

**B.Sc Civil
Engineering**

CONTRACT



Project & Contract Management CE 206

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Typical Contract Conditions

Typical Construction Contract Conditions/Clauses:

- **Contract conditions** set out the principal legal relationship between the parties to a construction project, determining the allocation of risk and consequently, price.
- Conditions of contract must be read in conjunction with specification documents, drawings bills of quantities, activity schedules and special conditions.
- A **contract clause** is a specific provision or section within a written **contract**.
- Each **clause** in a **contract** addresses a specific aspect related to the overall subject matter of the agreement.
- **Contract clauses** are aimed at clearly defining the duties, rights and privileges that each party has under the **contract** terms.

Possession of the site by the contractor:

- Contracts generally grant the contractor exclusive possession of the site until practical completion when a handover meeting takes place and possession reverts to the client.
- The contract may state the date for possession of the site by the contractor (or commencement date), or, if not, then the site must be handed over to the contractor within a reasonable time after signing of the contract.

Possession of the site by the contractor:

- If the client fails to give possession of the site to the contractor, and there are no provisions for delay in the contract, then they will be in breach of contract.
- Even if the contract does provide for delay in giving possession of the site to the contractor, the contractor will still be able to claim for an extension of time and perhaps loss and expense.

Practical completion:

- The contract administrator certifies practical completion when all the works described in the contract have been carried out.

Completion date :

- Most construction contracts set a date by which the works described in the contract must be completed.
- This is not the date by which all obligations under the contract have to be discharged, but the date by which 'practical completion' must be certified.
- That is, the date by which the works have been completed and the client can take possession of the site, albeit there may be very minor items outstanding that do not affect beneficial occupancy by the client.
- The completion date may be altered during the course of the contract, for example if the date the contractor takes possession of the site to begin construction is delayed, or if an extension of time is granted due to delays to the works that are not the contractor's fault.

Termination in construction contracts:

- Most forms of contract will include termination clauses, setting out the circumstances under which a contract may be terminated.
- When a contract is terminated, the parties to the contract are no longer obliged to perform their obligations under the contract.
- Terminating a contract can be complex, and it is very important that the correct procedures are followed. This may involve issuing notices setting out the grounds for termination, allowing warning periods, and giving the opportunity to remedy breaches.

Breach of contract:

- If the one of the parties to a contract fails to perform as required by the contract, this may constitute a breach of contract.
- A breach of contract may entitle the innocent party to make a claim for damages for the losses it has suffered.
- On construction contracts, it is generally in the interests of both parties for the contract to continue and for the works to proceed irrespective of minor problems. Whilst damages for breach of contract may seek to put the innocent party in the position it would have been in had there not been a breach of contract, the delay and disruption caused, for example, by having to appoint a new contractor can far outweigh the difficulties of proceeding, albeit under difficult circumstances.

Breach of contract:

Generally the contract breaches might include:

- Refusal to carry out work.
- Abandoning the site.
- Removing plant from the site.
- Failure to make payments.
- Employing others to carry out the work.
- Failure to allow access to the site.
- Failure to proceed regularly and diligently.
- Failure to remove or rectify defective works.

Suspension:

- Contracts may also allow suspension of performance. The circumstances allowing suspension are generally similar to those allowing termination.
- Suspension can be useful, for example, if the client has difficulty in raising funds to pay for the work to proceed at the speed anticipated by the contract.
- Either party may have the right to terminate at the end of a suspension period, or if a suspension becomes prolonged with no prospect of work re-commencing.

Extension of time (EOT) :

- Many construction contracts allow the construction period to be extended where there are delays that are not the contractor's fault. This is described as an extension of time (EOT).
- If the contract administrator accepts that the delay was caused by a relevant event, then they may grant an extension of time and the completion date is adjusted.

Force majeure in construction:

- The term 'force majeure' comes from French law, where it translates as 'superior force'.
- Very broadly, it relates to exceptional, unforeseen events or circumstances that are beyond the reasonable control of a party to a contract and which prevent or impede performance of their obligations under the contract.
- Generally it cannot be an event that the party could reasonably have avoided or overcome, or an event attributable to the other party.
- Clauses referring to force majeure attempt to set out the circumstances to which the term applies to and prescribe how such situations should be treated.

Force majeure in construction:

- Depending on the provisions of the contract, the following may be considered to constitute force majeure:
 - Unforeseen changes to legislation.
 - Wars and other hostilities (such as terrorism).
 - Fires.
 - Exceptionally adverse weather.
 - Civil unrest, such as riots or revolution.
 - Strikes (other than by the contractor or subcontractors).
 - Natural catastrophes such as earthquakes, floods and volcanoes.
 - Epidemics or pandemics.

Insolvency in the construction industry:

- “Insolvency” describes the inability of a debtor to pay its debts.
- In the United Kingdom insolvent individuals are made “bankrupt”, while companies are put into “liquidation” or “administration”.
- The specific aim of including this clause in contract is to recover all available assets which are then distributed to creditors to satisfy all debts to the greatest extent possible.

Liquidated damages in construction contracts:

- Contracts generally include a provision for the contractor to pay liquidated damages (or ascertained damages) to the client in the event that the contract is breached.
- In building contracts, liquidated damages usually relate to the contractor failing to achieve practical completion (i.e. completing the works so they can handover the site to the client) by the completion date set out in the contract.

Fluctuations in construction contracts:

- Fluctuations are a way of dealing with inflation on large projects that may last for several years.
- On smaller projects, the contractor will be considered to have taken into account inflation when calculating their price (a firm price).
- However, on the larger projects, the contractor may be asked to tender based on current prices (prices at an agreed base date) and then the contract makes provisions for the contractor to be reimbursed for price changes to specified items over the duration of the project (a fluctuating price).

Fluctuations in construction contracts:

- Fluctuation clauses in contracts may allow for:
 - Changes in taxation.
 - Changes in the cost of labour, transport and materials.
 - Increases in head office or administrative costs

Relevant event:

- Delays on a project will have different contractual consequences depending on the cause of the delay:
 - Where a delay which impacts on the completion date is caused by the contractor, the contractor will be liable to pay liquidated and ascertained damages (LAD's) to the client.
 - Where a delay which impacts the completion date is not caused by the contractor, it may be a 'relevant event', for which the contractor may be entitled to an extension of time and to claim loss and expense incurred as a direct result of the delay.

Relevant event:

- Relevant events may include:
 - Variations.
 - Exceptionally adverse weather.
 - Civil commotion or terrorism.
 - Failure to provide information.
 - Delay on the part of a nominated sub-contractor.
 - Delay in giving the contractor possession of the site.
 - Force majeure (events that are beyond the reasonable control of a party, such as a war or an epidemic).

Relevant event:

- Relevant events may include:
 - Loss from a specified peril such as flood.
 - The supply of materials and goods by the client.
 - National strikes.
 - Changes in statutory requirements.
 - Delays in receiving permissions that the contractor has taken reasonable steps to avoid.

Loss and expense :

- Construction contracts will generally provide for the contractor to claim direct loss and / or expense as a result of the progress of the works being materially affected by relevant matters for which the client is responsible, such as:
 - Failure to give the contractor possession of the site.
 - Failure to give the contractor access to and from the site.
 - Delays in receiving instructions.
 - Opening up works or testing works that then prove to have been carried out in accordance with the contract.

Loss and expense :

- Discrepancies in the contract documents.
- Disruption caused by works being carried out by the client.
- Failure by the client to supply goods or materials.
- Instructions relating to variations and expenditure of provisional sums.
- Inaccurate forecasting of works described by approximate quantities.
- Issues relating to CDM.

Defects in construction :

- Defects are aspects of the works that are not in accordance with the contract.
- Defects may occur because of:
 - Design deficiencies.
 - Material deficiencies.
 - Specification problems.
 - Workmanship deficiencies.

Defects in construction :

- Defects can be 'patent' or 'latent'.
- **Patent defects** are those which can be discovered by reasonable inspection.
- **Latent defects** are those which cannot be discovered by reasonable inspection, for example problems with foundations which may not become apparent for several years after completion when settlement causes cracking in the building.
- When a latent defect becomes apparent, it becomes patent rather than latent.

Defects liability period :

- The defects liability period (or rectification period) begins upon certification of practical completion and typically lasts six to twelve months.
- During this period, the client reports any defects that arise to the contract administrator who decides whether they are defects in the works (i.e. works that are not in accordance with the contract), or whether they are in fact maintenance issues.
- If the contract administrator considers that they are defects, then they may issue instructions to the contractor to make good the defects within a reasonable time.

Variations in construction contracts :

- A variation (sometimes referred to as a variation instruction, variation order or change order) is an alteration to the scope of works in a construction contract in the form of an addition, substitution or omission from the original scope of works.
- There should be express terms in contracts which give the power to instruct variations. In the absence of express terms in the contract the contractor may reject instructions for variations without giving rise to any legal consequences.

Variations in construction contracts :

- Variations may include:
 - Alterations to the design.
 - Alterations to quantities.
 - Alterations to quality.
 - Alterations to working conditions.
 - Alterations to the sequence of work.
- Variations may be valued by:
 - Agreement between the contractor and the client.
 - The cost consultant.
 - A variation quotation prepared by the contractor and accepted by the client.
 - By some other method agreed by the contractor and the client.

Retention in construction contracts :

- Retention is a percentage (often 5%) of the amount certified as due to the contractor, that is deducted from the amount due and retained by the client.
- The purpose of retention is to ensure that the contractor properly completes the activities required of them under the contract.
- Half of the amount retained is released on certification of practical completion and the remainder is released upon certification of making good defects.

Contract sum:

- The contract sum is the price agreed with the contractor and entered into the contract.
- Preparing the final account is the process of calculating and agreeing any adjustments to the contract sum at the end of the defects liability period so that the amount of the final payment to the contractor can be determined.



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