

Build to Suit Education Projects



Collaborating with a land owner, ground lease owner or developer (“Landlords”) to lease a ‘build to suit’ school or other educational facility is becoming an increasingly popular means for educational facility operators (“Tenants”) to meet their premises requirements in the UAE and broader region.

What is a build to suit arrangement?

In simple terms, a build to suit arrangement comprises the following elements:

- a Landlord who is prepared to undertake the construction of the educational facility provided they have a long term Tenant;
- a Tenant being a school or other educational institution provider who wishes to enter into a long term lease of an educational facility; and
- in many instances financial institutions who may be prepared to finance the Landlord in constructing the educational facility on the basis that, once built, the Landlord will have the revenue streams under the long term lease.

Why build to suit?

Private school operators or other educational institutions would prefer not to undertake the significant capital outlay required to acquire an interest in land and construct their own premises.

In addition, developers and other investors have an appetite for singly owned and tenanted real estate assets with tenants who will take over the full operation and maintenance of the facility.

Part of what makes build to suit arrangements so attractive, is that they are inherently flexible in their scope and structure. Parties can readily adapt the commercial arrangement to reach a mutually agreeable position on both the development and leasing aspects.

The pre-leasing aspect may also enable the Landlord to obtain finance for the project.

Accordingly, completing an education facility on a build to suit basis represents a win-win for operators, developers and investors. That said to avoid disputes arising at a later stage, build-to-suit projects can present a number of complexities that warrant careful consideration prior to entering into the relevant contractual documentation.

What are the key legal elements of a build to suit transaction?

While a detailed discussion of the issues and risk points is beyond the scope of this article, the following discussion points provide a high-level overview of the key legal elements to consider in a build to suit transaction:

Due diligence on the land plot

The parties should ensure that the land is appropriate for the proposed development. This may include considerations such as: ensuring the plot has appropriate planning and other regulatory approvals; ensuring the physical layout of the plot is suitable for the proposed designs; ensuring proximity to necessary infrastructure and utilities; confirming sufficient permitted GFA; licensing and free zone considerations; and other operational and design issues.

From a commercial perspective, the location of the plot will also be important, as patrons of a school or other educational facility will generally want this to be proximate to or easily accessible from their residence. Competitor schools in or planned for the locality may also be a consideration.

Scope of works

A lack of clarity in the scope of the works is one of the key issues giving rise to disputes. As the rent and other obligations are often struck based on what the owner is expecting to deliver and what the tenant is expecting to receive (and the associated costs), aligning the parties expectations is key to minimising risk.

To mitigate this risk, the parties should develop a clear scope of work at the outset. The parties should consider what plant and equipment is included in the scope of work, and whether the premises will be delivered in “turn-key” condition with all fit out installed as well as the extent to which equipment, furniture is included.

In the context of a school or other educational facility, the design may have to meet the requirements of the regulators such as the Dubai Knowledge and Human Development Authority. In addition, many operators will have their own design requirements. It is recommended that, unless the Tenant has such capabilities in-house, the Tenant engage suitable consultants to prepare a detailed technical brief addressing such matters as design requirements, structural loads, utility capacities and regulatory requirements. The detailed technical brief should be attached to the final agreement giving clarity to both the Landlord and Tenant as to key specifications required.

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Milestones and longstop dates

Will the owner be required to achieve completion of stages of the relevant works by milestone dates, or to procure completion of the project prior to a longstop date? If one or both of these requirements apply, what are the consequences of the Landlord failing to adhere to the relevant dates? Are delay damages payable, or does failure to meet milestone or long stop dates give rise to a right for the Tenant to terminate the agreements?

In education projects, the date of completion can be critical as failure to achieve completion by a certain date could result in missing the window for enrolments for an entire year.



Calculation of rent

How will the rent payable under the lease be determined? Considerations may include whether there will be a base/ground rent component payable for the land.

Where the rent (or a component of the rent) is to be calculated against the project costs incurred by the owner, what costs are included/excluded for the purpose of making that calculation? Examples of common exclusions are the owner's cost of acquiring the land (if applicable), the owner's cost of financing the construction and the cost of delivering infrastructure to the boundary of the plot.

Where the rent is calculated with reference to the project costs or by some other methodology, the Tenant will be concerned to ensure that there is a cap on its liability. The Tenant may also require that the project costs be certified by an independent cost consultant.

Often the rent is discounted at the beginning of the term with such discounts amortised over the remainder of the term. This practice recognises that it takes some time for the school or other educational facility to attract students and therefore improves the Tenant's cash flows until such time as the school or other educational facility is established in the market.

Appointment of contractors

How will the consultants and contractors undertaking the designs and works be appointed? Will mutual agreement be required? One option is for the parties to agree a short-list or pre-agree contractors and consultants whom the owner may engage. Alternatively, will there be a tender process and if yes, how will that be conducted and what role will the Tenant play in selecting the preferred tender? Will the Tenant have the right to approve the terms of the third party contracts?

Development of detailed designs and construction drawings

Ideally, detailed designs and specifications would be developed and attached to the contractual documents. However, often the project design is not finalised at the time when contractual documents are entered into. In those circumstances, the parties must agree on the mechanism for setting the final design requirements on which the project will be undertaken.

Variations

Issues to consider include whether variations (by the Landlord, Tenant or both parties) will be permitted once the final designs and specifications are settled. If variations are permitted, what parameters or processes will apply to determine whether the variation will be implemented and on what grounds may a variation be refused (and the grounds of refusal may differ depending on which party is approving the variation). For example, where a variation would result in a material delay to the works program or result in a material increase in project costs, one party may be entitled to withhold its approval.

Retention of a specialist consultant by the tenant

Unless the Tenant retains specialist architects and/or engineers in house, it is recommended that the Tenant obtain its own architectural and/or engineering consulting firm throughout the design, construction and handover phases of the project. The Tenant's consultant may assist with the following tasks:

- ensuring the design brief meets the Tenant's and any regulator's requirements;
- where permitted under the contractual documentation, consulting with the Landlord on the appointment of any contractor or sub-contractor;
- supervising the contractor and sub-contractors to ensure they are meeting the design brief;
- assessing any requests from the Landlord or the Tenant to make variations and evaluating the cost of such variations;
- cost consulting; and
- assessing whether milestones are met and whether the school is ready for handover.

Independent Experts

If disputes arise during the process, this could lead to delays in completing or the handover of the project, particularly where the disputes may be of a technical nature.

Whilst each party having its own consultant engaged may reduce the likelihood of disputes, it will not remove the risk completely as it remains possible that the respective parties' consultants will disagree.

In these circumstances, it can be useful to have an independent consultant appointed to mediate and determine such disputes as an expert.

Documentation

Transaction documents from a Tenant's perspective would typically include an agreement to lease and the occupational lease. Where acting for the Landlord, ground lease, financing, construction and development management documentation may be required.

The terms of the occupational lease are often critical, particularly given that the parties generally require a long-term arrangement. The parties should accordingly consider carefully the maintaining and repairing obligations and obligations for other outgoings, taxation issues, rent reviews, reinstatement obligations and insurance as well as the other usual Landlord and Tenant considerations.

Obligations in relation to registration of leases and any resulting registration fees should also be considered.

Conclusion

Build to suit arrangements are not the only option for private school or educational institutions when setting up operations however they provide a useful option from, both the Landlord's and the educational institutions perspective.

Readers will appreciate that there are a large number of issues to be considered prior to entering into build to suit projects and the above snapshot is by no means exhaustive. However, ensuring that the parties have a clear understanding and agreed position on these types of issues goes a long way to ensuring a successful project.

Al Tamimi & Company's, [Jeremy Scott](#), regularly advises on various [real estate matters](#) in the UAE and other countries in the GCC. For further information please contact Jeremy Scott (j.scott@tamimi.com).