

A Well-Written Contract is a Worthwhile Investment

There's an old saying that 'proper planning prevents poor performance.' But did you know that proper contract drafting might just be the thing that prevents protracted litigation?

Construction Update

A recent case involving a major refurbishment contract shows how important it is to have your agreements well documented. The decision in the South Australian Supreme Court (*Alstom Ltd v Yokogawa Australia Pty Ltd* (No 7) [2012] SASC 49) relates to a subcontract for part of a refurbishment of coal-fired power station near Port Augusta.

The Head Contract

In March 2002, the owner of the power station, Flinders Power Partnership (FPP), entered into a \$158.7m contract with Alstom Power Ltd (Alstom) to undertake mechanical, civil and electrical work to convert a power station originally constructed in the 1950s to remote operation. The contract was described as a 'turnkey' contract and included clear time, performance and reliability outcomes. To the extent that Alstom failed to achieve those outcomes, liquidated damages and performance guarantees could be levied by FPP.

The Subcontract

Yokogawa Australia Pty Ltd and Downer EDI Engineering Pty Ltd formed a joint venture known as 'YDRML' to tender for the electrical, control and instrumentation works. The contract was worth \$33.9 million.

The Project

There were problems with the project from the outset. Of the major milestone dates, none were met on time; the final acceptance milestone was in fact never certified. Disputes between FPP and Alstom arose within months of the contract commencing. Ultimately, FPP and Alstom settled those disputes in early 2005, with Alstom agreeing to pay \$20.5m in liquidated and other damages.

Who does this affect?

- Business operators
- Suppliers
- Third party contractors

Article Highlights

- Contracts should include time, performance and reliability clauses to ensure liquidated damages can be claimed in the event project outcomes are not met.
- Third party contractors must be aware of the superimposing of terms from head contract to subcontracts to avoid liability in litigation.



Subsequently, Alstom commenced proceedings against YDRML, seeking to recover at least the damages they had paid to FPP. Those proceedings culminated in the judgement handed down this year, more than 10 years after the project began.

Lessons Learned

The case demonstrates that a well-written contract can avoid a great deal of pain.

The document for the head contract ran to a total of 476 pages. It was described as being clear, comprehensive and substantial. The subcontract document, on the other hand, was in itself a mere 40 pages. However, it provided for the incorporation of the whole head contract into the subcontract, subject to a number of alterations, omissions and additions.

The court noted that 'this is not necessarily a poor drafting technique if done competently, in appropriate circumstances and with care.' However, in this case, 'the superimposition of terms [had resulted] in numerous ambiguities, inconsistencies, lacunae and in some cases, grammatical nonsense.' These problems afflicted even key provisions such as the definition of the works under contract.

The problems in the contractual relationship between Alstom and YDRML were not confined to the fact that they had a poorly drafted agreement, but as the judge noted, the document 'provided fertile ground for dispute' over a period of approximately seven years.

Your next move

For many projects, the Australian Standard contracts will be an appropriate and cost-effective basis for documenting head contracts and subcontracts. In other cases, an investment in the contract development process will be warranted and should pay off in smoother relationships and a better project outcome.

If you have any questions about contract documentation for your current or prospective projects, please contact our Construction team.

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