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# Importance of Careful Drafting for Council Contracts

Date : July 24, 2017

**Case Note: *Port Macquarie-Hastings Council v Diveva Pty Limited* [2017] NSWCA 97**

## Background

In a recent decision, the Court of Appeal of NSW made a determination which is particularly instructive for Councils when undertaking any tender process. The decision highlights the importance of carefully drafting contracts and the need to ensure that sufficient information is provided to potential tenderers during the tender process.

In 2011, Diveva Pty Limited (**Diveva**) successfully entered into a contract with Council to supply and lay asphalt around Council's local government area. The contract had a simple "option" clause which merely stated that the period of the agreement was to be two years "with a future twelve (12) month option available".

Diveva conducted works under the contract throughout 2011 and 2012 but Council observed significant defects in the works during this period. Due to the defective work, in March 2013 Council advised that it would not exercise the option to extend and a new tender would be advertised. In April 2013, Diveva gave notice that it would exercise the option to extend for a further 12 months. Council asserted that the option was not a unilateral clause for the benefit of Diveva and could only be exercised by the Council or by mutual agreement. Therefore, Council commenced the tender process and entered into agreement with another company for those services.

## Legal Issue

*Was Council in breach of contract for failing to honour Diveva's exercise of the option?*

On Appeal, the Court found that on construction of the contract, the "option" clause was a unilateral clause which could be exercised by Diveva only. The Court held that the clause must be construed objectively and within the context of the contract. On an objective assessment of the clause, the Court conferred a unilateral right for Diveva only to exercise the option. The Court's reasoning was as follows:

- The option clause read that there was a 'twelve month option available'. On an objective reading, the Court held that this wording suggests that the extension of term was an offer from the Council to any successful tenderer. The Court read this clause in the context of the entire agreement and found that there were many other similarly phrased clauses that conferred a unilateral right for Diveva only.
- The word 'option' indicates that there did not need to be a mutual agreement by both parties for the contract to be extended. The Court found that the wording of this clause is

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purposeful to allow the successful tenderer the freedom to exercise an extension.

- There was nothing contained within the tender documents or information for tenderers to suggest anything contrary to the clause being for the benefit of Diveva only.
- The commercial purpose and context of the tender suggested that it is highly unlikely that from an objective point of view, it was intended that Council could effectively bind the successful tenderer to an extension to the contract or that the clause was for the benefit of Council only.

Council was ordered by the Court to pay damages for breach of contract in the sum of \$247,443. This sum comprised an assessment of Diveva's lost profits for the option period and Diveva's lost opportunity successfully to tender for two further contracts with the Council. Council was also ordered to pay Diveva's costs.

### **Impact for Councils**

The effect of the Court of Appeal's decision highlights the importance for Council to ensure that it drafts any proposed contracts with sufficient care. If it is Council's position that the option is to be available to Council only or only available if both parties agree, this needs to be expressly stated in the contract and the tender documents. The decision makes it clear that a clause which simply allows an 'option to extend' will not be sufficient to protect Council's interests.