BUILDABILITY – WHO BEARS THE RISK?

By Travis Tomlinson

A common provision in build-only construction contracts is the requirement for the contractor to warrant to the principal that the contract works are "*buildable in accordance with the contract documents*".

This type of provision codifies the position at common law, which is that, save for any express terms in the construction contract to the contrary, as between the principal and the contractor "buildability risk" lies with the contractor.

So what is "buildability" and what risk does the contractor carry? This article examines these aspects and provides some practical considerations relating to buildability to enhance the prospects of project success for all involved.

Buildability – what does it mean?

In the construction context, buildability (or sometimes referred to as "constructability") refers to the capacity of a design to be implemented physically in a manner that is safe, sound and otherwise in accordance with the terms of the relevant construction contract. "Buildability" may embrace both the *physical possibility* of implementing a design, and the *practical ability* to do so.[1] Put simply, contract works are 'buildable' if they are *capable* of being built regardless of the methodology or cost that may be involved in doing so.

It is common in New Zealand to separate the design and construction elements (and risk) of a project; namely, under this traditional procurement model the designers and the builder are under separate contracts with the principal, with the construction contract usually only tendered and let once the design (i.e. plans and specifications) is substantively complete. Under this type of procurement model, the design consultants are responsible to the principal for their design and the contractor's main delivery risk and responsibility is to deliver that design. However, the common law is clear that the contractor is not entirely free from risk and responsibility for that design.

What does the law say?

Despite being over a century old, the case of *Thorn v The Mayor and Commonality of London* provides one of the leading principles on buildability risk. In this case, which involved the building of a new bridge over the River Thames, the House of Lords held that where plans and specifications are prepared for use by a contractor in executing certain construction works, the principal does not give any implied warranty that the work can be successfully executed according to such plans and specifications. The Court held that the contractor "*ought to have informed himself of all particulars connected with the work and especially as to the practicability of executing every part of the work contained in the specification*".[2]

The contract in question did not contain any express warranty that the bridge could be successfully built in accordance with the principal's drawings and specifications, nor could such a warranty be reasonably implied by the Court in favour of the contractor. This meant that the contractor was held to bear the (significant) cost of additional work that needed to be performed in order to complete the contract works in accordance with the contract terms. The case suggests that no such implied warranty would apply even if the impossibility of building to the

design was not reasonably discoverable by the contractor at the time of entering into the contract, though this would depend on the express terms of the particular contract in question.[3]

What does this mean in practice?

Much has already been said about the importance of achieving appropriate risk allocation settings between contracting parties by ensuring that risk is allocated to the party that is best place to manage that risk. Good risk allocation settings significantly increase the likelihood of project success for all involved.

In the context of buildability risk, to enhance prospects of project success it is incumbent on principals to provide appropriate opportunities for tendering contractors to be able to properly assume buildability risk and responsibility that the law (and potentially contract) imposes on them; and for those tendering contractors to conduct themselves during the tender process in a manner that ensures they're in a position to do so (rather than excessively price or qualify against/re-allocate this risk) should they be awarded the construction contract (the principal's designers clearly also play a fundamental role in preparing a buildable design).

In relation to principals and contractors, this may involve:

- from the principal's perspective, affording suitable tender timeframes that enable tendering contractors to appropriately interrogate the design and establishing a project and design team that are sufficiently available at tender time to respond to tenderer queries in an adequate and timely manner

- from the contractor's perspective, properly interrogating the tender design and positively engaging with the principal and its consultants (e.g. through a tender RFI process) in relation to that design

- interactive tendering workshop opportunities, where tendering contractors are able to work with the principal and its consultants to understand the design and to test the tenderers' proposed methodology to deliver to that design. To maximise the value of such workshops, tendering contractors will likely need the benefit of appropriate confidentiality protections and the principal should consider how this will be achieved

- early contractor (or preconstruction) processes, where a contractor is inserted early into the design process and is able to provide advice from a buildability or constructability perspective as the design develops and the programme and cost is built up

At common law, buildability risk lies with the contractor, and this principle is often included in express terms of construction contracts. While a principal will take comfort in this risk allocation, project success may be reliant on the contractor being sufficiently informed as to the project's design in order to effectively assume and manage this risk. We have identified above some practical examples of how the principal and contractor can front-foot this risk and ultimately facilitate a positive project outcome for all parties.

End Notes

[1] *Pickard Finlason Partnership Ltd v Lock* [2014] EWHC 25 (TCC) at [198], per HHJ Stephen Davies.

[2] *Thorn v The Mayor and Commonality of London* (1876) LR 1 HL 120 at 128-129.

[3] See speeches of Lord Cairns LC and Lord Hatherley in *Thorn v The Mayor and Commonality of London* (1876) LR 1 HL 120 at 128-129 and 137.

ABOUT THE AUTHOR

Travis Tomlinson
Partner

Travis is a specialist transactional construction and infrastructure lawyer and a Partner in MinterEllisonRuddWatts' Construction team.

Travis helps clients on their procurement planning, contract drafting and negotiations, project governance, and project administration across a wide spectrum of industry sectors, including acting for some of New Zealand's largest organisations. He has detailed knowledge of the Government's procurement rules and advises the public and private sector in relation to regulation and compliance.

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