



INTERNATIONAL PRESTRESSED
HOLLOWCORE ASSOCIATION

Customer Perspective



Contractual Awareness



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B O G O F

- **Buy One Get One Free**
- **Two for the price of one**
- **A Discussion about Provider & Customer Relationship**

What are you?

- A Producer
- A Manufacture
- Engineers
- Consultants
- Contractors

My Background

- Some 45 years in the Construction Industry.
- From labourer to Commercial Director – Now Consultant.
- Worked for Main Contractors, Local Authority, Private Practice and Specialist Subcontracting.
- The latter including Piling/Ground Treatment, High Quality Joinery, to my last company – Precast concrete
- For the largest part of my career I had the role of a Quantity Surveyor or I was responsible for that function in the organisation.

Contract Law – a definition

‘An Economical Agreement between two or more Parties.’

- I believe this encapsulates the principle of law in most countries.
- However for this presentation I will concentrate on the area of my experience, which is the Construction Industry in the United Kingdom.
- It should be noted that the Principles of this law, by history, are similar to those in the USA, Canada, Australia, New Zealand, India and a number of African countries.

Relationship between the Customer and Provider

- An Agreement
- A Formal Contract
- Both Covered by the Law of the Land
- They usually involve risk, which has to be managed

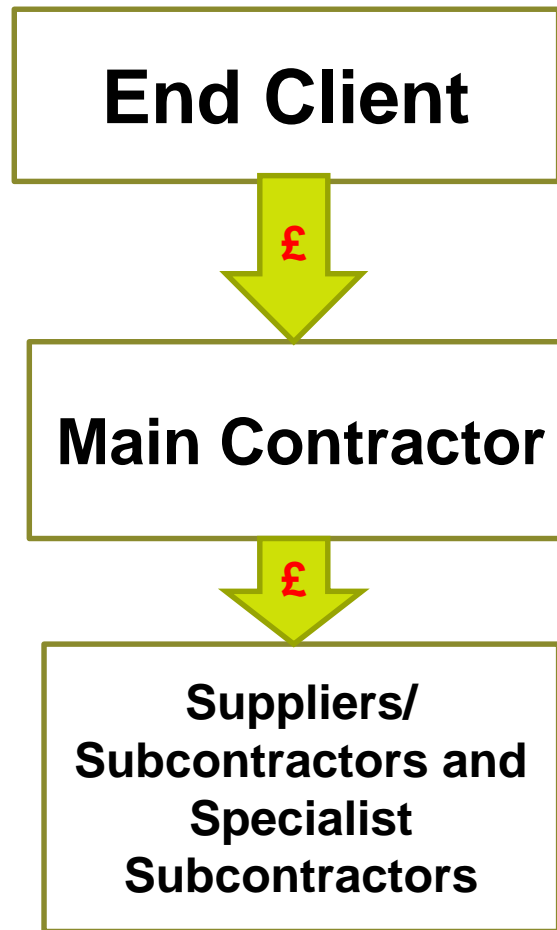


Customer Perspective

You as a Customer – Your Requirements

- Knowledge of the Provider and/or his capability.
- Risk in the Type of Product being provided.
- The greater the risk, the tighter the financial constraints on the provider.
- If the risk is high, establish a formal contract with 'Financial Penalties'.
- If the programme is critical, include penalties for delay.
- Your customers' requirements are the same.

Understand the Customer/ Provider structure in the UK Construction Industry



- Developer, Business Owner, Local Authority, Government Dept. Etc.
- ***Employs***
- E.g. Vinci, Carillion, Wates, Galliford Try, Balfour Beatty etc.
- ***In turn Employs***
- Piling, Concrete or steelwork frame, floor, windows, Heating Ventilation etc.

Understand the Customer's Power and strength as well as your own

- Your client may be a large organisation or Main Contractor.
- They will no doubt have the resources and are contractually astute.
- Consider your strengths e.g.
- Geographic location compared to the project in question,
- Specific type of product on offer and number of competitors, as in large depth providers.

What is a Quantity Surveyor (QS)?

- Started in late 18th Century as a 'Measurer.'
- Recognised as a 'Quantity Surveyor' in circa 1820.
- One of the earliest QSs was Sir Henry Arthur-Hand, who priced the 'new' Houses of Parliament in 1820 as £750k.
- Role involves Cost planning, value engineering, cost benefit analysis, tendering, valuations and dispute resolution.
- PQS (Private or Professional) looks after the end client's interests with the Main Contractor(M/C).
- The QS for the M/C works with the PQS and the Supplier/Subcontractors, looking after The M/C's interests.

Role of the Quantity Surveyor

- A Key role is to pass payment on to the various parties
- It is to advise the clients and their employers of the contractual status and rights
- They have also the responsibility for with holding payments for failures or breaches of the contract
- This must be carried out under the rules of the contract
- They find it easy to with hold monies but do not always apply the rules

A Question of Risk – to the end client

Example: - Client requires a new 4 storey building to produce drug making equipment in a highly clean atmosphere. Who are the high risk providers?

- Suppliers of the AC, heating & venting systems,
- Suppliers of concrete floors,
- Suppliers of aggregates for the site,
- Insitu Concrete suppliers for the ground floor,
- Piling subcontractor.
- The greater the risk, the higher the contractual nature of the agreement between the parties.
- This all to be managed by the various Qs

Type of contract

Dependent on the risk

- Simple - Typically a small contract or a supply of a standard product,
 - e.g. An ancillary building or a supply of cement bags or sand.
- Complicated - This is usually for a structure where there is risk to quality or programme, or a high profile structure,
 - e.g. Olympic stadium, where quality and programme dates are important.

What is included in a Contract

- Could be all correspondence and minutes of meeting regarding the negotiations
- Description of the works
- Drawings
- Specification
- Preliminaries
- Terms and Conditions

Terms and Conditions – The ‘Legal side’

How the contract is administered and its penalties



Borras Construction Limited - Subcontract Terms and Conditions

1.0 Definitions and Interpretation. The following definitions shall apply:

Buyer - Borras Construction Limited (Borras)

Supplier - The person or body with whom the subcontract order is placed

Customer - The Person or body with whom Borras has entered into an agreement for goods or services.

Main Contract - The agreement between Borras and the customer.

Subcontract - The contract for the subcontract work between Borras and the supplier, to which these terms apply.

2.0 General

2.1 This Subcontract Order is subject to and the supplier shall be deemed to have notice of and shall observe, perform, comply and be bound by all the provisions of this S&C agreement, so far as they relate to and are applicable to the subcontract operation to and from the end and the provisions of any tender documents issued by Borras and the conditions printed on any order placed between the production of the main contract and the sub-contract, the terms of the sub-contract and this contract.

2.2 The terms of the main contract are necessary for operation by the supplier, who will be deemed to have full notice of all terms included (except for conflictive relating to rates and prices).

2.3 These terms shall govern the subcontract between Borras and the Supplier and shall prevail over any terms put forward by the supplier unless expressly agreed to in writing by an authorised representative of Borras. Borras's contract and all conditions, specifications or any terms put forward by the supplier.

2.4 The supplier will carry out his obligations under this order as that Borras shall read, see, observe, and take the main contract including, but not limited to, the pricing of any necessary orders.

2.5 If any provisions of the subcontract shall be provided to be used or amended by a third to be provided, used or substituted, it shall to the extent required be deemed void for the avoidance and without prejudice if possible to the extent of the operation of the subcontract and shall not in any way affect any other circumstances of a variety of workability of the subcontract.

3.0 Contract Period

3.1 The programme for the subcontract works is stipulated in the order. Borras reserves the right to advance or retard dates to suit its programme.

3.2 The start of the subcontract works may be delayed by Borras by a reasonable period if delay is caused in the subcontract works by the default of Borras. The Supplier shall, upon becoming reasonably apparent that the completion of the subcontract works is delayed, notify Borras in writing of the delay. In the event that notice is not given by the Supplier to Borras within 14 days of the date from which the Supplier knew or ought to have known of the delaying event, the Supplier will not be entitled to an extension of time for performance of any related claim for loss and expenses.

3.3 If the Supplier fails to complete the Subcontracted works within the period specified in any extended periods as hereinafter provided, he shall pay to Borras a sum equivalent to any fee for storage authorized or incurred by Borras and issued by the Supplier.

4.0 The supplier undertakes:-

4.1 Upon receipt of notice in possession with due diligence and complete the subcontracted works within the period for completion stated in the order and reasonably in accordance with the programme of the main contract except to any extension of the period, and any reasonable deviation by Borras.

4.2 That all goods under reservation supplied will be free of all defects in design, quality and construction, the expense of the necessary repairs or replacements, together with all legal expenses and fee to be the Supplier's responsibility as shall be made known to Borras. This condition shall apply for a period of 18 months following delivery, or 12 months following commencement if limited out by the Supplier's advertisement in time.

4.3 That all defects shall be made good by the Supplier within 7 days from receipt of notice, a writing from Borras.

5.0 Delivery

5.1 Property in goods will pass to Borras on delivery without prejudice to any right of retention. The supplier shall be responsible for the forwarding, loading to sites, installation and adequate protection of all materials delivered to site until completion.

5.2 The Supplier and its representative for acceptance of goods must arrive from their works to the nearest available site as such proceeds, which to the extent to be required by Borras retains the custody of the site by the sub-contractor is a requirement of the sub-contracted works.

6.0 Insurance

6.1 The supplier will effect and maintain Comprehensive Liability Insurance and Legal Liability Insurance in respect of its responsibilities under this order at all least £5-Million and up to the requirements of the main contract and all proceeds additional to such insurance must be paid from Borras.

7.0 Payments

7.1 The price agreed in the order are fixed for the duration of the job and any increase of all labour, tools and other charges VAT.

7.2 The supplier shall submit an application for payment monthly in arrears to the Buyer agreed. Subject to an application being made, payment will be made in accordance with the agreed payment terms (the 'final' date for payment).

7.3 The company may withhold payments after the 'final' date for payment pending that the company shall notify the supplier of the amount to be withheld and the proceeds for withholding not later than 2 days before the 'final' date for payment.

7.4 The price of the subcontracted works payable to the supplier (hereinafter referred to as the 'contract price') shall be the sum agreed or such sum as shall become payable by means of Borras's written instructions. If as a result of Borras's written instructions, the specification or quantities are varied in order other material or equipment are substituted for those specified herein to complete Borras's contract, with the requirements of the contract, then adjustment shall be made to the contract price. Such adjustment shall be determined by Borras in accordance with the following rules:

7.5 Where work is of similar character to that set out in the schedule of rates, the rates and prices set out shall determine the valuation.

7.6 Where work is of similar character to that set out in the schedule of rates, but unaccounted upon different conditions, the rates and prices set out shall not be the basis of determining the valuation, and the valuation shall include a fair allowance for such difference in conditions.

7.7 Where the work is not of a similar character to that set out in the schedule of rates, the work shall be valued at fair and reasonable rates and prices.

8.0 Assignment

8.1 This order is its entirety shall remain in the name of the successful design and subsidiary and associated companies of Borras. The Supplier may not assign or subcontract any rights or obligations under this order without the written consent of Borras.

9.0 Retention

9.1 If either party shall have a Receiver or Administrator appointed or go into liquidation or (how a receiver order made or make a compromise with its creditors than the other party may terminate this order between.

9.2 If either party to the Main Contract becomes the subject of an event of insolvency, Borras shall only be liable to pay the Supplier in the event that Borras is able to recover the amount due under the Main Contract which relates to the subcontracted works.

9.3 In the event of determination of the engagement of Borras under the Main Contract then the employment of the Supplier shall automatically be determined. Upon such a determination the Supplier shall be entitled to such sums as are recoverable under the provisions of the main contract as far as applicable to the subcontract.

10.0 Health & Safety

10.1 The supplier shall comply with all applicable health and safety and environmental legislation, regulations and directives. The Supplier shall keep the work area clear and safe at all times.

11.0 Disputes

11.1 If a dispute is not resolved through negotiation, either party may seek advice of its intention to refer any dispute which arises out of or in connection with the contract to arbitration or any other arbitration with the following Dispute, Conciliation and Reconciliation Act 2000 and the Scheme for Construction Contracts 1998.

11.2 The Referring Party shall seek the appointment of an arbitrator from the President or Vice President of the Royal Institute of Chartered Surveyors.

11.3 In the event of adjudication, whether commenced under the terms of this contract or the Construction Act 1998, the costs of the adjudication, both those of Borras and the Supplier, and including the arbitrator's costs shall be borne and paid for by the Supplier.

FM-LEG-050 (01)



GT/DBSub/Conditions

Batch Priority Schools

lub/C



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Terms and Conditions – The ‘Legal side’.

How the contract is administrated and its penalties.

- JCT – Established standard T&Cs for use in the industry.
- Amendments to such standard documents.
- An organisation’s own T&Cs.
- These documents must be checked, because ‘The Devil is in the Detail’.
- Remember if you are in breach, the client’s or M/C’s QS will not be slow in levying costs against you.

'Battle of the Forms'

- Tender Enquiry – Enclosing their T&Cs etc.
- Offer – Your quotation – ignoring their T&Cs and incorporating your own.
- Negotiation of the price – Various letters, e-mails and minutes of meetings.
- The client's order – including their T&Cs.
- Your 'Order Acknowledgement' including your requirements and T&Cs.
- If not responded to by the client prior to starting on site, the latter is the basis of the contract.
- Alternatively, further negotiation and agreement is reached on the detail of the contract.

Things that can go wrong!!!! - Tarmac Topfloor Case Study 1. Product Failure.

- May 7th 2009, a 'catastrophic' failure of 200mm deep H/C on a site for a new HO for B&Q in Southampton. M/C Sir Robert McAlphine.
- May 15th 2009 a failure of 200mm deep H/C on a new College at Redruth, Cornwall. M/C Sir Robert McAlphine.
- Both products that failed were out of our Lound factory. All production was stopped after second failure.
- We deduced, after preliminary investigations, that the product produced over certain period was questionable, so some fifty plus sites told product delivered may need to be removed.
- Took 4wks to sort out. 60 plus other sites delayed.

CATASTROPHY!



Things that can go wrong!!!! - Tarmac Topfloor Case Study 1. Product Failure



Case Study 1 – Continued

- Claims for delay and disruption damages totalled in excess of £1.6 million on some 110 different contracts.
- However we found the contracts in a large number of cases due to the ‘Battle of the Forms’, were on our terms.
- We used this to our advantage and settled the disputes without recourse to going to Law, whilst, for the most part, retaining a relationship with the client.
- We settled at a total of some £750k.
- Which took us until May 2010.

Commercial settlement rather than Law

Case study 2 – Murreyfield Stadium Edinburgh



Commercial settlement rather than Law.

Case study 2 – Murreyfield Stadium Edinburgh.

- Dispute with client. They alleged we owed them £750k. We alleged they owed us £160k.
- After a year of threatening action, a meeting held. We wanted £70k – they offered £50k – no more.
- We did not accept.
- One further year later, after we started litigation costing us £20K, the judge recommended we settle out of court.
- We accepted £20k.
- Interest at the time in 1995 was some 10%.
- Learning point; If you have an offer to settle, consider it carefully and don't let pride or principles get in the way.

Conclusions

- Understand your client's perspective and what his needs and concerns are.
- What are the risks and is the reward worth the risk?
- Appreciate the client's strength but know yours and use it.
- Do not walk into a contract based solely on trust, check the detail of the contract and negotiate from strength and knowledge.
- Considering the volume of work you may get, have a system of 'Acknowledging' your orders based on your T&Cs. This can become the basis of the contract.
- Any disputes, try and settle outside court – the latter is too expensive and time consuming.
- Finally remember you are always in 'CONTRACTING'.

**It is the Nature of the
Relationship of the
Business we are in!**