

Contract Awareness



Formation of Contracts



- A contract is an agreement between two (or more) parties which is legally binding
- A contract does not have to be written
- For a contract to be legally binding there must be:
 - **an offer**
 - **an acceptance**
 - **consideration (except where the contract is under seal / as a deed)**

The Offer

- An offer is a statement of the terms that the party making the offer is willing to enter contract under
- The offer must be communicated
- The offer may come to an end if:
 - any time limit for acceptance (or other reasonable time) has lapsed
 - the offer is rejected
 - the offer is accepted
 - the offer is met with a counter offer
 - the offer is withdrawn (prior to acceptance)



Acceptance

- Generally, acceptance of an offer must be given either verbally or in writing to the party (or their agent) making the offer. However, the acceptance of the offer may be implied by the action of a party (such as performance)
- If acceptance of the offer can be made by post, then unless the contract states otherwise, the acceptance is valid from the time it was posted



Consideration

- For a “simple” contract (one not under seal) to be valid, there must be consideration
- Consideration can be considered as something of value
- The contractor’s consideration is his promise to construct the works, and the employer’s consideration is the promise to pay the agreed price for the works



Types of Contract

- Contract by deed
 - A deed must be:
 - in writing
 - sealed or signed as a deed
 - signed by the person with appropriate authority
 - delivered
 - Signed, sealed and delivered
- The main consequence of making a contract by deed is that the period within which a legal action for breach of contract can be taken is extended from 6 years (as for a simple contract) to 12 years from the date on which the right to bring the action accrues
- A simple contract may be
 - in writing
 - verbal
 - implied by conduct



Reaching a Contract

- Negotiations - to ensure the terms have been agreed
- Writing the contract - to ensure the agreed terms are written into the contract
- Conditions of contract - to set out the obligations and risks taken by the parties, that is to create certainty where otherwise there would be uncertainty

- In cases of uncertainty - what would a judge consider that an ordinary man in the street who is properly briefed consider the parties meant at the time they agreed the contract



The Drafting of Contracts



- Drafting terms are up to the parties
 - The contract sets the terms
 - The contract sets the responsibilities
 - The contract sets the risks
 - The contract should be precise (avoid ambiguity)
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- Drafting problems:
 - The precision of grammar
 - The meaning of words
 - everyday
 - industry jargon
 - colloquial

The Rules for Interpreting Contracts

- Specific clauses will prevail over general clauses
- Where a clause excluding liability has a number of possible meanings, the clause will be interpreted against the interest of the party that drafted the clause
- Words will be given their ordinary meaning
- Where words have two meanings, they will be interpreted against the party who drafted the words
- Terms will be interpreted to give them business common sense and according to long standing trade custom



Has the Contract been Properly Conformed

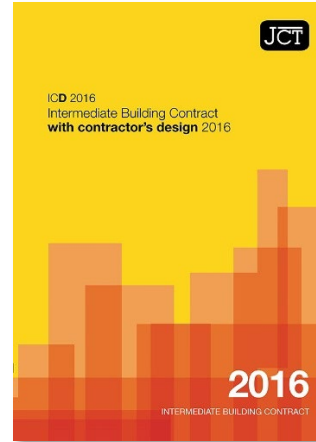
- Offer
 - Contractor`s tender
- Negotiations
 - meetings, correspondence etc
- Reaching a contract
 - to ensure the agreed terms are written into the contract (the conformed document)
- Original tender document amended to form the conformed document to take into account;
 - accepted tender qualifications
 - accepted tender clarifications
 - other agreements reached



THE ANSWER IS VERY OFTEN NO!

Industry Standard Forms

- Perceived neutral bias
- Drafted by experts
- Industry based
- Case history
- Ease of pricing
- One of the main reasons why standard forms are amended is to pass risk onto the contractor
- In which case, does the contractor include a risk premium in its price or take a punt?



Design and Build Contracts

- In a design and build contract the contractor will usually assume responsibility for designing the works so that they are reasonably fit for the purpose for which it is agreed
- The specification usually sets out the purpose of the works
- A purpose of using fitness for purpose in contract provisions is that the test for liability is absolute - is it fit or not. There is no need for an employer to prove the contractor had been negligent
- Whether or not a particular contract provides fitness for purpose depends upon its terms although the courts have held that fitness for purpose liability applies to design and build contracts

It is crucial that a contractor understands its design obligations and liabilities



Claims for Extra Time or Money

- Claims often occur because the person administering the contract does not follow the rules set out by the contract, they have overstepped (or neglected) their powers, duties or authority under the contract
- Good practice for contractors:
 - maintain good records
 - monitor the employer's own problems and delays
 - provide verification of claims for time and costs
 - challenge minutes of progress meetings – whoever records the meeting controls the meeting
 - obtain professional advice



The Burden of Proof

- The legal burden of proof lies with the side making the claim (*he who asserts must prove*)
- The legal burden that goes beyond a simple denial lies with the other side
- The required standard of proof is to ascertain on the weight of probabilities whether the assertions made are true

- What are your chances that your proof is sufficient?
- Consider seeking expert advice

