ASUC | Guidelines on
CONTRACTS AND PROCUREMENT

ASUC

Underpinning & Subsidence Repair Techniques | Engineered Foundation Solutions | Retro Fit Basement Construction

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ASUC

ASUC is an independent trade association formed by a number of leading contractors to promote professional and technical competence within the underpinning industry. Members offer a comprehensive range of specialist domestic services in: underpinning and subsidence repair techniques, engineered foundation solutions and retrofit basement construction. Any contractor wishing to join ASUC must first undergo a technical; health & safety, insurance and financial audit and make a commitment to prescribed safety procedures.

It publishes a number of useful documents on underpinning and related activities and a comprehensive directory of members all of which are freely available to download via the website. ASUC members offer 10 or 12 year, depending on the nature of the works, insurance backed latent defects guarantees.

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ASUC Guidelines to contracts and procurement

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FOREWORD

Those engaged in Construction Contracts are exposed to a wide range of risks. Many of these risks are considerable and may threaten the going concern of an organisation. Risk is different for individual parties depending on circumstances but one consistent factor for small to medium sized enterprises (SMEs) are the commercial terms of the contract.

In recent years the construction industry has seen a decrease in collaborative contracting and an increase in heavily amended standard forms or bespoke contracts, written by legal teams with the intention of delegating risk down the supply chain.

One in every four construction contractors has reported payment issues have placed them under threat of insolvency. It was reported in July 2017 by Crossflow Payments, that £266bn of annual UK SME turnover is held up by late payment. According to Construction News in August 2017, in public sector contracts where there is a 30 day payment requirement, over 60% of SMEs are not paid on time. The Asset Based Finance Association (ABFA) reported in August 2017 that UK Construction businesses have an average wait of 61 days for payment (an increase since 2016) and that delayed payment is a principal reason for the high number of insolvencies. In 2016, 17 per cent of all corporate insolvencies were businesses in the construction sector. Amicus Commercial Finance found in 2016 that in the U.K. SMEs write off £50bn in unpaid invoice debt as losses every year. A fifth of Construction SMEs surveyed by Bibby Financial Services reported that penalty clauses imposed by main contractors are negatively affecting their business.

The EC Harris Global Disputes Survey ranked the top causes of dispute in the UK as failure to administer the contract properly and failure to understand or comply with contractual obligations.

Many small to medium size construction companies do not have the resources to review, negotiate and administer complex or bespoke contracts. The pressure to maintain work, turnover and cash flow; often drives SMEs to accept employer's terms that they do not fully understand or feel are unfair. With increasing material cost, skills shortage driving labour prices up as well as impacting programmes, together with the trend for asymmetric risk allocation; accepting unamended bespoke contracts may prove fatal for a business.

Entering into a contract with onerous terms or clauses could result in anything from a restricted cash flow, preventing such things as salary payments; to insolvency. As experienced contractors know, cash is critical to a business: "you only run out of money once". Businesses must ensure that the best terms are negotiated and where necessary, outside assistance is sought.

Everyone deserves to benefit from a job well done. This document is not restricted to ASUC members, it is intended to enable anyone working for SMEs in Construction; to understand the key concepts, terms and legal principals in the process of agreeing and administering a construction contract; to recognise the risk presented by certain terms and construct the contract to allocate risk where it is best controlled; to provide a collaborative framework to mitigate shared risks; to achieve a fair and reasonable agreement with unambiguous terms to comply with the employer's requirements and gain fair remuneration. It does not cover every provision or matter or law, but addresses those that prove to be most relevant to Construction SMEs.

This document is compiled from selected case law, legal best practice and advice drawn from the substantial library of published material freely available to the public. In no circumstances, does ASUC insist its members adhere to this document - it is for each company to decide what is commercially acceptable to them as a business. If in doubt, legal advice must be sought to ensure that the business is not exposed to unnecessary risks. This document is intended to raise awareness of contractual matters and is not to be taken or interpreted as contractual or commercial advice.

INTRODUCTION

Contracts are a means for the parties to agree the allocation of risk.

The risk involved in a project lies not only in the tangible activities of construction but also, and perhaps more so, in the content of the contract. Appreciation of these risks will help all parties determine whether it's more sensible to accept a contract or refuse it.

It is crucial that the parties understand the risks presented by elements of a contract both individually and as a whole. Whilst at first glance it may be appealing to an employer for all the risk to be delegated to a contractor; and to a contractor it may seem most important to secure a contract; this arrangement is very rarely the best for either party.

Parties who accept large risks will often charge for doing so in the same way that those who accept lesser risk will reflect that in their charges. Worse perhaps, is a party who doesn't recognise the risk, does not prepare for it, cannot manage circumstances when the risk arises and cannot complete the works. This does not help the employer and it certainly is not good for the contractor.

A properly drafted construction contract shall provide a fair allocation of risk as well as a means for the parties to execute the works without delay, confusion or dispute. It is therefore in the employer's and the contractor's best interests to ensure a simple and fair contract is in place registering and allocating risk fairly to those best able to manage and mitigate it.

A construction contract need not be complicated and it must not be ambiguous. An effective contract should meet the needs of all the parties and provide the apparatus to allow an effective execution of the project.

The following is a guide to the typical contractual processes and provisions that a contractor may encounter. The intention is to help organisations and individuals involved in agreeing contracts, to achieve the avoidance of unnecessary disputes or hardship arising for anyone.

CONTENTS

1. UK LAW

UK Law can broadly be divided between Statutory and Common Law. Each is further sub-divided and has details specific to the three legal systems applying to England and Wales, Northern Ireland and Scotland. Those involved in Construction Contracts will most commonly encounter legal matters from the following parts of UK Law.

Statutory Law

Statutory Law is written law passed by government as legislation. It imposes as well as regulates obligations that are legally binding. Those found guilty of breaking these laws may find themselves prosecuted by the state. Statutory law is divided between Public Law; that is concerned with the relationship between the state and citizens; and Private or Civil Law that is primarily concerned with the rights and duties of individuals towards each other. Many aspects of statutory law will be encountered in construction contracts and the parties must agree who is responsible for discharging the statutory obligations.

Common Law

Common Law is derived from case law generated by the judiciary through court judgements. These court judgements will be based both on statute and legal precedent or case law, from previous judgements in common law. The common law system is not codified and therefore is constantly changing as new judgements are made. Elsewhere in the world many countries do not operate a common law system but rather codified civil law.

Tort

The law of Tort imposes specific liabilities upon the parties that may not arise from the contractual obligations. Tort also addresses and provides legal remedies for a party suffering a loss a result of another party's failure to discharge these responsibilities. The law of tort covers several areas including negligence, work safety, nuisance and product liability. A common tort in construction contracts is the tort of negligence that imposes an obligation not to breach the duty of care owed to those who may foreseeably be injured by any particular conduct.

Contract Law:

Contract Law regulates the obligations of parties to a contract. The contract defines obligations between parties and these are enforceable by law. If either party fails to meet those obligations as well as those implied in common law and statute; they are deemed to be in breach of the terms of the contract. In this event, the one party will be entitled to claim against the party in breach for that breach of contract.

Criminal Law

Criminal law deals with acts against the community with much of the law codified in Acts of Parliament. A breach of criminal law is seen as a wrong against society and prosecution may be brought by the state.

2. THE CONTRACT

What is a contract?

A contract is an agreement between two or more parties that is intended to be legally binding and enforceable. Construction contracts establish the legal relationship between parties, the allocation of risk, the obligations, liabilities and benefit.

There are many forms of standard contract published by various bodies to serve different disciplines and circumstances. These vary in terminology and apportionment of risks.

Contracts may be agreed using one of the standard forms, a bespoke contract or a simple agreement.

How is a contract created?

A contract may be created orally, in writing or by conduct.

There are 5 basic requirements for a valid contract and in construction these can be summarised as follows:

Intention – The parties intend to enter into a legally binding contract. In business to business transactions there is a presumed intention to enter into contract. There are two statements that may be added to a

document to prove that a party did not intend on entering into a legally binding contract; 1. “Subject to Contract” and 2. “Without Prejudice”. Both statements carry legal meaning, the former as a formal notification that the associated document is not a contract and that the contents shall be subject to a separate contract. The latter statement serves to formally notify that none of the contents of a document is legally binding.

Offer – A party offers to sell products or services to another party for a price, subject to specific terms (e.g. in a quotation). It is important to set a time limit on how long the offer remains open to acceptance.

Acceptance – An act that unequivocally responds positively to an offer. A party that confirms agreement to an offer is considered to have accepted the offer. There is no contract without a formal acceptance of the offer by the party to whom the offer was made. Acceptance may be demonstrated in several ways; in writing, orally, through conduct i.e. the sending of payment, post or electronically. There are specific rules relating to postal or electronic acceptance and a contract may be formed upon the sending of post or receipt of fax or email. It is important that both parties agree and clearly state the method of acceptance.

Consideration – A promise from one party in exchange for something of value from the other party. In construction contracts, consideration is usually measured in financial terms (cash or services). Consideration should be current; should one party voluntarily perform an act and a promise is then made by the other party, the consideration for the promise is said to be in the past. Past consideration is deemed not valid and cannot be enforced on a contract. There are some exceptions to this however: a party completed an act at the request of the other party, a past act was understood to be compensated in the future, a promise would have been legally enforceable had it been made prior to the act and antecedent debt.

Certainty – A contract must provide certainty as to who the parties are, the subject matter, the price etc.

Although it is possible to form a contract without written form; there are several types of contracts that must be in writing: guarantees; contracts relating to the sale, transfer, option or lease of land and licensing of certain intellectual property rights.

Agreements not contracts - If only an offer and acceptance occur without the other basic requirements; an agreement not a contract has been made. An agreement is not legally enforceable.

The overarching authority on construction contracts in the UK is “The Housing, grants and regeneration Act 1998 (The Construction Act)” as amended in 2011. The Act defines construction contracts and provides that these can be wholly in writing, partly in writing or wholly oral and accordingly the Construction Act shall apply to all such contracts.

Principal Parties to a Construction Contract

The construction contract may involve the following parties:

- Funder - Financing the project.
- Employer/Client - The party commissioning the work.
- Main Contractor - Overall responsibility for the works.
- Sub-Contractors - Employed by the Main Contractor to carry out specific parts of the works. Professional Consultants – Entities employed by the employer or main contractor to provide services such as Architectural - Engineering, Surveying etc.
- Checking Engineer - Employed directly by either the Employer or Main Contractor to check and report on the Subcontractor’s work

The Employer’s representative

Under some contracts a representative is appointed by the employer to oversee the works on their behalf. These may be referred to as the Contract Administrator; Architect or Engineer etc. and have authority under the contract that the contractor must comply with.

Their principal duties typically include: to act as the employer’s agent – providing information, sharing documentation, issuing instructions and exercising decision making on the client’s behalf -including issuing interim certificates.

The representative's authority is defined under each contract and is usually limited from executing key actions such as signing a contract/ subcontract, changing contract terms, suspending or terminating the contract.

3. PROCUREMENT METHODS

The procurement method is the contractual framework upon which all contracts are established. It defines how the projects are designed, financed, constructed, awarded, the appointment of the professional team as well as influences the form of the main and sub contract.

In the UK, there are five principal procurement methods:

Traditional Procurement - In this method the employer directly appoints a professional team who are responsible for the design work and a main contractor to undertake the construction works only. The main contractor has no responsibility for the design of the works. The main contractor is contractually responsible for undertaking the construction and may appoint sub-contractors to undertake aspects of the works. The employer will typically also directly appoint a quantity surveyor and architect. The quantity surveyor, architect or a member of the professional design team may be appointed as the Employer's Representative.

This method is regarded as enabling the employer greater involvement as well as more careful planning of the design, the build, health and safety. It is however considered as a potentially more expensive than alternatives to the employer due to the distributed responsibility.

Design and Build - The employer appoints a main contractor who is responsible for both design and construction of the works. The professional team is either novated to the main contractor following the pre-contract phase or appointed directly by the main contractor. The employer will usually appoint an agent who performs the role of contract administrator.

Design and Build is considered advantageous as there is one point of responsibility for the employer and accordingly it can be less expensive with shorter lead in times. The contractor's experience can also be used to reduce the cost of the construction and/or improve value to the client. Perceived disadvantages are that the employer has less control and a novation of professional team can lead to dispute relating to on-going designer roles.

Contractor's Design Portion – Is essentially a hybrid of Traditional Procurement with Design and Build. The Contractor is appointed to provide specialist elements of design with a professional team retained for the majority of the design.

Package contracting – Can either be Construction Management, where a construction manager is appointed to procure and arrange specialists and sub-contractors on behalf of the client who has a direct contract with those contractors or; Management Contracting, where a management contractor arranges and appoints the specialists and sub-contractors directly under separate contracts but does not take total responsibility for the delivery of the contract.

Integrated - Integrated procurement, sometimes known as collaborative procurement or partnering, emerged in the 1990s in response to the often adversarial situations encountered in major construction projects which used the three existing procurement methods.

The intention of the integrated procurement method is to focus all the project participants on the mutual objectives of delivering a project on time, to budget and to quality. It is about working as a team, regardless of organisation or location, to meet a client's needs. A central tenet is that risk and reward are shared by all parties in a way that aligns their actions with a successful project outcome.

The UK government's 1994 Latham Report 'Constructing the Team' started the thinking behind integrated procurement. One of the main recommendations of the report was compulsory inclusion of latent defects insurance on all construction projects in order to overcome the tension that exists in construction work caused by it not being possible to know at the time of completion if there are any problems with the works that are not apparent at that time.

Latent defects insurance is covered in more detail in the Insurance section however it is worth noting at this point that the ASUC Insurance Guarantee Schemes (BIG & DIG) are latent defects insurances in line with the Latham Report and support collaborative, integrated procurement.

Integrated procurement has been recognised as fundamental in the success of major construction projects like the London 2012 Olympics. There are several forms of contract which support integrated procurement for major works. The most well-known is the New Engineering Contract (NEC), or NEC Engineering and Construction Contract.

4. FORM OF CONTRACT

Contract forms can be broadly divided into three categories: Bespoke, Standard Forms and Modified Standard Forms.

Bespoke forms of contract are drafted by a party to manage their organisational risk and may contain clauses that are not relevant or terms that do not effectively distribute the risk. They are not supported by case law, may not cater for all potential circumstances and can therefore be relatively inflexible. It is advisable to avoid using bespoke forms of contract whenever possible.

Standard Forms are prepared to provide a balanced allocation of risk between the parties, a fair contract framework and the means to deliver a successful project. The various Standard Form suites are developed to reduce the time and cost of negotiation by providing full and relevant coverage for different disciplines, scale and scope of work. These are regularly updated by industry experts to reflect legislation, case law as well as best practice. It is advisable therefore that standard forms are used whenever practical.

Examples of Standard Forms of Contract:

- Construction: JCT, NEC, ICE and GC/Works.
- Engineering: FIDIC, ICC, IChemE and ICE
- Professional Consultants: RIBA, RICS, NEC and ACE.

Each one of these suites has several contract types created to suit different circumstances.

Modified Standard Forms are derived from amendments that parties feel are necessary to the standard forms. This may be necessary to account for changes in legislation, case law or due to the works being of a specialist nature not covered by the standard forms. Amendments to standard forms should be made with careful consideration to avoid ambiguity, clauses becoming unenforceable or creating unintended implied terms. These factors may lead to dispute, legal uncertainty and for the courts to interpreted the clauses unilaterally. Many modified standard forms have been prepared by a party with the intention of lessening their own risk and seeking to place more risk upon the contractor. They can and should be used to create balanced risk specific to the project.

Factors affecting the choice of Contract Form

There are over 40 standard forms of contract available and in order to narrow these to an appropriate selection; there are several considerations that should be made:

Risk Strategy - Contracts should provide parties with a means to reduce the likelihood and consequences of a risk event occurring. The standard forms include provisions that seek to allocate risk fairly according to an industry standard. Should it be deemed by the parties that this industry standard does not reflect the circumstances of a project a modified form should be collaboratively developed to reflect a project specific risk allocation.

Procurement Method - Many standard forms have been developed with the intention of being utilised with specific procurement methods i.e. Design and Build, with Sub-Contractor Design Portion etc.

Price Basis – The price basis describes how the contract sum can be varied during the works according to the pre-contract agreements. There are several descriptions for contract sums linked to the price basis and that have very different meanings.

- Lump Sum (sometimes called a fixed price) – describes where a price is agreed with the contractor carrying the risk or benefit of the costs being more or less than expected although there are circumstances when the price can be adjusted during the project by inclusion of variation provisions. This price basis should only be used when the scope and schedule of the works are highly defined.

- Measurement (sometimes called Re-measurement or measure and value) – describes where the parties agree to calculate the contract sum by re-measuring the price based upon the actual quantities of work carried out. Typically the parties agree a priced approximate bill of quantities or a schedule of rates and this is applied to the actual measured quantities. This method should be used where there is insufficient detailed design or patent condition information to determine the exact work needed or to calculate quantities. Depending on the precise circumstances, the parties may re-measure the entire contract using the rates or only the difference between an estimated quantity and the actual quantity.
- Cost Reimbursement (sometimes called Cost Plus) – is where a contractor is reimbursed for the actual cost to carry out the works with an agreed additional fee. The additional fee is typically percentage based and attributed to overhead and profit but may also be a profit share, a bonus, a limited aggregate value or a lump sum fee. This basis should be used when there is a high uncertainty regarding the method, resources and time needed. There are situations where the cost reimbursed is not always the actual cost incurred. It is imperative that extensive and accurate records are maintenance and agreed.
- A Firm Price - is similar to a lump sum but expressly prevents price fluctuations associated with direct costs that might occur during a contract i.e. cost of steel, labour or concrete.
- Guaranteed Maximum Price Contract - the contractor carries the risk for costs above the guaranteed maximum price and any savings below this level ether go to one of the parties or are shared.
- Target Cost Contract – similar to the guaranteed maximum price contract but both the additional costs and savings are shared by an agreed percentage.

Client's requirements - These define the requirements for the project and can vary greatly in extent and detail. It may be that the level of detail is so small that is impossible to define the project risks or accurately price the works. There may be a full design with extensive specifications, performance requirements, modelling and third party reports.

Type of Project – Whether a small building project for a domestic client or a very large multi-million pound multi-disciplined project for a Tier One Contractor working on a Public Private Partnership; the impact upon the appropriate form of contract is significant.

As the standard forms have been developed in accordance with these considerations, the parties taking account of the above shall be able to identify the most appropriate contract.

5. WHAT SHOULD A CONTRACT INCLUDE?

The main purpose of a contract is to prove the existence of and protect the parties' agreement as to how a service or product is delivered, the allocation of duties and risk as well as mitigate any uncertainty.

The contract should as a minimum include:

- the identity of the parties, their roles and responsibilities as well as their agents.
- the procurement method i.e. traditional or design and build.
- the price basis i.e. lump sum, measurable etc.
- the project deliverables: the scope of work, the programme, the time for completion of the works, salient dates etc.
- how the contract shall be administered: the payment terms, mechanisms for allowing the scope of works to be varied, terms that explain how contract work or variations are to be valued.
- all the terms and conditions the parties have agreed including provisions for variations and extensions of time.
- information and instructions of how the works shall be completed; specification, tolerances, drawings etc.
- any additional provisions such as third party restrictions, health and safety, methodology for the works, insurances etc.
- where ever possible an agreed schedule of rates and prices to be used in the event of variation.

There are many factors that can influence the works. The contract must fully describe the allowances, scope of works, understandings, expectations and agreements of the parties in detail. This shall assist the parties, to determine if a true variation has occurred during the execution of the contract.

Facilities and attendances

Describe the provisions required to carry out the construction works. These can either be general or special and provided or required by the main contractor or sub-contractor. Most contractors have standard attendances that they either require or provide.

General attendances such as welfare facilities, general lighting, electricity, water and security etc. are those provided by the main contractor to the whole site for all parties.

Special attendances are specific to a particular party and might include preparatory works such as demolition, provision of excavated soil removal or provision of materials etc.

The parties tend to submit these as standard documents with the offer. Similar to the terms and conditions described above in the formation of a contract, it is important to clearly establish exactly what attendances are to be provided to the sub-contractor by the main contractor as well as what the sub-contractors shall provide for themselves.

6. ENTERING INTO CONTRACT

The Construction Act defines that construction contracts can be wholly in writing, partly in writing or wholly oral.

A contract can therefore be entered in to in four ways:

- By spoken word when an offer is accepted either in person or by phone.
- By written word with the exchange of correspondence accepting the offer.
- By the conduct of the parties that implies the offer has been accepted i.e. following the submission of an offer, the employer enables works on site to commence and those works proceed.
- By written contract such as a standard form, a bespoke arrangement or agreed terms and conditions. In any case, it will be in writing as a formal contract usually including all contract documentation such as the offer, enquiry, acceptance and pertinent correspondence.

Counter Offers

It is not always the case that a single exchange of offer and acceptance occurs. It may be that the initial submission of either party is not agreeable to the other. When this circumstance arises; further exchanges may occur with each party submitting alterations to the original submissions. These are known as counter offers. Counter offers can occur in a number of ways:

Purchase Orders

Upon receipt of an offer a client may issue a purchase order. Purchase orders are usually generated by a computer system and standardised to be subject to the client's terms and conditions of purchase. This introduces a different set of conditions and rather than being an acceptance; constitutes a counter-offer.

Should a contractor commence works upon the basis of the Purchase Order they will be considered to have accepted the client's counter-offer. The contractor will be in contract to deliver products or services in accordance with the client's terms and conditions.

Order Acknowledgements

Should a contractor not wish to enter into contract under the client's terms and conditions, they may choose to partially accept the Purchase Oder but under the contractor's term and conditions.

This is achieved by responding to the Purchase Order with an Order Acknowledgement which accepts the order subject to the contractor's terms and conditions as supplied with the previous offer. This constitutes another counter offer and requires formal acceptance by the client before works commence in order to be legally binding.

The legal term used to describe when two parties seek to form a contract on their own standard terms and conditions is: Battle of the Forms. Typically, this arises when the employer issues an order with their standard terms and conditions. The contractor confirms acceptance of the order but on their own terms and conditions, as described above. Should there be no formal acceptance of these counter offers and works on site commence, a dispute shall often occur subsequently over the terms of the contract. If however, there is no objection from one party over the other parties counter offer, the contract is formed on the basis of the last standard terms and conditions issued. In this situation, under the "battle of the forms" rules; the contract is formed on the basis of those terms and conditions put forward last that were not explicitly rejected by the recipient.

Amendments Offers or Orders

Alternatively, a dialogue can be instigated with the client to agree mutually acceptable amendments to either the contractors offer or the clients purchase order.

As the contractor prepared the offer based upon their own terms and conditions, a change to the terms and conditions would ordinarily necessitate the offer to be reviewed and revised as necessary. A client may wish to avoid a review or changes to the offer and may amend the Purchase Order subject to the Contractor's Terms and Conditions. Either amended document avoids any unnecessary confusion or dispute at a later date.

Should a party wish to avoid dispute and confusion, it must not commence any works without a clear and agreed offer, acceptance and consideration.

Enforceability

Despite the 5 essential elements mentioned above being achieved, there are some circumstances that may prevent a contract from being enforceable:

- Insufficient capacity of one of the parties to enter a contract; this may be due to one of the parties being legally a minor (under the age of 18), being intoxicated or without mental capacity.
- The contract unduly restrains a person in their trade.
- The Contractual Mistakes Act 1977 grants relief to those who mistake the nature of the contract which results in a significant inequality in consideration.
- The Contractual Remedies Act 1979 as well as common law grants the right to cancel a contract (as well as claim damages) when there has been a misrepresentation of facts.
- The contract is deemed illegal, immoral or where one party has undue influence over another.

Letters of Intent

Letters of intent are a form of offer from the employer to pay the contractor to undertake works before an agreed contract is in place. The works usually involve preparation for the full contract, order of materials or plant for the full contract or initial service such as design. Care should be taken when issuing or accepting letters of intent as they are a contract themselves. To avoid dispute, letters of Intent should define at least one of the following:

1. Agreed scope of works required,
2. A financial limit,
3. A programme for delivery
4. Payment terms

To be contractually binding, the Letter of Intent must be accepted by the contractor and if accepted, it places no obligation on either party to enter into a full contract for the works thereafter. Moreover, the employer is under no obligation to meet any costs or time that might be incurred by the contractor in excess of those defined.

Acceptance can be demonstrated by any means including: text message, email, a phone call and starting work on site. The contractor must be very careful to review and agree all aspects of the letter of intent formally before commencing work. If the contractor does not, it is held that the Letter of Intent and all it entails were accepted. If separate subsequent letters of intent are issued that are not formally accepted but the contractor continues with work onsite: case law deems this as acceptance due to progression without demure.

Unfortunately, many letters of intent do not include the above four items, they seek to flow down obligations from a main contract elsewhere and are often neither reviewed nor formally accepted. They often become a source of dispute and can undermine the negotiations for the main works contract.

Pre-Contract Minutes

It is common practice for the parties to meet prior to commencement and agree the final arrangements for the construction phase. These meetings usually follow a pro-forma agenda with agreements recorded in a set of minutes. Typically these meetings will include procedures for instructions, logistics, programme, quality control and often recent variations to the scope of works

If is often the case that the final contract documentation shall be issued after this meeting and include reference to meeting minutes. It is of utmost importance that the parties ensure that they are appropriately represented at the meeting and that the meeting covers all salient outstanding matters. If agreed, these minutes are legally binding and in some cases the contract will be formed by signing them. The contractor must therefore ensure a careful review is completed to make certain the discussions are accurately recorded and that the contractor can discharge all the duties allocated to them.

7. KEY CONCEPTS, TERMS AND CONDITIONS

There are many terms and conditions that may or may not be considered when agreeing the contract. It is critical that both parties possess a clear understanding of the meaning of, the effect of and how to operate each element of the contract. The following is a non-exhaustive description of key concepts and considerations for the construction of the contract that the parties must be familiar with to best mitigate risks as well as avoid or resolve disputes.

Breach of Contract – where a party fails to comply with their contractual obligations. When a breach of contract occurs the other party to the contract, depending upon the circumstances, is entitled to: make a claim, suspend the contract, terminate the contract, claim compensation in court, commence dispute resolution processes etc.

Entire Agreement clauses are intended to signify that the party's discussions are consolidated into one document. They are intended to avoid unnecessary uncertainty in respect of the basis of the bargain between the parties and prevent a party bringing a claim founded upon statements or documents that had been superseded or discarded during the course of negotiations. They are not intended to behave as exclusion clauses and any exclusion should specifically be detailed separately.

Concurrent Liability defines where parties owe one another obligations under both the contract and tort. Concurrent liability can be excluded through contractual terms and the parties agree to limit liability to the contract.

Negligence – can occur in either contract or common law when one party fails in their duty to take reasonable care and thereby causes a loss or injury to another party.

Condition precedent - is a term applied to an event or circumstance that must occur before a specific contract or obligation is considered due. In other words, an agreement or certain parts of a contract shall not exist unless specific conditions are met.

Force Majeure - are events or circumstances that cannot be foreseen before the parties entered into the contract. Should the occurrence of these events delay, disrupt or prevent; a party from fulfilling its duty under the contract, it is often agreed that an extension of time can be claimed. Disputes may arise over the definition of such an event and some contracts detail specific circumstances rather than seek to capture events under the general Force Majeure term.

Adverse Weather clauses - Most construction projects are affected by adverse weather conditions at some stage and contractors will have a contractual right to an extension of time and/or to recover the extra costs incurred. The specific entitlements and the process for claiming them will vary depending on the contract. It is of utmost importance that the parties understand the process for claims in order to ensure that the appropriate notices, warnings and applications are made.

Although these circumstances may be covered by a force majeure clause, some standard contract forms provide a specific clause for inclement weather. The JCT and ICE Forms for instance describe exceptionally adverse conditions as being a relevant event for extensions of time but not costs. The

thought being that inclement weather is neither the fault of the Employer nor the Contractor so if the Employer does not benefit via from liquidated damages, the Contractor should not benefit.

There is no prescriptive definition of exceptionally adverse weather; the JCT Standard Forms of Contract require the contract administrator to determine if an event is exceptional where the ICE Standard Forms require the Engineer to do so. Both forms have time requirements in terms of notifications. Where the JCT prescribes an "as soon as" wording; the ICE contract has several specific deadlines for notifications.

The NEC3 contracts suite classes adverse weather conditions as a compensation event, enabling a contractor to claim for additional time and money. The NEC has a more objective and measurable approach for recording, notifying and claiming for costs and delays for adverse weather. The parties must be clear on what shall constitute adverse weather as well as the exact procedure for dealing with it under the contract.

FIDIC, is partly similar to both the ICE and JCT in respect of recognising a claim for extension of time but not costs; as well as the NEC3 suite in terms of the prescriptive nature of the claim process.

In any case, the parties should ensure that vague references are avoided and clearly defined events with the requirements for measurable substantiation provided for in the contract. Often amendments are made to the JCT, ICE and FIDIC forms to refer to normal adverse weather conditions rather than exceptional adverse weather conditions or a detailed schedule similar to the NEC contracts is adopted. The parties must understand and adhere to the notification process particularly in terms of timings. It is important that claims made under these terms also prove that the delay caused was adverse as well as the weather conditions.

In the event that the project encounters adverse weather conditions, it is essential to keep detailed records including i.e. regular detailed measurements from site (temperature) and local weather stations, how the works affected as well as steps taken to mitigate delays and losses. This information must be submitted with a comparison to historical data demonstrating that the event is exceptionally different to the average.

Latent conditions - are those factors that cannot or have not been identified during site inspection or site investigation. They may not be discernible thorough desk study, interpretative investigation or without opening up works. Typical latent conditions are unseen and unforeseeable features such as soil characteristics, buried structures, utilities, contamination, structural defects, unexploded ordinance etc.

Latent conditions are usually dealt with under the contract through allocation of risk. The contractor may choose to accept certain risks based upon previous experience or desk study but not others. The employer may commission a third party to prepare as much information as possible to limit the likelihood of latent conditions being encountered. This information may then be provided to the contractor with the employers guarantee as to its accuracy.

Frequently however it is the case that the employer does not guarantee the information provided and the contractor is not able to place reliance upon it. The contractor is required to make his own investigations in relation to the site and accept the risks of the provided information as well as the employer provided information being incorrect.

In this circumstance the contractor must be very careful and consider the contract as a whole before accepting this risk. If the contract elsewhere requires the contractor to have unlimited liability, the additional risk of latent conditions would be a very onerous and with a risk potentiality in excess of that which the contractor would accept.

Practical Completion – There is no exact legal definition for practical completion but it is usually agreed under the contract as the moment in time when the contract works are deemed complete with only snagging items, being those minor defects that do not hinder the progress of follow-on works and latent defects to be attended to.

Certificate of Practical Completion – This is a formal document issued upon practical completion and carries legal importance in relation to several contract items including: risk for the works, patent defects, retention, liquidated damages and insurance cover.

Taking-Over Certificate – Is a formal document used in the FIDIC Standard Forms that is similar to the Certificate of Practical Completion. The Employers Representative (the Engineer) will issue the Taking-

Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract, excepting any minor outstanding work and defects which will not substantially affect the use of the Works or Section for their intended purpose.

Defects Liability or Rectification Period – The period of time following Practical Completion during which a contractor must arrange to repair any defects that appear. During this period the contractor has the legal right to return to site and repair any defects. The exact period is agreed under the contract and is ordinarily 6 of 12 months.

Patent Defects - Defects that are apparent and notified at Practical Completion.

Latent Defects - Defects that are not apparent and cannot be discerned upon inspection at Practical Completion.

Certificate of Making Good Defects - A formal document issued at the end of the Defects Liability Period or upon completion of all required repairs to any defects.

Time Limitation – The Limitation Act 1980, provides statutory limitation periods that may extend beyond the defects liability period and during which, the contractor remains liable for the repair of defects.

The Act describes a limitation period commencing when the "cause of action accrues," case law provides that for contractors and designers in construction contracts, this point is upon Practical Completion, substantial completion or when the making good defects certificate is issued.

This commencement date can be extended in the execution of a collateral warranty. To prevent this, the parties must agree an express condition of the collateral warranty matching the new limitation period to the original contract period.

Under the Act, actions for breach of contract and tort can be brought within two periods of time depending whether the contract is a simple contract or formal deed. A simple contract is executed with one signature and has a six year period. A formal deed (sometimes called under seal if a company seal is used in accordance with the company's articles of association) is executed with signatures from two directors on behalf of a company and has a twelve year period.

The Law of Property (Miscellaneous Provisions) Act 1989 provides that a document which is clearly worded with the intention to be a deed (it must be declared thus on the front cover and be signed by the person bound by the contract), has the effect of a deed even if it is executed with only one signature. Care must be taken to ensure that the wording of any collateral warranty reflects the intention of a simple contract otherwise the document may have the effect of a deed.

The courts shall enforce contracts made under seal even if they are without valuable consideration (being the mutual transfer of something of value between the parties).

The Latent Damage Act 1986, extends the above periods by 3 years for claims of negligence associated with defects caused by a fault in design, materials or workmanship that occurred at the time construction was completed but that were not apparent at the time of completion. These are subject to an overall limit of fifteen years from the accrual of damage.

It is possible to restrict the liability for latent defects and this is usually achieved through exclusive remedy clauses. The Act's limitation periods can be reduced by contractual agreement for breach of contract and negligence claims. These amendments to the limitation period are commonly agreed to limit risk to a contractor and serve to prevent one party from bringing a claim against another party once a specific time period has expired regardless of the Act.

It is of utmost importance that a clause amending the limitation period is clear in relation to the duration of the limitation period, when the limitation period commences, the expiry date for bringing a claim is, the type of claims the limitation period relates to as well as the procedure for bringing claims.

Whilst such amendments may be tested under the legal provisions preventing unfair contract terms, as described elsewhere in this document; when the parties agreeing to the shorter limitation period are commercial parties of equal bargaining strength; the courts are likely to hold that the shorter limitation period is reasonable.

Once the limitation period for a claim has expired, a defendant can raise this as a defence and the claim may not be considered by a court. With all limitation periods, the court will not unilaterally time bar a claim based upon a lapsed limitation period unless the defendant pleads a claim is time barred upon the basis that the time for bringing the claim has passed.

Should it be found necessary in order to settle a dispute without raising a claim, the Limitation periods can be suspended by a standstill agreement. This agreement can also be used to allow time for compliance with a pre-action. The standstill agreement defers the deadline; it does not cancel the liability. It is important to ensure that any such agreement is drafted to accurately and clearly present the understanding and intention of the parties.

Time at Large – occurs if the contract is without a defined completion date. Time at large may also occur if the mechanisms to grant and extension of time are absent from the contract and the contractor has been prevented in their obligation to complete the works on time due to delay or disruption by the employer. Such delay or disruption shall be deemed to have occurred with the breach of the contract - fail to: allow access to the site on time; provide essential instructions; issue information; obtain consents or disrupt progress directly or indirectly via other stakeholders, or valid action i.e. vary the works, instruct additional works or suspend the works; time may become at large. In these circumstances, common law prevents the employer from enforcing the contractor's associated contractual obligations to meet a completion date or pay LDs (unless the LDs were defined as the employer's sole remedy for delay under the contract).

The contractor shall still be required to complete the works in a reasonable time and shall remain liable for any general damages that are proven for actual costs incurred by the employer.

Exclusive (or Sole) Remedy clauses explicitly limit the ways in which a party can seek remedy from another party for a particular event to those named under the clause. These remedies are described for specific events and exclude any other remedy. As an example, it is possible to exclude a party's right to common law damages for breach of contract or right to damages for negligence. Parties must be very careful when agreeing these as the inclusion of exclusive remedy clauses extinguishes every remedy that is not covered by statute. As in all contract clauses, it is very important that the intention is clearly stated.

Indemnity Clauses - allocate risk for claims or for loss or damage between the parties to the contract. Due to the complex nature of the relationships between all parties involved in a construction contract as well as a large body of case law; indemnity clauses require very careful consideration when drafting and accepting.

Time of the Essence - clause provides consequences for one party of the contract if they fail to perform a contractual obligation within a specified time limit. Missing this deadline will constitute a material breach of the contract with consequences such as the loss of a right or termination.

These clauses must be carefully drafted to identify particular duties critical to the contract otherwise they may be deemed as punitive and unenforceable.

Under English law if a contract provides a clause for a fixed compensation remedy for delay, such as liquidated damages, it is not possible to add another remedy such as termination. The parties must therefore agree whether to have a fixed compensation or termination clause for delay.

Exclusion clauses - define specifically what a party is not liable for. These clauses must be carefully and clearly written to ensure the intention of the parties is reflected in the loss excluded. Typical exclusions are consequential loss, indirect loss and loss of profit. When drafting any exclusion clauses, parties should not rely upon generic definitions but should clearly and specifically detail the types of losses that they will not be liable for in the event of any breach of contract. This may require amendments to be made to standard forms or company terms and conditions.

Unlimited Liability - A contractor's liability for breach of contract will ordinarily be unlimited. If the contract has a high degree of financial risk i.e. high liquidated damages, no reliance on information provided, fit for purpose obligations without insurance etc.; it is advisable that the contractor seek to place a cap on liability.

Financial Limitation occurs when a contract imposes a financial cap on the recovery of costs between parties.

Any agreement for financial cap should consider the level, the basis (each and every claim or in the aggregate, including LDs etc.) and the exclusions.

Some contracts include a mechanism for imposing a limit on liability with some i.e. FIDIC, providing a template. Some standard contract forms, including JCT, only contain provisions for express caps on liability related to loss of use, loss of profit and other consequential losses flowing from design defects. Others, the NEC3 for example, contain overall caps on liability subject to limited exclusions such as liquidated damages, loss to the Employer's property etc.

It is common in construction contracts for caps on liability to be expressed as a lump sum, the level of the contract value, a percentage of contract value, a multiple of fees, sufficient for the replacement value of defective works only or level of insurances maintained.

Net contribution - clauses limit liability when more than one party to a construction project are liable for the same loss or damage. The clause limits the liability of each party to the amount for which it is responsible.

Any limitation on liability should be based on what the risks of the project are and who is best placed to take responsibility for them. It may be that insurance cover provides a better solution to limiting liability. In any case, financial limitations on liability can effectively reduce the risk to a contractor.

If a limitation is however found by a court to be unfair, it may be void and unenforceable; see The Unfair Contract Terms Act 1977 below.

Discrepancy between contract documents - As listed above, contracts are constructed from several documents and it is not unusual for ambiguity or conflict between these documents to arise. In the absence of contract mechanisms to disambiguate these issues, should a dispute arise; the common law principles of contract interpretation will be applied. These Common Law principles direct the courts to give precedence to those documents specific to the contract over standardised items.

To avoid this conflict, the parties may choose to include a priorities clause to the contract terms. Such a clause should define the hierarchy of precedence between the contract documents. The order of precedence shall be exercised in the event of contradiction or ambiguity between documents.

Alternatively, the contract may place a duty upon the contractor to review the contract documents and notify any ambiguities, discrepancy or conflict to the employer by a particular deadline. Once the deadline has passed, any issues that have not been notified will become the liability of the contractor.

The *contra proferentem* rule - is the principle which provides that any ambiguity should be interpreted against the party who relies on it.

Equality of Bargaining Power - This is an important concept used by courts to determine the intention of the parties when the contract was agreed and if the *contra proferentem* rule should be applied. The courts are becoming increasingly more willing to uphold contractual terms agreed between commercial parties of equal bargaining strength even where there may be some ambiguity or submission that means some terms were unfair. Where bargaining power is unequal however, the courts may find the contract to be non-enforceable.

Express and Implied Terms - The entitlements and obligations of parties to a contract are defined by the contract terms. Express Terms are those explicitly agreed by both parties either orally or in writing. Case law also recognises implied terms as those that are not explicitly agreed but found to be reasonably presumed as either a matter of law or a matter of fact.

Those implied as a matter of law are found in the general application of contracts and may relate to statutory standards or legal incident

Those implied as a matter of fact are formed from the presumed intention of the parties to a particular contract. They may be judged as necessary to give the contract business efficacy; or had the parties considered is at the time the contract was made, obvious that both parties would have agreed to them.

In some instances, the courts may recognise a third definition of implied terms; those implied by custom. These are deemed to be those that are prevalent in a particular trade and that it is common practice to provide for in a contract.

Recent case law provides that if a term is needed to effectively execute the contract agreement or achieve the parties' mutual aims of the express agreement and is purposively construed against the admissible background; then it will be implied. Moreover, if a term was necessary to make the contract work and a reasonable person would have understood that the implied term was necessary to make the contract work; the courts may imply the term.

Recent Case Law has proposed six conditions which should be satisfied for a term to be implied in a contract:

1. it must be reasonable and equitable;
2. it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
3. it must be so obvious that 'it goes without saying';
4. it must be capable of clear expression;
5. it must not contradict any express term of the contract.
6. a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

If in the ordinary course of matters and common reasonable understanding; circumstances and facts indicate a mutual intention to enter into an express agreement; an implied obligation may be deemed to have arisen. This may relate to instructions or a promise to pay.

It is of utmost importance that during the negotiation of the contract, the parties take care to leave as few gaps for implied term as possible as well as explicitly state their intentions so as to avoid the courts making their own interpretation of the intentions and implying terms.

Punitive damages (exemplary damages) - In construction contracts, punitive damage clauses are unenforceable. A claimant must demonstrate that the damages levied are essentially compensatory in nature as opposed to penal.

Case law provides that a sum is not a penalty if it was considered by the parties at the time of entering into the contract to be a genuine pre-estimate of the loss that might be incurred as a result of the breach in question. The sum shall be considered a penalty if it is intended as a deterrent. This legal test is sometimes used to assess the level of liquidated damages claimed by one party against another.

Restitutionary Damages are those that seek to deny a party who has committed a wrong or breached a contract from making gains from such.

Fluctuation Clauses are provisions for dealing with the effects of changes in the price of commodities. They are usually included in contracts for large projects lasting several years where price changes may be significant. In these cases the contractor's price will typically be based upon current prices with a provision for reimbursement should the price of specific items vary by a certain percentage from the agreed base rate. These fluctuations shall ordinarily be measured using a recognised source of published priced indices. Where a commodity's price is particularly volatile; fluctuations clauses specific to these items may be added regardless of the project size or duration. It should be noted that these fluctuations recognise deflation as well as inflation.

Contracts may also provide for fluctuation in other aspects of the contractors costs such as tax, labour or administrative costs.

Contract Determination – The conclusion of a dispute bringing the contract to an end.

Duty to Warn - Whilst in UK law there is no specific Duty to Warn, there are circumstances where a duty shall exist. Case Law provides that the duty to warn is part of a competent professional's duty to act with the skill and care. Professionals have a duty to warn a client of any issues or dangers that they can reasonably be expected to have been aware of. Under Tort a duty of care requirement shall require a party to warn of danger. Specific contract terms also place a duty to warn upon parties in certain situations; contractors must for instance have a duty to warn of risks associated with developmental or untried designs. Implied duties shall also exist under the contract; to advise on potential defects in materials or design. There are several items of legislation CDM for example, that also place a duty to

warn on professionals; the Health and Safety at Work Act amongst other things; requires employees to take care of the health of those who may be affected by their actions at work.

Strict Liability - This is similar to fitness for purpose but relates to the accuracy of drawings. The professional warrants that their work will be entirely accurate and shall be liable if this is not the case; notwithstanding negligence, the reason for the error, the influence of others or actual damage experienced by the claimant.

Privity of Contract - In common law it is not possible for a contract to confer rights or obligations on a party who is not party to the contract. Only parties to a contract can enforce the terms of the agreement.

The Contracts (Rights of Third Parties) Act - This Act enables the parties to a contract to provide a means for a third party to benefit from the contract despite not being a party to the contract. In order to achieve this and not fail due to privity of contract: the contract must expressly provide that a party may enforce a term of the contract or, construct the contract to clearly describe that a benefit has been conferred upon a third party and that it is the parties intention for the third party to be enabled to enforce any term that provides that benefit.

Assigning Benefits (or Assignment) – is the transfer of an interest or benefit from one party to another. The party's obligations or liabilities under a contract cannot be transferred. The assignee is entitled to the benefit of the contract and to enforce its rights against the other original party to the contract. In construction contracts assignment may arises in association with collateral warranties granted to third parties. The third party funder may for instance require the employer to assign contractual rights as security against the contractor and designer. Similar to collateral warranties, the specific provisions relating to assignment must be carefully agreed between the parties.

Novation - With the agreement of the existing parties and a new party; both the burden and benefit of a contract can be novated to a new party. This cancels one contract and replaces it with a new contract between different parties.

Defective Premises Act 1972 - Places duties on parties undertaking work associated with dwellings to ensure that work is completed in a "workmanlike or as the case may be; a professional manner, with proper materials and so that as regards that work, the dwelling will be fit for habitation when completed". The act does not require a contract to be in place and provides a means for a subsequent owner to make a direct claim against the party who completed the work. This duty cannot be excluded and may only be dissolved if the party was under direct instruction from a third party.

The Unfair Contract Terms Act 1977 - The Unfair Contract Terms Act 1977 is used alongside the Unfair Terms in Consumer Contract Regulations 1999, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.

The Act does not determine whether a contract is unfair but places restrictions on the contract terms that can be agreed between businesses. It sets rules for the ways that exclusion clauses can be used to limit liability or indemnities as well as non-contractual notices excluding or restricting liability for negligence (i.e. disclaimers).

In summary; the statute introduces a test of reasonableness and any business selling goods or services is prohibited from excluding liability for:

- Death or injury - under any circumstances.
- Losses caused by negligence - unless to do so is 'reasonable'.
- Defective or poor quality goods - unless to do so is 'reasonable'.

The Act does not define the term 'reasonable' but does directs the court to account for: "circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made".

8. DESIGN

Some contracts are tendered when the design is incomplete. Depending upon the procurement route; the contractor must be very careful in agreeing the contract terms. It is best practice to agree "frozen details" upon which the tender shall be based and for the variation clauses to recognise the impact of changes to the design. This would apply in either a build only or design and build scenario. Some contracts however seek to

provide clauses that fix the contractors price regardless of the development design. An example of this is a variation clause excluding:

> 'any change/s or additional work/s caused by or resulting from the development of the design of the works (including…the development of the design for that part of the Works not documented or not fully documented as at the date of the Builder's tender and/or in the [contract documents])'.

The result of this is that the contactor takes the risk on the design changing as well as for refinements made to that design once completed. The contractor must be wary of amended clauses relating to design and ensure that the contract provisions accurately reflect the intention of the parties as well as the scope of work that the contractor has allowed for.

Key Concepts

Contractual Standard of Care - Should a contractor be assuming responsibility for part of or all the design on a project; they shall be expected to give undertakings as to the designs suitability as well as to complete the work in accordance with relevant standards. It is therefore of utmost importance that the contractor understands the design obligations under the terms of the contract and implied by law to discharge their liability as well as put sufficient levels of professional indemnity insurance in place.

Reasonable skill and care - As established in the Supply of Goods and Services Act 1982; in the absence of any written terms and conditions to the contrary, a professional designer has a duty to act with reasonable skill and care. This requirement is mirrored in common law where a professional person is not negligent if the work is carried out to the same standard that another reasonably competent member of the profession would have met.

In the event of a professional liability claim against a designer; should the designer demonstrate that their duties were performed in accordance with the normal practice and professional standards current at the time of acting; the designer shall be found to not be in breach.

Contracts often include a single clause combining these statutory and common law duties requiring the consultant to use the level of reasonable skill and care to be expected of an experienced member of his profession.

Although reasonable skill and care is usually covered by insurance policies, care should always be taken when agreeing the contract to ensure a higher standard is not required. Insurers' approval should always be sought for any contracts related to factors that are not within a party's ordinary undertakings i.e. where a project concerns works on a railway, to a nuclear facility or a high-rise building and the Employer requires the standard of a professional experienced in railway works, nuclear facilities or tall buildings.

Fit for Purpose - A fit-for-purpose obligation is a warranty that the completed works will be fit for their intended purpose. If a professional agrees that their work will be fit for the purpose required, they shall be held liable regardless of negligence, cause or the fault of others if the work later proves unsuitable.

Contractors may be expected to provide this if their contract includes design of any permanent element of the works.

As it is impossible to be sure as to the final purpose for the works, this obligation carries a very high risk and accordingly most professional indemnity insurers will not cover absolute obligations such as a "fitness for purpose obligation". It is therefore usually recommended that contractors should avoid such obligations in their contracts.

9. INSURANCES

There are several insurance policies that cover the different losses that may occur in construction projects.

Public Liability – this insures against liability for injury or death caused by the works to members of the public. This also insures against liability for loss or damage to some types of property.

Employer's Liability – insures against liability for injuries to the contractor's employees.

Professional Indemnity – insures against liability for defective designs with a minimum coverage often required by both the terms of the contract and some regulatory bodies.

Property Damage and Business Interruption - insures against both damage to property and business interruption.

Contractor's All Risk – insures the completed works and site materials against damage.

Non-Negligence Insurance – some standard forms require insurance to be put in place protecting the developer from expense, liability, loss, claim or proceedings incurred as a result of damage to existing buildings being worked upon and/or property on adjoining land, from certain works being undertaken.

Uninsured items - The contractor shall be liable for any shortfall in the cover required by the contract it is very important therefore that the specific wording of the contract is cross checked to the insurance policy.

Latent Defects - Defective workmanship is not ordinarily covered by any insurance policy although it is possible to gain some protection through latent defect guarantees such as the ASUC Insurance Backed Latent Defect Guarantee (see ASUC in Appendix) or Performance Bonds.

Some contracts may require the contractor to hold specific types or level of insurance. The contractor must ensure that they hold all those insurances relevant to the works due to be undertaken. Most policies explicitly define limits of cover; this may be value or duration of contract, specific work types or characteristics (height or depth), location or responsibilities. It is therefore important for the contractor to seek advice from their broker whenever the contractor is considering a contract where the work is of a different nature, character, scope or circumstance to those normally.

It is important also for the contractor to vet and audit their supply chain to ensure there is no short fall or gap in insurance cover between themselves and their sub-contractors, consultants or suppliers.

10. PROVISIONAL SUMS

Provisional Sums are items included in a contract to account for work items that may or may not be undertaken by the contractor or that are yet to be defined fully. If the work item is undertaken; the Provisional Sum will be valued during execution of the contract works and the contract sum will be adjusted accordingly as will the planning, preliminaries and programming of the works.

Provisional Sums are typically used in construction contracts to account for; works by specialised contractors that have yet to be procure; to account for unforeseeable items such as the removal of buried obstructions; or as yet unagreed aspects of the specification or design such as reinforcement quantities or type of brick.

RICS Standard Method of Measurement, seventh edition (SMM7) as adopted by the JCT Standard Forms for definition of Provisional Sums, describes them as either; defined with quantities, scope or extent, to allow the contractor to calculate allowances for programming, planning and preliminaries or; undefined when there is insufficient information for the an allowance to be made. Undefined Provisional Sums shall entitle the contractor to additional payment and extension of time should they be undertaken. The extent of definition determines the degree to which the relevant contract particulars will be adjusted upon execution.

Similar to the JCT Standard From, the ICE Conditions of Contract, seventh edition and FIDIC's Red Book also define provisional sums although make no specific allowance for their impact upon programme.

The potential disadvantages of provisional sums are many and as a result the NEC3 Standard Form makes no allowance for them in the belief that if an aspect of the works cannot be precisely defined, they should not be included.

The less detailed the contract terms are for dealing with provisional sums; the greater the likelihood there is of a dispute arising. The parties to the contract should take care to only use Provisional Sums where there is no alternative and to clearly define how they are to be accommodated in the wider contract. Every effort should be made to elucidate any uncertain aspects of a work item to negate the need for a provisional sum.

11. PRELIMINARIES

Preliminaries are those general items the contractor requires to execute the contract but that are not necessarily required for a particular work item nor do they form part of the completed works. As such they are a distinct item in the contract and are gathered separate to other costs.

Preliminaries usually consist of the general administration costs, facilities, site services, welfare, accommodation, utilities, Health and Safety, security, rents, leases, suspensions, licences, general plant, site supervisions and management staff etc.

As preliminaries are a general requirement to support the execution of the contract, they are time related costs based upon the estimated duration of the contract. In certain circumstances it is therefore possible to claim additional costs for preliminaries when the programme of works has been extended.

The contractor should be clear on what the preliminaries consist of and to what they relate in the programme to enable a valid claim.

12. PROGRAMME OF WORKS

The programme of works, sometimes referred to as "the master programme," is a document setting out the expected duration of the contract works. The detail of the programme will vary depending upon the party and contract but all will usually show the works broken down into the individual elements, the start date, the duration of each item, the work sequence, how the work items relate to define the critical path and the completion date.

Some contracts require the contractor to prepare a programme and this will be contractually binding. Others require the contractor to produce the programme but do not include it as a contract document nor derive any obligations from it. The employer in either case may prescribe certain contractual milestones or a specific construction methodology to be adhered to.

Whether contractually binding or not, the programme is a useful tool to plan the interface of the different contractors, suppliers and logistics etc. It is good practice therefore to carefully prepare such a document either as a reference target programme indicating the contractor's expectations to the employer or as a detailed submission to be included as a contract document. The latter will impose obligations upon both the parties and should be prepared to show milestones and requirements upon the employer i.e. release of detailed design information, possession, notice periods, manufacturing lead in etc.

The contractor must ensure that the programme reflects realistic productivities as well as factors time for unrecoverable delays and disruptions such as supplier failure or inclement weather. It may be that the contractor chooses to collapse elements of the programme to show only macro construction items and milestones rather than full work schedules that contractor wishes to remain free to change unilaterally.

A programme included as a contract document must be adhered to as any unagreed or unsubstantiated departure will constitute a breach of contract that may form the basis of a claim.

The considerable benefit to the contractor of such a document being included in the contract is that it becomes much easier to demonstrate the impact of variations, delays and disruptions. The contract programme can be easily adapted to reflect as built conditions for regular employer updates and form the basis for delay analysis.

The programme need not only show construction items, as mentioned above, requirements of the employer can be added as well as pre-enabling items such as third party approvals, preparatory works, information from the employer's consultants, lead in time for manufacture etc.

Some parties argue that contractual programmes give rise to increased claims or reduce the contractor's freedom; that the contractor will be at greater risk and will look to value this in their price. It might be counter argued that the more planning and communication of programme requirements and expectations; the less scope for confusion or error and conflict. The programme prompts the parties to consider the requirements to adequately discharge their duties and other parties, including those such as the consultants who hitherto may not have had foresight, to acknowledge these. It is for the individual organisation to decide based upon the commercial information to hand in each negotiation.

The majority of standard forms have provisions for a contract programme of works:

The FIDIC Standard Forms (Red and Yellow books) require a programme to be submitted together with a report on method and resources for each work stage.

The NEC3 Standard Form operates key administrative provisions based upon the programme; to such extent that payments may be withheld in the absence of the contractor having submitted their programme.

As there may be a hierarchy of importance between the documents, the parties must be familiar with the specifics of the contract with regards to the prominence of the programme and the specific provisions thereto and make appropriate allowances accordingly.

Case law provides that where the programme is included as a contract document and the contractor is obliged to comply with specific dates, it is not possible to imply an additional obligation for the contractor to carry out the works regularly and diligently or to give business efficacy to the contract.

To counter this, Employers may seek to place express obligations on the contractor to complete the works with due diligence as well as meet the dates in the programme.

13. PAYMENT

The requirements for payment in construction contracts are defined by The Housing, grants and regeneration Act 1998 (The Construction Act) as amended in 2011. The purpose of the amended Act is to provide a fair payment process giving contractors improved rights including suspension for non-payment and access to adjudication to resolve disputes.

The Act requires all construction contracts to include payment terms that provide an adequate mechanism for determining what and when payments become due. Payments can be made in stages, instalments or periodically but must have defined Payment dates including due date (the date each month when a payment becomes due), final date for payment (the date on which payment should be made) etc. The Act rules that any conditional "paid when paid" clauses based on performance obligations on another contract are prohibited and superseded by the payment provisions in the Act.

The Act also requires the employer or a person specified in the particular contract (payer) to issue notices to the contractor. Payment notices must be issued advising the amount considered due, on the date the notice is given, together with a calculation. The payment notice must be issued within 5 days of the payment due date. If the Payer intends to pay less than is set out in the payment notice; a pay less notice must be issued not less than 7 days before the final date for payment. The parties may however agree for these durations to be changed.

Should a contract be silent on any of the above; be missing payment provisions or contain any clauses that are non-compliant with the Act ; then the statutory provisions of the Act shall apply.

Where the contract requires payment applications to be submitted by the contractor, notifying the Payer of the amount the contractor considers due; the contract must be clear on the dates these are to be issued. In the event that a payment application is issued and the Payer fails to issue a payment notice by the date required by the contract; the payment application shall determine the amount due to the contractor. Should the Payer disagree with this amount; a pay less notice must be issued setting out the amount the payer considers due together with a calculation. In the absence of a pay less notice being issued, the amount applied for by the contractor shall become contractually due.

Where the contract does not require a payment application from the contractor but the Payer does not give a payment notice, once the date for payment notice has passed; the contractor can issue a 'payee notice'. The payee notice then determines the amount due to the contractor. Similar to the payment application, should the Payer fail to issue a pay less notice, the value of the payee notice becomes due. In this instance, the final payment date is delayed by the amount of time between the due date of the original payment notice and the date the payee notice was issued.

In summary, the notices are critical to both parties.

If the contractor fails to issue a payment application on time, the payer and employer have no obligation to administer the application in that period.

If the Payer fails to issue a payment notice, the contractor can rely upon the payment application or issue a notice of default.

If the Payer does not issue a pay less notice notifying their intention to pay less than that applied for; the employer shall have to pay the sum that the contractor has applied for.

The timings of the notices are of utmost importance. The parties to the contract must agree the frequency of the due date and final date for payment. The contract must be drafted to be very clear on these dates and the parties very careful to adhere to them.

The Fair Payment Charter

In 2014 the UK Government established a Construction Supply Chain Payment Charter aiming to create a more collaborative culture and sustainable supply chain. The charter provides 11 "fair payment commitments" including:

- a commitment to reduce supply chain payment terms to 45 days from June 2015 and 30 days from January 2018.
- a commitment to not withholding cash retentions or ensure that any arrangements for retention are no more onerous than those implemented by the client in the Tier 1 contract.
- a commitment to not delaying payment and making payments electronically.
- a commitment that any withholding of payment due to defects or non-delivery is proportionate, and clearly, specifically and demonstrably justified in line with the arrangements set out in the contract
- a commitment to implement a processes enabling the effects of contract variations to be agreed promptly and fairly with payments for such variations to be included in the payment immediately following the completion of the varied works.

Any organisation that signs the charter agrees to apply the fair payment commitments in its dealings with its supply chain as well as to be monitored for the purposes of compliance by reporting against a set of agreed key performance indicators (KPIs) and to consider the performance of its supply chain against those KPIs when awarding contracts.

In 2015 the government produced the Public Contracts Regulations 2015. These provide directives, regulations, policies and guidance relating to the procurement of supplies, services and works for the public sector. These regulations require Public authorities to pay within 30 calendar days. On central Government contracts payments to Tier 1 Contractors must be within 14 days, to Tier 2 within 19 days and to Tier 3 within 23 days of the due date, which will be 7 days after the common assessment or valuation date established by the client in the Tier 1 contract.

Late Payment of Commercial Debts (Interest) Act 1998:

The act establishes that a commercial entity with overdue debts for goods or a service provided by another party will be liable for 'statutory interest' defined as 8 per cent plus the Bank of England base rate. Should an employer be late in making payments to the contractor, the contractor is entitled to charge these rates provided the employer is a commercial entity.

Late Payment of Commercial Debts Regulations 2013:

These regulations set a payment period limit of 60 days for businesses and 30 days for public authorities.

Prompt Payment Code:

This is a voluntary agreement managed by the Chartered Institute of Credit Management. The code of conduct seeks to standardise payment practices and ensure invoices throughout the supply chain are settled on time. Those who sign the agreement commit to:

- Aim for 30 day payment terms with suppliers with a maximum limit of 60 days.
- To pay 95 per cent of undisputed invoices within 60 days
- Clearly communicate payment procedures to suppliers and operate a complaint and disputes mechanism.

14. RETENTION

Retention describes a deduction made to an amount certified as due to a contractor on an interim payment certificate. This deduction is calculated as a percentage (typically 5%) and must be clearly set out with the certificate. This retention is usually reapplied down the supply chain from main contractor to sub-contractor with the intention of ensuring that the contract works are adequately completed.

The Construction Act prohibits payments being conditional upon the performance of obligations under other contracts. The release of retention to a contractor cannot therefore be conditional upon the Main Contractor's

practical completion, making good defects, certifications nor any decision by the client relating to the Main Contractor's obligations.

Release of retention must be on a clearly-definable date relating to the contractor's contract with the employer. A proportion of the retained payments (usually half) is released upon Practical Completion (referred to as first moiety) with the balance released upon certification of making good defects (second moiety).

The value of retention and the way it is held is agreed under the contract and reflects the risk profile of the project. Enhanced retention can for instance be offered in lieu of a Performance Bond, full release of retention may be agreed at Practical Completion in exchange for a Latent Defects Guarantee Certificate and it is possible for the retained money to be kept in a trust account certified to contractors.

15. BONDS

A bond is a form of security provided by a bank or insurance company (bondsman) on behalf of a contractor to protect an employer against the loss or damage caused by a contractor's non-performance. They are either based upon primary or secondary obligations.

Bonds based on primary obligations are paid by a bondsman on demand without any preconditions i.e. without reference to the liability of the contractor. These are sometimes referred to as "on-demand" bonds and include advance payment and retention bonds. In general on-demand bonds are more common on international projects. These are independent of the underlying construction contract and therefore any variation in the construction contract will not discharge the bondsman from liability.

Bonds based on secondary obligations are where the bondsman is only liable to pay the Employer if the contractor has breached the contract. These are also referred to as Default or conditional bonds and include guarantees such as those from a Parent Company. These may cover specific amounts of money or payment for all the contractor's obligations. With a default bond, the liability of the bondsman may be diminished or entirely extinguished if the contractor's obligation to the employer is void, unenforceable, illegal, has been discharged, has been reduced, is subject to a defence or right of set-off. Moreover, a variation to the underlying contract may, without specific wording otherwise, discharge the bondsman from its liability.

A critical difference between the primary and secondary obligations is the principle of Co-extensiveness which provides: where secondary obligations are concerned; the bondsman's liability is limited to that of the contractor; under an on-demand bond, the bondman's liability is to the extent provided by the wording of the on-demand bond itself, regardless of the contractor's liability.

In many instances a hybrid form of the above is agreed as a "conditional on demand bond" that will contain conditions precedent to the release of the surety. Typically this may include an adjudicator's award or a statement from the employer's representative that the contractor is in default.

There are several bonds used in construction contracts:

Retention Bonds

As the value of retention can be a significant and therefore cause contractors cash flow issues, it is possible for a Retention Bond to be provided instead. A retention bond secures the value that would have otherwise been retained enabling the client to release the full value certified without retention. The release of the bond is treated broadly in the same way as retention with a proportion released upon practical completion and the balance upon making good of defects.

Performance bond

A performance bond offers the employer a surety to guarantee the performance of the contractor. Should the contractor fail to perform in accordance with the contract the surety covers the losses suffered by the employer. These bonds are usually subject to a limit often expressed as a percentage of the contract sum. In some instances, it is possible for the contractor and employer to agree enhanced retention in lieu of a performance bond.

Advance payment bond

Used to protect an employer who has made advance payments to a contractor against the contractor not completing the works covered by the payment.

Off-site materials

Similar to the Advance Payment Bond but used in relation to employer payments made for materials kept off site.

Defects liability bond

Provides an employer security against the contractor failing to remedy a defect.

Adjudication bond

Provides the employer security that payment from an adjudicator's decision is made.

In most instances the Employer shall seek to include a specifically worded bond in the contract. Should the contractor intend to enter into contract with a bond; it is imperative that they agree the wording of the bond with their bond provider and ensure a mutually acceptable wording is included in the contract.

Bonds ordinarily attract a fee from those, usually banks, providing them, should this prove prohibitive either due to the cost or the difficulty in finding sub-contractors able to provide these bonds. It may be possible to negotiate other commercial terms to negate the need for a bond. A contractor may find it more convenient to offer increased retention or discount in lieu of a bond.

Any such discount should be used to gain advantages such as prompt payment; the contractor may seek to provide prompt payment is a condition precedent to the discount.

16. DAMAGES AND LIQUIDATED DAMAGES

Claims for damages occur when a party defaults in their duties under the contract and the opposing party seeks to recover costs incurred as a result of the default. To successfully bring a claim for damages as a result of a breach of contract, the party suffering the loss is required to demonstrate the following:

- A breach of contract has occurred
- A loss has been suffered as a result of the breach
- A measurement of the loss
- The losses are not too remote.

The process of pursuing damages for breach of contract often causes dispute and can be both time consuming as well as costly. To avoid this, the parties can agree to Liquidated Damages (LDs) (sometimes referred to as Liquidated and Ascertained Damages or LDs) as a pre-agreed fixed compensation to a party in the event another party's default under the contract.

LDs should be based on a calculation of the actual loss the employer is likely to incur if the contractor fails to discharge their duties under the contract. The LDs are usually set as a fixed sum per unit of time (Hour, shift, 24 hours week etc.) but may be varied to account for different stages of the project where losses to the employer may fluctuate. The parties must ensure that if the contract allows for sectional completion or partial handover; the LDs change to accurately reflect the genuine estimated loss.

LDs that are deemed not to represent a genuine pre-estimate of loss may be seen as punitive and shall be unenforceable. It is important therefore that the parties take care to agree the sum payable in the event of a breach represents a genuine pre-estimate of loss. In the event that the LDs fail this test, it is still possible for LDs to be levied but at a recalculated rate.

In some circumstances the employer may choose to pursue a claim for unliquidated (actual) damages from a breach of contract as described above. These unliquidated damages are unlimited.

The contractor may seek agreement on a financial limitation of the LDs in the contract. In this circumstance the employer may look to insert a termination clause in the event that the cap is reached.

Although LDs can be applied to a range of breaches they are most commonly tied to a contractual completion date and levied by the employer in circumstances where the contractor has failed to complete the works on time. The employer does not have to prove a loss in order to recover LDs, if the contractor is in delay; the employer is contractually authorised to deduct the specified sum.

There are some instances, other than a challenge of the genuine pre-estimate of loss, when this may be disputed. All parties in a contract have a duty to mitigate losses. The rule of mitigation requires the claimant in

particular, to take reasonable steps to minimise their losses. Under this rule, a claim to recover losses may be negatively affected by a failure to take reasonable steps to mitigate said loss. Another common defence against LDs is that the employer prevented or impeded the contractor from discharging their obligations. This might occur due to disruption or delay.

Standard forms of contract shall ordinarily provide clauses for Liquidated Damages as well as explicit requirements for how they are to be administered. Should these requirements not be followed; the LDs cannot be enforced.

Should it be agreed between the parties that the LDs provisions in a standard form contract are not to be utilised or are being provided for elsewhere; employers must ensure that the entire provision is struck out. If instead, the provision is left or "nil", "zero" or similar is entered as a rate of LDs; the contractor shall be deemed to have zero, nil or similar liability for delay related damages.

It is important to note that when deducting liquidated damages the employer ensures that the correct contractual procedures are adhered to. Contract Law provides that if the Contractor fails to complete the Works or a Section by the relevant Completion Date and the employer issues a certificate to that effect; should an extension of time be granted thereafter; the extension shall cancel that certificate. In these circumstances the employer cannot claim Liquidated Damages.

17. COLLATERAL WARRANTIES

Collateral Warranties are an agreement that extend a party's contractual obligations, under an existing contract; to a third party outside the contract. This places a duty upon the original party to provide a benefit to the third party that due to Privity of contract and the limit of common law, they otherwise would not have been liable for. The agreement does not however place any liability upon the third party.

Collateral warranties are most often used when the employer intends to sell the completed construction to a third party or when the project is being funded by the third party. In the case of the former, should defects arise in the works, the collateral warranty makes the original party liable to the third party for rectifying these defects. In respect of the latter; should the original employer become insolvent, the collateral warranty may provide the funder with the right to assume the role of the employer under the contract and ensure the works are completed.

The purpose of the collateral warranty is to enable the third party to hold parties to the original contract directly liable for discharging their duty.

Some of the standard contract forms offer templates for collateral warranties but some employers and their funders require bespoke warranties. In either case, it is of utmost importance that anyone signing a warranty checks the wording with their insurers to ensure that cover shall be provided and that they are not accepting a greater of larger liability than that under the original contract.

18. CONTROL OF COMMUNICATIONS THAT LEGALLY BIND THE BUSINESS

For a contract to be legally binding, it must be signed by an individual with the appropriate authority. This would normally be a director of the company, its solicitor, or a manager.

If a contract is signed by an employee of the organisation and the other party has no reason to doubt the authority of the signatory; the contract shall be legally binding for the employee's employer.

The Corporations Act provides three kinds of authority an employee may have to bind the organisation. A contract is validly signed if the signatory has either actual, implied (apparent) or ostensible authority. Actual authority is granted by power of attorney, letter of authority or an organisation's authorised signatories list. Implied authority is demonstrated by the nature of the individual's role. Ostensible authority is demonstrated by the individual previously signing contracts with actual or implied authority.

It is important that organisations have a clear signatory policy identifying which individuals shall have the authority to sign legally binding documents. Parties can avoid confusion by sending and receiving correspondence confirming who the authorised signatories are.

Any document requiring signature should be carefully reviewed. Some may bind the individual as well as the organisation or the individual instead of the organisation. Moreover, the name of the companies should be carefully checked to ensure that the parties to the contract are correctly identified on all correspondence.

Capacity

The law states that minors (those under the age of 18); inebriated and mentally ill individuals do not have the capacity to enter into a contract. Any contracts signed in these circumstances may be declared void by the court.

19. RELIANCE ON THE ACCURACY OF INFORMATION PROVIDED BY THE EMPLOYER

Third parties are often commissioned by the employer to generate information concerning a proposed construction project. This information may be drawings, surveys, reports etc. and be architectural - defining the proposed works; structural - setting out the existing and proposed structures or; geo-technical – describing the ground conditions at the site etc.

During the procurement process, this information is presented to the contractor as the "Employer's Requirements" for the purpose of generating the proposal, estimate, price, tender etc. The contractor is expected to submit a proposal based upon this information. In some instances the contractor might be advised that any non-compliant submission will not be considered.

Some contract terms may place the risk for the actual conditions on site varying from those provided, upon the contractor. It is very important therefore for the contractor to consider the risk of this information being inaccurate or completely incorrect. The Contractor generally has six options in this regard:

1. Accept the risk.
2. Undertake or allow to undertake further investigative works themselves.
3. Qualify the submission although this may lead to it being rejected as non-compliant.
4. Seek a collateral warranty from the originator.
5. Seek confirmation that the original contract between the employer and consultant was constructed in such a way as to enable the contractor to rely upon provisions of the Contracts (Rights of Third Parties) Act.
6. Gain a Reliance Letter from the third party originator of the information. This letter would confirm that the contractor can rely on the information provided by them.
7. Ensure terms are added to the contract that confirm the contractor may place reliance upon the information provided being correct and indemnifying the contractor against the risk of variance.

Options 4, 5 and 6 establish a relationship between the contractor and originator enabling the contractor to issue proceedings, if necessary, at a later date.

In most circumstances the original documents are accompanied by a disclaimer specifically absolving the originator from guaranteeing the accuracy of the information therein. It is therefore unlikely that options 4, 5 or 6 will be successful.

Should the contractor be successful in gaining a Reliance Letter, the contractor must ensure that the letter is drafted with appropriate advice to either establish a contract with all the usual rights and remedies, or a common law duty to use reasonable skill and care.

Without this protection, the contractor shall be responsible for any errors in the information provided. This may for instance include; the occurrence of the water table where there should be dry conditions; buried reinforced concrete obstructions where there were none indicated; existing foundations consisting only of a shallow brick corbel instead of deep concrete; the existing structure being weakened by inherent defects, damage or previous remodelling; contaminated land that requires specialist waste removal; the building loads may be far greater than indicated, invalidating design allowances; the adjacent property may have a different floor level to the subject property meaning the works cause collapse or damage to the neighbour's property; there may be buried sewers or utilities not indicated but that are damaged by the contractors works etc.

If the contractor cannot place reliance upon the information provided; they will find themselves liable for the costs and associated outcomes of overcoming; or for any accident relating to; the above. Moreover the contractor must contemplate the additional risk that may come from elsewhere in the contract i.e. unlimited damages or LDs etc.

20. SUB-CONTRACTORS

Sub-Contractors are individuals or businesses who are appointed to complete elements of the main contract upon the main contractor's behalf. Sub-contractors generally fall into three categories: Domestic, Nominated and Named and are described as:

Bona fide – offering a full package of labour, materials and plant etc. They work under their own direction, provide their own tools, manage their own Health and Safety requirements and carry their own insurances.

Labour-Only – offering labour services only, they do not provide materials, health and safety management or their own direction.

Labour Only Sub-Contractors can be further divided and vary in both their tax and insurances status.

Her Majesty's Revenue and Customs (HMRC) via the Intermediaries legislation or IR35 set out a number of key features to distinguish an employee from a labour only sub-contractor. In brief, a labour only sub-contractor shall be deemed an employee if the relationship with the contractor is such that:

- The labour only sub-contractor is under the control of the contractor i.e. representatives of the contractor give detailed instructions on how and where the sub-contractor works.
- The labour only sub-contractor has clothing, paid holidays/sickness and tools provided for them by the Contractor.
- The labour only sub-contractor only works for the contractor, is paid on a dayworks basis and is still paid in the event that there is a gap between contracts and they do not work.
- The labour only sub-contractor cannot substitute themselves or someone else.

A Labour only sub-contractor shall generally not be deemed an employee if:

- They work to a sub-contract with a programme and lump sum cost basis.
- Work independently of the contractor determining their own work system and sequence.
- Substitutes individuals at their own discretion.
- Is free to decline work from the contractor as well as work for other employers.

A labour only sub-contractor may operate as a sole trader, self-employed, partnership or limited company. Each carries a different tax status and it is of paramount importance that the contractor is clear on the status of a sub-contractor prior to appointing them. This status has significant bearing upon the contractor's responsibility to collect and pay tax (under the Construction Industry Scheme (CIS), contractors must deduct money from a sub-contractor's payments and pass it to HMRC.

Much of the information set out in this document for the Contractor is relevant of the Sub-Contractor only where the Sub-Contractor is concerned the Employer is the Main Contractor. With this in mind; most standard forms of contract include optional sub-contracts but it is often the case that sub-contracts are entered into on the basis of exchanged letters or purchase orders etc.

The parties must ensure the sub contract provides express terms of how the sub-contract is to be undertaken and operated. Without these it is likely that a dispute shall arise and the courts shall be left to determine the implied terms of the contract. Whilst some implied terms are well known and sometimes negate the need for the contract to cover each detail of the project; it is best for the avoidance of dispute and security of goodwill, for the contract to cover sufficient matters as to avoid confusion. For example, what is "reasonable access" to one party may not be to another and a License to occupy the site would eliminate uncertainty.

It is important to consider the following:

Primary provisions

As a minimum the contract must define the scope for work, a price and a programme. Ideally the contract shall also record the payment terms.

Secondary provisions

These should include mechanisms for varying the works and claims process, special conditions such as restrictions or health and safety requirements, working times, permissions, allowances, preparatory works etc.

The main contractor must also check the terms of the main contract to ensure that there are no prohibitions on sub-contracting the works. The JCT contract for instance contains a provision for prohibiting sub-contracting:

"The Contractor shall not without the written consent of the Architect (which consent shall not be unreasonably delayed or withheld) sub-let any portion of the Works. The Contractor shall remain wholly responsible for carrying out and completing the Works … notwithstanding the sub-letting of any portion of the Works."

The sub-contractor must be aware that a main contractor may seek to incorporate contractual terms by reference. This can prove contentious and often contributes to the "battle of the forms" as described above.

It is good practice for the main contractor to review the sub-contractor's competency and suitability for the works. This ideally would include an investigation of previous performance, experience, demonstrated ability, financial standing, insurances, trade certifications, health and safety performance etc. These searches are not only required to satisfy the contractor's duty of care but also statutory obligations under such legislation as the Health and Safety at Work Act that itself is operated under Common Law by the guidance of the Construction Design and Management Regulations.

Nominated Sub Contractors and Suppliers

A nominated sub-contractor or supplier is a specialist party selected by a client and who, via provisions in the main contract, the main contractor is obliged to employ. The client may choose this arrangement in order to enable direct input to design, fulfil a requirement for a certain service provided only by the nominated party (i.e. a patented system), to directly negotiate with the sub-contractor or Supplier and gain benefit through value engineering or where, for programme or statutory reasons; elements of the works (design, manufacturing etc.) must be commenced prior to the appointment of the main contractor.

The contractual arrangements associated with nomination can be complex with a wide range of options available to the parties and differences between the standard forms.

Although the client negotiates with and selects the nominated party; the client and nominated party do not usually have a direct contractual relationship. They may issue guarantees to one another in terms of payment from the client in the event the main contractor fails to pay or indemnification of the client in the event of the main contractor breaches contract. Sometimes the client has an initial contract with the nominated party to commence design or manufacturing and this is novated to the main contractor.

The main contractor is in contract with the sub-contractor or supplier and is entitled to mark-up, profit and attendance fees. Typically, the employer advises the cost of the nominated party for the main contractor to include as a provisional sum with agreed mark-up in the contract. The main contractor is liable for the performance of the nominated supplier in the same way as they would for a freely chosen sub-contractor. In both instances the agreed terms of the contract prevail and the main contractor may agree limitations on their liability i.e. responsibility for the sub-contractor's design. As in any contract negotiation, the parties must take care to analyse and understand the obligations and liabilities put upon them by the contract.

Particular attention should be paid to the insurance cover that the main contractor has and both parties must ensure that the main contractor is covered for the appointment of the nominated party i.e. the main contractor may not have insurance for some specialist works such as demolition, working with explosives or hazardous materials.

There is a significant catalogue of case law for nomination of specialist suppliers and sub-contractors. The consensus is that this case law provides; that in some circumstances where the specific construction of the contract denies the contractor reliance upon the skill and care of the nominated party; the contractor may be held to not be responsible for defects in that parties products. Similarly, depending upon the construction of the contract; the contractor's liability for the workmanship of the nominated party may be reduced from that for a domestic party. Furthermore, a Contractor whose contract does not contain any design liability cannot be liable to the employer, through the nominated sub-contractor; for the nominated sub-contractor's design.

In any case, the client should nominate the sub-contractor in good time to allow the main contractor sufficient time to discharge their obligations under the contract.

As the main contractor is prevented from using skill and judgment in the selection of materials supplied by the sub-contractor; the main contractor should not be held liable in the event that such materials are not fit for purpose.

If the main contractor's responsibility for design includes that of the sub-contractor; they shall also be liable in the event the sub-contractor is found to be negligent.

In the event that the sub-contract is terminated, any delays associated with the sub-contract works cannot be used to claim for an extension of time.

Should the main contract exist solely for the purpose of the sub-contract works and the sub-contractor either enters insolvency or does not complete the works; the main contractor may not have an obligation or authority to progress the works. In the event that the main contractor is instructed to complete the works, they should be entitled to additional payment as well as an extension of time should the completion date have elapsed. Should the client seek to replace the nominated contractor with another sub-contractor the main contractor has the right to object.

Most contract forms place liability for all the sub-contractor's performance, whether domestic or nominated, upon the main contractor. The main contractor is entitled to raise objection to the nominated sub-contractor. FIDIC, for instance states that the main contractor is not obliged to employ the nominated sub-contractor in the event that they raise reasonable objections. It is therefore critical the the Main Contractor completes the usual due diligence that should be completed for any sub-contractor. Should the Main Contractor not undertake this due diligence and appoints the nominated sub-contractor without objection; the main contractor may lose the right to a later claim for the nomination process being unfair or flawed. The test of reasonableness will examine fact based issues such as impact upon the main contractors abilities to discharge their duties under the contract, the time provided in which the due diligence may have been completed, the proven ability of the nominated sub-contractor to undertake the works, the nominated sub-contractors history in terms of factors critical to success; Health and Safety Management, credit score etc. These issues shall enable the parties to amend the contract to account for reasonable concerns i.e. direct payment of the sub-contractor from the employer (JCT Standard Forms), name borrowing provisions, the Main Contractor may be indemnified against certain risks, a different nomination may be made or the works omitted from the Main Contract.

In any case, it is crucial to the success of the contract, that the parties enter a mutually acceptable arrangement for Nominated Sub-Contractors that ensures the goodwill and collaboration of all those involved.

Named Sub-Contractors

Some forms of contract (JCT Intermediate standard form) no longer provide for the nomination of sub-contractors but includes the naming of sub-contractors. In these forms; the employer names one or more preferred sub-contractors to the main contractor's tender list. The Main Contractor is permitted to name their own sub-contractors but are obliged to invite the employer's named sub-contractors to tender.

The Main Contractor selects the sub-contractor as a domestic sub-contractor and is solely responsible for that sub-contractor.

Name Borrowing:

Although Privity of Contract prevents a sub-contractor commencing proceedings against the employer; if the parties agree; it is possible for the contracts to provide for the sub-contractor to bring a claim against the employer directly. Conventionally these arrangements have arisen when a sub-contractor was nominated by the employer. If the sub-contractor became unhappy with the employer or employer's representatives administration of the contract; the sub contract would allow the sub-contractor to being proceedings against the employer.

21 CDM 2015 – OBLIGATIONS AND MANAGEMENT OF LIABILITY

Construction Design and Management Regulations 2015 set out the requirements for the management of Health and Safety on Construction Projects. These regulations impact upon contract formation particularly where scope of works, pre-start programme and management of the site are concerned. It is strongly recommended that all those involved in construction projects thoroughly familiarise themselves with the regulations.

It is important that the following key principals of the regulations are considered when negotiating a contract.

Competency

The regulations require that any party putting themselves forward for a project or employing any other entity to undertake the work; first considers the following:

Do we/them have the skills, training, qualifications, experience and demonstrated ability to undertake the work securing the health, safety and wellbeing of those who might be affected?

This is especially important when considering the scope of works, design, instructed variations and sub-contractors. It may be possible to obviate some works and instructions upon the basis that a party does not meet the above requirements. This is especially relevant when considering sub-contractors be they named, domestic or nominated.

Principal Designer

Whilst the guidelines set out explicit requirements for each role; that of Principal Designer is particularly important to contractors who undertake design work. The regulations provide that any party completing concept design shall, in the absence of the client appointing a principal designer or in the case of a domestic client; become the Principal Design for the project. The duty of the Principal Designer is to facilitate cooperation with the client and the principal contractor, coordinate the work of others in the project team to ensure that significant and foreseeable risks are managed throughout the design process. This is a considerable role and carries a great deal of responsibility. A contractor must appraise themselves for competency before entering this role if necessary; specifically exclude this role from their contract.

Projects with more than one contractor

Any project involving more than one contractor requires the client to appoint a Principal Contractor. If the client does not appoint a Principal Contractor; the role passes to the contractor who is in control of the construction phase. The role of Principal Contractor holds considerable responsibility under the regulations, some of which are outlined under the heading Principal Contractor below. If a party employs sub-contractors they shall be the de facto Principal Contractor.

Should a project have a domestic client, the responsibilities of the client pass to the principal contractor (unless the client has formally appointed another party).

The regulations require those projects with more than one contractor to have a number of additional processes including a Health and Safety File. Although the regulations distinguish the requirements for projects with a domestic client; these distinctions are largely removed when 2 or more contractors are employed.

Under the new CDM Regulations, Contractors who previously may not have had to discharge these additional requirements now find themselves with a great deal of responsibility, yet may not be doing any new or different work than before. If a party employs sub-contractors, be they labour only, self-employed etc. shall find themselves legally responsible for the duties of a Principal Contractor; unless this role has been formally appointed elsewhere.

Principal Contractor

A principal contractor is responsible for the control of the construction phase of any project involving more than one contractor.

Principal contractors hold the primary role in managing health and safety risks during the construction phase and must have the skills, knowledge, experience and organisational capability to carry out the work.

Including

- plan, manage, monitor and coordinate the entire construction phase;
- take account of the health and safety risks to everyone affected by the work (including members of the public), in planning and managing the measures needed to control them;
- liaise with the client and principal designer for the duration of the project to ensure that all risks are effectively managed;
- prepare a written construction phase plan before the construction phase begins, implement, and then regularly review and revise it to make sure it remains fit for purpose;

- have on-going arrangements in place for managing health and safety throughout the construction phase;
- consult and engage with workers about their health, safety and welfare;
- ensure suitable welfare facilities are provided from the start and maintained throughout the construction phase;
- check that anyone they appoint has the skills, knowledge, experience and, where relevant, the organisational capability to carry out their work safely and without risk to health;
- ensure all workers have site-specific inductions, and any further information and training they need;
- take steps to prevent unauthorised access to the site;
- liaise with the principal designer to share any information relevant to the planning, management, monitoring and coordination of the pre-construction phase.

When working for a domestic client, the principal contractor will normally take on the client duties as well as their own as principal contractor. If a domestic client does not appoint a principal contractor, the role of the principal contractor must be carried out by the contractor in control of the construction phase.

In summary, it may be that a specialist sub-contractor, who is engaged by a domestic client to undertake design and build of foundations, shall find themselves with the duties or Principal Contractor, Principal Designer and the Client.

It is important to be familiar the regulations in order to both accurately account for and discharge those duties placed upon the contractor from the outset during contract negotiations. The regulations require professionals to advise and ensure that the client is aware of their responsibilities as well as make the necessary programme allowances for the regulations to be adhered to. It is especially important to define in the contract who is the principal designer, who is the principal contractor and who shall be executing tasks such as issuing the F10.

22. MANAGING CHANGE

Variations and amendments

A variation is a change to the original scope of work specified under the contract. Amendments are changes made to the contract provisions.

Almost all construction contracts encounter factors that necessitate changes to the agreed works. Variation provisions are vital to the contract as without them it is not possible for variations to be agreed and disputes are likely to arise. Case law provides; an employer insisting on a variation where the contract makes no provision for variations, in effect has repudiated the contract and the contractor is entitled to terminate the contract accordingly.

It is important therefore that the contract contains mechanisms enabling the project scope to be varied. The purpose is to allow the parties to adapt to suit unforeseen circumstances or to suit the employer's requirements. These mechanisms allow the employer or employer's representative; to issue instructions and the contractor to implement changes that may include:

- the execution of additional work;
- a change in the character or quality of the material employed or the work;
- a change to the form, extent or structure of the work i.e. levels, lines, positions or dimensions;
- an increase, decrease or omission of work under the contract;
- the demolition or removal of material or work no longer required.

Although different terminology is used in the various standard contract forms (compensation events, variations, change orders etc.) almost all forms have mechanisms for varying the works. Some forms make allowance for different types of changes i.e. the JCT forms provide for changes in working hours and access. In most instances the contract defines the party who shall instruct variations on behalf of the employer. Depending on the form, this may be the architect, engineer or in the case of the design being completed by the Contractor, this shall be the employer's representative or agent.

There are limits however to what an employer can change and unless the specific contract states otherwise, it is not possible for the employer to:

- • Omit work or reduce the amount of work agreed.
- • Instruct additional work that is outside the scope of that agreed.
- Instruct variations that are so different in nature from the work agreed that they change the character of the contract or might be considered worthy of an entirely separate contract.

Defining a variation

In order to identify a variation, the parties must have a clear agreement upon what the original scope of works entailed. As mentioned above; it is of utmost importance that a contract must fully describe the allowances, scope of works, understandings, expectations and agreements of the parties in detail. This shall assist the parties, to determine if a true variation has occurred during the execution of the contract and whether it as result of circumstance or intention.

Variations can be defined by deviation from the agreed scope, allowances or agreements in the execution of work required and that are not specifically provided for in the contract.

What is not a Variation?

- an item specifically provided for in the contract;
- an item the original scope of work depended on to enable completion, sometimes called indispensably necessary, as this is deemed as implied in the scope of works;
- an item that becomes necessary due to a failure or fault of the contractor;
- materials of a better quality than the quality required by the contract and that the contractor chooses to use;
- materials or works not included in the description of works and that the contractor introduces without instruction;
- a change unilaterally instigated by the contractor without instruction or agreement;
- work that is undertaken without request or instruction;
- work that is impliedly provided for in the contract, as being within the contemplation of the parties.

When might a variation occur?

The agreed works can be influenced by many factors. These factors may delay, disrupt, hinder or prevent the works and typically occur due to the following:

- Instructions from the employers representative, contract administrator, architect or engineer.
- Changes to drawings, design, product details etc.
- Changes in site, work management, methods, systems and procedures e.g. Health and Safety requirements, logistics, facilities and attendances.
- Changes in the quality or quantity of works items.
- Requests from the Employer.
- Instructions to expend provisional sums.
- Third Party influences i.e. Changes in Statutory Requirements and Regulations or permissions being withheld.
- Requests from the Contractor.
- Omissions and discrepancies in or between contract documents.
- Agreed allowances proven to be incorrect (layout of the site, access and egress etc.)
- Unforeseen and unforeseeable existing conditions i.e. ground conditions/structures.
- Factors arising that prevent the agreed programme being met i.e. possession.

It is important to note that the contract may set conditions precedent to legitimate variation claims. The contractor must take care to follow these or the employer may not accept any associated claims.

In order for an instruction varying the works to be legitimate, there must be an agreement between the parties as well as consideration.

A notification of variation from one party to another does not constitute a variation to the contract.

Consideration, in the context of variations; may take the form of additional duties if the contract is breached, mutual dissolution of rights against one another or agreement of mutual benefits.

In the event that a party secedes or grants a benefit at the request of another party and without consideration; this is not generally a variation. As mentioned elsewhere, in this instance a deed would be required.

Relevant Events

A Relevant Event is an occurrence not caused by the contractor that impact the completion date and for which, the contractor is entitled to an extension of time and to claim loss and expense for. A relevant event might be a delay that is caused by the client or a neutral event, including the following:

- Delay in giving the contractor possession of the site
- Failure to provide information
- Variations
- Failures in the supply of materials and goods by the employer
- Delays in receiving permissions that the contractor has taken reasonable steps to avoid
- Delay on the part of a nominated sub-contractor
- Adverse weather
- Force majeure
- National strikes
- Civil commotion or terrorism
- Loss from a specified peril
- Changes in statutory requirements

As the contractor is obliged to mitigate the delay and any resulting loss of these events; awards for extension of time do not necessarily validate a claim for loss and expense.

Instructions

It is possible under common law, for the parties to vary a contract by both oral and written agreement. There are instances however where oral agreement will be prevented either by statute or express conditions in the contract.

It is widely held that variations and instructions explicitly confirmed in writing reduce unnecessary confusion and unintended changes. Contracts therefore often provide conditions precedent that any changes require written instructions signed by the employer (or their representative) or by both parties.

In the event that the parties choose to include a provision for oral instructions it is very important to consider the potential dispute that may arise from miss-communication. It may be that an instruction is given between the parties at a site level and the parties may later not recognise the authority of those agreeing the variation. It may be that inadvertent instructions are given that a party later disagrees to recognise as a variation. Oral instructions are provided for in some standard forms under the description “of an instruction to vary the works…other than in writing” in these cases, the contractor is required to confirm the instruction within a specified period of time. Care should be taken in these circumstances however as some variation clauses also include that if the written confirmation is in error, the employer’s representative shall confirm the instruction within a specified period of time. If there is no objection raised to this confirmation, the variation is deemed accepted. An alternative to this is a confirmation of verbal instruction (CVI) procedure that records and notifies the oral instruction.

If an instruction is given for additional work to be completed that is within the scope of the contract’s variation clauses, the contractor is obliged to follow the instructions. Should the contractor ignore the instruction or refuse it, then the contractor shall be in breach of contract.

If an instruction is given for additional work to be completed that is outside the scope of the variation clauses provided for in the contract; there is no obligation to carry out that work and the contractor can refuse to undertake the work. Alternatively, a separate agreement can be made to ensure that the contractor is appropriately remunerated.

It is important to note that a contractor typically liaises with an employer's representative on these matters. In some instances this individual may have limited authority to bind the employer. Proof from the employer may therefore be required if for the contractor seeks formal confirmation that a variation has been agreed.

Employer's Duty to agree Variations.

Although there is an implied duty upon the parties to co-operate and extending form this; an obligation upon the employer to take action to assist the Contractor to discharge their obligations; when the Contractor is unable to fulfil their obligation to complete the works within the contract scope: the employer may refuse to instruct a variation.

The risk of buildability is held by the contractor and they may find the contract works to be unbuildable due to hitherto unknown or unforeseeable factors. In these circumstances the Contractor shall be in breach of contract for not completing the contract works. If the Employer refuses to instruct or agree to a variation and the contractor, to avoid the breach above; unilaterally varies the works; the contractor shall be in breach for varying the works without instruction. In either case the contractor may find themselves liable for damages, additional costs or corrective action to undo those works completed without permission and shall be unable to claim for any additional time or payment.

This issue may arise as not all contracts require the Employer to instruct or agree variations. Some standard forms do include terms that accommodate the above circumstances the ICC Measurement Contract 2011 for example qualifies the contractor's obligation as follows:

> *"Save in so far as it is legally or physically impossible the Contractor shall construct and complete the Works in strict accordance with the Contract"*

And that the employer representative is obliged as follows:

> *"The Engineer… (a) shall order any variation to any part of the Works that is in his opinion necessary for the completion of the Works"*

These do not relieve the contractor of their obligations but do enable the works to be reasonably progressed without the contractor being penalised for ostensibly impossible circumstances outside of their control. The contractor must ensure that whatever contract they enter into; they take care to ensure the risk of buildability is limited and that there is a provision for the works becoming impossible to complete.

Unagreed Variations

As it is in the employer's interest to limit their risk; it is often the case that variations will not be agreed before the contractor progresses the particular variation works. Unless the contract specifically provides otherwise as the NEC3 does for instance, once a variation is instructed, the employer is responsible for compensating the contractor. Under the construction act, this compensation is for both additional payment and an extension of time. This delay in instruction may therefore be due to the Employer's reluctance to agree liability for additional costs or time without knowing the full extent or indeed the validity of the variation.

As the contractor is at risk for delay; the contractor shall often progress works that they consider to be a variation without an express instruction. This may be breaking out and removing buried obstructions or undertaking additional design work. The contractor in these circumstances shall be progressing at their own risk.

It is for the contractor to determine the risk potential of delaying the works versus the risk of proceeding without an instruction agreeing the variations.

In either case it is in the Contractor's interest to build a detailed submission supporting their claim.

Should the contractor choose to proceed at risk; this claim is considerably strengthened by contemporaneous agreement of the resources deployed, the work done etc. and for this reason the signed agreement of the contractor's records by employer or their representative is critical. The contractor may seek to ensure a clause is provided in the contract requiring the Employer or their representative, to agree the contractor's records contemporaneously with a signature. This itself does not agree the variation *per se* but will provide an agreed record that the claim may be based upon. In addition to this it may be worthwhile for the contractor to further seek a clause that deals with the eventuality of non-signature. This may be the transmittal of electronic copies of the records within a given period and non-response signifying agreement.

In some cases it has been possible for contractors to insert clauses that provide the use of the contractor's Notification of Variation Form, Change Notice or Request for Instruction forms with a standard period of review following which, if the employer has not rejected the request; the variation is deemed as instructed.

Implied or Express Instructions and Promise to pay.

Although the employer may not have made an express agreement to pay for a benefit, they may be deemed to have made an implied promise and shall be obliged to pay accordingly. This circumstance arises in case law when it is deemed that the employer objected to making an express promise on account of a belief that the benefit was already included in the scope. Should it be proven that the benefit is in variation to or additional to; the original scope; the employer may be found to have impliedly promised to pay. Alternatively, if an employer directly instructs a contractor to undertake additional works in variation to the contract and thereby deliberately or dishonestly circumvents the requirements of the contract for the employer's representative to issue instructions; this may be deemed to be a waiver of their rights and an implied promise to pay arises. (ref. Keating on Construction Contracts 4.048)

Agreed variation without instruction

There are several circumstances where the contract shall be varied without instructions:

1. In instances where the Contractor has deviated from or is unable to follow; the scope of works, he may seek permission from the employer to vary the scope of works accordingly. The Employer will not be liable for the associated additional time or cost that may arise due to this variation and may avoid exercising the formal contractual mechanisms for breach and variations by permitting the variation by agreement and not instruction.
2. To satisfy concerns relating to potential risks that might prevent the contractor completing the works as agreed, the parties may agree that the occurrence of certain specified events, which require a change in the scope of works, to automatically generate an agreed variation without formal instruction from the Employer. These are sometimes referred to as "deemed variations" and often relate to latent site conditions, the correction of errors and omissions in the Employers requirements i.e. discrepancy between schedules and drawings or design errors. Different to the variations under 1 above; these entitle the contractor to compensation.
3. To account for changes in statute that may prevent the works from being completed as agreed; some standard forms including the JCT Standard Building Contract, 2011 Edition provide that these changes in the scope of works will be deemed a variation without the need for instruction from the Employer.
4. Some contracts include a provision for automatic variations to arise without the need for instruction to ensure the contractor is compensated for the occurrence of unforeseeable physical conditions. An example of this is the NEC3 Standard Forms where a variation, referred to as a compensation event; arises if the contractor encounters unforeseen physical conditions. The contractor shall in due course be required to demonstrate that the conditions were what an experienced contractor would consider as so unlikely to occur that it would have been unreasonable to allow for them.

In each of the circumstances above; the parties must agree to this provision, in the case of items 2, 3 and 4 in the construction of the contract and for item 1, during the works. It is often the case that an employer, seeking to mitigate risk to themselves, delete these type of provisions from the standard forms. Indeed some standard forms, FICIC Silver Book for example, specifically place the risk for latent conditions, physical conditions and discrepancies upon the contractor. It is of utmost importance therefore that the contractor takes care to review the contract and understand the provisions in detail. It may be that the Contractor can request that clauses be added to; or removed from; a contract that reflect that intended above.

Waiver

Should a party request another party cede their right to enforce an obligation and that party voluntarily agrees; the party has waived a right. This can occur in writing or orally.

It might be that a party waives their right by inference through their actions. It is for this reason that parties may often include an express provision to the contract preventing actions or non-action to prejudice their rights under the contract.

In the case of variations; the employer may waive the right to require the contractor to undertake variation works only with an express instruction from the employer. This would enable the contractor to proceed with works in variation to the contract without the contractor needing the employer's instruction to do so. It is important to note that in most contracts this would only be possible with the direct agreement of the employer and not the employer's representative who is unable to bind the employer in this manner.

Time Bar Provisions

Some contracts may introduce a limitation to the period in which a contractor can raise a claim. These time bar provisions are intended to ensure contemporaneous resolution of claims. It is regarded that this approach reduces dispute and uncertainty.

The standard forms of contract vary in the time bar provisions.

FIDIC requires the contractor gives notice of claim within 28 days of becoming aware or from when they should have been aware; of an event or circumstances giving rise to claim. NEC requires the Contractor to notify the Project Manager within 8 weeks of becoming aware of an event which has happened or which he expects to happen.

The implications of failing to meet these requirements vary and the contractor must take care to familiarise themselves with the variation clauses. The contractor must make arrangements to scrutinise issued details from the employer for changes or discrepancies at the earliest opportunity.

Some contractors may choose to appoint a project team with greater experience and ability to determine change, plan the programme and manage claims.

As variations do not always carry an express agreement that an additional price shall be paid; the contractor should be sure to notify the employer that the variation shall lead to additional costs that the contractor shall seek remuneration for. Without notification, an employer may be within their right to consider the extra work to fall within the agreed contract price and refuse payment for additional costs.

Obligations to comply with instructed variations

In some instances, contracts provide for the contractor to object to instructions given to vary the works or contract. These may be specific entitlements under the contract or general relating to types of variations. In any case the parties cannot undertake works that break the law and it might be the duty of the contractor to inform the employer when instructions might lead to breaches of statute, the Health and Safety at Work Act for instance, and thereby cannot be complied with.

Several JCT standard forms contain clauses that enable the contractor to give reasonable objection to instructed variations and thereby the right to not comply. The 2011 Standard Building Contract Without Quantities for example, establishes types of variation that the contractor need not comply with as well as those that must be followed. Should the employer instruct variations that fall under the type that need not be complied with, the contractor can notify the employer of a reasonable objection.

The 2011 JCT Design and Build Contract, provides that the Employer cannot issue an instruction requiring the design of the Works to be varied without the Contractor's consent.

It is important to note that consent must not be unreasonably delayed or withheld. Should these objections be upheld, the Employer must then alter the instruction to satisfy the reasonable objection raised.

Preparation of a variation claim

The contract should provide procedures for dealing with variations and the parties must ensure that they comply with these provisions.

When a circumstance occurs that might be considered variation it is best to seek agreement for the impact of the variation prior to progressing the related works. This should include all costs (including time related and disruption) the necessary changes to the sequence of works or programme and extension of time.

Some contract forms provide mechanisms that encourage and enable the above. Others do not and as mentioned above; some employer's may be reluctant to come to such an "up-front" agreement. In any case it is good practice to prepare at every stage of the process for a dispute to arise and adjudication or litigation to follow. Should they not, nothing is lost as the preparations will go a long way to agreeing the variations and if they do; all is in readiness.

Timing

The variation clauses in most contracts shall have a timescale setting out the requirements for notification, particulars, submission, valuation and payment etc. It is of utmost importance that the contractor meets these timescales not only for the submission of a claim but also for notification that an event has occurred that may be a variation.

The Content of a Notification

- Ensure that the event is notified to the employer as soon as convenient; first directly and then by electronic correspondence recording the date, time, circumstances and including a brief summary of why the event constitutes a variation.
- Ensure that the employer's representative is advised and if possible observes the variation work directly.
- Request an instruction to proceed.

Evidence

- Ensure that detailed records are kept of the circumstances and including as a minimum; date, times, resources utilised, description of the event, pertinent information and that the employer's representative signs the record.
- Record the circumstances with photos or video. Where necessary ensure that an item of known dimensions such as an extended tape measure is in the photo for a reference of scale.
- Should the representative not be in attendance or refuses to sign the record; an electronic copy of the record must be sent to the employer as soon as possible and if possible a statement referencing the provision in the contract that recognises this as the formal method of agreeing the validity of the records.
- Gain formal receipt for all correspondence.

Communication

- Agree a common approach to dealing with the variation.
- Ensure a regular emailed update is provided to the employer or their representative.
- Meet with the employer or the representative weekly to summarise the progress and the impact of the variation.
- When sufficient information is available; advise the employer or their representative of the cost and time impacts of the variations, the estimated total impact and provide an updated programme.

Submission

For ease of agreement it is best to ensure that each valuation submitted includes all the pertinent information to enable it to be reviewed as a standalone document. The submission must be consistent, clear and easy to understand. It is worthwhile preparing the submission as if it were to be read by a party who has no prior knowledge of the project.

As a minimum the submission should include:

- A narrative briefly describing the basis of the claim, including contract clauses etc. and its genesis.
- A reference to the aforementioned information; notification, emails, records, Photos and videos, initial estimates on programme and cost impacts etc.
- Reference to the specific instructions, if they were received, given to proceed with the works.
- Provide a breakdown of the claim including measurements, reference material i.e. drawings/surveys/specifications with substantiation from the agreed rates, instructed estimates or quotes.
- A programme showing the original critical pathway, the as built programme and impact of the variations works.
- A summary of the any additional preliminary costs caused by the delay.

It is important that the contractor considers the impact the variations may have on other aspects of the contract i.e. insurances, warranties, guarantees or design liability.

Valuation

Most contracts include provisions for dealing with the valuation of variations and can broadly divided into 6 types:

At the agreed rates or defined costs

Many contracts, the JCT forms for traditional procurement in particular are contracts with quantities. These are constructed with the price based upon a bill of quantities setting out unit prices for each element of work. The Bill of Quantities is prepared on the basis of the work that is anticipated to be carried out.

The contract will usually provide; that where the additional work or varied work is completed of a similar character and under similar conditions to that detailed in the bills; the rates must be used to value these works; or, that where the works are of a similar character but not similar conditions; the rates should be used with an adjustment to account for the conditions.

Other contracts that may not be constructed upon the basis of a Bill of Quantities may provide a schedule of variation rates. Similar to the bill of Quantities; this provides the parties with an agreed basis for valuing certain defined work items that may be undertaken in addition or variation to the contract. In these circumstances it is possible to measure the variation works and agree a fixed price in advance of the works being completed.

At fair rates and prices

The above rates can however only be used where the additional or varied work is of a similar character to the contract works. Where the variation works are not of a similar character as those set out in the contract; there shall usually be provisions to value the works at fair rates and prices.

The interpretation of the term "fair rates and prices" is the source of much dispute with a great deal of case law upon the matter as result.

Depending on the circumstances, the contract wording and the nature of the work; this type of valuation may or may not give regard to: the current market, overheads, profit, loss, inefficient working, wastage, influence of third parties, quantities, actual costs or the quality of the completed work etc. These factors greatly influence the valuation and it is therefore recommended that the parties seek to elucidate how it is intended for this term to be applied through specific wording in the contract.

In accordance with a quote

Some of the standard contract forms including JCT and NEC3, include provisions for the contractor to submit a quotation for additional or varied works as well as a procedure for what should be included. The JCT form for instance requires time, loss and expense where the NEC3 as well as ICE 7th Edition require an adjustment to prices and completion date to be included.

It is very important that any quotations for varied or additional works, clearly define what is included and allowed for. It may be that the contractor is able to set out time, loss and expense due to the direct impact of the works as well as the disruption elsewhere in the contract.

If the contract is silent upon the matter of submitting a quote for variation works; the contractor is not obliged to submit one when requested.

Quantum meruit

Quantum meruit meaning "amount earned" is applied where a claimant seeks payment for a benefit provided to the defendant that the defendant has not compensated the claimant for. It requires the claimant to demonstrate that there was benefit to the defendant and that the defendant impliedly or expressly undertook to compensate the claimant.

A claim of this type is not usually made where there is a contract as contract law prevails. A *quantum meruit* valuation may however be made;

- when there is an agreement to pay a "reasonable sum";

- the contract work is completed without a fixed price;
- work is completed under a quasi-contract (usually during contract negotiation when that negotiation fails;
- the contract is not agreed but the contractor must be compensated a reasonable sum for the work completed;
- where there is a contract but the works completed are done outside that contract at the employer's request.

Similar to valuation at fair rates and prices; the *quantum meruit* measurement is the source of a considerable amount of case law. There is no guarantee therefore that the expectations of the claimant shall be realised.

The measurement may be based upon the costs to the claimant or the value to the defendant. As this form of measurement considers quality, defect and wastage/efficiency as well as benefit; the value to the defendant may or may not be greater than the claimant's costs.

It is important to note that the courts will consider all available relevant information and this would include rates, quotes and prices previously submitted or agreed. In this case it is unlikely that a claim based upon *quantum meriut* will realise greater than similar rates, quotes or prices submitted by the claimant previously.

Dayworks

The parties may agree to proceed on a Dayworks basis where:

- the variation work is not of similar character to that set out in the contract documents;
- is not executed in similar conditions to that set out in the contract documents;
- is of significantly different quantities;
- is of a particularly unique nature;
- is such that it is deemed impossible to value as provided elsewhere in the contract;

Many of the standard forms of contract provide for the payment of contractors on a daywork basis. The JCT Form provides for this specifically when it is not possible to value the works as provided for in the contract documents. The ICE Conditions provide for the Employer's representative to instruct this measurement.

Dayworks consist of a summary of the labour time undertaking the specific work item together with the materials and plant used. This measurement is based upon agreed records of the works completed on site and often requires the contractor to submit these records to the Employer or their representative. The specific timing of these submissions is determined by the provisions of the particular contract.

Omitted Work and Lost Profit

Some contracts provide for the Employer to vary the contract by deducting the value of work either unsatisfactorily completed or that they intend to omit from the agreed scope. It is usually provided that the value of the works will be varied by the value of that work item as set out I the contract documents.

Case law provides that omission clauses to relieve the employer of what they deem a bad bargain are unenforceable and to omit works in this manner would constitute a breach of contract.

In the absence of an express provision; any omission is considered wrongful and constitute a breach of contract. In this event the contractor would generally be entitled to be paid the loss of profit associated with the omitted work.

Please note that should the omission be so great that it fundamentally alters the nature of the contract works or considerably diminishes the size of the contract: it may be deemed a repudiatory breach that entitles the contractor to rescind the contract and claim damages.

The Employer's Response

Upon receipt of a variation claim it is the Employers prerogative to respond in any way they see fit. Typically the Employer shall respond as follows depending on the circumstance:

- accept the variation or quote.

- withdraw the instruction or give different instructions.
- disagree and make their own assessment.

Should the contractor disagree with the employer's action, a dispute may be logged and the remedies detailed elsewhere in this document adopted.

23. CLAIMS

Claims may be made for many reasons under a construction contract. They typically arise when a party deems there to either have been a breach by the other party or to assert an entitlement. However so arising, the claims are generally for either Time or Money.

Most contracts provide the mechanism for making claims, defining what constitutes a claim and how to processes it. It is important to note that some claims may be subject to conditions precedent as well as precise timings or processes. The contractor should be familiar with the associated requirements and must follow them explicitly.

Claims can be broadly categorised as follows:

- For unpaid money
- For defective or incomplete work
- For delay, disruption and prolongation.

Key Concepts:

Causation - establishes that one party's action or inaction has caused another party loss. To recover any losses, a claimant must establish that a defendant's action or inaction has caused its loss.

Contributory Negligence - under tort and contract law, damages may be reduced should the claimant be found partly at fault.

Pure Economic Loss – The loss experienced by a party is economic only. Under contract law this is recoverable, unless specifically excluded. For this to be recoverable under Tort, a "special relationship" must exist between the parties that will not necessarily exist due to the existence of a construction contract.

Direct and Indirect Losses –Direct losses occur in the natural progression of matters as a result of a breach of contract. These are deemed as foreseeable and are recoverable. Indirect losses arise from special circumstances outside the natural progression of matters. These are only recoverable when they are deemed to have been in the reasonable contemplation of the parties at the time the contract was agreed, as a probable consequence of the breach. This means that the party in breach of contract must be aware of the special circumstances when the contract is entered into. Under Tort, losses must have been reasonably foreseeable by the defendant at the time the breach of duty occurred.

Remote Loss – are those that are deemed to be outside the reasonable contemplation of the parties when the contract was agreed. This means that it was not possible to consider the loss as a potential risk when the parties entered into contract.

Direct and Indirect Costs - Direct costs can be accurately attributed to a cost object such as a product or a project. Indirect Costs are spread over several cost objects and cannot wholly be attributed to a single one.

Remote Costs – Are costs that cannot be allocated to a cost object directly or indirectly but which have are affected by the cost object.

A party in breach of contract will not be liable for remote losses, even if it is shown that that the party's breach caused the loss. To recover remote costs the claimant must prove that the defendant was aware of some special or unusual circumstances when he entered into the contract.

Although a party will be liable for both direct and indirect costs it is possible for both parties to a contract to exclude liability for indirect loss as well as types of direct loss.

Consequential Loss – There is no general legal rule that distinguishes consequential loss from indirect loss. In UK law, consequential losses are deemed indirect losses. International contracts may however hold consequential loss to be separate to indirect cost.

Preparing a Claim

In order to bring a claim there are several things that must be completed or established in a properly constituted and documented submission:

Notification

All parties to the contract are obliged under commercial law to give notification as soon as a breach of contract becomes apparent. This is followed by the obligation to mitigate loss. The claimant's failure to do so will diminish or deny their right to additional payment for loss or expense.

Legal Entitlement:

For legal entitlement to exist, the relationship between the parties and the details of the breach must be established either by the terms of the contract (Implied and Express) or under tort (negligence of duty of care for example).

Causation

Regardless of the breach, losses will only be recoverable if they were caused by the breach of contract or duty. The claimant must prove on a balance of probabilities that the breach caused the loss. Contract and Common Law provide established principles for demonstrating causation. They are regarded as either Fact or Legal.

Factual Causation uses a test known as the "but for" test that examines whether the loss would have happened in any event without the breach or; would the loss not have occurred "but for" the breach.

Legal Causation tests vary substantially depending upon the specific breach. There is considerable case law informing these examinations with some contradictory judgements. All however treat causation as a common sense matter. The burden of proof is on the claimant and such things as intervening acts, remoteness, scope of the defendant's duty of care in respect of the loss suffered etc. are important. The claimant must consider the language and purpose of the contract provisions when the contract is construed as a whole, as well as demonstrate a clear connection between the breach and the specific loss as a consequence of that breach in detail. Key principles to be borne in mind are: SAAMCo principle (tort or contractual duty of care only), Dominant Cause test and the Malmaison Approach (relating to delay that the claimant may have contributed to).

The claimant must take care to record any reasonable steps taken to mitigate the loss as well as prove (if necessary) that any actions taken were not to unreasonably increase the loss.

It is widely considered that specific claims based on individual breaches, with precise cause and effect are more likely to succeed than global claims. A global claim, gathering for instance many different causes of delay together to create a case for constant disruption and cumulative effect; are best avoided. These types of claims are less successful as the defendants have a wider target to challenge can may more easily demonstrate that the contractor's inefficiencies and failings were a dominant cause of any loss as well as concurrent or contemporaneous delay.

Define the Loss.

The effect of the breach and extent of the loss must be clearly demonstrated with contemporaneous supporting evidence.

The claimant must prepare and submit clear records supporting the claim and in particular disclosing information relating to the effect of the event, relevant dates and periods involved and the impact upon the completion date. Bearing in mind that the burden of proof is on the claimant; the validity and strength of the supporting evidence is critical to success.

The claimant must avoid unmerited and exaggerated claims as these may be considered fraudulent and lead to criminal changes.

Typical Claims in a Construction Contract:

Acceleration

Acceleration describes when a contractor expedites a particular work activity in order to complete it earlier than programmed. Acceleration may be achieved through additional working hours or shifts,

increasing resources or re-sequencing work activities. Whilst these methods may be effective; they often attract additional costs disproportionate to the benefit. This is due to inefficiencies in crowded working and the premium for increased hours and shifts.

The contractor may choose to accelerate voluntarily; to mitigate its own delays and inefficiencies, to make savings by reducing the project duration, to achieve pre-agreed performance bonuses or due to start another project etc. Acceleration of this type undertaken at the Contractor's own free will is not considered to be valid claim.

A valid claim for acceleration will be categorised as Direct or Instructed Acceleration and Constructive Acceleration.

Where direct acceleration is concerned, the contractor has received instructions and the parties should have agreed the accelerative measures together with the expected outcome and costs. These claims are processed in accordance with the provisions of the contract.

Constructive Acceleration occurs when the contractor is in delay due to factors they feel are not of their failing or control but that the employer has refused to recognise with the grant of an Extension of Time. In this instance the contractor is still expected to complete by the original date and is under the threat of Liquidated Damages being levied.

For a Constructive Acceleration claim to be successful, the contractor must demonstrate that they had followed the contract provisions for extension of time claims, that these had been unfairly refused and that they provided the employer sufficient notice of the intention to accelerate together with the additional costs.

Guarantee

A claim for the benefit of a bond, warranty or guarantee may be made by the beneficiary based upon the specific wording of the contract provision.

Breach of Warranty

A claim for breach of warranty may arise when the defendant has provided a warranty to the claimant that has been proven to be false. This may relate to insurance levels, factual accuracy of information provided, working to specific standards, defect free work, standards of workmanship etc. A breach of this warranty may have caused the claimant financial loss and the claim shall be for the recovery of this loss.

Liquidated Damages

For further information see Section 16.0 Damages and Liquidated Damages

Fitness for Purpose

See section 8.0 Design – Fit For Purpose

Insurance

There may be claims for Physical Damage to the Works, Employers Liability etc.; these will usually be claimed against the defendant's insurance policies (see Section 9.0 Insurances).

Defects

The term defect may be applied to many different perceived flaws in the works. The contract may define what shall constitute a defect as well as the provisions for dealing with them. In addition to the general description as either Latent of Patent, defects are either considered to be in design, material, specification or workmanship.

The contract should establish the framework for dealing with defects including the specified quality requirements, the criteria for agreeing the severity of defects, the effect they have on the measurement of the contractor's performance and the remedies available to the parties in the event a defect arises.

Generally, the contractor is obliged to remedy their defect at their own expense and will be responsible for any delays caused to the projects a result of the defect. The remedies available to the parties will however vary depending on when the defect becomes evident:

Those evident during construction will under express terms of the contract; require the employer's representative to identify the defects and for the contractor to take appropriate action.

Those that are evident during the defects liability period must be notified by the employer and an instruction issued for the contractor to return to site and either rectify the defective item and/or undertake opening up and testing. Should the contractor fail in this obligation, the contractor may be entitled to terminate the contract.

The employer is entitled to withhold the Certificate of Practical Completion and/or Making Good of Defects Certificate or The Taking Over Certificate under the FIDIC Standard Forms until the defects are satisfactorily rectified.

The employer may be entitled to claim for breach of contract for defects becoming apparent after the defect liability period has expired.

The defects shall be either considered to be so severe that the project fails the quality standards required (unfit for its intended purpose etc.) or minor and repairable without preventing practical completion.

Sever defects constitutes a breach of contract and depending on the circumstance the Employer may reject the works and claim for damages. The basis of this damage claim will be the cost required to restore the claimant to the same financial position as he would have been in but for the breach.

Change – Variations/Compensation events

For further information see Section 22. Managing Change.

Preliminaries

See section 11 – Preliminaries.

Damages for late completion.

Many matters can arise during a construction projects that will cause delay. The express provisions of the contract and terms implied by law will determine the contractor's obligations in terms of the time for completion.

The principal damages claimed against the contractor for late completion shall be Liquidated damages that will be deducted at the agreed rate, from the date for completion set out in the contract until the date that the works are actually completed.

Extensions of Time

The contract will usually provide that the occurrence of certain relevant events delaying the project will entitle the contractor to claim an extension of time. This extension of time, if granted, shall change the contract completion date according to the delay agreed. An extension of time will not necessarily constitute agreement of additional costs or associated delay and disruption claims.

Standard forms of contract ordinarily provide clauses for extension of times. It is important that both parties ensure that should bespoke or amended contracts be used, the contract provides the means for an extension of time to be granted.

Should the contract not provide such a mechanism for delays caused by the employer or that are not the fault of the contractor; time will be at large. The contractor would no longer be required to complete the works by the completion date but rather, in a 'reasonable' time. Without an enforceable completion date, the employer will lose the right to claim liquidated damages. In some circumstances however the contractor may be required to complete the works within the original period and without any additional time.

Delay (prolongation) Claims

When the contract is delayed due to factors outside the contractor's control; the contractor may in certain circumstances, be entitled to claim additional costs arising as a result of the delay.

The contract shall establish the process and entitlements for this type of claim but the contractor must prove that delay and additional costs were incurred. An example of a claim of this type is the employer failing to grant the contractor possession of the site at the agreed date.

The contractor must demonstrate that a) the work was delayed; b) this caused additional costs to be incurred; and c) the cause for the delay constitutes a breach of contract by the employer or that a condition of the contract has been met for the reimbursement of extra costs.

The typical heads of loss for delay claims include

- overheads;
- preliminaries;
- any finance charges;
- loss of profit;
- loss of productivity.

Claims of this type can be complex and depending on the specifics of the contract and the circumstances under which the delay arose; the contractor may be denied a claim for certain cost heads. Some standard forms for example define very specific circumstances under which a claim for loss of profit can be made. It is not unusual for some contracts to provide that the contract price includes fixed sums for some cost items including overheads and profit. In these cases the contractor will be unable to claim additional monies against these. Moreover, the employer may have included limitation clauses that prevent claims for loss of profit and overhead.

The contractor must be careful to consider these clauses during contract negotiation and ensure that the appropriate claims are made in the correct circumstances.

Disruption

Disruption describes loss arising from disturbance, hindrance or interruption of the normal progress resulting in reduced efficiency or productivity. It is very difficult to quantify and prove disruption costs as there are many factors on site that influence productivity and it is relatively easy for a claim to be defended. For this reason generic and broad comparisons based upon tendered productivities are usually unsuccessful.

Claims for disruption may be based upon:

- Failure to provide information on time.
- Failure to provide facilities and attendances as agreed.
- Failure to provide uninterrupted access to and throughout the site.
- Ordering changes to work sequencing.
- Interference in site processes i.e. the work in hand and logistics.

Effects that may cause loss of productivity:

- Working out of sequence.
- Loss of work continuity.
- Short term over resourcing when planned work not possible.
- Additional visits.
- Hand tool working instead of planned mechanised working.
- Overcrowded work areas.

Typical objections made by the employer against the contractor's performance in defence of a claim.

- The contractor's original tendered productivities were incorrect.
- The work was poorly planned;
- Poorly supervised;
- Undertaken with poor workmanship;
- Under or over resourced.
- The contractor employed poorly performing subcontractors.
- The contractor poorly maintained access and working platforms;
- Poorly managed logistics;
- And had inadequate house-keeping

A successful disruption claim is based upon extensive, clear, detailed and unequivocal contemporaneous records. Evidence and records must be prepared to demonstrate precisely what aspects of the contractor's operations were disrupted, by what and how. This should diminish the impact of the defence listed above as self-inflicted disruption should not therefore feature in the claim.

Key Evidence that may be gathered and submitted

- Daily work records.
- Labour Timesheets.
- Labour costs.
- The value of the work.
- Tender programme.
- As built programme.
- Tool and plant operation records.
- Tool and plant costs including fuel and hire etc.
- Quality Control Records including third party audits.

A baseline for uninterrupted productivity must be established. This often requires as much or more effort as demonstrating the cause of and how the productivity was disrupted.

Methods of Disruption Evaluation:

- Measured mile.
- Industry standards.
- Comparison with similar projects.
- Productivity analysis.
- System Dynamics Modelling.
- Earned Value Analysis.
- Global claim.

The measured mile is most widely accepted by the courts and experts. The method includes the analyses of each aspect of the works to demonstrate productivity before, during and after the disruption. A comparison of the productivity before and after; with that during the disruption is prepared and the impact thus revealed.

The global claim that summarises all the disruptive events against a comparison of tendered and actual costs; is regarded as the least likely to succeed and can cause unintended aggravation. The evaluation can be viewed as an effort to recover for the contractor's own inefficiencies and therefore, quite rightly, gives relevance to the usual defence listed above

It may be argued that the global claim is best used where there is a cumulative effect of many varied disruptive events that create such a complex interaction, it is impossible to discern one from another. Notwithstanding this, it is very unlikely that the employer's defence will fail, more so when acknowledging that the global claim does not account for the possibility that the original tendered productivity was incorrect.

Due to the complex nature of these calculations and their importance to the success of the claim, it is best that a quantum expert is employed to assist and advise on the best approach as well as lead the claim.

Loss and expense

The contract shall provide relevant events for which the client shall be held responsible and that the contractor is entitled to make a claim for loss and expense caused by their occurrence;

Examples of these events are:

- Failure to provide the contractor possession of the site at the agreed date.
- Failure to provide the contractor access to and from the site.
- Delays in issuing instructions.

- Opening up or testing works that are proven to be unnecessary.
- Discrepancies in the contract documents.
- Disruption caused by the client.
- The client's failure to supply goods or materials.
- Instructed variations and expenditure of provisional sums.
- Failures under CDM.

Claims are ordinarily restricted to 'direct' loss and expense only but it is possible under some contracts for consequential losses such as overheads or loss of production to be claimed. The Contractor must take care when agreeing the contract to exclude or include those costs that they feel are reasonable.

24. TERMINATION AND SUSPENSION

The parties to a contract have the right to terminate that contract. These rights are either contractual or non-contractual.

Contractual rights

Contractual rights are defined by the provisions of the contract. The majority of standard contract forms contain express provisions regarding the rights of to terminate the contract. Whilst some may have conditions precedent for a specific circumstance such as a breach by the other party or the occurrence of a force majeure event, others may include the right to terminate "for convenience" where there has been no breach by the other party.

Termination for convenience – also referred to as termination 'at will' provides that a party is entitled to terminate the contract without conditions precedent i.e. a specific event occurs or breach is committed by the other party. Some standard forms including NEC3 and GC/Works accommodate these provisions and whilst relatively uncommon in most contracts, many PFI Contracts include these terms.

Although it is possible to include express terms for termination at will, case law has provided some parameters to ensure reasonable application. Should the employer for instance, wish to terminate a contract to enable another contractor to be appointed or due to harsh objectives; explicit and unequivocal wording to this effect must be included; in the absence of which, the provision will be unenforceable and the employer may find themselves in breach. Furthermore, the employer cannot use a termination clause to relieve them of what they may consider to be a bad bargain. Case law also indicates that without compensation for the contractor in the event of a termination, the clause may be unenforceable on the grounds of fairness.

Non-contractual rights to terminate

There are a number of ways that a non-contractual right to terminate may be derived.

Frustration Event - Occurs when it becomes impossible to discharge contractual obligations due to circumstances that are not the fault of either party. It may be that further progression of the contract works is impossible, illegal or significantly different from that which the parties contemplated when the contract was agreed.

As further performance of the contract is prevented, the contract may be dissolved without a party being considered to be in breach. The parties are relieved of their future obligations but shall remain liable for accrued liabilities from matters that have already occurred.

The parties must be very careful when considering terminating the contract upon the basis of a frustration event. The parties should concur that a frustration event has occurred and mutually agree to dissolve the contract. A party unilaterally terminating a contract upon the basis of a perceived frustration event may find themselves to be in breach for non-performance when the opposing party successfully disputes the validity of the frustration event.

Whenever contemplating termination, the parties must ensure that the contract is construed as a whole. Although an event may have occurred that meets the test of preventing progress or significantly changing the works; it may be specifically excluded elsewhere as Force Majeure for example. Moreover, what one party considers being impossible or a radical change from that contemplated; another party may not.

Case law provides guidance as well as examples of what does not constitute a Frustration Event: if the event is provided for in the contract, or if the contract works become more expensive than expected or tendered, it is not considered that a frustration event has occurred.

Repudiation – occurs when a party commits a serious breach of contract that clearly indicates they no longer intend on being bound by the terms of the contract.

There is a great deal of case law on repudiation. Consensus described in Keating on Contracts 9th Edition item ref. 6-066; is that Repudiation should only be held to arise in clear cases of absolute refusal to perform contractual obligations in relation to a matter critical to the contract. It may consist of renunciation, of absolute refusal to perform the contract or it may arise as a result of a breach or breaches such that the acts of conduct of the party evince an intention to no longer be bound by the contract.

Anticipatory repudiation is deemed to have occurred if the party evinces an intention to not to discharge its obligation before those obligations are due under the contract.

Some breaches that are considered sufficiently drastic that they ordinarily constitute repudiation include:

- The contractor's refusal to carry out work.
- The contractor's abandonment of the site.
- The contractor delaying the works when time is of the essence.
- The employer appointing other contractors to carry out the same work.
- An employer failing to give access to the site.

When repudiation occurs, the innocent party's options are limited; they can ignore the repudiation, proceed with the contract and claim damages; or, accept the repudiation and claim damages.

If repudiation is accepted, the contract survives but the obligations of the parties remaining under the contract end. Repudiation by one party will not release the parties from their contractual obligations; the repudiation must be unequivocally accepted by the innocent party. The innocent party must take care to unambiguously accept the repudiation as without this, there is a risk that their future actions are construed as reaffirmation of the contract. Should they latterly cease performing their obligations under the impression that they have accepted the other party's repudiation, they may be found to be in breach. Alternatively, if the innocent party wrongly treats and accepts the contract as repudiated i.e. due to breach that is proven to not constitute repudiation, and thereupon terminates the contract, that party will be deemed to be in breach for wrongful termination.

Suspension

Suspension clauses operate in a similar manner to contractual termination clauses but are not terminal to the progression of the works.

Suspension clauses enable the parties to respond to a breach of contract in a manner that is intended to enable an agreement and resumption of the works. They also afford time to overcome unexpected issues in an agreeable and positive manner.

Whilst in most cases they are the precursor to termination with the break in works used to prepare claims and to effectively operate the contract termination clauses. In some cases, the works may be suspended to agree how to overcome an adverse change of circumstances i.e. a substantial change in the expected ground conditions or for the employer to negotiate third party agreements i.e. local authority or funding.

Typical reasons for suspension are:

- The employer does not pay the contractor.
- The contractor's works have failed to meet quality requirements.
- The works have failed a statutory inspection.
- The employer requires time for third party concerns.

The Construction Act provides the right to suspend for late payment or failure to pay the full sum due by the final date for payment. In these circumstances the contractor is entitled to suspend any or all of its obligations.

The suspending party is required to give at least seven days' notice of its intention to suspend stating the ground or grounds for suspension.

Where the right to suspend is exercised, the party in breach will be liable to pay reasonable costs and expenses incurred by the suspending party as a result of the suspension.

25. QUANTIFYING CLAIMS

The purpose of damages is to compensate the claimant and the extent of any award is based strictly upon a clear demonstration of financial loss subject to reasonableness and mitigation. In the absence of clear financial loss only nominal damages may be awarded.

As an example, the financial loss incurred due to defective work or materials can be demonstrated either by the loss of property value due to the defects or the cost of remedying the defects.

There are a number of considerations when quantifying claims, some of which are described below:

Costs - The basis for quantifying a claim is the actual cost incurred including inflation that might have resulted from a delay.

Preliminaries – As mentioned above, it is important that the contractor understands and describes the preliminaries for the various project stages. As preliminaries will include specific costs for set-up site, mobilisation, dismantling etc., most claims for additional preliminaries should be net of these items.

Loss of profit - Where the claimant can prove that contract breaches directly prevented profit elsewhere; a claim for loss of profit may be made.

Finance charges and interest – It is possible to recover finance charges and interest on any additional capital required to fund the costs that may have arisen arising from breaches of contract.

The contractor must always bear in mind that there may be conditions precedent to any claim. These will be clearly provided for in the contract and the contractor must adhere to these or risk losing the right to claim.

26. DISPUTES AND REMEDIES

The nature of Construction Projects is such that it is impossible for all difficulties, disagreements and risks to be foreseen and avoided or controlled. In 2016, 18% of surveyed construction contractors, according to Statista were involved in a contract dispute during the third quarter of the year.

Where the parties find themselves in a position of sustained disagreement that the provisions of the contract do not resolve; there are several remedies:

Adjudication - introduced by the Housing Grants Construction and Regeneration Act 1996 (Construction Act) as a method of resolving disputes more quickly and improving cash-flow for contractors and subcontractors. In recent years it has proven to be the most popular method of resolving construction disputes. Adjudication applies to all construction contracts except those with residential occupiers, regardless of whether they are in writing or not.

The Parties are entitled to refer a dispute that arises to adjudication at any time. There is a prescribed timescale for submissions and response as follows: following receipt of a party's referral (the claim), the opposing party usually has between seven and 14 days to submit its response. The adjudicator will reach his decision within 28 days of receiving the referral, unless the parties agree to an extension. Although the process is significantly shorter than litigation or arbitration, the decision may take much longer than 28 days.

The adjudicator's decision is binding and the successful party may apply to the courts for enforcement should the other party not comply. There are very limited grounds for disputing the validity of an adjudicator's decision but the parties can pursue litigation following the decision.

Litigation – is the default in the event that the parties fail to resolve the dispute in any other way. Litigation is run through the UK Judicial System. The majority of litigation on construction contracts is dealt with by the Technology and Construction Court (TCC).

This specialist part of the High Court deals with the second highest number of construction disputes. The Parties must be very careful to comply with the pre-action protocol for construction and engineering

disputes before commencing disputes in the TCC. Under the Protocol the parties must consider whether Alternative Dispute Resolution methods would be more suitable than litigation.

Failure to follow the Protocol can lead to costs penalties at a later date.

If TCC consider that ADR would assist in settling the proceedings before trial, TCC may make an ADR Order. This order grants a stay of proceedings while the parties pursue ADR.

The TCC will only usually accept cases with a value of more than £250,000 in the High Court in London. Those claims with a value of less than £250,000 will be dealt with by the TCC in County Courts or High Courts outside of London. There is guidance released by the TCC that anyone considering litigation should consult.

Arbitration - is a method of private dispute resolution governed by the Arbitration Act 1996. A confidential alternative to litigation, the parties must agree to refer disputes between them to arbitration and the arbitrator's award is binding on the parties and enforceable at court. Arbitration is included in many of the standard forms although in some recent versions the provisions have changed slightly to accommodate the option of adjudication or the TCC.

Alternative Dispute Resolution Methods

Mediation – Is a without prejudice but relatively quick process that the parties volunteer to enter. A neutral third party mediator works with both parties to reach an agreement that is then formalised in a settlement agreement.

Early neutral evaluation – is a without prejudice and non-binding form dispute resolution. A neutral, who is usually a current or former member of the judiciary, hears the party's submissions and states the likely outcome should the dispute go to trial.

Expert determination – an alternative to mediation or early neutral evaluation; the parties appoint an independent expert to hear the submissions and agree to be bound by the experts decision**.**

Dispute review boards – are appointed to consider and decide upon the dispute. These are ordinarily appointed for the duration of large international construction contracts. The benefit is that the board is familiar to the details of the project and the evolving dispute

27. COMPETITION LAW

Competition law exists to enable businesses to compete openly and fairly with each other. The government Competitions and Markets Authority (CMA) has powers to bring legal proceedings against those who are found to be breaking competition law.

Published research released by the CMA reveals 77 per cent of senor business leaders admitted that they didn't know the law well, only 19 per cent had senior-level discussions about it in the past year and many didn't realise that practices such as discussing bids or sharing customers with competitors is illegal.

Those found to be breaking the law may be fined of up to 10 per cent of global turnover, directors may be disqualified and those involved in agreements to not compete can face jail terms.

Alex Chisholm, CEO of the Competition and Markets Authority (CMA), sets out 5 things all company directors should know to avoid breaking competition law:

1. You must make entirely independent decisions

   Arrangements between businesses that seek to limit or control how they compete against one another are likely to be unlawful. Such arrangements are particularly at risk of arising within trade and member associations – or even on the fringes of the meetings of such associations – where businesses may agree that some form of co-ordination is better than competition.

   Such associations and their members should also be wary of having discussions where sensitive information could be shared. While discussing general industry trends might not be unlawful, talking about how you might respond to market conditions – for example, your future commercial and pricing plans – is likely to cause issues. A business should make its commercial decisions independently and not as a result of collusion with competitors.

2. Beware what you share

   Eighty three per cent of those surveyed said they had some form of contact with others in their industry. While some contact may be perfectly legitimate, competitors risk triggering an anti-competitive arrangement where they share sensitive information about their pricing, output levels, customers or future commercial intentions.

   It is against the law for competing businesses to fix prices, share markets or discuss which of them will win a specific tender, whether that is by agreement or by means of a lesser form of co-operation. Ensuring that staff are properly trained on what it is appropriate to discuss with external contacts is vital to protect a business from slipping into dangerous territory.

3. Small businesses should never think they're immune

   While high-profile investigations may make more headlines, many competition law cases involve small to medium-sized businesses operating in local, specialised markets. It is dangerous to think that you're "too small to matter" – if the CMA discovers a cartel or other serious anti-competitive activity, businesses should not assume that the CMA won't investigate them because of their size. The subsequent fines for breaking competition law can also have a significant impact for smaller firms. In a 2013 case that exposed a series of separate anti-competitive agreements involving commercial dealer of Mercedes-Benz trucks and vans, fines wiped out up to 18 months' worth of profit for the dealers involved.

4. It's better to come clean

   Those we surveyed had little knowledge of the options for their business if they discover it has been involved in anti-competitive activity, such as a cartel. Only 15 per cent knew that the CMA operates a leniency policy which can offer immunity from penalties if a business comes forward and confesses its involvement. Key to securing this is to be the 'first one in' and to co-operate fully in helping the CMA carry out an investigation. This is where it pays to be diligent and proactive if you discover wrongdoing – as the full benefits of leniency are only available to the first business that applies. Waiting to see what others do first could be a very costly decision.

5. You need to encourage a culture of compliance to competition law

   As a business leader, you must take overall responsibility for instilling a culture of compliance within your organisation. Including competition law compliance as part of an existing risk or compliance programme is an important way to do this. Directors will know their business best and understand how compliance messages can be spread effectively throughout their organisation. By tailoring your approach to the specifics of your company, you can maximise the likelihood of reducing competition law risks while ensuring the process works with the grain of your business.

28. PRODUCT WARRANTEES AND GUARANTEES:

A warranty provides a contractual link between a third party to the contract and the parties of the contract. The form, extent and express obligation of that warranty depends upon the specific wording of the warranty document. Where product warranties are concerned, the warranty places an obligation upon the provider, usually a manufacturer from whom the contractor procured the product; to rectify defects in that product either by repair or replacement. The warranty will typically be limited to the value of the installed product, exclude any works or costs of works to uncover and access the defective item; or make good the affected area, as well as any consequential losses. For this reason they have limited benefit to the employer for whom the consequential loss of the defect may far exceed the limit of the warranty.

A guarantee is a 'promise' that any issues arising associated with a product or service within a specific period of time; will be rectified. As described above under Section 15. Bonds; a guarantee is a secondary obligation upon a third party to support the primary obligation of the contractor to fulfil its obligations. The third party, subject to the conditions of the guarantee, will fulfil the contractor's obligations in the event that the contractor fails to.

Both guarantees and warranties are contracts and as such they must be in writing and the Employer in particular must be very careful to ensure the details reflect their expectations.

It is an unfortunate feature of the Construction Industry that some guarantees and warranties provided by contractors are meaningless and extends the employer no greater security than they already have under contract law. These guarantees or warranties are not legally bona fide and only promise that the contractor themselves shall rectify issues arising. In the event that the contractor ceases trading, the employer shall be left with no security what so ever. There are many cases where guarantees or warranties provided to employers by contractors or suppliers are not backed by a third party; and have been extinguished by the contractor's or supplier's voluntary liquidation.

The guarantees offered in the UK Construction market can be broadly divide into 3 categories:

Insolvency Guarantees – These come in many forms often including the words Insurance, Guarantee and Protection. They are offered by many contractors and although advertised as insurance backed; they are only backed by an insurance company once the contractor has ceased to trade. If the contractor is trading, the employer must rely upon the contractor to rectify the issues and this will necessitate operation of the contract provisions for breach of contract and claims. The contractor must agree that a breach has occurred otherwise a dispute may arise ending potentially with litigation. When a contractor has ceased to trade, the contractor's negligence must be proven to the insurer in order for the guarantee to be honoured. The burden of proof is on the employer and this may involve heavy legal expenses and a great deal of work gathering evidence and third party testimony.

Company Guarantees – These legally speaking are not true guarantees; they are an assurance that the contractor themselves shall fulfil the conditions of the guarantee. As such the specific wording of the guarantee is critical. Given that contractors are liable for defects under statute for either 6 or 12 years; these company guarantees to appear attractive to an employer are often written for longer periods. They are completely worthless if the company ceases to trade and at any other time, similar to the insolvency guarantees, would require the employer to demonstrate the contractor's negligence and breach to enforce.

Latent Defects Insurance – Is a genuine guarantee providing an employer a first party latent defects insurance policy. The policy provides cover for the cost of rectifying or repairing damage caused by a fault in the design, construction, workmanship or materials of a completed construction project.

Key points of Latent Defects insurance are:

1. It is the building works that are insured not the person – thus freely transferable on sale.
2. It is not dependent on the contractor who carried out the work continuing to trade.
3. It is a direct contract, albeit incepted by the contractor, between the underwriting insurer and the building owner.
4. A Latent Defects cover operates where a claim is valid and there is no need to prove negligence.

Members of ASUC operate and incept these guarantees on behalf of their clients under two categories:

DIG - Defects Insurance Guarantee period 12 years, this is used for underpinning, piling and foundation and remedial structural repairs.

BIG – Basement Insurance Guarantee period 10 years, as the name suggests is used for Basement works in the retro-fit market and can include waterproofing cover if required.

The key benefits of these guarantees are:

1 The schemes are exclusive to ASUC members and offer a unique opportunity to engage with an approved contractor that has been vetted upon entry to ASUC for Technical, Insurance, Health and Safety, Training and Financial matters. The rectification works will only be undertaken by an ASUC member.

2 The warranties are considered better than signing Collateral Warranties and/or Certificates of Adequacy, because these require the continuance of Professional Indemnity (PI) cover at levels suitable for the contracts undertaken. PI cover is for "claims made" so if the company who undertook the work is not trading there will be NO policy to claim under.

3 The cost of DIG or BIG will be included in the contract sum and is for 10 or 12 years as noted above, so any costs associated can be considered spread over the whole period, although the premium is paid at completion of the works.

4 No one expects their company to fail, but there has been some notable collapses of companies during the recession and Construction companies often fail as the market comes out of recession as cash flow becomes a major issue for them. The DIG or BIG helps protect a company's balance sheet against a claim, costs associated with dis-proving negligence claims etc. as well as reduces the a member's risk level in the eyes of insurers thereby reducing the cost of general insurance policies.

5 Many Clients including Insurers, Lenders and London Estates have appreciated that engaging with an ASUC contractor reduces their own risk management, because members are pre vetted and offer these Guarantees

6 At point of sale Solicitors enquiries will reveal if underpinning of any form has taken place and trigger the question - is there a warranty or guarantee?

7 Covers ALL the contract works and defects in workmanship or design

8 Up to 25% of the contract sum is insured for consequential losses and Alternative accommodation is also covered for up to 26 weeks

9 Contract sum is index linked.

10 Tender pre-qualifications are increasingly requiring an insurance backed latent defects guarantee.

11. The policy covers workmanship that is not covered by any other insurance policy.

28. MANAGING THE RISK

"No construction project is risk free. Risk can be managed, minimised, shared, transferred or accepted. It cannot be ignored."
Sir Michael Latham, 1994

It should be borne in mind that risk may materialise in many aspects of a construction project;

- Health and Safety.
- Quality.
- Cost Management.
- Time Management.
- Change management.
- Commercial agreements (procurement and contracts).
- Stakeholder Management.
- Information Management.
- External forces.

If these risks are realised they may lead to increased costs, reduced productivity, delayed programme, damaged reputation and even insolvency.

It is for the contractor to identify the risks and determine how they are best managed, mitigated, minimised or controlled. As Sir Michael Latham stated, they may be shared, transferred or accepted.

The objective of a contract is to help achieve this by recording how the parties have agreed to deal with risk through their mutual acceptance of responsibility for loss arising from their own actions or for matters for which they have accepted liability. The parties should engage to disambiguate the agreement as much as possible; avoid tacit acceptance, implied terms or presumed responsibility.

Most contractors do not seek to entirely de-risk a contract for themselves; rather they wish the contract to simply reflect that they have agreed a price to build something and they will build it truly and honestly. They allow in their proposals to deal with all those risks that they can. It is often the case that they are asked for a "best price" they know they are in a competitive situation and they respond in due manner. As contracts become complex and introduce commercial principles removed from these core deliverables, the contractor is often exposed to risks that are not of their making, not strictly linked to their works and that are not best theirs to manage. In some circumstances the average contractor may find themselves ill equipped to discern these risks or the impact upon themselves.

There are many considerations that must therefore be borne in mind when the parties agree a contract. The paradigm of negotiation should ensure that the contract; is clear; reflects the intention of each party; avoids unnecessary confusion and provides a vehicle for dispute resolution.

The contractor must consider risk potentialities and negotiate the contract terms accordingly. Received wisdom informs that risk is best managed through:

- Hazard Identification.
- Assessment and quantification of the probability of that risk occurring and the severity of its impact.
- Establishing steps that reduce or control the risk.
- Implementation of those steps.
- Monitoring and review.

The construction of the contract offers the parties a vehicle to unequivocally manage risk by recording this in the contract.

Risk Register

Following the above 5 steps in risk management, Risk Registers are a practical tool for the successful management of project risk (and are a requirement of the NEC3 suite). A risk register is also a good tool for an organisation's management of commercial risk. A risk schedule registers the risks recognised at any stage in the project cycle; describes each risk and the actions required to either avoid or mitigate that risk. This process is extremely effective when the parties engage to complete it together but is also a very powerful means for an organisation individually to manage commercial risk.

Tender Documentation and Contract Provisions

Although it is the contract that provides a vehicle for recording how risk is managed. It is important that the contractor is cognisant of the risks throughout the contract negotiations and therefore from when reviewing the tender documentation. Depending on the circumstances; the contractor should consider the following:

Amending Standard Forms

Extensive changes to standard forms often introduce ambiguity and the *contra proferentum* rule will lead the courts to find against the party who drafted or offered the changes. Bearing in mind that the standard forms have specifically been prepared for a particular type of contract; if extensive change is needed; is the right standard form being used?

Wherever possible it is best to use a standard from rather than a bespoke contract. The latter tend to either;

- be prepared for an employer to appoint every contractor under and therefore are so general that they are often not suited to the specific scope or works, introduce ambiguity as a result and place unreasonable obligations on one contractor that may be ordinary for one trade but not another;
- or constructed to transfer risks to the contractor that would not be transferred under the standard forms.

Any amended standard or bespoke form must be extensively reviewed and efforts made to construe the contract as a whole.

Tender and Contract Documents

Uncertainty in the tender or contract documents often causes dispute and effort must therefore be made to disambiguate these as much as is practicable.

Nebulous, open ended or undefined statements and items must be avoided. These might include general comments such as "to contractor's design" without a schedule, description or scope; "to be agreed" for a specification item; "to suit manufacturer's details" or "to suit contractor's programme" etc.

It is of paramount importance that the details are established and frozen for the purposes of the tender. Statements that link quantitative items to the provision of information that is not available such as design information: "adjoining ground level to be confirmed" or "adjacent superstructure to be

surveyed," cannot be accepted. The contractor should seek for the contract to provide that changes in the frozen details constitute a variation for which the contractor is entitled to claim additional cost and time.

Any information submitted by the contractor with the tender such as a programme, construction sequence, resource levels must be qualified as "subject to detailed design" or "estimated". There are many factors that will become apparent post tender that will influence these items and the employer must not consider these to be contractually binding documents.

The form of contract, employer's requirements etc. must form part of the tender considerations. The contractor must be afforded the chance to review the commercial risks as part of the tender. Tenders that reference standard terms not provided but "available for review at the employer's office" or letters of intent that reference agreement of an as yet undisclosed contract; must be treated with caution. Contracts that commence without these items being mutually agreed are much more likely to enter dispute.

If the contractor does accept a letter of intent, they should ensure that there is a commitment to pay, a description of what works are expected, in what time and how they are to be valued.

Reliance on information provided

Risk to the contractor is substantially affected by the warranty or guarantee of the information provided with the tender. The contractor should seek indemnification for errors or omissions in the information provided i.e. design drawings, structural details, ground conditions, utility locations, access etc. Without this, the risk to the contractor may be of a level that threatens solvency if realised; particularly if there is no cap of damages or if there is a fit for purpose obligation.

Order of precedence in the contract documentation

Where more than one document is included in the contract, a hierarchy must be established to determine which document prevails in the event of dispute or discrepancy between them. The contractor should consider if the order of precedence will disambiguate discrepancies or conflicts to reflect the intention of the parties. The documents should be clearly numbered with those specific to the project ideally taking precedence over general conditions.

Scope of Works

As the performance of the contractor is measured in significant part by the scope of works, it is of utmost importance that the scope is clearly and precisely defined. Any ambiguity or uncertainty must be elucidated during the tender period, covered by a provisional sum or excluded.

Latent Conditions

Who is liable for latent conditions? What disclosures or disclaimers have been made in this regard in the tender documents? Was all the data available during the tender process? Is the liable party the best equipped in terms of expertise, capacity, information and timing to carry the risk?

If latent conditions are the risk of the contractor or there are design and build elements of the contract, is may be worthwhile to undertake additional investigations. Bearing in mind that research by the National Economic Development Office (NEDO) report found that over 60% of claims arose from delays due to ground problems.

Fit for Purpose or Reasonable Skill and Care

A design and build contract will usually carry a "reasonable skill and care" or a "fit for purpose obligation". "Fit for purpose" carries a considerably higher level of risk for the contractor that "reasonable skill and care". Moreover, in the event of a defect or breach occurring, professional indemnity insurance will not ordinarily cover liability for a fit for purpose obligation and the contractor may therefore be uninsured. A contractor must not accept obligations or liabilities for which it is not insured, this is in no one's best interest.

Programme

The contractor must take care when submitting a programme of works and ensure that a critical path is detailed, including allowances for less certain work items and clearly stating the calendar days upon

which it is based i.e. working weeks, calendar weeks etc. It is possible for a contingency period for delay or disruption in the programme to be included and linked to a Liquidated damages free period in the contract. The contractor should consider those delays that occur that are no-one's fault and for which it is not possible to claim an extension of time i.e. delayed deliveries, supplier breakdowns, inclement (but not exceptionally adverse) weather, illness etc. Allowance ought to be made for these.

Liquidated Damages

Liquidated damages can be challenged on the basis that they are not a true reflection of the loss incurred by the employer. It is worthwhile therefore for the contractor to request a formal confirmation of the calculation of liquidated damages together with evidence. If the proof is lacking or insufficient, the damages may be unenforceable. It may be possible for the contractor to renegotiate the level of liquidated damages accordingly.

Recent case law indicates that if the damages are part of a commercial contract between two parties of equal bargaining power; it is presumed that the level is proportionate to the loss for the employer. The contractor will therefore struggle to prove that the damages are excessive and punitive in nature. In this circumstance the contractor should satisfy themselves that the level of damages reflects the true costs of loss during the contract negotiation.

The contractor may find that the employer is responsible for a delay to which liquidated damages are being applied. The contractor can in these circumstances pursue an extension of time or dispute the damages on the basis that the employer has breached the contract.

Provisional Sums

Provisional sums should be limited and a clear provision included for their valuation and accommodation in the contract programme. The contractor must take care to include the provisional sums in the contract sum.

Variations

The contract must be clear on the document and timing requirements for variation notification etc. and the contractor must be sure to follow these. The contractor should seek to agree a clause that requires the parties to contemporaneously agree the validity of site records. This may take the form of a clause requiring the employer's representative to sign records in a given time. The clause may go on to provide that in the event of failure to sign the records; the contractor shall digitally communicate copies by email and these shall form the agreed record for the works.

Where possible, the contractor should include a schedule of rates for variation or additional work to cover all feasible works that may be required.

Variation provisions should define what instructed variations can be reasonably objected. Typical items in this regard are changes to: possessions, access, sequencing and working hours. These often lead to extensive disruption that is difficult to quantify or prove and therefore often disputed.

The provisions should also define deemed variations that do not require an instruction. The contractor may seek to include discrepancies or omissions in the employer's requirements or schedules as deemed variations.

The contract should clearly define what "fair rates and prices" means and how these are to be applied to the contract in the event of variations.

The contractor should be careful that the contract offers protection from the employer omitting contract works. It may be that the contract includes a clause entitling the employer to omit works without full or part compensation to the contractor. The contractor may wish to consider ensuring that the contract either prevents omissions altogether or clearly entitles the contractor to full loss, expense and profit compensation.

Retention

Retention levels must be reasonable and the release linked to a firm date associated with practical completion or hand over of the site. Those contractors who have access to an insurance backed latent

defects guarantee may look for the contract to provide that retention is released in full in exchange for such a guarantee.

Payment

The contract must be clear on the document and timing requirements for payment applications etc. The contractor should seek to agree payment terms that reflect the risk level of the project, the cash draw on the organisation and the credit worthiness of the employer.

It might be that the employer's credit worthiness is such that the risk of adopting standard payments terms is too great. The contractor might consider up-front payments, shorter payment cycles and certification periods, milestone payments etc. These may be agreed to address the reasonable concern of the contractor and need not unfairly place risk on the employer. The contractor could consider offering a conditional performance bond in exchange for up-front payments. In this manner the risk of both parties is significantly reduced.

Facilities and Attendances

As these are a substantial enabling factor in the contractor discharging their obligations; nothing should be left to chance or doubt. The parties must clearly and extensively define the facilities and attendances that the employer is providing. Moreover, the contractor must be sure that these are sufficient to support their works; wherever not, the contractor must include the additional items in their own preliminaries.

Insurance Cover

Do the obligations of the contract fall within the extent of the insurance cover? This is particularly important when considering fit for purpose obligations as opposed to reasonable skill and care; working near water courses; discharging extracted water etc.

Limiting Liability

Is there a net contribution clause to fairly and proportionately limit liability in the event that a loss or damage occurs for which more than one party is liable? This is opposed to joint and severally that under the Civil Liability (contribution) Act 1978 entitles the claimant to pursue one party for the full loss – that party may then pursue the other parties for their proportional contribution.

Is the contractor's liability capped to the value of their insurances cover?

The contractor may consider that the risk on a particular project is such that it is necessary to limit liability i.e. financially and to place a cap on damages. Typically a contractor may limit the aggregate of these two to the value of the contract.

Limitation Periods

Are the limitation periods as set out in the Limitation Act 1980 amended; are these amendments reasonable?

Exclusion Clauses

Have exclusion clauses been included? What losses are excluded and are they reasonable?

Acceleration Clauses

Care must be taken when accepting acceleration clauses to ensure that they are reasonable and that achievable allowances are included. In some bespoke contracts an acceleration clause may be unreasonably applied and may be impossible for the contractor to achieve. Failure to meet the acceleration requirements could be used as grounds for termination.

Statutory Obligations

The parties must ensure that the obligations set out in statute are clearly allocated where they can best be discharged. These may include: Commercial, Company, Tax, Building, Planning, Health and safety, Environment and Pollution, Noise, Traffic, Public Procurement, Products and Services etc. Some bespoke contracts may seek to place the responsibility on the contractor but the contractor is unlikely to have the breadth of expertise to satisfy these. The contractor must be careful accepting any obligations with which they do not have extensive experience or specific qualifications for.

Back to Back Terms.

Is there a complete contractual chain with back to back terms up and down? It is important to ensure that any gaps between the sub-contractor and the contractor and or Main Contractor are understood and wherever possible, reasonably closed. If this is not possible, the employing contractor will find themselves exposed to liability for shortcomings in the sub-contractors operations that the sub-contractor is not liable for.

General Policies that manage risk

In addition to the management of risk when negotiating a specific contract, a contractor may establish general business policies that further assist in the control of risks. This may for example include:

- A requirement that all contracts are written.
- The designation of those with the authority to negotiate and sign contracts.
- Training for staff to ensure everyone understands the obligations under the contract and the risks associated with those obligations.
- A requirement that appropriate and competent individuals review and internally approve the terms of a contract prior to signature.
- Authorised signatories to any binding agreements must be defined in the contract.
- The safe storage of both soft and hard copies of all signed contracts and a policy for who can access these documents.
- The establishment of a safe digital filing system for emailed correspondence critical to the contract.
- An archiving procedure for completed contracts, including how long they will be retained. This may include scanning for digital archiving.
- The construction of a Pre-Contract Checklist for all contracts to be appraised against during negotiation and prior to signature. Such a checklist might look to ensure that a contract includes critical information and that risk management procedures have been completed such as:
  - The parties to the contract are legal entities.
  - Correct legal names are recorded on all documents.
  - Correct addresses for notices etc. are shown in the documents.
  - The scope of works is clearly described together with the performance measurements.
  - Any reporting requirements are recorded.
  - All changes to the contract must be made in writing and signed by all parties.
  - The legal jurisdiction is recorded and acceptable.
  - The insurance requirements are specified and consistent with that which the company holds; bear in mind that explicit limitations may be defined for length of contract, depth or height of works as well as work types/circumstances/environments.
  - Any limitations of liability are identified and reasonable.
  - That assignment requires written approval.
  - The non-disclosure or confidentiality requirements are reasonable and achievable.
  - That termination provisions are specified and reasonable.
  - That dispute resolution processes are identified.
  - Pertinent dates i.e. start date, payment application dates etc. are clearly set out.
  - That compliance requirements i.e. local or international laws do not introduce additional risks that have not been considered.
  - That intellectual property is protected.
  - The payment terms, dates, values, notices and submissions etc. are clearly and unambiguously defined.
  - Effective credit checking has been completed on the payer.
  - Adequate due diligence has been completed on the other third parties involved in the contract.
  - The contract does not restrict the use of the contractor's usual resources i.e. labour only sub-contractors.
  - Liabilities and indemnities are clearly defined and thoroughly understood.
  - Due diligence has been completed to ensure that the competition act is complied with.

- The penalties clauses are understood and acceptable.
- Dispute resolution is adequately provided for.
- There are adequate provisions for change management.
- The suspension and termination clauses are fair and do not provide a party any "at will" entitlements.
- Any bonds are conditional as opposed to on demand and those bonds are acceptable to the bondsman and insurers.
- The margin is within business limits.
- The value of the contract and cash demand can be supported by the business.
- The business has the capacity to support the demands of the project.
- The business can discharge the works in accordance with CDM.
- Subcontractors are pre-qualified, hold the insurances, capacity, demonstrated experience, training and qualifications to complete the works safely, adequately as well as according to the same terms and conditions as the employing contractor.

Project controls

Commercial risk management does not end with the agreement of the contract. The contractor must be sure to fulfil its obligations under the contract and administer the contract correctly. Bearing in mind that the EC Harris Global Disputes Survey ranked the top causes of dispute in the UK as failure to administer the contract properly and failure to understand or comply with contractual obligations. Best practice is to create and apply a framework of project controls. The risk register shall inform the contractor as to what actions and controls must be executed. Project controls specifically address those issues unique to the contractor and may account for experience, strengths and weaknesses etc. and address issues such as:

- Effective dissemination or and understanding or the contractual obligations.
- Project planning, programme, progress and costs.
- Effective management of logistics, procurement, staff, Health and Safety etc.
- Statutory requirements.
- Recognition of developing risks and adequate responses.
- Correctly making or defending claims.
- Correctly administering the contract (payment applications, variations etc).
- Compliance with the project requirements and avoiding a breach of contract
- Avoiding the acquisition of additional liabilities or losing entitlement due to miss-understanding or ignorance of the contract terms.

The contractor should review itself to identify these internal risks in the same manner as it reviews the commercial risks. The project controls are then applied to assist in the management of both the commercial risks and internal competencies.

Items that the contractor may consider to include in such Project Control framework are:

- An integrated management system of policies and procedures to ensure the project is efficiently co-ordinated, monitored and managed (interweaving procurement, health and safety, commercial management, surveying, estimating, design, technical, contract, supervision, compliance etc.).
- Clear allocation of authority and responsibility in a project hierarchy.
- Definition and allocation of roles – to ensure that contract critical items such as programme tracking, cost control, Health and Safety, quality control, technical management, commercial management etc. are met.
- A meeting timetable to ensure documented pre-contract handover between colleagues, project management planning, co-ordination, compliance and risk review meetings are held and actions agreed.
- The dissemination of the pertinent elements of the contract to the project management team setting out the risks, the controls, requirements for administering the contract, the performance obligations etc. and ensuring that they are empowered to discharge the obligations.

- A protocol for communication to ensure stakeholder management is maintained, timely and effective; that notification requirements are met and procedures documented etc.
- Regular documented meetings are held to disclose as built progress and remaining programme expectations, problems, future requirements, confirmation of agreements or instructions, delays and disruptions etc.
- Allocation of the responsibility for reviewing the contractor's compliance with performance and quality requirements under the contract.
- Development of quantitative measures to monitor progress, productivity, quality, cost control and performance.
- On-going maintenance of the risk register.
- The appropriate competent and experienced professionals are on site or involved remotely to ensure that any new information issued by the employer is expertly reviewed for any details that may constitute a variation and this is promptly assessedd for risk and notified to the employer.
- That a trained and competent individual is responsible for keeping records of the works and communicating these to the employer clearly, correctly, promptly and in a manner that controls the risk to the organization.
- Any document (other than standard approved documents sent in their entirety) that exit the business and that binds the business in any way to an obligation of service to a third party is not be signed by anyone other than designated authorities.
- Any email that is sent during a live contract that binds the business to providing work in variation to the contract must be sent by a designated authority or approved by them.
- Any estimate that is emailed must:
  - clearly state that it is an Estimate and NOT an Offer or Quotation.
  - state that if the Estimate is of interest then a fully detailed Offer will be provided.
  - state an estimated target programme along with contract period.
  - clearly set out any allowances including being subject to standard conditions of contract, whether any of the roles under CDM are allowed etc.
  - are sent without any attachments or references to an invitation to tender, external terms and conditions etc

The Final Option

It may be that despite the extensive efforts of the parties to agree a sensible and reasonable allocation of risk in the contact; the contractor still finds themselves in a position where the risk is significant. The rapturous relief of successfully negotiating and securing a contract can sometimes beguile the cautious. The contractor must have mechanisms in place to ensure that matters are considered with neutral intent. When all else fails, the final option is to decline the contract and withdraw from the negotiation. It is of course not the option that anyone desires but there will be times when it is the best option for the security of the business.

29. SUMMARY

Contracts are a means for the parties to agree the allocation of risk. This may not be balanced but the risk should be borne by the party best able to manage it.

Regretfully it is not always the case that the parties to a contract have the intention to collaborate; rather they may be seeking the best position for themselves. This is often a position with as little risk but as much entitlement as possible.

The small to medium sized construction contractor will often face the difficult situation of internal and external pressure to enter into contract with unknown or unfair risks.

This document has been compiled from experience, selected information available to the public in case law, legal best practice and a substantial library of published material with the express intention of helping contractors agree fair contract terms and manage risk. The brief risk management section is intended only as a guide for an orgnanisation to determine their own approach specific to their strengths and weaknesses. It would be possible to write much more on that subject, indeed there are many publications and professional qualifications available for more expansive guidance.

A contractor who understands the nuances of a contract and the effect of different provisions is empowered to negotiate with an employer and advise them of the reasonableness of seeking fair terms. Or indeed to offer an alternative that reduces the risk for both parties viz. performance bond in exchange for improved payment terms or an ASUC Guarantee in exchange for retention.

In some instances the contractor may find themselves in a negotiation with a main contractor and enabled to collaborate in reducing the shared risk by advising them on the contract terms. It may otherwise be that both contractor and main contractor price for the same risk where only one need to allow for it. A risk schedule in these instances is invaluable.

In no circumstances, does ASUC insist its members adhere to this document - it is for each company to decide what is commercially acceptable to them as a business. If in doubt, legal advice must be sought to ensure that the business is not exposed to unnecessary risks. This document is intended to raise awareness of contractual matters and is not to be taken or interpreted as contractual or commercial advice.

The content should assist a business to determine when further advice is needed. It may be that the content of this document is only rarely needed but as is so often the case when managing risk; it is the many times that a risk is managed in order to defend a single harmful occurrence. We do not know when that harm might materialise, but the single occurrence may be the event that leads to insolvency; therefore we must always be prepared for it.

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