

further examination of Census data may reveal more. The present level of knowledge will not support the setting of a national affirmative action target, and the Act does not demand it.

- Larry King, Director, National Affairs, AFCC

15. PROJECT AND CONSTRUCTION MANAGEMENT AGREEMENT

There is currently no standard contract in Australia available for either project or construction management. As a consequence, clients often search for a suitable contract to use to avoid the time, work and cost involved in developing an appropriate contract for a particular project. Of course, a number of companies which act as project or construction managers have their own contracts which they put forward to clients.

The agreement set out in full below can be used for either project or construction management.

It has been used with apparent success by the Public Works Department of NSW for the Opera House forecourt redevelopment, for the Circular Quay development, for Macquarie Street and for the refurbishment of the Mark Foys building and by the Darling Harbour Authority as the construction management agreement for Darling Harbour.

It is understood that no copyright is asserted over it by the Public Works Department. Consequently, consideration might be given to its use for either project or construction management.

It must be understood that this agreement is really in the nature of a cost plus contract.

It is an agency agreement, i.e. an agreement whereby the project or construction manager acts on behalf of the client as its agent in entering into contracts for the design and construction or the construction phases of a project. The agency approach involves a benefit for the client in that it enables direct action by the client against the consultants and contractors, if necessary.

Although cost plus in nature, this agreement contains a significant benefit for the client in that the relationship with the project or construction manager is not adversarial; the project or construction manager is on the client's team.

The agreement contains the flexibility for the client to direct the project or construction manager to carry out whatever work is required. This enables an increase or a decrease in the scope of the work, without the problem of claims and disputes arising under the terms of this agreement.

Apart from the importance of reputation and any potential for action by the client for negligence or possibly breach of contract, the underlying control over the activities and performance of the project or construction manager lies in the client's ability to direct and more particularly the ability to terminate the project or construction manager's services at any time. Indeed, it is understood that on one project a construction manager was terminated under this agreement and a substitute construction manager engaged, without any particular difficulties with respect either to the termination or the continuance of work by the direct contractors.

In conjunction with this agreement, it would be necessary to develop an administrative system with respect to directions,

approvals and reporting. In some projects this has been done by the preparation of a very detailed procedures manual for the project. This is one possibility. There are others. It might be possible to focus on and develop the administrative system for the project by a process of meetings, with the minutes recording the agreement with respect to the administration process. Due to the power of the client under the agreement to direct the activities of the project or construction manager, it would be possible to alter or add to these procedures at any stage.

It would also be possible to add cost control objectives and incentives.

Of course, the contract set out below should not be used without considering its appropriateness to the particular project and the client's requirements. Advice should be sought before using it.

This Contract is made the day of, 198

Between ("the Managing Contractor") incorporated in N.S.W. and ("the Client").

Recitals

1. The Client requires the services of a competent and experienced Managing Contractor to provide design, procurement of materials, management of contracts and other services.
2. The Managing Contractor has extensive experience in the management of large construction projects and has agreed to provide services to the Client on the following terms:

1. Appointment

The Client appoints the Managing Contractor as "Managing Contractor for the Client" for the project. The Managing Contractor agrees to provide services to the Client, as and when requested, on the following terms.

2. Design

When requested by the Client, the Managing Contractor will design various works. The design will be carried out by the Managing Contractor's staff and by consultants engaged by the Managing Contractor. The Managing Contractor will be responsible to the Client for design work carried out by the Managing Contractor's staff and by consultants engaged by the Managing Contractor.

3. Construction

When requested by the Client, the Managing Contractor will enter as agent for the Client contracts for the carrying out of construction work and procurement of materials. The Managing Contractor will be "the Principal" under the contracts but will include in the contracts the statement:

"The Managing Contractor contracts as agent for and on behalf of (complete with the name of the Client) and not so as to itself incur liability under the Contract"

or other words approved by the Client to similar effect. The Managing Contractor will manage those contracts and appoint a Superintendent to administer them. Any liquidated damages or other damages payable by contractors will be the property of the Client.

4. Services

The services to be provided by the Managing Contractor are described generally in the Client's invitation to tender, the

Managing Contractor's Offer and in other correspondence, but this Contract is the whole agreement between the parties and those documents do not form part of this Contract and do not completely delineate the services which the Authority may request. The Client is not bound to give the Managing Contractor any particular work. The Construction Manager will not be entitled to any remuneration over and above the remuneration provided in this Contract no matter what services are provided or what changes occur.

5. Trust Fund

The Client will establish a trust fund from which the Managing Contractor can from time to time draw moneys to pay contractors engaged by the Managing Contractor as agent for the Client and consultants engaged with the approval of the Client.

The trust fund will be replenished by the Client as necessary and the Managing Contractor will give the Client reasonable notice of anticipated withdrawals.

6. Security and Retention Moneys

Any security or retention moneys under any contracts let by the Managing Contractor as agent for the Client must be deposited with the Client.

7. Insurance

The Client will effect a policy of insurance covering the full value of construction work and public risk for an amount of not less than \$10M in respect of any one occurrence. The policy will cover the Managing Contractor as well as the Client.

The Client or the Managing Contractor will effect a Professional Indemnity Policy for \$10M. The policy will be for the benefit of the Client and the Managing Contractor and will be in respect of services provided under this Contract. The Client will decide which party is to effect the insurance. The policy will be maintained for one year after the Managing Contractor's work under this Contract is complete or such longer period as the Client may approve.

8. Guarantee

The Managing Contractor will procure for the Client a guarantee by to the effect of the draft guarantee included in the Managing Contractor's letter to the Client of, 198...

9. Remuneration

By the first day of each month the Managing Contractor and the Client will agree upon an estimate of the costs which the Managing Contractor will incur in that month and which will not be payable from the trust fund. The Client will pay that amount to the Managing Contractor no later than the end of that month.

Each month the Managing Contractor shall provide to the Client a statement of all amounts to which the Managing Contractor is entitled and all amounts paid by the Managing Contractor out of the trust fund. The statement shall be supported by such verification as the Client may reasonably request.

Within 30 days of receipt of the statement the Client will pay the Managing Contractor the amount due.

The amount due will be:

- i. All costs reasonably incurred after the date of this Contract by the Managing Contractor in performance of this Contract; and
- ii. The fixed profit fee.

The Client will be entitled to a credit for amounts paid in advance under the first paragraph of this clause. Any balance will be repaid by the Managing Contractor to the Client.

In determining costs, the cost of the Managing Contractor's staff will include:

- Salary
- Project allowance
- Standard company benefits, including vehicle, bonus and staff reimbursements.
- Relocation and interim accommodation expenses
- Workers' compensation
- Payroll tax
- Superannuation
- Annual leave
- Sick leave
- Long service leave loading
- Public holidays
- Other applicable items

There shall be added to the cost of staff an amount equal to 15% of the cost. This will cover the cost of the Managing Contractor's overhead. "Overhead" is defined in the schedule.

The Managing Contractor shall prepare a schedule of proposed salaries and allowances for staff and proposed rates for staff engaged under contract and will submit the schedule to the Client for approval. Proposed changes from the approved salaries, allowances and rates will be submitted to the Client for approval. The salaries and allowances must be consistent with those applicable to the Managing Contractor's staffing policy generally.

For staff engaged under contract, as distinct from employees and consultants, an amount equal to 9% of the amount payable to staff engaged under contract will be included to cover the Managing Contractor's overheads.

Other costs will not attract any amount for overheads and only the nett cost will be reimbursable. The Client will receive the benefit of any discounts or refunds which the Managing Contractor obtains.

Without limiting the generality of the term "costs reasonably incurred", it does not include any cost arising from breach of this Contract, tort, carelessness, negligence or incompetence of the Managing Contractor or the servants or agents of the Managing Contractor.

10. Fixed Profit Fee

The fixed profit fee will be applied to the sum of:

1. All costs reasonably incurred by the Managing Contractor in performance of this Contract;
2. Amounts reasonably paid by the Managing Contractor to consultants out of the trust fund;
3. Amounts reasonably paid by the Managing Contractor to contractors with whom the Managing Contractor has contracted as agent for the Client;
4. Amounts paid by the Client to contractors where the Managing Contractor on the instructions of the Client does all of managing, supervising and administering the work of the contractors.

The sum is called "the Project Costs".

In determining item 3 of the Project Costs:

- Amounts paid to contractors as damages for breach of contract shall not be included. The term "damages" does not include delay costs and prolongation costs.
- If an amount (other than damages) which would have been payable to a contractor is not paid by reason of a set off for liquidated damages or other damages payable by the contractor, the amount will nevertheless be included in item 3.

The fixed profit fee will be calculated and paid by monthly instalments in accordance with Clause 9.

The fixed profit fee shall be:

- On the first \$ million of the Project Costs... %
- On the next \$ million of the Project Costs... %
- On so much of the Project Costs as exceeds \$ million %

11. Termination

If the Managing Contractor is not performing to the reasonable satisfaction of the Client, the Client can terminate the services of the Managing Contractor in whole or in part at any time by notice in writing. Notwithstanding termination of any services, the Managing Contractor shall be paid reasonable costs of disestablishment and those costs will also attract the fixed profit fee. The Managing Contractor can terminate the Contract at 1st January, 19 by 3 months notice in writing to the Client

- 4. Those head office buildings and facilities required for the ongoing business of the Managing Contractor. The use of the buildings and facilities for tasks attributable to the project would be subject to prior agreement of the Client and the Managing Contractor and would be reimbursable.
- 5. Insurance other than that included in this Contract or requested by the Client.
- 6. Other costs not directly attributable to the carrying out of services for the Client.

The Common Seal of the Managing Contractor was herunto affixed in the presence of

Signed on behalf of the Client by the General Manager in the presence of

.....
Witness

SCHEDULE

The fixed percentages for company overheads to be applied to the Managing Contractor's staff, and staff employed under contract, are to allow for head office costs not directly attributable to the project, viz:

- 1. The chief executive of the Managing Contractor.
 - 2. Corporate support staff as follows (this list is for illustrative purposes only):
 - Director, Treasury and Investment,
 - Director of Finance and Administration
 - Group Secretary
 - General Manager, Human Resources
 - 3. Head office management and administration staff where their involvement with the project is solely for the purposes of the Managing Contractor's ongoing business.
- Should the Client make a request for such staff to carry out tasks directly attributable to the project, then their cost would be reimbursable