

Insights

BUILD UK'S RECOMMENDATION ON CONTRACT TERMS: A STEP IN THE RIGHT DIRECTION

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Build UK, a leading representative organisation for the construction industry, has published a non-binding recommendation on which contract terms its members should (as a minimum) refrain from using. The recommendation “seeks to form a new common ground between clients and the supply chain on contractual practice in the construction sector” with the key objectives being “to promote collaboration, encourage a fairer allocation of risk through the supply chain, and deliver better project outcomes”.

In this blog I look at each of Build UK's recommendations and consider whether they represent a departure from current market practice, or a consolidation of the examples of best practice that we are already seeing clients and contractors adopting in the current market.

Fitness for purpose

Build UK's recommendation: “Do not include a ‘fitness for purpose’ standard of care for design (except in the process sector)”.

The standard of care required in relation to design is always a key negotiating point in any building contract. The debate is usually informed by concerns around PI insurance coverage and the hardening of the PI insurance market in the wake of the Grenfell tragedy has done little to ease these concerns.

Build UK do not attempt to define “fitness for purpose” in their recommendation. This is unfortunate because a lot turns on this definition and so some further clarification in this regard would be helpful. In his blog, The meaning of fitness for purpose, my colleague, John Hughes-D'Aeth, draws a helpful distinction between “guaranteeing a result”, on the one hand, and “fitness for purpose”, on the other. As John puts it:

“There is nothing at all wrong with asking a contractor to produce a building that meets specified performance requirements. Indeed, that is exactly what a main contractor is being paid to do. What is objectionable is being asked to provide a facility that is suitable for any unspecified purpose that

the client may choose to put it in future. It is unreasonable to expect an office building to serve as a process plant, any more than a family car is designed to negotiate the Cresta Run”.

Assuming Build UK is only countenancing against the latter scenario, then their recommendation on this point is in line with current market practice. Build UK correctly recognise that a fitness for purpose standard is quite typical in the process engineering sector where contracts such as IChemE Red Book provide for it as standard.

Unquantifiable risks

Build UK’s recommendation: “Do not include extension of time/loss and expense risk where not reasonably ascertainable for dealing with:

- asbestos;
- fossils, antiquities and other objects of interest or value;
- unexploded ordnances;
- the carrying out by a statutory undertaker of work in pursuance of its statutory obligations in relation to the works, or the failure to carry out such work”.

On any construction project there will be risks which contractors cannot sensibly price or programme for, or which, if they were to do so, might leave them in an undesirably precarious position (that is to say, with over exposure to liquidated damages and/or mounting prelims costs). The recent experience with Carillion and the profit warnings issued by other main contractors has, I think, led to a paradigmatic shift where responsible clients have become very wary of allowing contractors to assume disproportionate levels of risk or “buy” jobs. For the same reason, prudent main contractors are less inclined to gamble their balance sheets in order to win work and are adopting a more conservative approach to risk. However, this may well change as the UK development pipeline continues to slow and there are fewer contracting opportunities in the market.

In the case of statutory undertakers’ works, many clients will feel that their contractor is best placed to manage any associated programme risks through prompt notifications, regular contact, reminders and the like. As such, we often see extensions of time being made conditional upon the contractor having taken all reasonably practical steps to procure that the statutory undertaker carries out its work to programme and in co-ordination with the works.

The eagle-eyed reader will notice that certain of the matters which Build UK has listed in its recommendation would entitle the contractor to time but not money under the JCT contracts (for example, statutory undertakers’ works). It is not clear whether Build UK is advocating a broader entitlement for contractors than they would typically have under an unamended JCT contract. Let us assume that they are not advocating this for the time being, in which case the recommendation

in this regard is broadly in line with current market practice and the trend towards a fairer allocation of responsibility for unquantifiable risks as between clients and their contractors.

“Specified Perils”

Build UK’s recommendation: “Do not include that ‘Specified Perils’ (as defined in JCT) will not give rise to extension of time where caused by the (sub)-contractor”.

The standard position under the JCT contracts is that, where completion is delayed by a “Relevant Event” (including loss or damage occasioned by Specified Perils), the contractor will be entitled to a fair and reasonable extension of time. In this way, the programme risk associated with Relevant Events sits with the client, regardless of any culpability on the part of the contractor. Most clients view this as an inequitable position and will look to amend the JCT contracts so as to disentitle the contractor to any extension of time for delays that are caused by its breach or negligence.

However, clients looking to promote a fair balance of risk will typically preserve the contractor’s right to claim extensions of time for loss or damage occasioned by Specified Perils (and therefore relief from liquidated damages), even where this is the result of the contractor’s breach or negligence. The reason for this is that overall clients are best placed to manage the consequences of delay arising from Specified Perils and they have the option of insuring against such risks should they consider it prudent to do so (for example, by purchasing delay in start-up cover). The contractor will not usually be entitled to reimbursement of loss and expense for such delays under the JCT contracts, so, in this way, it remains a neutral risk.

Breach of contract

Build UK’s recommendation: “Do not include a blanket indemnity for breach of contract”.

I think Build UK are preaching to the converted with this recommendation. There are certain specific categories of breach (for example, infringement of third party intellectual property rights (IPR), nuisance, trespass, personal injury/death and damage to third party property) for which well-advised clients will usually expect to be indemnified against third party claims.

However, aside from these, it is generally accepted within the UK market that contractors will only be liable to clients on a common law (that is to say, a non-indemnity basis) for breach of their contractual obligations.

The position under a construction management procurement route is slightly different and it is not unusual to find broader indemnities in trade contracts covering matters such as delay and disruption to other trades. However, this is usually a function of the procurement model (specifically, the need for contra-charging between trade contracts and the difficulties in pre-estimating loss consequent on delay), rather a desire to load disproportionate risk onto trade contractors.

Uncapped liabilities

Build UK's recommendation: "Do not include uncapped (sub)-contractor liability (save for certain aggregate cap carve-outs such as fraud, misrepresentation, personal injury/death, wilful default)".

In the current market, it is fairly typical for contractors to seek to limit their liability for loss of use, loss of profit and other consequential loss arising from design breaches, usually at the level of their professional indemnity insurance. Both the 2016 Editions of JCT Design and Build Contract (clause 2.17.3) and the JCT Standard Building Contract (clause 2.17.3) include optional clauses which cater for this. It is also worth noting that liquidated damages will operate to cap a contractor's liability for the specific breaches to which they attach (for example, failure to achieve practical completion by the contractual date for completion or failure to achieve target areas within stated tolerances). We also sometimes see clients agreeing to limit the total amount of liquidated damages for which a contractor can be held liable. However, this is usually resisted with the preference being for graduated, as opposed to capped, liquidated damages.

It is not entirely clear if Build UK is advocating caps of the type described above or overall aggregate caps on liability, but I suspect it is both. While requests for overall aggregate caps are becoming ever more commonplace, it is still quite rare to see them accepted by clients, even in a contractor's market. However, a client's ability to resist such caps will obviously depend on its relative bargaining position opposite the contractor. Where a client has no choice but to accept an overall aggregate cap, it should be set at an appropriate level (ideally a multiple of the contract sum) and subject to sensible carve outs (including liquidated damages, IPR infringement claims and the like) to avoid issues with bankability and future saleability of the works.

Given the current focus on the residential sector and the proliferation of build to rent, it is also worth noting in this regard that it may not be possible for contractors to cap or exclude liability under contracts which involve the provision of a "dwelling" within the meaning of the Defective Premises Act 1972.

Performance securities

Build UK's recommendation: "Where the following forms of performance security are required:

- Do not use a pure on-demand performance bond.
- Do not use a parent company guarantee (PCG) which does not include a 'no greater liability' clause (save for legal costs) and equivalent rights of defence.
- Do not use a collateral warranty which does not include a 'no greater liability' clause".

On demand performance bonds are not typically available in the UK market and, where they are, they tend to be prohibitively expensive. As such, Build UK's recommendation reflects client expectations in this regard which have largely been shaped by the surety market. Thankfully, Build UK does not appear to be advocating the use of the ABI model form of bond, which is not really fit

for purpose without material amendment. There are, of course, other types of construction bond, which clients will expect to be written on an on demand basis and the surety market is able to accommodate (for example, advance payment bonds, off-site goods and materials bonds and retention bonds). However, Build UK's recommendation appears to relate specifically to performance bonds.

Strictly speaking, there is no need to include "no greater liability" or equivalent rights of defence provisions in a PCG. A PCG is a contract of guarantee, so the principle of co-extensiveness will apply meaning that the liability of the guarantor can never be any greater or less than the liability of the principal. However, by the same token, most clients will take the view that nothing is lost by including such provisions. The same applies in the context of collateral warranties, and most well-advised beneficiaries will have no issue with the inclusion of such provisions provided the contractor's rights of set-off or counterclaim against the client (if any) are excluded from their application.

Conclusion

As someone who acts almost exclusively for the client side of the market, I was expecting Build UK's recommendations to be somewhat at odds with my own view of current market practice. However, whilst there are a few areas which require further clarification, I was pleased to find that there is little in Build UK's recommendations with which I strongly disagree. Indeed, for the most part, the recommendations consolidate positions which are already being adopted by market leading clients and contractors.

The matters covered in Build UK's recommendation are ultimately points for commercial agreement between clients and their contractors, but the recommendations nonetheless represent a balanced and sustainable approach to contracting, which feels like a step in the right direction.

This [article](#) first appeared on the Practical Law Construction blog dated 15 May 2019.

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