

# The contracting trap – why contract specifications are the most likely thing to let you down

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Parties will typically invest in drafting and negotiating contract 'general conditions' to protect their commercial interests. While this investment is critical, it is only a small part of what is required to mitigate one of the most common sources of construction disputes – the often impenetrable maze of schedules and annexures forming the 'specification.'

To do their job, construction contracts must include specifications describing in clear and sufficiently detailed terms, the scope of works performed, materials used, standard of workmanship required and the performance requirements or overall objectives to be met.

Too many disputes originate from inadequate specifications, usually only manifesting once works are underway. By this time, it is too late to erase drafting problems and parties are left to interpret contracts, when time is money.

## Common issues

Specifications often comprise multiple documents drafted by different authors, and assembled quickly under time constraints. Common problems include:

*Lack of housekeeping:* Parties bundle multiple documents, tender clarifications and correspondence, including long and often superseded emails. While this can be a quick and easy way of assembling the specifications and tender inclusions/exclusions, it often leads to significant problems as inconsistencies and vagaries arising from mismatching documents. This often cannot satisfactorily be resolved with an order of precedence clause.

*Failure to identify relevant standards:* Increasingly, projects involve both local and overseas participants – the applicability of Australian standards for local supply is not assured; there may be conflict between local and international standards. Careful consideration should be given to the standard expected – ensure it is clearly stated.

*Non-specific allocation of responsibilities:* Specifications often don't identify who is responsible for particular compliance and associated costs. Too often, documents state that "provision shall be made" for a particular input or output, but do not make clear who specifically is responsible. The risk for uncertainty occurs when multiple parties are involved on a project and all have obligations to comply with the same or interrelated specifications.

*No clear conflict resolution:* There are often inconsistencies between documents forming a specification, and within documents. There is often too little attention paid to reconciling documents and deleting inconsistencies, and the absence of a clear process for resolving conflicts that may arise.

*General v specific:* An overarching general condition, eg. the contractor accepts all risks associated with site conditions, will often be at odds with a tender exclusion, eg. no allowance has been made for certain types of contamination. The issue often lies dormant until contamination is discovered and claims for latent conditions made. One party will want to rely on the general 'risk allocation' clause; the other relies on 'exclusion.'

## Lessons learnt: avoiding these pitfalls

*Avoid short cuts when assembling specifications:* An upfront investment is well spent in comparison to the time and money lost dealing with disputes resulting from poorly prepared specifications.

*Set ground rules early for preparing your contract:* A project glossary of common terms/requirements can ensure all documents are prepared consistently.

*Integrate your specifications:* they must be cohesive, unambiguous and consistent. Delete redundant sections or documents. If possible, avoid bundling correspondence and revise your tender specification to include only the necessary negotiated changes.

*Include an order of precedence clause:* Address conflicts between documents, and within documents. Make clear who resolves conflicts, how, and what cost responsibilities follow.

*Consider a responsibilities matrix:* Often a simple tabular document that clearly calls out specific inputs and outputs with the balance supplied by a contractor is much clearer than drafted text.

*Consider a deadlock breaker:* Scope and specification disputes are costly and often need to be resolved to allow projects to move forward. Consider including a fast track deadlock breaker that allows the project to move forward, such as an expert referee or adjudication, rather than arbitration or litigation.

*Use your legal team:* The impact of deficient specifications is costly but can truly be mitigated with the right upfront investment that is rewarded many times over if you can avoid costly, time consuming and often stressful litigation.



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