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30 August 2024

Brad Wheeler
Director of Building Control
Consumer, Building and Occupational Services
Department of Justice
Town Hall, Macquarie Street
GPO Box 503
Hobart TAS 7001

By email to: cbos.info@justice.tas.gov.au, CBOS.Executive@justice.tas.gov.au and Brendon Bowes:
Brendon.Bowes@justice.tas.gov.au

Re: Residential Building Work Act – Mandatory Contract Provisions

Dear Brad,

On behalf of the Tasmanian Chapter of the Australian Institute of Architects (the Institute), we would like to thank you for the opportunity to provide feedback on the proposed changes to the Director's Determination – Mandatory Contract Provisions (the Determination), and for working with us on the matters that have been identified. The Institute would also like to thank you for the extension that has been provided for this submission.

In principle, the Institute agrees with the changes to the proposed wording to the Determination and are grateful to CBOS for hearing the initial concerns raised with the existing Determination and seeking to address these.

We have, however, identified that there are instances where projects that fall under the Director's Determination are required to be administered using an Australian Standard contract, such as for government projects or larger private projects. Therefore, the proposed alternative method for making progress payments on a monthly basis cannot be applied.

The Institute was thankful for opportunity to meet with Brendon Bowes, Senior Policy and Project Officer, to discuss this issue, and are appreciative for the collaborative nature of this consultation. Following this meeting, the Institute has considered some potential wording changes that could be made to the Director's Determination – Mandatory Contract Provisions Document. The proposed changes to the wording, and an explanation, are attached as an appendix to this letter. As this document is important to ensure consumer protection, the Institute would like to request an

opportunity to meet with you as the Director of Building Control, and Brendon, or other relevant CBOS staff, to discuss these suggested changes due to their complexity. As part of this meeting, the Institute would also like to facilitate the attendance of some of our members, to enable them to accurately convey the current challenges that they are facing with delivering projects under the current Determination.

The Institute requests your due consideration of the attached response. We look forward to working with you further on this to find a solution that ensures the best outcome for, and protection of, the consumer.

Kind regards,



Daniel Lane
President, Tasmanian Chapter
Australian Institute of Architects



Jennifer Nichols
Executive Director, Tasmanian Chapter
Australian Institute of Architects

The Australian Institute of Architects (Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with over 14,400 members across Australia and overseas. The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture. The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design. To learn more about the Institute, log on to www.architecture.com.au.

Appendix

The *Directors Determination – Mandatory Contract Provisions v1.1* is intended to create the required solution so that monthly payments occur by way of an architect's assessment and certification of a claim for payment by the builder (as a percentage of the total cost of works). However, the draft determination only enables the "alternative method" to be used in conjunction with ABIC SW(H) and MW(H) contracts.

The Institute highlights some unintended consequences in relation to limiting the "alternative method" to these contracts.

In the *Residential Building Work Contracts and Dispute Resolution Act 2016 (Tas)* and associated *Residential Building Work Contracts and Dispute Resolution Regulations 2018 (Tas)*, residential building is defined as relating to class 1a building (single house), or class 2 building (apartments), or class 10 building (garage/shed) where it is associated with class 1a or class 10 building.

There are no apparent exemptions¹ for clients who are a developer (a trust or company) or who are a government department or government owned or controlled entity.

Consequently, giving specification to ABIC contracts may preclude other contracts such as, the Tasmanian Government preferred contract, AS 4000 which might be used for commercial (including not-for-profit) or government procurement of multiple dwellings on a site. Examples include:

- a. A private commercial developer constructing 20 x Class 1a town houses.
- b. A not-for-profit organisation developing multiple independent living units (ILUs) on a site.
- c. Government procurement of multiple dwellings on a site for social housing

There is a potential risk of specifying the ABIC contracts in the explanatory notes, as precluding the Tasmanian government from using their own version of AS 4000 in any social housing procurement.

We recommend that CBOS engage with other agencies of government responsible for procuring buildings works to assess the impacts of the proposed contract limitation and consider extending the "alternative method" to Australian Standards forms of contract, where an architect is acting in the role of Superintendent.

Options for consideration to amendments include consideration of inclusion of AS 4000 Contract for:

- Complex residential projects (within scope of the Act) and/or when they are procured by an agency of the Tasmanian Government;
- Where the contract administrator is a suitably qualified and experienced licensed professional.

¹ In the Victorian Domestic Building Contracts Regulations 2017, does preclude some types of work from some (but not all) provisions of the Domestic Building Contracts Act 1995. For example, Regulation 11(1) prescribes that Subsection 31(1) of the Act which sets out the "*General contents etc. of a contract*" does "*not apply in relation to a major domestic building contract for public construction*".

Defining Project Complexity:

There two main options for defining project complexity, based on precedent of other jurisdictions, include:

- Building typology/yield
- Monetary threshold²

For defining complexity based on building typology, the Institute recommends that this be based on building class and yield based on complexity of shared infrastructure (i.e. services). As such a proposed definition of complex “residential projects” could include:

- Class 2 (apartments) included within the Act; and
- Class 1a (townhouses or grouped dwellings) included within the Act with a yield of 5 or more Single Occupancy Units (SOU's).

Defining a “suitably qualified and experienced professional”:

For more complex projects, the Institute recommends that where a monthly progress claim method is sought, the contract administrator demonstrates as a ‘suitably qualified and experienced professional’ via a suitable competency framework. Competency frameworks, such as the National Standard of Competency for Architects (NSCA)³. The competency frameworks need to go beyond education qualification and years of experience alone, but form suitable robust methods of assessment of education standards against a common set of national competency standards equivalent to the NSCA. The competency standards need to include procurement processes, risk management (including safety in design), contract and contractor selection, site visits and quality assurance during construction, record keeping, defect identification, certification and notification processes, and contract components for complete documentation at all construction stages⁴.

It is also recommended that this contract administrator is appropriately licensed/registered with the Department of Justice under the appropriate professional category.

Proposed Amendments to Explanatory Notes of Director’s Determination on pages 10-12:

This alternative method for making progress payments under the Act can only be used where:

1. a standard form residential building work contract (~~the Australian Building Industry Contracts (ABIC) Housing Contract~~) is executed between the parties; and
2. a Contract Administrator (the licensed architect ~~responsible for the design of the residential building work the subject of the building work contract~~) is appointed by the owner; and
3. the contract provides that the process for receiving and assessing progress payments is to be determined by the Contract Administrator.

The standard contracts applicable to clause (1) above are specifically:

² For example, in Western Australia, the *Home Building Contracts Act 1991 (WA)* sets a threshold of application to home builds between \$20,000 - \$500,000.

³ The 2021 National Standard of Competency for Architects published by the Architects Accreditation Council of Australia (AACA) is used to accredit architectural university courses, form basis of registration examinations and Continuing Professional Development of registered Architects. See: <https://aaca.org.au/national-standard-of-competency-for-architects/performance-criteria/>

⁴ Refer to NSCA competencies: PC9, PC16, PC48, PC51, PC52, PC53, PC 54, PC 55, PC56, PC57 and PC58. Available: <https://aaca.org.au/wp-content/uploads/2021-NSCA.pdf>

- a) The ABIC Simple Works Contract for Housing in Tasmania (commonly referred to as the ABIC SW 2018 H Tas building contract); as amended from time to time; or
- b) The ABIC Major Works Contract for Housing in Tasmania (commonly referred to as the ABIC MW 2018 H Tas building contract); as amended from time to time.
- c) AS 4000 Contract where the building services are ***complex** in nature and/or procured by an agency of the Tasmanian Government and a ***suitably qualified and experienced professional** is in the role of the Superintendent

The building work contract should outline the process for Progress Claims (including frequency) and cross-reference variation, defect and dispute resolution clauses in the contract.