



New Government Construction Contracts

HUSSEY FRASER SOLICITORS

New Government Construction Contracts

- 1. Objectives of new contracts**
- 2. How objectives are to be achieved**
 - **Risk Transfer**
 - **Procedural / Information Burden**
- 3. Termination Provisions**
- 4. Collateral Warranties**
- 5. Conclusion**

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Very significant change to the relationship between Employers and Contractors



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- **80 pages long**
- **150 provisions**
- **5 different forms**

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“To introduce lump sum fixed price contracts which will bring cost certainty and value for money to the complex process of procuring and contracting and project managing public works contracts.”

G.C.C.C. Guidance Notes April 2006

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HOW IS THIS TO BE ACHIEVED?

- 1. Contracts to be fixed price lump sum**
- 2. Many contractual risks moved to Contractor**
- 3. Contractor's claims subject to strict procedures**
- 4. More responsibility for contract management moved to Contractor**

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RISK

“You can reduce it. You can prevent it. You can accept it or you can transfer it. You must not ignore it.”

Sir Michael Latham

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Traditionally unforeseeable risks or risks that could not be accurately estimated were borne by the Employer.

- new contracts designed to transfer risk

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“The level of risk transfer should be based on the level and quality of information available to the Employer and included in the tender documents... a high level of comprehensive quality information should allow for a high level of risk to be transferred.”

G.C.C.C. Guidance Notes April 2006

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RISK 1

FIXED PRICE RISK

effectively no price variation clause



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RISK 2

DELAY EVENT RISKS



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- 1. Delay Events attracting time only**
- 2. Delay Events attracting time and compensation (delay costs)**
- 3. Delay Events attracting time but compensation electable**
 - Unforeseeable ground conditions
 - Unforeseeable utilities
 - Unforeseeable archaeology
 - Unforeseeable failure to relocate utilities

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PROGRAMME CONTINGENCY

9.4.2 The Contractor has included in the initial Contract Sum and shall include in its programme a contingency for delays to the Date for Substantial Completion of the Works caused by Compensation Events.

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PROGRAMME CONTINGENCY

ASSUMPTIONS FOR WORKED EXAMPLE

- A) The project is on schedule**
- B) The Employer's Representative instructs variation valued at €100,000.00**
- C) Delay caused by instruction:- 65 days**
- D) Contractor's tendered daily delay cost:- €2,000.00**
- E) The Employer's elected delay thresholds for Compensation events:-
First Threshold 30 days, Second Threshold 30 days (spread over 60(max) days)**

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1. PAYMENT FOR INSTRUCTED VARIATION = €100,000.00

2. EXTENSION OF TIME CLAIM

	<u>Delay Incurred</u>		<u>Extension of Time Granted</u>
1 st Threshold	0 – 30 Days	0% Allowed	= 0 Days
2 nd Threshold	30 – 90 Days	50% Allowed	= 17.5 Days
Thereafter	<u>0 Days</u>	100% Allowed	= <u>0 Days</u>
Total	65 Days		17.5 Days

$$\begin{aligned} \text{Extension of time granted} &= 65 - 30 - 0.5(65 - 30) \\ &= \underline{17.5 \text{ Days}} \end{aligned}$$

3. DELAY COST CLAIM

$$17.5 \text{ days} \times \text{€}2,000 \text{ per day (daily Delay Cost)} = \text{€}35,000$$

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RISK 3

CONSENT AND AUTHORISATION RISK

- **Employer will only obtain the consents he specifies**

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RISK 4

RISK ATTACHING TO LEGAL REQUIREMENTS

- Legal Requirements are very broadly defined

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Procedural / Information Burden

- (A) Programmes**
- (B) Progress Reports**
- (C) Claims**

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(A) Programmes

- **Initial programme very detailed**
 - when instructions required, order of works, personnel on site, critical path, critical resources, floats etc.
- **Revised programmes to be submitted within fifteen days of request**
- **Penalty for failure to comply**

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(B) Monthly Progress Reports

- **Progress reports very detailed**
 - **Progress of works, personnel and plant utilised, when instructions will be required, details of possible adverse affect on works**

- **Penalty for failure to comply**

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(C) Claims

- **20 workings days notice (Clause 10)**
- **Further 20 working days - full supporting details and documents**
- **Condition Precedent**
- **No Global Claims**

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Termination



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Termination

- **Employer's election (no default required) – no common law damages**
- **Employer's default/Contractor's termination – no common law damages**
- **Contractor's default**

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CLAUSE 12.9 CONCILIATION REFERRAL

Employer refers right to terminate to Conciliator

Conciliator confirms Employer's right to terminate

Contractor refers to Arbitration

Arbitrator holds with Contractor

Termination deemed to be termination at Employer's election

No common law damages

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COLLATERAL WARRANTIES

- no limitation on liability



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IN CONCLUSION

- **Raise pre-tender enquiries**
- **Gear up your administrative staff**
- **Tender very carefully**

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RISKS TO BE PRICED IN TENDER

1. Fixed Price contract
2. Lump Sum contract
3. Risks re ground conditions, utilities and archaeology
4. Compensation Events affected by contingency
5. Claims that are not clear cut
6. Added administration

RISKS THAT CANNOT BE PRICED

1. Consents
e.g. Carrickmines Castle
2. Legal Requirements
e.g. Court order curtailing works
3. Unlawful Clause 12.9 termination
4. Wide nature of collateral warranties