

15 June 2011



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*Dear Lord Sassoon,*

Please find attached the Construction Industry Council's contribution to the next National Infrastructure Plan to be produced later this year. This document outlines the benefits to be gained by using standardised consultancy contracts, and has been prepared by the Liability Panel of the Construction Industry Council.

The Construction Industry Council (CIC) is the representative forum for professional bodies, research organisations and specialist business associations within the construction industry. It provides a single voice for professionals in all sectors of the built environment through its collective membership of 350,000 individual professionals and 25,000 firms of construction consultants.

I hope that this is helpful and we would be happy to discuss the issues in more detail, as appropriate.

Graham Watts OBE  
**Chief Executive**

Chief Executive  
**Graham Watts OBE**



CIC, CITB-ConstructionSkills, CITB(NI) are working in partnership as the Sector Skills Council for Construction.



Design Quality Indicator  
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## **Benefits of Standardised Consultancy Contracts**

*The paper below has been prepared by the Liability Panel of the Construction Industry Council. It outlines the benefits of standardised consultancy contracts.*

### **Benefits of Standardised Consultancy Contracts**

When compared to many other countries with sophisticated construction industries, the United Kingdom sits apart in respect of three things - the plethora of contract forms used for procurement; the level of litigation and; the cost of Professional Indemnity insurance. UK PI insurance levels are amongst the highest in the world when compared to countries which impose a similar standard of care on designers. In relation to Scandinavia and in The Netherlands, they are significantly higher. Within the United Kingdom there are also many more contract forms used for procurement of definition compared to construction. Clearly this situation is contrary to economic efficiency, for reasons set out below.

Whilst Government has made great strides in moving towards standardised contract terms, standardised services are rarely adopted. Without both standardised terms and services, major economic benefits cannot be realised. With appropriate and equitable standard consultancy contracts that cover terms and services, significant economic benefit is achievable; the Industry needs to identify these forms and adopt them, without amendment.

### **Forms of contract used for procurement of design:**

Until the eighties, definition services were procured under professional body standard agreements, RIBA, ACE, RICS. Then, with the boom in private sector construction, the private sector introduced bespoke forms for particular clients and the government introduced GC Works. The next wave prompted by high levels of disputes and inefficiency in the UK industry was the move towards partnering contracts, NEC PSA 1994, PPC 2000 and JCT Constructing Excellence 2006. The professional bodies continued to update their forms of agreement through the nineties and all forms have been updated in the last decade. BPF introduced their standard form in 2005 and most recently CIC published in 2007 a new form of contract aligning the interests of Clients and all participants involved in definition services with its balanced terms and comprehensive scope of services.

Why so many forms? The number may reflect the efforts of various institutions to meet the needs of the industry. There is also one other key factor; the scope of services. It is evident that the root cause of most disputes involving definition services is ill-defined and poorly integrated scope of services. Most forms have scopes that are defined only at a

superficial level and often only for a specific discipline. The partnering contracts do not have scopes.

A comparison with those European countries with sophisticated construction industries shows that they have a more standardised and integrated approach with harmonised scopes of services. In countries with a similar legal framework for standard of care to that in the UK, there are generally both lower litigation rates and insurance costs. The private sector may impose more stringent terms but the scopes of services remain standard. And by comparison, construction as an industry is perceived as being much more lean and efficient.

### **The cost of using bespoke consultancy contracts in construction**

The use of bespoke (non-standard) forms of contract for procuring definition services in construction is widespread in the UK. Procuring services in this way is time-consuming, expensive and inefficient. The industry would be better served by using equitable industry standard forms: the reasons for this are set out below.

- **Cost of drafting and negotiation:**

Bespoke contracts (or heavily amended standard forms) involve detailed negotiations between clients, contractors, consultants, suppliers and their respective legal and insurance advisers. All of that input comes at a cost, which can be substantial. Many public bodies employ legal departments, much of whose time can be spent in contract negotiations with organisations bidding for work. Similarly many private clients employ legal firms to negotiate bespoke contracts on their behalf. In both cases, if unamended standard forms of contract were used, much of that time could be saved and the cost avoided.

- **Cost in use**

Standard forms bring with them a familiarity in use and consistency of terminology. There is less room for uncertainty and therefore more scope for projects to run successfully. Clear and familiar contractual responsibilities help to create efficient projects, achieving the desired quality, at the predicted price and in accordance with the anticipated timescale. Bespoke forms can create a fog of contractual expectations among the participants, creating uncertainty, defensiveness, inefficiency and hostility. Bespoke contract terms may also simply be inappropriate for the works or services being procured – creating further confusion, wasted resources and unwillingness to co-operate.

- **An unrealistic allocation of risk**

The drafting of bespoke forms will tend to mitigate the risks of the party sponsoring the drafting and put them in the strongest position possible, particularly when there is significant competition. Bespoke forms of contract often seek to transfer greater levels of risk to contractors and consultants than would ordinarily have been the case had equitable standard forms been used. Research commissioned by ICE shows that most modifications to standard forms are in the area of risk allocation, liabilities and payment. However, allocating excessive levels of risk to parties not best able to

manage or finance that risk achieves neither effective risk management nor effective risk transfer. It is economically inefficient. Transferring risk may result in:

- higher tender prices;
- uninsured liabilities; and
- conservative design resulting in increased construction cost.
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On the other hand, standard forms developed by independent bodies reflect an allocation of risk and reward that is generally seen as being equitable, and such risks are routinely insurable.

#### • **Cost of failure**

Most construction projects in the UK run well: some do not. Unfortunately, the financial implications for those projects that are not completed successfully can be disproportionately high, particularly where bespoke contract forms are being used. Over the years, most standard forms have been tested through the courts and there is now generally a good level of understanding as to who is responsible for what; what constitutes a breach of contract and; the financial consequences of any such breach. With certainty comes efficiency.

Bespoke forms by their very nature do not bring this level of certainty. In the event of a dispute, neither party can be confident of either the merits of their claim, or defence to a claim. Unusual or bespoke contractual wordings are often open to several interpretations and may require the input of legal advisers – and ultimately the courts – to resolve, all at significant cost. Clients may find in practice that clauses that had been presumed to transfer risk do not in fact do so, by which time it is too late to do anything about it.

#### • **Insurance**

Uncertainty over the exact nature of the risks being transferred by bespoke contracts must materially increase the cost of those risks. When asked to insure uncertain levels of risk, professional indemnity insurers will charge higher levels of premium to reflect that uncertainty. In addition, professional indemnity insurance policies are subject to terms, conditions and exceptions and may not apply to all types of claim brought under bespoke forms. By contrast, it would be highly unusual for claims brought under standard forms of contract not to be paid. Construction clients face a choice in this regard: the use of standard forms backed by high levels of certainty of insurance protection, or the use of bespoke forms with a material degree of uncertainty.

### **Summary**

The UK construction industry could achieve significant improvements in economic efficiency through the adoption of equitable standardised contracts for the procurement of definition services. These contracts must incorporate a comprehensive and integrated scope of services. The varying scales of projects and the desire for partnering or not means that no single form will fit all. However, there are a few key principles which need to be followed.

- Standard forms require an integrated and standard scope of services. This has the additional benefit of providing a framework for integrating the growing number of specialisms.
- Standard forms should not be amended significantly.
- Inequitable allocation of risks should be avoided.
- The standard form adopted should fit the scale and aspirations for the project; overly complex contracts should not be used for simple projects.

This leaves the industry with some clear actions on which Government should provide a lead.

- Standard integrated scopes of services are required for the partnering forms of contract.
- Equitable standard forms, terms and scope of services, for different scales of projects should be recognised and adopted nationally.
- The desire to amend standard forms must be resisted.

Should the use of such forms of contract become standard practice across client bodies and the whole spectrum of consultants, a substantial cost saving will surely follow. Consultants and clients will no longer have to employ legal advisers every time an invitation to tender is received or dispatched, and any subsequent negotiations will always be on familiar ground. Taking these savings and the economic efficiencies that follow, the use of standard forms of contract would remove a substantial financial burden that currently restrains efficient development of the nation's infrastructure.