The Value of a Written Contract

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Ask any lawyer and I am sure you will get the same advice…. "don't start work until you have a contract in place". They will probably add that the contract must be in writing.

That sounds pretty much like common sense, doesn't it? After all, both parties need to know and understand each other other's obligations. Even in a relatively small and minor contract, these obligations will include, at the very least, matters relating to work scope, time and payment—the very lifeblood of business. Add to that other important matters like quality, insurance, relationships and obligations to third parties etc etc (the list goes on) and you soon realise that only the most foolish would proceed on a mere handshake or 'gentlemen's agreement'.

A written contract means that you do not need to rely upon subjective or selective recollection and interpretation. It also allows others, not involved in any negotiations, to understand the parties' agreement, allowing that agreement to be disseminated to others as they require.

If you are ever tempted to proceed without a verifiable contract in place, you should take one step back and ask yourself why. If you and the other party cannot reach agreement on important matters, or if one party appears reluctant or unable to commit themselves in writing (whilst in agreement to proceed with the work) then you should question the wisdom of the relationship.

Standard form contracts have gone a long way to improve the situation, however, bespoke contracts and wholesale amendments are still commonplace and not always for good reason. Unusual amendments to standard forms and bespoke contracts may necessitate the impact from lawyers and start a series of exchanges which can take an age to resolve.

Now, I am not completely naïve. I do understand that in the real world it is no simple matter to put together a complex construction contract containing all the 'necessary' clauses and articles, let alone specifications, designs etc even when a standard form contract is adopted. Commercial reality dictates that it is often necessary to commence before every element has been designed and obligations thrashed out and agreed. This is when many people reach for the time honoured solution of the Letter of Intent (LOI).

Where overbearing pressure dictates that it is absolutely necessary to create a temporary agreement, and the only practical way is a LOI, then careful consideration should be given to the terms contained therein. As a minimum, this should include:

1 Statement as to intention to conclude formal contract documents.

2 Extent of works authorised by LOI, including appropriate technical specification.

3 Maximum sum to be expended under LOI.

4 Effective commencement date, duration and termination date.

5 A right of revocation.

6 Clarification that the LOI may be superseded by the formal contract (and a list of matters remaining to be concluded for this to occur).

7 Valuation and payment mechanisms.

8 Dispute resolution mechanisms.

9 Insurance and indemnity provisions.

10 A copy of the draft form of contract conditions intended to be incorporated (wherever possible).

A properly structured LOI is therefore, in effect, a formal (albeit temporary) agreement whose terms can be evidenced in writing and not simply a letter indicating the parties' intention to agree, at a later date, something which is clearly not yet agreed.

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