

Contractual Provisions for Health and Safety: Standard Form Contracts in the UK Construction Industry

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Abstract

The importance of construction sector activities to any economy cannot be overstated yet this industry is faced with numerous concerns with Health and Safety (H&S) practices being at the top. This study examines H&S contractual provisions in four standard form contracts widely used in the UK construction industry because of their 'bargaining power'. It is established using content analysis and literature review that the Joint Contracts Tribunal (JCT) and General Conditions of Government Contracts for Building and Civil Engineering Works (GC/Works) embrace key features of secondary legislation such as compliance, cooperation and competence while the New Engineering Contract (NEC) and Federation of Consulting Engineers (FIDIC) contracts promote flexibility, fairness and certainty. The novelty of this study is in its ability to compare H&S contractual provisions with key features of the Construction (Design and Management) Regulations 2007 (CDM 2007). The conclusions drawn from the study demonstrate the need for greater clarity and uniformity in standard form contracts particularly in the area of H&S.

Keywords

Regulation, law, standardization.

INTRODUCTION

Health and safety as an 'agenda' for the UK construction industry has been surrounded with concerns in practice (Donaghy, 2009; Löfstedt, 2011). Standard form contracts therefore provide a platform for expressing health and safety contractual provisions. Embedded in a contract, these provisions will describe the obligations of either party making them accountable for their actions and to a large extent share project risks. The importance of a contract cannot be over stated in which contractual provisions are provided as the bargaining power of either party. It is on this premise that construction standard forms of contract provide conditions on which either party performs. Ashworth (2012) argues that it is not practical to write a new set of conditions for every project and hence the need for standard forms. Murdoch and Hughes (2008) suggest that standard forms can be understood as a means of distributing risk. It is against this background, that this study seeks to understand the allocation of risk in terms of health and safety. Recent attempts have been made to look at reforming health and safety (such as Winward, 2010; Young, 2010; Löfstedt, 2011) making this research relevant and consistent to the needs of the industry at large. The study identifies four standard form contracts widely used across the UK construction industry namely: (i) JCT; (ii) NEC3; (iii) FIDIC; and (iv) GC/Works of which an analysis is carried out on health and safety contractual provisions. Patterson (2010) observed that standard form contracts will have both advantages and disadvantages of which the most advantage is to reduce cost. These findings are relevant to the construction industry due to the uncertain nature of construction (fragmentation). Sales (1953) for instance emphasises that standard form contracts exist to "clarify the

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bargain and to facilitate the operation of a contract.” It is in this context that health and safety contractual provisions are examined in order to ‘clarify the bargain’.

The second section of this study provides an overview of the research method and focus, while the third section introduces the discussion on standard form contracts. Sections four (4) to seven (7) provide an analysis of health and safety contractual provisions and the final sections summarises the findings by way of a discussion and conclusions drawn.

The aim of the study is therefore to examine core health and safety contractual provisions, after which an analysis is performed by comparing the extent to which these provisions embrace secondary legislation; particularly the Construction (Design and Management) Regulations 2007 (CDM, 2007). CDM 2007 ultimately aims to achieve the integration of health and safety into project management (HSE, 2007). In this sense if the health and safety provisions are well aligned to the CDM Regulations, significant benefits are bound to be realised translating into good project management (Watermeyer, 2012). Furthermore, the contractor will hope to enter into an agreement with favourable terms that will yield expected profit (Laryea and Hughes, 2009), without necessarily bearing all the risk. NEC3 for instance offers an approach of seeking to allocate risk fairly (Dulake, 2011, p.603).

RESEARCH METHOD AND SCOPE OF STUDY

Content analysis was adopted as a viable method of carrying out this study based on the context within which the research question is raised. Bryman (2008) defines this approach as a “method to analyse documents and texts that seek to quantify content”. Further, a critique of literature is reviewed, particularly examining detailed text of health and safety contractual provisions in widely used standard forms of contracts as illustrated in Table 1. Due to its wide coverage in the UK construction industry unlike the FIDIC for instance, a discussion is provided on the application of NEC3 in practice in order to demonstrate its usability. Undoubtedly, it is reasonable in this context to apply content analysis to answer key questions highlighted in the section 3.1 titled application of standard forms. The study limits its scope to health and safety contractual provisions with particular focus on key feature of secondary legislation (i.e.) cooperation; compliance; risk; injury; accident and welfare facilities. The study further adopts the use of ‘standard form contracts’ as defined by Watermeyer (2012) as “...a contract between two parties that is published by an authoritative industry body with fixed terms and conditions which are deemed to be agreed and are not subject to further negotiation or amendment.”

STANDARD FORM CONTRACTS

Standard form contracts as the name suggests in most instances contain standard conditions which form the basis upon which parties to a contract agree. Patterson (2010) asserts that the ability to cut down transaction costs as a result of contractual negotiation is the most obvious reason for parties to enter into an agreement. It is commonplace for trade business or commerce to identify a commercial contract to promote fairness, certainty, uniformity and flexibility (Sales, 1953) and construction industry contracts will by and large follow suit. The UK construction industry commonly uses three standard forms of contract i.e. – JCT, NEC and GC/Works (cf. Fenn *et al.*, 1997). Depending on the nature of the procurement route, the FIDIC suite of contracts may be applied. The NEC Engineering and Construction Contract according to Mason (2011) was the first standard form of contract to incorporate the overriding principle of ‘good faith obligation’ requiring the exercise of mutual trust and co-operation. This principle is consistent with

Construction (Design and Management) Regulations; particularly regulations 5 and 6 which place specific obligations on duty holder in line with cooperation and coordination.

APPLICATION OF STANDARD FORMS

Most contracts like the JCT suite of contracts are made up of ‘families’ or suites of standard forms, guidance notes and other documents that largely apply to the majority of construction projects and procurement methods (Joint Contracts Tribunal, 2012). The ethos behind contractual provisions in standard form contracts according to the JCT (2012) is based on their ability to:

- save time;
- minimise transaction cost;
- allocate risk in a fair and recognisable way;
- provide comprehensive cover for most pitfalls which surround contractual relations in the building industry;
- reflect the benefits that are accrued through precedent – achieved by defining benchmark provisions which reflect a generally acceptable position in practice; and
- cater for all parties in the construction supply chain

Laryea and Hughes (2009) outlined other advantages such as “[...] familiarity for contract administrators and tenderers and an established body of case law which can assist in the drafting and interpretation of contracts” (Willis *et al.*, 1994 in Laryea and Hughes, 2009, p.559). Three questions emerge which merit further consideration into health and safety contractual provisions in standard form contracts widely used across UK construction projects (see Table 2). Three questions that emerge from the foregoing discussion and introductory section of this study are:

- (1) What are the core clauses for health and safety?
- (2) What contractual provisions are provided in the core clauses?
- (3) To what extent do they conform to secondary legislation (i.e.) CDM 2007?

CONTRACTUAL PROVISIONS IN STANDARD FORM CONTRACTS – A CRITICAL ANALYSIS

In order to answer the three questions, the first step involved identifying widely used standard form contracts. Having identified the most widely used, a critical analysis of the standard form contracts was carried out by word search covering a variety of topics such as injury, insurance, safety, health, risk and accident based on devised parameters (i.e.) scope of study, due to their direct influence on health and safety issues in practice and contract interpretation (see Milner, 2011).

Perry (1999) cited in Griffith and Phillips (2001) suggest that the CDM regulations exist to: “improve the health and safety record on construction sites by requiring all parties involved in a construction project to take responsibility for health and safety standards [...]” latterly suggesting contractual negotiation. It is against this background that question 3 is assessed consistent with the following options; summarised in table 1 and 2:

- appointment of duty holders (i.e. regulation 14);
- CDM planning period (i.e. regulation 10(2)(c), 13(2), 13(3), 15(b), 20(b), 22(1)(b), 22(1)(f));
- general obligation to comply with health and safety;
- general obligation to comply with CDM duties (i.e. regulation 4 - 13);
- duty of cooperation (i.e. regulation 5);
- termination by employer for CDM breach; and

- termination by contractors.

Table 1. Categorisation of contractual provisions – emerging pattern

Contractual Provisions	Appointment of duty holders	CDM planning period	General obligation to comply with H&S	General obligation to comply with CDM duties	Duty of cooperation	Termination by employer for contractor CDM breach	Termination by Client for contractor CDM breach
Contract							
JCT	Yes	Yes	Yes	Yes	Yes	Yes	Yes
NEC3	No	No	Yes	Yes (Partly)	Yes	Yes	No
FIDIC Design Build Operate (DBO)	No	Not applicable	Yes	Not applicable	Not applicable	Yes (covers all H&S regulations)	No
GC/Works	No	No	Yes	Yes	Yes	No	No

Generally, it is observed from table 1 and 2 that all standard forms provide contractual provisions for H&S. The JCT covers all categories particularly in line with secondary legislation (CDM, 2007), whereas the NEC and GC/Works are not explicit on duty holder appointments, CDM planning period and termination by the contractor. Notably the FIDIC has sections which are not applicable as it is based on international standard forms of contract of which the UK is a member association through the Association of Consultancy and Engineering (ACE). In terms of coverage both the JCT and the GC/Works fully embrace the values of CDM regulations.

JOINTS CONTRACT TRIBUNAL (JCT)

Murdoch and Hughes (2008) defined the JCT as an affiliation of interest groups within the construction industry with the mandate of determining the content of the clauses in a standard form. They are predominantly considered as the UK 'industry standard' (Ramus *et al.*, 2006). Analysis of core H&S clauses are consistent with regulation 5 and 6 (i.e.) cooperation and coordination. Under section 6, clause 6.1 specifies the contractors' liability for personal injury or death. Clause 2.1 can be termed as the overarching provision which stipulates the contractors' obligations while clause 3.23 specifies duties of the contractor in relation with CDM regulations (see regulation 5,6,13 and 19). Beyond the core provisions for health and safety, the JCT also provides supplemental provisions in which it is stated that:

Without limiting either party's statutory and regulatory duties and responsibilities and/or the specific health and safety requirements of this contract, the parties will endeavour to establish and maintain a culture and working environment in which health and safety is of paramount concern to everybody involved with the project.

Not only does this contract embrace Regulations, it provides additional 'features' such as culture and cooperation which promote H&S provisions.

Table 2. H&S contractual provisions

	Name of Contract	H&S, risk, injury and termination core clause(s)	Contractual provisions	Analysis
1	Joint Contracts Tribunal forms of contract (JCT).	1.1, 2.1, 3.23, 3.23.1, 3.23.2, 3.23.3, 3.23.4, 3.24, 3.25, 6.1	Covers the appointment of duty holders, CDM planning period, general obligation to comply with H&S, obligation to comply with the CDM Regulations, duty holder cooperation and termination by either party.	The JCT provides substantial evidence to suggest that health and safety provisions generally provide a wide coverage with key features of secondary legislation. The contractor is liable for bodily harm of his workers and is therefore required to provide insurance cover throughout the construction phase; consistent with the construction phase plan proportional to identified risks and hazards.
2	The Engineering and Construction Contract (NEC3) – Priced contract with Bill of Quantities (Option B).	16.3, 25, 27.4, 31.2, 84, 91.3	The chief provision provided is for the contractor to cooperate during the construction phase in accordance with health and safety requirements stated in the works information. Insurance cover is provided in the event of bodily harm.	NEC adopts a broad and flexible approach to health and safety without express reference to secondary legislation. Only the contractors' health and safety contractual obligations are detailed under clause 27.4 although other employer obligations such as termination if contractor is in breach of health or safety regulations are provided (see clause 91.3).
3	International Federation of Consulting Engineers (FIDIC) – Design Build Operate (DBO) contract	6.4, 6.7, 6.9, 10.5, 15, 16, 17	The Contractor has the overall responsibility to manage health and safety issues by appointing an accident prevention officer and notify the Engineer of accident details.	Certain sections of the FIDIC standard forms will not apply to secondary legislation particularly the CDM regulations such as CDM planning period. Overall, the health and safety ethos is in line with the Regulations as they clearly spell risk allocation, providing suitable welfare facilities and H&S legislation compliance.
4	General Conditions of Government Contracts for Building and Civil Engineering Works (GC/Works).	7, 8, 11, 19, 56, 57	Parties should adhere to contractual procedures and requirements as required. They uphold the values of secondary legislation such as ensuring competence.	The GC/Works contractual provisions for health and safety meet their intended objectives and provide a level playing field for parties in a contract. The GC/Works also provide provisions for personal injury and risk. They fully embrace secondary legislation without necessarily providing express conditions on CDM planning and appointments.

CORE CLAUSE 3.23 – HEALTH AND SAFETY PROVISIONS

Under clause 2.1, the contractor has the obligation to comply with statutory instruments; (i.e.) primary and secondary legislation defined under clause 1.1 (Ndekugri and Rycroft, 2009), therefore embracing CDM regulations in their entirety. For instance clause 3.23 to state that: “Each Party acknowledges that he is aware of and undertakes to the other in relation to the works and site he will duly comply with undertakes to the other that in relation to the Works and the site he will duly comply with the CDM regulations [...]” Breach of these obligations may lead to prosecution of which either party is entitled to terminate the contract similar to clause 91 of the NEC3 although none of the terminating reasons provided address the contractors right to terminate the contract as a result of the clients breach.

ENGINEERING AND CONSTRUCTION CONTRACT (NEC): AN OVERVIEW FROM PREVIOUS STUDIES

It is well documented that the New Engineering Contract (NEC), were introduced on the premise of a simple and direct draft approach focusing on strong project management principles (Gould 2008). Firstly introduced as NEC1, they have undergone changes to now what is known as NEC3 in their current form introduced in 2005 (Lloyd 2008). NEC3 form of contract suggests the use of simple English thereby eliminating legal jargon; originally introduced as a result of the 1994 Latham report (Ramus *et al.*, 2006; Murdoch and Hughes, 2008) in order to provide flexibility. The three most pertinent reasons according to Ramus *et al.* (2006) for their introduction were: flexibility in their use; designed to cater for all types of procurement systems and methods and; provides a stimulus for good management. They consist of seventeen (17) contracts and thirteen (13) guidance notes and charts (Clarke, 2010). In terms of their application, the NEC3 provides flexibility, simplicity and its suitability for procuring a diverse range of engineering and construction works (such as Gould, 2008; Hide, 2010; Watermeyer, 2012); best suited for risk allocation as emphasised by Dulake (2011) in his research on cross rail - design and construction in which he provides an overview of the benefits of NEC3 form of contract and their application in practice.

NEC3; APPLICATION AND PRACTICE

The NEC3 forms of contract are widely used across the UK construction industry. Organisations such as the National Health Service (NHS) have embraced this family of standard forms; providing certainty in terms of cost and programme (Jones, 2004). Their application cuts across an array of projects from rail, oil and gas to major infrastructure developments such as London Olympic 2012 and healthcare facilities in excess of £4 billion (NEC Contract, 2012). The NEC3 has been endorsed across various sectors of the UK including Government led initiatives despite having the GC/Works standard form contracts particularly used for public sector projects (Lloyd, 2008).

CORE CLAUSE 27.4 – HEALTH AND SAFETY PROVISIONS

Gould (2008) points out that under the contractors’ programme, provisions for float, time, risk and health and safety requirements should be set out in the contract. In the same line clause 27.4 requires the contractor to: “...act in accordance with health and safety requirements stated in the works information.” Undoubtedly this conforms to regulation 22 and 23 on the provision of a construction phase plan; drawn up in proportion with identified risks and hazards. Arguably other duty holder responsibilities do not necessarily conform to CDM Regulations unlike the JCT suite of contracts for instance.

INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS (FIDIC)

FIDIC standard form contracts are not 'tailor-made' for the UK construction industry, although the level of relevance in line with CDM regulations cannot be overstated. For instance they clearly spell out that the contractors personnel must comply with all laws, particularly safety legislation (Glover *et al.*, 2006) therefore signifying cooperation and competence (i.e.) Regulation 4 and 5. Other key words that feature in line with the secondary legislation are compliance and adequacy of welfare facilities (see Regulation 4, 9(1)(b), 13(7), 22(1)(c) and 24). The format for contractual provisions for health and safety under the FIDIC conditions are in a sense consistent with those of the NEC3 where the contractor has the overall responsibility. They place specific obligations to be complied with during the construction phase by the contractor. Their main 'strength lies in the ability to be used anywhere in the world (Murdoch and Hughes, 2008). Undoubtedly, the FIDIC suite of contracts are unlikely to fully embrace secondary legislation of a particular country, however table 2 provides a different perception insinuating that they are by far not just a generic contract but careful thought went into the wording and structure; suitable to construction works in the UK regardless of secondary legislation conditions.

CORE CLAUSE 6.7 – HEALTH AND SAFETY REQUIREMENTS

The contractor is obliged to main at all times during the construction phase a safe environment for his workers. This is in line with regulation 13, 19 and 22-23 which requires the provision of a construction phase plan. Consistent with the findings in table 1, the provisions embrace competence and compliance values which in the long term translate into accident prevention. Clause 6.4 states that: "...The Contractor shall comply with all the relevant labour Laws ..., including Laws relating to their employment, health, safety, welfare, immigration and emigration [...]." Clearly this clause demonstrates that the contractor has a duty of care to maintain a safe work environment consistent with regulation 13, 19 and 22 -24.

GENERAL CONDITIONS OF GOVERNMENT CONTRACTS FOR BUILDING AND CIVIL ENGINEERING WORKS (GC/WORKS): AN OVERVIEW FROM PREVIOUS STUDIES

The GC/Works standard form of contract is normally used for the procurement of public sector projects such as schools and hospitals. Although devised for government and acknowledged as the UK government forms of contract for construction work (Bayton, 2002), not all government sponsored works are executed using these forms evident from the section 5.1 - NEC3 in practice.

CORE CLAUSE 11 – HEALTH AND SAFETY PROVISIONS

Clause 11 outlines provisions in line with the CDM Regulations. Other provisions feature key phrases such as risk allocation, termination, insurance and bodily injury all relevant to secondary legislation. Again most of the key features are in line with the CDM regulations such as cooperation and compliance although there is a slight difference in weighting demonstrated in Tables 1 and 2. Despite the contractual provisions in relation to planning and appointments remaining inexplicit, key features such as the construction plan and principal contractor arrangements are provided in standard forms conforming to regulations 22 and 23 which specify the duties of the principal contractor.

DISCUSSION AND CONCLUSION

Every employer has a duty of care to ensure a safe work environment for his employees in accordance with section two of the Health and Safety at Work etc. Act 1974. Based on the foregoing, secondary legislation will therefore be perceived to provide a basis for all parties involved on a construction project to be accountable for their actions. Consistent with the findings of Sales (1953), the study examined health and safety contractual provisions in standard forms and scrutinized the extent to which they conform to secondary legislation; particularly the CDM Regulations. To a large extent, contractual provisions for health and safety in the standard form of contracts have the same message although the level of uniformity inevitably fluctuates in the terms and conditions. What standard form contracts ultimately aim to achieve is fairness and certainty where either party informs the other of their obligations regarding expected performance and targets contractually agreed and negotiated (Mason, 2011). It is on this premise that standard form contracts specify contractor and employer obligations that concern health and safety (Gould, 2008).

The JCT standard form contract largely conforms to the CDM Regulations and provides adequate health and safety contractual provisions. Key features are the CDM planning period and appointment of competent duty holders. It has widely been agreed that the NEC3 proves to be favourable in terms of flexibility, fairness and certainty (cf. Sales, 1953), due to among other things its simplicity (Eggleston, 1996). For instance the NEC3 provides detailed descriptions of the insurance cover in proportion to contractor/employer risks signifying flexibility and fairness. In terms of uniformity, the JCT and GC/Works contractual provisions are consistent with the CDM Regulations unlike the NEC3 and FIDIC. Undoubtedly, since the GC/Works are largely meant for government projects rather than private work, it is highly likely that they will remain uniform with secondary legislation as demonstrated in Table 1. There is generally a wide knowledge on the JCT and NEC3 standard form contracts, while the GC/Works and FIDIC are less popular (such as Jones, 2004; Dulake, 2011), albeit the extents are outside the scope of this study. It is therefore reasonable to suggest that health and safety contractual provisions embrace key features that depict fairness on either party.

Despite their flexibility which scores significant benefits as mentioned earlier, NEC3 standard forms rather remain silent on the CDM duty holder appointments and planning period as demonstrated in table 1. Be that as it may, they still embrace other features of the Regulations such as providing the construction phase plan (see Regulation 23). For instance it states that the contractor is to adhere to the works information which describes the actual work to be carried out and specifies how the contractor deals with any constraints on the works consistent with regulation 13 which describes the contractors' duties executed in accordance with the construction phase plan.

The study highlights the context within which health and safety contractual provisions exist in line with secondary legislation (i.e.) CDM Regulations. The benefits of carrying out this study contribute to the need for greater clarity, uniformity and standardization into health and safety contractual provisions. An examination of core clauses on health and safety provisions demonstrates the use of different key features of secondary legislation such as competence, cooperation and compliance.

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