

PROFESSIONAL PRACTICE
Construction Contract Conditions

for
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CONSTRUCTION CONTRACTS

Standard Forms of Construction Contract generally comprising Agreement and Conditions have been developed to accommodate the circumstances which regularly arise when a client wants something built by a contractor. Different Standard Forms have been developed for different types of work, eg. Buildings, Engineering Works, Landscape Works, Landscape Maintenance Works, etc.

The advantage of Standard Forms is that everyone knows exactly what they say. This certainty can only be maintained if the Forms are published documents so that any revisions specific for the project are clearly identifiable so that anyone can see them (traditionally hand written and initialled by both parties). Computerisation threatens this certainty hence Standard Forms are not available on the internet, JCT Forms are available on disc but have special security to ensure none of the clauses can be revised except in specific locations where information must be added. Loss of this certainty would destroy the credibility of the Standard Form.

REQUIREMENTS OF PARTIES	HOW NORMALLY ACCOMMODATED
<p>Obligations</p> <p>Client: What are my obligations?</p> <p>Contractor What are my obligations?</p> <p>Contract Administrator What are my duties / powers / obligations?</p>	<p>Pay the appropriate amounts at the agreed times And others like Make site available at the appropriate time Several obligations under CDM Regulations</p> <p>Build the project in accordance with the contract documents And many others like Complete on time Carry out instructions Competent person on site at all times</p> <p>Administer the contract to the limit of the powers given the CA by the contract. Eg. Issue certificates required by the Standard Form, issue instructions in writing, issue further information, etc. Some powers are obligatory although some obligatory ones may only be necessary if the particular circumstances arise, some powers can be used if the CA wishes.</p>

<p>Note: The client and the contractor are the 2 parties to the contract. Until recently nobody else had any rights under the contract (privity of contract). However since the Contracts (Rights of Third Parties) Act 1999 anybody who can prove an interest can have rights under the contract. But most Standard Forms opt out of the Act (third parties are given rights using collateral warranties if required)</p> <p>The client can have different names in different Standard Forms, eg Employer, Authority</p> <p>The CA has different names in different Standard Forms eg. Engineer, Architect, Superintending Officer, Supervising Officer</p> <p>Other terminology can vary between Standard Forms, eg. Practical Completion in JCT Forms is Substantial Completion in ICE Forms</p>	<p>Some Standard Forms include other persons who assist in the administration of the contract eg. Resident Architect, Resident Engineer, Clerk of Works. Their role is specified in the Standard Form and all parties must be advised in writing by the CA of the limits of the other person's authority. If the Standard Form does not include the role of someone who is required to have authority (including staff of the CA) their role and authority must be advised by the CA to all parties in writing.</p> <p>Some Standard Forms require close inspection of the works using resident engineers, and close involvement with works on site including more of a joint responsibility approach with the contractor (eg health and safety). The JCT (Architects) and JCLI (Landscape Architects) Standard Forms have a more hands off approach with no requirement to visit site in the Standard Form (other than that implied by the duty of certifying payment for work done properly). The requirement to inspect the works comes from the CA's Agreement with his client where the extent of inspection should be stated.</p> <p>The CA's obligation to act impartially between the parties comes from his professional code of conduct. Hence the reference to Architect or Engineer instead of CA in some Standard Forms, which limits the use of these forms. Clients using a CA who is not bound by such code or whose code does not include this requirement should require it in their Agreement with the CA</p>
<p>Time</p> <p>Client: When/how soon will it be finished</p> <p>Contractor: When will site be available for me to start How long do I have to do the work</p> <p>Client: What if it isn't finished at the agreed time, I will be losing money if it is late</p>	<p>Agree Commencement and Completion dates pre contract</p> <p>Liquidated and Ascertained Damages determined by client/CA pre tender, realistic assessment of loss by client if contractor does not complete on time, rate per week, included in tender docs so contractor knows obligation</p>

Contractor	What if I am delayed by things beyond my control? – eg abnormally adverse weather conditions delaying work, additional work instructed, delayed handover of site, ...	Extension of Time determined, ie new date for completion determined. Larger Standard Forms include acceptable reasons for delay and whether additional money is appropriate. Smaller forms often leave the assessment to the discretion of the CA with no additional money
Defects		
Client:	What happens if something falls apart after completion	When the works are complete the CA certifies Practical Completion (usually defined as when the works can safely be used for the purpose designed) and the Defects Liability Period / Rectification Period commences. Length of period stated in contract, 6 months or 12 months usually (can be longer for some types of work). Contractor puts right anything which is defective during this period (note, not problems due to a lack of maintenance). At end of period and when everything put right CA issues Certificate of Making Good Defects. But this is not the end of the contractor's liability.
Contractor:	What is the extent of my liability for defective work after completion	
Client	What happens if work already paid for fails before completion, how avoid over payment incase the contractor goes into liquidation?	Retention is deducted from amounts paid, generally 5% pre practical completion and 2.5% during defects period. Some clients also require performance bonds from contractors, but they are not mentioned in many Standard Forms and need to be added when required. All valuations are for the value of work done properly since the date work commences, hence if previous work included on a previous valuation proves to be defective later but before practical completion then the value is not included in the valuation after discovery of the problem, hence avoiding over certification. Payment certificates are for the valuation minus retention minus amounts previously certified.
Liabilities / insurance		
Client/Contractor/CA	What if children get into the site at night and one is seriously injured	Contractor has possession of the site from commencement to practical completion and is responsible for security, insurance etc and indemnifies employer. (Possession is not given in some smaller Standard Forms, for some projects it is not possible to define the site very well and/or not possible/practical to secure it) – see below

<p>What happens about theft, fire, etc damaging the works before practical completion</p> <p>What happens if the contractor cuts the electricity supply to the office next door? What if the scaffolding collapses into the road and injures a pedestrian?</p> <p>How ensure that all parties comply with their Health & Safety duties including CDM</p> <p>What happens if there is an accident on site and workmen are injured</p>	<p>Insurance of the works by contractor In some situations eg extension of existing building, client may insure the works</p> <p>Contractor indemnifies employer and has Third Party Insurance to cover damage to other peoples property and personal injury Ditto</p> <p>Standard Forms include necessary provisions for the CDM Regs but there are other issues eg competence, adequate resources, provision of information etc which are part of the pre-contract procedures which are an essential part of compliance, not just what is in the Standard Forms</p> <p>HSE investigation including CDM Regs compliance; client, CDM Co-ordinator, designers, contract administrator, contractors and principal contractor compliance with regs investigated and fines/imprisonment can result even if non-compliance did not contribute to the accident!</p>
<p>Instructions / Variations</p> <p>Client: What happens if I want to add additional work, omit or change work, suspend work?</p> <p>Contractor What happens if I find discrepancies between the contract documents? How do I get paid for verbal instructions I receive from the CA on site What do I do if the client tells me to do something which contradicts the drawings?</p> <p>CA What happens if I need to ask the contractor to do additional/different work due to circumstances on site being different than originally envisaged (or if I change my mind about something)</p>	<p>If there is a CA the client has no power under most contracts to instruct the contractor. Contractor told at the beginning to refer any client instructions to CA and not act until CA instructs. CA issues instructions (if one has an implication on the cost of the contract it is a variation). It is a CA duty to issue instructions in writing. Most Standard Forms require verbal instructions to be confirmed in writing within a specific short period.</p> <p>Discrepancies to be reported to CA as soon as discovered and resolved by instruction, Conditions of Contract take precedence over everything else, usually drawings take precedence over specification and then BoQ but Standard Forms often list precedence.</p> <p>Unforeseen revisions/additions instructed are paid for out of the contingency. Contingency should not be used to hide CA mistakes/designers mistakes, nor for something you fancy doing differently, or something the client wants to do differently. (Additional money should be used for these).</p>

<p>Payment</p> <p>Client: How much do I have to pay and when?</p> <p>Contractor: What happens if I don't get paid on time, how do I get my money, can I stop work? VAT? What about inflation? What if tax changes eg a National Insurance increase raises my labour costs after tender?</p> <p>CA What do I have to do?</p>	<p>The construction part of the Housing Grants, Construction and Regeneration Act requires all construction contracts to include specific provisions for payment (includes contracts between consultants and clients where construction is the intention). If a contract fails to comply with one or more of the Acts requirements then the Scheme for Construction Contracts applies for the particular non-complying aspect.</p> <p>Payment provisions in Standard Forms comply with the Act but vary between Forms. Typically contractor is due a payment for work done to date less previous payments less retention every 28 days, CA duty to issue certificate showing amount due, Client pays within 14 days from date certificate due, if client wishes to pay less than amount certified he has to go through a specific procedure (issuing notices to the contractor).</p> <p>If client fails to pay on time then provided contractor goes through the procedures in the Standard Form he can get interest, suspend work, take the client to adjudication, terminate his employment (following notice of default etc).</p> <p>Issuing certificates on time is a very important CA duty, getting it wrong or late could be very expensive for the CA.</p> <p>VAT is additional to tenders, certificates etc and is generally a matter between the client and contractor not involving the CA (unless Standard Form involves the CA or unless client wants the CA to sort out VAT with the contractor)</p> <p>Some Standard Forms have the option to include increases for inflation for contracts of significant duration, otherwise fixed price. Most contracts even if fixed price include provision for increases/decreases for tax changes which affect the contractors costs, but this provision is often deleted for short contracts (eg NIC and Land Fill Tax).</p> <p>Payment certificate also done after (typically within 14 days) practical completion (retention reduced by half).</p> <p>At end of defects period after issue of certificate certifying contractors obligations for defects complete, final payment certificate issued. In order to determine amount due a Final Account is usually prepared and hopefully agreed (between contractor and CA – if contractor disputes and CA/client disagree then issue final certificate anyway and then contractor will go through dispute resolution procedure if he wishes – depends on amount disputed), contractor provides information as necessary</p>
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<p>Failure to Perform</p> <p>Client: What happens if the contractor turns out to be useless – can I get rid of him and get the job done by someone else – what if it costs me more to get it finished if I use someone else? What happens if the contractor doesn't do the work but uses the site as a builders yard.</p> <p>All parties: Must not be unreasonable, vexatious etc.</p>	<p>Termination ('termination of the contractors employment under the contract', the contract is not terminated because if it were you could not apply the clauses which tell you what to do after termination); then tender the remaining work and appoint lowest, any additional cost charged to original contractor, very detailed provisions needed in Standard Form - Last resort, problematic. May have to go to court to get the contractor off the site (thankfully rare) Usually also a provision if contractor fails to comply with an instruction can get another contractor to do the work on the instruction (using specific procedure) Don't pay for work not done, including not paying for work not done properly, apply liquidated damages,...</p>
<p>Disputes</p> <p>Client / Contractor What happens if we get into a dispute and are unable to agree a resolution between ourselves</p>	<p>CA has a role in trying to resolve disputes and initially in trying to prevent them occurring. The essentially independent role of administering the contract is in fact hampered by only one of the construction contract parties being the client of the CA. The objective should be to avoid disputes because they cost everyone concerned a lot of money and rarely does anyone win (only the legal profession gets rich). Resolve all issues as early as possible and don't let them fester. The construction industry has traditionally been adversarial and it is an easy rut to fall into!</p> <p>The construction part of the Housing Grants, Construction and Regeneration Act requires all construction contracts to include dispute resolution by adjudication, a fast track (possibly rough justice) method of resolution which can be rapidly enforced (with recourse to arbitration or the courts later if necessary to review decisions). If a construction contract does not comply with any of the adjudication requirements in the act then the adjudication provisions in the Scheme for Construction Contracts apply in full (also applies to consultant/client contracts where construction envisaged)</p> <p>Different Standard Forms include different dispute resolution options as well as adjudication including one or more of mediation, arbitration, the courts.</p>

<p>Liquidation</p> <p>Client/Contractor What happens if the other party goes into liquidation or similar</p>	<p>Determination of the contractors employment under the contract occurs. Standard Forms include detailed provisions to use following determination. Note the contract is not terminated/determined otherwise the determination provisions in the contract could not be applied!</p>
<p>Other Issues</p> <p>Many Standard Forms include provisions for other circumstances, for example:</p> <p>Phasing of the contract with partial practical completion for the different phases, release of retention phased, end of defects phased etc</p> <p>Partial possession, if client wants to take over part of the works which are complete, before all the works are complete, similar to phasing but not pre-planned, not initiated by contractor (although they try to regularly especially for landscape work, and client may be prepared to agree)</p> <p>Assignment generally not allowed for either party unless agreed with the other party</p> <p>Sub-contracting not allowed without CA consent (responsibility remains with contractor)</p> <p>Provisions for naming or nominating suppliers and/or sub-contractors, with complex provisions/forms etc. See sub-contracts section in the other handout (Ref: CM BV Contracts1-07)</p> <p>Provisions to avoid income tax evasion by sub-contractors – the Construction Industry Scheme</p> <p>Contractor to comply with all statutory requirements, if contractor complies with contract documents but these contradict statutory requirements then contractor not responsible</p> <p>Client can cancel contract and recover costs if contractor commits offence under Prevention of Corruption Acts</p>	