

Running out of workers

Managing Australia's escalating labour shortage in construction contracts

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Rising labour costs and shortages

In November 2025, Infrastructure Australia released its Infrastructure Market Capacity 2025 Report (Infrastructure Australia's Report), which examines public infrastructure demand and market capacity for the period 2024–2025 to 2028–2029.

Infrastructure Australia's Report found, among other things, that:

- The major public infrastructure pipeline has grown to AU\$242 billion for the period 2024–2025 to 2028–2029, which is a 14% increase from last year's outlook and reverses previous reductions in forecasted spending
- This growth is driven by national priorities to supply more housing, and to accelerate the energy transition
- There is an estimated shortage of 141,000 workers, which could reach a peak of 300,000 by 2027
- For that reason, labour continues to pose a critical delivery risk with 63% of surveyed firms citing labour costs and 59%, citing labour and skills shortages as a substantial threat to delivery

Given those findings, companies preparing to commence new construction projects should carefully assess the risks of rising labour costs and shortages, and their contractual mechanisms for managing those risks.

Contractor-friendly considerations

Where a rise in labour costs or a shortage of labour occurs, which affects the contractor's performance under a construction contract, but the contract contains no provision to deal with that scenario, the contractor would typically bear the risk of that change and any resulting impact on its performance.

For example, in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696; [1956] 3 WLR 37, a contractor agreed to build 78 houses in eight months for a fixed price. Due to a shortage of labour, the project took 22 months, at an increased cost to the contractor.

The contractor made a claim for the increased cost, on a *quantum meruit* basis, asserting that the contract had been frustrated due to the scarcity of labour. The House of Lords rejected that claim and held that the contract had not been frustrated, even though the change in circumstances had rendered the contract more onerous than the parties had contemplated. Lord Reid said: "The delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event; the job proved to be more onerous, but it never became a job of a different kind from that contemplated in the contract." Similarly, Lord Radcliffe said: "[T]he cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so."

On the above basis, contractors concerned about the anticipated rise in labour costs or shortages of labour, should, in the words of Lord Radcliffe, "make it the subject of special contractual stipulation".

For example, a contractor could seek to:

- Contract on a "cost plus" basis, which would allow it to recover its actual labour costs from the owner
- Include a price escalation mechanism in any fixed price construction contract, which is triggered on a periodic or other basis (for example, pursuant to clause X1 of the New Engineering Contract (NEC) engineering and construction contract (ECC), at each assessment date, an amount is added to the amount due to allow for inflation)
- Increase the scope of provisional sums
- Include a shortage of labour as either a delay event or force majeure event giving rise to an extension of time and/or delay costs (for example, pursuant to new clause 60.1(22) of the Library of Standard Amendments to the NEC4 ECC for public works projects in Hong Kong, a contractor can claim an extension of time due to a "shortage of labour which would have been unreasonable for an experienced contractor to have allowed for at the tender closing date")

- Include a broader definition of delay event or force majeure event (for example, pursuant to clause 20.1(19) of the NEC4 ECC, a “compensation event” includes “an event... which neither party could prevent, an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable to have allowed for it and is not one of the other compensation events stated in the contract”)
- Ensure that it is entitled to subcontract any part of its obligations under the construction contract without the owner’s approval, which may assist in overcoming any workforce shortages
- Include additional performance incentives to motivate the contractor to achieve timely completion (despite labour shortages)
- Narrow or impose limits on the term “shortage of labour” if included as either a delay event or force majeure event (for example, pursuant to clause 8.5(d) of the 2017 FIDIC Yellow Book, the “Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to Extension of Time if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over the Works and Sections] is or would be delayed by...Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions”);

Owner-friendly considerations

It is generally accepted that an equitable allocation of risk in construction contracts can have the effect of reducing project costs, minimising disputes and motivating timely completion of the project. Accordingly, if an owner is inclined to accept a contractor’s proposal to reallocate the risks of rising labour costs and shortages, it should seek to achieve an equitable risk-sharing position. For example, an owner could:

- Include a guaranteed maximum price in any “cost plus” construction contract, in which case the risk of costs above the guaranteed maximum price would revert to the contractor (however, in this scenario, the contractor should ensure that the construction contract allows for the guaranteed maximum price to be adjusted for variations)
- Include an incentivised target price in any “cost plus” construction contract, in which case the owner and the contractor would share in the risk of any cost overruns, or the rewards of any cost underruns, compared to the target price (again, the contract should allow for the target price to be adjusted for variations)

- Structure the construction contract so that it provides the contractor with a defined period of time to assess and claim the time and cost impact of a shortage of labour, but after expiry of that period, bars the contractor from claiming any additional time or cost resulting from the shortage of labour (which should motivate the contractor to address claims promptly)
- Include an “early warning” mechanism to stimulate good management of any delays caused by a shortage of labour

Recommendation

The warning signs are already here. Infrastructure Australia projects a workforce shortage of 300,000 by 2027. With labour costs already ranking as the top delivery risk for the majority of firms surveyed, the pressure on construction contracts is only going to intensify. Project participants cannot afford to wait, and construction contracts should address the risks of rising labour costs and workforce shortages now, with clear and equitable risk allocation between the parties. The cost of getting this wrong (in delays, disputes and cost overruns) far outweighs the cost of getting it right from the outset.

If you would like to discuss how this may affect your projects or contracts, please contact us.



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