State assumptions and exclusions. If your client wants to use the head contract scope, ask for it to be marked up to identify your scope. Alternatively, ask if you can use your proposal as the scope, making sure it is expressly incorporated into the contract.



# 4

## INAPPROPRIATE CONTRACT

**SCENARIO:** You've tendered for the engineering scope on a strategic D&C project. There was no draft contract in the tender package. You won the job. They've now sent you a copy of the construction contract and told you "the other consultants just signed it".

**RISK:** The contract is not a match for your scope. You take on risk that you can't possibly control or insure and agree to obligations that you can't deliver.

**CONTROL:** Propose performing your scope under a balanced, industry accepted standard form contract, negotiating minor amendments to manage project-specific risks for both parties.



# 5

## NASTY INDEMNITIES

**SCENARIO:** There's an indemnity clause in the contract. It goes for half a page and it's chock full of legal gibberish. You don't understand a word of it but you don't want to sound stupid so you just ignore it and hope for the best.

**RISK:** The general legal position is that you'll pay for losses that come about because you failed to deliver the promises you've made in the contract. Insurance typically responds to that risk. If the indemnity departs from the common law position, you may be agreeing to extra risks that you can't control or insure.

**CONTROL:** Make sure you understand what the indemnity says. It should be fault-based, contain a proportionate reduction for losses caused by other parties and be subject to a cap on liability and an exclusion of consequential loss.



# Need help?

SoundLegal can support you with:

- Tender stage contract reviews
- Drafting contracts, subcontracts and suites of contracts
- Contract administration flowcharts and guidelines
- Tailored workshops for commercial and contract administration teams

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