Managing Onerous Clauses: A Guide For Civil Engineering Contractors

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Introduction

Considering the impact of amendments to and perceived onerous clauses within construction contracts is a challenge for all those working within the construction industry. While they are often inserted into contracts by clients in good faith to manage risk and protect the public purse, they can have the opposite effect, weakening supply chains, restricting innovation and driving inefficiencies.

This practice often results in risks being transferred to the contractor who may not be able to manage or mitigate the physical risk and therefore is left with no option but to incorporate a financial assessment of that risk into the tender thereby unnecessarily increasing the price. Long term across the construction industry this practice inflates costs.

This document is intended as a guide for clients and contractors when agreeing contracts. Due to competition rules, it is not a definitive set of do's and don'ts, but more of a resource tool, offering a range of solutions to support positive discussions. The aim is to drive clarity and certainty throughout the supply chain, leading to better infrastructure outcomes to complement how we live and work. The benefits of effective programme management cannot be overstated and this must become a golden thread in contract development. Our first point of principle is that the most suitable form of contract should be chosen in line with the recommendations of the Construction Playbook. Furthermore, as a rule, and Standard Form of Contract should not be amended.

This is the first of three documents published by CECA's Legal & Commercial Group. It focuses on the common challenges faced by contractors. A second guide will be published in early 2024 on less common but highly damaging clauses with a final guide to focus on managing commercial terms by the end of the year.

TOPIC	ISSUE	POTENTIAL MITIGATION
Disallowed costs & Audit	Definitions can be ambiguous and lead to the imposition of unusual or inappropriate costs or reasons for barring. Named parties can audit all documents, despite commercial sensitivities and the body being audited must pay the costs.	Any definition needs to be clear and unambiguous, with principles expressed in clear teams and not revisited. This includes managing how homeworking is renumerated. Limit Audit to what is necessary to satisfy terms of contract and verify anti-fraud measures. Audit should only be against a clear set of rules and expectations with clear list of information that will be subject to audit and methods of satisfying audit by example - so risks of non-payment are understood, and likewise satisfy audit = get paid. GDPR and personal info should not be available (unless and only to a professional accountant practice and named Chartered individuals).

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Payment	Supply chain payments can be late, or less than anticipated. Retentions for defect resolution are often held for longer than anticipated and / or not returned as expected. Often there is no provision for advance payment. Reluctance to certify applications.	Apply conditions precedent in a proportionate fashion. Ensure payment process and requirements are clearly set out within contract documents. Adhere to only one form of security. Only hold retentions if absolutely necessary. Retention requirements (if held) must be propor-tionate and reasonable. Consider a cap on the maximum level of retention that can be deducted. Consider releasing retentions as assurance stages are cleared. Facilitate mobilisation payments. Do due diligence on payment terms and quality control systems. Introduce obligations to certify in a timely fashion.
Indemnities	While it is not unreasonable to enforce indemnities, they are frequently over-amended via clauses.	Indemnities should be reasonable and given only in the following cases: - Bribery and corruption - Modern slavery - Breaches of law - Personal and property damage
Design Liability	Liabilities arising from design obligations which go beyond the professional standard of reasonable skill and care, such as fitness for purpose or absolute obligations, are uninsurable.	Resist express or implied design obligations which exceed reasonable skill or care. Limit design liability to reasonable skill and care. Ensure contracts include appropriate limitation clauses, for example Secondary Options X15 and X18 in the NEC4 Engineering and Construction Contract.

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Third Party Agreements	Contractors can unknowingly sign up to unseen Third Party Agreements.	Ensure all documents are provided before contract is concluded. Ensure all third parties are known and cannot be unliterally added to by the client. Ensure clarity and sufficient time to review implications, otherwise unfair. Ensure no conflicts between requirements and precedence.
Compliance with main contracts	Clients often anticipate full compliance with the main contract.	Ability to delete these contractual provisions and where impossible, introduce recommended amendments. Each tier should really filter requirements so relevant to procurement of next tier - otherwise gaps and overlaps and confusion creeps in - but time is needed for this - and push back to client is necessary to facilitate that time.
Ancillary Documents	Clients often anticipate full compliance with unseen ancillary documents. Unfair - unless listed with version control.	Ability to delete provisions on compliance with unseen documentation or make compliance conditional. List documents forming part of the sub-contract in order of precedence. Main contractor responsible for time and monetary consequences of conflict or discrepancy resolution.
IPR and Copyright Licences	Contractors can sometimes find IPR clauses difficult to flow-down to design subconsultants. This prohibits obtaining the right outcome.	Designers and clients must agree at an early stage what is reasonable, ascertain a common position, definition and ensure consistency.
Extension Clauses	Programme literacy is needed here to avoid misunderstanding.	Industry training of clients, contract administrators and supply chain is needed to ensure consistent understanding and practices are deployed. This must include acceleration and concurrency in programme management. There must be agreement on what is reasonable. Confirmation must be sought in writing.

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