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10 WAYS TO AVOID CONTRACT POTHOLES

By Jonathan Olson-Welsh and Amber Chew

Agreeing the financial nuts and bolts of a construction project takes a lot of time and effort. However, all of that could be put at risk if no contract is agreed and signed. Putting a contract in place should, perhaps, be the top KPI for all parties. And there are other simple contractual issues that can be easy to miss, with potentially significant consequences. Just dip into the law reports to see what can go wrong. So here are some common contract traps, easy to fall into but important to avoid.

1. A letter of intent is not for life (of the project)

It's a short term fix to get a project under way in the absence of a finalised contract, but it is usually light on important ingredients. For example, it may have an expiry date or a ceiling on expenditure because the expectation is that a contract will materialise. There can be problems if it does not.

2. Wot – no contract?

Two years after a football stadium opened, a judge found that two of the major players in its construction had no contract. This meant the subcontractor concerned was entitled to payment, not to the contract price, which had been carefully priced, but on a quantum meruit basis (a reasonable sum for each element of its work). And proving what is a reasonable sum can be a long and tedious task.

3. Keeping the right company

Make sure you check the correct identity of whoever is contracting with you. When a tenderer described itself as the 'Cuddy Group', the employer's solicitors searched for the company that would enter into the building contract and found a Cuddy company, which was entered as the party to the building contract. It turned out to be the wrong one. Would the court rescue the situation because it was clear what was intended? In that case, no.

4. Who did you say you were?

If you are signing a contract, make very clear on what basis you are signing. Is it in your personal capacity? Or on behalf of someone else? If so, is that someone or company clearly identified? The sole director and shareholder of a limited company signed a contract, which included the trading name of the company underneath his signature, but no reference to the limited company or its name. That was not enough to make the company a party and the director was considered to have signed in his personal capacity.

5. Put it in writing – promptly

Perhaps you have reached an oral agreement on the phone. Make sure you record and confirm what was agreed with the other party straight away. If there is a dispute you can expect the court to be looking at what was said and done by the parties after the alleged agreement. Written confirmation of the details could be very helpful.

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6. And don't forget Mrs Carlill

A binding contract can come into existence even though you have not signed any thing. For example, simply getting on with the works, without first responding to an order and attached contract terms, might be enough to constitute acceptance by conduct (which is what Mrs Carlill did in the famous Carbolic Smoke Ball case). If works are carried out and paid for, a court will need convincing that there is no contract.

7. How do you know it's a variation?

Make sure the scope of the work is clearly recorded. You may think that everyone is clear about what needs to be done but there are advantages in recording it carefully. It may be a tedious task but it could later be invaluable as a yardstick for determining whether work is, or is not, a variation.

8. Say what you mean

Check that you understand, and are happy with, all the contract wording. For example, liability for 'consequential loss' might be excluded, but what do those words mean? The English courts have said 'consequential loss' means indirect loss, which is only recover able if attention is drawn to it as a potential head of loss when the contract is made. Loss of profit may or may not be consequential, depending on the circumstances. Avoid legal debate on the point by carefully checking and agreeing the wording of contract obligations and liabilities.

9. I want my terms to apply

If you would like your carefully drafted standard terms and conditions to apply to your contract, particularly if you are sending them by fax or e-mail, make sure that you give the other party reasonable notice of them and make clear that you intend to rely on them. This can be achieved by referring to your terms on the front of the order or acknowledgement and sending a copy by fax or email. There may, of course, be a battle of the forms if the other party also wishes to rely on its standard terms in the same way, but at least the other party can't complain that they have not had notice of your terms.

10. Do you know your limits?

Do check and comply with all contract time limits. NEC 3, for instance, opens with a welcoming reference to mutual trust and co-operation, but then operates a zero tolerance policy on time limits. Just look at clause 61.3 for a start. Be careful.

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