



Contract Advice Notes (Part 1)

Professional Guidance Series
PGS10

Introduction

Contracts

A contract can be defined as 'an agreement between two parties for the exchange of goods and services for a reward of value'. Contracts are essential in carrying out business as they formalise arrangements between two parties.

A professional industry must be competent to deal with contracts and be aware of the liabilities imposed by those contracts. Ignorance is no defence.

It is important to promote professional competence and maintain a high level of competition.

Who is Involved?

Contracts can only be enacted between two parties that have the capacity to freely enter a contract. Contracts will be deemed null and void if one party does not have the capacity to deliver.

A contract defines the rights of the interacting parties together with the extent and duration of the interaction. The contract defines the subject of the agreement and the value of the benefits that accrue from the interaction.

Elements of a Contract

Legality

A contract is a legal document that is binding on the involved parties.

Contract Law derives from Common Law and Law of Tort which defines civil wrongs or unreasonable behaviour and from Statute Law which includes the Law of Contract; the Unfair Contract Terms Act 1977; and the Limitations Act 1980.

Contract Law is extremely complex and the Institute would always advise that an expert is contacted where doubt occurs.

Contract Process

There are three main stages for the contract process:

- Agreement offer
- Acceptance
- Value
- Exchange.

This procedure forms the basis of most contract tender procedures and the tender documents are an important element of contract agreements.

1. Offer

An offer is made by the consultant/contractor to the employer. The offer must be genuine and have sufficient details to allow the employer to accept. It must also be in a form that is capable of being acceptable and have no ambiguity. An offer can be withdrawn at any time before acceptance.

2. Acceptance

Acceptance of a contract is a positive act that must be unconditional. The contractor must be able to undertake the works stated in the contract documentation or else the contract is void. Acceptance of the contract must be given in writing as verbal agreements are difficult to prove in a court of law. Acceptance should be dated from the date of posting not the receipt of acceptance document.

3. Value

The value of the contract is what the parties consider to be a 'sufficient consideration' for the goods/services provided. If there is any miscalculation of the cost of works (i.e. if the value offered and

accepted is below what it actually costs) the difference is borne by the contractor.

4. **Exchange**

There is an assumption in law 'that both parties enter a contract with the specific intention of being legally bound to effect a contractual exchange'.

The intention to be bound by a contract indicates the willingness of the involved parties to fully comply with the general principles and detailed rules of contracts.

The exchange must transfer ownership of the subject of the exchange from one party to the other. In a works contract, the whole of the incorporated material passes from the ownership of the contractor to the employer. Copyright then belongs to the employer.

The exchange is completed by the employer fulfilling the obligation to pay for the service rendered.

Tender Documents

These pull together all the qualitative and quantitative details of a contract agreement. Accuracy and completeness of the contract are essential. It is necessary for both parties to foresee all potential problems as all foreseeable elements must be accounted and costed for. For further guidance on tendering, see CIEEM's 'Guidance for Tendering' (Professional Guidance Series No. 5).

Payment

The Contract should set out the method of payment and state whether the payments will be made as a single one-off payment, monthly payments or staged payments. It is essential that the method of payment is agreed at the outset to maintain cashflow.

Variations

Variations are allowed under Contract Law but must always be agreed by all involved parties and agreement in writing must be obtained.

Obligations and Duties of Parties to a Contract

- **Contractor**

The contractor must always carry out and complete works diligently in accordance with the contract documents. If delays are likely the contractor must inform the client, stating the reasons for the delay and give an estimate as to how long the contract will be delayed by.

The consultant/contractor must not sub-contract or assign work to a third party without written agreement from client.

- **Employer**

In a Works contract it is the Employer who provides the site to the Contractor, which means he must be in a position of ownership.

If the employer fails to honour payments by the due date the consultant/contractor can determine his employment.

If an employer causes problems over access or progress the consultant/contractor can claim damages.

Consultants will effectively be working as an agent for their client, if they are managing any form of contract with contractors for example a habitat creation project or have employed specialist sub-consultants as part of a larger team.

The agent's duties are legally binding and the agent must exercise diligence and skill-communication. The agent must comply with principal's/client's instructions whilst not letting his/her interests conflict with the obligations to the client or principal, nor disclosing confidential information to any third party. The agent must not delegate duties to a sub-agent and must not under any circumstances take bribes.

The agent is to administer the contract in strict accordance with the requirements of the contract, even if at first it appears to be detrimental to the client.

The agent must render proper accounts which should be available for inspection on request.

Ecologist Acting as an Agent on a Works Contract

Always make sure that all actions and oral agreements in relation to the contract are recorded in writing.

Always:

- Inspect evidence of insurance
- Supply further information necessary for the satisfactory completion of works
- Issue instructions as necessary
- Issue interim certificates
- Issue certificate of practical completion
- Issue schedule and certification making good defects
- Issue final certificate.

Whilst each of these can be considered as generic obligations, each specific form of contract will include slightly different requirements.

Legal Implications and Liabilities

Contract Privity

The rule of privity confirms that the contract is between two parties only. Third parties rarely have right to claim direct benefit from the contract or have a legal say in the administration or operation of the contract.

Contract Terms and Conditions

It is essential to have all contract terms, conditions and variations in writing. During the life of the project always keep written evidence of progress.

The contract sets out the terms of the agreement and sets out the rights and responsibilities. It is therefore vital to read the contract before providing written agreement.

Promises made during negotiations leading to the contract are binding. If errors occur it can be costly or it can be held as misrepresentation.

Illegal or Unfair Terms

A contract cannot elicit an illegal or criminal act or contravene statutes.

Unfair terms are not enforceable by law but reflect the reasonable request of a reasonable person.

The commonest area of potential unfairness would be to limit or exclude liability of one party. The Unfair Contract Terms Act 1977 provides for this.

Moral and Legal Framework

A contract should be entered into in good faith. Ethically a contract gives the expectation of the fulfilment of a promise with 'good, right, true, honest, intention delivery and performance'.

Under Section 13 of the Supply of Goods and Services Act 1982 the essence of a service contract lies in the requirement that 'the supplier will carry out services with reasonable skill and care'.

Breach of Contract

Mistakes

Genuine mistakes are not illegal. Common and simple mistakes have no effect on the contract apart from needing correction. However, some mistakes may be serious enough to make a contract voidable.

Misrepresentation or Repudiation of Contract

Where a contract term or condition proves false in fact there is misrepresentation. This is typically due to:

- An unintentional and innocent mistake
- Duty of care – negligence e.g. habitat design or recreational facilities. Duty is to foresee how act or omission is reasonably likely to injure another
e.g.
 - o Donoghue v Stevenson 1932
 - o Rylands v Fletcher 1868
- Nuisance e.g. trees
- Negligence
- Fraud, or
- Omission of information.

Repudiation of Contract

If one party refuses to discharge their contractual obligations this entitles the other party to either cease work and withdraw from the site or refuse to pay for the work and seek damages for the delay. When the actions of one party are in breach of the contract the other party can seek to remedy the situation through arbitration and mediation or through the courts under Contract and Common Law.

Remedies

Unintentional or innocent mistakes are usually rectified by agreement with the client. However, more serious misrepresentation could result in the voiding of the contract or damages being claimed.

Non-performance penalties may also be claimed for on a quantum meruit basis. That is, to sue for the value of the benefit conferred or money expended before the breach occurred.

Many 'standard' forms of contract allow the inclusion of 'damages', normally expressed as a value per period of time, to be levied against the Contractor in the event he delivers the works/supplies later than expected. These damages are often referred to as 'liquidated damages'.

Specific performance can be pursued if damages awarded are considered insufficient. This may result in withdrawal from the contract.

Limitations Act 1980

Under the Limitations Act 1980 the breach of contract must be pursued within a reasonable time. The timescales set out in the Act state that a breach of contract can be pursued for up to six years; a speciality document under seal can be pursued up to 12 years after the event. It should be noted that liability continues after death and in this circumstance the estate becomes liable.

To avoid misunderstandings, it is advisable to have a pre-contract meeting to discuss all elements of the contract. Every element of the works has to be clearly described in the documents that are issued and these should be checked for accuracy of detail and fullness of investigation. Regular communication between parties is essential to ensure works are progressing as expected.

To protect the business, professional indemnity insurance is vital.

References

Chartered Institute of Ecology and Environmental Management (2011). *Guidance for Tendering. Professional Guidance Series No. 5.*

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