Construction Contract Risk Assessment
Examples of Potential Risks

The table below identifies a number of risks that sometimes appear in commercial construction contracts, particularly bespoke contracts and amended Australian Standard contracts. This list is not exhaustive. There are likely to be other risks relevant to your project that do not appear below.

The ‘Strategy’ column is intended to enable you to identify whether the risk arises from your contract and, if it does, whether you intend to pass through the risk (for example, to an insurer, subcontractor, sub-consultant or supplier), absorb it (knowing that it cannot be passed on), or to qualify or exclude it (either partially or in full).

| RISK | STRATEGY | **NOTES** |
| --- | --- | --- |
|  | **N/A** | **Pass through** | **Absorb** | **Qualify/Exclude** |  |
| Approvals |  |  |  |  |  |
| 1. The Contractor is required to obtain all planning approvals.
 |  |  |  |  |  |
| 1. The Contractor is required to obtain all permits required in connection with the use or occupation of the works.
 |  |  |  |  |  |
| Security |  |  |  |  |  |
| 1. The Principal is not required to provide any security in respect of its obligations.
 |  |  |  |  |  |
| 1. The Contractor is required to provide director guarantees and/or a related party guarantee.
 |  |  |  |  |  |
| 1. The Principal may have recourse to the Contractor’s security without having to give notice.
 |  |  |  |  |  |
| Design |  |  |  |  |  |
| 1. The Contractor will be liable if the works are not fit for their intended purpose.
 |  |  |  |  |  |
| 1. The Contractor will be liable if the works do not comply with applicable legislative requirements.
 |  |  |  |  |  |
| 1. The Contractor will be liable if the works do not satisfy prescribed Green Star, NABERS, WELLS or other ESD requirements.
 |  |  |  |  |  |
| Pricing |  |  |  |  |  |
| 1. The Contractor is taken to have allowed for any ambiguities or discrepancies in or between the design documents.
 |  |  |  |  |  |
| 1. The Contractor is taken to have allowed for incidental work, even if not documented.
 |  |  |  |  |  |
| 1. The Contractor is taken to have allowed for any buildability issues.
 |  |  |  |  |  |
| 1. The Contractor is taken to have allowed for the risk of any latent conditions.
 |  |  |  |  |  |
| 1. The Contractor is not entitled to rely on any documents provided by the Principal containing information about the site.
 |  |  |  |  |  |
| 1. The Contractor will not be entitled to claim for any unfixed materials, plant or equipment intended to form part of the works.
 |  |  |  |  |  |
| Subcontractors |  |  |  |  |  |
| 1. The Principal/Superintendent must approve the Contractor’s choice of subcontractors.
 |  |  |  |  |  |
| 1. The Contractor will be responsible for the acts and omissions of all subcontractors, including selected, nominated, or novated subcontractors.
 |  |  |  |  |  |
| 1. The Contractor is required to obtain warranty deeds or other documents from subcontractors in a prescribed form.
 |  |  |  |  |  |
| Delays |  |  |  |  |  |
| 1. The Contractor will be liable for liquidated damages and/or will not be entitled to claim delay costs if it is delayed by:
 |  |  |  |  |  |
| * 1. a delay to receiving site access;
 |  |  |  |  |  |
| * 1. another contractor engaged by the Principal;
 |  |  |  |  |  |
| * 1. another contractor engaged by someone other than the Principal;
 |  |  |  |  |  |
| * 1. a variation;
 |  |  |  |  |  |
| * 1. a direction given by the Superintendent or Principal to minimise noise or other disturbance or nuisance;
 |  |  |  |  |  |
| * 1. any other act or omission of the Principal or Superintendent that is not described above;
 |  |  |  |  |  |
| * 1. a latent condition;
 |  |  |  |  |  |
| * 1. inclement weather;
 |  |  |  |  |  |
| * 1. an industrial dispute not caused by the Contractor; or
 |  |  |  |  |  |
| * 1. other matters beyond the Contractor’s control.
 |  |  |  |  |  |
| SITE ACCESS |  |  |  |  |  |
| 1. The Contractor is taken to have allowed for all site access costs, including the costs of accessing the site via neighbouring premises (if needed).
 |  |  |  |  |  |
| 1. The Contractor will only be given non-exclusive access to the site, not possession.
 |  |  |  |  |  |
| 1. The Contractor will not be entitled to claim relief if the arrangements for accessing the site and/or materials handling change.
 |  |  |  |  |  |
| WHS, Safety and property Damage |  |  |  |  |  |
| 1. The Contractor will be the ‘principal contractor’ for WHS purposes.
 |  |  |  |  |  |
| RISK, Insurance & Indemnities |  |  |  |  |  |
| 1. The Contractor will be liable for any property damage/personal injury that occurs on the site and there are no or reduced number of ‘excepted risks’.
 |  |  |  |  |  |
| 1. The Contractor will be required to pay all insurance excesses, even if it is not responsible for the event giving rise to the claim.
 |  |  |  |  |  |
| 1. The Contractor is required to give indemnities that are not:
 |  |  |  |  |  |
| * 1. limited to acts or omissions of the Contractor;
 |  |  |  |  |  |
| * 1. reduced to the extent of losses caused by others;
 |  |  |  |  |  |
| * 1. reduced to the extent the Principal fails to mitigate its loss;
 |  |  |  |  |  |
| * 1. expressed to exclude liability for consequential loss (appropriately defined); or
 |  |  |  |  |  |
| * 1. capped in amount.
 |  |  |  |  |  |
| 1. The proportionate liability legislation is expressed to be excluded.
 |  |  |  |  |  |
| 1. There is no cap on liquidated damages (or general damages for delay, if applicable).
 |  |  |  |  |  |
| 1. There is no overall cap on the Contractor’s liability.
 |  |  |  |  |  |
| 1. There is no exclusion for liquidated damages.
 |  |  |  |  |  |
| 1. There is no exclusion for consequential loss.
 |  |  |  |  |  |
| Third party documents |  |  |  |  |  |
| 1. The Contractor may be bound by obligations contained in third party documents that do not form part of the contract, such as the Principal’s policies and procedures, a lease or a head contract.
 |  |  |  |  |  |
| 1. The Contractor may be required to sign a financier’s tripartite agreement that either:
	1. imposes unreasonable requirements on the Contractor; or
	2. has not been provided.
 |  |  |  |  |  |
| Contract Administration |  |  |  |  |  |
| 1. There is no Superintendent, or the Principal will be the Superintendent.
 |  |  |  |  |  |
| 1. The Principal has no obligation to ensure the Superintendent acts reasonably.
 |  |  |  |  |  |
| 1. The Contractor’s claims will be barred if they are not made strictly in accordance with the contract (ie time bars apply).
 |  |  |  |  |  |
| 1. The timeframes for the Contractor to issue notices and claims are unrealistic or unreasonable (eg variations, EOTs, latent conditions).
 |  |  |  |  |  |
| 1. The Principal has audit rights in respect of the Contractor’s documents.
 |  |  |  |  |  |
| Practical Completion and Defects |  |  |  |  |  |
| 1. Practical completion will not be achieved until:
 |  |  |  |  |  |
| * 1. the works are free of all defects;
 |  |  |  |  |  |
| * 1. subcontractor/supplier warranty deeds have been provided; or
 |  |  |  |  |  |
| * 1. final operating manuals and as-built drawings have been provided.
 |  |  |  |  |  |
| 1. The defects liability period is longer than 12 months.
 |  |  |  |  |  |
| Termination |  |  |  |  |  |
| 1. The Principal can terminate the contract at any time, for any reason (‘Termination for Convenience’).
 |  |  |  |  |  |
| 1. If the Principal terminates the contract in circumstances where the Contractor is not at fault, the Contractor will not be entitled to recover:
 |  |  |  |  |  |
| * 1. site demobilisation costs;
 |  |  |  |  |  |
| * 1. the cost of resources that cannot be redeployed;
 |  |  |  |  |  |
| * 1. any profit or loss of profit; or
 |  |  |  |  |  |
| * 1. other costs or losses arising from the termination.
 |  |  |  |  |  |
| Other |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |
|  |  |  |  |  |  |