

# *Preparing the Employer's Requirements for a Construction Project*



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## ***Introduction***

The Employer's requirements are project-specific components of the construction contract that document the:

- fitness for purpose criteria for the project
- Contractor's scope of work and design and how it is to fulfil those obligations
- technical criteria to be satisfied
- other project-specific obligations

Preparing and putting into words the Employer's requirements for a construction project is one of the most difficult tasks the Employer will undertake and is critical to the success of the project. It requires market research, a thorough analysis of the many commercial and legal influences and risks on the project, and expert technical and project management skills. Importantly, it also requires the Employer to have a clear understanding of the project purpose, goals and objectives from the outset of the contract procurement process.

Unfortunately, Employers often select a contract delivery method for a project and commence preparing the contract documents without identifying their goals and objectives at an early stage so that those responsible for developing the contract documents do not have a clear understanding of what the Employer wants from the final product. It is also not uncommon for lawyers acting for an Employer to prepare the general conditions in isolation from the Employer's technical consultants responsible for the Employer's requirements and other technical documents.

This leads to inconsistencies between the various components of the construction contract and uncertainty as to the extent of the Contractor's obligations. It also increases the risk of important aspects of the Contractor's obligations not being comprehensively described in either the general conditions or the Employer's requirements and leads to a misalignment of the parties' expectations, which is a common cause of disputes and costly variations.

To avoid these risks, the process should be centrally managed by suitably qualified personnel with combined expertise in contract procurement, contract administration, project delivery and legal drafting.

## ***Key stages in preparing the Employer's requirements***

There is no universally accepted process for preparing the Employer's requirements. The process will vary depending on the Employer's resources, commercial drivers and the nature of the project. However, irrespective of these variations, the guiding principles for an Employer when preparing the Employer's requirements and other contract documents must be to:

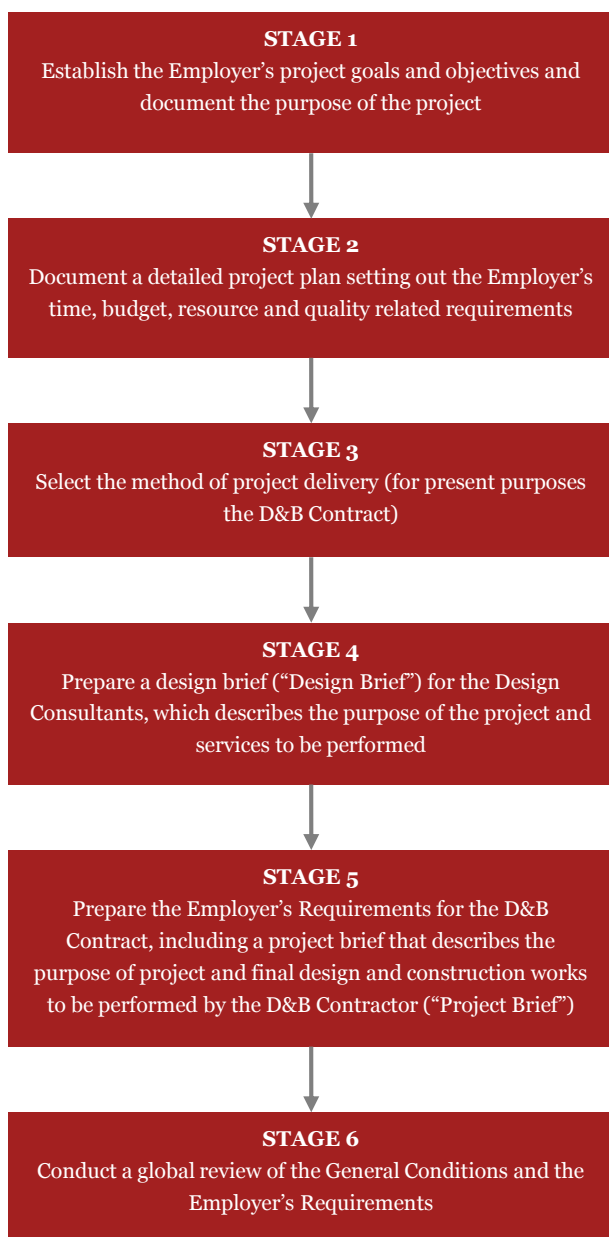
- allocate sufficient time and resources to conduct market research, gather information and identify its overall requirements for the project
- document the project goals, objectives and purpose at the outset, so that those responsible for developing the contract documents have a clear understanding of what the Employer wants from the final product and what it expects the Contractor to deliver

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- document the Employer's requirements in a manner so that it articulates precisely and consistently what must be designed and/or constructed by the Contractor and who will be responsible for design and other prior works (if any) undertaken by the Employer
- undertake a global review of the contract documents, utilising the combined knowledge of the Employer's project management team, expert technical consultants and lawyers to ensure consistent and clear drafting throughout the contract and certainty in relation to the project goals, objectives and purpose.

In practice, the Employer's requirements will evolve in stages and will vary for different types of projects. To outline the key stages, we have chosen the design and build contract (**D&B Contract**) project delivery method. This is a useful basis for discussion because the Employer has to prepare Employer's requirements for design consultants responsible for the concept and preliminary design (**Design Consultants**) and ultimately for a design and build Contractor (**D&B Contractor**).

The key stages in developing the Employer's requirements for a D&B Contract are:



Each stage of this process will be described in further detail below.

## ***Stage 1 – Establishing the project goals, objectives and purpose of the project***

Prior to choosing the contract delivery method and attempting to articulate the Employer's requirements, the Employer must establish its goals and the purpose of the project. This forces the Employer to consider and prioritise its goals and objectives at an early stage and will ultimately form the basis of the Employer's requirements to be included in the D&B Contract.

This will include consideration of the impact the project will have on its resources and existing operations and the commercial, technical, quality and timing requirements. It does not matter if the requirements cannot be finalised at this point because these requirements will be updated as the design and planning progress.

The factors that the Employer must consider at this early stage include:

- the overall timing of the project, including understanding the Employer's current business market, where the market will be when the Employer intends to sell the product generated by the project and at what point in the boom/bust cycle the construction industry is at the time of the project
- the specific timing requirements, including the critical stages and milestones for the project and when are they required to be completed
- budgetary restrictions and the Employer's economic and commercial drivers
- availability of both internal and external resources required to complete the project
- the external requirements of customers and other relevant parties and authorities

Determining the target market and the requirements of customers and other external parties, in addition to the Employer's internal requirements, is critical during this stage. For example, in the property development sector, the external requirements of the residential and commercial sales contracts, tenancy agreements, relevant government authorities, Financiers (if any) and arrangements with utilities and services providers will all form the basis from which the Employer's requirements must be developed.

Analysing these external agreements and requirements is critical to the D&B Contract procurement process because they contain concessions which have been made by the Employer and which oblige the Employer to ensure that the project is designed and constructed in order to fulfil certain requirements. This will directly affect the D&B Contract and the Employer's requirements. Examples include:

- timing of construction
- approvals for commencement of the works
- labour, safety, environmental and development guidelines
- access restrictions
- design approval process
- construction methodology
- the standard and quality of materials and finishes
- performance requirements and outputs (if any)
- the pricing and approval of variations and extensions of time and financier step-in rights
- interface requirements with utilities and service providers
- the requirements for completion and certification.

It is therefore essential that the Employer determines what its obligations are in order to meet these external requirements from the outset. It can then communicate them to those responsible for developing the contract documents and, in turn, build those specific obligations into the Employer's requirements and ultimately pass on those obligations to the Design Consultants and the D&B Contractor as required.

### ***Stage 2 – Document a project plan***

Once the Employer has established its internal and external requirements, it then needs to prepare a detailed plan for the delivery of the project that articulates those requirements. The plan should include:

- a clear statement of the purpose of the project
- the goals and objectives, including time, cost and quality and requirements of external parties etc.
- a resources plan that identifies internal resources and where external resources are required to produce the contract documentation and deliver the project
- budgets
- an overall development programme and milestones
- any other specific requirements of the Employer

Generally, it is not until the completion of this stage that the Employer will be in a position to consider the appropriate method of project delivery.

### ***Stage 3 – Selecting the method of project delivery***

There are numerous project delivery options for the Employer to choose from including:

- design by the Employer and construction by a Contractor
- preliminary design by the Employer and final design and construction by a Contractor
- total design and construction by a Contractor
- design by Employer, construction by trade Contractors and management of project delivery by a construction manager
- design commenced by Employer – Design completion and construction by Contractor

The selection of the most appropriate method (there is usually no right or wrong way to deliver the project) requires careful thought and consideration of many of the factors identified in stages 1 and 2.

This paper will not attempt to provide an analysis of the various project delivery methods. However, for the purposes of illustrating stages 4 and 5 of the process, we will identify some of the issues, by no means exhaustive, to be considered by the Employer when preparing the contract documents for the project delivery method referred to in item (b) above. This is where the Employer elects to commence preliminary design using the Design Consultants engaged under separate agreements (Consultancy Agreements) before engaging the D&B Contractor to perform the final design and construction.

Stages 4 and 5 below focus on developing the two key construction-related documents for this method of project delivery, which are:

- the design brief for the preliminary design to be carried out by the Design Consultants (Design Brief)
- the Employer's requirements for a D&B Contract



Given that the scope and risk profiles will vary for each project and across construction sectors, it is not possible to provide a comprehensive list of all the issues the Employer should consider when preparing the Design Brief and the Employer's requirements. However, the following sections will highlight some of the important issues that should be considered when preparing those documents.

Again, it should be noted that regardless of the type of project or the specific risk profile, it is still essential for the Employer to clearly articulate the requirements it has developed during stages 1 to 3 in both the Design Brief and the Employer's requirements. This must be in a manner that is consistent with the general conditions and clearly describes the obligation of the respective parties.

### ***Stage 4 – Prepare the design brief for the consultancy agreements***

Using the information compiled during stages 1 to 4, the Employer should prepare and include a Design Brief in the Consultancy Agreements. This is in addition to the contract documents which specify the actual scope of services and deliverables for each of the Design Consultants.

It is in this Design Brief that the Employer articulates its goals and objectives, including its time, cost, quality and other requirements and how the Design Consultants are to comply with those requirements so that the Employer can measure and enforce the Design Consultant's obligations.

The Design Brief will develop as the design develops, but one must be included at the outset in all of the Consultancy Agreements. The ultimate goal in the D&B Contract project delivery method is to have the D&B Contractor assume an overall fitness for purpose obligation for the final design and construction of the project and for it to become responsible for the preliminary design prepared by the Design Consultants on execution of the D&B Contract. Therefore, it is critical that the Design Brief prepared for the Consultancy Agreements is consistent with the Employer's requirements to be provided to the D&B Contractor.

Examples of other important aspects to be considered by the Employer when preparing the contract documents which specify the actual scope of services and deliverables for each of the Consultants include:

- a clear description of the deliverables, coordination and interface obligations and the timing for the provisions of the services, for each of the Design Consultants, during each phase of the design.
- the design programme for the performance of the services which must be consistent with the Employer's overall development programme and timing requirements described in stage 2 above
- administrative issues such as reporting and attendance at meetings and where applicable must be consistent with the D&B Contract
- a statement that each Design Consultant confirms that it understands the Employer's goals and objectives and the Design Brief

Often these obligations would be documented in the schedule of scope of services.

### ***Stage 5 – Prepare the Employer's requirements for the D&B contract***

It is fundamental to the success of the project to identify precisely what must be designed and then constructed by the D&B Contractor and the performance criteria that must be satisfied. The particulars of that essential element of the procurement process must be contained in the Employer's requirements, including the requirements of external parties identified in stages 1 and 2.

The level of detail contained in the Employer's requirements will vary depending on the timing of its preparation and the extent of design completed prior to the formation of the D&B Contract. Clearly, the later the Employer's requirements are prepared the more detail that can be incorporated. The preparation of the Employer's requirements during this stage is an excellent test to ascertain whether the Employer is in a position to sensibly articulate its requirements for the project. If it cannot describe its requirements with certainty in the Employer's requirements, then logically the contract procurement process has not reached a point where the D&B Contract can sensibly be distributed to tenderers.

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The contents of the Employer's requirements will obviously vary depending on the nature of the project, the specific scope of work and risk profile. The information compiled during stages 1 to 4 will form the basis from which the Employer's requirements will be further developed and finally articulated. For instance, the Design Brief referred to in stage 4 will be further developed with the assistance of the Design Consultants and form an integral component of the Employer's requirements for the D&B Contract.

Examples of key aspects to be considered by the Employer and articulated in the Employer's requirements for any D&B Contract include:

- a list of the Employer's goals and objectives for the project. The emphasis in this regard, and at this critical stage, is on providing detailed and measurable objectives, rather than general objectives or motherhood statements
- the obligations that must be satisfied by the Employer under separate arrangements with external parties that are to be passed on to the D&B Contractor must be specified in detail. These obligations will include development and planning approvals, environmental approvals, agreements for lease, sale agreements, agreements with adjacent lands and the requirements of banks and Lenders. Fundamentally, in preparing the Employer's requirements, the Employer must ask itself whether it has procured the D&B Contractor to fulfil all of the Employer's own relevant obligations with external parties
- the Employer's future operational expenditure. The Employer must ensure that its requirements, in terms of operational expenditure once the project is taken over by it, including future concession or off-take agreements and arrangements with service and utility providers, are also specified. This is important, not only in relation to interface obligations, but also because reduced capital expenditure through design and selection of materials, which might be a source of savings for the D&B Contractor, will often only be achieved at the expense of increased future operating expenses. These are, of course, borne by the Employer
- relevant industry standards and criteria. However, considerable care must be taken before specifying a benchmark existing project or using an existing Employer's requirements document for another project as the required standard to be achieved. It will be rare that any other project will encapsulate and be consistent with all of the Employer's specific requirements of its project. The Employer must also consider the commercial implications of using an existing project to set a minimum benchmark. The D&B Contractor will inevitably assess the risk of uncertainty between the actual required standard and the minimum benchmark and pass this cost onto the Employer in the contract price
- quality of equipment and materials. For example, in a commercial or residential building project the standard of finishes, floor coverings and sound proofing should be specified, as should the telecommunications and security requirements and ecologically sustainable development (ESD) requirements. However, particular care must be taken if the Employer intends to prescribe a product. Prescribing specific items can lead to difficulties in enforcing the D&B Contract in relation to fitness for purpose and design warranties. Rather than the Employer specifying a particular product, it may be preferable for it to describe the type, appearance and purpose of the product. The reason for this is, if the Employer prescribes a specific product and a defect is found in that product after it is installed, then it will have difficulty rejecting the product on a fitness for purpose basis.

The question should be which party is to be responsible if the material or equipment ultimately does not perform as required? If the Employer wants the answer to be the D&B Contractor, then it should not tell the D&B Contractor what specific product to use. The types of description that should be avoided include sizes, thickness, strength, suppliers and models. Of course, if the Employer has a specific requirement and wishes to use a particular product and in turn take the risk of that product performing, then it must clearly set out that requirement. For a residential development project, for example, it will often be in the interests of both parties to carefully draft a mechanism in the D&B Contract providing for the construction of a prototype villa or apartment so that issues of specified finishes and design functionality can be worked through at an early point in the design and construction process.

- Separable portions, milestones, program and staging requirements for the project, particularly where the development is to occur adjacent to operating buildings and/or facilities or the Employer's external obligations dictate staged completion.

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- The scope and extent of the works to be clearly delineated. The Employer must consider whether some of the works will be carried out by others and then consider the critical issue of the interaction and interface between those parties. This is a common cause of disputes and variation claims for delay.
- The scope of the D&B Contractor's design obligations and the existing design prepared by the Design Consultants. An issue that is peculiar to this type of D&B Contract delivery method involving the novation of the Employer's Design Consultants to the D&B Contractor is the status of the design work completed by those Design Consultants on behalf of the Employer (Existing Design). The purpose for using a D&B Contract delivery process is that the D&B Contractor is solely responsible for the final design of the project under the D&B Contract. However, a key question is what happens to the Existing Design? If the Existing Design contains elements that the Employer absolutely must have included in the final design then these elements must be transferred to the Employer's requirements.

In our view, the Existing Design should be considered as a work in progress that the D&B Contractor can develop and change as the final design development proceeds.

However, to avoid disputes over design responsibility, the general conditions and Employer's requirements must be consistent on this point. The general conditions should provide that the D&B Contractor warrants and takes responsibility for any Existing Design included in the Employer's requirements, so that the Employer can enforce the D&B Contractor's overall design obligations and fitness for purpose warranties. It is possible to place overall design responsibility on the D&B Contractor while still ensuring the Employer retains control of the design process by incorporating carefully drafted design review regimes.

Alternatively it is also possible to prohibit any changes by the D&B Contractor to the Existing Design, but this removes a fundamental commercial benefit to the D&B Contractor to value engineer its design and make allowance in its price the cost savings it believes it can achieve by developing the design to suit its construction methods. It also potentially limits the design promises made by the D&B Contractor and must therefore be considered in that context. This balancing act between the requirements of the Employer to control the design and the commercial driver of the D&B Contractor is a very important dynamic to understand and should be foremost in the Employer's mind when selecting the project delivery method during stage 3 and then when deciding on the level of detail to be included in the Employer's requirements.

- Design documents and maintenance manuals to be provided by the D&B Contractor, including the form of the documents.
- Performance requirements for the works identified during stages 1 to 4. These are essential for a D&B Contract arrangement and they must be exhaustively specified. For example, the Employer's requirements for the construction of a high rise building may include detailed performance requirements for air conditioning, lifts and other services, net lettable areas, environmental ratings, apartments sizes and car park numbers. These performance requirements should be carefully and thoroughly described, along with how satisfaction of those requirements will be determined. Consideration must be given to:
  - designing for whole of life requirements and the method of design review and approval
  - specific fitness for purpose requirements and a description of how satisfaction will be determined by the Employer
  - compliance with technical standards and specifications
  - performance guarantees and performance liquidated damages (if any)
  - the completion, testing and commissioning requirements including Employer supplied resources (both personnel and materials), responsibility for output (which can be blurred if the Employer provides resources), provision of input material (including quantity and quality) and provision for delayed testing if input material is not available
  - physical limits of the works including a description of the site boundaries and any connection points for services and access restrictions



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- a list of exclusions that have not been included in the D&B Contractor's scope of work
- interface obligations with existing plant and/or auxiliary works
- interaction between the D&B Contractor and other Contractors
- interface obligations with adjoining property Owners
- plant or material to be supplied by the Employer
- training the D&B Contractor must provide to Employer's personnel
- future Operator/Owner access requirements for maintenance and repairs
- permits or approvals that the D&B Contractor is required obtain
- an exclusive list of Employer's responsibilities such as obtaining planning approvals and supplying facilities, equipment or materials
- project-safety, quality and coordination policies, plans or procedures which the D&B Contractor is required to comply with or prepare
- approved working hours and any requirements or restrictions as to working hours
- defect rectification – Period and access requirements
- Sub contractor and supplier warranties for specific works or materials or services for which the Employer wants a direct ongoing contractual relationship with the sub contractor, manufacturer or supplier in relation to performance and defect rectification.

### ***Stage 6 – Global review of the D&B contract documents***

Ideally, the Employer's requirements and the general conditions should not be prepared in isolation. Unfortunately they often are, despite the significant costs to the Employer in procuring the commercial, technical and legal expertise required to perform this task. It is also not uncommon for the Employer's requirements or documents prepared by the D&B Contractor (**Contractor's Proposal**) to be simply attached to the general conditions and distributed as the tender documents without a thorough global review of all components of the D&B Contract.

In practice the contract documentation, including the Employer's requirements, will continue to evolve during the tender process and negotiations until the D&B Contract is executed. However, failing to undertake a review of the entire D&B Contract prior to going to tender increases the risk of ambiguity and uncertainty existing between the Employer's requirements and the general conditions and various components of the Employer's requirements. This will inevitably lead to a disputes and costly variations.

The Employer cannot rely on inconsistencies or ambiguities being identified or raised by the D&B Contractor during the negotiation process. In fact, often Contractors will specifically look for ambiguity in contract documents during the tender process and internally identify ways to take advantage of any uncertainty during the performance of the works. For the same reason, the Employer should not include documents in the D&B Contract which have been prepared by the D&B Contractor, without a thorough review for consistency with the Employer's requirements and general conditions.

Another common cause of uncertainty is the use of unclear and inconsistent language in the Employer's requirements. The drafting must definitively articulate the Employer's requirements and the obligations of the parties. Using general motherhood statements or legalistic wording, rather than simple plain English drafting, will not only lead to uncertainty, costly disputes and/or variations, but also makes it more difficult and time consuming for the Employer's project delivery team to determine what is to be constructed and to administer and enforce the D&B Contract.

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The following paragraph, taken from an existing D&B Contract used on an actual project, provides an example of drafting that fails to definitively describe the required scope, standard or duration of the D&B Contractor's design obligations in relation to designing temporary facilities and services:

*The Contractor shall provide good quality design services and the like for temporary facilities necessary which may be in use for a few years pending completion of final permanent building works or infrastructure/roads to the project and which will need to be compatible with the buildings in normal use for that time.*

The D&B Contractor's obligations under the above paragraph are uncertain. An alternative drafting style that more definitively describes the D&B Contractor's obligations might be:

*The Consultant must design all temporary facilities required at the site to ensure that all services to existing buildings are maintained for the duration of the project and for a period not less than 3 years after the completion of the project. The temporary facilities must be compatible and, fully interface with, all existing buildings at the site.*

While it is acknowledged that there are usually ambitious deadlines and budget restrictions imposed by Employers in relation to the contract procurement process, the global review, irrespective of the contract value, is critical. The review must combine input from the Employer's project management team, technical consultants and legal advisors. It must also be centrally managed by personnel with the requisite skills set and combined expertise in contract procurement, contract administration, project delivery and legal drafting.

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