



Amending standard forms of contract

Presentation to RICS, 2019
Hayley Sullivan, Partner, Gateley Plc

Advantages of standard form contracts

Advantages of standard form contracts

1. Speed of tender.
2. Familiarity.
3. Established body of case law.

3

• Gateley Plc

Drafting Amendments

1. Care to be taken.
2. Consider full contractual implications.
3. Be cautious of effects not originally intended.

4

• Gateley Plc

Common reasons for amending contracts

1. Dealing with project specific issues.
2. Altering the risk profile.
3. Better management of the works.
4. Requirements of third parties.

5

• Gateley Plc

Amendments that alter the balance of risk

6

• Gateley Plc

Amendments that alter the balance of risk

- Design
 - Contractor to take responsibility for design prepared by the employer pre-contract.
- Discrepancies
 - Contractor to deal with discrepancies between the ER's and CP's without additional cost and time.
- Ground conditions
 - Contractor to deal with unforeseen conditions without cost or time.

7

• Gateley Plc

Amendments that alter the balance of risk

- Consents
 - Contractor to satisfy any Consents necessary for the Works
- Changes in statutory requirements
 - Contractor to take responsibility for A change in law or building regulations may require a change to the Works

8

• Gateley Plc

Amendments that alter the balance of risk

- Extensions of Time/ Relevant Events
 - usual for funding or development agreements to give extensions of time to the Employer equivalent to the rights of the Contractor under the building contract.
 - Changes to be driven by the employer's desire to reduce the contractor's entitlement to extension of time whilst recognising that the contractor will price for this additional risk.

9

• Gateley Plc

Amendments that alter the balance of risk

- Concurrent Delay
 - Exclusion of the Contractor's right to an extension of time where delay caused by the Employer (a Relevant Event) is concurrent with the delay for which the Contractor is responsible.

10

• Gateley Plc

Amendments that alter the balance of risk

Payment of Loss and/or Expense

- JCT D&B entitles the Contractor to recover loss and/or expense where the works are delayed or disrupted for certain specified events ("Relevant Matters") - clause 4.21.
- Amendments remove certain of the grounds for recovering loss and expense.

11

Gateley Plc

Amendments relating to the management of the contract

Provision of Contractor and Subcontractor warranties:

- require full copies of subcontracts within defined timescales.
- warranties executed as deeds.
- copies of power of attorney.
- penalties for failure to deliver warranties.

12

Gateley Plc

Amendments relating to the management of the contract

- Time limits for making applications for extensions of time and/or loss and expense
 - Other standard form contracts are more prescriptive over time limits for making claims.
 - Time bar for making claims.

13

• Gateley Plc

Third Party Requirements

14

• Gateley Plc

Third Party Requirements

- No breach of third party agreements.
- Fitting Out Work by the Employer or Tenants.
- Requirements relating to practical completion.
- Dwellings.
- Unrestricted copyright licence.
- Charge/ assignment without consent.

15

• Gateley Plc

Unintended consequences

16

• Gateley Plc

Unintended consequences

- **Balfour Beatty v Docklands Light Railway Limited**
 - Removal of the standard power given to the arbitrator to "open up, review and revise" the decisions of the contract administrator and certifier;
 - The court held that the Contract should be construed strictly;
 - The effect was that there was no agreed means in the Contract of challenging the decisions of the Employer's Representative; and
 - The decision of the Employer's Representative, as expressed in certificates for additional payment and extensions of time, became final and binding on both parties and that the courts had no general power to "open up, review and revise" the decisions of the Employer's Representative.

17

• Gateley Plc

Unintended consequences

- **Bovis Construction (Scotland) Limited v Whatlings Construction Limited**
- Removal of the standard power given to the arbitrator to "open up, review and revise" the decisions of the contract administrator and certifier;
 - The court held that the Contract should be construed strictly;
 - The effect was that there was no agreed means in the Contract of challenging the decisions of the Employer's Representative; and
 - The decision of the Employer's Representative, as expressed in certificates for additional payment and extensions of time, became final and binding on both parties and that the courts had no general power to "open up, review and revise" the decisions of the Employer's Representative.

18

• Gateley Plc

Unintended consequences

- Mitsui Babcock Energy Limited v John Brown Engineering Limited ("J.B.E.")
 - Measurement of tolerances for generators to be supplied by Mitsui;
 - Relevant clause expressed as “ . . .to be discussed and agreed“;
 - Mitsui sought a declaration that no binding contract had been concluded between the parties as they had no intention of entering into a contract when the Agreement was signed;
 - The High Court held that the Contract as a whole was not unworkable or void for uncertainty; and
 - The parties had conducted their relations after signing the Agreement on the basis that there was in fact in existence a binding Contract between them.

19

• Gateley Plc

Cautionary Note

- Amendment of one provision has ramifications throughout the Contract Conditions.
- The amendment may not adequately achieve the objective which originally prompted the amendment.
- Consider consequential amendments arising from the principal amendment are required to maintain the integrity of the Conditions of Contract as a whole, and whether the proposed amendment is effective in reflecting the intention of the parties.

20

• Gateley Plc

Cautionary Note

- Amendment of one provision has ramifications throughout the Contract Conditions.
- The amendment may not adequately achieve the objective which originally prompted the amendment.
- Consider consequential amendments arising from the principal amendment are required to maintain the integrity of the Conditions of Contract as a whole, and whether the proposed amendment is effective in reflecting the intention of the parties.

21

• Gateley Plc



Hayley Sullivan
Partner

dt: + 44 (0) 161 836 7885
m: + 44 (0) 788 557 1211
hayley.sullivan@gateleyplc.com

• Gateley Plc

Questions?

23

• Gateley Plc