

**REVIEW OF SCOTTISH PUBLIC
SECTOR PROCUREMENT IN
CONSTRUCTION**

**Guidance on Selecting a Procurement
Strategy and a Form of Contract**

Implementation of Recommendations

16, 17 and 18

27 September 2017

8 Amendments to Standard Form Contracts

8.1 Findings of the Review

The Review identified serious concerns with wholesale amendments to standard form construction contracts. Often this practice aims to place greater risk on contractors, which is then pushed down the supply chain such that the risk eventually lies wholly inappropriately with the party least able to manage that risk. The Review was clear this practice is neither sustainable nor desirable.

Section 9 of this Guidance deals with the selection of a particular form of contract with information on the range of standard form contracts available in Scotland. This Section 8 contains guidance on how authorities should assess the appropriateness of proposed amendments to those standard form contracts.

8.2 Guidance

In order to ensure the procuring authority adequately considers the appropriateness of any amendments, there must be dialogue with legal advisers on the likely consequences for contractors and their supply chains of all amendments which might be proposed.

If, after due consideration, a series of amendments are to be made then these should be made known to tenderers by way of a tracked change document – not by a separate schedule of amendments. The original text of a clause should be typed with any deletions struck through, and any additional text highlighted. This will significantly reduce the time, and cost, which every tenderer will incur in considering the effect of the amendments. Additionally, a schedule should be prepared which explains why the amendments are required.

A procuring authority must be mindful that the greater the number of amendments made, the greater the risk of disputes arising. This is due either to differences in interpretation or to the amendments being incompatible with the remainder of the contract. There is also a danger that the personnel administering the contract, for both parties, are not intuitively aware of, or understand, the effect of the amendments.

The greater the number of amendments also means possibly the greater the legal fees for preparing (and possibly negotiating) the contract – and the greater possibility of disputes arising for which further legal fees will be incurred by both parties.

Figure 8, below, is a table of examples of the type of amendments which should not normally be considered as appropriate.

Figure 9 is a table of examples of common amendments which should only be introduced if information is provided at the time of tender to allow the main contractor and its sub-contractors to both understand and price the risk being transferred from the authority.

8.3 Sub-Contracts

Procuring authorities should make clear to their main contractors that the guidance in 8.2 above is expected to be replicated through the supply chain. This addresses Recommendation 10.3.6 of the Review of Scottish Public Sector Procurement in Construction which stated:

“When the public sector adopts good practice - such as might relate, for example, to the appropriate use of retentions, requirements for insurance or the use without alteration of appropriate standard forms of contract - industry should replicate this throughout the supply chain.”

<u>Proposed Amendment</u>	<u>Reasons not to Amend</u>
Different or more onerous payment or retention arrangements	The payment terms in standard contracts are fair, and comply with the requirements of the Procurement Reform Act. Authorities must recognise their responsibilities for maintaining a sustainable industry and understand the importance of cash flow to contractors and sub-contractors. The Procurement Reform Act also requires authorities to introduce measures to ensure maximum 30 day payments throughout the supply chain.
Different or more onerous periods for the issue of contract notices	The periods in standard contracts are fair and are familiar to contractors and sub-contractors. Amendments present the particular risk that tier 2 and 3 contractors may miss notice dates and become unfairly and disproportionately penalised.
Different or more onerous dispute resolution procedures	Any amendments which extend periods for dispute resolution, or present barriers to its access, are disproportionately unfair to small businesses - particularly in securing payments.
Responsibility for the consequences of changes in law or statutory regulations after a contract is executed.	Such an amendment presents a risk that cannot be either understood or priced at the time of tender. The consequences will likely be stepped down the supply chain to businesses that are not equipped to take such risks.

Figure 8. Examples of contract amendments for risk transfer which should not normally be considered.

A20 SBCC STANDARD BUILDING CONTRACT WITH QUANTITIES (SBC/Q/SCOT)

6.7

INSURANCE OF THE WORKS – INSURANCE OPTIONS

Option C shall be amended by the addition of the following sub-clause: -

Nothing in Option C (all risks insurance) shall render the Employer liable to insure against or be responsible for: -

- (a) The first £2,500.00 of each and every claim which shall be solely the liability of the Contractor.
- (b) Loss or damage to temporary buildings, plant, equipment or tools owned or hired by the Contractor or any Sub-Contractor.

SECTION 7: ASSIGNATION, THIRD PARTY RIGHTS AND COLLATERAL WARRANTIES

SECTION 8: TERMINATION

8.12

CONSEQUENCES OF TERMINATION

- At Clause 8.12 after "or 6.14" in line 2 add "or clause 10.3".
- At Clause 8.12.3 after "or 6.14" in line 3 add "or clause 10.3".

SECTION 9: SETTLEMENT OF DISPUTES

SECTION 10: COVID-19

Insert the following at the end of section 9

Clause 10.1

Without prejudice to clause 2.29.15 and notwithstanding clause 4.22.5:

- 10.1.1 - The Employer shall not be in breach of contract or have any other liability to the Contractor where the Employer's ability to perform any of its obligations under the Contract (or that of the Contract Administrator/Architect to perform any matter which is their responsibility) is affected by a Public Health Emergency; and
- 10.1.2 - Any time for the performance of those obligations or responsibilities referred to in clause 10.1.1 shall be adjusted in such manner as shall be reasonable so as to permit the Employer and Contract Administrator/Architect to comply.

Clause 10.2

Notwithstanding clause 8.9.4, the Contractor shall not be entitled to terminate the Contract where the reason for the impediment, prevention or default by the Employer or the Employer's Persons is caused by or contributed to by a Public Health Emergency.

Clause 10.3

The Employer and the Contractor agree that the suspension of the Works due to a Public Health Emergency is not a suspension due to any of the events specified in Clauses 8.11.1.1 – 8.11.1.5 inclusive, but where the Works are suspended due to a Public Health Emergency then either Party, subject to clause 8.11.2, may upon expiry of a period of six months of suspension give notice to the other that unless the suspension ceases within 7 days after the date of receipt of the notice, he may terminate the Contractor's employment under this Contract. Failing such cessation within that 7 days' period, he may then by further notice terminate that employment".

SCHEDULE PART 9: CONTRACT DOCUMENTS

- The Agreement consisting of the Recitals, the Articles and the Contract Particulars along with the Schedule annexed.
- The Conditions.
- The Schedule of Works attached hereto.
- The Contract Drawings in the drawings list attached hereto.
- The Employer's Requirements attached hereto.
- The Contractor's Proposals attached hereto.
- The CPD Analysis attached hereto.
- Additional Contract Documents:
 - (i) Preconstruction Information.