



Managing Risk – the legal perspective

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Ground risk

“The ground is the place where things are most likely to go wrong during a construction project, and the worse the ground, the greater the risk”

Institution of Civil Engineers - 1991



The “hot potato”

Employer:

- Risk averse
- Seeking price certainty
- Unwilling to warrant site information and/or carry out detailed investigations

Contractor:

- Trying to win tender on lowest price
- BUT also has to budget for risks he is required to carry



ICE Design and Construct

Clause 12

“Adverse physical conditions and artificial obstructions

(1) If during the carrying out of the Works and Contractor encounters physical conditions (other than weather conditions or conditions due to weather conditions) or artificial obstructions which conditions or obstructions could not in his opinion reasonably have been foreseen by an experienced contractor the Contractor shall as early as practicable give written notice therefore to the Employer’s Representative.”



ICE Design and Construct

Clause 12 (continued)

“(2) If in addition the Contractor intends to make any claim for additional payment or extension of time arising from such condition or obstruction he shall at the same time or as soon thereafter as may be reasonable inform the Employer’s Representative in writing pursuant to clause 53 and/or clause 44(1) as may be appropriate specifying the condition or obstruction to which the claim relates.”



FIDIC – “Red” and “Yellow” Books

Clause 4.12:

“Physical conditions’ means natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydro-logical conditions but excluding climatic conditions...If the Contractor encounters adverse physical conditions which he considers to have been unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable.”



FIDIC – “Silver” Book

Clause 4.10:

“The Contractor shall be responsible for verifying and interpreting all such data. The Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data...”

Clause 4.12:

“Except as otherwise stated in the Contract:

- By signing the Contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works; and*
- The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs.”*



NEC3

NEC3 clause 60.1(12):

“The *Contractor* encounters physical conditions which

- are within the Site,
- are not weather conditions and
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for them

only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event”



NEC3

NEC3 clause 60.2:

“In judging the physical conditions for the purpose of assessing a compensation event, the Contractor is assumed to have taken into account

- the Site Information
- publically available information referred to in the Site Information,
- information obtainable from a visual inspection of the Site and
- other information which an experienced contractor could reasonably be expected to have or to obtain”



NEC3

NEC3 clause 60.3:

“If there is an ambiguity or inconsistency within the Site Information (including the information referred to in it), the Contractor is assumed to have taken into account the physical conditions more favourable to doing the work”



JCT Constructing Excellence Contract (CE)

Clause 5.3:

“Risk Allocation Schedule

Completion and effect of Risk Allocation Schedule

- .1 The forms of Risk Allocation Schedule referred to in Part 5 of the Contract Particulars set out:
 - .1 The allocation (as between the Purchaser and the Supplier) of any cost and time consequences of risks referred to in the Risk Allocation schedule; and
 - .2 The amount (if any) for risks for which the Supplier shall be responsible which is also included in the Target Cost or Contract Sum to deal with the occurrence of risks and the allocation of any costs in excess of this amount; and
 - .3 The period of time (if any) resulting from the occurrence of risks that the Supplier has accepted as being his responsibility and the allocation of responsibility for any time consequences in excess of this period.”



Risk Allocation Schedule

Description of risk	Amount included in Contract Sum (if any) to meet the risk	Time consequences of the occurrence of the risk (if any) for which the Supplier will be responsible	Allocation of costs incurred in excess of column 2 allowance		Allocation of time consequences of occurrence of the risk in excess of period (if any) in column 3	
			Purchaser %	Supplier %	Purchaser %	Supplier %
	£	Period (days)				
Asbestos in building "A"	£5,000.00	7 days	50%	50%	50%	50%



JCT Constructing Excellence Contract (CE)

Clause 5.3 (continued):

“.2 The Purchaser’s liability to contribute to the cost consequences of, or grant any extension of time in respect of, risks shown in the Risk Allocation Schedule shall only apply:

.1 as to cost, after the relevant amount (if any) shown in the column 2 of Risk Allocation Schedule as having been included in the Target Cost or Contract Sum has been spent in full;

.2 as to time, after any relevant time period shown in column 3 of the Risk Allocation Schedule as being the Supplier’s responsibility has expired and the Purchaser shall not be required to consider any extension of time to the Date or Dates for Completion in respect of risks shown in the Risk Allocation Schedule until such expiry.

Subject to these conditions, the cost and time consequences of the occurrence of risks in excess of the amount or time period that are the responsibility of the Supplier will be apportioned in accordance with the allocation set out in the Risk Allocation Schedule.



JCT Constructing Excellence Contract (CE)

Clause 5.4:

“Notification of occurrence of risks indentified in the Risk Allocation Schedule

If a risk identified in the Risk Allocation Schedule occurs, whichever of the Purchaser or the Supplier becomes aware of the occurrence of the relevant risk shall immediately notify the other and both shall cooperate to agree the best means of dealing with any adverse consequences of the occurrence of the risk and to mitigate its effects, whether or not the occurrence or the risk also constitutes a Relief Event.”