

From Siberia to Sydney: Universal Principles of Variations to Building Contracts

By Stefano Marchesin, Construction and Planning Law Expert

What are variations? Variations are changes to the building contract that occur after the contract agreement was made. These changes may be required by the building owner, or the builder, or by a legally recognised order from a building surveyor or inspector. For whichever reason the change is required, most building contracts usually contain provisions that must be followed to vary the contract. These provisions follow the universal tenets of contract law, namely offer, acceptance, intention, certainty and performance.

Approval

Most contracts require the approval of the variation by the building owner. Sometimes the owner may not have a choice in the instance of a variation resulting from changes ordered by a building surveyor or inspector. If a variation of this nature occurs, most contracts require the builder to give the owner copies of the order to make the changes, and the variation notice.

Most contracts do not require approval from the building owner where the variation:

- doesn't require a change to the building permit; or
- doesn't cause delay; or
- has a negligible increase to the contract price, say less than 2%.

If approval by the building owner is required, the following conditions for approval are usually found:

1. **Notice:** Notice of the variation must be in writing, before the work is undertaken. Most contracts allow the notice to be delivered by post, by facsimile, email or by hand.
2. **Price:** There must be some certainty in the price, either a fixed price or, for example 'per metre'.
3. **Date or Time:** The change may also require an written Extension of Time request under the contract if extra time is required for the variation work.
4. **Reason:** Why is the variation being made? Is it due to an order by a building surveyor, or an unforeseen circumstance, such as rock being discovered where trenches are excavated. Alternatively, is the variation claim for something which is otherwise already implied into the contract, such as builder's expense regarding compliance with OH&S regulations.
5. **Signature:** The written approval of the building owner is required.

Note: Where a builder has failed to obtain a signed variation a builder may still be able to recover payment if applicable building laws in the place where works take place provide exceptions to the "offer & acceptance" process. If this situation occurs, i.e. if the paper trail has not been followed, or you have dispute about variations contact Lovegrove Solicitors for advice.

Disputes about Variations

Most contracts include provisions where the building owner must:

- respond in writing to a variation notice; and
- do so within a specified time, for example 5 days.

If an owner fails to respond in writing and within time, some contracts allow the builder to assume the variation has been approved. In any case, all documents and records of telephone conversations should be kept in the event the variation is disputed at a later date. Most importantly neither party should approve a variation without certainty as to price and the time required for the variation.

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