

Managing Onerous Clauses: A Guide For Civil Engineering Contractors - Part 2

November 2024

Introduction

Onerous amendments to standard form construction contracts (as well as onerous clauses within bespoke contracts) can be detrimental to all those working within the construction industry.

Whilst such provisions are often inserted into contracts by Employers or their representatives in good faith to manage risk and ensure cost certainty, they can have a negative impact on contractual relationships and co-operative working practices, weakening supply chains, restricting innovation and driving inefficiencies.

This means that risks are often transferred to the Contractor who can be left with no option but to incorporate a financial assessment of that risk into the tender and unnecessarily increasing the price, although in many cases the Contractor is not the party with the capacity / ability to manage such commercial risks in the most efficient and beneficial manner for a specific project. This practice then inflates costs, negatively impacting the wider industry.

This document is intended as a guide for Employers and their representatives 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 and suggestions to support positive discussions.

The aim is to encourage 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 always that the most suitable form of contract should be selected in line with the recommendations of the Construction Playbook. Furthermore, as a rule, any standard form of contract should not be amended. Finally contractual terms must always be clearly written, defined and not subjective

In December 2023, CECA published [Managing Onerous Clauses \(Part 1\): A Guide For Civil Engineering Contractors](#). This publication (Part 2) is the second of three documents published by CECA's Legal & Commercial Group. It focuses on less common but potentially onerous clauses. A final document (Part 3) will explore managing commercial terms will be published in early 2025.

Managing Less Common, But Potentially Onerous Clauses

TOPIC	ISSUE	POTENTIAL MITIGATION
Concurrent Delay	The contractual allocation of risk for concurrent delay is sometimes unclear and can drive the wrong type of behaviours from the Project Manager.	<p>Develop protocol to manage concurrent delay at the start.</p> <p>Proper cause and effect analysis should be carried out before penalties are considered.</p> <p>There should be an agreed definition of what is a concurrent delay established before a contract is agreed by the contracting Parties.</p>

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Liquidated Damages	These are often unrealistic, but Contractors feel forced to accept the terms.	Discussions about liquidated damages need to be realistic, transparent and clearly establish and set out expectations of planned completion dates and compensation for delay. Parties should work together to find better ways of managing the risks of delay to both Employer and Contractor.
Handback Provisions	Contracts are being amended to seek complete sign off on all parts of project delivery (accumulating delay and costs via penalties) when the customer is already using the infrastructure as a workable asset.	Develop a realistic approach to managing this, by confirming a Perfect Agreement, based on a collaborative approach. This should define and agree what constitutes Completion of the project or sections thereof.
Compensation Event approval process (under NEC)	This is linked more with the underlying obligation of a Project Manager to act in accordance with their obligations and is a behavioural challenge driven by contractual amendments. It is often the Contractor that has to notify the Client of an event, under reduced times. This means that the burden often falls more to the Contractor than the Project Manager.	Seek to develop a spirit of cooperation. Do not omit those clauses. The obligation for the Employer / Employers Representative to advise the Contractor of changes / potential compensation events as soon as possible should not be overlooked in the negotiations.
Amendments to contracts that provide no warranty of accuracy	Contractors are often under obligation to factor in risk, which can be at far greater cost to the Client, when the risk is likely to be minimal. Contractors are regularly being asked to warrant that information received from Clients and other parties does not hold any blockers. Clients often do not warrant the information they provide to the Contractor.	Clients should ascertain at the outset the level of risk outlined, decide who is the best party to manage the various risks for the overall benefit of the project, communicate and agree this with the Contractor.
Scope/Service Information documents	These documents often do not define work but introduce requirements that start to allocate risk and liability. Contractors often take full risk of existing assets, without the assets being exposed or tested.	These documents should simply set out the work required, be clear and not contradict other Contractual documents. The Contract should state the precedence of all documents forming the Contract. Documents should be clear and responsibility for them should stay with the party that provides them.
Climate-related clauses	Such clauses are likely to become more common in future.	Such clauses are best used as an incentive.

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Statutory Diversions and Statutory Undertakers	<p>These are happening more often, they may not always be necessary and they do not benefit project outcomes.</p> <p>The Contractor is often asked to take risk of Statutory Undertakings not performing.</p>	<p>Ascertain if these are really needed, or whether another solution can be identified via management and dialogue. If needed, establish who owns the diversion.</p> <p>The risk should remain with the Client who is best placed to manage as it has the interface with the Statutory Undertaker.</p>
Programme	<p>Programmes are often not accepted or abused by the Project Manager and reasons for rejection and the Contractors opportunity to address ill defined rejection are not often communicated until the Contractor has committed to construction as detailed in the submitted programme.</p>	<p>Establish an agreed procedure for acceptance of the programme or updates thereto at the outset that uses NEC in its intended spirit to avoid unnecessary delay.</p> <p>Programme needs to be updated and accepted throughout the project.</p>
Limits of Liability	<p>Contracts sometimes include unlimited liability (or very high limits) for the Contractor.</p> <p>These may cause contractors not to consider offering to undertake a contract, or price unrealistic risk into the contract price; neither of which being beneficial to the Employer.</p>	<p>Consider levels that are commensurate with the parties' interests in the project (consider who gains what from the contract, and at what potential risk)</p> <p>Limit liability levels to that for which there is insurance coverage.</p>