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# BUILDING STRATEGY

## WHY USE STANDARD FORM CONSTRUCTION CONTRACTS?

### STANDARD-FORM CONTRACTS - AVOIDING DISPUTES

#### OBJECTIVES

- 1 Understanding of legal documents and 'standard' contracts
- 2 An appreciation of the 'rights and obligations' of the parties
- 3 The agreement as a 'contract administration tool'
- 4 Early detection - reduction/avoidance of potential claims
- 5 Benefits of using Standard-form Contracts



### STANDARD-FORM CONTRACTS - AVOIDING DISPUTES

#### WHY CONTRACTS ?

"Oral agreements are binding"

An oral contract is not worth the paper it is written on ...  
Samuel Mayer



### STANDARD-FORM CONTRACTS - AVOIDING DISPUTES

#### WHY CONTRACTS ?

"In an ideal world there would be no need for contracts"

Proof of an unsigned agreement may be evidenced by the parties  
performing respective contractual obligations  
Charlie Watson, VDMA - 'Without Prejudice' May 2015 P 80/1

An agreement prepared (but not signed) by the employer and signed  
by the contractor (acceptance of the employer's conditions) is valid  
Roberts v Martin 2005 (4) SA 163 (C)



## WHY CONTRACTS ?

In an ideal world there would be no need for contracts.

Parties may make any agreement provided it is enforceable by law  
In common law almost any agreement may be enforceable - with a whole lot of additional obligations that may not suit the parties

Hence 'standard' agreements have been developed for use in different industries, to limit some obligations imposed in common law



## WHAT IS A STANDARD-FORM CONTRACT ?

A building contract has been described as  
"an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done.

Decisions have to be made from time to time about such essential matters as the making of variation orders, the expenditure of provisional and prime cost sums and extension of time for the carrying out of the work under the contract"

Lord Diplock 1974 Modern Engineering v Gilbert-Ash



## WHAT IS A STANDARD-FORM CONTRACT ?

Standard forms may be cumbersome, "one size fits all" = "compromise"  
drafted for the (traditional) building industry ...

with an equitable distribution of quantified contractual risks -  
*provided no unilateral changes are made to the documents ...*

reduce 'risks' to parties ... and increase productivity!

Lloyd QC: Royal Brompton Hospital vs Hammond 7 others ... 2001

**"A standard form is supposed to be just that. It loses value if those using it, or at tender stage those intending to use it, have to look outside it for deviations to the standard"**



## PARTIES TO A CONTRACT

the client and a consultant, or  
the employer and the contractor and/or  
the contractor and a subcontractor

Most 'conventional' SfC require the appointment of a neutral contract administrator = principal agent / project manager

**and Stakeholders ??**



## PARTIES TO A CONTRACT

SfC requires a neutral party to administer the agreement

Scheldebouw BV vs St James Homes... the 'principal agent' has:

1- an agency function to execute instructions of the employer

2 - a decision making function where the employer and the contractor may have opposing interests

... thus the employer (contractor) can not be the 'principal agent'



## TENDERING BEFORE ENTERING INTO A CONTRACT

Tendering:- to provide competition and therefore reduce costs!

Iancoucci (MJB v Defence Construction 1995) ...

" a prudent owner would also consider the capability and experience of the contractor and how realistic the tender price was..."

The employer does not commit to:

proceed with the project

accept the highest/lowest tender

accept any tender

give reasons for acceptance or refusal

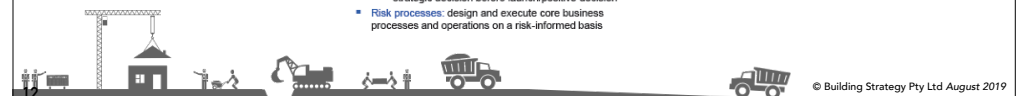


## RISKS 'IN' A CONTRACT

M Latham 1994 - *Constructing the team HMSO London*

"Risk is an inherent feature of construction and it has been noted that 'no project is free of risk'

"Risk can be managed, minimised, shared, transferred, or accepted. It can not be ignored"



## ISSUES GIVING RISE TO “DISPUTES”

### Late, partial or non payment

Late, partial or incorrect information

Late scope changes

Poor definition of expected quality > poor workmanship

### Extension of time claims



## DISPUTES

Take time to resolve while the execution of a contract proceeds;

Stressful to all concerned;

Can be very expensive if legal professionals are involved !

Guidance from the RSA Department of Justice ...

to use the dispute resolution provisions  
in Standard-form Contracts  
before considering litigation



## DISPUTE AVOIDANCE 101

PRE - CONTRACT	POOR PROJECT DEFINITION	DOCUMENT STANDARDS COMPLETE
PROCUREMENT-Contract Data	AUTHORITY DECISIONS ADMIN	CONTRACT GUIDANCE CONTROL
DUTIES of the PARTIES	SPECS GUIDANCE REJECT ?	SPECS TIME DAMAGE
SUBCONTRACTORS / DC	LATE COST+TIME SCOPE?	
EXECUTION		
COMPLETION		
* CONTRACT INSTRUCTIONS		
PAYMENT		



## 6 WORK STAGES PMBOK Recognised by the SACPCMP

- 1 Initiation and briefing
- 2 Concept and feasibility
- 3 Design development
- 4 Procurement
- 5 Construction
- 6 Close-out



## 1 INITIATION AND CONCEPT

A business opportunity has been identified - assume the  
IDEA FOR A PROJECT has passed the 1st gate >

A PROJECT BRIEF has been developed >

Potential BUSINESS RISKS have been identified / resolved

Realistic criteria defined wrt: Scope - Quality - Time - Costs

Communication hierarchy / authority of role players

What if .... escape plan?



## 1 INITIATION AND CONCEPT

"Imagineer" the completed project:

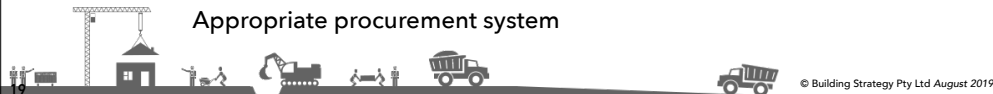
Optimum design solution agreed that complies with:

Statutory requirements (time for design and for approvals?)

Appropriate construction technology + materials >  
buildability?

Quality (standards) ... now > and during the project lifespan;

Appropriate procurement system



## 2 CONCEPT AND FEASIBILITY

▶ Review the concept solution:

? use of new materials / novel construction techniques ?

Also involve H&S consultant (buildability?) and end users;

Confirmation of statutory compliances;

Identification of long lead items / specified 'products'

Review risk register and assumptions made in stage 1

▶ # Consider abortion of the project ??



### 3 DESIGN DEVELOPMENT

Design development by the project professional team

\* Beware of late appointment of necessary skills

Test criteria used in stage 2:

Freeze the scope - changes after this date are expensive !

Possibly involve a 'principal consultant' to "coordinate designs"

Check information (correct/complete) before issue...

# Consider abortion of the project ??



### 4 PROCUREMENT

Confirm decisions made earlier:

Traditional "employer design>tender>contractor to build" ?

or "design and build" option?

Early involvement of specialist (sub)contractors in design?

Early involvement of "others" in design ?

Standard-form Contracts <> bespoke option ?

# Changes to 'Standard-form Contracts' = project risk !!!



### 5 CONSTRUCTION

Varies with 'traditional' or 'early contractor involvement' option

Must follow procedures in (standard) form contract used;

May require 'different professional skills' for 'execution';

Similarly contractor's agents may differ from 'rough construction' to persons dealing with 'finishes'

# Pedantically manage the issue and retrieval of all 'construction information'



### 5 CONSTRUCTION

#### ▶ CONTRACT ADMINISTRATION

▶ Regular meetings ...

▶ Meetings - record of decisions / approved at subsequent meeting;

▶ Notice of event/delay/no information / = separate from 'minutes'

▶ Contract Instructions = separate from 'minutes'!

▶ Potential dispute where information is incomplete / lacking !!

▶ # All standard form contracts have a time barred notice provision



## 5 CONSTRUCTION

### PAYMENTS

Payment claims from all contractors processed by the consultants for payment by the client/employer by the dates in the contract:

Amount due disputed by employer - pay undisputed amount;

Refer disputed amount to adjudication;

Late payment > contractor entitled to default interest;

# Potential dispute on partial/late payments > adjudication?



## 5 CONSTRUCTION

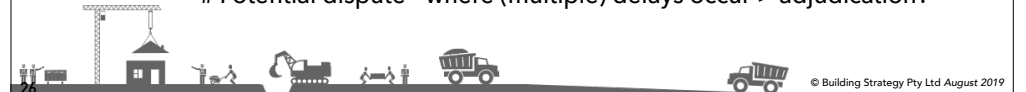
### PROGRAMME

Issued by contractor on appointment to tender documents:

'base' programme updated at regular intervals to record progress (or otherwise);

'Revised programme' where the date for practical completion has been revised - updated at regular intervals to record progress ;

# Potential dispute - where (multiple) delays occur > adjudication?



## 5 CONSTRUCTION

### QUALITY

... Not specified properly > impossible to enforce compliance!

... Consultants regularly inspect work on site - to give interpretation to contractors of quality/standard of finish/other compliance required;

# Potential dispute - about "quality" of workmanship



## 5 CONSTRUCTION

► COMPLETION ... in terms of the standard form contract used:

Commissioning

Practical Completion

Final Completion

► # Potential dispute - about 'state' of completion



## 6 CLOSE-OUT

- Compliance with applicable statutory requirements;
- Completion of 'contractual obligations';
- Issue of certificates for 'completion' and 'payment';
- Submission of as-built documentation, product warranties, operating instructions, etc

# Potential dispute - about the 'final' (sub)contract value



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## CONCLUSION

All standard form contracts provide a framework to identify, resolve and adjudicate potential disputes

Most disputes can be dealt with quickly and often without cost provided all participants act in a spirit of cooperation



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