

SUBCONTRACT REVIEW

CHECKLIST



Hi there, Savvy Subbie!

Good on you for taking control of your contracts, you won't be sorry you took the bull by the horns!

Before we get started, it is important that you understand that this is an internal contract review intended for you to consider the commercial operations of your business and how those factors might fit in (or not fit in) with the subcontract terms.

This resource is not to be used as a substitute for legal advice.

If you have questions consider booking a call with me and we can talk it through together.

Warmest possible regards,

Michelle Carson



BOOK A CALL NOW

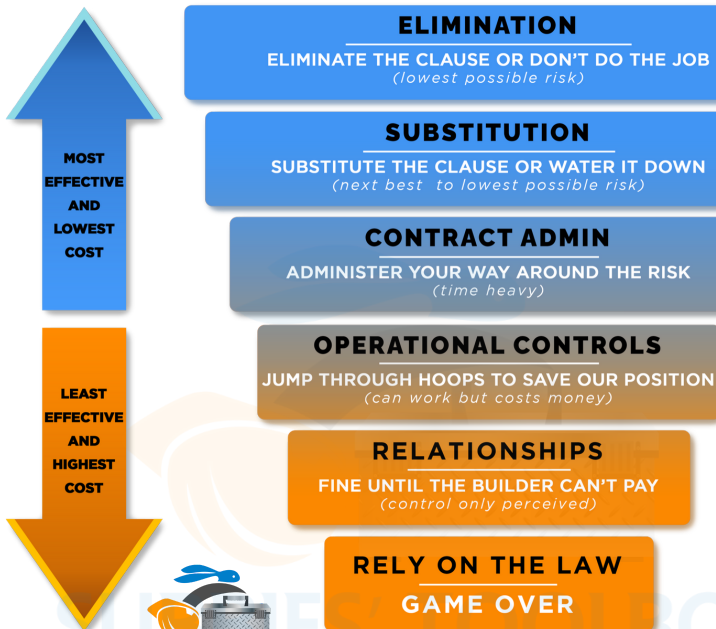




SUBCONTRACT REVIEW CHECKLIST



THE HIERARCHY OF CONTRACT RISK CONTROLS



Concept developed and represented by Michelle Cirson 2020

This figure was inspired by the Hierarchy of Controls used to manage risk in safety, which we believe was first developed by the National Institute of Occupational Health and Safety.

We have adopted this method because it is widely recognised and accepted within a number of international standards, such as ISO 45001/ ISO 9001 which we know is important to our certified clients.

We make no claim to the original concept behind the theory.



SUBCONTRACT REVIEW CHECKLIST



SUBBIE'S BUSINESS CONSIDERATIONS

IS THERE ANYTHING OUT OF THE ORDINARY WITH THIS JOB?

TICK AS RELEVANT:

- First time working for this builder
- First time doing this kind of work
- We think the builder might be struggling financially
- We have been given the run around by this builder before
- This builder is known for not paying its subbies
- We are worried about the property market and the principal's financial capacity
- We are using a sub-subbie for the first time to do this job
- We must use a Client nominated sub-subbie for the first time
- We are working in a new town
- We are working with a new product
- There are new laws affecting what we do
- We designed some of the work and we don't normally do design
- This is a new contract document from the builder, he normally gives us something else
- We are hiring specialist equipment for this job, normally the Builder provides it
- We are relying on another mob to be able to do this job (e.g. supplier, sub-subbie)
- We are importing something critical to completing our works
- We are doing some bespoke work that is not covered by an Australian Standard
- We aren't sure whether we are allowed to do this work under our license
- We need to hire staff to adequately resource this job
- The Builder's design isn't complete
- The Builder is wishy washy about the scope
- Our work is subject to lead times for critical materials/parts
- We are financing a larger than average chunk of materials/upfront costs
- OTHER: _____
- OTHER: _____
- OTHER: _____
- OTHER: _____
- OTHER: _____
- OTHER: _____
- OTHER: _____

WHO ELSE NEEDS TO KNOW THIS INFORMATION?

WHO	NAME & DATE NOTIFIED
<input type="checkbox"/> DIRECTOR/MANAGEMENT	_____
<input type="checkbox"/> ACCOUNTS/CFO	_____
<input type="checkbox"/> WHS OFFICER/UNION REP	_____
<input type="checkbox"/> PURCHASING/PROCUREMENT	_____
<input type="checkbox"/> FOREMAN/LEADING HAND	_____
<input type="checkbox"/> SITE STAFF VIA TOOLBOX TALK	_____
<input type="checkbox"/> SUBBIES' CONTRACT ADMIN	_____
<input type="checkbox"/> ESTIMATING	_____
<input type="checkbox"/> EXTERNAL SUPPLIER	_____
<input type="checkbox"/> EXTERNAL SUB-SUBBIE	_____
<input type="checkbox"/> OTHER	_____
<input type="checkbox"/> OTHER	_____

Followed Up By:

On Date:



SUBCONTRACT REVIEW CHECKLIST



SCOPE OF WORKS (DID WE QUOTE WHAT IS IN THIS SCOPE?)

- DOCUMENT CONTROL AUDIT ATTACHED (*Subbies Toolbox under Quotes and Tenders)
- QUOTE Vs CONTRACT SCOPE AUDIT ATTACHED (*Side by side and sign these docs)

Subcontractor's Quote Date: _____

Quote version number: _____

(write your follow up/clarifications in here)

- _____
- _____
- _____
- _____
- _____

SUBBIES' TOOLBOX

MOST COMMON CAUSES OF DISPUTE

1. drawing revision discrepancies
2. scope inclusions/exclusions
3. out of date construction programs, resequencing of works and not getting a "clean run".
4. Methods of measuring quantities by using "industry standards".





SUBCONTRACT REVIEW CHECKLIST



FORMAL INSTRUMENT OF AGREEMENT AND SIGNING PAGE (MAY BE CONTAINED IN PART A)

SUBCONTRACTOR'S DETAILS

BUILDER'S DETAILS

- ABN Checked
- ACN Checked

- ABN Checked
- ACN Checked

- Licence details checked and these are written into the Subcontract

- Licence details checked and these are written into the Subcontract

- Our address is correct

- Builder's address is correct
(cross reference with ASIC and Licence Details)

- Contact person & details correct

- Contact person & details correct

- Ensure Contract hasn't been backdated. When you sign, record the date you sign.

- What does the Formal Instrument actually say? Do you understand it?

- Does the Formal Instrument have any sentences that use the words "This Contract is "subject to" the Subcontractor"...doing something else, such as, signing a Deed of Guarantee and Indemnity (Director's Guarantee).

- Who are the entities to sign, does the Contract imply that the Director as an individual is signing as an individual – or is it clearly on behalf of the Company?

- The Formal Instrument of Agreement often lists the Documents that are incorporated in the Contract Document.
 - Do you have a copy of all of those documents? YES/NO
 - Is the Construction Program date and revision number the same as what you have a copy of? YES/NO
 - Is the Drawing Register date and revision number the same as what you have a copy of? YES/NO
 - Does the Contract incorporate the Head Contract? YES/NO
 - If yes – do you have a copy of the Head Contract (you should be doing an internal review of it too).
 - Are there Principal's Project Requirements, and if so, do you have a copy? YES/NO
 - What other documents does the Contract incorporate? Do you agree with them?

NOTES:





SUBCONTRACT REVIEW CHECKLIST



THE DEFINITIONS

Take note of these defined terms in the Contract:

- Business Day

- Qualifying Causes of Delay

- Practical Completion & Substantial Completion
(which one will apply to your Works)?

- Date for Practical Completion & Date for Substantial Completion

- Compensable Cause or Excusable Cause

Typically a cause that allows for delay costs

- Defects Liability Period (should refer to a clause in the General Conditions – if not, what does the definition say that the DLP is?)

- The Subcontract Works – reality test this, are they describing your works adequately?
Could also be referred to as *WUS* or *WUC*.

- Is there a definition of days/Days (you'll need to take notice of the capital it can make all the difference).

- Variations – is there a definition?

- Read and reality test the other definitions and take note of anything concerning:

NOTES:



SUBCONTRACT REVIEW CHECKLIST



SUBCONTRACT PARTICULARS / SCHEDULE / PART A

The Subcontract Sum matches quote. **Subcontract sum is:** _____

The commencement date is as agreed. **Commencement date is:** _____

The completion date is as agreed. **Completion date is:** _____

Do the commencement and completion dates line up with the start and finish dates on the Construction Programme?

The amount for liquidated damages is as agreed, or otherwise, request an amount that is less than 1% of Subcontract Sum per day AND/OR capped at 5% of total subcontract value. **Rate per day for LDs is:** _____ **Capped at** _____% **OR Not Capped**

The amount for head contract liquidated damages is as agreed, or otherwise, request an amount that is less than 1% of Subcontract Sum per day AND/OR capped at 5% of total subcontract value. **Rate per day for LDs is:** _____ **Capped at** _____% **OR Not Capped**

Do this reality check:

The number of days the Builder can apply LDs to before we work for free is: _____ days
(To calculate, divide the Subcontract Sum by the rate for LDs per day)

What percentage of retentions will the builder hold from every payment claim: _____%

Up to what percentage of the total contract sum _____%

What day of the month can we give a Payment Claim? _____

When will the Builder pay the Payment Claim (due date) _____

Does the contract say who the Principal is? YES/NO

What are the working hours for the site?

Is there a percentage or an amount listed for profit on variations? Do you agree?

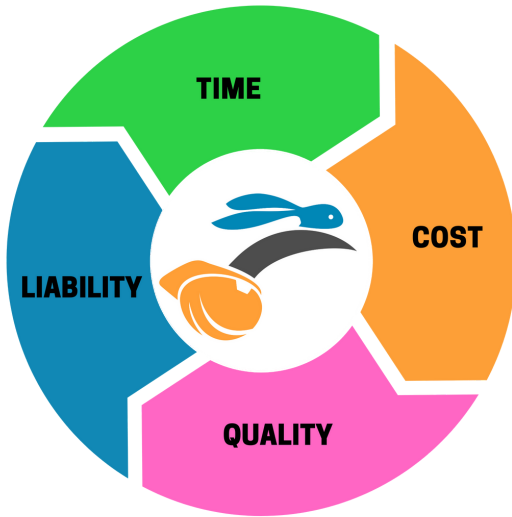
Note the insurance limits in this section – we'll come back to it when we look at the insurance clauses in the General Conditions.

Does this section note the general site facilities?

Who is responsible for power, scaffolding, cranes and hoisting, other plant and equipment?



UNPACK THE GENERAL CONDITIONS



In the remaining sections, I use coloured highlighters to track where we have read and to categorise the clause. This task will help you pay attention to what you are reading as you have to ask yourself what the clause is asking you to do.

Take notes as you go through the next section of the checklist. When you have finished with the contract review, there should be no pages without clauses highlighted.





SUBCONTRACT REVIEW CHECKLIST



TIME

If there are Separable Portions complete as follows:

- Cross out any portions that you are not working in.
- Do the dates for commencement and completion of each portion align with your intended program? Can you deliver on these?
- Are liquidated damages allocated to each portion? If not, spread them out based on the overall rate per day to spread the eggs across baskets.
- Is any portion able to influence your ability to complete other portions? If yes, how will you manage this with your EOTs?

Does each portion have a separate Defects Liability Period? If yes, how does this affect your warranties with your suppliers?

Portion #	1	2	3	4	5
Are we working in this portion?	YES / NO	YES / NO	YES / NO	YES / NO	YES / NO
Commencement Date					
Commencement Notice to be given?	YES / NO	YES / NO	YES / NO	YES / NO	YES / NO
Completion Date					
PC Notice(s) to be given?	YES / NO	YES / NO	YES / NO	YES / NO	YES / NO
LDs Portion	\$	\$	\$	\$	\$
Separate DLP?	YES / NO	YES / NO	YES / NO	YES / NO	YES / NO
DLP Duration (each)					
Other:					

COMMENCEMENT & COMPLETION (No separable portions)

- Date for Commencement _____
- Commencement Notice to be given? YES/NO If yes, clause number is: _____
- Date for Practical Completion/Works Completion/Substantial Completion _____
- Notice of anticipated PC to be given? YES/NO If yes, clause number is: _____
- Notice to be given at PC? YES/NO If yes, clause number is: _____
- Subcontractor is required to give a Construction Program. YES/NO
If yes, clause number is: _____
If yes, how when does the Subcontractor have to give the program? _____



SUBCONTRACT REVIEW CHECKLIST



TIME (CONTINUED)

DELAY AND EXTENSIONS OF TIME

If the causes of delay that entitle the Subcontractor to an EOT for are not defined in the definitions, look for them in the General Conditions that deal with delay and progress. Take note of what the causes of delay are in the table below. The suggested listed ones are recommended if relevant to your trade.

CAUSE OF DELAY	INCLUDED?	REQUIRED?
Acts or omissions of the Builder?	YES / NO	YES
Acts or omissions of the Builder's Agents?	YES / NO	YES
Acts or omissions of the Builder's Subcontractors?	YES / NO	YES
Acts or omissions of the Principal?	YES / NO	YES
Acts or omissions of the Principal's Agents?	YES / NO	YES
A variation?	YES / NO	YES
Delays caused by Statutory Authorities, Municipal or other third-party regulating bodies?	YES / NO	YES
Industry wide industrial unrest or delays by Unions?	YES / NO	YES / NO
Stop works orders issued by any authorised third party due to pandemic or public health concerns.	YES / NO	YES
Inclement weather?	YES / NO	YES / NO
OTHER:	YES / NO	YES / NO

The following section is designed to help you understand what triggers your entitlement to an EOT, and what notices you are required to give to get one.

For each notice type, identify what triggers your requirement to give a notice, and how long you have to give one.

Notice Type	Triggered By	Time Bar
Notice of Delay	<input type="checkbox"/> Likely Delay <input type="checkbox"/> Delay Occurs <input type="checkbox"/> Commencement of the delay <input type="checkbox"/> Subcontractor ought to have reasonably known about the delay <input type="checkbox"/> Subcontractor ought to have reasonably known of the likely delay <input type="checkbox"/> _____ (other)	Notice must be given within: _____ DAYS _____ BUSINESS DAYS _____ (Other) after the: <input type="checkbox"/> Commencement of the delay <input type="checkbox"/> Subcontractor ought to have reasonably known about the delay <input type="checkbox"/> Subcontractor ought to have reasonably known of the likely delay



SUBCONTRACT REVIEW CHECKLIST



TIME (CONTINUED)

Notice Type	Triggered By	Time Bar
Extension of Time Claim	<ul style="list-style-type: none"><input type="checkbox"/> Likely Delay<input type="checkbox"/> Delay Occurs<input type="checkbox"/> Commencement of the delay<input type="checkbox"/> Subcontractor ought to have reasonably known about the delay<input type="checkbox"/> Subcontractor ought to have reasonably known of the likely delay<input type="checkbox"/> _____ _____ (other)	Notice must be given within: _____ DAYS _____ BUSINESS DAYS _____ (Other) after the: <ul style="list-style-type: none"><input type="checkbox"/> Commencement of the delay<input type="checkbox"/> Subcontractor ought to have reasonably known about the delay<input type="checkbox"/> Subcontractor ought to have reasonably known of the likely delay
Further Extension of Time Claim	<ul style="list-style-type: none"><input type="checkbox"/> Likely Delay<input type="checkbox"/> Delay Occurs<input type="checkbox"/> Commencement of the delay<input type="checkbox"/> Subcontractor ought to have reasonably known about the delay<input type="checkbox"/> Subcontractor ought to have reasonably known of the likely delay<input type="checkbox"/> _____ _____ (other)	Notice must be given within: _____ DAYS _____ BUSINESS DAYS _____ (Other) after the: <ul style="list-style-type: none"><input type="checkbox"/> Claim for EOT was given OR <ul style="list-style-type: none"><input type="checkbox"/> Every _____ Days/BD for the duration of the ongoing delay OR Other: _____ _____



SUBCONTRACT REVIEW CHECKLIST



TIME (YOUR NOTES)

Insert your notes here:

Extra notices required:

Notice	Trigger	Time Bar

Other:

SUBBIES' TOOLBOX





SUBCONTRACT REVIEW CHECKLIST



COST

In this section we identify how monetary adjustments are made to the Contract. These include variations, provisional sums, back charges, and other amounts that the builder is able to set off or deduct from your contract sum.

VARIATIONS

What can you get paid for as a variation? Tick as relevant:

- | | |
|---|---|
| <input type="checkbox"/> Increase or decrease in nature, extent or description of the work. | <input type="checkbox"/> A latent condition |
| <input type="checkbox"/> Costs arising from a change in legislation or statutory authority requirements | <input type="checkbox"/> Costs arising from delay (where an EOT is granted) |
| <input type="checkbox"/> Other _____ | <input type="checkbox"/> Other _____ |

Is there any clause that specifies a "variation lower limit"? *Tip: you'll often find this in the Part A Subcontract particulars where the Builder deems a low cost variation as included in the subcontract sum (usually an amount less than \$500).

- None found
- Yes – it's found on page _____ at clause _____ and any variations quoted for less than \$ _____ are deemed to be included in subcontract sum.

PROVISIONAL SUMS

Provisional Sums applicable:

- None
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____
- _____

How is the amount payable for the Provisional Sum calculated?
(*tip: try using the Control-F Find function to search "provisional sum")

Your notes here:



SUBCONTRACT REVIEW CHECKLIST



COST

BACKCHARGES AND SET OFFS

Tick as relevant:

- | | |
|--|---|
| <input type="checkbox"/> Work "Taken Out". | <input type="checkbox"/> The cost of rectification of defects. |
| <input type="checkbox"/> Costs associated with purchasing insurance policies on your behalf. | <input type="checkbox"/> Costs associated with implementing a Quality Management system on your behalf. |
| <input type="checkbox"/> Site Clean or housekeeping costs. | <input type="checkbox"/> Removal of rubbish from site/provision of skip bins etc. |

Take note of the wording in these clauses. Does the Builder have a right to set off for an amount "owing" under the contract, or is the bar much lower, and the builder can set off for any amount that it "claims" to be owed?

- Debts due
- Amounts claimed to be owed.

Refer back to your scope of work comparison. Did you identify anything that was listed in the scope of work that you have not included in your quote? Tick as relevant and allocate an approximate value next to these items. This will help you to dollarize the risk associated with each.

Some common ones listed below (not an exhaustive list):

- Item 1: Quality Management System to ISO 45001 or 9001 equivalent. \$
- Item 2: Insurance of the whole of the Project Works under the Head Contract. \$
- Item 3: Removal of trade waste off site at Subcontractor's own cost or provision of certain number of skip bins to site. \$
- Item 4: Materials handling: Mobile scaffolds, vertical movement, craneage, perimeter scaffolding. \$
- Item 5: Preliminaries such as: crib hut, site office, site power, site water. \$
- Item 6: Form 15s/16s for Passive Fire work or certification. \$
- Item 7: Other:
Value \$
- Item 8: Other:
Value \$
- Item 9: Other:
Value \$
- Item 10: Other:
Value \$

Other Monies Due Clause:

Is there a clause in the Contract that allows for cross-contract set-offs, or "Other Monies Due"?

Tip: this clause is normally clause 37.6 in the AS4903 - Australian Standard Conditions of Contract.



SUBCONTRACT REVIEW CHECKLIST



QUALITY

In this section we identify how defects and quality are managed under the Subcontract.

QUALITY & STANDARDS

Is the contract asking you to carry out the scope of work to a quality or standard that exceeds Australian Standards, the Building Code of Australia and/or the Standards and Tolerances Guide applicable by the building regulator in your State?

- Contract requires a Grade 5 Finish
- Contract requires test certificates for certain materials or aspects of building work
- Practical Completion/Completion or Substantial Completion can't be achieved until the scope of work is 'Defect Free'
- Contract requires us to hold or implement quality management system to ISO45001 or 9001 or equivalent
- Contract requires additional reporting or administration in order to reach PC/Substantial Completion or Completion
- Contract requires certificate from a licensed land surveyor for confirmation of boundary locations in respect of works
- Contract requires certificate from a licensed building surveyor for confirmation of works built in accordance with BCA
- Other _____

- Other _____

- Other _____

NOTIFICATION OF DEFECTS

Take note of the procedure outlined in the Defects clause. How many days do you have to complete defect rectification once the Builder has notified you? _____ days

Is this adequate time for you to mobilise, carry out defect rectification and complete?





SUBCONTRACT REVIEW CHECKLIST



LIABILITY

In this section we identify general liability that we attract under the Subcontract. This typically comes in the form of warranties and in the form of deeds attached to the Subcontract.

What does the subcontract ask you to provide Warranties for?

**Note – warranties aren't just about defects and workmanship. This checklist provides examples of common ones, tick as appropriate and add to the list.

- Be qualified, skilled and carry out the work with due diligence.
- Comply with the Subcontract.
- Comply with legislative requirements.
- Comply with the BCA; NCC; Australian Standards; Plans and Specifications; etc etc.
- Has checked the design and warrants that there are no discrepancies.
- Has visited site and accepts the site conditions.
- Has insurance and will keep insurance in place.
- Hasn't relied on any data or information that the Builder has given you.
- Have satisfied yourself that the contract sum is right.
- Other: (Clause Number: _____)

- Other: (Clause Number: _____)

- Other: (Clause Number: _____)

- Other: (Clause Number: _____)

- Other: (Clause Number: _____)



SUBCONTRACT REVIEW CHECKLIST



TERMINATION/ENDING THE CONTRACT

Is there a right for the Subcontractor to terminate the Subcontract if the Builder is in breach, or for any other reason?

No

Yes

Termination allowed in these circumstances:

In which circumstances can the Builder terminate the Contract? Tick as relevant:

When the Subcontractor is in breach of contract

When the Main Contract (Head Contract) has been terminated or ended

For the Builder's convenience, at his absolute discretion.

Due to Subcontractor's insolvency

Termination due to frustration

Other _____

In each of the above circumstance that the Builder can terminate the Contract, there should be a corresponding clause that outlines what the Builder will pay the Subcontractor on termination. Tick the boxes to check what you are entitled to be paid (or what the Builder is entitled to do) if it terminates the Subcontract.

Contract allows for payment of work carried out up to date of termination

Contract allows for release of retention on termination

Contract only allows for payment of works certified in any unpaid payment certificates (doesn't allow for work carried out up to termination or the release of any retention)

If the Builder terminates because the subcontractor is in breach, the builder can keep the subcontractor's plant and equipment and materials to complete the job, and can deduct the cost of having others complete.

Other _____



SUBCONTRACT REVIEW CHECKLIST



DEEDS ATTACHED OR INCORPORATED BY REFERENCE

- Deed of Release
 - Sometimes there are two – one for PC and one for end of DLP.
 - Read to see what you are releasing the Builder from. Does it say all retention has already been paid?
- Deed of Novation
 - Usually used to allow Principal to contract direct with Subcontractor if Builder becomes insolvent or is terminated.
 - Allows the Principal to maintain warranties that the Subbie had through the original Builder.
 - Check to see what is novated. Who are you being novated to?
 - Who can demand that the Subcontractor signs this Deed?
- Deed of Unconditional Undertaking
 - Typically packaged to look like a harmless Bank Guarantee to be used in lieu of cash retention, look to see what the Subcontractor is undertaking to do in the Deed.
 - Often incorporate “all of your liability under the Subcontract” clauses – not just clauses about retentions.
- Subcontractors Warranty Deed
 - Typically packaged to look like a warranty document for your workmanship. You'll probably think this is just about defects.
 - Look closely to see what you are providing a warranty for. Is it all of your obligations under the Subcontract? Or is it just for workmanship, fit for use products etc...
 - HOW LONG are they asking you to provide this “Warranty” for? Does it exceed your Statutory warranty for structural defects, and if yes, have you allowed for this in your price? Will your suppliers extend this warranty too, or is there a gap?
- Sub-Subcontractor's Warranty Deed
 - As above – and also, if you are using sub-subbies, will they sign this? Consider a passive fire sub-subbie.
- Supplier Warranty Deed
 - As above, and also – will your suppliers sign this Deed? Eg: truss supplier (Form 15 provider) or other suppliers that provide you with certification documents. This is where you'll come unstuck.
- Subcontractor's Design Warranty Deed
 - Did you design anything? What extent of the design is this Deed asking you to Warranty?
 - Will your design consultants (if not in house) sign this Deed?
- Deed of Guarantee and Undertaking (Director's Guarantee)
 - Does your Director know about this Deed? Have they sought legal advice before signing?



SUBCONTRACT REVIEW CHECKLIST



COMPLETE FOR EACH DEED TYPE:

- Do we understand what this Deed is?
- Who are the Parties to the Deed?

_____ AND _____
Any others? _____

(if there are others, are they a party to the Subcontract?)

- What does this Deed require us to do? Explain in your words:

REALITY TEST: IF YOU CAN'T EXPLAIN IT IN SIMPLE TERMS, YOU MIGHT NOT UNDERSTAND THE DEED AS WELL AS YOU NEED TO.

**Print this page for each Deed and attach it to the front of them. Senior Manager to check prior to issue to Director for signing.*

Reviewed By:
Authorised for Signing by:

On Date:
On Date:

WARNING AND DISCLAIMER

Deeds are binding on the parties once signed, and are considered to be formal contracts on their own.

If you are the signatory to a Deed, we strongly recommend you seek legal advice prior to signing a contract and/or a Deed on behalf of your Company.

This internal subcontract review checklist is not a substitute for legal advice, and should only be used as a guide to identifying the commercial considerations for your business.





Final catch - all list of words to CNTRL-F



#	Search	Why
1	"\$" and "%"	Will find liquidated amounts (amounts where a \$ figure has been pre-set by the builder) for deductions, backcharges, set offs or damages.
2	"indemni"	Search the partial word to catch "Indemnity; indemnify; indemnifies". These clauses typically require the subcontractor to warranty an obligation and promise to reimburse the builder on a costs basis if the obligation is not fulfilled.
3	"set off"	Also search "set-off" to identify any clauses where the builder can deduct amounts from a progress claim.
4	"deduct"	As above.
5	"notice"	Will usually identify clauses where the subcontractor has to provide a formal notice to the builder or vice versa.
6	"written"	As above.
7	"Deed"	Will assist in locating any document that could potentially bind the subcontractor to another party, or where additional terms are being imposed.
8	"damages"	usually will identify clauses where the builder requires the subcontractor to pay the builder costs if the subcontractor breaches an obligation.
9	"absolute"	will usually identify clauses where the builder can unilaterally decide or impose its "absolute discretion" on a subcontractor.
10	"attorney"	commonly used in clauses where the builder can sign a Deed on behalf of a subcontractor, acting as its attorney.
11	"days"	will usually catch "Business days"; "calendar days" and "days", to help find all the time bars in the contract.