A BETTER GUIDE TO SUBCONTRACTING PTY LTD

[redacted]

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SUBMISSIONS REGARDING PROPOSED CHANGES / ADMENDMENTS

Key proposals address the following topics:

1. **Retentions particularly in State Government contracts.**
2. **The "Take out clause" in government contracts.**
3. **BCIPA regarding lien on unfixed plant / materials.**
4. **Back to back contracts with public works, head contractor and subcontractors**
5. **The spurious activities of [redacted] and [redacted] on state government / federal government funded projects.**
6. **A building and construction list for the Supreme Court QLD, similar to the NSW model.**

1. WITHELD RETENTIONS ON GOVERNMENT AND OTHER CONTRACTS

Issue

It is clear from the failure of [redacted] and [redacted] constructions recently and many others previously, that subcontractors are most likely lose their withheld retentions due to the failure of the head contractor. It is appropriate to note that money retained is for work already completed and approved. This is money that has been earned and to which the contractor is entitled. The money is retained by contractual provisions to secure the enforcement of defect rectification. The money is withheld regardless of any defects being present. Contractual provisions requiring money held as retention in separate bank accounts or trust accounts are honoured in the breach.

Consequence

Should a superior contractor holding retention funds fail and enter either administration or liquidation, the money held is considered part of the common fund and is distributed to the subcontractor at the rate ordered for all creditors. The effect is to create a series of cascading insolvencies often destroying otherwise viable contractors, large and small. Given the sum retained is usually held for 12 months, the job may be long completed. Additionally, the subordinate contract is likely to have factored the receipt of this payment into their cash flow management and it is likely to represent a large portion of the profit they expect to earn from the work completed.

Possible Solution

It should be possible for the State Government to withhold the retention amounts themselves for the subcontractors and therefore guarantee at least those payments to be secure on state government projects. More broadly by creating s statutory body to hold all such funds in an independent statutory body similar to the Rental Tenancies Authority, funds would be secured. All parties in the construction industry are well versed with the making of payments to various statutory agencies and this could be a simple process of adding that agency in addition to the ATO and other periodical payment bodies. The fund should be cost neutral as the interest earned would more than meet the costs of administration and it could be housed in either the existing RTA structure or within the Building Services Authority.
A fund such as described would give the State Government funding to implement more protective or educational measures to protect the most vulnerable in the building and construction community.

Further general Information

In 2007 A Better Guide to Subcontracting Pty Ltd published a magazine regarding retentions: go to www.abgts.com choose in the login bar contractor login, type bruce into the serial number box, check out the publications box for the retentions magazine, but also check out all other points of interest.

The loss and hardship each year caused by failed building companies taking other peoples retention payments with them into their liquidations is enormous and the Industry particularly on state and federal government jobs has had enough of this most heinous "rip off".

In most cases retentions are not called up because subcontractors dutifully attend to defects that are part of their works and have in place contractually "job insurance" which provides protection for subcontractors where an event occurs which the subcontractor could not foresee; an example is where a plumbing contractor has supplied and fitted taps and fittings to a three storey walk up building, the job is still in construction and overnight a tap washer fails and the floors are flooded, which means that the gyprock, the painting, some carpentry and the carpets must be replaced. This event would be an insurance claim item and not a retention claim unless the subcontractor refused to make a claim upon their insurer which seems unlikely.
Retention only becomes a matter of concern when the subcontractor refuses to make good defective works and those works cannot be insured.

To ensure the ~~cost~~ completes

Conclusion

For far too long subcontractors have been treated as interest free loans, without any security by building and construction companies. This proposal creates the opportunity for the Government to remedy a long standing issue and ameliorate the consequences of the collapse of companies in the construction industry.

2. UNFAIR CONTRACTS, TAKE OUT CLAUSE, ETC

Issue

Government contracts currently reflect the "Take out clause" which was introduced through Global SAI (Australian standards committee) that committee has no sub-contractor representatives. As described on their web page the committee is comprised of engineers, master builders, HIA, unions and some other industry groups.

A 'take out' clause is a contractual provision that allows a superior contractor to hold the equipment of the subordinate contractor on site and to use that equipment without charge for the duration of the work under contract, should the subcontractor be dismissed from site. The following extract is representative of the standard clause and is from the AS4300 contract.

3. PAYMENT ACT REGARDING LIEN

Issue

Building and Construction Industry Payments Act 2004 (BCIPA) largely reflects the NSW Building and Construction Industry Security of Payment 1999 (as amended in 2003). However, some apparently minor amendments, or more properly omissions from the BCIPA have the effect of significantly disadvantaging Queensland builders and suppliers. -equipment supplied to site. Currently the BCIPA does not provide for a lien on unfixed goods supplied to site, this must change as there are many examples of head contractors seizing subcontractor's goods after they have been denied access to site.

Consequence

The absence of this statutory protection exposes builders to a similar consequence to the 'take out' provision noted above. Effectively a superior contractor can prevent a subordinate contractor from attending site and dismiss the contract and then they can access materials and or equipment owned by the subordinate contractor. While the subordinate contractor has remedies through the courts, they often lack the financial capacity to sue for the goods. Similar the process of seeking injunctive relief is also both outside most contractors' knowledge and financial reach.

Possible Solution

The relevant provision of the NSW legislation could be introduced to the BCIPA by amendment. These provisions have caused no issue in NSW but do act to protect the subordinate contractor. The NSW provisions are found at section 11(3) through 11(5) and take the following form:

> (3) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.
>
> (4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).
>
> (5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials.

44.5 **Procedure when the Principal Takes Over Work**

If the Principal takes work out of the hands of the Contractor under Clause 44.4(a), the Principal shall complete that work and the Principal may without payment compensation take possession of -

(a) such of the Constructional Plant and other things on or in the vicinity of the Site as owned by the Contractor; and

(b) the Design Documents and other documents, information, materials and the like produced by the Contractor,

which are reliably required by the Principal to facilitate completion of the work. The Principal shall keep records of the cost of completing the work.

If the Principal takes possession of Constructional Plant, Design Documents or other things, the Principal shall maintain them and, subject to Clause 44.6, on completion of work, the Principal shall return to the Contractor the Constructional Plant and any things taken under Clause 44.5 which are surplus and, subject to Clause 13, the Design Documents.

Consequence

When activated or threatened the consequence is devastating for the business impacted. Consider if the subordinate contractor is a small earthworks contractor with one or two pieces of plant. They will lose all revenue earning capacity while still being contractually obligated to meet lease or repayment costs for that equipment.

It is noteworthy that there is no sunset clause incorporated in the extracted provision and it would be possible for the equipment to be held for a protracted period and there is no incentive for the superior contractor to return the equipment within any reasonable time frame.

History

The "Take out clause" was then introduced into commercial contracts; considering that it was an Australian Standard, Australian construction companies made a meal of it! Companies such as Multiplex, Watpac, Hutchinson's, Condev, Glenziel, Leightons and others have threatened to or have invoked this clause to the detriment of subcontractors in QLD. This clause must be removed from State government contracts to show that the way forward by government standards are fair.

Possible Solution

Queensland has leaded the nation in statutorily controlling the content of contracts in the building and construction industry. Part 4A of the Queensland Building Services Authority Act (QBSA Act) proscribes some contractual provisions and sets sensible limits on others. It would be both feasible and effective to create a further provision in part 4A of the QBSA Act to make such contractual provisions void.

4. **Fair contracts must become a state issue, particularly Public Works Contracts because the QMBA commercial contract and most other head contractors who contract for public works jobs have clauses in their contracts that are built to thwart subcontractors rights and has clauses that would prevent fair and reasonable outcomes for subcontractors whilst employed under said contracts. For example a clause which applies that the subcontractor must be responsible for the substrate work of other subcontractors is clearly unworkable. Therefore retention amounts may be applied under said contract for work carried out by others, obviously this clause is a contradiction because if the builders role to supervise and ensure that the works carried out by other subcontractors is as per contract and suitable for following trades to continue with their works, and in fact this is what the builder is paid for.**

In NSW Public Works contracts over $100,000.00 must be back to back contracts with the government, in QLD companies such as J[redacted] and [redacted] have expensive lawyers draw up contracts that are very one sided and are designed to relieve subcontractors of their rights and their money. Another example is the J[redacted] contract for the dredging works in the Gladstone Harbour and the construction of Harbour facilities for the LNG project. The J[redacted] contract is a matter for the supreme court, the supreme court of appeal and ultimately the High court, as [redacted] refuse to take the umpires decision on the validity of their contract and subsequently the affected subcontractor is out of pocket some 3,7 million dollars and legal fees over 300,000.00 and continuing, even though the subcontractor has won the adjudication, the supreme court challenge, the supreme court of appeal challenge and now faces a high court challenge regarding the contract. All of this could be avoided by having fair and reasonable back to back contracts with the state government and all contractors.

5. **The spurious activities of [redacted] and T[redacted] on state government / federal government funded projects.**

Its more than clear from Supreme Court QLD registers and the attached BCIPA register that the above mentioned companies who are in charge of public monies awarded to them by the QLD state government spend an extraordinary amount of money in adjudications and subsequently in the Supreme Court of QLD fighting adjudication decisions and civil proceedings against those who would not normally be able to raise the legal fees to respond to the challenges.

Therefore it seems clear to me and my members that the above mentioned companies use there weight and funds provided by public monies to fight

Interestingly on the Airport Link project [redacted] argued vehemently against my subcontractors claims (civil works Australia pty ltd) that the geo- tech information supplied to my client at tender was correct, at adjudication and in subsequent Supreme Court QLD challenges of the adjudicators decision this was proven to be inaccurate.

Strangely [redacted] is now claiming against the state government for over runs of the finish time because the geo-tech information was incorrect. They seem to want it both ways either screw the subcontractor and if that fails attempt to screw the public works department. Why do these people continue to be on the preferred contactors list for state and federal funded works?

The Labour party let vast contracts of public money to the above mentioned firms; a scroll through the Supreme court historical registry or the BCIPA registry will reveal the amount of damage done to intermediate and small subcontractors who had the misfortune of tendering for state works to these firms.

6. A building and construction list for the Supreme Court

Issue

It is indisputable that the people of Queensland are well served by having an excellent judicial system; however it could be better. The Courts have recently adopted strong case management practices that ensure matters progress more quickly through the courts. In NSW the Supreme Court has developed a series of specialist lists, where judges with a particular interest or expertise are utilised to deal with matters arising in the area of the specialist list.

Of particular interest is the "building and technology list" which deals with claims under their version of the BCIPA. The judges all come from very strong backgrounds as senior commercial practitioners dealing with contracts and particularly construction law. The creation of this list has delivered a number of benefits, including but not limited to:

- Making best use of the judges existing specialist knowledge
- Delivering high levels of consistency in the judgments of the Court
- Extremely fast hearing times as the 'list judges' are all intimately familiar with the legal principles, relevant cases and statutory scheme
- Removal of decisions rendered 'per incuriam' (those being decisions where the Counsel have not alerted the bench to relevant decisions, thus inadvertently leading the court away from correct precedent.

By the creation of a list a judge is not removed from matters on the general list or applications list, rather matters that fall within the purview of a specialist list can be directed to the relevant officer and resolved rapidly and finally.

battles that are constructed and construed by middle management cronies who have a vested interest in creating disputes.

In most cases the above contractors sign Statutory Declarations claiming that there aren't any disputes and all have been paid to get their draw downs from public works, which is clear fraud! As in most cases there are disputes and adjudications and court proceedings ongoing, which is not mentioned in statutory declarations provided to public works.

Clearly not just those above companies mentioned but many others have an ideology in place that is I'm big your small therefore I shall prevail. Bullying in the Building and Construction Industry has been legislated but it seems that some very large construction companies and their subsidiaries think they are outside of those legislative amendments.
If the above mentioned companies as with many others treat the Statutory requirements with the Government and principal contractors with such contempt then why does the state government continue to have those companies on a preferred contractors list for public works?

Surely the tax payer would be better served if those companies were given an ultimatum; "clean up your act or else".

[redacted] was exposed by A Better Guide to Subcontracting Pty Ltd some years ago doing exactly as expressed earlier and public works NSW gave them the ultimatum, heads rolled at a management level and as a result the serious problems we had with [redacted] on Hospital and School projects in NSW ceased immediately, saving the subcontractors, the courts and the government millions of dollars in litigation, mediation, adjudication and lost time and productivity.

In 2007 I had some similar problems with [redacted] in NSW, after negotiations with public works and the ministers department [redacted] were given an ultimatum "either clean up your act or be removed from the preferred tenderers list for state and federal funded works; immediately heads rolled at a management level and I have not had any further trouble with them.

Unfortunately the middle management trouble makers leave one large construction company and take their dodgy contract administration activities to another construction company and so the rort begins again.

It is without doubt that the current problem in question with J[redacted] on the LNG Gladstone harbour project is the making of senior J[redacted] lackeys who refuse to take responsibility for shoddy pre contract arrangements and misinformation from the head contractors geo-tech reports.

Possible Solution

Consider raising the matter with the Attorney General.

allowed judges who were best suited to hear challenges to adjudications to do so. Currently in QLD the supreme Court system is languishing under extreme delays where if the most experienced judges had been on duty for the case the delays could have been avoided.

I would be pleased to meet with Mr fraser or the Hon Minister to discuss the above mentioned issues at your convenience. I represent the 40 members of A Better Guide to Subcontracting Pty ltd and some 600 paid up members of the Solid Plasterers association of Queensland.

I imagine that our discussions may take up to 45 minutes and the outcomes for Queensland may be magnificent.

Sincerely

Malcolm varty
Director: A Better Guide to Subcontracting Pty Ltd
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