



Defects in construction – your rights and obligations

Date: Thursday March 17, 2022

In a construction project, repair work is often inevitable. Defects or faults can start to emerge from the early stages of the project and ultimately need to be fixed. Repairs are usually done by the contractor, typically during the defect liability period. In this article, we provide some guidance on your rights and obligations in relation to defects under a typical construction contract.

What is a defect liability period?

A defect liability period for a construction contract will usually start on the day the construction work is practically or substantially completed (or when goods are supplied) and ends on the last day any defect is completed under the contract.

In a typical construction contract, the duration is usually 12, 24 or 36 months. This is usually negotiable but when it comes to goods, this period is sometimes governed by what is offered by the manufacturer of the goods. For goods, it is common to think of the defect liability period as the “warranty period”.

How does the defect liability period work?

In a contract, if a principal finds work done (or goods provided) by the contractor which does not comply with the contract, they can give written details of the defect to the contractor and ask them to repair the work or goods.

Some standard contracts will go further to state that if the defect has not been rectified, the contractor may be asked to do any one or more of the following:

- remove the goods from the site;
- demolish the work;

- reconstruct, substitute, or correct the work; or
- not deliver faulty goods to the site.

5 common issues around construction defects

The following are 5 topical issues related to defects during construction projects, which are likely to affect the principal or the contractor, and general guidance on how to avoid or manage these issues.

1. Determining an appropriate defect liability period or warranty period

When you are [negotiating a construction contract](#), the defect liability period is sometimes contentious. For the principal, it is important to ensure that the project is covered by a standard defect liability period when negotiating contracts with the various providers; and particularly when negotiating a head contract.

For a contractor who is engaged in providing goods and services, it is often the case that the goods arrive at the project site at an earlier date, but installation and commissioning work finishes at a later stage. This means that the defect liability period may need to be stated twice; one for the works and a separate period for the goods.

This scenario is often seen in multi-disciplinary projects where one contractor on the project (sometimes the head contractor) has control over the time when you can begin your installation or commissioning work. Meanwhile, the manufacturer's warranty period for the goods you have delivered continues to run out as the goods sit idle until you can complete the installation or commissioning works.

Where there is a mix of goods and services in the contract, it is often advisable to ensure that the defect liability period for the goods is driven by the manufacturer's warranty so that if it does run out during the project, then the owner is required to pay for repairs.

The warranty period for the goods will often start when the goods have left the warehouse on an ex works-basis and this period does not consider the shipping time. As discussed in an earlier article, ["Using Incoterms® to manage the risk of damaged goods in transit"](#), damage during shipping can cause issues for the project and damage or delays during shipping also have an impact on the warranty period agreed to in the contract. When this warranty continues to run out when there is a delay or damage, your budgeted costs can be quickly undone.

2. Extension of time impacts the defect liability period

In the example given above, where a contractor is supplying goods and services, it is important to also remember that whenever an extension of time is requested to complete the work, the defect

liability period will be impacted when the request for extension is granted by the principal.

This can become problematic for the contractor if the goods and services have a single defect liability period under the contract. Any extension of time will mean that you, as the contractor, will need to carry the risk of being responsible for repairs long after the manufacturer's warranty has finished.

When it comes to resourcing for labour during the defect liability period, you must also be able to forecast whether there is adequate manpower available to repair defects when the extension of time is granted as it extends the period for which you are responsible for repairing defective workmanship.

3. Location of the project

In the consumer world, when a large household appliance (for example, a fridge) is faulty and it is still under warranty, the customer will usually expect the manufacturer to come to their house and conduct the repairs at no cost. In the world of construction and infrastructure projects, the location of the site can have a significant cost impact when a defect needs to be repaired.

The principal will usually expect that the labour for the removal of the faulty part and the labour for repairs are all included in the contract price. This is regardless of whether the contractor is expected to travel to remote locations or take long journeys to get to the site. The cost of repairs could therefore mean that you, as the contractor, are required to pay your own costs for travel and accommodation to get to the site to complete the repair work for a widget that doesn't cost much to replace.

For the repair work involving faulty goods, it would be generally advisable as a contractor, to clearly state that the principal is responsible for the cost of removing the faulty part and sending it back to you for repairs or replacement.

That requires the principal to be responsible for the labour required to remove the defective part and the work required to re-install the replacement part. This can be a controversial topic if it is not discussed during contract negotiations as it requires you as the contractor, to explain the basis for refusing to cover the cost of travel, accommodation and labour costs for traveling to the site to remove a widget for repairs.

4. Giving access for repair works to be done

In construction contracts, is it reasonable for an owner to deny a contractor the opportunity to re-enter the site to rectify defects? This question becomes more complicated when there is a retention clause in the contract which allows the principal to hold a certain percentage of the

contract sum until the end of the defect liability period.

Sometimes construction sites can be toxic environments where the relationships between the parties involved can be tested. Sometimes a sour relationship can cause the principal to refuse to give access for repair work to be done.

The key in this situation is to refer to what the contract says. If the principal is under an obligation to provide access, then they risk breaching the contract if they refuse access and engage another contractor to do the repair work. It becomes more complicated for the principal to pursue the original contractor to cover those costs which are likely to be at a premium level.

Specific legal advice should always be sought in such circumstances.

A construction contract may allow the principal to elect to accept the defective work instead of requiring the contractor to perform repair work and deem it to be a variation. Again, the language of the contract is critical, and it is important to refer to the obligations as laid out in the contract and seek specific legal advice.

5. Serial defects

The concept of serial defects is becoming more common in construction projects in Australia. This can be considered a “new” type of defect because it is used to describe a percentage of work which is affected by the same type of defect.

This is generally in projects where many units of the same thing are required. If a certain percentage of the total units (say 20%) is found to be defective, the principal may require the repair of all the units, even the ones that are not faulty.

For contractors, this can be a very expensive remedy, especially if the cost of parts and labour is significant. Your profits can easily melt away.

Negotiating a serial defects clause is not to be taken lightly and it would be important to limit this defects clause, for example, by ensuring that you as a contractor can claim back the costs, as a variation, if the identified problem is not your fault.

Get help

Wambeti Legal can assist you with ensuring that your rights and obligations regarding defects is covered by:

- providing advice on contracting strategy and appropriate terms to use in your construction project;

- assisting with contract negotiations;
- ensuring your tender submissions clearly state the defect liability that is offered and also ensuring that the terms of the offer can be carried over into a contract; and
- assisting to resolve disputes involving defects.

If you found this article interesting and useful, you may also like to read ["Top 6 causes of construction disputes"](#).

Contacting Wambeti Legal

[0423 825 235](tel:0423825235)

hello@wambetilegal.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.