

## 2. Types of Contracts

### 2.1 Construct only

#### (a) Construction and Design

- **Contractor** only **constructs** the work (no design)
- Contractor only **responsible for quality of construction** (not for design)
  - i.e. not their fault if they build exactly what is in the design & specification but doesn't work
- **Design by owner** or owner's design consultant

#### (b) Payment

- **Lump sum contract** (common)
  - **Owner**: doesn't have to give contractor more money if feel sorry for them
  - **Contractor**: gets more money from owner if owner overestimates price
  - Subject to agreed adjustments for variations or other right to claim under contract (e.g. change in law)
- **Schedule of rates**
  - Suitable: Unclear scope
  - Apply contractors' rates to quantity of things done
  - E.g. mining contract, digging contract, mediation contract
- **Hybrid**
  - Suitable: Clear scope (e.g. build this on site) & unclear scope (e.g. need to decontaminate)

#### (c) Time

- **Fixed time** (common)
  - Completion date
  - If delay, liquidated damages
  - Subject to extensions of time for agreed events
- **Target date**

#### (d) Advantages

- **Design**
  - Get **control** and **certainty** over design
  - Suitable where quality important – and owner has good design team (e.g. chadstone with expensive marble)
- **Simple project**
  - Suitable where simple project

#### (e) Disadvantages

- **Split responsibility**
  - Back and forwards between designer and contractor
- **Requests for information** (RFI)
  - Need to make sure designer has it right
  - Contractor thinks there's an opportunity for ambiguity, flag it as an RFI
  - Owner / superintendent / project manager will look at it and issue a direction
  - At that point when a direction is issued, contractor will say thanks but this will cost me more now. my lump sum wasn't based on that, this is a variation and will also delay me so I will need an extension of time.
  - Bad effect on the relationship

## Topic 6 – Variations

### 1. Introduction

- As there is **no common law right to vary** the contract, [contractor] must rely upon a variation clause. Such a clause is **essential** as [owner] is **not otherwise entitled** to instruct [contractor] to perform [variation] or perform the works in any way different to the scope of the works.
- As a transactional construction lawyer, can **ensure variations are not an issue** by:
  - Ensuring original scope of work is well defined and documented;
  - Draft the variation clause well;
  - Closely followed the variation procedure set out in contract; and
  - Endeavoured to have agreement (in writing) on all aspects of a variation **before** the work is carried out.

### 2. What is a variation?

- It is a **variation** where:
  - ✓ **Rule:** it is within the **character and extent/ scope** contemplated by the contract.
  - ✓ Under **cl 36 of AS4000**, a **variation** is:
    - An increase, decrease or omission of any part of the works;
    - A change to the character or quality of the works;
    - A change to the levels, lines, position or dimensions of the works;
    - Any additional work; or
    - The removal of any work no longer required by the owner.
- It is **not a variation** where:
  - × **Too major:** P orders work that is **outside the character/scope** of the original contract → contractor **could refuse to do the additional work**, or **do the work, but charge for it on a quantum meruit basis**.
  - × **Too minor:** If the work is in fact **within the original scope of work**, it is not a variation at all- it is already included as part of the K.
  - × Cf under **cl 40 HC 1 DEQMS**, no variation (regardless of its scope) is a repudiation of the contract (however this clause can be amended)
- Example:
  - × Contract is to construct a single storey **timber** framed dwelling, couldn't use the variation clause to change this to a **steel** framed duplex.
  - × Contract is to install 100 km of broadband cable, arguably a variation to increase this to 1,000km of cable would not be within the original scope

### 3. Is there a variation?

- **ORIGINAL SCOPE:** The original scope of the works is to [build a house].
- **NOW DIRECTING:** [Principal] is now directing [contractor] to [build a bridge]

→ this [is/is not] within the **character and scope** of the contract

### 4. Limitations on power to vary

- [Contractor] will argue that [principal] has improperly used the variation clause as it has utilised it to give the work to [other], and variation clauses **cannot be used to delete work to give to others** (*Carr v Berriman; Commission for Main Roads v Reed & Stuart*)
  - ^ Such conduct is **unreasonable and amounted to repudiation** by the principal and would effectively **vitiating the contract**
  - ^ however can do anything with **consent** of both parties

## Topic 8 – Latent Conditions

### Step 1: Is it a latent condition?

#### 1.1. Definition [potentially omit this]

- Generally, latent conditions are a type of site conditions that are unforeseen at the time of contracting. These are referable to what the **Contractor knew (subjective) or ought to have known (objective)**, or that were not reasonably foreseeable by an experienced and competent contractor (objective) at the time of tendering / contracting.
- Site conditions = nature of soil, contam, utilities, building footings, other man made things
- Latent conditions = type of site conditions that we don't know about

#### 1.2. Contract

- The parties must look to clause [X] of the **contract** to determine whether [site condition] constitutes a latent condition.

#### AS4902 cl 25 / AS4000 cl 25.1

*Latent conditions are physical conditions on the site and its near surrounds, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by a competent contractor at the time of the Contractor's tender if the Contractor had inspected:*

- (a) *all written information made available by the Principal to the Contractor for the purpose of tendering;*
  - (b) *all information influencing the risk allocation in the Contractor's tender and reasonably obtainable by the making of reasonable enquiries; and*
  - (c) *the site and its near surrounds.*
- P sometimes amends to make 'time of paying'. Time of tender better for C, because if the price hasn't moved during the negotiation period, you are assessed differently.
  - **Test:** what a competent and suitably qualified contractor would expect to encounter by way of physical conditions in the execution of the works (*BMD Major Projects, Pagone J, following Ryde City Council v Transfield*)
  - Clause to be determined **objectively**, including what could have been reasonably anticipated on the basis of material it had before it? (*BMD Major Projects, Pagone J*). Had regard to:
    - o **Inquiries** made;
    - o **Information** spat out as a result of those inquiries; and
    - o Content of boreal file.
  - C must make **reasonable inquiries** – cannot put its 'head in the sand' & must be **prudent** about understanding the project & site before tendering
  - Includes making **continuous** inquiries if required (*BMD Major Projects, Pagone J*)
  - "Competent contractor" - Court **won't impose standard of experts on contractors** (*BMD Major Projects, Pagone J*)
    - o **BMD should not have reasonably anticipated** latent conditions where information is **so specific & particular** and could only be spot out by someone with geotechnical expertise!
  - May be prompted by **previous inquiries (however they came to be known)** may carry the consequence of an obligation to make inquiries about it (*BMD Major Projects, Pagone J*)
  - Simple fact that it costs you more to do the work doesn't mean you have a latent condition, you've got to (*Abigroup Contractors Pty Ltd v Sydney Catchment Authority*)
  - Leaves **open scope** to argue the effects of **weather conditions** (e.g. soft ground)