

Building contracts - good practice and inspections



► **Inside**

Good practice

Contractual certainty

Good communication

Timely provision of relevant information

Inspection

Duties of an employer's agent



Introduction

This guide will look at how employers, contractors and consultants can form, improve and maintain good relationships. Many of these tips are not exclusive to building contracts, but are especially important in construction projects due to the number of parties involved and the often complex nature of the work.

Certainty

Wherever possible a formal contract should be entered into rather than a letter of intent or a verbal agreement. The contract should set out in detail exactly what each party is expected to do, how and when they are expected to do it and what to do if something does go wrong.

The parties should make sure the contract they propose to enter is suitable for that project and covers everything that is or may be required in the course of the whole project. The key points will be:

- the correct identity of the parties
- what works/services are to be performed
- how and where they are to be performed
- the start and end dates
- how much it will cost
- how the employer will pay for the work/ services
- the impact of variations
- what is to happen in the event of a delay and
- how disputes will be resolved.

Having spent time and money drafting and negotiating a contract, the parties should make sure that all the key people involved actually read and understand the contract and their duties and obligations under it. Rather than filing the contract away, use it as a management tool to carry out the project. This is particularly important with contracts such as the NEC or PPC forms with detailed 'management' processes, and consequences for not following them.

Record Keeping

A written record of the important events that occur during the life of the project should be kept, especially records of:

- any changes or variations ordered by the employer
- valuations and payment records
- weather records
- details of work carried out each day/week and updated programmes

- details of trades/operatives on site
- whether there have been any defects and how they have been resolved
- whether there has been any delay, and if so who caused the delay
- details of materials ordered and whether they have been received and/or paid for
- correspondence with planners/ inspectors and
- all the health and safety information the employer has received or should have received throughout the life of the project.

Although this all sounds a lot of paper work and information to be accumulated, it will greatly assist the smooth running of the project. It will also be invaluable in the event of any dispute over what actually happened or was agreed. It is much better to keep a regular record than to attempt to recreate history when a problem arises.

Written records do not all need to be in a specific format. They can be letters, emails and meeting notes as well as any formal notices required under the contract.

Any instructions relating to the works should be in writing, or recorded in writing. Written instructions leave a paper trail of what has been requested so that all the parties know what they are expected to do and by when. Again this adds certainty for all involved.

Early Warning Systems

An early warning system can be incorporated into the contract or agreed informally between the parties. The aim is to flag to the parties any problem as it arises which may result in more time and/or money being required. The key parties can then work to minimise the time and cost implications of the problem. This is much easier if the problem is identified at an early stage.

Check your contract terms as to whether this is a precondition to any relief being sought.

Information flow

This is probably one of the most important considerations, especially in a long running construction project. If information is provided on time, to the correct people, and there is good



communication between all the parties involved, the construction project should run much more smoothly. The information provided should be up-to-date and if any changes are agreed everyone who will be affected should be made aware of that change as soon as practicable.

Information doesn't only consist of plans, drawings, specifications and project timetables but anything which looks like it may cause a problem to the project or would be useful for the parties to know. For example a list of the key persons involved in the project and their contact details and levels of authority is often very useful.

Delays on site, particularly surrounding programming, are often blamed on a lack of communication. Regular on-site meetings with all interested parties attending can prove invaluable in aiding communication.

Some contracts, such as the NEC, are very procedural as to notices and communication. Clients occasionally comment this feels 'adversarial'. However, if a formal communication regime is required of the parties, failure to follow it may lead to a party being penalised.

Changes

If any changes are required or ordered, the relevant parties should aim to discuss and agree the time and money impact of those changes as and when they occur. Contracts generally set out detailed provisions as to how changes are valued and effected. Departing from these provisions can lead to problems and uncertainty.

Changes to contract terms should ideally be recorded in a formal agreement. Again, any contractual requirements should be followed.

Employer's Agent/Contract Administrator/ Architect

The employer will normally appoint someone to carry out many of his duties. However under most building contracts, this person has a dual role. As well as inspecting and overseeing the works on behalf of the employer, he will have certification duties where he will have to "forget" that he is an agent of the employer and act independently and in good faith towards all the parties.

Common duties of a contract administrator are to:

- inspect the works and ensure they are carried out in accordance with the contract
- obtain bonds, guarantees and warranties required by the contract
- report any problems or delays to the employer
- issue instructions to the contractor and
- co-ordinate the release of information

Common duties in which the contract administrator has to act independently are:

- certification of monies to be paid and
- certification of extra time allowed
- certification of completion of the works

The person certifying has a duty to all those involved to act independently and fairly when carrying out certification duties. Time and money are so important to all the parties in a construction project that it can easily result in a dispute if the certification is wrong, or the person certifying has not appeared to act independently and fairly.

Inspection

The employer and its agents normally have a right under the contract to inspect the works as they are progressing to ensure that the works are:

- in accordance with the contract
- not defective and
- progressing in line with the programme

Remember that the employer can delegate any of its duties to another party. If any duties are delegated, all the relevant parties should be informed which duties have been delegated and to whom so they know who they should accept instructions from.

The employer wants to make sure it is only pays for works which have been properly carried out and are not defective. The contractor wants to ensure a regular cash flow and won't want minor defects to mean payment is delayed until the next month.

The employer will have the right under the contract to require works to be opened up for testing and/or inspection if it suspects they are defective. However, generally it will bear the cost of opening up and making good the works as well as any consequential costs unless the works are found to be defective. If the works are defective, the party responsible will bear the losses.

Regular inspection of the works including inspections at key stages should identify any problems at an early enough stage to make rectification a relatively easy job. This can also ensure that the employer gets the building it wants and to resolve issues in good time so that they don't affect cash flow.

Conclusion

The keys to good relationships and a smooth running project are:

- a clear, written contract which everyone understands and uses throughout the life of the project and
- good communication between everyone involved.

For further information on this subject please contact:

Clare Reddy

Partner

T + 44 (0) 20 7074 8095

clare.reddy@lewissilkin.com

Owen Williams

Managing Associate

T + 44 (0) 20 7074 8218

owen.williams@lewissilkin.com

