



**CPC50210 Diploma of Building and Construction (Building)**

**CPCCBC4003A**

**Select and Prepare a Construction Contract**

**Learner Resource**

**Version: VI-1**





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# Introduction to unit CPCBC4003A

Welcome to the Learner Resource for *CPCBC4003A Select and prepare a construction contract*. This unit forms part of the CPC50210 Diploma of Building and Construction (Building), which is a qualification designed to meet the needs of builders and managers of small to medium-sized building businesses.

The builder may also be the appropriately licensed person with responsibility under the relevant building licensing authority in a particular state or territory. Builder licensing varies across states and territories, so additional requirements may be required to become licensed in the particular state or territory.

Occupational titles may include:

- builder
- construction manager.

This unit of competency specifies the outcomes required to select and prepare appropriate construction contracts, including the sections, clauses and conditions for low rise construction projects. The ability to interpret complex documents, communicate clearly and succinctly and negotiate are essential skills.

This unit of competency supports the needs of builders, project managers, estimators and managers in the building and construction industry responsible for selecting and preparing contracts for building work.

A copy of the full unit of competency is included in Appendix 3 of this Learner Resource together with a list of all the units required to complete the CPC50210 Diploma of Building and Construction (Building).

**Note:** The unit of competency in this Learner Resource was current at the time of publication.

## References

This Learner Resource is to be used with reference to other texts, such as the Building Code of Australia and Australian Standards. These will be included in the printed materials provided.



## About this course

This Learner Resource is one of a set of resources that you will use to complete the CPC50210 Diploma of Building and Construction (Building).

### Flexible delivery

This Learner Resource is used to provide you with everything you need to complete this unit. You are about to embark on a type of training that is called flexible learning, which means that you do not need to attend formal classes.

Flexible learning is a good option for this level of learning as it allows you to undertake the course at your own pace and in your own time. When undertaking flexible learning it is important to:

- set and document clear timelines to read and understand a topic and to complete all the learning activities and assessment tasks
- be motivated and don't let distractions impact on your progress
- undertake one topic at a time. You should work through the topics in the order they are presented in this Learner Resource
- submit your assessment tasks on or before the due date and time
- not wait until you finish all the reading and learning activities before you attempt the assessment tasks – undertake them when you feel you are confident about the topics they address
- make sure the assessment task that you send to be assessed is clearly labelled by completing and attaching the assessment task cover sheet with your name, assessment task title, date, etc.





## What you will study




This Learner Resource contains three topics that you should work through step by step. The topics are:

1. Essential elements, sections and clauses of a business contract
2. Selecting an appropriate contract
3. Prepare the contract

There are also learning activities that you should complete before moving on to the next topic. These are provided to help you apply and reinforce what you have learnt in each section. If you have trouble answering any of them, you should contact your tutor.

## Icons

The following icons are used throughout this Learner Resource.

	<p><b>Learning activity</b></p> <p>These activities help you consolidate your learning and may be used to build a portfolio of evidence.</p>
	<p><b>Assessment task</b></p> <p>These must be submitted to your tutor and will be used to assess your knowledge and skills in each competency.</p>
	<p><b>Information</b></p> <p>Note or key points are used to alert you to additional information or critical points that need to be understood.</p>

## Your time commitment

It should take about 40 hours to complete this unit. However, depending on your circumstances or prior knowledge, you may find that it takes a little less or more time to finish the work.



## Activities and assessment

Throughout this Learner Resource, there are activities to help reinforce the learning associated with a new topic. Your tutor may require you to forward your responses to these activities to them as part of your formal assessment. If this is required you will be advised by your tutor. The assessment tasks are provided at the back of this Learner Resource.

The assessment tasks can be attempted as you work through the Learner Resource. You don't have to wait until you have completed all the activities before attempting an assessment task.

There are three assessment tasks for this unit that you must submit to your tutor on or before the agreed date and time. The titles of the assessment tasks are:

1. Essential elements of a contract for a low rise construction
2. Contract selection
3. Contract preparation and administration

Make sure that all work you submit is your own and that you appropriately acknowledge and reference source materials. When you have completed an assessment task, send it to your tutor who will assess your work and provide appropriate feedback about whether you have satisfied the requirements of the assessment task. If you have any questions about your assessment results, please contact your tutor.

## Satisfactory completion of the unit

You will be deemed competent for this unit on the basis that you can provide evidence of:

- selecting the right contract for the particular project
- selecting appropriate clauses and conditions within the contract
- identifying causes of a breach of contract
- specifying requirements for the offer and acceptance of a contract
- specifying requirements for the termination of a contract
- accurately calculating rise and fall amounts
- specifying schedule for progress payments
- specifying requirements for extensions of time
- including all related documentation
- referring to all relevant legislation.



It is essential that competence is demonstrated in the relevant aspects of contract selection and insertion of appropriate clauses, including rise and fall and progress payments.

## Employability Skills

Employability Skills are the generic skills required not only to gain employment but also to progress within the workplace. These skills help you to achieve your potential and to successfully contribute to the strategic directions of an organisation or your business.

Employability Skills are embedded within every competency and included in all assessments. The Employability Skills within this unit are presented in a table in Appendix 1 of this Learner Resource, mapped against the assessment activity that addresses the skill.

## Getting started

It's now time for you to start working through this Learner Resource. We wish you all the best with your study in this unit and all the other units required to complete the CPC50210 Diploma of Building and Construction (Building).

Remember, if you have any questions about your study please contact your tutor for clarification.





# 1. Essential elements, sections and clauses of a business contract

A builder has a number of responsibilities established by law and the building and construction industry. The builder, as the professional adviser, needs to ensure that their advice is not biased and that they behave responsibly on the client's behalf. The code of the profession requires that a duty be held to the client. The builder also has certain legal responsibilities. These responsibilities are outlined below.

## 1.1 Legal responsibilities

Every builder has a legal responsibility and duty of care for all aspects of the work they perform, this includes responsibilities related to the construction contract.

### 1.1.1 The law of tort - negligence and duty of care

A tort is a civil wrong as opposed to a criminal wrong. An action in tort is brought by the person who has been wronged against and it is remedial (compensatory), in philosophy.

The most common tort is the *tort of negligence* which is the failure of a professional person to use the care or skill that a reasonable professional would use in the normal course of events.

Negligence does not require intent on the part of the person who commits the act. For example, the courts will regard an architect as possessing a greater level of skill than an ordinary reasonable person.

### 1.1.2 The law of contract

A contract is an agreement which parties intend to be legally binding. For a contract to exist, one of two parties must offer to enter into a contract on certain terms. The other party must accept this offer. For a contract to be enforceable, there needs to be some form of consideration. For example, the promise to pay is consideration for the builder's promise to construct.

A lawfully binding contract therefore has three parts:

- offer
- consideration
- acceptance.



### 1.1.3 Consumer protection law

Welfare state contract law, which is common or judge-made law, has increasingly been supplemented by statute law, which is legislation made by parliament.

Important pieces of legislation that are relevant to construction contracts include:

- Trade Practices Act 1974
- Copyright Act 1968 and Copyright Amendment (Moral Rights) Act 2000
- Corporations Act 1989 and Corporations Law 1989
- Australian Industrial Relations Act 1988
- Income Tax Assessment Act 1988
- Building Code of Australia
- Development law governing land usage and construction
- Workers' compensation legislation
- Occupational safety, health and welfare legislation
- Equal opportunity and disability discrimination legislation

#### *State/territory acts and registration*

All states and territories have registration acts which regulate who can operate as a builder. The acts were established mainly to protect the public interest. The argument that the public requires protection from those not qualified to practice building, and that registration maintains high standards in the built environment is warranted.

### 1.1.4 The concept of agreement and the parties involved

A construction contract involves two parties: the proprietor (principal/owner) and the builder (contractor/head contractor).

Some contracts allow for a third entity to act as the contract administrator, although this party is not privy to the construction contract. Contracts typically refer to the contract administrator as architect, engineer or superintendent. The contract administrator acts as both the owner's agent (eg the architect/engineer or other nominated person), and independent certifier, in carrying out the contract administration. In this latter role, the law requires that the contract administrator acts independently between the parties.



Generally, the builder subcontracts part of the works to various trades (subcontractors), but remains responsible for their performance. The proprietor is not a party to the arrangements with the subcontractors, only the builder.

The proprietor, depending on the nature, complexity and method of delivery of the project, may also have numerous contracts of engagement with various consultants, such as:

- designer (architect, engineer or building designer)
- quantity surveyor
- project manager
- construction manager.

## 1.2 Types of construction contracts

There are a number of types of construction contracts and each form of contract has its advantages and disadvantages depending on the construction works involved.

For example, if the project works are very well defined, then the total cost of the project can be reasonably identified as opposed to a construction project where, for example, an accurate estimate of the quantities involved is difficult, then a schedule of rates (ie a dollar value per unit of identified work), is a more realistic proposition for the parties involved.

It should be noted that irrespective of the type of contract used for a construction project, sometimes part of the tendering process for a job requires pre-qualification. Such pre-qualification is intended to assure that potential organisations submitting tenders have the appropriate experience and financial backing to carry out such projects.

### 1.2.1 Lump sum contracts (with or without 'rise and fall')

The contract for the works is for a specified lump sum, payable via periodic progress payments.

Often, the final lump sum paid by the proprietor varies from that originally agreed on. This is due to variations to the contract, that is, additions, omissions or deletions in the scope of works. The contract provisions will usually allow for variations and adjustment of the contract lump sum.



Rise and fall refers to the inclusion cost for any rise or fall to labour and materials that may occur during the life of the project.

Care must be taken with this type of contract to make sure that the plans and specifications are interpreted mutually by all parties. This is important as it is these documents that can lead to misunderstandings and therefore conflict, and consequently, non-adherence to the agreed lump sum, as some parties will see them as variations and therefore an increase in cost.

## 1.2.2 SBW2 contracts

These are a type of lump sum contracts that are available through the Royal Australian Institute of Architects (RAIA) and by the Master Builders Association of Victoria (MBAV). These contracts cover administration of a project by an architect. SBW2 contracts do not cover supervision of the project which is the responsibility of the builder.

## 1.2.3 Cost plus contracts

Under a cost plus contract, the proprietor pays the contractor the actual cost of the work plus agreed profit above the actual cost.

This type of contract requires thorough and detailed preparation and administration for its success. It relies on trust between the owner and the contractor and effective communication as what constitutes cost can lead to conflict between the parties. Defining the scope of the works to be constructed is crucial in this type of project as drawings and/or specifications are normally not completed at the commencement of the construction of the project.

Costs can refer to a wide range of activities to be paid and may include labour, wages, subcontract, materials, rental, documentation, travel, royalties, and much more.

A cost plus type contract without a guaranteed maximum price (GMP) can lead to many pitfalls and therefore, the earlier the complete works of the project is agreed to, the better.

## 1.2.4 Guaranteed maximum price contract

This class of contract may be viewed as a variation of the cost plus contract. It operates on similar principles but there is an upper limit which, if exceeded, will be borne by the contractor.





This type of contract gives the client protection in regards to the maximum cost of the construction. It is basically a cost plus a fee contract with a cap on it. This type of contract is often used for fast track type projects when sketchy construction documents are all that is available at the time of contract preparation, ie probably about 75% or more of the design documentation has been completed at this point.

### 1.2.5 Schedule of rates

Under a schedule of rates contract, the proprietor pays the contractor for the amount of material used at the agreed rate.

### 1.2.6 Bill of quantities

Under this class, the bill of quantities forms part of the contract and the proprietor pays the contractor for the exact amount of labour and materials provided.

### 1.2.7 Turnkey contracts

This type of contract is widely used in the design and construction of petrochemical, process engineering and chemical plants. Here, the owner of the project asks for a design and construct of the facility. Payment of the project generally occurs whereby the contractor hands over the keys to the owner – hence ‘turns the key’. It is at this point that the contractor receives payment in full.

### 1.2.8 Joint venture

This type of contract may be suited to organisations that have expertise in their own country but when seeking projects in overseas markets, they enter into a partnership with local organisations that are able to provide accurate information and resources to meet the needs of the construction project. For example, local subcontractors, vendors and labour markets and so on may be parties to a joint venture agreement. Such a joint venture can benefit both organisations by allowing them to share responsibilities and profits.



### 1.2.9 Build-Operate-Transfer (BOT) or Build-Operate-Own-Transfer (BOOT)

This type of contract emerged in the 1970s and gained popularity in Europe and Asia. Here, the builder/developer provides architectural, engineering, construction and financial services to construct a project which they will build and operate for a number of years, prior to transferring the title to the owner.

The concept in this type of contract is that the builder/developer receives sufficient funds to design, construct, finance and operate, whilst also generating a profit. Typically, projects include toll roads, tunnels, bridges, etc. Government authorities often use this type of contract to their community needs.

## 1.3 Contracts for domestic building work

Contracts for domestic building work must be in accordance with your local state or territory Domestic Building Contracts Act which requires that they be written in a specific form and include certain provisions. There is similar legislation in each state and territory.

A domestic building contract which is not in writing may not be contractually enforceable. Therefore, a builder who performs building work without a written contract may be unable to enforce any contractual rights and may only recover under a claim for quantum meruit which is a Latin term meaning 'what one has earned'. In the context of building and construction law, it means 'reasonable value of the services provided'. Put simply, a builder without a contract can only demand payment for the value of the goods and services provided.

## Activity 1 - Benefits of a lump sum contract

Explain the benefits of entering into a lump sum contract for the home owner and the builder for a project to renovate and extend a residential dwelling.

[illegible]

Check your findings with the correct answer in the back of this Learner Resource under 'Learning activity answers'.

\* Retain this learning activity as part of your portfolio of evidence.



## 1.4 Project delivery methods

Time, cost and quality are key criteria in any building project.

The emphasis a building owner places on each of these criteria will vary from owner to owner and the particular sector in which they operate. For some, time will be most important factor, for others cost, and for others, quality. For some, a balance of all three will be critical.

The choice of a particular type of contract and delivery method has the potential to affect each of these criteria. It will also affect the extent and scope of contract documentation and the roles, responsibilities and liabilities of the various parties.

### 1.4.1 Construct versus design and construct

In essence, project delivery methods may be characterised as either construct only or design and construct, albeit with variations within each characterisation.

A builder or trade contractor who delivers a project or part of a project under a construct only method is, as the title suggests, responsible for all the services necessary to construct the building or that aspect of the building. The design responsibility lies with the building owner.

Under a design and construct method, the builder, as the title suggests, provides the design services in addition to the construction services. There are various permutations on the level of design services provided by the builder. This may range from full design based on the owner's performance brief or design development, following a preliminary design provided by the owner. This type of delivery method is also known as package deal or turnkey.

The project delivery method chosen will create different contractual links between the parties and therefore, affect roles and responsibilities.



## 1.4.2 Construct only contracts

Under a traditional head (or principal) contract, the main building owner engages a designer (architect/engineer) to design the building. On completion of the design documentation, the project may be tendered out to builders and ultimately, the building owner enters into a contract with a builder for the construction of the building in accordance with the design. This method is also known as construct only because the builder is responsible for provision of all services necessary for the construction only of the building. The design responsibility lies with the building owner and his or her design consultants.

In order to deliver the project and ensure that all contractual obligations owed to the building owner are met, the builder subcontracts part of the works to various trade subcontractors and supervises and coordinates their work. The building owner's contract is with the builder only and not with the subcontractors, therefore the builder remains contractually responsible to the owner for all work carried out by the subcontractors.

Generally, the builder will not be able to subcontract all of the works or assign his or her contractual responsibility to another party.

### *Typical project phases*

Typical project phases in traditional construct only contracts include:

- pre-design – property procurement, selection and engagement of consultants
- brief development
- site survey
- concept/sketch design
- design development
- contract documentation
- tender
- contract
- contract administration (construction).



### 1.4.3 Design and construct contracts

Under a design and construct arrangement, the builder is responsible for the design and construction of the building, without direction from the owner. The builder will also be required to provide the owner with warranties of fitness for purpose of the design and the quality of workmanship.

Under design and construct in its conventional form, the builder undertakes all the design work based on a design brief provided by the building owner, sometimes referred to as the principal's project requirements. On completion, the builder hands the building over to the owner, who only has to turn the key, which is why this method is also known as turnkey.

Variations on the design and construct model include:

- design development and construct where the proprietor provides preliminary design which the builder then develops further
- design, novate and construct where the proprietor novates his or her design consultants, following preliminary design, to the builder.

A significant purpose in varying the conventional design and construct model is to allow the proprietor a greater degree of design control.

Generally, the builder will be required to provide the proprietor with certain warranties as to fitness for purpose and quality of workmanship.

## 1.5 Standard form construction contracts

Generally, the contracts used for the majority of building projects, domestic and commercial, are known as standard form contracts.

Contracts in the building industry are numerous. For example, there are contracts between:

- the owner and the builder
- the builder and subcontractors
- the builder and suppliers
- the builder and his or her employees
- the owner and his or her consultants, such as architects, engineers, and draftspersons.



For example, in Victoria, the following are typical standard form construction contracts:

- Housing Industry Association (HIA)
  - alterations, additions and renovations
  - new homes contract
  - small works contract
  - medium works (commercial contract) conditions
- Master Builders Association (MBA)
  - building contract – home improvements
- The Royal Australian Institute of Architects (RAIA/MBA)
  - ABIC MW-1 2003 major works contract – owners copy
  - ABIC MW-1 2003 major works contract – reference copy
  - Schedule 1 Contract information – Housing in Victoria
  - Schedule 2 Special conditions – Housing in Victoria
  - Schedule 9 Non-domestic building work – Housing in Victoria
  - information for the owner – Housing in Victoria.

Such standard form contracts contain standard conditions and are prepared by various industry bodies and parties involved in the construction industry. Parties may include, architectural and master builder associations, building owners and managers, standards committees and government departments.

Such contracts have evolved from a process of negotiation and discussion between the various parties. However, no standard form contract will contain all the terms and conditions that a particular group desires.

The advantages of using standard form contracts include:

- convenience and economy of having a ready made contract
- working familiarity
- highlighting areas where the contract conditions do not work well
- standard contracts are revised and updated intermittently.

All standard form contracts typically contain a number of common clauses. It is important that the parties involved assess the implications of the use of the particular contract. Therefore, at times, special conditions may be inserted by mutual agreement of all parties.



## 1.5.1 Table of standard forms of contract

The following are the most commonly used standard form contracts.

AS 2124 – General Conditions of Contract <ul style="list-style-type: none"><li>• Construct only</li><li>• Published by Standards Australia</li><li>• Administered by a superintendent where the contractor constructs the works based on a design completed by the principal/owner (generally through the principal's consultants)</li></ul>
AS 2545 – Subcontract Conditions (companion to AS 2124)
AS 4300 – General Conditions of Contract for Design and Construct <ul style="list-style-type: none"><li>• Design and construct</li><li>• Published by Standards Australia</li><li>• Commercial</li><li>• Does not comply with domestic building legislation</li><li>• Administered by a superintendent where the contractor must design and construct the project</li></ul>
AS 4303 – General Conditions of Subcontract for Design and Construct (companion to AS 4300)
AS 4305 – Minor Works Contract Conditions <ul style="list-style-type: none"><li>• Administered by the owner/principal for relatively minor works</li></ul>
AS 4000 – General Conditions of Contract <ul style="list-style-type: none"><li>• Construct only</li><li>• Published by Standards Australia</li><li>• Commercial</li><li>• Does not comply with domestic building legislation</li><li>• Administered by a superintendent where the contractor constructs the works based on a design completed by the principal/owner (generally through the principal's consultants, architect or engineer)</li></ul>
AS 4901 – Subcontract Conditions (companion to AS 4000)
AS 4902 – General Conditions of Contract for Design and Construct <ul style="list-style-type: none"><li>• Design and construct</li><li>• Commercial</li><li>• Does not comply with domestic building legislation</li><li>• Published by Standards Australia</li></ul>





AS 4903 – General Conditions of Subcontract for Design and Construct (companion to AS 4902)

2006 (edition 4) MBAV New Homes Contract – HC-5

- Construct only
- Domestic
- Published by MBA
- Favours builder/contractor

2003 Australian Building Industry Contract – ABIC MW – 1 Major Works Contract

- Construct only (value range \$100,000 to \$25 million)
- Commercial and domestic
- Can be amended to design and construct
- Published by RAIA
- Administered by an architect where the contractor constructs the works based on a design completed by the principal/owner (through the architect)

2002 Australian Building Industry Contract – ABIC SW – 1 Simple Works Contract

- Construct only (value range up to \$2 million)
- Commercial and domestic
- Can be amended to design and construct
- Published by RAIA
- Administered by an architect where the contractor constructs the works based on a design completed by the principal/owner (through the architect)

1981 (edition3) General Conditions of Contract – NPWC3

- Construct only
- Civil/commercial
- Published by National Public Works Council
- Mainly used by government departments and agencies
- Oldest standard form contract in use



## 1.6 Contract law

Legal liability within the building industry and associated professions involves four main areas:

- Legislation (statutes, acts and regulations)
- Tort law
- Criminal law
- Contract law.

### 1.6.1 Legislation

Legislation is law that has been enacted by the government.

### 1.6.2 Tort law

Tort law covers civil wrongs that include anything that causes economic, physical or legal harm.

### 1.6.3 Criminal law

Criminal law involves the government as the prosecutor for crimes against the interest of the public.

### 1.6.4 Basic contract law

A contract is a legally binding agreement between two or more parties if it complies with specific rules of contract law. An alternative definition of a contract is a set of legally binding promises made by one party or more.

The following elements are necessary for the existence of a binding, enforceable contract:

- offer
- acceptance
- consideration
- an intention to create legal relations
- formalities
- certainty
- capacity
- legality.



## Definitions

Following are definitions for the previously mentioned elements of a contract.

Offer	An expression of willingness to contract on the terms stated. It is judged 'objectively by the courts – in the position of how it would be viewed by the reasonable person'.
Acceptance	<p>Is an unqualified agreement to be bound on the terms offered. Acceptance can be communicated to the offeror, or may be inferred through the conduct of a party.</p> <p>Acceptance of an offer by the other party gives rise to a binding contract subject to all elements being satisfied, for example:</p> <p>A principal/owner invites builders (tenderers) to submit a tender (quotation). The builder's tender, once submitted and communicated to the owner, is an offer. The owner is then free to decline or accept the offer.</p>
Consideration	Is what the parties exchange in return for the promises as stipulated in the contract. Consideration is usually monetary.
Intention to create legal relations	Letters of intent are common in the building industry. These are sent to a successful tenderer prior to the formal execution of contract documents, to indicate that a contract will follow.
Formalities	While contracts can be generally formed without formality, some transactions are thought to require form, either because it makes a person think carefully before they bind themselves to an agreement, or merely that it serves as clear evidence.
Certainty	A contract's essential terms must be sufficiently certain and not vague or uncertain.
Capacity	An enforceable contract requires that both parties have legal capacity to enter into the contract.
Legality	A contract whose purpose is illegal or is against public policy will be invalid.

[illegible]

\* Retain this learning activity as part of your portfolio of evidence.



## 1.6.2 Dispute and termination of contracts

In accordance with contract law, contracts may be terminated or discharged in any one or more of the following ways by:

- agreement
- performance
- frustration
- election upon breach
- contractual right to termination.

### *Liquidated damages*

A client will specify that if the project is not complete by the date nominated in the contract, or as extended by agreement, then the builder will pay the client liquidated damages of the contract amount specified, usually calculated on a daily basis.

### *Categories of contracts*

Contracts may be oral, written or partly oral/partly written. Contracts may be a simple contract or a deed. A deed is a formal/specialty contract which must be signed, sealed and delivered and no consideration is required.

- Oral contracts – if the contract is oral, each party in dispute will have difficulty in establishing its version of the terms of the agreement.
- Partly oral/partly in writing – evidentiary problems will be similar to oral contracts.

### *The importance of writing*

Where the contract is in writing and it appears to be complete, the courts will presume that the contract contains all the terms. In the event of a dispute:

- the parties' individual conflicting interpretations of their intentions (terms) will generally not be relevant
- the document is interpreted without regard to extrinsic evidence (oral or additional written evidence that contradicts or adds to the original terms of the contract).



## *Terms of the contract*

The content or terms of the contract are determined at the time the contract was made. Therefore, once a contract is made, it is fixed, and only subject to variation by mutual agreement.

### **Express terms**

These are terms written/expressed in the contract.

### **Implied terms**

These are terms implied by legislation or by the courts at common law. For example, terms implied by Trade Practices Act or the Domestic Building Contracts Act or at common law.

The courts will imply particular terms will fall into particular types of contracts. For example:

- a contract between an architect and his or her client
- a contract between a builder and his or her client.

## *Warranties or conditions*

Terms are either warranties or conditions:

- Breach of a warranty gives right to damages but does not entitle the innocent party to end the contract.
- Breach of a condition gives right to damages **and** entitles the innocent party to end the contract.
- Technically, any breach of a term of a contract entitles the innocent party to damages.



### *Is the contract valid?*

A contract may be deemed invalid due to any of the following.

<b>Misrepresentation and misleading conduct (at common law)</b>	This may occur at the pre-contractual negotiations, whereby a party makes a false statement to the other party.
<b>Misleading or deceptive conduct under the Trade Practices Act (TPA)</b>	<p>Section 52 of the TPA prohibits a corporation, in trade or commerce, from engaging in conduct that is misleading or deceptive or likely to mislead or be deceptive.</p> <p>Equivalent legislation exists under the various Fair Trading Acts which apply to natural persons. A person or corporation may be liable for damages for contravention of the legislation.</p> <p>The intention of the party in contravention of the Acts is irrelevant – it is sufficient if it exists and does not matter that there was no fraud, recklessness or negligence in the misleading or deceptive conduct.</p>
<b>Mistake</b>	A contract may be void because of a mistake by one party or both parties.
<b>Duress</b>	<p>A contract which is entered into under duress, against a person's free will and was part of the reason for entering the contract, may be rendered voidable by the injured/wronged party.</p> <p>The following sections of the TPA are relevant to 'duress':</p> <ul style="list-style-type: none"> <li>• S53A(2) a corporation shall not use physical force or undue harassment or coercion for interest in land</li> <li>• S60 a corporation shall not use physical force or undue harassment or coercion for goods or services or payment for goods or services</li> <li>• S51AB(1) a corporation shall not, in trade or commerce (in connection with goods or services), engage in unconscionable conduct</li> <li>• S51AB(2)(d) provides that a court may have regard to undue interference or pressure or unfair tactics against a consumer.</li> </ul>



<b>Undue influence</b>	In a relationship of trust or confidence or where one party exerts more influence, undue influence will be deemed to occur where one party takes unconscionable advantage of the other party, by virtue of the special relationship between the two.
<b>Unconscionable conduct</b>	S51AA of the Trade Practices Act prohibits a corporation from engaging in unconscionable behaviour, whether in the course of a consumer transaction or otherwise.
<b>Lack of formalities</b>	Although there is no general requirement for contracts to be in writing (a contract may be oral, written, partly oral and partly written), some legislation prescribes that certain contracts comply with particular formalities.
<b>Incapacity</b>	An enforceable contract requires that both parties have legal capacity to enter into the contract.
<b>Uncertainty</b>	A contract's essential terms must be sufficiently certain and not vague or uncertain.
<b>Illegality</b>	A contract whose purpose is illegal or is against public policy will be invalid.





### Activity 3 - Contract validity

Identify a relevant project site and discuss the following terms with reference to the project site in your capacity as a project supervisor engaging a subcontractor. The terms are:

- misrepresentation and misleading conduct
- misleading or deceptive conduct under the Trade Practices Act
- mistake
- duress
- undue influence
- unconscionable conduct
- lack of formalities
- incapacity
- uncertainty
- illegality.

[illegible]

Check your findings with the correct answer in the back of this Learner Resource under 'Learning activity answers'.

\* Retain this learning activity as part of your portfolio of evidence.



### 1.6.3 Statutory intervention into contract law

Freedom of contract assumes equal bargaining power between the parties to a contract. In reality, this is rarely the case, particularly in the case of consumers. Consequently, there has been significant statutory intervention in the area of contract law. With an emphasis on favouring and/or protecting the consumer, this legislation has:

- made small amendments to case law
- reformed significant portions of the law.

Contract law today therefore, is a mixture of case law and legislation.

The following legislation has had a significant effect on the area of contract law and therefore, building contracts:

- Trade Practices Act 1974 (Cth) – important sections include:
  - S52 misleading and deceptive conduct
  - S53 false and misleading representation
  - S55A misleading conduct in relation to services
  - S74(2) implied warranty of fitness for purpose.

Remedies for breaches of the statutory provisions include damages and injunctions:

- Fair Trading Act 1999 (Vic) which unlike the TPA applies to unincorporated entities
- Corporations Act 2001 (Cth)
- Domestic Building Contracts Act 1995 (Vic).

The above statutes affect consumer transactions and as such, the building industry is not immune from their operation. In addition, there is also state and federal legislation directly relevant to contracting within the building industry, such as legislation affecting domestic building contracts and security of payment under construction contracts.

#### *Security of payment legislation*

In recent years, Australian jurisdictions have followed the approach of the United Kingdom by introducing security of payment legislation.

This powerful legislation seeks to protect the parties who carry out construction work under construction contracts (builders, subcontractors, consultants and suppliers), by providing them with a statutory entitlement to progress payments. This legislation however, is generally not applicable to domestic building contracts between a home owner and builder.



### 1.6.4 Contracts for domestic building work (low rise constructions)

Domestic building contracts are treated as consumer transactions and thereby fall within the consumer protection regime. Contracts for domestic building work must comply with the legislation of the particular jurisdiction, as there is no uniform standard of a domestic building contract.

Generally, the various statutes prescribe the following:

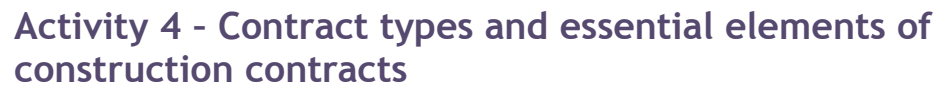
- implies, into contracts, warranties regarding all domestic building work
- caps, at a percentage of the contract sum, the deposit amount a builder may demand or receive
- prohibits arbitration clauses
- prescribes how prime cost items and provisional sums are to be used in the contract
- prescribes specific requirements for major domestic building work contracts
- provides for a cooling-off period
- regulates the use of variations
- imposes limits on progress payments
- prescribes specific requirements for display home contracts.

#### ***Domestic Building Contracts Act (Victoria) 1995 - Overview***

In Victoria, VCAT has jurisdiction to hear and resolve building disputes arising under a domestic building contract and as such, resolution is prefaced by a compulsory conciliation process.

Contracts for domestic building work which relate to a home must be in accordance with the Domestic Building Contracts Act 1995 (Victoria). This requires that the contract be in writing, in a specific form and include certain provisions.

A contract for domestic building work, which does not comply with the legislation, may not be enforceable.



List and explain the purpose of each type of contract including their essential terms and elements.

\* Retain this learning activity as part of your portfolio of evidence.



## 2. Selecting an appropriate contract

When you enter into a construction contract, it is critically important that you select the correct contract type for the works to be undertaken.

### 2.1 Contract selection

Prior to selecting a standard contract for a particular building and construction project, a number of considerations need to be taken into account:

- Type of contract – need to identify the purpose of the contract (eg residential, commercial, industrial), and whether it is lump sum, schedule of rates, cost plus etc.
- The scale and complexity of the project – small, medium or large and whether it is a normal or complex type project.
- The works to be carried out – are the works wholly new or are they principally alterations.
- Who will administer or supervise the project – could be an architect, engineer, or other.
- Is a schedule of rates or a bill of quantities included as part of the contract documentation –these will define the clarity and extent of payments.
- Practical completion – are the works, from a practical viewpoint, to be staged.

Due consideration of each of the above factors will assist in determining the most appropriate type of contract for the building and construction project in question.

### 2.2 Contract documentation

There are a range of documents that collectively make up a contract. These documents need to be accurately identified and prepared before the contract can be entered into and the building works undertaken. These documents include:

- a formal instrument of agreement which is signed by both parties (ie the contract itself)
- general or special conditions of contract – standard form or specially prepared by lawyers
- plans



- drawings: usually architectural and engineering drawings but may, for example, also include specialist consultants, such as landscape architects and interior designers
- specifications
- schedules
- bill of quantities
- project timelines
- material lists
- human resource projections
- equipment, site accommodation and services information
- other information as required.

The contract will normally specify an order of precedence of the documents, to be referred to in the event of conflict between the documents:

- formal instrument of agreement
- special conditions of contract
- general conditions of contract
- specification preliminaries
- specification
- drawings.

An important document that normally forms part of the contract documents is the AS 2124 General Conditions of Contract. An overview of the purpose and contents of this document is provided in the following.



## 2.2.1 AS 2124 General Conditions of Contract

AS 2124 General Conditions of Contract normally forms part of the contract documents. In broad terms, it represents the interests of all parties to a contract, including resolution of conflicts and disputes. For example, the standard includes:

- general conditions pertaining to the contractor:
  - shop drawings
  - schedules
  - contractor responsibility
  - conflict between drawings and specifications
  - limitation of liability
  - dispute resolution
- general conditions – changes in the work
  - the rights of the owner with respect to subcontractors and material suppliers
  - disagreements between owner and contractor
  - payments and completions
- general conditions – miscellaneous provisions
  - this is primarily applicable to renovation and rehabilitation work.

### *Contractual obligations*

The principal obligation of the owner is to pay the contractor the agreed monies for the works done by the contractor in accordance with the scheduled timelines.

Upon practical completion, the contractor usually returns possession of the site to the owner. In general, neither the principal nor contractor can assign any rights or obligations to a third party without both parties agreeing.

The owner/client must give possession of the site to the contractor/builder by the agreed date for the commencement of the building works. Likewise, the builder/contractor has an obligation to complete the works to practical completion.



AS 2124 General Conditions of Contract forms part of the contract documentation for a project. Remember that AS 2124 can also have inclusions/exclusions by mutual agreement in the form of addendums. For example, most of the works within the building and construction industry is carried out by subcontractors. It is the usual practice of some principal/client that they wish to be involved in the process of the appointment of any subcontractor, AS 2124 allows for such provisions to serve the concerns of both parties.

## 2.3 Nominated subcontractors

A nominated subcontractor carries out their work under the umbrella of the main contractor. They are chosen by the architect, designer or the clients, and are paid directly by the client.





## Activity 5 - Contractual obligations

Mrs Smith has lived in her house for the last 70 years and needs some electrical works to be carried out. Mrs Smith knows that John (aged 40 and who she has known all his life and lives in the same street), is a qualified electrician. Mrs Smith asks John for a quote on the electrical works to her house but John says that he hasn't got time to quote on the job as he has too much work on.

Upon Mrs Smith's insistence, John commences the work and completes it over the course of three weekends as a favour to her. John gives Mrs Smith a bill upon completion of the works for the sum of \$2470.

Mrs Smith's daughter Janet, is visiting her mother during the weekend following the completion of the electrical works by John and she is very upset that her mother intends to pay the \$2470. Janet demands that her mother Mrs Smith obtain proper invoicing for the works carried out by John, prior to any payments, as she believes the total cost of the works is excessive.

In relation to the above scenario just mentioned, address the following:

- Identify if the above scenario constitutes a contract and why.
- If a contract exists, what type of contract would constitute the above works?
- What recourse does Mrs Smith have against John for the works completed?

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Check your findings with the correct answer in the back of this Learner Resource under 'Learning activity answers'.

\* Retain this learning activity as part of your portfolio of evidence.



## 2.3 Contract offer and acceptance

You should not choose a subcontractor based only on their tender bid price. You should also review the quality of their work on previous projects. Getting a good price doesn't mean much if the work is shoddy or partially completed. You have every right to ask for references for the subcontractor's previous work by contacting their previous or existing clients. Three jobs should be enough to make an informed decision. When you check the subcontractor's references don't just contact the people the subcontractor specifies. These may be family members or friends who will always give positive reviews of the subcontractor's work no matter how good or bad it was. The best way to check up on previous work is to go to current job sites or find independent referees.

If the trade is licensed, plumbing and electrical for example, you must confirm that the subcontractor and all their personnel working on-site have the appropriate licences and insurances to perform and sign off the work.

### 2.3.1 Contractor scope meeting

Before agreeing on final terms and price, you should meet with the subcontractor to agree on the scope of their work. For example, the scope of work for a window contractor will include documentation covering the types of windows, frame construction and finishes, and all the hardware that the contractor is required to provide to finish the job. The scope will also include installation, delivery and other general conditions of the work associated with the site.

At the time you agree on final terms, you also need to agree on payment terms, the schedule and any other project conditions including site induction, safety, work processes and clean up procedures.

If there are areas of work that may potentially overlap between two different subcontractors you must make sure you clarify in the scope of work who is responsible for each task. It is better to get this sorted out at the start rather than during construction when it may lead to delays while you sort out who is responsible for the work. You may also need to determine who is responsible for obtaining licences and permits and include these details in the contract.

The terms of service must be included in the agreement and include start and end dates for all services to be performed. In addition, these terms should define the dates deliverables or milestones that should be met, if work is to be completed in the planned phases.



## 2.3.2 Contractor capacity

Following the scope meeting, you should have a thorough understanding of the potential subcontractor's capacity to complete the required work. In legal terms the capacity to enter into a contract is based on age (minors), mental disorders, intoxication and financial status (bankruptcy). For a contract to exist and be enforceable, all parties must have the contractual capacity to enter into the contract.

From a purely business sense, you must also ensure that the subcontractor has the necessary skills, knowledge and resources (human and financial) to complete the work. You also need to confirm that they can complete their work on time and to the construction schedule. It is not worth entering into a contract based on price with anyone who will not complete their work on time, thereby potentially holding up other trades and eventually delaying final handover of the building.



## Activity 6 - Contract selection and contract documentation

[illegible]

\* Retain this learning activity as part of your portfolio of evidence.



### 3. Prepare the contract

Prior to selecting a standard contract for a particular building and construction project, a number of considerations need to be taken into account.

#### *Terms and conditions*

The successful construction of a building project is dependent upon the successful execution or administration of the contract. Therefore, a successful contract is only as good as its terms and conditions. Such conditions may include, for example:

- definitions
- contract formation
- general obligations
- variations
- contract price and payment
- insurance and liability
- duration, handover and defects liability
- termination
- disputes
- materials
- a general clause detailing notices, assignment, subcontracting, the scope of the agreement, amendment, representation, severance and waiver.

#### *Contract administration*

Whether the building works are for a new building, refurbishment, extension or maintenance works, the procedures are very similar and usually include the following:

- assessment of clients' requirements and preliminary solutions
- formal feasibility study if required
- where an existing building, preparation of existing plans
- where a new building, measurement of the site
- initial scheme drawings
- full scheme drawings
- obtaining planning, Building Regulation and other consents
- preparation of specification/bills of quantity
- obtaining competitive tenders with the process carefully controlled



- analysis of tenders received and tender report
- commencement on-site
- contract administration – building contract management, preparation of contract documents, supervision of the contractor, documentation and reporting
- monitoring of the program of work, quality of work and costs
- identification of poor working practices, defects and damage
- work rejected if appropriate
- agreement of final account
- production of as-built record drawings.

## 3.1 Seeking expert advice

Before developing a contract, it is important that you seek advice from people who have the particular qualifications and experience to provide the advice. Unless you have the specific qualifications and experience, taking the 'do it yourself' approach can be a costly mistake. Two specialists that you might use are legal practitioners (solicitors) and conveyancers.

Expert advice can be sought for all aspects of work in the construction industry. All trades and professions have some level of specific skill that the general population would not be aware of, these skills can and do have a major impact on the successful completion, structural integrity and quality of the project.

### 3.1.2 Legal practitioners

A legal practitioner must hold a current practising certificate and have professional indemnity insurance. They can:

- review and advise on the vendor's statement and the contract of sale
- make sure that the transfer of title is done correctly
- advise on terms and conditions that need to be included in a contract to meet individual needs, and on how different types of title may affect ownership rights and responsibilities
- perform general legal work and provide legal advice to their client.

If you use a legal practitioner, make sure they have a current practising certificate by checking with the appropriate body in your state or territory. For example, in Victoria, you can check the Legal Service Board of Victoria's public register of legal practitioners.



### 3.1.3 Conveyancers

A conveyancer is a person other than a legal practitioner, who can:

- undertake property conveyancing work
- do legal work or give legal advice with respect to the transfer of title.

A conveyancer must hold a licence and have professional indemnity insurance.

Conveyancers can be engaged to:

- find and review property titles
- check the vendor's statement (also known as a Section 32)
- advise on the terms and conditions in the contract of sale.

If you use a conveyancer, make sure they are licensed by checking with the appropriate body in your state or territory. For example, in Victoria, you can check the Victorian Business Licensing Authority's public register of conveyancers.

*Consumer Affairs Victoria (2010)*

## 3.2 Project reporting

The success of a project relies on quality communication processes. Therefore, it is important to make sure that various key factors are adhered to in achieving a successful construction of a building project. This may involve a number of challenges relating to monitoring, measuring and controlling performance.

Performance involves the art of control which in turn involves the process of monitoring. Traditional effective control involves:

- establishing standards (and hence benchmarking will follow)
- monitoring standards via regular inspections
- measuring performance against standards and taking corrective action as necessary.

Performance controls may include the use of tools, such as:

- charts (for milestones, budgets, etc)
- contingency plans
- risk management.



Measuring performance is a criterion or a range of criteria agreed between the parties. It is normally represented by the contract documentation. It is not easy to measure performance because of a number of factors, for example:

- project lifecycle – different stages of the project produce different outcomes over the life of the construction of the project
- the duration of the project – generally, the longer the duration of the project, the greater the number of individual tasks. Therefore, it is difficult to measure across all tasks with confidence and accuracy.

Project reporting requirements should be specified at the outset of the construction project and should be clearly defined in the contractual agreement.





### 3.3 Contract close-out

The construction of a project is normally represented by contract documents and specifications, therefore, part of the completion of a construction project requires that all the legal requirements are finalised. This information should be included in the contract documentation at the commencement of the project.

For example, the following are some of the considerations that need to be completed.

- Completion certificates – documents which effectively demonstrate performance, as stipulated in the contract.
- Retention of monies – provisions against any defects discovered in the finished works, such retentions are normally held by the client.
- Warranties – normally associated with the technical aspect of the project and can be easily invalidated due to incorrect operation.
- Maintenance – normally represented by a separate contract following formal handover of the project.
- Operational documentation – every project does not necessarily have operating manuals and supporting technical documentation. The law dictates that ignorance of this requirement is no defence.
- Archiving – this provides a trail for the future for similar projects so that outcomes can be improved. The reasons for keeping project records may include:
  - benefits for the next project
  - skills and knowledge transference.



Outline what can go wrong with a construction contract during the final stage of completion.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and extend across the width of the page. There are no margins, text, or other markings on the paper.

\* Retain this learning activity as part of your portfolio of evidence.



## 3.4 Termination of a contract

When developing a contract for a construction project, it is important that you identify and assess the factors that might lead to the termination of a contract. You will therefore need to make sure that the roles and responsibilities of all contract parties are identified, agreed and documented in accordance with legislative, organisational and project requirements. This will involve implementing consultative processes to negotiate and confirm contract specifications with the relevant people.

Although contracts can be cancelled by any party at any time, the party terminating the contract must consider the costs of doing so. All your construction contracts should include a clause or clauses that clearly state the grounds and procedures associated with termination of the contract. If you do not have appropriate termination clauses, then the contract may be subject to the general contract law, appropriate to your state or territory. If this is the case, then the outcomes of any disputes may not be as favourable as you may have expected.

You may wish to terminate a contract with a subcontractor for theft, fraud, poor or slow work or the death of the contractor. Whatever the cause, you must follow the contract conditions and written procedures contained in it. To do this may involve giving the subcontractor a specified period of notice, or you might be required to request rectification/repair of particular work. In some instances, you might be able to claim extra costs associated with contracting others to complete the work.

Failure to follow the termination clauses and procedures specified in the contract could lead to a claim by the subcontractor for loss of profit and other expenses, which will ultimately impact on the profitability of the job.

When undertaking communications with a subcontractor during contract termination, it is vital that every contact is documented in some way. Keep copies of emails and letters and make file notes of telephone conversations or meetings. No matter how insignificant you might think the contact is, recording the details might make a difference to the outcomes of subsequent legal action. Peter Elliott (2002) confirmed this importance by stating that, 'if it's not in writing, it doesn't exist'.



During the lead up to, and following termination of a contract, you should make sure that the site has been properly secured. This also applies to any materials and tools on the site. By doing this, you are protecting the assets of your organisation that might be under threat from the subcontractor who might cause damage to, or take assets in lieu of payment pending the outcome of legal action. Although you should have suitable security procedures and processes in place at all times, it is particularly important during contract termination, as people sometimes act irrationally when under stress caused by legal conflict.

If unsure about any aspect of contract termination, seek always advice from the legal department of your organisation, or from a suitably qualified legal practitioner.

According to Alexandra Wedutenko (2007) from the legal firm Clayton UTZ, it is critical that when developing contracts that you:

- make sure that your contract is clearly drafted with a clear scope and clear timelines for delivery
- include and follow contract variation procedures and if you do exercise variations, make sure you specify (where relevant), new delivery times
- properly manage a contract and deal with non-performance issues in a prompt manner; if you wish to terminate, you need to clearly and specifically follow the termination procedures in your contract
- make time of the essence if time is a critical element in your contract
- comply with all contract provisions, including giving appropriate notice related to termination requirements.

### 3.5 Calculation of rise and fall provisions

Given that the duration of the construction phase of a project can often be measured in terms of months and years, and because the construction of project is basically represented by labour and materials, it stands to reason that the cost of labour and materials may rise and fall periodically during the life of the project. The rise and fall may be the responsibility of either the contractor, or the client, when a fixed price contract is entered into.



Rise and fall provisions are used in lump sum type contracts to compensate either the client or the contractor, due to fluctuations in the prices of labour and/or materials. The use of such a clause in a contract allows tenderers to provide competitive pricing in that they do not have to be concerned with the effects of inflation. The use of AS 2124 General Conditions of Contract allows for rise and fall provisions.

Calculation of the applicable rise and fall is by a formulae which relies on one or more independently maintained cost indices which are published monthly by the Australia Bureau of Statistics.

### *Simple rise and fall example*

Rise and fall % =  $[(\text{New index} - \text{Base index}) / (\text{Base index})] \times 100$

*Example:*

- Index for February 2006 = 427.58
- Index for September 2006 = 439.63
- Rise and fall from February to September =  $[(439.63 - 427.58) / (427.58)] \times 100 = 2.82 \%$

## 3.6 Progress payments

The basic principle of progress payments is to enable the contractor to receive a portion of total value of the contract when a particular part of the construction of a project is completed. Normally, progress payments for the construction of a project are processed on a monthly basis, thereby allowing a contractor, for example, to receive payments for works completed for, say, the month of April to be paid at the end of May. Such payments enable the contractor to maintain a positive cash flow with respect to the construction of the project at hand.

AS 2124 General Conditions of Contract contains within it detailed documentation as to the process to follow for progress payments, including other types of payments that may be made as part of the construction project.



## 3.7 Extensions of time

Normally, within the building and construction industry, extensions of time for delay are concerned with the practical completion date, and more specifically, those activities which are critical, thereby causing practical completion to be delayed. Remember that activities on a critical path of a construction program refers to such activities having no spare time or float, this means that the activity must start and be completed on their allocated dates.

On the other hand, it is normal within a building construction contract to allow for a stipulated number of days for when poor weather (eg rain), does not allow construction to proceed. However, should poor weather be excessive to that stipulated in the contract, then there may be good reason for the contractor to seek an extension of time.

AS 2124 General Conditions of Contract clearly stipulates the circumstances upon which extensions of time can be granted.



## Activity 8 - Contractual terms

Discuss the effects of the following contractual terms with respect to works carried out by subcontractors:

- progress payments
- extensions of time
- termination of contract
- rise and fall.

[illegible]

Check your findings with the correct answer in the back of this Learner Resource under 'Learning activity answers'.

\* Retain this learning activity as part of your portfolio of evidence.



## 3.8 Finalisation of the contract

The final contract must be prepared in consultation with relevant people and be in accordance with the policies and procedures of your organisation and all necessary legal requirements.

All required contract information must be sourced in consultation with relevant people and assessed for currency, accuracy and relevance, in accordance with organisational and project requirements.

According to the Tasmanian Government Purchasing Department (2010), at the contract finalisation stage you have the opportunity to:

- test the understandings and assumptions made by tenderers in determining their costs
- clarify and rectify any false assumptions
- achieve operational refinements and enhancements that may result in cost reductions.

Any gaps or deficiencies can then be identified and appropriate actions implemented.

Once the contract has been completed, all associated documents, working drawings and specifications must be collated and assembled in readiness for formal consideration. All associated correspondence for submission to contract parties must also be prepared in accordance with organisational requirements. When completed, all documents can be forwarded for signing in accordance with legislative and contractual requirements.

You should ensure a copy of the contract documentation is retained for future reference and maintained securely with due regard to confidentiality, in accordance with legislative, organisational and project requirements.

At the end of the defects liability period of the contract when all omissions have been completed and defects rectified, the contractor is entitled to receive the balance of the contract sum. This sum would have been adjusted for any variations that have arisen during the period of the contract. The issue of a final certificate constitutes an acceptance that all work required under the contract has been satisfactorily completed.

The initiation of further new work under the original contract during the defects liability period of the contract is to be avoided. The balance of any remaining contract securities should be released to the contractor.



## Activity 9 - Finalising the contract

Outline the process that could be used to finalise the contract and the personnel involved in this process.

[illegible]

Check your findings with the correct answer in the back of this Learner Resource under 'Learning activity answers'.

\* Retain this learning activity as part of your portfolio of evidence.



## Sample documents

Access the following New South Wales Government Procurement website to review the documents available in the Contract management section:

[www.nswprocurement.com.au/Procurement-System-for-Construction/Contract-management/GC21\\_1.aspx](http://www.nswprocurement.com.au/Procurement-System-for-Construction/Contract-management/GC21_1.aspx)

You should also review the other sections and associated documentation available through the menu on the left hand side of the screen.

Although the documents on this site relate to projects in New South Wales, they will give you examples of the content of a range of documents required to satisfy contractual obligations of a construction project in your particular state or territory.

Review these documents in the context of the skills and knowledge covered in this unit.



## Learning activity answers

Your answers should include reference to the following key information. You may have included extra detail based on personal experience or further research into the topic however as a minimum the key information must be included.

If you are having difficulties with any of the learning activities you should contact your tutor for guidance.

### **Activity 1 – Benefits of a lump sum contract**

Your answer should include discussion about a lump sum contract being a legally enforceable document under which the builder is contracted to complete the building works for a fixed amount (lump sum). This enables the home owner and the builder to know exactly what work will be performed, at what price, by what date and any special conditions which apply (eg penalties for late completion).

### **Activity 2 – Purpose of a contract**

A contract documents the established agreement between the parties impacted by the contract. It contains the rights and duties of all parties and is enforceable through courts.

### **Activity 3 – Contract validity**

Your answer will depend on the project you have selected, however, you must discuss each of the following terms. For example, a subcontractor may misrepresent his abilities to carry out the required work. They may state that they have extensive experience and produce false documents to back up their claims. As project supervisor, you may need to verify the information provided by the subcontractor by contacting other people they have worked for. The terms are:

- misrepresentation and misleading conduct
- misleading or deceptive conduct under the Trade Practices Act
- mistake
- undue influence
- unconscionable conduct
- lack of formalities
- incapacity
- uncertainty
- illegality.

If you have any questions about your response, please contact your tutor.



#### **Activity 4 – Contract types and essential elements of construction contracts**

The list may vary depending on which state or territory you are working in. However, you should have listed contracts for commercial and residential construction and any special conditions, such as the Australian Institute of Architects contract for Major Works – Housing, which is not to be used in Queensland.

#### **Activity 5 – Contractual obligations**

Mrs Smith and John both have the capacity to enter into a legally binding agreement and have done so by entering into a verbal contract. Although this is a legal form of contract, it is not in writing so there may be some difficulty in proving the terms of the contract.

Mrs Smith has made the offer and John has accepted it. John has also fulfilled his obligations under the agreement. Mrs Smith can ask for an itemised invoice to determine if the price charged is fair. She also has some recourse under consumer protection laws if she believes the price to be excessive.

Although this was a straightforward transaction between people who knew one another, possible legal action could have been avoided by completing a written contract for the work. This contract would have documented the scope of the work, the price, payment terms and any other special conditions specified by either party.

It is now a case of John's word against Mrs Smith's.

#### **Activity 6 – Contract selection and contract documentation**

The scope of a project is what it is trying to be achieved (the purpose of the project), and includes all the processes and work required to achieve the desired outcomes. Any agreements with subcontractors need to be in writing and be legally binding. The contract then becomes the point of reference for the development of all project management strategies, processes and documentation.

To make sure the interests of all parties are catered for in the contract, meetings are important to determine what needs to be included in the contract.

#### **Activity 7 – Contract close-out**

Your answer should include discussion about the contract being a legally enforceable agreement between all parties to the contract. Any breach of contract terms may result in legal action and requirement to pay monetary compensation.

It is therefore vital that you fully understand all provisions in the contract.



### Activity 8 – Contractual terms

Your answer will depend on the project you have selected, however, you must discuss each of the following contractual terms. For example, if discussing termination of a contract, you will need to state whether or not the contract had clearly defined clauses related to termination and the conditions under which either party could terminate the contract. You would also need to include discussion related to payments of outstanding amounts, any penalties that applied and the impact on the profitability of the job:

- progress payments
- extensions of time
- termination of contract
- rise and fall.

### Activity 9 – Finalising the contract

Your answer will depend on the project you have selected. However, the process should allow that all requirements of the contract have been completed and signed off by appropriate shareholders. You should make sure that any penalty clauses have been addressed and processes/ paperwork is in place for warranties. Each organisation will have different policies and procedures related to project finalisation and these must be strictly adhered to.





# Appendices

Appendix 1 – Employability Skills

Appendix 2 – Qualification structure

Appendix 3 – Unit of competency







## Appendix 1 - Employability Skills

The following table shows the Employability Skills embedded within this unit together with the appropriate assessment task that assess these skills. Note that not all the Employability Skills in the qualification are assessed in this unit. Assessments for other units will cover the remaining Employability Skills.

<b>Employability Skills</b>	<b>Evidenced by</b>	<b>Assessment task</b>
Communication	Oral and written communication skills that contribute to productive and harmonious working relations between co-workers, customers and other stakeholders	Task 1 Task 2 Task 3
Teamwork	Skills that through cooperation and collaboration contribute to productive working relationships with others to achieve the desired outcomes of the project	Task 1 Task 2 Task 3
Problem solving	Appropriate analytical skills that contribute to timely completion of tasks and productive outcomes	Task 1 Task 2 Task 3
Initiative and enterprise	Skills that contribute to innovative outcomes, within scope of responsibility	Task 1 Task 2 Task 3
Planning and organising	Task management skills that support the attainment of project goals and objectives and the strategic planning of the organisation	Task 1 Task 2 Task 3
Self management	Skills to manage personal reactions to responsibilities and challenges in the workplace and contribute to self-satisfaction and growth	Task 1 Task 2 Task 3
Learning	Skills that contribute to ongoing professional development	Task 1 Task 2 Task 3
Technology	Skills that contribute to effective execution of tasks using a range of appropriate technological options and a willingness to embrace emerging technologies	Task 1 Task 2 Task 3



## Appendix 2 - Qualification structure

This Learner Resource, *CPCCBC4003A Select and prepare a construction* forms part of the CPC50210 Diploma of Building and Construction (Building) qualification.

BSBOHS504B	Apply principles of OHS risk management
BSBPMG404A	Apply quality management techniques
BSBPMG505A	Manage project quality
BSBPMG508A	Manage project risk
BSBPMG510A	Manage projects
CPCCBC4001A	Apply building codes and standards to the construction process for low rise building projects
CPCCBC4003A	Select and prepare a construction contract
CPCCBC4004A	Identify and produce estimated costs for building and construction projects
CPCCBC4010A	Apply structural principles to residential low rise construction
CPCCBC4013A	Prepare and evaluate tender documentation
CPCCBC5001B	Apply building codes and standards to the construction process for medium rise building projects
CPCCBC5002A	Monitor costing systems on medium rise building and construction projects
CPCCBC5003A	Supervise the planning of on-site medium rise building or construction work
CPCCBC5007A	Administer the legal obligations of a building or construction contract
CPCCBC5008A	Apply structural principles to the construction of medium rise buildings
CPCCBC5009A	Identify services layout and connection methods to medium rise construction projects
CPCCBC5010A	Manage construction work
CPCCBC5011A	Manage environmental management practices and processes in building or construction
CPCCBC5018A	Apply structural principles to the construction of medium rise buildings



## Appendix 3 - Unit of competency

### CPCCBC4003A Select and prepare a construction contract

#### *Unit descriptor*

This unit specifies the outcomes required to select and prepare appropriate construction contracts including the sections, clauses and conditions for low rise construction projects. The ability to interpret complex documents, communicate clearly and succinctly and negotiate are essential skills.

#### *Employability Skills*

This unit contains employability skills.

#### *Application of the unit*

This unit of competency supports the needs of builders, project managers, estimators and managers in the building and construction industry who have a responsibility for selecting and preparing contracts for building work.

#### *Sector*

Building and construction



## Element

Elements describe the essential outcomes of a unit of competency.

## Performance Criteria

Performance criteria describe the required performance needed to demonstrate achievement of the element. Where ***bold italicised*** text is used, further information is detailed in the range statement. Assessment of performance is to be consistent with the evidence guide.

- |  |  |
|--|--|
| <p>1. Identity and analyse the essential elements, sections and clauses of a business contract</p> | <p>1.1 Various types of <b><i>building and construction contracts</i></b> are identified and the appropriate application of each type is analysed.</p> <p>1.2 The essential terms and elements of a valid contract are identified and analysed.</p> <p>1.3 The importance of identifying an intention to create legal relations is analysed.</p> <p>1.4 The rights and liabilities of parties under a contract are identified and analysed.</p> <p>1.5 Common building contract terms and procedures are identified and applied.</p> <p>1.6 Circumstances that bring about a breach of contract are identified and analysed.</p> <p>1.7 Legislative requirements are identified and applied.</p> |
| <p>2. Select an appropriate contract for the works to be undertaken</p>                            | <p>2.1 A contract, appropriate for the type of construction, is accurately selected.</p> <p>2.2 The <b><i>range of documents</i></b> that collectively make up a contract is accurately identified and prepared.</p> <p>2.3 The requirements associated with an offer and acceptance of a contract are accurately identified and applied.</p> <p>2.4 The capacity of the parties to form a binding agreement in the form of a contract is confirmed.</p> <p>2.5 Factors associated with the parties' consent to a contract are identified and applied.</p>   |



Element	Performance Criteria
3. Prepare the contract	<p>3.1 Expert advice is sought as required in the preparation of the contract.</p> <p>3.2 The impact of factors leading to the <b>termination of a contract</b> are defined, analysed, and assessed during the preparation of the contract.</p> <p>3.3 Contract rise and fall amounts are accurately calculated during the preparation of the contract.</p> <p>3.4 The schedule of progress payments is assessed and included in the preparation of the contract.</p> <p>3.5 Processes for applying for extensions of time are included in the preparation of the contract.</p> <p>3.6 The final contract is prepared in consultation with relevant personnel and in accordance with the accepted processes of the organisation and legal requirements.</p>

## Required skills and knowledge

This section describes the skills and knowledge, and their level, essential for this unit.

### *Required skills*

- Negotiation
- Oral and written communication skills to facilitate effective communication by phone, facsimile, email or in writing, with members of the organisation and external parties, including clients and subcontractors, and to facilitate drafting detailed responses to queries relating to the finer points of the contract
- Problem solving
- Reading and comprehension skills to facilitate understanding and interpretations of complex legal text

### *Required knowledge*

- Definitions and interpretations commonly applied to contracts
- Legal meanings of terms and clauses in building and construction contracts
- Relationships between the organisation and its clients
- Various contract types and the circumstances they cover



## Range statement

The range statement related to the unit of competency as a whole,. It allows for different work environments and situations that may affect performance. ***Bold italicised*** wording in the performance criteria is detailed below. Add any essential operation conditions that may be present with training and assessment depending on the work situation, needs of the candidate, accessibility of the item and local industry and regional contexts.

***Building and construction contracts*** relevant to the sector and enterprise needs may include:

- individual organisational contracts
- JCC Suite
- SBW2 Lump Sum
- CIC Suite
- MBA, HIA or other standard industry contracts
- Australian Standard contracts (including the AS 2124 and AS 4000 series)
- SBW series contract
- contracts required or supplied by regulatory authorities or state or territory legislation.

***Range of documents*** include:

- plans, drawing and specifications
- schedules
- project timelines
- material lists
- human resource projections
- equipment, site accommodation and services information.

Factors related to the ***termination of a contract*** include definitions and applications of:

- repudiation of a contract by one party and its agreed definition
- unreasonable or vexatious notice
- conditions for completion at the cost of the contractor
- the effect of ousting the contractor from the building or construction
- abandonment of a contract
- relevant legislation and contract provisions.



## Evidence Guide

The evidence guide provides advice on assessment and must be read in conjunction with the performance criteria, required skills and knowledge, the range statement and the Assessment Guidelines for this Training Package.

### Overview of assessment

- Competency is to be demonstrated by the selection and development of appropriate contracts which meet organisational and industry standards and which relate to at least one of the industry areas listed in the unit descriptor.

### Critical aspects for assessment and evidence required to demonstrate competency in this unit

- It is essential that competence is demonstrated in the relevant aspects of contract selection, insertion of appropriate clauses, including rise and fall and progress payments.
- A person who demonstrates competency in this unit must be able to provide evidence of:
  - selection of the right contract for the particular purpose
  - selection of the appropriate clauses and conditions within the contract
  - identification of the causes of a breach of contract
  - specification of the requirements for the offer and acceptant of a contract
  - specification of the requirements for the termination of a contract
  - accurate calculation of rise and fall amounts
  - specification of the schedule for progress payments
  - specification of requirements for the extensions of time
  - inclusion of all related documentation
  - reference to all relevant legislation.
- Persons demonstrating competence in this unit must be able to communicate effectively in English to the extent that they can discuss workplace issues clearly and without ambiguity during a normal telephone conversation.
- This unit requires the ability to read and interpret contracts, specifications, construction schedules and reports.



**Critical aspects for assessment and evidence required to demonstrate competency in this unit continued**

**Context of specific resources for assessment**

- Writing is required to the level of completing memos, schedules and evaluating reports and communicating complex ideas and alternatives
- Numeracy is required at a level which supports the calculation of rise and fall amounts applicable to changed contractual circumstances.
- Resources implications for assessment include:
  - documentation that should normally be available in either a building or construction office
  - relevant codes, standards and government regulations
  - office equipment, including calculators, photocopiers and telephone systems
  - computers with appropriate software to view 2-D CAD drawings, run costing programs and print copies
  - a technical reference library with current publications on measurement, design, building construction and manufacturer's product literature
  - a suitable work area appropriate to the construction process.
- Where applicable, physical resources should include equipment modified for people with disabilities.
- Access must be provided to appropriate learning and/or assessment support when required.
- Assessment processes and techniques must be culturally appropriate, and appropriate to the oracy, language and literacy capacity of the candidate and the work being performed.
- Validity and sufficiency of evidence requires that:
  - competency must be demonstrated over a period of time reflecting the scope of the role and the practical requirements of the workplace



**Context of specific resources for assessment continued**

- where the assessment is part of a structured learning environment, the evidence collected must relate to a number of performances assessed at different points in time and separated by further learning and practice with a decision of competence taken only at the point when the assessor has complete confidence in the person's competence
- all assessment that is part of a structured learning experience must include a combination of direct, indirect and supplementary evidence.
- Where assessment is for the purpose of recognition (RCC/RPL), the evidence provided will need to be authenticated and show that it represents competency demonstrated over a period of time.
- Assessment can be through simulated project-based activity and must include evidence relating to each of the elements in this unit.
- In all cases where practical assessment is used, it will be combined with targeted questioning to assess the underpinning knowledge. Questioning will be undertaken in a manner appropriate to the oracy, language and literacy levels of the operator, and to any cultural issues that may affect responses to the questions, and reflect the requirements of the competency and the work being performed.





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- Elliott, P 2002, *Construction law/Construction contract termination*, Available://en.allexperts.com/q/Construction-Law-914/Construction-Contract-Termination.htm
- Housing Industry Association (HIA)  
79 Constitution Avenue Campbell ACT 2612  
Telephone: (02) 6245 1300  
Facsimile: (02) 6245 1444  
Email: enquiry@hia.com.au  
Website: www.hia.com.au
- Housing Industry Association (HIA) contracts:
  - Alterations, Additions and Renovations
  - New Homes Contract
  - Small Works Contract
  - Medium Works (Commercial Contract) Conditions
- Master Builders Association (MBA)  
Level 1, 16 Bentham Street  
(PO Box 7170) Yarralumla ACT 2600  
Telephone: (02) 6202 8888  
Facsimile: (02) 6202 8877  
Email: enquiries@masterbuilders.com.au  
Website: www.masterbuilders.com.au
- Master Builders Association (MBA) contracts:
  - Building Contract – Home Improvements
- The Royal Australian Institute of Architects (RAIA)  
Level 2, 7 National Circuit  
Barton ACT 2600  
PO Box 3373  
Manuka ACT 2603  
Telephone: (02) 6121 2000  
Facsimile: (02) 6121 2001  
Email: national@raia.com.au



- The Royal Australian Institute of Architects (RAIA/MBA) contracts:
  - ABIC MW-1 2003 major works contract – Owners copy
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  - Schedule 1 Contract information – Housing in Victoria
  - Schedule 2 Special conditions – Housing in Victoria
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