epm projects pty ltd

NEWSLETTER

SUMMER 2010

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green building council australia
MEMBER 2010-2011

GETTING THE BALANCE RIGHT

Negotiating contracts for a project – key considerations in getting a "useful" document

Kennedys
Legal advice in black and white

It is no secret that the majority of people when entering a contract tend to sign it and, without giving it much further thought, put it away. Indeed for a construction project, it is a positive outcome if at the end the parties can regard the document as nothing more than an exercise in the wanton destruction of rainforests. However, treating contract negotiation and preparation as little more than a procedural inconvenience deprives the parties of a chance to adopt a genuinely useful risk allocation and contractual procedures that can help to avoid or minimise disputes.

For many projects, it becomes necessary at some point to consider the rights of and remedies available to the parties. Whether you are a principal, consultant or contractor, appropriate risk allocation and communication requirements are critical matters that contribute to the usefulness of a contract. If parties have prepared their contracts so that they are clear, thorough and easy to understand, referring back to them later need not be a headache.

Insurance

During the negotiation phase the availability of insurance often underlies a parties' position in relation to risk allocation. This can lead to misguided overemphasis. Regardless of which side of the fence you find yourself on, "negotiation by insurance" is not an effective strategy. Ultimately, while insurance is an important part of a well-rounded risk management strategy, control of the factors that affect risk is paramount. Parties must remember that insurance only comes into play in the event of a loss. The focus should remain on strategies to prevent and minimise loss and damage.

Allocating Risk

As part of every robust risk-management exercise, parties must consider and address the problems that can arise in a project and what can be done to prevent loss and disputes. Fundamental to this is allocating risk in a commercially sensible way that reflects which party is best able to manage it. Sadly, this is not always done in practice. The relative bargaining strength of some parties enables them to off-load substantial risks. A common example of this is requiring warranties of standards well in excess of what the warrantor would be found liable for at common law. A number of factors militate against this including:

- the creation of difficult-to-ascertain standards of uncertain meaning; and
- in the event of a loss the contractual warranty may be of no real benefit if the party found liable has no assets and the policy of insurance that's in place does not respond.

Communication

Assuming the risk allocation is right, the key to avoiding disputes will be effective, timely and clear communication. A principal informed of the difficulties being faced by its consultants and contractors, and a consultant or contractor fully informed in advance of the principal's requirements and expectations, will be far more likely to find common ground and resolve situations before the dispute resolution process under the contract need come into play.

Conclusion

Contract documents should be critically reviewed before you sign them to ensure that the contract sets up appropriate processes that respond to the needs of the parties and make sense in the context of your projects.

The fundamental message is a simple one: In preparing the contracts for your project consider its "usefulness" as a record of the agreement between the parties

ASK DFP

Readers are welcome to email DFP questions regarding challenging planning matters to jmcfadden@donfoxplanning.com.au. The most interesting questions will be selected for discussion in the next edition of EPM's newsletter.

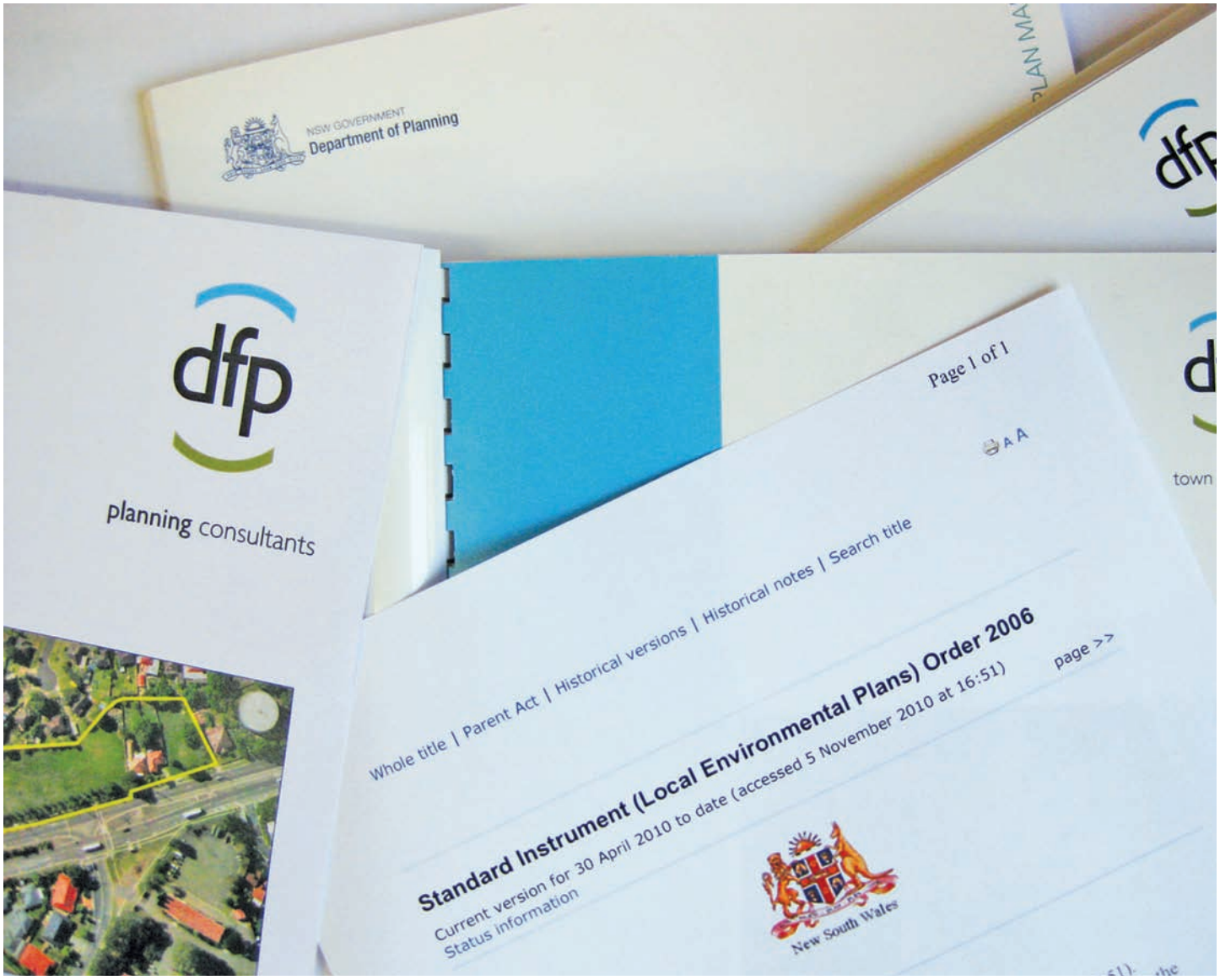
An example is provided below:
How can planning be more efficient when incorporated as part of our next educational establishment project?

As a consequence of the Global Financial Crisis and Australian Government Economic Stimulus package, the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009 was introduced. This legislation provides for efficiencies to result from what has essentially been likened to a merit-based assessment of non-complying (or 'almost complying') Complying Development. If the benefits of the NBJP Act are considered seriously, many would be forgiven for asking if these efficiencies should be incorporated as part of the next round of planning reform.

Expect any current Authorisations issued under the NBJP Act 2009 by the Infrastructure Coordinator General to become deemed development consents. If you intend to build a new non-government school, be aware that certain provisions of the State Environmental Planning Policy (Infrastructure) 2007 will cease to apply in early 2011, so act early.

Ensure that there are no surprises with your project by assessing it an early stage to identify the critical issues and challenges. DFP can assist by addressing planning issues as part of a preliminary town planning assessment.

dfp planning consultants



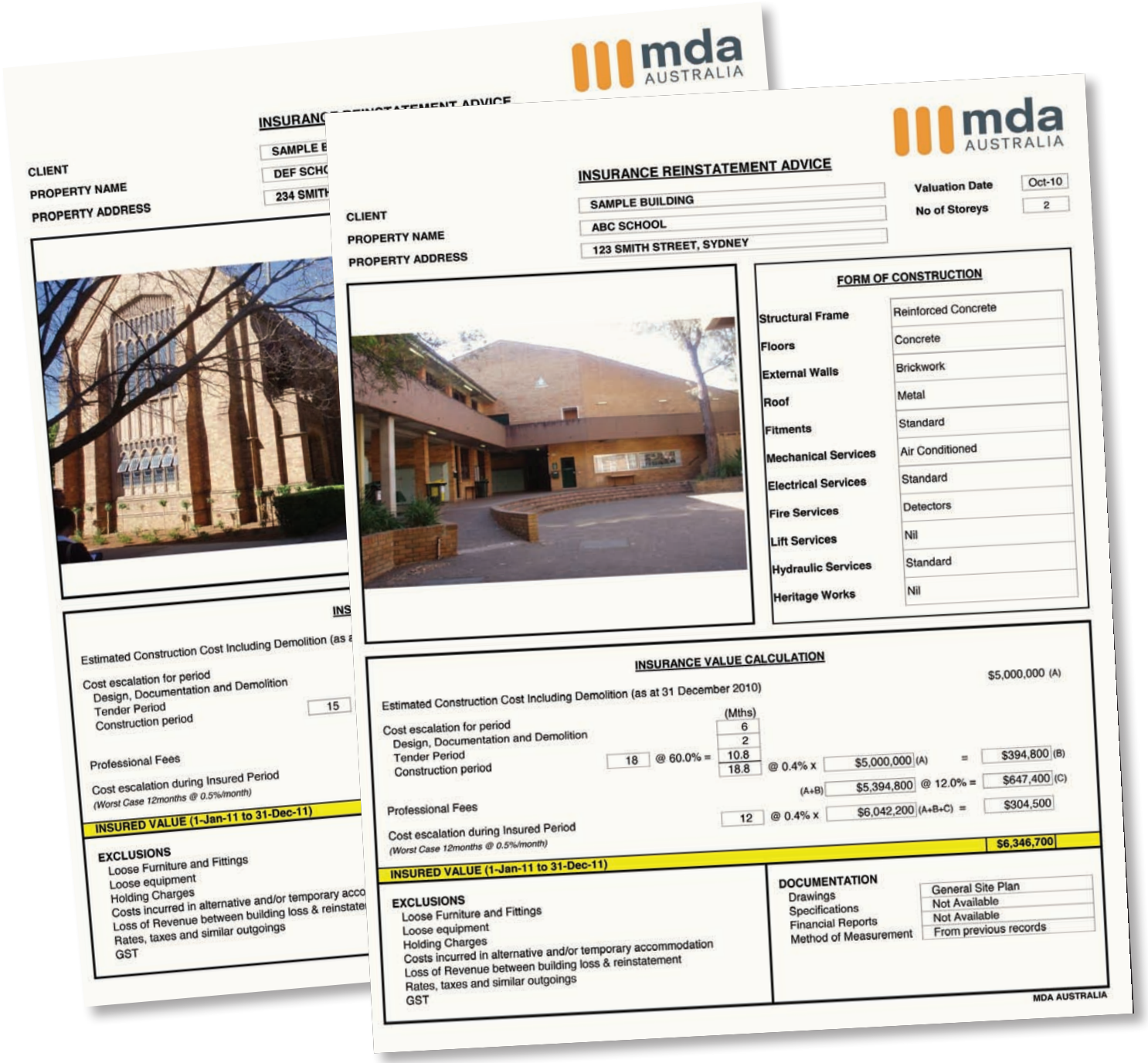
NOT A SIMPLE SQUARE-UP

Determining the value of a building for "Insurance Reinstatement" purposes remains a detailed exercise to ensure that property owner's assets are properly protected.

With time the insured value of a building can "fall behind" its true replacement value if a correct procedure of assessing the value is not maintained. Traditionally the standard practice of determining a building's replacement cost is to apply a $/m2 valuation but determining this figure is not as simple as it seems.

Insurance Value Calculations are based on a total loss scenario and factors such as demolition costs, professional fees, statutory costs, escalation during the demolition, design, documentation tender & construction periods as well as the actual construction cost need to be considered, and in some instances, take into account that some materials and skills used in the original construction are no longer available.

Subject to the availability of existing documentation the preferred method is to undertake an elemental measure that identifies all standard and site specific items in the building being valued. It is then suggested that recognised industry indices are applied yearly to the replacement cost for a maximum three years and then the elemental measure is re-priced with current rates to ensure the insured value is maintained.



INSURANCE REINSTATEMENT ADVICE

CLIENT: SAMPLE BUILDING
PROPERTY NAME: ABC SCHOOL
PROPERTY ADDRESS: 123 SMITH STREET, SYDNEY
Valuation Date: Oct-10
No of Storeys: 2

FORM OF CONSTRUCTION

Structural Frame	Reinforced Concrete
Floors	Concrete
External Walls	Brickwork
Roof	Metal
Fitments	Standard
Mechanical Services	Air Conditioned
Electrical Services	Standard
Fire Services	Detectors
Lift Services	Nil
Hydraulic Services	Standard
Heritage Works	Nil

INSURANCE VALUE CALCULATION

Estimated Construction Cost Including Demolition (as at 31 December 2010) $5,000,000 (A)

	(Mths)				
Cost escalation for period					
Design, Documentation and Demolition	6				
Tender Period	2				
Construction period	10.8				
	18	@ 60.0% =	18.8	@ 0.4% x $5,000,000 (A) =	$394,800 (B)
			(A+B)	$5,394,800 @ 12.0% =	$647,400 (C)
Professional Fees					
Cost escalation during Insured Period (Worst Case 12months @ 0.5%/month)	12	@ 0.4% x	$6,042,200 (A+B+C) =		$304,500
					$6,346,700

INSURED VALUE (1-Jan-11 to 31-Dec-11)

EXCLUSIONS
- Loose Furniture and Fittings
- Loose equipment
- Holding Charges
- Costs incurred in alternative and/or temporary accommodation
- Loss of Revenue between building loss & reinstatement
- Rates, taxes and similar outgoings
- GST

DOCUMENTATION

Drawings	General Site Plan
Specifications	Not Available
Financial Reports	Not Available
Method of Measurement	From previous records

MDA AUSTRALIA

WORKING IN SILOS?

The complexities of the construction industry demands experts to obtain statutory approvals but sadly these experts often work in silos leading to significant project risk.

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The building and construction industry in Australia and particularly NSW is extremely complex. Obtaining development approvals under the Environmental Planning & Assessment Act 1979 (NSW) has become a lengthy and costly exercise. Specialist consultants are regularly required to address the complex technical standards for Development Applications, Construction Certificates and Occupancy Certificates.

These days, it is not uncommon for a relatively simple construction project to need up to 20 specialist consultants including Arboricultural, Ecological, Heritage, Hydrological, Geotechnical, Contamination, Civil, Structural, Architectural, Ecologically Sensitive Design, Building Code of Australia, Principal Certifying Authority, Acoustic, Traffic, Landscape, Electrical, Hydraulic, Mechanical, Fire Safety and Hazardous Materials, among others.

In our experience, this complex environment gives rise to the potential for miscommunication and inadequate coordination between disciplines where consultants work in silos, and presents a significant risk to obtaining approvals, time and cost.

This risk should be managed as early as possible by identifying the technical standards that must be addressed by expert consultants, clearly defining the services of each consultant in a manner that avoids overlap and gaps, and establishing a chain of command and communication regime.

NSW GOVERNMENT MOVES TO REMOVE SOME MINOR DA FRUSTRATIONS!

Will the Clock Only Stop Once?

Lawyers | McCullough Robertson

The NSW Government has released some proposed major changes to the Environmental Planning and Assessment Regulation which may take some (but not all) of the frustration and anxiety out of processing your development applications by Councils and the Department of Planning.

The Department of Planning recently announced that it had obtained approval to extend the repeal date of the 2000 Regulation. Some of the key changes identified by the Minister for Planning include:

- Requiring councils to only ask once for additional information from an applicant during the developement application assessment process within 21 days of lodgement.

- Requiring State agencies e.g. DECC Water to respond to requests for support or advice in relation to a development application within 21 days.

- Revising deemed refusal timeframes to take into account the measures to limit stop the clock requests and the timeframes by which State agencies are required to respond.

- Reduction of determination times to 50 days for simple DAs and 90 days for more complex DAs.

Applicants should be cautiously optimistic about these administrative changes. With only one 'stop the clock' opportunity consent authorities could choose to simply decide not to determine the development application within the 50 day period which leaves the Applicant faced with the possibility of having to appeal to the Land and Environment Court or wait until Council determines the DA.

While there may be a reduction in delays caused by requests for further information the likelihood of a similar reduction in frustration caused by delays or failure to determine DAs within the statutory time frames are slim if history is any indication.

COMPLYING DEVELOPMENT

The standardisation of requirements relating to Complying Development under the NSW SEPP (Exempt & Complying Development Codes) 2008 leads to greater efficiency of approvals for industrial, commercial & retail fitouts.

BLACKETT MAGUIRE+ GOLDSMITH

Since the introduction late last year of the General Commercial & Industrial provisions in the SEPP, there has been a gradual uptake of this form of approval for almost all internal fitout works in commercial, retail & industrial buildings over the course of 2010.

Complying Development is a simplified form of both planning and building approval that may be issued by Private Certifiers without the need for Local Council approval.

The SEPP has provided a state wide set of requirements that now allows for almost all internal fitout work in existing buildings to be approved under Complying Development. This has eliminated the local council based requirements for Complying Development that were previously very limited and resulted in almost all substantial works to be referred to Council under a Development Application.

Under these state wide provisions building owners are now realising the significant benefits in reduced time frames for approvals to allow for new tenants to move in and commence business in a shorter time frame than what was expected in most cases.

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