

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



Second Edition – February 2020

### BESPOKE CONTRACTS

+ *Author: Arvitha Singh*

**Owing to the complexity of the works and the long duration of the project, amongst other things, construction contracts are more risky than normal commercial contracts. The contract must therefore clearly allocate the parties' risks as well as prescribe their rights and obligations.**

It is for this reason that the standard form suite of contracts remains a first option in the industry as it is tried and tested and ultimately tailored to address all issues of the contract life cycle with certainty and efficacy. Where a standard contract specifically styled to the exact nature of the works is not available, these contracts also allow for easy customization to cater for almost any type of construction works.

Standard form contracts also contain guidance notes which aid in its interpretation and hence

implementation of the contract flows smoothly. The familiarity it offers its users brings comfort (as it is tailored for fair contracting) and confidence (through repeated use it becomes simple to use). This confidence converts to more economical tender pricing.

Despite this, we do sometimes find that an employer/client resorts to a non-standard/bespoke contract, in the mistaken belief that allocating risk in an uneven manner will be of benefit to it.

However, there are numerous pitfalls associated with using a bespoke contract, which include the following:

- It will be a time consuming and costly exercise to draft. Not an attractive alternative if you are a one time developer;
- It usually favours one party over the other; (i.e., the author of the agreement), this is the reason they drafted their own document in the first place;
- Notwithstanding the excessively competitive market currently prevailing, prices will be higher to allow for the unknown factors of dealing with a one off agreement;
- Standard form contracts are drafted by teams of experts and are subject to rigorous reviews to ensure their compliance with good practice. The same standard cannot be achieved for a one-off bespoke contract;
- Unrealistically tight time periods for filing of claim notices as well as restrictions on amounts that can be claimed by contractors regarding delays/issues beyond the contractor's control or variations to the contract;
- May not make adequate provision for all circumstances;
- Clauses that are not clearly drafted may be subjectively interpreted, and if found to be ambiguous, may fail to achieve its desired purpose, which in turn will lead to disputes between the parties (Mitkus & Mitkus 2014)<sup>1</sup>;
- Dispute resolution procedures: One sided procedures [or a procedure where the employer (or a party associated with the employer) determines the outcome];
- Not supported by history of case law.

In the private sector, where contractors are desperate

for work and competition is rife, they often have very little choice but to accept a bespoke contract. Due to the lack of familiarity, contractors allow for risks that may never materialise. In all likelihood, the outcome will be an increased claim environment and energy being expended on dispute and conflict that should instead be directed at achieving the goals of the project.

In situations such as the above, it is recommended that reference be made to FIDIC's 2018 'FIDIC Golden Principles' detailed below for general guidance on fair contracting standards.

1. The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, (i.e. the FIDIC Contracts) and appropriate to the requirements of the project.
2. The Particular Conditions must be drafted clearly and unambiguously.
3. The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.
4. All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.
5. Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.

---

<sup>1</sup> Mitkus S and Mitkus T, *Procedia - Social and Behavioral Sciences* 110 ( 2014 ) 777 – 786, *Causes of Conflicts in a Construction Industry: A Communicational Approach*

In addition, it is recommended that the contract be vetted by an experienced professional before signing on the dotted line. A thorough commercial review process will ensure that issues such as risk allocation and other onerous clauses are suitably assessed and appropriate actions taken to mitigate/avoid such.

Whilst the perception may exist that bespoke contracts through their flexibility and adaptability to meet the special needs of the parties and the scope of works involved, aids the simplification of the contractual arrangement between the parties, industry experience suggests that a bespoke contract generally falls short of addressing all contractual issues adequately and fairly and in most instances serves to achieve a less than optimal outcome for at least one, if not both parties.

Contractors should therefore always advocate for a standard form contract where possible and if presented with a bespoke contract, approach this with caution.