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Joseph is a construction lawyer who has been involved in the delivery of many major projects for Council clients. He has a range of experience in producing project documentation, along with providing legislative advice and project support. He has recently assisted Sunshine Coast Council on the City Hall project, Toowoomba Regional Council on the TRC Principal Depot project and Building Queensland on recent major dam and road infrastructure business cases.

**Goals and Risks**

Projects have varying goals but typically for Council’s construction projects the aim will be that they are completed on time, within the budget and with the required quality outcomes (time, cost and quality). Council may view time, cost or quality as being more or less important on any particular project but it may also have separate goals on any job, for example the utilisation of local businesses in the project.\(^1\)

Project goals might be adversely impacted by a range of risks which are typically considered to be outside of the direct control of any party to a contract. For example, weather is a variable that can impact construction on many projects and neither party is likely to be able to stop the rain, wind or lightning. A project which involves work below the surface is typically also faced with the some level of uncertainty about what lies beneath and the potential for additional time and cost implications of encountering the unexpected.

Separately, there are a range of issues that may adversely impact the achievement of goals, which can be more directly controlled by a party to a contract. For example, these risks might include warranty and defect issues, breaches of legislation, the infringement of intellectual property rights and damage to reputation. The usual approach in construction projects is that Council will seek to pass many of these risks to the contractor and have rights of redress against the contractor in the event of a breach of the contract.

Council should not take the view that it has completely outsourced risk to a contractor the moment a contract is executed (even if the contract is on extremely favourable terms for Council). Take for example the situation of the contractor becoming insolvent. This would instantaneously pose challenges for Council and likely set achieving the goals at risk. Noting also that the recent ‘ipso facto’ reforms to the *Corporations Act 2001* (Cth) may limit Council’s rights to terminate the contract in the event the contractor entered administration (as opposed to liquidation). Further, the drain on Council’s recourses in the event a contract becomes hostile and litigious should not be underestimated. It is not uncommon for a project engineer to be diverted almost entirely from their day to day job to handle a major contract dispute for a period of months or even years.\(^2\)

**The Rules of the Game**

Contracts are primarily tools of risk allocation as between the parties.

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1. Refer the ‘sound contracting principles’ the *Local Government Regulation 2009* (Qld).
2. Involvement may be in assisting legal responses under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) and/or preparing witness statements, collating documents and giving oral evidence in Court, arbitration or expert determination. Engineers will often be called on to provide input to mediations, settlement offers and the strategic resolution of disputes.
In a construction setting they should be regarded as the rules of the game – not to be confused with the game itself. Rules tend to be followed in a commercial setting where compliance with them results in a reward or conversely a non-compliance results in a sanction. The process for the preparation of any contract therefore becomes one of identifying the risks and allocating those risks amongst the parties to the contract. Where the risk is given to the contractor to manage, it is critical to do so in such a way that it incentivizes the contractor’s compliance.

**The Carrots**

When it comes to drivers framed in a positive way (the ‘carrots’), payment for performance is the typical driver. However common methods to supplement that to be considered include:

- the contractor being guaranteed direct cost recovery (but their margin being adjustable based on performance);
- the contractor having achieved specific milestones being the trigger for payment;
- the application of a bonus regime (whether linked to time, actual performance or other key performance indicators (KPI)); and
- the potential for value management / value engineering solutions (where the contractor can share directly in any savings achieved).

**The Sticks**

Conversely, when it comes to drivers framed in the negative way (the ‘sticks’), the typical response is a breach claim by Council. However, the concept of liquidated damages is often adopted which will assist to make the ramifications of a breach claim real and visible (whether expressed as liquidated damage or framed otherwise, for example, in the guise of an abatement regime). Liquidated damages are amounts pre-agreed by the parties and are typically utilised for:

- failures to complete on time or in accordance with an agreed schedule;
- failures to meet set performance criteria; and
- underperformance against particular KPI (e.g. based on agreed service levels, safety, the environment, etc).

Importantly Council should have regard to the risk that any liquidated damages set out in a contract could be challenged as being a penalty (which would potentially render them unenforceable). Aside from liquidated damages, there are a range of other drivers that can be utilised in a contract to bolster a breach claim by Council. This often takes the form of an indemnity or a requirement of the contractor to overcome the breach (e.g. through rectification, recovery plans, showing cause, etc).

**Writing the Rules**

While it is important to set the rules of the game from the outset to drive performance toward Council’s goals, it is also relevant for Council to have the necessary flexibility to react and make changes during the course of a project. A major infrastructure contract should contain a range of provisions to allow Council to respond to events, whether that is through utilisation of a variation provision to remove work from scope and give it to another contractor, directing accelerations, making decisions on proceeding to the next stage of work, the ability to terminate a contract for convenience or otherwise.

The common law will not ordinarily relieve the contractor from achieving an outcome merely due to a contractor encountering some level of hardship in performance. However, where a provision of a contract provides relief to a contractor upon a certain event or circumstance occurring, the Court will of course grant that relief on the basis of its objective interpretation of the contract (i.e. applying the rules of the game fairly). The relief in a construction contract is typically the contractor’s entitlement to an extension of time and the payment of additional amounts. There is usually a tension between the contractor’s entitlements and Council’s ability to achieve its project goals (particularly completion on time and within budget).

In the construction industry the utilisation of Australian Standard contract forms is relatively common. Council should be cognisant that the unamended forms contain a long list of provisions which are designed to

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3 This risk can be mitigated by Council ensuring the amount of the liquidated damage is a genuine pre-estimate of the loss or damage which might be suffered by Council for the relevant breach or primary stipulation not being complied with or met by the Contractor.

4 See *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; *Ooh! Media Roadside Pty Ltd (formerly Power Panels Pty Ltd) v Diamond Wheels Pty Ltd* [2011] VSCA 116.
grant the contractor relief. While an Australian Standard contract can provide a draft set of rules for the game, it will necessarily require some level of adaption to be suitable for use by Council on any modern construction project. It is important to test whether or not the risk allocation set out in the Australian Standard contract, or any other template utilised by Council, needs alteration for a particular project to ensure it contains the required levers to drive the contractor’s performance.

**Team Work and Progress**

In embarking on any new project, the identification of risks will be informed not only by expert knowledge but also by the broader sharing of experiences and view points. Workshops are well suited to identifying risk, allocating it and ensuring a level of alignment within Council’s broader project team. Much will hinge on Council choosing the right contractor for the job and the importance of thorough due diligence cannot be understated. After award of any contract, Council should ensure it has monitoring in place and the flexibility in its contracts to take action, should the need arise. Improving performance outcomes should be regarded as an ongoing stream for development within Council and its broader project teams, with a willingness of everyone to learn from the failures and successes of the past.

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5. Take AS2124-1992, by way of example, clauses 8.1, 12, 14, 16.3, 17, 27, 28, 33, 35, 40, 45 and 46.

6. Including updates to cover work health and safety, security of payment, building, environmental, tax and other legislation impacting the construction industry which is not addressed in the Australian Standards.